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THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

MAY 6, 2014 and JULY 6, 2015

IN THE

Nebraska Court of Appeals

NEBRASKA APPELLATE REPORTS

VOLUME XXII

PEGGY POLACEK

OFFICIAL REPORTER

PUBLISHED BY

THE STATE OF NEBRASKA

LINCOLN

2016

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By Peggy Polacek, Reporter of the Supreme Court
and the Court of Appeals

For the benefit of the State of Nebraska

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Frankie J. Moore, Chief Judge[2]
John F. Irwin, Associate Judge
Everett O. Inbody, Associate Judge[3]
Frankie J. Moore, Associate Judge[4]
Michael W. Pirtle, Associate Judge
Francie C. Riedmann, Associate Judge
Riko E. Bishop, Associate Judge

Peggy Polacek . . . . . Reporter
Lanet Asmussen . . . . . Clerk[5]
Teresa A. Brown . . . . . Acting Clerk[6]
Teresa A. Brown . . . . . Clerk[7]
Corey Steel . . . . . State Court Administrator[8]

[1]Until September 12, 2014
[2]As of September 13, 2014
[3]As of September 13, 2014
[4]Until September 12, 2014
[5]Until July 11, 2014
[6]As of July 12, 2014
[7]As of August 27, 2014
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(† Indicates opinion selected for posting to court Web site.)

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†No. A-12-1162: **Cushman v. Cushman**. Affirmed as modified. Bishop, Irwin, and Pirtle, Judges.

No. A-12-1179: **State v. Zimbelman**. Affirmed. Pirtle, Moore, and Riedmann, Judges.

†No. A-13-011: **Mischo v. Chief School Bus Serv**. Affirmed. Bishop, Moore, and Pirtle, Judges.

No. A-13-034: **State v. Payne**. Affirmed in part, reversed in part, and in part remanded for further proceedings. Inbody, Chief Judge, and Moore and Pirtle, Judges.

†No. A-13-156: **Else v. Else**. Affirmed. Irwin, Riedmann, and Bishop, Judges.

No. A-13-181: **Zapata v. Cline, Williams**. Affirmed in part, and in part reversed and remanded. Bishop, Irwin, and Riedmann, Judges.

No. A-13-182: **Pestal v. Malone**. Affirmed in part, and in part reversed. Irwin, Riedmann, and Bishop, Judges.

No. A-13-196: **Loveless v. Loveless**. Affirmed as modified. Pirtle, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-13-206: **Fellers v. Fellers**. Affirmed as modified. Riedmann, Moore, and Pirtle, Judges.

No. A-13-243: **State v. Aguilar**. Affirmed. Inbody, Chief Judge, and Irwin and Bishop, Judges.

†No. A-13-276: **Kunnemann v. Kunnemann**. Affirmed. Moore, Pirtle, and Riedmann, Judges.

†No. A-13-313: **In re Trust of Morris**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Bishop, Judge.

No. A-13-337: **U.S.S. Hazard v. City of Omaha Zoning Bd. of Appeals**. Affirmed. Pirtle, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-13-343: **In re Interest of Lorenzo P**. Affirmed. Irwin, Moore, and Bishop, Judges.

No. A-13-344: **In re Interest of Angel P**. Affirmed. Irwin, Moore, and Bishop, Judges.

†No. A-13-364: **Wertman v. Bollinger**. Affirmed. Bishop, Irwin, and Riedmann, Judges.

†No. A-13-393: **Reed v. State**. Affirmed. Moore, Pirtle, and Riedmann, Judges.

No. A-13-398: **Stekr v. Stekr**. Remanded with directions. Inbody, Chief Judge, and Irwin and Bishop, Judges.

No. A-13-404: **Ildefonso v. Nebraska Dept. of Corr. Servs**. Affirmed. Riedmann, Irwin, and Bishop, Judges.

†No. A-13-405: **In re Estate of Knickman**. Affirmed in part, and in part reversed and vacated. Inbody, Chief Judge, and Moore and Pirtle, Judges.

No. A-13-421: **Walsh v. Erickson**. Affirmed in part, and in part reversed. Irwin, Riedmann, and Bishop, Judges.

†No. A-13-433: **Blair v. Dory**. Affirmed. Riedmann, Moore, and Pirtle, Judges.

†No. A-13-447: **SWJKM v. General Cas. Ins. Co**. Affirmed. Moore, Pirtle, and Reidmann, Judges.

No. A-13-462: **Castonguay v. Tecumseh Institution Mailroom Staff**. Affirmed. Moore, Pirtle, and Riedmann, Judges.

†No. A-13-482: **Kelly v. Smith**. Affirmed in part, and in part reversed and remanded with directions. Bishop, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-13-488: **Sutton v. Sutton**. Affirmed in part, and in part dismissed. Inbody and Irwin, Judges. Moore, Chief Judge, participating on briefs.

No. A-13-488: **Sutton v. Sutton**. Affirmed in part, and in part reversed and remanded for further proceedings. Inbody, Judge, and Moore, Chief Judge, and Irwin, Judge.

†No. A-13-494: **NRS Properties, LLC v. Resilent, LLC**. Reversed and remanded for further proceedings. Irwin, Judge, and Inbody, Chief Judge, and Bishop, Judge.

No. A-13-501: **Colwell v. Garvey**. Affirmed. Inbody, Chief Judge, and Irwin and Bishop, Judges.

†Nos. A-13-504, A-13-506: **State v. Griffin**. Affirmed in part, and in part vacated. Irwin, Moore, and Bishop, Judges.

No. A-13-508: **Hansen v. French**. Reversed and remanded with directions to vacate. Bishop, Judge, and Inbody, Chief Judge, and Irwin, Judge.

†Nos. A-13-513, A-13-516: **In re Interest of Lorenzo S. & Lillian S**. Affirmed. Pirtle, Moore, and Riedmann, Judges.

No. A-13-521: **State v. Hickman-Harrison**. Affirmed. Moore, Irwin, and Bishop, Judges.

†No. A-13-529: **State v. Balvin**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Bishop, Judge.

Nos. A-13-532, A-13-535: **State v. Stednitz**. Convictions affirmed. Sentences vacated, and cause remanded for resentencing. Inbody, Chief Judge, and Moore and Pirtle, Judges.

†No. A-13-547: **Standing Stone v. Kirkham Michael & Assocs**. Affirmed. Pirtle, Moore, and Riedmann, Judges.

No. A-13-553: **State v. Kot**. Affirmed. Bishop, Irwin, and Moore, Judges.

No. A-13-561: **Formanek v. Formanek**. Reversed and remanded for a new trial. Moore, Pirtle, and Riedmann, Judges.

†No. A-13-577: **Voter v. Trump**. Affirmed. Moore, Pirtle, and Riedmann, Judges.

No. A-13-594: **Anzalone v. Anzalone**. Affirmed. Inbody, Chief Judge, and Irwin and Bishop, Judges.

†No. A-13-595: **TFF, Inc. v. St. Ellen 100**. Affirmed. Riedmann, Moore, and Pirtle, Judges.

No. A-13-604: **In re Interest of Aveah N**. Affirmed. Irwin, Moore, and Bishop, Judges.

No. A-13-605: **In re Interest of Natasha N. et al**. Affirmed. Irwin, Moore, and Bishop, Judges.

No. A-13-611: **Sullivan v. Sarpy County Jail**. Appeal dismissed. Irwin, Judge, and Inbody, Chief Judge, and Bishop, Judge.

No. A-13-618: **State v. Mitchell**. Affirmed. Pirtle, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-13-622: **State v. Johnson**. Affirmed. Moore, Pirtle, and Riedmann, Judges.

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No. A-13-629: **Wheeler v. Wheeler**. Affirmed. Riedmann, Judge, and Inbody, Chief Judge, and Bishop, Judge.

†No. A-13-640: **Jones v. Sellers**. Affirmed. Riedmann, Judge, and Inbody, Chief Judge, and Bishop, Judge.

No. A-13-645: **Interstate Land v. Union Pacific RR. Co**. Affirmed. Inbody, Chief Judge, and Riedmann and Bishop, Judges.

†No. A-13-655: **State v. Gomez**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Bishop, Judge.

†No. A-13-675: **Breit v. Breit**. Affirmed. Moore, Chief Judge, and Irwin and Pirtle, Judges.

No. A-13-688: **Coupens v. Coupens**. Affirmed. Riedmann, Moore, and Pirtle, Judges.

No. A-13-690: **State v. Cervantes**. Affirmed. Bishop, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-13-703: **Sherrets, Bruno v. Boecker**. Affirmed in part, affirmed in part as modified, and in part reversed and remanded for further proceedings. Inbody and Irwin, Judges. Moore, Chief Judge, participating on briefs.

No. A-13-711: **State v. Kibbee**. Affirmed. Pirtle, Moore, and Riedmann, Judges.

No. A-13-712: **Sanchez v. Sanchez**. Affirmed. Riedmann, Moore, and Pirtle, Judges.

†No. A-13-717: **Koch v. Koch**. Affirmed in part, and in part remanded with directions. Inbody, Riedmann, and Bishop, Judges.

No. A-13-725: **Brothers v. Kimball County**. Affirmed. Pirtle, Moore, and Riedmann, Judges.

†No. A-13-734: **Keady v. Keady**. Affirmed. Irwin, Moore, and Pirtle, Judges.

†No. A-13-742: **State v. King**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Bishop, Judge.

No. A-13-750: **State v. Kinser**. Affirmed. Pirtle, Moore, and Riedmann, Judges.

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†No. A-13-762: **Malchow v. Michaelsen**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Irwin, Judge.

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No. A-13-766: **Zapata v. Roberts**. Affirmed. Moore, Pirtle, and Riedmann, Judges.

No. A-13-771: **Pratt v. Houston**. Affirmed. Bishop, Inbody, and Riedmann, Judges.

†No. A-13-773: **O'Flannagan v. Ochsner**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

No. A-13-775: **Johnson v. Johnson**. Affirmed in part, and in part reversed and remanded. Irwin, Judge, and Moore, Chief Judge, and Pirtle, Judge.

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No. A-13-783: **State v. Mumin**. Affirmed. Inbody, Chief Judge, and Moore and Pirtle, Judges.

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†No. A-13-815: **In re Conservatorship of Trobough**. Dismissed in part, and in part reversed and remanded with directions. Moore, Chief Judge, and Riedmann and Bishop, Judges.

No. A-13-816: **In re Interest of Catalino V**. Affirmed. Irwin, Riedmann, and Bishop, Judges.

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†No. A-13-840: **Essman v. Nebraska Dept. of Health & Human Servs**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Irwin, Judge.

†No. A-13-859: **Kouba v. Kouba**. Affirmed. Moore, Pirtle, and Riedmann, Judges.

†No. A-13-865: **Harrison v. Department of Corr. Servs**. Affirmed. Bishop, Judge, and Inbody, Chief Judge, and Irwin, Judge.

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No. A-13-883: **State v. Alford**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Bishop, Judge.

No. A-13-884: **In re Interest of Josiah R**. Affirmed. Moore, Pirtle, and Riedmann, Judges.

No. A-13-885: **In re Interest of Nathaniel R**. Affirmed. Moore, Pirtle, and Riedmann, Judges.

†No. A-13-889: **DeHart v. DeHart**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-13-892: **Deterding v. Deterding**. Reversed. Pirtle and Riedmann, Judges. Irwin, Judge, participating on briefs.

†No. A-13-894: **Blankenbecler v. Rogers**. Affirmed in part, and in part reversed and remanded for a new trial. Moore, Chief Judge, and Irwin and Riedmann, Judges.

No. A-13-908: **State v. Earith**. Affirmed. Bishop, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-13-915: **State v. Martinez**. Affirmed. Pirtle, Moore, and Riedmann, Judges.

†No. A-13-917: **Snodgrass v. Snodgrass**. Affirmed. Bishop, Inbody, and Riedmann, Judges.

No. A-13-922: **State v. Nguot**. Affirmed. Pirtle, Moore, and Riedmann, Judges.

No. A-13-925: **State v. Dat**. Affirmed. Inbody, Chief Judge, and Irwin and Bishop, Judges.

†No. A-13-938: **In re Guardianship of Jordan M**. Affirmed. Per Curiam.

No. A-13-939: **State v. Myers**. Affirmed. Inbody, Chief Judge, and Irwin and Bishop, Judges.

†No. A-13-942: **Leonard v. Leonard**. Affirmed. Moore, Chief Judge, and Irwin and Pirtle, Judges.

No. A-13-945: **In re Interest of Elijah M**. Affirmed. Pirtle, Moore, and Riedmann, Judges.

No. A-13-947: **State v. Adame**. Affirmed. Bishop, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-13-955: **State v. Scott**. Affirmed. Riedmann, Moore, and Pirtle, Judges.

No. A-13-958: **State v. Ernstmeyer**. Affirmed. Bishop, Judge, and Inbody, Chief Judge, and Irwin, Judge.

†No. A-13-962: **Estate of Elox v. Paul Johnson & Sons Cattle Co**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Bishop, Judge.

†No. A-13-968: **State v. Sheldon**. Affirmed. Moore, Pirtle, and Riedmann, Judges.

†No. A-13-972: **Dillenburg v. LeCrone**. Affirmed. Irwin, Moore, and Pirtle, Judges.

No. A-13-973: **State v. Long**. Affirmed. Inbody, Chief Judge, and Moore and Pirtle, Judges.

No. A-13-975: **State v. White**. Affirmed. Inbody, Chief Judge, and Riedmann and Bishop, Judges.

†No. A-13-978: **State v. Shannon**. Reversed and remanded with directions. Irwin, Moore, and Pirtle, Judges. Withdrawn on December 29, 2014.

†No. A-13-984: **O'Brien v. O'Brien-Hytrek**. Affirmed as modified. Pirtle, Irwin, and Inbody, Judges.

No. A-13-990: **Wulf v. Robinson**. Affirmed. Riedmann, Judge, and Inbody, Chief Judge, and Bishop, Judge.

No. A-13-992: **In re Interest of Adrian L. et al**. Affirmed. Bishop, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-13-996: **State v. Bewley**. Affirmed. Riedmann, Irwin, and Bishop, Judges.

†No. A-13-997: **Pitcher v. Wal-Mart Stores**. Affirmed. Moore, Chief Judge, and Irwin and Pirtle, Judges.

†No. A-13-1005: **State v. Churchich**. Affirmed. Bishop, Irwin, and Riedmann, Judges.

No. A-13-1009: **State v. Contreras**. Affirmed in part, and in part vacated and remanded for resentencing. Inbody, Chief Judge, and Irwin and Bishop, Judges.

†No. A-13-1011: **Adamson v. Horizon West**. Affirmed in part, and in part reversed and remanded for further proceedings. Moore, Chief Judge, and Riedmann and Bishop, Judges.

†No. A-13-1012: **In re Interest of Messiah S**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Bishop, Judge.

†No. A-13-1015: **Mejia v. Chapman**. Affirmed. Moore, Chief Judge, and Riedmann and Bishop, Judges.

No. A-13-1017: **State v. Martinez**. Affirmed. Pirtle, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-13-1018: **Nelson v. Jantze**. Affirmed in part, and in part reversed and remanded for further proceedings. Inbody, Irwin, and Pirtle, Judges.

†No. A-13-1026: **State v. Foster**. Affirmed. Riedmann, Moore, and Pirtle, Judges.

No. A-13-1031: **In re Interest of Adreyona J**. Affirmed. Inbody, Chief Judge, and Irwin and Bishop, Judges.

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No. A-13-1043: **In re Estate of Schmidt**. Affirmed. Pirtle, Irwin, and Inbody, Judges.

†No. A-13-1053: **Burns v. Burns**. Affirmed in part, and in part reversed and vacated. Bishop, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-13-1056: **State v. Perry**. Affirmed in part, and in part appeal dismissed. Inbody, Chief Judge, and Riedmann and Bishop, Judges.

No. A-13-1057: **Kunath v. Kunath**. Affirmed. Pirtle, Irwin, and Moore, Judges.

No. A-13-1058: **State v. Alvarez**. Affirmed. Moore, Pirtle, and Riedmann, Judges.

No. A-13-1059: **State v. Kerber**. Affirmed. Pirtle, Irwin, and Moore, Judges.

†No. A-13-1060: **In re Interest of Angeleah M. & Ava M**. Affirmed in part, and in part reversed and remanded for further proceedings. Bishop, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-13-1061: **State v. Johnston**. Affirmed. Bishop, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-13-1069: **Timperley v. Omaha Pub. Power Dist**. Affirmed. Pirtle, Irwin, and Moore, Judges.

†No. A-13-1071: **DeGeorge v. DeGeorge**. Affirmed. Irwin, Inbody, and Pirtle, Judges.

No. A-13-1076: **State v. Tackwell**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

†No. A-13-1079: **State v. Tapia**. Affirmed as modified. Moore, Chief Judge, and Inbody and Pirtle, Judges.

No. A-13-1080: **Worl v. Worl**. Affirmed. Moore, Chief Judge, and Riedmann and Bishop, Judges.

No. A-13-1081: **State v. Brown**. Affirmed. Inbody, Chief Judge, and Moore and Pirtle, Judges.

No. A-13-1082: **State v. Baldwin**. Affirmed. Inbody, Pirtle, and Bishop, Judges.

No. A-13-1083: **Huettner v. Tyson Foods**. Affirmed. Riedmann, Judge, and Inbody, Chief Judge, and Bishop, Judge.

No. A-13-1085: **Castonguay v. Retelsdorf**. Affirmed. Riedmann, Judge, and Inbody, Chief Judge, and Bishop, Judge.

No. A-13-1088: **State v. Bonner**. Affirmed. Pirtle, Moore, and Riedmann, Judges.

No. A-13-1093: **Witmer v. Nebraska Dept. of Corr**. Affirmed in part; reversed and remanded in part. Riedmann, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-13-1094: **In re Estate of Flemming**. Reversed and remanded with directions. Bishop, Irwin, and Riedmann, Judges.

†No. A-13-1099: **State v. Chilen**. Affirmed. Moore, Irwin, and Pirtle, Judges.

No. A-13-1104: **State v. Eddy**. Affirmed. Pirtle, Irwin, and Moore, Judges.

No. A-13-1106: **Foster v. Foster**. Affirmed. Moore, Pirtle, and Riedmann, Judges.

No. A-13-1110: **Mumin v. Pettit's Pastry**. Affirmed. Pirtle, Irwin, and Moore, Judges.

No. A-13-1114: **State v. Fitzgerald**. Affirmed. Bishop, Judge, and Inbody, Chief Judge, and Riedmann, Judge.

No. A-13-1115: **Muhammad v. Gage**. Affirmed in part, and in part reversed and vacated. Pirtle, Irwin, and Moore, Judges.

†No. A-13-1117: **State v. Cahuichchii**. Affirmed. Pirtle, Irwin, and Inbody, Judges.

No. A-13-1121: **In re Interest of Joseph A. et al**. Affirmed. Riedmann, Moore, and Pirtle, Judges.

No. A-13-1134: **Poullos v. Pine Crest Homes**. Appeal dismissed. Moore, Chief Judge, and Riedmann and Bishop, Judges.

Nos. A-13-1135, A-14-088: **State v. Purdie**. Affirmed. Moore, Irwin, and Pirtle, Judges.

†No. A-13-1137: **Fayle v. Thiesen Construction**. Affirmed. Moore, Irwin, and Pirtle, Judges.

†No. A-13-1146: **State v. Felder**. Reversed and remanded for further proceedings. Irwin, Judge (1-judge).

No. A-14-008: **State v. Eaton**. Affirmed as modified. Pirtle, Moore, and Riedmann, Judges.

†No. A-14-009: **State v. Vance**. Affirmed. Moore, Chief Judge, and Riedmann and Bishop, Judges.

†No. A-14-010: **Woehl v. Ryle**. Affirmed in part, and in part reversed. Irwin, Inbody, and Pirtle, Judges.

No. A-14-013: **Ulmer v. Ulmer**. Affirmed in part, and in part reversed and remanded for further proceedings. Riedmann, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-14-014: **State v. Little Eagle**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-14-017: **State v. Jackson**. Affirmed. Bishop, Judge, and Inbody, Chief Judge, and Riedmann, Judge.

No. A-14-018: **Jensen v. Jensen**. Reversed and remanded with directions. Moore, Chief Judge, and Riedmann and Bishop, Judges.

†No. A-14-019: **In re Interest of Don'Kaveon S. et al**. Affirmed. Moore, Pirtle, and Riedmann, Judges.

No. A-14-023: **State v. Flege**. Affirmed. Moore, Chief Judge, and Inbody and Pirtle, Judges.

Nos. A-14-026, A-14-027: **State v. Glasson**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-14-029: **State v. Bowman**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-14-041: **In re Interest of Baby Boy R**. Affirmed. Riedmann, Moore, and Pirtle, Judges.

†No. A-14-048: **State v. Erickson**. Affirmed. Moore, Chief Judge, and Riedmann and Bishop, Judges.

†No. A-14-050: **Hartley v. Metropolitan Utilities Dist**. Reversed and remanded for a new trial. Bishop, Judge, and Moore, Chief Judge, and Riedmann, Judge.

†No. A-14-051: **Meisinger v. Metropolitan Utilities Dist**. Reversed and remanded for further proceedings. Bishop, Irwin, and Riedmann, Judges.

†No. A-14-055: **State v. Santana**. Affirmed. Irwin, Inbody, and Pirtle, Judges.

No. A-14-062: **State v. Guerra**. Affirmed. Inbody, Chief Judge, and Irwin and Bishop, Judges. Withdrawn on December 30, 2014.

No. A-14-062: **State v. Guerra**. Affirmed. Inbody, Irwin, and Bishop, Judges.

†No. A-14-064: **Hughes v. Hughes**. Affirmed. Irwin, Pirtle, and Riedmann, Judges.

No. A-14-067: **Purdie v. Dohmen**. Affirmed. Bishop, Inbody, and Riedmann, Judges.

No. A-14-069: **McClure v. Burk**. Affirmed. Inbody, Irwin, and Pirtle, Judges.

†No. A-14-073: **Saravia v. Hormel Foods**. Reversed and remanded with directions. Pirtle, Irwin, and Inbody, Judges.

No. A-14-074: **Applied Underwriters v. Department of Labor**. Affirmed. Inbody, Irwin, and Pirtle, Judges.

No. A-14-077: **In re Interest of Averie G**. Affirmed. Pirtle, Moore, and Riedmann, Judges.

No. A-14-078: **In re Interest of Serenity G**. Affirmed. Pirtle, Moore, and Riedmann, Judges.

No. A-14-079: **In re Interest of Christopher G**. Affirmed. Pirtle, Moore, and Riedmann, Judges.

†No. A-14-080: **Mahler v. Marshall**. Affirmed. Irwin, Inbody, and Pirtle, Judges.

†No. A-14-086: **State v. Dlouhy**. Affirmed. Irwin, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-14-087: **State v. Powers**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-14-094: **Parking Mgmt. & Consults. v. City of Omaha**. Remanded for further proceedings. Bishop, Irwin, and Riedmann, Judges.

No. A-14-096: **State v. Meints**. Affirmed. Bishop, Inbody, and Riedmann, Judges.

No. A-14-100: **State v. Patterson**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-14-102: **In re Interest of Luka W. et al**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Bishop, Judge.

†No. A-14-106: **A. Raymond Plumbing v. Eggers**. Affirmed. Pirtle, Inbody, and Bishop, Judges.

†No. A-14-107: **Macias v. Bader**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-14-111: **Hatez v. E & K of Omaha**. Affirmed in part, and in part reversed and remanded with directions. Bishop, Inbody, and Riedmann, Judges.

No. A-14-116: **In re Adoption of Raymond L**. Affirmed. Inbody, Chief Judge, and Irwin and Bishop, Judges.

No. A-14-130: **State v. Green**. Affirmed. Inbody, Irwin, and Pirtle, Judges.

No. A-14-133: **State v. Sullivan**. Affirmed. Moore, Chief Judge, and Riedmann and Bishop, Judges.

No. A-14-134: **State v. Berggren**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-14-138: **Harper v. Department of Corrections**. Affirmed in part, and in part reversed. Pirtle, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-14-144: **Hegi v. Johnson Sand & Gravel**. Affirmed. Riedmann, Irwin, and Bishop, Judges.

No. A-14-146: **Hegi v. County of Polk**. Affirmed. Riedmann, Irwin, and Bishop, Judges.

No. A-14-147: **State v. Vincent**. Affirmed. Bishop, Inbody, and Riedmann, Judges.

No. A-14-149: **In re Interest of Tristan C**. Affirmed. Bishop, Inbody, and Riedmann, Judges.

No. A-14-153: **Giandinoto v. Giandinoto**. Affirmed. Pirtle, Irwin, and Inbody, Judges.

No. A-14-155: **Bernt v. Alter Metal Processing**. Affirmed. Inbody, Chief Judge, and Riedmann and Bishop, Judges.

†No. A-14-156: **Peterson v. Peterson**. Affirmed. Irwin, Inbody, and Pirtle, Judges.

No. A-14-161: **State v. Ciurej**. Affirmed. Pirtle, Irwin, and Inbody, Judges.

†No. A-14-164: **State v. Jones**. Affirmed in part, and in part reversed and remanded for further proceedings. Irwin, Riedmann, and Bishop, Judges.

No. A-14-167: **Stang v. Stang**. Affirmed. Pirtle, Inbody, and Bishop, Judges.

†No. A-14-172: **Farmers Mut. Ins. Co. v. Cox**. Affirmed. Riedmann, Irwin, and Bishop, Judges.

No. A-14-173: **State v. Miksch**. Affirmed. Bishop, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-14-174: **State v. Driver**. Affirmed. Riedmann, Moore, and Pirtle, Judges.

No. A-14-175: **In re Interest of Natesia P. & Michael P**. Affirmed. Bishop, Judge, and Inbody, Chief Judge, and Riedmann, Judge.

†Nos. A-14-180, A-14-187: **State v. Chuol**. Affirmed. Irwin, Riedmann, and Bishop, Judges.

No. A-14-191: **In re Interest of Marcus C. et al**. Affirmed. Inbody, Chief Judge, and Riedmann and Bishop, Judges.

†No. A-14-193: **Wildman v. George Witt Service**. Remanded for further proceedings. Irwin, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-14-196: **State on behalf of Cade P. v. Chad P**. Affirmed as modified. Riedmann, Irwin, and Bishop, Judges.

†No. A-14-197: **State v. Ruegge**. Affirmed. Irwin, Riedmann, and Bishop, Judges.

No. A-14-198: **State v. Klaassen**. Affirmed. Moore, Irwin, and Pirtle, Judges.

No. A-14-201: **In re Interest of Makayla W. et al**. Affirmed. Riedmann, Judge, and Inbody, Chief Judge, and Bishop, Judge.

Nos. A-14-202 through A-14-205: **State v. Joynes**. Affirmed. Inbody, Riedmann, and Bishop, Judges.

No. A-14-206: **Old Republic Nat. Title Ins. Co. v. Kornegay**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-14-207: **Onuachi v. Meylan Enters**. Affirmed. Inbody, Irwin, and Pirtle, Judges.

No. A-14-208: **In re Interest of Izabella W**. Affirmed. Moore, Chief Judge, and Irwin and Pirtle, Judges.

†No. A-14-210: **Lagerstrom v. Neal**. Affirmed in part as modified, and in part reversed and remanded. Pirtle, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-14-212: **State v. Lewis**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-14-215: **Hayes v. Hayes**. Reversed and vacated, and cause remanded with directions. Inbody, Judge, and Moore, Chief Judge, and Pirtle, Judge.

No. A-14-228: **In re Interest of Talik S. et al**. Affirmed. Inbody, Chief Judge, and Riedmann and Bishop, Judges.

†No. A-14-232: **State v. Stubbendick**. Affirmed. Moore, Irwin, and Pirtle, Judges.

†No. A-14-233: **State v. Hill**. Affirmed. Riedmann, Irwin, and Bishop, Judges.

†No. A-14-234: **In re Interest of M.P**. Affirmed. Irwin, Riedmann, and Bishop, Judges.

†No. A-14-239: **State v. Chamberlain**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Riedmann, Judge.

†No. A-14-244: **In re Adoption of Eva S. & Elijah S**. Reversed and remanded with directions. Pirtle, Irwin, and Inbody, Judges.

†No. A-14-248: **Lakner v. Lakner**. Reversed and remanded with directions. Bishop, Irwin, and Riedmann, Judges.

†No. A-14-254: **Gray v. Nebraska Dept. of Corr. Servs**. Affirmed in part, and in part reversed and remanded for further proceedings. Bishop, Inbody, and Pirtle, Judges.

No. A-14-256: **In re Interest of Katrina B**. Affirmed. Inbody, Irwin, and Pirtle, Judges.

No. A-14-257: **In re Interest of Aiden P**. Affirmed. Inbody, Irwin, and Pirtle, Judges.

No. A-14-258: **In re Interest of Hayleigh P**. Affirmed. Inbody, Irwin, and Pirtle, Judges.

No. A-14-259: **In re Interest of Ricky P**. Affirmed. Inbody, Irwin, and Pirtle, Judges.

†No. A-14-260: **Commercial Contractors Equip. v. Lower Platte North NRD**. Affirmed. Irwin, Riedmann, and Bishop, Judges.

†No. A-14-264: **In re Interest of Maykala P**. Affirmed. Pirtle, Irwin, and Inbody, Judges.

No. A-14-265: **Davis v. Davis**. Reversed and remanded with directions. Inbody, Pirtle, and Bishop, Judges.

No. A-14-267: **State v. Lyne**. Affirmed. Bishop, Irwin, and Riedmann, Judges.

No. A-14-268: **Malone v. Malone**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Irwin, Judge.

No. A-14-271: **Brown v. Tenneco Automotive**. Affirmed. Pirtle, Irwin, and Inbody, Judges.

Nos. A-14-274, A-14-275: **State v. Kriz**. Affirmed as modified. Bishop, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-14-276: **State v. Hauf**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-14-280: **State v. McWilliams**. Affirmed. Pirtle, Irwin, and Moore, Judges.

No. A-14-285: **Parmer v. Parmer**. Affirmed. Moore, Chief Judge, and Riedmann and Bishop, Judges.

No. A-14-286: **State v. Hollibaugh**. Affirmed. Pirtle, Moore, and Riedmann, Judges.

No. A-14-288: **State v. Higel**. Affirmed in part, sentence of restitution vacated, and cause remanded with directions. Moore, Pirtle, and Riedmann, Judges.

No. A-14-289: **Skutchan v. Grenfell Eating Establishments**. Affirmed. Inbody and Bishop, Judges. Irwin, Judge, participating on briefs.

†No. A-14-296: **Tabb Enters. v. Stevens**. Affirmed. Moore, Chief Judge, and Inbody and Pirtle, Judges.

†No. A-14-300: **In re Interest of Eyllan J**. Affirmed. Irwin, Moore, and Pirtle, Judges.

No. A-14-302: **State v. Taylor**. Affirmed. Inbody, Chief Judge, and Riedmann and Bishop, Judges.

No. A-14-305: **State v. Chuol**. Affirmed. Moore, Chief Judge, and Inbody and Pirtle, Judges.

No. A-14-310: **In re Interest of Nemiah F**. Affirmed. Pirtle, Irwin, and Inbody, Judges.

†No. A-14-312: **Manhart v. Manhart**. Affirmed as modified. Moore, Chief Judge, and Irwin and Riedmann, Judges.

No. A-14-319: **State v. Anderson**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-14-329: **Brown v. Brown**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-14-330: **Priesner v. Starry**. Affirmed as modified. Riedmann, Judge, and Moore, Chief Judge, and Irwin, Judge.

†No. A-14-335: **Wolfe v. Wolfe**. Affirmed in part, and in part reversed and remanded with directions. Inbody, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-14-336: **State v. Magallanes**. Reversed and remanded with directions. Moore, Chief Judge, and Irwin and Riedmann, Judges.

No. A-14-341: **State v. Baker**. Affirmed. Irwin, Judge, and Moore, Chief Judge, and Pirtle, Judge.

No. A-14-343: **Sims v. Nebraska Technical Servs**. Affirmed as modified. Pirtle, Irwin, and Inbody, Judges.

Nos. A-14-344, A-14-347, A-14-350, A-14-351: **State v. McCroy**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-14-357: **Thompson v. Thompson**. Affirmed. Riedmann, Pirtle, and Bishop, Judges.

†No. A-14-359: **State v. Van Winkle**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-14-360: **State v. Richter**. Affirmed. Riedmann, Irwin, and Inbody, Judges.

No. A-14-362: **State v. Schaneman**. Affirmed. Moore, Chief Judge, and Riedmann and Bishop, Judges.

No. A-14-365: **Wilson v. Wilson**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-14-371: **Schriner v. Schriner**. Affirmed in part, and in part reversed and remanded for further proceedings. Irwin, Riedmann, and Bishop, Judges.

†No. A-14-386: **State v. Ayala**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

No. A-14-391: **Campbell v. Campbell**. Affirmed. Moore, Chief Judge, and Inbody and Pirtle, Judges.

†No. A-14-395: **Geiser Constr. v. Nickman**. Affirmed. Irwin, Judge, and Moore, Chief Judge, and Riedmann, Judge.

Nos. A-14-396, A-14-425: **State v. Marchese**. Affirmed in part, and in part reversed and remanded. Moore, Chief Judge, and Irwin and Riedmann, Judges.

No. A-14-399: **State v. Ivory**. Affirmed. Riedmann, Moore, and Pirtle, Judges.

No. A-14-406: **McPherson v. First National Bank of Omaha**. Affirmed. Pirtle, Inbody, and Bishop, Judges.

No. A-14-407: **Connot v. Connot**. Affirmed. Inbody, Riedmann, and Bishop, Judges.

No. A-14-412: **State v. Miramontes-Madero**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Irwin, Judge.

†No. A-14-417: **Briggs v. State**. Reversed and remanded with directions. Bishop, Irwin, and Riedmann, Judges.

No. A-14-418: **Weiss v. Western Sugar Co-op**. Affirmed in part, and in part reversed and remanded for further proceedings. Riedmann, Irwin, and Bishop, Judges.

No. A-14-432: **Williams v. Williams**. Affirmed. Inbody, Irwin, and Pirtle, Judges.

No. A-14-434: **In re Interest of Trace M**. Affirmed. Inbody, Irwin, and Pirtle, Judges.

Nos. A-14-444, A-14-451: **State v. Robey**. Affirmed. Inbody, Pirtle, and Bishop, Judges.

†No. A-14-446: **Gutchewsky v. Westside Community Schools**. Affirmed. Pirtle, Inbody, and Bishop, Judges.

†No. A-14-453: **In re Interest of Noah J. et al**. Affirmed. Irwin, Riedmann, and Bishop, Judges.

No. A-14-458: **State v. Murillo**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Irwin, Judge.

No. A-14-470: **Osborn v. Osborn**. Affirmed as modified. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-14-498: **In re Interest of Patrick B**. Affirmed. Irwin, Inbody, and Pirtle, Judges.

No. A-14-501: **State on behalf of Laney W. v. Jeffrey B**. Affirmed. Pirtle, Inbody, and Bishop, Judges.

No. A-14-514: **State v. Caruthers**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-14-515: **In re Estate of Jurgens**. Affirmed. Pirtle, Inbody, and Bishop, Judges.

†No. A-14-520: **State v. Pittman**. Affirmed. Irwin, Riedmann, and Bishop, Judges.

†No. A-14-525: **Gittins v. Windstream Corp**. Affirmed in part, and in part reversed. Bishop, Irwin, and Riedmann, Judges.

No. A-14-527: **In re Interest of Annastachia D**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Inbody, Judge.

†No. A-14-530: **In re Interest of Kameron R**. Affirmed. Pirtle, Irwin, and Inbody, Judges.

†No. A-14-532: **State v. Frank**. Affirmed. Moore, Chief Judge, and Inbody and Pirtle, Judges.

No. A-14-534: **State v. Dickey**. Affirmed. Bishop, Irwin, and Riedmann, Judges.

No. A-14-539: **State v. Sosa**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Inbody, Judge.

†No. A-14-540: **Welch v. Welch**. Reversed and remanded for further proceedings. Moore, Chief Judge, and Irwin and Riedmann, Judges.

No. A-14-547: **State v. Ramos**. Affirmed. Moore, Chief Judge, and Irwin and Pirtle, Judges.

†No. A-14-548: **Meints v. City of Beatrice**. Affirmed. Pirtle, Inbody, and Bishop, Judges.

No. A-14-555: **In re Interest of Johnathon M**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-14-558: **In re Interest of Danaisha W**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-14-559: **Loomis v. Messersmith**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

No. A-14-565: **Hall v. Lan-Ken Rental**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Irwin, Judge.

No. A-14-575: **State v. Ohde**. Affirmed. Irwin, Inbody, and Riedmann, Judges.

†No. A-14-576: **In re Interest of Kathryn S. & Lauren S**. Affirmed. Moore, Chief Judge, and Inbody and Pirtle, Judges.

No. A-14-577: **Higgins v. Werner Service & Trucking**. Affirmed. Bishop, Irwin, and Riedmann, Judges.

†No. A-14-584: **State v. Burton**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

Nos. A-14-585, A-14-673: **State v. Voter**. Affirmed. Irwin, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-14-589: **State v. Door**. Affirmed. Inbody, Pirtle, and Bishop, Judges.

No. A-14-590: **State v. Modlin**. Affirmed. Bishop, Irwin, and Riedmann, Judges.

†No. A-14-592: **Stamm v. Fisher**. Affirmed as modified. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-14-593: **Schwaller v. Schwaller**. Vacated and remanded for further proceedings. Inbody and Riedmann, Judges. Irwin, Judge, participating on briefs.

No. A-14-594: **Fleming v. Neckar**. Affirmed as modified. Inbody, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-14-601: **Evensen v. George Risk Indus**. Affirmed in part, and in part reversed. Moore, Chief Judge, and Inbody and Pirtle, Judges.

No. A-14-602: **In re Interest of Khareem B**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-14-603: **In re Interest of Autrell B**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-14-605: **State v. Pittman**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Irwin, Judge.

No. A-14-608: **Harrison v. State**. Affirmed. Riedmann, Irwin, and Bishop, Judges.

†No. A-14-610: **In re Interest of Alexandria H. et al**. Affirmed. Irwin, Judge, and Moore, Chief Judge, and Riedmann, Judge.

†No. A-14-613: **Jandrain v. Staff Mid-America**. Reversed and remanded for further proceedings. Riedmann, Judge, and Moore, Chief Judge, and Irwin, Judge.

No. A-14-616: **Buck's Inc. v. City of Omaha**. Affirmed. Inbody, Irwin, and Riedmann, Judges.

No. A-14-618: **State v. Vigil**. Affirmed. Irwin, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-14-619: **State v. Ramirez**. Affirmed. Riedmann, Irwin, and Bishop, Judges.

No. A-14-621: **State v. Gardner**. Affirmed. Riedmann, Irwin, and Bishop, Judges.

No. A-14-624: **Koerber v. Koerber**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Irwin, Judge.

†No. A-14-636: **State v. Bogenreif**. Affirmed. Irwin, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-14-644: **In re Interest of Morgan C**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-14-645: **In re Interest of Yue-Bo W. & Xin-Bo W**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Pirtle, Judge.

No. A-14-648: **Attaie v. Attaie**. Affirmed. Inbody, Pirtle, and Bishop, Judges.

†No. A-14-651: **Poessnecker v. Zeman**. Affirmed in part, and in part reversed and remanded with directions. Moore, Chief Judge, and Inbody and Pirtle, Judges.

No. A-14-652: **State v. Ali**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-14-655: **In re Interest of Cameo B**. Affirmed. Moore, Chief Judge, and Inbody and Pirtle, Judges.

No. A-14-656: **Goens v. Department of Admin. Servs**. Affirmed. Inbody, Pirtle, and Bishop, Judges.

No. A-14-663: **State v. Holmes-Thompson**. Affirmed. Riedmann, Irwin, and Inbody, Judges.

No. A-14-668: **State v. Ryan**. Affirmed. Bishop, Inbody, and Pirtle, Judges.

†No. A-14-672: **Angela K. v. Timothy K**. Affirmed in part, and in part reversed and remanded for further proceedings. Pirtle, Inbody, and Bishop, Judges.

No. A-14-674: **Washington Cty. Bd. of Equal. v. Burdess**. Affirmed. Riedmann, Irwin, and Inbody, Judges.

†No. A-14-683: **Helzer v. Mamot**. Affirmed in part, and in part reversed and remanded with directions. Moore, Chief Judge, and Pirtle and Bishop, Judges.

†No. A-14-689: **In re Adoption of Riley L**. Affirmed. Moore, Chief Judge, and Irwin and Riedmann, Judges.

No. A-14-690: **Peck v. Payeur**. Affirmed. Irwin, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-14-695: **State v. Vaughn**. Affirmed. Moore, Chief Judge, and Riedmann and Bishop, Judges.

†Nos. A-14-703, A-14-977: **Pales v. Pales**. Affirmed in part, and in part reversed. Irwin, Inbody, and Riedmann, Judges.

†No. A-14-705: **Williams v. EGS Appleton**. Affirmed in part, and in part reversed. Moore, Chief Judge, and Irwin and Riedmann, Judges.

No. A-14-712: **Sisneros v. Comfort Inn & Suites**. Affirmed in part, and in part reversed. Riedmann, Irwin, and Bishop, Judges.

†No. A-14-714: **State on behalf of Gavin N. v. Whitney R**. Affirmed in part, and in part reversed and remanded with directions. Irwin, Inbody, and Riedmann, Judges.

†No. A-14-719: **Rath v. State Farm Mut. Auto. Ins. Co**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

No. A-14-725: **Bond v. Monthey**. Affirmed. Moore, Chief Judge, and Irwin and Riedmann, Judges.

No. A-14-726: **State v. Tickle**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-14-728: **Quinn v. Archbishop Bergan Mercy Hosp**. Affirmed. Irwin, Riedmann, and Bishop, Judges.

No. A-14-730: **Smith v. Gerken**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Inbody, Judge.

†Nos. A-14-739, A-14-832: **In re Interest of Brendon J**. Affirmed. Pirtle, Inbody, and Bishop, Judges.

No. A-14-742: **In re Estate of Maahs**. Affirmed. Irwin, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-14-746: **Hunsche v. Hunsche**. Affirmed. Irwin, Judge, and Moore, Chief Judge, and Riedmann, Judge.

†No. A-14-759: **State v. Chol**. Affirmed. Riedmann, Irwin, and Inbody, Judges.

†No. A-14-760: **Shemek v. Brown**. Affirmed in part, and in part reversed and remanded. Irwin, Inbody, and Riedmann, Judges.

No. A-14-761: **State v. Cordova**. Affirmed. Inbody, Irwin, and Riedmann, Judges.

No. A-14-763: **Davlin v. Sabatka-Rine**. Affirmed. Bishop, Inbody, and Pirtle, Judges.

†No. A-14-766: **Bejmuk v. Bejmuk**. Affirmed in part, and in part reversed and remanded with directions. Irwin, Inbody, and Riedmann, Judges.

No. A-14-772: **In re Interest of Ky'Mhani B. et al**. Affirmed. Bishop, Inbody, and Pirtle, Judges.

†No. A-14-776: **State v. Doman**. Affirmed. Pirtle, Inbody, and Bishop, Judges.

†No. A-14-777: **State v. Schaetzle**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

No. A-14-779: **State v. Buford**. Affirmed. Bishop, Inbody, and Pirtle, Judges.

No. A-14-785: **State v. Acosta-Diaz**. Reversed and remanded with directions to vacate. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

No. A-14-786: **In re Interest of Jaberise P. et al**. Affirmed. Riedmann, Irwin, and Bishop, Judges.

†No. A-14-788: **State v. Brehm**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-14-789: **Burns v. Burns**. Affirmed. Inbody, Irwin, and Riedmann, Judges. Withdrawn on July 31, 2015.

No. A-14-794: **In re Interest of Yue-Bo W. & Xin-Bo W**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Pirtle, Judge.

Nos. A-14-807, A-14-809: **State v. Leinhos**. Affirmed. Inbody, Irwin, and Pirtle, Judges.

No. A-14-817: **State v. Jahnke**. Affirmed as modified. Inbody, Judge, and Moore, Chief Judge, and Pirtle, Judge, Withdrawn on April 13, 2015.

No. A-14-817: **State v. Jahnke**. Affirmed as modified. Inbody, Judge, and Moore, Chief Judge, and Pirtle, Judge.

Nos. A-14-819, A-14-820: **State v. Liner**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Irwin, Judge.

†No. A-14-821: **Village of Union v. Bescheinen**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

No. A-14-836: **State v. Frazier**. Affirmed. Inbody, Judge (1-judge).

No. A-14-840: **Ten Eyck v. Ten Eyck**. Affirmed in part, and in part reversed and remanded. Irwin, Inbody, and Riedmann, Judges.

No. A-14-857: **Pruitt v. Dollar General**. Affirmed. Moore, Chief Judge, and Irwin and Riedmann, Judges.

†No. A-14-859: **In re Interest of Madison V. & Vincent V**. Affirmed in part, and in part reversed and remanded with directions. Irwin, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-14-860: **In re Interest of Angeleah M. & Ava M**. Affirmed. Inbody, Irwin, and Riedmann, Judges.

†No. A-14-863: **Bures v. Bures**. Reversed and remanded with directions. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-14-866: **Jaeger v. Bloomberg**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-14-869: **Montegut v. Franklin**. Reversed and remanded for further proceedings. Moore, Chief Judge, and Pirtle and Bishop, Judges.

No. A-14-875: **Carlson v. Carlson**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-14-882: **State v. Dowling**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Irwin, Judge.

No. A-14-893: **State v. Trevino**. Affirmed. Irwin, Inbody, and Riedmann, Judges.

No. A-14-894: **In re Interest of Julia H. & Timothy H**. Affirmed in part, reversed in part, and remanded for further proceedings. Inbody, Pirtle, and Bishop, Judges.

†No. A-14-910: **State v. Arthur**. Affirmed in part, and in part reversed and remanded with directions. Pirtle, Inbody, and Bishop, Judges.

No. A-14-914: **State v. Khalaf**. Affirmed. Riedmann, Irwin, and Inbody, Judges.

†No. A-14-921: **Welch v. Welch**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

No. A-14-933: **In re Interest of Tristan H. et al**. Affirmed. Inbody, Irwin, and Riedmann, Judges.

No. A-14-935: **Manipis v. Follett Higher Education Group**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-14-939: **In re Interest of Xavier M**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

No. A-14-940: **In re Interest of Sean M**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

No. A-14-941: **In re Interest of Chance M**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

†No. A-14-942: **In re Interest of Keisha G**. Affirmed. Riedmann, Irwin, and Inbody, Judges.

No. A-14-943: **In re Interest of Erica Y. & Marilyn Y**. Affirmed. Inbody and Riedmann, Judges. Irwin, Judge, participating on briefs.

No. A-14-964: **In re Interest of Jordan M**. Affirmed. Irwin, Inbody, and Riedmann, Judges.

No. A-14-965: **In re Interest of Miley M**. Affirmed. Irwin, Inbody, and Riedmann, Judges.

No. A-14-974: **State v. Gonzalez**. Affirmed. Irwin, Inbody, and Riedmann, Judges.

No. A-14-985: **State v. Huff**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

No. A-14-989: **In re Interest of Frank W. & Casyn W**. Affirmed. Bishop, Inbody, and Pirtle, Judges.

†No. A-14-993: **Hanshaw v. Earls**. Reversed and remanded with directions. Moore, Chief Judge, and Irwin and Riedmann, Judges.

No. A-14-999: **In re Interest of Adalyn B**. Affirmed. Moore, Chief Judge, and Irwin and Riedmann, Judges.

†No. A-14-1017: **State v. Soto**. Affirmed. Moore, Chief Judge, and Irwin and Riedmann, Judges.

†No. A-14-1018: **Kelsey v. Sandy Pine Systems**. Award vacated, and cause remanded for further proceedings. Irwin, Inbody, and Riedmann, Judges.

No. A-14-1026: **In re Interest of Jacob I**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-14-1031: **In re Interest of Estrellita L**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

No. A-14-1034: **Lanning v. Lanning**. Affirmed. Riedmann, Irwin, and Inbody, Judges.

No. A-14-1063: **Patterson-Holling v. Schmeits**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-14-1067: **State v. Meyer**. Reversed and remanded for resentencing. Irwin, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-14-1068: **In re Interest of Nathaniel P**. Affirmed. Riedmann, Irwin, and Inbody, Judges.

No. A-14-1072: **State v. Mosqueda**. Affirmed in part, reversed in part, sentence vacated and remanded for further proceedings. Inbody, Irwin, and Riedmann, Judges.

†No. A-14-1074: **In re Interest of Victoria W. & Lindsey W**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

No. A-14-1077: **State v. Clayborne**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-14-1092: **In re Interest of Don S. et al**. Affirmed. Irwin, Inbody, and Riedmann, Judges.

No. A-14-1113: **State v. Antibas**. Affirmed. Inbody, Pirtle, and Bishop, Judges.

No. A-14-1119: **In re Interest of Alyssa B. et al**. Affirmed. Inbody, Irwin, and Riedmann, Judges.

†No. A-15-019: **State v. Marshall**. Affirmed. Riedmann, Judge (1-judge).

No. A-15-022: **In re Interest of Diana M. et al**. Affirmed. Inbody, Irwin, and Riedmann, Judges.

No. A-15-087: **State v. Eng**. Order vacated and cause remanded with directions. Irwin, Judge, and Moore, Chief Judge, and Riedmann, Judge.

†No. A-15-110: **State v. Johnson**. Affirmed. Moore, Chief Judge, and Irwin and Riedmann, Judges.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. A-12-888: **State v. Workman**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-13-287: **Naber v. Nissen**. Appeal dismissed. See § 2-107(A)(2). See, also, *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999).

No. A-13-435: **State v. Settles**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-13-488: **Sutton v. Sutton**. Motion of appellant for rehearing granted. Appeal reinstated.

No. A-13-552: **Paper Tiger Shredding v. Nautica Capital**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-13-603: **Jaeger v. Bloomberg**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-13-609: **Sullivan v. Allied Prop. & Cas. Ins. Co**. Stipulation allowed; appeal dismissed.

No. A-13-623: **Landrigan v. Bruce**. Stipulation allowed; appeal dismissed.

No. A-13-683: **Haworth v. Douglas County**. Affirmed. See, § 2-107(A)(1); *State ex rel. Comm. on Unauth. Prac. of Law v. Tyler*, 283 Neb. 736, 811 N.W.2d 678 (2012).

No. A-13-692: **State v. Ryan**. Appellee's suggestion of remand sustained; reversed and remanded with directions.

No. A-13-696: **State v. Turrentine-Sims**. Affirmed. See, § 2-107(A)(1); *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012). See, also, *State v. Vanderpool*, 286 Neb. 111, 835 N.W.2d 52 (2013); *State v. Wagner*, 271 Neb. 253, 710 N.W.2d 627 (2006).

No. A-13-783: **State v. Mumin**. Motion of appellee for rehearing sustained in part. Appeal reinstated.

No. A-13-796: **Jones v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Lewis v. Casey*, 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996); *White v. Kautzky*, 494 F.3d 677 (8th Cir. 2007); *Mandolfo v. Mandolfo*, 281 Neb. 443, 796 N.W.2d 603 (2011); *Strom v. City of Oakland*, 255 Neb. 210, 583 N.W.2d 311 (1998); *State v. Pratt*, 20 Neb. App. 434, 824 N.W.2d 393 (2013); *Martin v. Curry*, 13 Neb. App. 171, 690 N.W.2d 186 (2004).

No. A-13-817: **Kelly v. Nebraska Equal Opp. Comm**. Motion of appellee for summary affirmance sustained. See, § 2-107(B)(2); *Finley-Swanson v. Swanson*, 20 Neb. App. 316, 823 N.W.2d 697 (2012). See, also, *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008).

Nos. A-13-823, A-13-824: **State v. Buchanan**. Affirmed. See, § 2-107(A)(1); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-13-868: **State v. Muhic**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Watson*, 285 Neb. 497, 827 N.W.2d 507 (2013).

No. A-13-871: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-13-886: **State v. Fay**. Summarily affirmed. See § 2-107(A)(1).

No. A-13-904: **State v. Kometscher**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-13-931: **State v. Duckworth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-13-936: **State v. Wizinsky**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-13-941: **Wigington v. Wigington**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-950: **Moss v. C & A Industries**. Stipulation allowed; appeal dismissed.

Nos. A-13-960, A-13-1044: **Kelly v. Housing Auth. of City of Omaha**. Motions of appellee for summary affirmance granted. See *VanDeWalle v. Albion Nat. Bank*, 243 Neb. 496, 500 N.W.2d 566 (1993).

No. A-13-964: **Kobza v. Bowers**. Motion of appellant for remand sustained; appeal dismissed as prematurely filed. See Neb. Rev. Stat. § 25-1912(3) (Reissue 2008).

No. A-13-967: **Wilson v. Anderson**. Affirmed. See, § 2-107(A)(1); *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009).

No. A-13-978: **State v. Shannon**. Motion of appellee for rehearing sustained. Appeal reinstated.

No. A-13-978: **State v. Shannon**. By order of the court, case reversed and remanded.

No. A-13-982: **Owens v. Boboev**. Matter dismissed.

No. A-13-983: **In re Interest of Tiffani K**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-1003: **State v. Castonguay**. Affirmed. See § 2-107(A)(1). See, also, Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *Cole v. Blum*, 262 Neb. 1058, 637 N.W.2d 606 (2002).

No. A-13-1008: **State v. Parde**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-13-1013: **State v. Tyler**. Affirmed.

No. A-13-1022: **Tyler v. Cricket**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006).

No. A-13-1034: **State v. Clark**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-13-1036: **State v. Keup**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-13-1037: **Tyler v. Douglas County Court**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-13-1062: **State v. Lopez-Mercado**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Kinser*, 283 Neb. 560, 811 N.W.2d 227 (2012).

No. A-13-1094: **In re Estate of Flemming**. Reversed and remanded for further proceedings.

No. A-13-1098: **State v. McPherson**. Motion of appellee for summary affirmance sustained. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-3001(4) (Cum. Supp. 2012).

No. A-13-1107: **State v. Rosa**. Affirmed. See, § 2-107(A)(1); *State v. Bol*, 288 Neb. 144, 846 N.W.2d 241 (2014); *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013).

No. A-13-1111: **Sitzmann v. Ross**. Appeal dismissed. See § 2-107(A)(2). See, also, Neb. Rev. Stat. § 25-1912 (Reissue 2008).

No. A-13-1112: **State v. Goetting**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 27-701 (Reissue 2008); *State v. Ross*, 283 Neb. 742, 811 N.W.2d 298 (2012).

No. A-13-1113: **State v. Goetting**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 27-701 (Reissue 2008); *State v. Ross*, 283 Neb. 742, 811 N.W.2d 298 (2012).

No. A-13-1130: **State v. Welton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-13-1141: **State v. Newte**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-1147: **State v. Murphy**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, §§ 2-107(B)(1) and 2-101(B)(4); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

No. A-13-1148: **State v. Eaton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-14-005: **State v. Janis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-025: **King v. Houston**. Motion of appellee for summary dismissal sustained; appeal dismissed. See § 2-107(B)(1).

No. A-14-031: **Hynek v. Kliewer**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-14-037: **State v. Bryant**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-040: **State v. Crippen**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 29-3001(4) (Cum. Supp. 2012); *State v. Smith*, 286 Neb. 77, 834 N.W.2d 799 (2013).

No. A-14-046: **State v. Baker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Phelps*, 286 Neb. 89, 834 N.W.2d 786 (2013).

No. A-14-052: **State v. Renteria**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-14-053: **State v. Phillips**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Kinser*, 283 Neb. 560, 811 N.W.2d 227 (2012).

No. A-14-060: **Robinson v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained. See Neb. Rev. Stat. § 25-2301.02 (Reissue 2008).

No. A-14-061: **State v. Arevalo**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *State v. Mamer*, 289 Neb. 92, 853 N.W.2d 517 (2014); *State v. Gonzalez*, 285 Neb. 940, 830 N.W.2d 504 (2013).

No. A-14-062: **State v. Guerra**. Motion of appellee for rehearing sustained. Appeal reinstated.

No. A-14-063: **State v. Guerra**. Stipulation allowed; appeal dismissed.

No. A-14-065: **State v. Teater**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-068: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-14-072: **State v. Minturn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-075: **State v. Potter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-076: **Vlach v. Vlach**. Motion of appellant for rehearing sustained; order on summary affirmance vacated. Appeal reinstated.

No. A-14-082: **Laux v. Laux**. Stipulation allowed; appeal dismissed.

No. A-14-090: **State v. Brewer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Kinser*, 283 Neb. 560, 811 N.W.2d 227 (2012).

No. A-14-091: **State v. Norris**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-14-095: **State v. Fotopulos**. Motion of appellee for summary affirmance sustained. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

Nos. A-14-097, A-14-099: **State v. Garcia**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-104: **State v. Robertson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-14-108: **Fletcher v. Gage**. Affirmed. See, § 2-107(A)(1); *Alleyne v. United States*, ___ U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013).

No. A-14-112: **State v. Turner**. Stipulation allowed; appeal dismissed.

No. A-14-113: **State v. Langenberg**. Stipulation allowed; appeal dismissed.

No. A-14-114: **State v. Langenberg**. Stipulation allowed; appeal dismissed.

Nos. A-14-117, A-14-118: **State v. Prout**. By order of the court, appeals dismissed for failure to file briefs.

No. A-14-120: **State v. Engstrom**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-14-123: **Pine Bluffs Gravel v. Cheyenne Cty. Bd. of Adjust**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-14-124: **State v. Engstrom**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-14-131: **Mengedoht v. Washington County Court**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2). See, also, Neb. Rev. Stat. § 25-2157 (Reissue 2008); *State ex rel. Wolski v. Reed*, 146 Neb. 348, 19 N.W.2d 545 (1945).

No. A-14-132: **Estate of Hue v. Mengedoht**. Motion of appellee for summary affirmance granted. See Neb. Rev. Stat. § 25-601(1) (Reissue 2008).

No. A-14-135: **Theiler v. Robino**. Appeal dismissed. See, § 2-107(A)(2); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-14-136: **Harper v. Douglas County Clerk Office**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1912 (Reissue 2008); *Macke v. Pierce*, 263 Neb. 868, 643 N.W.2d 673 (2002).

No. A-14-137: **Cole v. Houston**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-14-139: **Wulf v. Washington County Court**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2). See, also, Neb. Rev. Stat. § 25-2157 (Reissue 2008); *State ex rel. Wolski v. Reed*, 146 Neb. 348, 19 N.W.2d 545 (1945).

No. A-14-145: **State v. Griffin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-14-148: **In re Estate of Nickel**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-154: **In re Interest of Wyatt F**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-14-160: **State on behalf of Elena A. v. Ricardo A**. Affirmed. See § 2-107(A)(1).

No. A-14-162: **State v. Wabashaw**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Hessler*, 288 Neb. 670, 850 N.W.2d 777 (2014).

No. A-14-168: **Hendrix v. Sivick**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Spady v. Spady*, 284 Neb. 885, 824 N.W.2d 366 (2012).

No. A-14-170: **State v. White**. Affirmed. See § 2-107(A)(1).

No. A-14-184: **State v. Hochstein**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Price*, 252 Neb. 365, 562 N.W.2d 340 (1997).

Nos. A-14-186, A-14-188: **State v. Brenner**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

Nos. A-14-189, A-14-190: **State v. Reynolds**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Sikes*, 286 Neb. 38, 834 N.W.2d 609 (2013).

No. A-14-192: **Goff v. Paterson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-194: **State v. Cayou**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-14-195: **State v. Beehn**. Motion of appellee for summary affirmance sustained. See *State v. Podrazo*, 21 Neb. App. 489, 840 N.W.2d 898 (2013).

No. A-14-199: **Bilderback-Vess v. Vess**. Stipulation allowed; appeal dismissed with prejudice.

No. A-14-216: **Dial v. Crnkovich**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-218: **Moore v. Peschong**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-219: **Moore v. Kelly**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-220: **Moore v. Wynner**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 25-2301.02 (Reissue 2008).

No. A-14-221: **State v. Bass**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-222: **State v. Bequette**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-14-226: **State v. Brown**. Motion of appellee for summary affirmance granted. See *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

No. A-14-231: **Robinson v. Department of Corrections**. Motion of appellee for summary affirmance granted. See Neb. Rev. Stat. § 25-2301.02 (Reissue 2008).

No. A-14-235: **Jantzi v. Knoke**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-237: **Onuachi v. Meylan Enters**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1912 and 25-1329 (Reissue 2008).

No. A-14-237: **Onuachi v. Meylan Enters**. Motion of appellant for rehearing granted. Appeal reinstated.

No. A-14-237: **Onuachi v. Meylan Enters**. Affirmed. See, § 2-107(A)(1); *Billingsley v. BFM Liquor Mgmt.*, 264 Neb. 56, 645 N.W.2d 791 (2002); *Sargent Feed & Grain v. Anderson*, 216 Neb. 421, 344 N.W.2d 59 (1984).

No. A-14-242: **State v. Fox**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-14-243: **State v. Elliott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-247: **State v. Robertson**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3) (Reissue 2008). See, also, *Beckman v. McAndrew*, 16 Neb. App. 217, 742 N.W.2d 778 (2007); *State v. Blair*, 14 Neb. App. 190, 707 N.W.2d 8 (2005).

No. A-14-249: **King v. Rolin K. Farms & Trucking**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-251: **State v. Downey**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-252: **State v. Paramo-Cisneros**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-14-253: **State v. Gabarrete**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009). See, also, *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-255: **McLaughlin v. Crete Carrier Corp**. Stipulation allowed; appeal dismissed.

No. A-14-266: **Arndt v. Arndt**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-272: **State v. Stanko**. Appeal dismissed. See, § 2-107(A)(2); *McClellan v. Board of Equal. of Douglas Cty.*, 275 Neb. 581, 748 N.W.2d 66 (2008).

No. A-14-273: **Wells v. Houston**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-277: **Morosic v. Schamel Auto Supply**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-14-278: **State v. Domach**. Motion of appellee for summary affirmance sustained. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-14-279: **State v. Hillyard**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-282: **State v. Kelly**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Phelps*, 286 Neb. 89, 834 N.W.2d 786 (2013).

No. A-14-284: **State v. Larabee**. Motion of appellee for summary affirmance granted. See *State v. Zimmerman*, 19 Neb. App. 451, 810 N.W.2d 167 (2012).

No. A-14-287: **State v. Herz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-293: **State v. Jochem**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-295: **In re Interest of Ethan H. et al**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Danaisha W. et al*., 287 Neb. 27, 840 N.W.2d 533 (2013).

No. A-14-298: **State v. Richardson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-14-299: **In re Interest of Estrellita L**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *In re Interest of Diana M. et al*., 20 Neb. App. 472, 825 N.W.2d 811 (2013).

No. A-14-301: **State v. Rahman**. Appeal dismissed. See, § 2-107(A)(2); *State v. Cisneros*, 14 Neb. App. 112, 704 N.W.2d 550 (2005).

No. A-14-303: **State v. Burton**. Appeal dismissed. See, § 2-107(A)(2); *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005).

No. A-14-306: **Horner v. Board of Trustees of Bishop Square**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-307: **State v. Sherrod**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Phelps*, 286 Neb. 89, 834 N.W.2d 786 (2013). See, also, Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *Peterson v. Houston*, 284 Neb. 861, 824 N.W.2d 26 (2012).

No. A-14-311: **In re Interest of Skylia H**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-313: **Lutz v. UNMC Physicians**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315 (Reissue 2008); *Cerny v. Todco Barricade Co*., 273 Neb. 800, 733 N.W.2d 877 (2007); *Halac v. Girton*, 17 Neb. App. 505, 766 N.W.2d 418 (2009).

No. A-14-314: **Buckles v. Tucker**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-316: **State v. Alnori**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-318: **State v. Rocha**. Motion of appellee for summary affirmance granted. See *State v. Sikes*, 286 Neb. 38, 834 N.W.2d 609 (2013).

No. A-14-321: **Bank of America v. Madej**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-14-322: **In re Interest of Tianna M**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-323: **In re Interest of Tianna M**. Motion of appellee to dismiss as moot granted; appeal dismissed. See § 2-107(B)(1).

No. A-14-324: **In re Interest of Tianna M**. Motion of appellee to dismiss as moot granted; appeal dismissed. See § 2-107(B)(1).

No. A-14-325: **Osler v. Osler**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-327: **State v. Wagner**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-14-328: **State v. Wagner**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-14-333: **In re Estate of Drexel**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-334: **Roost v. Cimarina Sales & Serv**. Stipulation allowed; appeal dismissed.

No. A-14-337: **State v. Harris**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-14-340: **McCaulley v. C L Enterprises**. Appeal dismissed.

No. A-14-342: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009).

No. A-14-348: **Nelson v. Nelson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-349: **State v. Roan Eagle**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-352: **Moore v. Maret**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-353: **Moore v. Maret**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-354: **State v. Ware**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-356: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-14-361: **State v. Kelly**. Affirmed. See § 2-107(A)(1).

No. A-14-364: **State v. Yiel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-366: **Wagner v. Wagner**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *Wagner v. Wagner*, 275 Neb. 693, 749 N.W.2d 137 (2008); *Belitz v. Belitz*, 17 Neb. App. 53, 756 N.W.2d 172 (2008).

No. A-14-368: **Schrier v. Schrier**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-369: **State v. Walker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-14-370: **State v. Valdez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-14-372: **In re Interest of Tianna M**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-373: **State v. Stevenson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-14-374: **Anderson v. Anderson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-381: **State v. Blowers**. Stipulation allowed; appeal dismissed.

No. A-14-385: **State v. Overgaard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Abdulkadir*, 286 Neb. 417, 837 N.W.2d 510 (2013); *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009).

No. A-14-387: **Phillips v. Douglas County**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-14-388: **In re Estate of Drexel**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-390: **Hughes v. Hughes**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-392: **Rotherham v. Lahm**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-14-393, A-14-394: **State v. Livingston**. Motions of appellee for summary affirmance sustained; judgments affirmed.

No. A-14-397: **In re Name Change of Llanes**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-14-398: **State v. Jensen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-14-400: **State v. Moore**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-401: **State v. Carlson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-402: **Anderson v. Anderson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-403: **State v. Schroeder**. Stipulation allowed; appeal dismissed.

No. A-14-405: **Lower Loup NRD v. Prokop**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-14-408: **O'Neal v. Sabatka-Rine**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-409: **State v. Kadavy**. Stipulation allowed; appeal dismissed.

No. A-14-410: **State v. Tellis**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-14-411: **State on behalf of Michael A. v. Samar A**. Appeal dismissed. See § 2-107(A)(2). See, also, Neb. Rev. Stat. § 25-1912(1) (Reissue 2008); *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-14-414: **State v. Malesker**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-415: **Miller v. Village of Palisade**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-421: **State v. Castonguay**. Affirmed. See, § 2-107(A)(1); *State v. Patton*, 287 Neb. 899, 845 N.W.2d 572 (2014).

No. A-14-423: **Halagarda v. Hargrave**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-426: **In re Revocable Trust of Drexel**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-428: **State v. Wright**. Appellee's suggestion of remand granted.

No. A-14-429: **State v. Shank**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-14-430: **State v. Lenz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-14-431: **State v. Rife**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-14-433: **State v. Castillo**. Affirmed. See, § 2-107(A)(1); *State v. Sikes*, 286 Neb. 38, 834 N.W.2d 609 (2013); *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

No. A-14-436: **State v. Swift**. Affirmed. See § 2-107(A)(1).

No. A-14-437: **State v. Millien**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-439: **State v. Schwartzkopf**. Appeal dismissed. See, §§ 2-107(A)(2) and 2-101; Neb. Rev. Stat. §§ 29-2315.01 and 33-103 (Reissue 2008).

No. A-14-440: **State v. Marchese**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-3001(4)(e) (Cum. Supp. 2014).

No. A-14-441: **Prater v. Kenney**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Peterson v. Houston*, 284 Neb. 861, 824 N.W.2d 26 (2012).

No. A-14-445: **Furby v. Sarpy County**. Joint stipulation and motion to dismiss appeal granted; appeal dismissed.

No. A-14-447: **State v. Bass**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-448: **State v. Simon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-14-449: **State v. Cheatams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-450: **State v. Boutin**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-14-454: **State v. Ballou**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-14-455: **State on behalf of Maddox S. v. Matthew E**. Appeal dismissed. See, § 2-107(A)(2); *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009).

No. A-14-457: **City of Fort Calhoun v. Papio-Missouri River NRD**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-459: **State v. English**. Affirmed. See § 2-107(A)(1).

No. A-14-460: **Smith v. Gerken**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-463: **State v. Mosqueda**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-464: **State v. Gallegos-Palafox**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-14-465: **State v. Henderson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-466: **Travelers Indemnity Co. v. Gonzalez Constr**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-467: **Shillinglaw v. Shillinglaw**. Motion sustained; appeal dismissed.

No. A-14-468: **State v. Contreras**. Stipulation allowed; appeal dismissed.

No. A-14-472: **Timmons v. Ortiz**. Appeal dismissed.

No. A-14-473: **Reddy v. Lofdahl-Reddy**. Stipulation allowed; appeal dismissed.

No. A-14-474: **State v. Ohrt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sikes*, 286 Neb. 38, 834 N.W.2d 609 (2013).

No. A-14-475: **Garcia v. Kurt Mfg**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 48-125 (Cum. Supp. 2012); *State v. Hausmann*, 277 Neb. 819, 765 N.W.2d 219 (2009); *Brown v. Harbor Fin. Mortgage Corp.*, 267 Neb. 218, 673 N.W.2d 35 (2004).

No. A-14-479: **Lang v. Peter**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-480: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Abdulkadir*, 286 Neb. 417, 837 N.W.2d 510 (2013).

No. A-14-481: **State v. Marti**. Stipulation allowed; appeal dismissed.

No. A-14-482: **State v. Marti**. Stipulation allowed; appeal dismissed.

No. A-14-483: **State v. Arellano**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-14-484: **In re Interest of Octavio B**. Appeal dismissed. See § 2-107(A)(2). See, e.g., *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009).

No. A-14-484: **In re Interest of Octavio B**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-14-485: **In re Interest of Cristalyla C**. Appeal dismissed. See § 2-107(A)(2). See, e.g., *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009).

No. A-14-485: **In re Interest of Cristalyla C**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-14-486: **In re Interest of Gabriel B**. Appeal dismissed. See § 2-107(A)(2). See, e.g., *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009).

No. A-14-486: **In re Interest of Gabriel B**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-14-487: **In re Interest of Blanca M**. Appeal dismissed. See § 2-107(A)(2). See, e.g., *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009).

No. A-14-487: **In re Interest of Blanca M**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-14-488: **In re Interest of Nathaniel M**. Appeal dismissed. See § 2-107(A)(2). See, e.g., *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009).

No. A-14-488: **In re Interest of Nathaniel M**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-14-489: **In re Interest of Angel M**. Appeal dismissed. See § 2-107(A)(2). See, e.g., *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009).

No. A-14-489: **In re Interest of Angel M**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-14-490: **State v. McCamish**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

Nos. A-14-493, A-14-494: **State v. Wilson**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Podrazo*, 21 Neb. App. 489, 840 N.W.2d 898 (2013).

No. A-14-496: **State v. Cavanaugh**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-497: **State v. Liberty**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-14-499: **Rutter v. Rutter**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-502: **In re Interest of Donald B**. Appeal dismissed. See § 2-107(A)(2). See, also, *State v. Lassek*, 272 Neb. 523, 723 N.W.2d 320 (2006).

No. A-14-503: **In re Interest of Donald B**. Appeal dismissed. See § 2-107(A)(2). See, also, *State v. Lassek*, 272 Neb. 523, 723 N.W.2d 320 (2006).

No. A-14-504: **State v. Foster**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-14-507: **Longwell v. Faylor**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-14-512: **State v. Gillespie**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-513: **Akins v. Albers**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-516: **State v. Kinzie**. Stipulation allowed; appeal dismissed.

No. A-14-518: **State v. Drappeaux**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sikes*, 286 Neb. 38, 834 N.W.2d 609 (2013).

No. A-14-521: **State v. Brooks**. Motion of appellee for remand granted; matter remanded with directions.

No. A-14-522: **State v. Altevogt**. Stipulation allowed; appeal dismissed.

No. A-14-524: **Klingelhoefer v. Monif**. Motion of appellee for summary dismissal sustained; appeal dismissed. See § 2-107(B)(1).

No. A-14-526: **State v. Highfill**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-14-528: **Peters v. Peters**. Summarily remanded with instructions. See *Rutherford v. Rutherford*, 277 Neb. 301, 761 N.W.2d 922 (2009).

No. A-14-533: **State v. Romero**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-14-536: **State v. Youmans**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-541: **State v. Holcombe**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sikes*, 286 Neb. 38, 834 N.W.2d 609 (2013).

No. A-14-543: **State v. Smedley**. Stipulation allowed; appeal dismissed.

No. A-14-549: **State v. Mortensen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011); *State v. Hall*, 268 Neb. 91, 679 N.W.2d 760 (2004).

No. A-14-552: **State v. White**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Mooney v. Gordon Memorial Hosp. Dist.*, 268 Neb. 273, 682 N.W.2d 253 (2004); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-14-554: **State ex rel. Linder v. Hoerle**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Poppe v. Siefker*, 274 Neb. 1, 735 N.W.2d 784 (2007); *State ex rel. Grams v. Beach*, 243 Neb. 126, 498 N.W.2d 83 (1993).

No. A-14-556: **State v. Campbell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-3001(4) (Cum. Supp. 2012).

No. A-14-560: **Kunze v. FedEx Corp**. Appeal dismissed. See § 2-107(A)(2). See, also, *Custom Fabricators v. Lenarduzzi*, 259 Neb. 453, 610 N.W.2d 391 (2000); *Federal Land Bank of Omaha v. Johnson*, 226 Neb. 877, 415 N.W.2d 478 (1987).

No. A-14-562: **State v. Chavez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-14-566: **State v. Misula**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-567: **Junker v. Junker**. Motion of appellant to dismiss appeal considered; appeal dismissed.

Nos. A-14-570, A-14-571: **State v. Collins**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-14-572: **State v. Flores**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-580: **State v. Hillard**. Appeal dismissed. See, § 2-107(A)(2); *Friedman v. Friedman*, 20 Neb. App. 135, 819 N.W.2d 732 (2012).

No. A-14-581: **In re Estate of Schulz**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-586: **In re Interest of Audrina K**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-587: **In re Interest of Elijah K**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-588: **In re Interest of Nyla K**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-596: **Owens v. Owens**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-14-597: **McCoolidge v. Oyvetsky**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

Nos. A-14-598, A-14-599: **State v. Metcalf**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-14-604: **State v. Amerson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-606: **State v. Friend**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-14-609: **Dowd Grain Co. v. County of Sarpy Bd. of Adjust**. Appeal dismissed. See, § 2-107(A)(2); *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007).

No. A-14-612: **State v. Phillips**. Stipulation allowed; appeal dismissed.

No. A-14-614: **Kurgan v. Kurgan**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-615: **State v. Holbert**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-617: **State v. Haggan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-14-622: **State v. Lynn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-625: **State v. Owens**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-626: **State v. Barritt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-628: **State on behalf of Derrick L. v. Derrick S**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-14-629: **Tyler v. City of Omaha**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-14-630: **State v. Peters**. Motion of appellee for summary dismissal sustained; appeal dismissed. See § 2-107(B)(1).

No. A-14-631: **State v. Eskridge**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-3001(2) and (4) (Cum. Supp. 2014); *State v. Smith*, 286 Neb. 77, 834 N.W.2d 799 (2013).

No. A-14-633: **In re Interest of Ayce B**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-634: **Lister v. Regional West Med. Ctr**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-635: **State v. Olsen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Banks*, 289 Neb. 600, 856 N.W.2d 305 (2014); *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014); *State v. Hill*, 288 Neb. 767, 851 N.W.2d 670 (2014); *State v. Tolbert*, 288 Neb. 732, 851 N.W.2d 74 (2014); *State v. Sikes*, 286 Neb. 38, 834 N.W.2d 609 (2013).

No. A-14-637: **State v. Edwards**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-639: **Gemaehlich v. Gemaehlich**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-14-640: **State v. Ramos**. Appellee's suggestion of remand sustained; remanded with directions. See, § 2-105(B)(5); *State v. Kays*, 289 Neb. 260, 854 N.W.2d 783 (2014).

No. A-14-641: **Arndt v. Arndt**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Reissue 2008).

No. A-14-642: **State v. Ramos**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-14-643: **In re Estate of Hagemeier**. Stipulation allowed; appeal dismissed.

No. A-14-646: **State v. Ballard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-647: **In re Estate of Bray**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 30-1601(1) (Cum. Supp. 2012) and 25-1912(1) (Reissue 2008).

No. A-14-649: **State v. Terrazas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-653: **Sulu v. Magana**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-657: **State v. Pilgrim**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-658: **Old Republic Nat. Title v. Kornegay**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Gaytan v. Wal-Mart*, 289 Neb. 49, 853 N.W.2d 181 (2014).

No. A-14-659: **Douglas Cty. Bd. of Equal. v. Morello**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-661: **State v. Castonguay**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-14-664: **State v. Kennedy**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-14-667: **Floerchinger v. Floerchinger**. Summarily remanded with instructions. See *Rutherford v. Rutherford*, 277 Neb. 301, 761 N.W.2d 922 (2009).

No. A-14-669: **State v. Stotler**. Appellee's suggestion of remand granted; remanded for resentencing. See Neb. Rev. Stat. § 29-2281 (Reissue 2008).

No. A-14-675: **Kunze v. Otter**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-678: **State v. Vandorien**. Motion of appellee for summary affirmance granted. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-679: **Monthey v. County of Kearney**. Stipulation allowed; appeal dismissed.

No. A-14-680: **In re Interest of Marilyn S**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Karlie D.*, 19 Neb. App. 135, 809 N.W.2d 510 (2011).

No. A-14-682: **In re Interest of Tiffani K**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-686: **Nielsen v. Ambron**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-687: **State v. Miller**. Appeal dismissed.

No. A-14-688: **In re Interest of Natesia P. & Michael P**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-694: **In re Guardianship of Navaeh J**. Affirmed. See, § 2-107(A)(1); *Murphy v. Murphy*, 237 Neb. 406, 466 N.W.2d 87 (1991).

No. A-14-699: **In re Interest of Edward A**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-14-704: **Villa-Martinez v. Nebraska Beef**. Motion sustained; appeal dismissed.

No. A-14-707: **State v. Wilson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-14-713: **State v. Leuck**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-14-715: **ACI Worldwide Corp. v. BHMI, Inc**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-14-716: **State v. Newman**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-14-717: **State v. Newman**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-14-718: **State v. Carlton**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-720: **State v. Gaines**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-722: **State v. Hajek**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-729: **Chastain v. W-G, Inc**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-731: **Wilson v. Ascentia Real Estate Invest. Co**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1902 and 25-1912 (Reissue 2008).

No. A-14-733: **State v. Merrill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011). See, also, *State v. Thomas*, 6 Neb. App. 510, 574 N.W.2d 542 (1998).

No. A-14-734: **State v. London**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-14-735: **State v. Griffard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-737: **State v. Ramirez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-14-738: **State v. Wheeler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-14-744: **State v. Chaloupka**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-14-748: **Sprague v. Toyota Motor Sales USA**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-749: **Brunkhorst v. IATSE Union Local 151**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-750: **State v. Meints**. Appeal dismissed. See, § 2-107(A)(2); *State v. Hausmann*, 277 Neb. 819, 765 N.W.2d 219 (2009).

No. A-14-754: **Holmes v. Holmes**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

Nos. A-14-755, A-14-758: **State v. Lewis**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-756: **State v. Velazquez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-757: **State v. Aguilar-Garcia**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-14-767: **State v. Scott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011). See, also, *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616 (2014).

No. A-14-768: **State v. Trejo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Podrazo*, 21 Neb. App. 489, 840 N.W.2d 898 (2013); *State v. Alford*, 6 Neb. App. 969, 578 N.W.2d 885 (1998).

No. A-14-771: **Pineda v. Tenneco, Inc**. Appeal dismissed. See, § 2-107(A)(2); *Becerra v. United Parcel Service*, 284 Neb. 414, 822 N.W.2d 327 (2012). See, also, *Jacobitz v. Aurora Co-op*, 287 Neb. 97, 841 N.W.2d 377 (2013).

Nos. A-14-773, A-14-774: **State v. Reynolds**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-778: **State v. Banaszak**. Stipulation allowed; appeal dismissed.

No. A-14-784: **State v. Ramirez**. Stipulation allowed; appeal dismissed.

No. A-14-787: **In re Interest of Joslin W**. Stipulation allowed; appeal dismissed.

No. A-14-791: **State v. Williams**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-14-795: **State v. Jones**. Appeal dismissed. See, § 2-107(A)(2); *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-14-797: **Muhannad v. State**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-14-798: **Muhannad v. State**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

Nos. A-14-800, A-14-801: **State v. Lora**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-14-802: **State v. Friedrichsen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-14-803: **State v. Campbell**. Appeal dismissed. See § 2-107(A)(2). Furthermore, district court's order of affirmance is vacated for lack of jurisdiction. See *State v. Head*, 14 Neb. App. 684, 712 N.W.2d 822 (2006).

No. A-14-806: **Wiese v. Citimortgage, Inc**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-808: **State v. Stuart**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-14-810: **State v. Clayton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-811: **State v. Bailey**. Stipulation allowed; appeal dismissed.

No. A-14-812: **State v. Spevak**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-14-816: **State v. Shepard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Berney*, 288 Neb. 377, 847 N.W.2d 732 (2014).

No. A-14-817: **State v. Jahnke**. Motion of appellant for rehearing granted in part. Appeal reinstated.

No. A-14-824: **Delawter v. Delawter**. Stipulation allowed; appeal dismissed.

No. A-14-826: **State v. Castonguay**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Kiplinger v. Nebraska Dept. of Nat. Resources*, 282 Neb. 237, 803 N.W.2d 28 (2011).

No. A-14-827: **State v. Cardenas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-14-829: **State v. Hernandez**. Appeal dismissed. See, § 2-107(A)(2); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998). See, also, § 2-101(B)(4).

No. A-14-834: **Fantroy v. Yah**. Appeal dismissed as moot. See *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999).

No. A-14-835: **Kercher v. Kercher**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-837: **State v. Thornburg**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-14-838: **State v. Spotted War Bonnett**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-839: **In re Guardianship of Charmaine F**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-846: **State v. Bradley**. Appeal dismissed. See, § 2-107(A)(2); *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-14-848: **Zvolanek v. Maly**. Motion sustained; appeal dismissed.

No. A-14-849: **State v. Maushak**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004).

Nos. A-14-850, A-14-851: **State v. McLaughlin**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-852: **In re Interest of Alizyhana F. et al**. Summarily affirmed. See §§ 2-107(A)(1) and 2-101(B)(1)(b).

No. A-14-853: **State v. Donald**. Stipulation allowed; appeal dismissed with prejudice.

No. A-14-854: **State v. Daisley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-14-855: **State v. Clark**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-858: **In re Estate of Forster**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 30-2454(a) and 30-2457 (Reissue 2008); *In re Estate of Cooper*, 275 Neb. 322, 746 N.W.2d 663 (2008).

No. A-14-864: **Monthey v. County of Kearney**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-865: **In re Estate of Warner**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2729(1) (Reissue 2008).

No. A-14-868: **Housing Authority, City of Omaha v. Batun**. Affirmed. See, § 2-107(A)(1); *Irwin v. West Gate Bank*, 288 Neb. 353, 848 N.W.2d 605 (2014).

No. A-14-870: **State v. Graves**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-14-871: **State v. Renschler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-873: **State v. Stanko**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-2728(1) (Cum. Supp. 2014).

No. A-14-874: **State v. Wardlow**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-876: **State v. Cerros**. Stipulation allowed; appeal dismissed.

No. A-14-878: **Lobo v. Swift & Co**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 48-182 (Supp. 2013).

No. A-14-880: **State v. Kolbjornsen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-14-881: **State v. Kolbjornsen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-14-884: **In re Interest of Imelda H. et al**. Summarily dismissed. See, § 2-107(B)(1); *In re Interest of Borius H. et al.*, 251 Neb. 397, 558 N.W.2d 31 (1997).

No. A-14-886: **Purdie v. Clark**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-888: **State v. Sessions**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-14-889: **Conrad v. Conrad**. Stipulation allowed; appeal dismissed.

No. A-14-890: **City of Long Pine v. Voss**. Affirmed. See § 2-107(A)(1).

No. A-14-892: **State v. Harper**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. §§ 24-302 and 29-4120 (Reissue 2008); *State v. Haas*, 279 Neb. 812, 782 N.W.2d 584 (2010); *State v. McDonald*, 269 Neb. 604, 694 N.W.2d 204 (2005); *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

Nos. A-14-896 through A-14-898: **State v. Erickson**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-902: **Smith v. Hall**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-904: **Gray v. Foxall**. Appeal dismissed. See, § 2-107(A)(2); *Goodwin v. Hobza*, 17 Neb. App. 353, 762 N.W.2d 623 (2009).

No. A-14-907: **In re Interest of Nathaniel P**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-14-908: **Puls v. Knoblauch**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-14-909: **J.E. Meuret Grain Co. v. TCT Turkeys**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-912: **State v. Cutler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Payne*, 289 Neb. 467, 855 N.W.2d 783 (2014).

No. A-14-913: **Eric W. on behalf of Eric W. v. Jill C**. Motion of appellee for summary dismissal sustained; appeal dismissed.

No. A-14-918: **State v. Damme**. Stipulation allowed; appeal dismissed.

No. A-14-923: **In re Irrevocable Trust of Einspahr Daughters**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-924: **State v. Jackson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Berney*, 288 Neb. 377, 847 N.W.2d 732 (2014).

No. A-14-925: **State v. Herrin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sellers*, 290 Neb. 18, 858 N.W.2d 577 (2015).

No. A-14-928: **State v. Noyd**. Stipulation allowed; appeal dismissed.

No. A-14-930: **Cohrs v. Bruns**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1902 (Reissue 2008). See, also, *McCaul v. McCaul*, 17 Neb. App. 801, 771 N.W.2d 222 (2009).

No. A-14-932: **Moreno v. City of Gering**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1315(1) and 25-21,185.10 (Reissue 2008).

No. A-14-934: **In re Interest of Analillya B. & Levi H**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-936: **State v. Noyd**. Stipulation allowed; appeal dismissed.

No. A-14-945: **State v. Edwards**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Berney*, 288 Neb. 377, 847 N.W.2d 732 (2014).

No. A-14-946: **Tyler v. McDermott**. Affirmed. See § 2-107(A)(1).

No. A-14-950: **Johnson v. Lower Big Blue NRD**. Appeal dismissed. See, § 2-107(A)(2); *State v. Carney*, 220 Neb. 906, 374 N.W.2d 59 (1985).

No. A-14-951: **Wells v. Kenney**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-14-956: **State v. Ranslem**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-14-961: **Miller v. Farmers & Merchants Bank**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-962: **State v. Marion**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-968: **State v. Miranda**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-969: **State v. Bures**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-14-972: **Forster v. Immanuel Hospital**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-973: **Robinson v. Department of Corrections**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. §§ 81-8,209 and 81-8,210(3) (Reissue 2014).

No. A-14-978: **State v. Sinnard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-14-981: **Nebraska Beef Packers v. Tax. Equal. & Rev. Comm**. Appeal dismissed. See, § 2-107(A)(2); 442 Neb. Admin. Code, ch. 6, § 001 (2007); Neb. Rev. Stat. § 7-101 (Reissue 2012); *Back Acres Pure Trust v. Fahnlander*, 233 Neb. 28, 443 N.W.2d 604 (1989).

No. A-14-984: **Deuerlein v. State**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-14-991: **State v. Boston**. Stipulation considered; appeal dismissed.

No. A-14-996: **State v. Collins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-14-997: **State v. Truong**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-998: **State v. Lamb**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-14-1000: **Wilson v. Peart**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.01 (Reissue 2008).

No. A-14-1001: **Fire Ridge Estates Homeowners v. Marsh**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-14-1003: **Todd v. Jones**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-1004: **Jones v. Jones**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-14-1006: **State v. Martinez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-1008: **Meister v. Nebraska Account. & Disclosure Comm**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-1009: **Morris Enterprises v. Akins**. Appeal dismissed.

No. A-14-1010: **State v. Miles**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011); *State v. Finnegan*, 232 Neb. 75, 439 N.W.2d 496 (1989).

No. A-14-1011: **State v. Williams**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-14-1012: **State v. Linares-Rojas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-1013: **State v. Erpelding**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-14-1014: **State v. Hallett**. Appeal dismissed. See § 2-107(A)(2). See, e.g., *State v. Al-Sayagh*, 268 Neb. 913, 689 N.W.2d 587 (2004); *State v. Curry*, 18 Neb. App. 284, 790 N.W.2d 441 (2010).

No. A-14-1015: **State v. Hallett**. Appeal dismissed. See § 2-107(A)(2). See, e.g., *State v. Al-Sayagh*, 268 Neb. 913, 689 N.W.2d 587 (2004); *State v. Curry*, 18 Neb. App. 284, 790 N.W.2d 441 (2010).

No. A-14-1016: **Kenealy v. Kenealy**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-14-1019: **State v. Townsell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-14-1020: **Schrage v. Schrage**. Stipulation allowed; appeal dismissed.

No. A-14-1021: **Wilson v. Peart**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-14-1022: **Wilson v. Rihn**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-14-1023: **State v. Geiger**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-14-1024: **State v. Geiger**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-14-1027: **Matthewson v. Lincoln Cty. Bd. of Equal**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-1029: **State v. Gutierrez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-1030: **Himmelrick v. Bass**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-1032: **Elsten v. Elsten**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-1036: **State v. Garcia**. Appeal dismissed. See, § 2-107(A)(2); *State v. Podrazo*, 21 Neb. App. 489, 840 N.W.2d 898 (2013).

No. A-14-1038: **State v. Pecor**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 650 N.W.2d 512 (2003).

No. A-14-1039: **State v. Mendoza**. Appellee's suggestion of remand sustained; convictions and sentences reversed, and cause remanded with directions. See *State v. Eberly*, 271 Neb. 893, 716 N.W.2d 671 (2006).

No. A-14-1040: **State v. Ellis**. Motion of appellee for summary affirmance granted. See *State v. Watkins*, 284 Neb. 742, 825 N.W.2d 403 (2012).

No. A-14-1041: **Pan v. Elite Labor Servs**. Affirmed. See, § 2-107(A)(1); *Michel v. Nuway Drug Serv.*, 14 Neb. App. 902, 717 N.W.2d 528 (2006).

No. A-14-1042: **Fraternal Order of Police v. City of Crete**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-14-1045: **State v. Nixon**. Stipulation allowed; appeal dismissed.

No. A-14-1046: **State v. Brinton**. Appellee's suggestion of remand granted with directions.

No. A-14-1050: **State v. Garcia**. Appeal dismissed. See, § 2-107(A)(2); *State v. Podrazo*, 21 Neb. App. 489, 840 N.W.2d 898 (2013).

No. A-14-1051: **State v. Boye**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-14-1052: **Young v. Turner**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-1056: **In re Interest of Malcolm S. et al**. Appeal dismissed. See, §§ 2-107(A)(2) and 2-101(B)(4); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-14-1057: **Mumin v. Lincoln Journal Star**. Appeal dismissed.

No. A-14-1058: **State v. Lee**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-1059: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-1062: **Tyler v. Viagra**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-1066: **State v. Gonzales**. Stipulation allowed; appeal dismissed.

No. A-14-1070: **State v. Spotts**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-1071: **State v. Nevels**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-14-1075: **Gulliver v. Fairway Asset Mgmt**. Appeal dismissed. See § 2-107(A)(2). See, also, Neb. Rev. Stat. §§ 25-1315(1) and 25-1902 (Reissue 2008).

No. A-14-1078: **Schlake v. Schlake**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-1079: **State v. Travis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-1084: **State v. Bye**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-14-1086, A-14-1088: **State v. Smith**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-14-1097: **In re Estate of Cook**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-14-1099, A-14-1100: **State v. King**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-14-1101: **State v. Almasaudi**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-14-1102: **Carsey v. Gail Werner-Robertson Investments**. Stipulation allowed; appeal dismissed with prejudice.

No. A-14-1110: **State v. Thomas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-14-1111: **Hall v. Kenney**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-14-1118: **State v. Kirksey**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-14-1122: **State on behalf of Shirley E. v. Roy E**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-14-1123: **State v. Jennings**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-1125: **State v. Ruff**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-14-1126: **State v. Rice**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-14-1128: **State v. Lozano**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-14-1129: **Midwest Designs & Gen. Contracting v. Accuquilt, LLC**. Motion to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-14-1133: **Buckner v. Department of Health & Human Servs**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-14-1133: **Buckner v. Department of Health & Human Servs**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-14-1133: **Buckner v. Department of Health & Human Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-1136: **State v. Longwell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 83-1,106(1) and (4) (Reissue 2014); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012); *State v. Banes*, 268 Neb. 805, 688 N.W.2d 594 (2004).

No. A-14-1143: **State v. Agok**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-14-1145: **State v. McNally**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-1146: **Charles S. on behalf of CharNez S. v. Health & Human Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-1147: **White v. White**. Appeal dismissed. See, § 2-107(A)(2); *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997).

No. A-14-1148: **State v. Kosiski**. Appeal dismissed. See § 2-107(A)(2). See, e.g., *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-14-1149: **Wacker v. Wacker**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-1152: **State v. Pigee**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-14-1154: **Escamilla v. Escamilla**. By order of the court, appeal dismissed for failure to file briefs.

No. A-14-1156: **Lashley v. Lahm**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-1157: **State v. Kellis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-14-1159: **State v. Sanchez-Pinedo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-14-1163: **State v. Ross**. Motion of appellee for summary affirmance granted. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-1164: **Peters v. Peters**. Stipulation allowed; appeal dismissed.

No. A-14-1170: **Billups v. Gage**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1912(1) and 25-2301.02 (Reissue 2008).

No. A-15-006: **State v. Hallowell**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-007: **Johnson v. Department of Corr. Servs**. Appeal dismissed. See, § 2-107(A)(2); *Nichols v. Nichols*, 288 Neb. 339, 847 N.W.2d 307 (2014).

No. A-15-010: **State v. McKenzie**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-15-013: **Schreck v. Kryger Glass Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-014: **State v. Olson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-15-015: **State v. McWilliams**. Motion of appellee for summary affirmance granted. See *State v. Dominguez*, 290 Neb. 477, 860 N.W.2d 732 (2015).

No. A-15-018: **State v. Pearson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-020: **Calvillo v. JBS USA, L.L.C**. Appeal dismissed. See § 2-107(A)(2).

No. A-15-025: **State v. Jackson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-15-027: **Holtze v. Chambers**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1902 (Reissue 2008).

No. A-15-030: **State v. Hancock**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-15-031: **State v. Washington**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-15-034: **State v. Howard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-15-036: **Cullinane v. Graham**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-038: **State v. Larive**. Stipulation allowed; appeal dismissed.

No. A-15-041: **In re Interest of Daryn M**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999).

No. A-15-042: **Ruch v. Waste Mgmt. of Neb**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-046: **State v. Mena-Hernandez**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-15-047, A-15-049: **State v. McCollister**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-15-048: **State v. Marks**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-15-050: **State v. Davis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-15-052: **State v. Hostetter**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008). See, also, *State v. Kinser*, 259 Neb. 251, 609 N.W.2d 322 (2000); *State v. Trammell*, 231 Neb. 137, 435 N.W.2d 197 (1989).

No. A-15-052: **State v. Hostetter**. Motion of appellant for rehearing sustained. Appeal reinstated. See *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004).

No. A-15-056: **State v. Meints**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-057: **State v. Ibal**. Stipulation allowed; appeal dismissed.

No. A-15-058: **State v. Meints**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-059: **State v. Meints**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-060: **State v. Meints**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-061: **State v. Meints**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-062: **State v. Meints**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-063: **State v. Meints**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-064: **State v. Meints**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-065: **State v. Meints**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-066: **State v. Meints**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-067: **State v. Meints**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-068: **State v. Meints**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-069: **State v. Meints**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-070: **State v. Meints**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-071: **State v. Meints**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-072: **Gadeken v. Al-Hakemi**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-073: **Henry v. Williams**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-079: **Collar v. Gryder**. Appeal dismissed. See, § 2-107(A)(2); *Qwest Bus. Resources v. Headliners–1299 Farnam*, 15 Neb. App. 405, 727 N.W.2d 724 (2007).

No. A-15-082: **Quraishi v. Grady**. Appeal dismissed. See, § 2-107(A)(2); *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012); *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006).

No. A-15-084: **In re Interest of Raedyn L. & Dominic L**. Appeal dismissed. See, § 2-107(A)(2); *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009). See, also, *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006).

No. A-15-085: **State v. Duncan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-15-088: **State v. Eng**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-090: **Castonguay v. Kenney**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-15-093: **State v. King**. Appeal dismissed for lack of jurisdiction as filed out of time. See Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-100: **Akins v. Lincoln Electric System**. Appeal dismissed. See, § 2-107(A)(2); *Waite v. City of Omaha*, 263 Neb. 589, 641 N.W.2d 351 (2002).

No. A-15-101: **State v. Cloonan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-15-105: **Purdie v. NAC Servs. & Invest**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-112: **Rahe v. Rahe**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3) (Reissue 2008).

No. A-15-113: **State v. Tyler**. Appeal dismissed. See § 2-107(A)(2).

No. A-15-116: **State v. Eklund**. Stipulation allowed; appeal dismissed.

No. A-15-118: **Moore v. Blomstedt**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-119: **State v. Holoubek**. Stipulation allowed; appeal dismissed.

No. A-15-120: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. Appellant's verified motion for postconviction relief was not timely filed. See Neb. Rev. Stat. § 29-3001(4) (Cum. Supp. 2014).

No. A-15-121: **Brammer v. Brammer**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996).

No. A-15-122: **Mitchell v. Mansfield**. Appeal dismissed. See Neb. Rev. Stat. § 25-1902 (Reissue 2008). See, also, *Frederick v. Seeba*, 16 Neb. App. 373, 745 N.W.2d 342 (2008).

No. A-15-124: **State on behalf of Eriayana F. v. Gary F**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-125: **State on behalf of Cortavius K. v. Gary F**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-131: **Ertzner v. Lahm**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-15-132: **White v. State**. Appeal dismissed. See, § 2-107(A)(2); *Carney v. Miller*, 287 Neb. 400, 842 N.W.2d 782 (2014).

No. A-15-136: **State v. Shaw**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-15-143: **State v. Budka**. Stipulation allowed; appeal dismissed.

No. A-15-145: **State v. Kephart**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-15-147: **Smith v. Sarpy County**. Appeal dismissed. See *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-15-153: **Moeller v. Wolenberg-Moeller**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-154: **McVeigh v. Hauptman, O'Brien**. Appeal dismissed, and cause remanded with directions. See § 2-107(A)(2).

No. A-15-157: **State v. Greer**. Stipulation allowed; appeal dismissed.

No. A-15-163: **Investors for Infrastructure v. Washington Cty**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-15-164: **McCoy v. TBK Corp**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-166: **State v. Durham**. Appeal dismissed. See § 2-107(A)(2). See, also, *State v. Sports Couriers, Inc*., 210 Neb. 168, 313 N.W.2d 447 (1981).

No. A-15-175: **Olsen v. Taylors Drain & Sewer Serv**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-15-183: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-15-187: **State v. Loucks**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-15-188: **State v. Martinez-Alvarado**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-189: **State v. Williams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

Nos. A-15-193, A-15-194: **State v. Cuevas**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-15-200: **Tyler v. Deavor**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-206: **State v. Sherrod**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-207: **Johnson v. Harris**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-15-212: **State v. Naney**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-15-213: **McGill Restoration v. Lion Place Condo. Assn**. Appeal dismissed. See § 2-107(A)(2).

No. A-15-214: **Olenick v. Olenick**. Stipulation allowed; appeal dismissed with prejudice.

No. A-15-223: **Lecher v. Zapata**. Appeal dismissed. See, § 2-107(A)(2); *Jessen v. Jessen*, 259 Neb. 644, 611 N.W.2d 834 (2000); *Gerber v. Gerber*, 218 Neb. 228, 353 N.W.2d 4 (1984).

No. A-15-225: **Schultz v. Laughinghouse**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-226: **Disney v. Laughinghouse**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-227: **Wiles v. Laughinghouse**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-232: **Johnson v. Johnson**. Appeal dismissed. See, § 2-107(A)(2); *Furstenfeld v. Pepin*, 287 Neb. 12, 840 N.W.2d 862 (2013); *Waite v. City of Omaha*, 263 Neb. 589, 641 N.W.2d 351 (2002).

No. A-15-233: **State v. Witt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-15-237: **Clason v. Bayliss**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-15-239: **State v. Young**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-15-244: **State v. Filholm**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Reissue 2008).

No. A-15-247: **Mengedoht v. Stuthman**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1144.01, 25-1315.02, and 25-1329 (Reissue 2008).

No. A-15-252: **Dixon v. Dixon**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-253: **State v. Delgado**. Stipulation allowed; appeal dismissed.

No. A-15-254: **State v. Dwyer**. Stipulation allowed; appeal dismissed.

Nos. A-15-255, A-15-256: **State v. Frazier**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-15-257: **State v. Peters**. Stipulation allowed; appeal dismissed.

No. A-15-264: **State v. Grimaldo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-15-265: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-15-266: **State v. Hasbrouck**. Appeal dismissed. See § 2-107(A)(2).

No. A-15-268: **State v. Staab**. Stipulation allowed; appeal dismissed.

No. A-15-274: **Rotness v. Lahm**. Appeal dismissed as untimely. See *Lozier Corp. v. Douglas Cty. Bd. of Equal.*, 285 Neb. 705, 829 N.W.2d 652 (2013).

No. A-15-278: **Costello v. Costello**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-279: **State on behalf of Michael A. v. Samar A**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2008); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004); *Martin v. McGinn*, 265 Neb. 403, 657 N.W.2d 217 (2003).

No. A-15-281: **State v. Boston**. Appeal dismissed. See § 2-107(A)(2).

No. A-15-282: **Purdie v. Department of Corr. Servs**. Appeal dismissed. See § 2-107(A)(2).

No. A-15-296: **Horner v. Horner**. Motion to dismiss appeal granted; appeal dismissed as untimely. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1912 (Reissue 2008).

No. A-15-302: **State v. Harden**. Motion and stipulation considered; appeal dismissed.

No. A-15-303: **Spotted Wood v. Kenney**. Appeal dismissed. See § 2-107(A)(2).

No. A-15-312: **DeNoyer v. State**. Stipulation allowed; appeal dismissed.

No. A-15-321: **Kurtzer v. Kurtzer**. Motion and stipulation to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-15-330: **Moore v. Moore**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-338: **State v. Tichota**. Denial of in forma pauperis status to defendant affirmed, due to lack of standing to appeal such order. See *Field Club v. Zoning Bd. of Appeals of Omaha*, 283 Neb. 847, 814 N.W.2d 102 (2012).

No. A-15-339: **Central Platte NRD v. Smith**. Appeal dismissed. See § 2-107(A)(2). See, e.g., Neb. Rev. Stat. § 25-1902 (Reissue 2008); *Qwest Bus. Resources v. Headliners–1299 Farnam*, 15 Neb. App. 405, 727 N.W.2d 724 (2007).

No. A-15-357: **Great Southern Bank v. Mora Realty**. Appeal dismissed. See, § 2-107(A)(2); *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009). See, also, *Burke v. Blue Cross Blue Shield*, 251 Neb. 607, 558 N.W.2d 577 (1997).

No. A-15-362: **Sampson Constr. Co. v. Martin**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-15-363: **Clapper v. Bettin**. Appeal dismissed. See, § 2-107(A)(2); *Tietsort v. Ranne*, 200 Neb. 651, 264 N.W.2d 860 (1978); *Pofahl v. Pofahl*, 196 Neb. 347, 243 N.W.2d 55 (1976); *TierOne Bank v. Cup-O-Coa, Inc.*, 15 Neb. App. 648, 734 N.W.2d 763 (2007).

No. A-15-379: **In re Estate of Sonder**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2729(1) (Reissue 2008).

No. A-15-381: **A. Johnson Ent., L.L.C. v. Lane**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-382: **Doe v. Piske**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-15-386: **Ewers v. Saunders County**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *Schropp Indus. v. Washington Cty. Atty.'s Ofc.*, 281 Neb. 152, 794 N.W.2d 685 (2011); *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010); *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004); *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989).

No. A-15-387: **In re Interest of Mysoul B. et al**. Appeal dismissed. See § 2-107(A)(2).

No. A-15-406: **State v. Ret**. Stipulation allowed; appeal dismissed.

No. A-15-416: **State v. Schmidt**. Stipulation allowed; appeal dismissed.

No. A-15-431: **Brown v. Adams Bank & Trust Co**. Appeal dismissed. See § 2-107(A)(2).

No. A-15-436: **State v. Atkins**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-438: **Steiner v. Steiner**. Appeal summarily remanded with directions.

No. A-15-439: **O'Donnell v. O'Donnell**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Marcella B. & Juan S.*, 18 Neb. App. 153, 775 N.W.2d 470 (2009).

No. A-15-442: **Hielscher v. Med-Trans Corp**. Appeal dismissed. See, § 2-107(A)(2); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-15-473: **State v. Rice**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008); *TierOne Bank v. Cup-O-Coa, Inc.*, 15 Neb. App. 648, 734 N.W.2d 763 (2007). See, also, *Tietsort v. Ranne*, 200 Neb. 651, 264 N.W.2d 860 (1978); *Pofahl v. Pofahl*, 196 Neb. 347, 243 N.W.2d 55 (1976).

No. A-15-520: **State v. Carlisle**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-521: **State v. Carlisle**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

Nos. A-11-806, A-11-974: **In re Guardianship & Conservatorship of Giventer**. Petitions of appellant for further review denied on July 22, 2014.

No. A-12-745: **Barthel v. Liermann**, 21 Neb. App. 730 (2014). Petition of appellant for further review denied on June 4, 2014.

No. A-12-802: **Pflueger-James v. Pope Paul VI Institute Physicians**, 21 Neb. App. 635 (2014). Petition of appellee for further review denied on May 7, 2014.

No. A-12-804: **Harris v. Frazier**. Petition of appellant for further review denied on May 2, 2014, as premature.

No. A-12-804: **Harris v. Frazier**. Petition of appellant for further review denied on October 22, 2014.

No. S-12-843: **O'Brien v. Bellevue Public Schools**. Petition of appellant for further review sustained on July 2, 2014.

No. A-12-853: **Jones v. Houston**. Petition of appellant for further review denied on August 27, 2014.

No. A-12-888: **State v. Workman**, 22 Neb. App. 223 (2014). Petition of appellee for further review denied on October 22, 2014.

No. A-12-903: **Hayes v. County of Thayer**, 21 Neb. App. 836 (2014). Petition of appellant for further review denied on June 25, 2014.

No. A-12-909: **State v. Gardner**. Petition of appellant for further review denied on June 25, 2014.

No. A-12-933: **Austin v. Timperley**. Petition of appellant for further review denied on June 17, 2014.

No. A-12-962: **In re Guardianship & Conservatorship of Herrick**, 21 Neb. App. 971 (2014). Petition of appellant for further review denied on June 25, 2014.

No. S-12-1052: **State v. Matthews**, 21 Neb. App. 869 (2014). Petition of appellee for further review sustained on May 22, 2014.

Nos. A-12-1067 through A-12-1070: **In re Interest of Jordana H. et al.**, 22 Neb. App. 19 (2014). Petitions of appellant for further review denied on July 18, 2014.

Nos. S-12-1083 through S-12-1092: **City of Beatrice v. Meints**, 21 Neb. App. 805 (2014). Petitions of appellant for further review sustained on July 29, 2014.

No. A-12-1162: **Cushman v. Cushman**. Petition of appellant for further review denied on December 17, 2014.

No. A-13-011: **Mischo v. Chief School Bus Serv**. Petition of appellant for further review denied on September 29, 2014, as untimely filed. See § 2-101(F)(1).

No. A-13-018: **Cole v. Sabatka-Rine**. Petition of appellant for further review denied on May 6, 2014, for failure to file brief in compliance with § 2-102(F)(1).

No. A-13-034: **State v. Payne**. Petition of appellant for further review denied on December 17, 2014.

No. A-13-038: **In re Louise V. Steinhoefel Trust**, 22 Neb. App. 293 (2014). Petition of appellants for further review denied on January 22, 2015.

No. A-13-038: **In re Louise V. Steinhoefel Trust**, 22 Neb. App. 293 (2014). Petition of appellee Steffensmeier for further review denied on January 22, 2015.

No. A-13-038: **In re Louise V. Steinhoefel Trust**, 22 Neb. App. 293 (2014). Petition of appellees Addison and Wetherelt for further review denied on January 22, 2015.

No. A-13-074: **Bruna v. Bradford & Coenen**. Petition of appellant for further review denied on May 22, 2014.

No. A-13-093: **Henderson v. Smallcomb**, 22 Neb. App. 90 (2014). Petition of appellant for further review denied on August 21, 2014.

No. A-13-159: **Nebraska Equal Opp. Comm. v. Widtfeldt**. Petition of appellant for further review denied on August 20, 2014.

No. A-13-181: **Zapata v. Cline, Williams**. Petition of appellees for further review denied on February 19, 2015.

No. A-13-182: **Pestal v. Malone**. Petition of appellant for further review denied on October 22, 2014.

No. A-13-196: **Loveless v. Loveless**. Petition of appellant for further review denied on July 15, 2014.

No. A-13-206: **Fellers v. Fellers**. Petition of appellant for further review dismissed without prejudice on July 18, 2014, as premature.

No. A-13-206: **Fellers v. Fellers**. Petition of appellant for further review denied on August 27, 2014.

No. S-13-258: **Schrag v. Spear**, 22 Neb. App. 139 (2014). Petition of appellee for further review sustained on September 10, 2014.

No. A-13-269: **Lyman-Richey Corp. v. Nebraska Dept. of Rev.**, 22 Neb. App. 412 (2014). Petition of appellant for further review denied on February 11, 2015.

No. A-13-278: **Burnett v. Tyson Fresh Meats**, 21 Neb. App. 910 (2014). Petition of appellant for further review denied on July 2, 2014.

No. A-13-281: **Melville v. Hansen Truck Salvage**. Petition of appellant for further review denied on June 25, 2014.

No. A-13-301: **Bott v. Holman**, 22 Neb. App. 229 (2014). Petition of appellee for further review denied on October 29, 2014.

No. A-13-302: **Bartunek v. Bellevue University**. Petition of appellant for further review denied on May 22, 2014.

No. A-13-313: **In re Trust of Morris**. Petition of appellant for further review denied on July 29, 2014.

No. A-13-337: **U.S.S. Hazard v. City of Omaha Zoning Bd. of Appeals**. Petition of appellant for further review denied on November 19, 2014.

No. A-13-343: **In re Interest of Lorenzo P**. Petition of appellant for further review denied on October 29, 2014.

No. A-13-344: **In re Interest of Angel P**. Petition of appellant for further review denied on October 29, 2014.

No. A-13-346: **Sartain v. Wohlenhaus Appraisal Serv.**, 22 Neb. App. 218 (2014). Petition of appellants for further review denied on November 12, 2014.

No. A-13-364: **Wertman v. Bollinger**. Petition of appellant for further review denied on March 18, 2015.

No. A-13-376: **Highway Signing v. Coleman Constr**. Petition of appellant for further review denied on June 11, 2014.

No. A-13-384: **Brittain v. H & H Chevrolet**, 21 Neb. App. 986 (2014). Petition of appellant for further review denied on June 25, 2014.

No. A-13-417: **State v. Alvarado**. Petition of appellant for further review denied on June 4, 2014.

No. A-13-421: **Walsh v. Erickson**. Petition of appellee for further review denied on June 24, 2015.

No. A-13-426: **State v. Nyman**. Petition of appellant for further review denied on May 7, 2014.

No. S-13-429: **Adams v. Manchester Park**, 22 Neb. App. 525 (2014). Petition of appellee for further review sustained on March 18, 2015.

No. A-13-447: **SWJKM v. General Cas. Ins. Co**. Petition of appellant for further review denied on July 29, 2014.

No. A-13-462: **Castonguay v. Tecumseh Institution Mailroom Staff**. Petition of appellant for further review denied on June 11, 2014.

No. A-13-476: **City of Hastings v. Hughes**. Petition of appellant for further review denied on June 25, 2014.

No. A-13-494: **NRS Properties, LLC v. Resilent, LLC**. Petition of appellant for further review denied on November 26, 2014.

No. A-13-501: **Colwell v. Garvey**. Petition of appellant for further review denied on August 14, 2014, as untimely. See § 2-102(F)(1).

Nos. A-13-504, A-13-506: **State v. Griffin**. Petitions of appellant for further review denied on October 15, 2014.

No. A-13-510: **Johnson v. DHS Drilling Co**. Petition of appellant for further review denied on May 22, 2014.

Nos. A-13-513, A-13-516: **In re Interest of Lorenzo S. & Lillian S**. Petitions of appellant for further review denied on September 10, 2014.

No. A-13-514: **State v. Stevens**. Petition of appellant for further review denied on May 22, 2014.

No. S-13-528: **In re Estate of Lorenz**, 22 Neb. App. 548 (2014). Petition of appellee for further review sustained on June 10, 2015.

No. A-13-529: **State v. Balvin**. Petition of appellant for further review denied on November 19, 2014.

No. A-13-547: **Standing Stone v. Kirkham Michael & Assocs**. Petition of appellant for further review denied on January 22, 2015.

No. A-13-567: **In re Interest of Quintel C. et al**. Petition of appellant for further review denied on May 9, 2014, as untimely filed.

No. A-13-585: **Cizek Homes v. Columbia Nat. Ins. Co.**, 22 Neb. App. 361 (2014). Petition of appellee for further review denied on January 14, 2015.

No. A-13-604: **In re Interest of Aveah N**. Petition of appellant for further review denied on January 14, 2015.

No. A-13-605: **In re Interest of Natasha N. et al**. Petition of appellant for further review denied on January 14, 2015.

No. A-13-611: **Sullivan v. Sarpy County Jail**. Petition of appellant for further review denied on September 10, 2014.

No. A-13-635: **Sutton v. Killham**, 22 Neb. App. 257 (2014). Petition of appellant for further review denied on December 17, 2014.

No. A-13-640: **Jones v. Sellers**. Petition of appellant for further review denied on March 6, 2015. See § 2-102(F)(1).

No. S-13-643: **In re Interest of Shayla H. et al.**, 22 Neb. App. 1 (2014). Petition of appellee for further review sustained on July 18, 2014.

No. S-13-653: **State v. Hansen**. Petition of appellee for further review sustained on June 17, 2014.

No. A-13-655: **State v. Gomez**. Petition of appellant for further review denied on October 22, 2014.

No. A-13-675: **Breit v. Breit**. Petition of appellant for further review dismissed on December 5, 2014, as premature without prejudice to filing a timely petition for further review. See § 2-102(F)(1).

No. A-13-675: **Breit v. Breit**. Petition of appellant for further review denied on March 18, 2015.

No. A-13-683: **Haworth v. Douglas County**. Petition of appellant for further review denied on December 10, 2014.

No. A-13-687: **State v. Hernandez**, 22 Neb. App. 62 (2014). Petition of appellant for further review denied on July 17, 2014.

No. A-13-695: **State v. Jensen**. Petition of appellant for further review denied on May 22, 2014.

No. A-13-701: **Kaufman v. Reganis Auto Group**. Petition of appellant for further review denied on June 17, 2014.

No. A-13-711: **State v. Kibbee**. Petition of appellant for further review denied on October 15, 2014.

No. A-13-715: **State v. Saenz**. Petition of appellant for further review denied on May 14, 2014.

No. S-13-725: **Brothers v. Kimball County**. Petition of appellant for further review sustained on August 27, 2014.

No. A-13-734: **Keady v. Keady**. Petition of appellant for further review denied on November 12, 2014.

No. A-13-742: **State v. King**. Petition of appellant for further review denied on October 29, 2014.

No. A-13-747: **State v. Foltz**. Petition of appellant for further review denied on May 22, 2014.

No. A-13-750: **State v. Kinser**. Petition of appellant for further review denied on June 25, 2014.

No. A-13-753: **State v. Alford**. Petition of appellant for further review denied on October 15, 2014.

No. A-13-760: **State v. Brooks**, 22 Neb. App. 419 (2014). Petition of appellant for further review denied on February 19, 2015.

No. A-13-761: **State v. Brooks**, 22 Neb. App. 435 (2014). Petition of appellant for further review denied on February 19, 2015.

No. A-13-762: **Malchow v. Michaelsen**. Petition of appellant for further review denied on January 14, 2015.

No. A-13-765: **Pratt v. Department of Corr. Servs**. Petition of appellant for further review denied on September 24, 2014.

No. A-13-767: **Tucker v. Adams Industries**. Petition of appellant for further review denied on May 14, 2014.

No. S-13-769: **In re Estate of Clinger**, 22 Neb. App. 692 (2015). Petition of appellant for further review sustained on April 15, 2015.

No. A-13-771: **Pratt v. Houston**. Petition of appellant for further review denied on November 12, 2014.

No. A-13-773: **O'Flannagan v. Ochsner**. Petition of appellant for further review denied on July 15, 2014.

No. S-13-775: **Johnson v. Johnson**. Petition of appellee for further review sustained on December 10, 2014.

No. S-13-777: **In re Estate of Panec**, 22 Neb. App. 497 (2014). Petition of appellant for further review sustained on January 14, 2015.

No. A-13-781: **State v. Glazebrook**, 22 Neb. App. 621 (2015). Petition of appellant for further review denied on April 22, 2015.

No. A-13-783: **State v. Mumin**. Petition of appellant for further review and amended petition of appellant for further review denied on May 19, 2014, as premature.

No. A-13-783: **State v. Mumin**. Petition of appellant for further review denied on August 1, 2014.

No. A-13-783: **State v. Mumin**. Petition of appellant pro se for further review denied on August 1, 2014.

No. A-13-786: **Costello v. Costello**. Petition of appellant for further review denied on May 7, 2014.

No. A-13-790: **In re Interest of Elijah G. & Ezra G**. Petition of appellant for further review denied on July 2, 2014.

No. A-13-792: **State v. Cavanaugh**. Petition of appellant for further review denied on September 10, 2014.

No. A-13-796: **Jones v. Department of Corr. Servs**. Petition of appellant for further review denied on August 29, 2014, for lack of jurisdiction.

No. A-13-809: **Payne v. Payne**. Petition of appellant for further review denied on November 26, 2014.

No. A-13-815: **In re Conservatorship of Trobough**. Petitions of appellant for further review denied on June 3, 2015.

No. A-13-815: **In re Conservatorship of Trobough**. Petition of appellee Clippinger for further review denied on June 3, 2015.

No. A-13-815: **In re Conservatorship of Trobough**. Petition of appellee Timmerman-Fees for further review denied on June 3, 2015.

Nos. A-13-823, A-13-824: **State v. Buchanan**. Petitions of appellant for further review denied on September 24, 2014.

No. A-13-828: **Battle Sports Science v. Circo**. Petition of appellant for further review denied on December 17, 2014.

No. A-13-843: **In re Interest of Avery S. & Izabel S**. Petition of appellee for further review denied on May 28, 2014, as untimely filed.

No. A-13-864: **In re Interest of Trentity D. & Surenity D**. Petition of appellant for further review denied on June 4, 2014.

No. A-13-876: **State v. Kollekowski**. Petition of appellant for further review denied on February 11, 2015.

No. A-13-877: **State v. Tuttle**. Petition of appellant for further review denied on May 7, 2014.

No. A-13-883: **State v. Alford**. Petition of appellant for further review denied on October 22, 2014.

No. A-13-884: **In re Interest of Josiah R**. Petition of appellant for further review denied on November 26, 2014.

No. A-13-885: **In re Interest of Nathaniel R**. Petition of appellant for further review denied on November 26, 2014.

No. A-13-886: **State v. Fay**. Petition of appellant for further review denied on September 10, 2014.

No. S-13-887: **State v. McSwine**, 22 Neb. App. 791 (2015). Petition of appellee for further review sustained on June 10, 2015.

No. A-13-893: **In re Guardianship & Conservatorship of Forster**, 22 Neb. App. 478 (2014). Petition of appellant for further review denied on February 19, 2015.

No. A-13-895: **Herman Trust v. Brashear 711 Trust**, 22 Neb. App. 758 (2015). Petition of appellant for further review denied on April 15, 2015.

No. A-13-896: **Herman Trust v. Brashear LLP**, 22 Neb. App. 758 (2015). Petition of appellant for further review denied on April 15, 2015.

No. A-13-897: **Herman Trust v. Brashear**, 22 Neb. App. 758 (2015). Petition of appellant for further review denied on April 15, 2015.

No. S-13-900: **In re Interest of Gabriella H.**, 22 Neb. App. 70 (2014). Petition of appellee for further review sustained on July 29, 2014.

No. S-13-906: **Ficke v. Wolken**, 22 Neb. App. 587 (2014). Petition of appellant for further review sustained on April 8, 2015.

No. A-13-912: **Bird v. Bird**, 22 Neb. App. 334 (2014). Petition of appellant for further review denied on October 3, 2014, as premature.

No. A-13-912: **Bird v. Bird**, 22 Neb. App. 334 (2014). Petition of appellant for further review denied on December 17, 2014.

No. A-13-922: **State v. Nguot**. Petition of appellant for further review denied on November 12, 2014.

No. A-13-938: **In re Guardianship of Jordan M**. Petition of appellant for further review denied without prejudice on February 2, 2015.

No. A-13-938: **In re Guardianship of Jordan M**. Petition of appellant for further review denied on April 22, 2015.

No. A-13-946: **Curtis Acres Assn. v. Hosman**, 22 Neb. App. 652 (2015). Petition of appellant for further review denied on March 18, 2015.

No. A-13-955: **State v. Scott**. Petition of appellant for further review denied on July 15, 2014.

No. A-13-958: **State v. Ernstmeyer**. Petition of appellant for further review denied on August 29, 2014, as untimely.

Nos. A-13-960, A-13-1044: **Kelly v. Housing Auth. of City of Omaha**. Petitions of appellant for further review denied on September 10, 2014.

No. A-13-968: **State v. Sheldon**. Petition of appellant for further review denied on September 17, 2014.

No. A-13-972: **Dillenburg v. LeCrone**. Petition of appellant for further review denied on December 10, 2014.

No. A-13-975: **State v. White**. Petition of appellant for further review denied on October 16, 2014. See § 2-102(F)(1).

No. A-13-990: **Wulf v. Robinson**. Petition of appellant for further review denied on January 7, 2015.

No. A-13-996: **State v. Bewley**. Petition of appellant for further review denied on July 18, 2014.

No. A-13-1003: **State v. Castonguay**. Petition of appellant for further review denied on September 10, 2014.

No. A-13-1003: **State v. Castonguay**. Petition of appellant for further review denied on September 22, 2014.

No. S-13-1009: **State v. Contreras**. Petition of appellant for further review sustained on July 2, 2014.

No. A-13-1012: **In re Interest of Messiah S**. Petition of appellant for further review denied on December 10, 2014.

No. S-13-1015: **Mejia v. Chapman**. Petition of appellant for further review sustained on April 15, 2015.

No. A-13-1018: **Nelson v. Jantze**. Petition of appellant for further review denied on June 10, 2015, as untimely filed.

No. A-13-1018: **Nelson v. Jantze**. Petition of appellees for further review denied on June 10, 2015.

No. S-13-1024: **Kappas Enters. v. Department of Roads**. Petition of appellant for further review sustained on May 7, 2014.

No. A-13-1026: **State v. Foster**. Petition of appellant for further review denied on October 15, 2014.

No. A-13-1042: **State v. Holroyd**. Petition of appellant for further review denied on April 13, 2015.

No. A-13-1053: **Burns v. Burns**. Petition of appellant for further review denied on June 17, 2015.

No. A-13-1056: **State v. Perry**. Petition of appellant for further review denied on October 15, 2014.

No. A-13-1079: **State v. Tapia**. Petition of appellant for further review denied on March 25, 2015.

No. A-13-1081: **State v. Brown**. Petition of appellant for further review denied on June 25, 2014.

No. A-13-1098: **State v. McPherson**. Petition of appellant for further review denied on July 24, 2014.

No. A-13-1099: **State v. Chilen**. Petition of appellant for further review denied on January 22, 2015.

No. A-13-1104: **State v. Eddy**. Petition of appellant for further review denied on October 15, 2014.

No. A-13-1107: **State v. Rosa**. Petition of appellant for further review denied on August 27, 2014.

No. A-13-1109: **State v. Harms**. Petition of appellant for further review denied on May 14, 2014.

No. A-13-1114: **State v. Fitzgerald**. Petition of appellant for further review denied on October 22, 2014.

No. A-13-1117: **State v. Cahuichchii**. Petition of appellant for further review denied on March 11, 2015.

No. A-13-1121: **In re Interest of Joseph A. et al**. Petition of appellant for further review denied on July 29, 2014.

Nos. A-13-1135, A-14-088: **State v. Purdie**. Petitions of appellant for further review denied on October 15, 2014.

No. A-13-1136: **State v. Watts**, 22 Neb. App. 505 (2014). Petition of appellant for further review denied on May 21, 2015.

No. A-14-002: **In re Interest of Seth K. & Dinah K.**, 22 Neb. App. 349 (2014). Petition of appellee for further review denied on December 17, 2014.

No. A-14-009: **State v. Vance**. Petition of appellant for further review denied on April 22, 2015.

No. A-14-017: **State v. Jackson**. Petition of appellant for further review denied on October 15, 2014.

No. A-14-022: **State v. Kozisek**, 22 Neb. App. 805 (2015). Petition of appellee for further review denied on May 6, 2015.

No. A-14-025: **King v. Houston**. Petition of appellant for further review denied on August 25, 2014.

No. A-14-025: **King v. Houston**. Petition of appellant for further review denied on October 3, 2014.

Nos. A-14-026, A-14-027: **State v. Glasson**. Petitions of appellant for further review denied on February 11, 2015.

No. A-14-029: **State v. Bowman**. Petition of appellant for further review denied on February 11, 2015.

No. A-14-038: **State v. Kellogg**, 22 Neb. App. 638 (2015). Petition of appellant for further review denied on February 25, 2015.

No. A-14-046: **State v. Baker**. Petition of appellant for further review denied on July 10, 2014.

No. A-14-050: **Hartley v. Metropolitan Utilities Dist**. Petition of appellee for further review denied on May 6, 2015.

No. A-14-051: **Meisinger v. Metropolitan Utilities Dist**. Petition of appellee for further review denied on May 6, 2015.

No. S-14-058: **State v. Armagost**, 22 Neb. App. 513 (2014). Petition of appellant for further review sustained on January 29, 2015.

No. S-14-058: **State v. Armagost**, 22 Neb. App. 513 (2014). Petition of appellee for further review sustained on January 29, 2015.

No. A-14-062: **State v. Guerra**. Petition of appellant for further review denied on September 29, 2014, as premature.

No. A-14-068: **State v. Johnson**. Petition of appellant for further review denied on July 2, 2014.

No. A-14-075: **State v. Potter**. Petition of appellant for further review denied on July 2, 2014.

No. A-14-080: **Mahler v. Marshall**. Petition of appellant for further review denied on March 11, 2015.

No. A-14-086: **State v. Dlouhy**. Petition of appellant for further review denied on May 21, 2015.

No. A-14-095: **State v. Fotopulos**. Petition of appellant for further review denied on August 20, 2014.

No. A-14-096: **State v. Meints**. Petition of appellant for further review denied on December 10, 2014.

No. A-14-100: **State v. Patterson**. Petition of appellant for further review denied on February 6, 2015, as untimely. See § 2-102(F)(1).

No. A-14-107: **Macias v. Bader**. Petition of appellant for further review denied on February 11, 2015.

No. A-14-108: **Fletcher v. Gage**. Petition of appellant for further review denied on October 15, 2014.

No. A-14-132: **Estate of Hue v. Mengedoht**. Petition of appellants for further review denied on November 12, 2014.

No. A-14-137: **Cole v. Houston**. Petition of appellant for further review denied on December 17, 2014.

No. A-14-162: **State v. Wabashaw**. Petition of appellant for further review denied on April 8, 2015.

No. A-14-168: **Hendrix v. Sivick**. Petition of appellant for further review denied on December 10, 2014.

No. A-14-170: **State v. White**. Petition of appellant for further review denied on February 19, 2015.

No. A-14-177: **State v. Jones**. Petition of appellant for further review denied on September 10, 2014.

Nos. A-14-180, A-14-187: **State v. Chuol**. Petitions of appellant for further review denied on June 3, 2015.

No. A-14-184: **State v. Hochstein**. Petition of appellant for further review denied on July 17, 2014.

No. A-14-191: **In re Interest of Marcus C. et al**. Petition of appellant for further review denied on December 10, 2014.

No. A-14-194: **State v. Cayou**. Petition of appellant for further review denied on September 24, 2014.

No. A-14-197: **State v. Ruegge**. Petition of appellant for further review denied on March 11, 2015.

No. A-14-198: **State v. Klaassen**. Petition of appellant for further review denied on December 17, 2014.

Nos. A-14-202 through A-14-205: **State v. Joynes**. Petitions of appellant for further review denied on February 11, 2015.

No. A-14-206: **Old Republic Nat. Title Ins. Co. v. Kornegay**. Petition of appellant for further review denied on January 9, 2015.

No. A-14-207: **Onuachi v. Meylan Enters**. Petition of appellant for further review denied on March 11, 2015.

No. A-14-220: **Moore v. Wynner**. Petition of appellant for further review denied on December 31, 2014. See § 2-102(F).

No. A-14-233: **State v. Hill**. Petition of appellant for further review denied on May 6, 2015.

No. A-14-239: **State v. Chamberlain**. Petition of appellant for further review denied on May 13, 2015.

No. A-14-273: **Wells v. Houston**. Petition of appellant for further review denied on July 15, 2014.

No. A-14-276: **State v. Hauf**. Petition of appellant for further review denied on December 17, 2014.

No. A-14-278: **State v. Domach**. Petition of appellant for further review denied on August 27, 2014.

No. A-14-280: **State v. McWilliams**. Petition of appellant for further review denied on January 14, 2015.

No. A-14-282: **State v. Kelly**. Petition of appellant for further review denied on September 17, 2014.

No. A-14-284: **State v. Larabee**. Petition of appellant for further review denied on September 24, 2014.

No. A-14-300: **In re Interest of Eyllan J**. Petition of appellant for further review denied on January 9, 2015.

No. A-14-307: **State v. Sherrod**. Petition of appellant for further review denied on October 15, 2014.

No. A-14-310: **In re Interest of Nemiah F**. Petition of appellant for further review denied on January 14, 2015.

No. A-14-312: **Manhart v. Manhart**. Petition of appellant for further review denied on June 8, 2015, as premature.

No. A-14-319: **State v. Anderson**. Petition of appellant for further review denied on May 21, 2015.

No. A-14-341: **State v. Baker**. Petition of appellant for further review denied on May 20, 2015, as untimely. See § 2-102(F)(1).

No. A-14-343: **Sims v. Nebraska Technical Servs**. Petition of appellant for further review denied on February 11, 2015.

Nos. A-14-344, A-14-347, A-14-350, A-14-351: **State v. McCroy**. Petitions of appellant for further review denied on June 17, 2015.

No. A-14-358: **In re Interest of Ethan M.**, 22 Neb. App. 780 (2015). Petition of appellant for further review denied on June 10, 2015.

No. S-14-378: **Gray v. Kenney**, 22 Neb. App. 739 (2015). Petition of appellant for further review sustained on March 11, 2015.

No. A-14-391: **Campbell v. Campbell**. Petition of appellant for further review denied on June 24, 2015.

Nos. A-14-393, A-14-394: **State v. Livingston**. Petitions of appellant for further review overruled on March 9, 2015, for lack of jurisdiction.

No. A-14-411: **State on behalf of Michael A. v. Samar A**. Petition of appellant pro se for further review denied on October 15, 2014.

No. A-14-417: **Briggs v. State**. Petition of appellee for further review denied on June 24, 2015.

No. A-14-418: **Weiss v. Western Sugar Co-op**. Petition of appellant for further review denied on June 24, 2015.

No. A-14-421: **State v. Castonguay**. Petition of appellant for further review denied on April 8, 2015.

No. A-14-440: **State v. Marchese**. Petitions of appellant for further review denied on June 3, 2015.

No. A-14-441: **Prater v. Kenney**. Petition of appellant for further review denied on January 29, 2015.

No. A-14-449: **State v. Cheatams**. Petition of appellant for further review denied on October 15, 2014.

No. A-14-474: **State v. Ohrt**. Petition of appellant for further review denied on November 12, 2014.

No. A-14-492: **Bohnet v. Bohnet**, 22 Neb. App. 846 (2015). Petition of appellant for further review denied on May 20, 2015, as premature. See § 2-102(F)(1).

No. A-14-496: **State v. Cavanaugh**. Petition of appellant for further review denied on November 19, 2014.

No. A-14-504: **State v. Foster**. Petition of appellant for further review denied on August 27, 2014.

No. A-14-505: **State v. Cobos**, 22 Neb. App. 887 (2015). Petition of appellant for further review denied on June 10, 2015, as untimely.

No. A-14-518: **State v. Drappeaux**. Petition of appellant for further review denied on October 31, 2014, as untimely filed.

No. A-14-524: **Klingelhoefer v. Monif**. Petition of appellant for further review denied on September 24, 2014.

No. A-14-533: **State v. Romero**. Petition of appellant for further review denied on January 9, 2015, as untimely. See § 2-102(F)(1).

No. A-14-534: **State v. Dickey**. Petition of appellant for further review denied on March 16, 2015, as untimely. See § 2-102(F)(1).

No. A-14-548: **Meints v. City of Beatrice**. Petition of appellant for further review denied on June 10, 2015.

No. A-14-548: **Meints v. City of Beatrice**. Petition of appellee for further review denied on June 10, 2015.

No. A-14-556: **State v. Campbell**. Petition of appellant for further review denied on November 21, 2014, as untimely filed. See § 2-102(F)(1).

Nos. A-14-585, A-14-673: **State v. Voter**. Petitions of appellant for further review denied on April 15, 2015.

No. A-14-589: **State v. Door**. Petition of appellant for further review denied on June 24, 2015.

No. S-14-590: **State v. Modlin**. Petition of appellant for further review sustained on March 18, 2015.

No. A-14-601: **Evensen v. George Risk Indus**. Petition of appellee for further review denied on May 6, 2015.

No. A-14-604: **State v. Amerson**. Petition of appellant for further review denied on December 10, 2014.

No. A-14-605: **State v. Pittman**. Petition of appellant for further review denied on June 3, 2015.

No. A-14-606: **State v. Friend**. Petition of appellant for further review denied on November 12, 2014.

No. A-14-610: **In re Interest of Alexandria H. et al**. Petition of appellant for further review denied on June 17, 2015.

No. A-14-617: **State v. Haggan**. Petition of appellant for further review denied on March 11, 2015.

No. A-14-621: **State v. Gardner**. Petition of appellant for further review denied on April 15, 2015.

No. A-14-624: **Koerber v. Koerber**. Petition of appellant for further review denied on March 16, 2015, as premature. See § 2-102(F)(1).

No. A-14-624: **Koerber v. Koerber**. Petition of appellant for further review denied on April 22, 2015.

No. A-14-631: **State v. Eskridge**. Petition of appellant for further review denied on January 9, 2015, as untimely. See § 2-102(F)(1).

No. A-14-635: **State v. Olsen**. Petition of appellant for further review denied on May 6, 2015.

No. A-14-645: **In re Interest of Yue-Bo W. & Xin-Bo W**. Petition of appellee Bo W. for further review denied on June 9, 2015, as untimely.

No. A-14-645: **In re Interest of Yue-Bo W. & Xin-Bo W**. Petition of appellee Catherine A. for further review denied on June 9, 2015, as untimely.

No. A-14-647: **In re Estate of Bray**. Petition of appellant for further review denied on November 19, 2014.

No. A-14-668: **State v. Ryan**. Petition of appellant for further review denied on May 13, 2015.

No. A-14-678: **State v. Vandorien**. Petition of appellant for further review denied on March 25, 2015.

No. A-14-688: **In re Interest of Natesia P. & Michael P**. Petition of appellant for further review denied on October 15, 2014.

No. A-14-705: **Williams v. EGS Appleton**. Petition of appellee for further review denied on June 3, 2015.

No. A-14-715: **ACI Worldwide Corp. v. BHMI, Inc**. Petition of appellant for further review denied on February 11, 2015.

No. A-14-716: **State v. Newman**. Petition of appellant for further review denied on November 19, 2014. See *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-14-717: **State v. Newman**. Petition of appellant for further review denied on November 19, 2014. See *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-14-728: **Quinn v. Archbishop Bergan Mercy Hosp**. Petition of appellant for further review denied on April 13, 2015, as untimely.

No. A-14-737: **State v. Ramirez**. Petition of appellant for further review denied on March 11, 2015.

No. A-14-737: **State v. Ramirez**. Petition of appellant for further review denied on March 13, 2015.

No. A-14-739: **In re Interest of Brendon J**. Petition of appellant for further review dismissed on May 5, 2015.

No. S-14-742: **In re Estate of Maahs**. Petition of appellants for further review granted on June 10, 2015.

No. S-14-750: **State v. Meints**. Petition of appellant for further review sustained on February 25, 2015.

No. A-14-763: **Davlin v. Sabatka-Rine**. Petition of appellant for further review denied on May 6, 2015.

No. A-14-779: **State v. Buford**. Petition of appellant for further review denied on May 21, 2015.

No. A-14-791: **State v. Williams**. Petition of appellant for further review denied on December 17, 2014.

No. A-14-795: **State v. Jones**. Petition of appellant for further review denied on February 11, 2015.

No. A-14-802: **State v. Friedrichsen**. Petition of appellant for further review denied on February 11, 2015.

No. A-14-817: **State v. Jahnke**. Petition of appellant for further review denied on June 10, 2015.

Nos. A-14-819, A-14-820: **State v. Liner**. Petitions of appellant for further review denied on May 8, 2015, as untimely.

No. A-14-826: **State v. Castonguay**. Petition of appellant for further review denied on December 10, 2014.

No. A-14-827: **State v. Cardenas**. Petition of appellant for further review denied on March 11, 2015.

No. A-14-832: **In re Interest of Brendon J**. Petition of appellant for further review dismissed on May 5, 2015.

No. A-14-854: **State v. Daisley**. Petition of appellant for further review denied on March 25, 2015.

No. A-14-857: **Pruitt v. Dollar General**. Petition of appellant for further review denied on May 13, 2015.

No. A-14-858: **In re Estate of Forster**. Petition of appellant for further review denied on December 23, 2014.

No. A-14-860: **In re Interest of Angeleah M. & Ava M**. Petition of appellant for further review denied on June 17, 2015.

No. A-14-865: **In re Estate of Warner**. Petition of appellant for further review denied on May 21, 2015.

No. A-14-888: **State v. Sessions**. Petition of appellant for further review denied on March 11, 2015.

No. A-14-907: **In re Interest of Nathaniel P**. Petition of appellant for further review denied on January 22, 2015.

No. A-14-912: **State v. Cutler**. Petition of appellant for further review denied on March 11, 2015.

No. A-14-921: **Welch v. Welch**. Petition of appellant for further review denied on June 8, 2015, as untimely.

No. A-14-930: **Cohrs v. Bruns**. Petition of appellant for further review denied on March 25, 2015.

No. A-14-942: **In re Interest of Keisha G**. Petition of appellant for further review denied on June 17, 2015.

No. A-14-946: **Tyler v. McDermott**. Petition of appellant for further review denied on April 21, 2015, for failure to file brief in compliance with § 2-102(F)(1).

No. A-14-951: **Wells v. Kenney**. Petition of appellant for further review denied on January 22, 2015.

No. A-14-962: **State v. Marion**. Petition of appellant for further review denied on June 24, 2015.

No. A-14-964: **In re Interest of Jordan M**. Petition of appellee for further review denied on June 24, 2015.

No. A-14-965: **In re Interest of Miley M**. Petition of appellee for further review denied on June 24, 2015.

No. A-14-1013: **State v. Erpelding**. Petition of appellant for further review denied on June 3, 2015.

No. A-14-1036: **State v. Garcia**. Petition of appellant for further review denied on March 25, 2015.

No. A-14-1050: **State v. Garcia**. Petition of appellant for further review denied on March 11, 2015.

No. A-14-1111: **Hall v. Kenney**. Petition of appellant for further review denied on May 6, 2015.

No. A-14-1143: **State v. Agok**. Petition of appellant for further review denied on June 17, 2015.

No. A-15-082: **Quraishi v. Grady**. Petition of appellant for further review denied on May 21, 2015.

No. A-15-113: **State v. Tyler**. Petition of appellant for further review denied on April 21, 2015, for failure to file brief in compliance with § 2-102(F)(1).

No. A-15-118: **Moore v. Blomstedt**. Petition of appellant for further review denied on April 13, 2015, for failure to comply with § 2-102(F)(1).

No. A-15-206: **State v. Sherrod**. Petition of appellant for further review denied on June 17, 2015.

No. A-15-266: **State v. Hasbrouck**. Petition of appellant for further review denied on June 10, 2015.

No. S-15-282: **Purdie v. Department of Corr. Servs**. Petition of appellant for further review granted on June 17, 2015.

CASES DETERMINED

IN THE

NEBRASKA COURT OF APPEALS

In re Interest of Shayla H. et al., children under 18 years of age. State of Nebraska, appellee, v. David H., appellant.

846 N.W.2d 668

Filed May 20, 2014. No. A-13-643.

1. **Juvenile Courts: Evidence: Appeal and Error.** Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. However, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over another.
2. **Indian Child Welfare Act: Parental Rights.** The substantive portions of the Indian Child Welfare Act and the corresponding portions of the Nebraska Indian Child Welfare Act provide heightened protection to the rights of Indian parents, tribes, and children in proceedings involving custody, termination, and adoption.
3. **Indian Child Welfare Act: Parental Rights: Proof.** The active efforts standard contained in Neb. Rev. Stat. § 43-1505 (Reissue 2008) requires more than the reasonable efforts standard that applies in cases not involving the Indian Child Welfare Act.
4. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.
5. **Juvenile Courts: Minors.** The Nebraska Juvenile Code must be liberally construed to accomplish its purpose of serving the best interests of the juveniles who fall within it.
6. **Juvenile Courts.** The juvenile court has broad discretion as to the disposition of those who fall within its jurisdiction.
7. **Juvenile Courts: Parental Rights.** A juvenile court has the discretionary power to prescribe a reasonable program for parental rehabilitation to correct the conditions underlying the adjudication that a child is within the Nebraska Juvenile Code.

8. ____: ____. While there is no requirement that the juvenile court must institute a plan for rehabilitation of a parent, the rehabilitation plan must be conducted under the direction of the juvenile court and must be reasonably related to the plan's objective of reuniting parent with child.
9. **Juvenile Courts: Appeal and Error.** In analyzing the reasonableness of a plan offered by a juvenile court, the Nebraska Supreme Court has noted that the following question should be addressed: Does a provision in the plan tend to correct, eliminate, or ameliorate the situation or condition on which the adjudication has been obtained under the Nebraska Juvenile Code? An affirmative answer to the preceding question provides the materiality necessary in a rehabilitative plan for a parent involved in proceedings within a juvenile court's jurisdiction. Otherwise, a court-ordered plan, ostensibly rehabilitative of the conditions leading to an adjudication under the Nebraska Juvenile Code, is nothing more than a plan for the sake of a plan, devoid of corrective and remedial measures.
10. **Juvenile Courts: Parent and Child.** Similar to other areas of law, reasonableness of a rehabilitative plan for a parent depends on the circumstances in a particular case and, therefore, is examined on a case-by-case basis.

Appeal from the Separate Juvenile Court of Lancaster County: LINDA S. PORTER, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Patrick T. Carraher, of Legal Aid of Nebraska, for appellant.

Ashley Bohnet, Deputy Lancaster County Attorney, and Nikki Blazey, Senior Certified Law Student, for appellee.

Rosalynd Koob, of Heidman Law Firm, L.L.P., for amici curiae Winnebago Tribe of Nebraska and Omaha Tribe of Nebraska.

Brad S. Jolly, of Brad S. Jolly & Associates, L.L.C., for amicus curiae Ponca Tribe of Nebraska.

Jennifer Bear Eagle, of Fredericks, Peebles & Morgan, L.L.P., for amicus curiae Santee Sioux Nation.

Robert McEwen and Sarah Helvey, of Nebraska Appleseed Center for Law in the Public Interest, for amicus curiae Nebraska Appleseed Center for Law in the Public Interest.

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

MOORE, Judge.

Following a dispositional hearing, the separate juvenile court of Lancaster County found that reasonable efforts had been made to return to David H. legal custody of his three children, but that returning the children's legal custody to David at that time would be contrary to their welfare. David was ordered to follow numerous provisions in a rehabilitation plan. David appeals, assigning error to the court's use of the reasonable efforts standard in place of the active efforts standard of the Indian Child Welfare Act (ICWA) in the disposition order. He also argues that the plan's provisions were not materially related to the underlying adjudication and that the court erred in permitting a change in the family therapist. For the reasons set out in our opinion below, we affirm in part, and in part reverse and remand for further proceedings.

FACTUAL BACKGROUND

David is the father of three minor children: Shayla H., born in August 2001; Shania H., born in August 2003; and Tanya H., born in September 2004. He and his three daughters live together with his girlfriend, Danielle R., and her three children. Through David, his daughters are eligible for enrollment with the Rosebud Sioux Tribe. At the time of this case, the record shows that Shania and Tanya had become enrolled members of the tribe, while Shayla remained eligible for enrollment.

On January 17, 2013, the Department of Health and Human Services (DHHS) received an intake after Shayla was observed at school with a "dark purple hand-print bruise" on her right cheek. When describing the cause of her injuries, Shayla stated that Danielle had held her down and slapped her. The next day, DHHS took custody of David's and Danielle's children and removed them from the home. On January 22, the State filed a petition alleging that all six children, David's and Danielle's, lacked proper care by reason of Danielle's faults or habits.

By January 29, 2013, all of the children had returned home except for Shayla. Following a hearing on the State's motion for temporary custody, Shayla returned home on March 9.

All of the children have remained placed in the home since their return.

The State first notified the Rosebud Sioux Tribe of these juvenile court proceedings by way of an affidavit and notice dated January 31, 2013. The tribe filed a notice of intervention shortly thereafter. Following a hearing on April 2, the court granted the tribe leave to intervene as a party in these proceedings. The tribe did not appear at the adjudication or the disposition hearing.

The juvenile court held an adjudication hearing on April 19, 2013. On May 31, the court issued an order finding that the State had proved its allegations that Danielle had used inappropriate physical discipline on Shayla. Accordingly, the court found that Shayla, Shania, and Tanya (David's children) were at risk of harm as a result of Danielle's inappropriate discipline. However, the court declined to exercise jurisdiction over Danielle's children. In making that decision, the court reasoned that Danielle's children were older than David's and noted that there was no evidence of Danielle's having used inappropriate discipline on her children.

David and Danielle have participated in a variety of services since the initial intake in this case. Caseworkers have entered their home on a daily basis to observe the family at random times throughout the day. The family also successfully completed a unification services program which focused on David's and Danielle's parenting without using physical discipline. In the program's discharge report, the service providers noted that David and Danielle had improved their abilities in addressing negative behaviors and teaching alternative positive behaviors. In addition to these programs, the family also continued to receive family counseling from therapist Laurie Crayne.

The first dispositional hearing in this case was held on July 11, 2013. Silvia Betta Cole, a children and family service specialist for DHHS, was the only witness to testify at the hearing, and her lengthy court report was received in evidence. Cole has been the case manager since February 2013. Cole discussed David's and Danielle's use of a closet to discipline

Tanya. When Tanya misbehaved at school, she would be separated from the class in an alternative learning environment room until she corrected the behavior. To simulate this form of discipline at home, David and Danielle cleared out a closet and would have Tanya sit inside after misbehaving. While Tanya was inside, the door remained open. Cole also testified that allegations that Tanya was put into a closed closet were found to be untrue after a police investigation.

During Cole's testimony, she stated that DHHS wished to change the family therapist because the family had been working with Crayne for almost 4 years and DHHS felt as though the children had not made sufficient progress. In her opinion, a new perspective in this case would be beneficial. At the time of the hearing, she had identified a good candidate to become the replacement family therapist. Cole opined that the case was not at a stage where it could be closed, because the children had ongoing behavioral issues. She noted that Shania had a possible eating disorder and that Tanya had exhibited a tendency to run away from home after having visited with her biological mother.

After Cole's testimony, the State requested the court to adopt the DHHS recommendations that were contained in Cole's report. David objected to those recommendations, contending that many of the provisions were not related to the reason for the adjudication. He noted that the case would never be closed if DHHS attempts to "fix every problem that was not adjudicated."

At the conclusion of this hearing, the court orally announced that it was accepting the DHHS recommendation for a change in the family therapist. In the written order that followed, the court found that reasonable efforts had been made to return legal custody to David. However, the court concluded that returning the children's legal custody to David at that time would be contrary to their welfare. The court also made nine specific orders related only to David. Specifically, the court ordered David to

> a. . . . cooperate with [DHHS] and service providers in his home.

> b. . . . cooperate with all drop-in services as arranged by [DHHS] and allow access to [his] children and the family home at all times.
>
> c. . . . not discuss the children's mother . . . or their visitation with their mother, except in a therapeutic setting.
>
> d. . . . not use any form of physical discipline on any of the minor children, except any restraint-based discipline specifically approved by [DHHS, and] not place any of the minor children in a closet as a form of discipline at any time.
>
> e. . . . provide the children access to necessary mental health care, including medication checks as appropriate.
>
> f. . . . cooperate with family therapy as arranged by [DHHS].
>
> g. . . . schedule and attend the children's regular medical, dental, and vision examinations and other specialist appointments as necessary and recommended by medical providers.
>
> h. . . . schedule an appointment for Shania's speech and language evaluation, as recommended . . . in her psychological evaluation.
>
> i. . . . ensure that the children have adequate adult supervision at all times [when] they are in his care.

David appeals from this order. An amici curiae brief was filed by Nebraska Appleseed Center for Law in the Public Interest and the Nebraska ICWA Coalition, consisting of the Ponca Tribe of Nebraska, Winnebago Tribe of Nebraska, Omaha Tribe of Nebraska, and Santee Sioux Nation.

ASSIGNMENTS OF ERROR

David assigns, renumbered and restated, that the juvenile court erred in (1) applying the reasonable efforts standard for reunification instead of the ICWA standard of active efforts, (2) ordering him to follow a dispositional plan that was not material to the underlying reason for the adjudication, and (3) ordering his family to change the family therapist.

STANDARD OF REVIEW

[1] Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. However, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over another. *In re Interest of Rylee S.*, 285 Neb. 774, 829 N.W.2d 445 (2013).

ANALYSIS

Active Efforts Standard of Reunification.

We first address David's argument that the district court erred when it found that the State had made reasonable efforts to return the children's legal custody to him. He contends that ICWA applies to this case and that the active efforts standard should be applied at all stages in the case. The State responds that ICWA does not apply in cases, such as the present case, when physical custody of the minor children remains with a parent. Instead, the State argues that the ICWA active efforts requirement applies in only select custody proceedings when the State seeks a foster care placement or termination of parental rights to an Indian child.

We begin our analysis of this issue by noting that the purpose of ICWA, enacted in 1978, is

> to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 U.S.C. § 1902 (2012).

[2] The Nebraska Indian Child Welfare Act (NICWA) was enacted by the Nebraska Legislature in 1985 to "clarify state policies and procedures regarding the implementation by the

State of Nebraska of [ICWA]." Neb. Rev. Stat. § 43-1502 (Reissue 2008). The Legislature declared that "[i]t shall be the policy of the state to cooperate fully with Indian tribes in Nebraska in order to ensure that the intent and provisions of [ICWA] are enforced." § 43-1502. Generally stated, the substantive portions of ICWA and the corresponding portions of NICWA provide heightened protection to the rights of Indian parents, tribes, and children in proceedings involving custody, termination, and adoption. *In re Adoption of Kenten H.*, 272 Neb. 846, 725 N.W.2d 548 (2007).

[3] Included in this heightened protection is the active efforts reunification standard found in Neb. Rev. Stat. § 43-1505(4) (Reissue 2008):

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

Case law in this state has clearly established that the active efforts standard in this section requires more than the reasonable efforts standard that applies in cases not involving ICWA. See, *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008); *In re Interest of Ramon N.*, 18 Neb. App. 574, 789 N.W.2d 272 (2010). See, also, Neb. Rev. Stat. § 43-292(6) (Cum. Supp. 2012).

The question presented to us in this case is whether ICWA's active efforts standard applies when the State, through DHHS, has legal custody of the children, but the children are placed in the parental home. Nebraska appellate courts have not specifically addressed this question. David argues that case law from other jurisdictions should lead this court to conclude that ICWA's protections are applicable at all stages of a juvenile court proceeding.

To support his claim, David directs our attention to *In re Jennifer A.*, 103 Cal. App. 4th 692, 127 Cal. Rptr. 2d 54 (2002), a decision from a California Court of Appeal. In that case, a juvenile was adjudicated as a neglected child due to her

mother's faults and removed from the custody of her mother. *Id*. During a detention hearing, the superior court was allegedly notified that both of the child's parents were of Indian heritage. *Id*. At trial, however, no evidence relating to notice to the tribes was presented. After a subsequent disposition hearing, the court awarded custody of the child to her father, who was not married to the child's mother. *Id*.

On appeal, the mother argued that the lower court did not comply with ICWA's notice requirements. *In re Jennifer A., supra*. She contended that the record did not contain any proof that the tribes had been notified of the proceedings and of their right to intervene in the proceedings. *Id*. The county social services agency argued that any violation of the notice requirements was harmless because the child was ultimately placed in her father's custody. The California appellate court agreed with the mother, holding that because the county social services agency was seeking foster care placement in an involuntary proceeding, the county was obligated to comply with the ICWA notice requirements. *In re Jennifer A., supra*.

However, we note that a subsequent decision from the California Court of Appeal noted that the holding in *In re Jennifer A*. was limited to the specific facts presented in that case. See *In re Alexis H*., 132 Cal. App. 4th 11, 33 Cal. Rptr. 3d 242 (2005). In so limiting *In re Jennifer A., supra*, the California court noted that the statutory text limited ICWA's application to cases where Indian children were removed from their family. See *In re Alexis H., supra*.

In its opinion in *In re Jennifer A., supra*, the court relied on prior decisions from Oregon and Iowa. In *State ex rel. Juv. Dept. v. Cooke*, 88 Or. App. 176, 744 P.2d 596 (1987), the Oregon Court of Appeals held that there must be compliance with ICWA throughout a juvenile proceeding, including the adjudication stage, even though the actual court order did not place the Indian child in foster care. The Oregon Court of Appeals decision followed the Iowa Supreme Court's ruling in *In re Interest of J.R.H*., 358 N.W.2d 311 (Iowa 1984). In that case, the Iowa Supreme Court found that a proceeding to determine whether a child is in need of assistance

due to parental unfitness could result in potential foster care placement of the Indian child and, therefore, clearly fell under ICWA.

David further argues that ICWA applies in this case because DHHS has legal custody of his children. Thus, he concludes that a removal of custody has occurred. David asserts that while the State has custody of his children, they are merely "placed" with him.

The State focuses on the text of NICWA to refute David's arguments. Neb. Rev. Stat. § 43-1504(3) (Reissue 2008) provides an Indian tribe with the right to intervene in any state court proceeding "for the foster care placement of, or termination of parental rights to, an Indian child." Further, Neb. Rev. Stat. § 43-1503(1) (Reissue 2008) provides the following definitions:

> (1) Child custody proceedings shall mean and include:
>
> (a) Foster care placement which shall mean any action removing an Indian child from [his or her] parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
>
> (b) Termination of parental rights which shall mean any action resulting in the termination of the parent-child relationship.

Taking these two provisions together, the State contends that ICWA is appropriately applied only when it seeks foster care placement of children or termination of parental rights.

The State also highlights the U.S. Supreme Court's recent decision in *Adoptive Couple v. Baby Girl*, ___ U.S. ___, 133 S. Ct. 2552, 186 L. Ed. 2d 729 (2013), as support for its position. In that case, the Supreme Court confronted a situation where an Indian child's biological father, a registered member of the Cherokee Nation, had voluntarily relinquished his parental rights to the child's mother prior to the child's birth. The mother later placed the child up for adoption, and a non-Indian South Carolina couple began adoption proceedings. *Id.* When the biological father was apprised of the adoption, he

contested the proceedings, arguing that he believed he was only relinquishing his rights to the child's mother. *Id*. A South Carolina family court awarded custody to the father, finding that the adoptive couple had not carried the heightened burden under 25 U.S.C. § 1912(f) (2012) of proving that the child would suffer serious emotional or physical damage if the biological father was awarded custody. *Adoptive Couple v. Baby Girl, supra*.

The South Carolina Supreme Court affirmed the family court's denial of the adoption. *Id*. The court found that the biological father was a parent within the meaning of ICWA and refused to terminate the biological father's parental rights for two reasons. First, the adoptive couple had not shown that active efforts had been made to prevent the breakup of the Indian family as required by 25 U.S.C. § 1912(d). Second, the South Carolina Supreme Court concluded that the adoptive couple had not shown that the biological father's "'custody of [the child] would result in serious emotional or physical harm to her beyond a reasonable doubt.'" 133 S. Ct. at 2559, quoting *Adoptive Couple v. Baby Girl*, 398 S.C. 625, 731 S.E.2d 550 (2012).

The U.S. Supreme Court reversed the decision of the South Carolina Supreme Court. In its opinion, the majority specifically held that ICWA's active efforts requirement "applies only in cases where an Indian family's 'breakup' would be precipitated by the termination of the parent's rights." 133 S. Ct. at 2562. The Court found that the active efforts requirement did not apply in the case because there was no familial breakup due to the fact that the father had abandoned the child prior to birth.

Although it is not entirely clear from the U.S. Supreme Court's opinion how far this holding reaches, the State interprets the decision to signify that ICWA's active efforts requirement applies only to cases where the children are removed from the home. However, we conclude that the markedly different facts in this case do not lend to extending the U.S. Supreme Court's holding to the degree the State advocates. See *Adoptive Couple v. Baby Girl*, ___ U.S. ___, 133 S. Ct. 2552, 186 L. Ed. 2d 729 (2013) (Breyer, J., concurring).

David, unlike the biological father in *Adoptive Couple v. Baby Girl*, did not abandon or relinquish his rights to his children, but, rather, he has been involved with and cared for his children throughout their lives. The children have been in his custody or placement nearly all of their lives. The filing of this involuntary proceeding did result in a "breakup" of the family when the children were removed from David's custody and placed in the legal custody of DHHS.

The amici parties contend that ICWA, and specifically the active efforts requirements, applies throughout an involuntary proceeding, even if the Indian children are placed in their own home. The amici assert that the plain language of § 43-1505(4)—that "active efforts have been made to provide remedial services and rehabilitative programs designed to *prevent* the breakup of the Indian family"—logically indicates that the provision applies to situations in which the family has not yet been broken up. The amici argue that the State's reliance upon the definition of "child custody proceeding" as limited to foster care placement fails to consider the entirety of ICWA, but, rather, should be construed to apply to any involuntary state court proceeding involving an Indian child. In support of this argument, the amici note that in an involuntary juvenile proceeding, temporary foster care placement could occur at any time; that a child might be removed multiple times during the pendency of an involuntary proceeding; and that an involuntary proceeding removes an Indian parent's right to have their child returned upon demand.

The amici further argue that the provision of active efforts, and many of the other procedural protections of ICWA, would be internally inconsistent if the State's interpretation is adopted. For example, the amici point to 25 U.S.C. § 1912(a) and to Nebraska's § 43-1505(1), which require notice to the parent or Indian custodian and the Indian child's tribe of their right of intervention in any involuntary proceeding in a state court, not specifically limiting the requirement to cases where children have been placed in foster care or in which termination of parental rights is sought. Finally, the amici contend that the State's statutory interpretation would lead to an absurd

result in that ICWA, and its substantive protections, "would essentially operate as a light switch that can be turned on and off throughout the course of a juvenile proceeding filed under state law." Brief for amici curiae at 10.

In our de novo review, we conclude that the active efforts requirement contained in ICWA should have been applied to the disposition proceeding in this case and that the juvenile court erred in applying the reasonable efforts standard. We decline to accept the State's broad position that the active efforts requirement does not apply when children are placed in the parent's home in the course of an involuntary juvenile proceeding. In this case, the children were in fact removed from the home at the commencement of the involuntary proceeding. Although the children were returned to the home prior to the adjudication and disposition hearing, there remains the possibility that removal could occur again, since the case has not been dismissed and DHHS remains the legal custodian of these children. See Neb. Rev. Stat. §§ 43-279.01, 43-285, and 43-297 (Reissue 2008 & Supp. 2013) (requiring advisement that child's placement could change at any time in proceedings under Neb. Rev. Stat. § 43-247 (Supp. 2013)). Further, should the case progress to one in which foster care placement or termination of parental rights is sought, the failure to show that active efforts have been made throughout the duration of the case to prevent such an occurrence would be problematic.

In the case of *In re Interest of Louis S. et al.*, 17 Neb. App. 867, 774 N.W.2d 416 (2009), this court tacitly recognized that active efforts under ICWA are to be provided throughout a juvenile proceeding under § 43-247(3)(a). In that case, the Indian children were removed from the parents' care and ultimately their parental rights were terminated. On appeal, they challenged the court's finding that active efforts had been made to prevent the breakup of the family. In affirming this finding, we outlined the numerous services that were provided while the children were removed from the home. We further noted the services that were provided when the children were returned to the mother's care for approximately 6 months.

Finally, we discussed the services that were provided when the children were again placed in foster care. We concluded that the mother was "clearly provided with active efforts throughout this case," without distinguishing between the efforts made when the children were removed and the efforts made when the children were placed with the mother. *In re Interest of Louis S. et al.*, 17 Neb. App. at 881, 774 N.W.2d at 427.

In reaching the conclusion that active efforts should be provided during periods that placement of the children is with the parent or parents, we recognize that the active efforts required may certainly be different from those required during a period of removal from the home. As discussed by the Nebraska Supreme Court in *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008), the active efforts standard requires a case-by-case analysis. See, e.g., *In re Interest of Louis S. et al., supra* (where further rehabilitative efforts would be futile, requirement of active efforts is satisfied); *T.F. v. State, Dept. of H & S Services*, 26 P.3d 1089 (Alaska 2001); *People ex rel. D.G.*, 679 N.W.2d 497 (S.D. 2004); *In re Cari B.*, 327 Ill. App. 3d 743, 763 N.E.2d 917, 261 Ill. Dec. 668 (2002) (degree of active efforts required to prevent Indian familial breakup reduced by parent's incarceration).

Because the juvenile court erred in applying the reasonable efforts standard to its determination that returning legal custody to David would be contrary to their welfare, as opposed to the active efforts requirement contained in ICWA, we reverse the disposition order and remand the cause for further proceedings consistent with this opinion.

Additional Assignments of Error Concerning Disposition Order.

[4] David also challenges certain provisions in the disposition order as being an abuse of discretion and not material to the adjudication. Because these issues are likely to recur upon remand, we proceed to address them. An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *In re Interest of Laurance S.*, 274 Neb. 620, 742 N.W.2d 484 (2007).

Materiality of Disposition Plan.

David takes issue with the juvenile court's rehabilitation program's provisions as they relate to him. He argues that he was not the cause of the underlying adjudication and, therefore, should not be included in the rehabilitation plan.

[5,6] The Nebraska Juvenile Code must be liberally construed to accomplish its purpose of serving the best interests of the juveniles who fall within it. *In re Interest of T.T.*, 18 Neb. App. 176, 779 N.W.2d 602 (2009). The juvenile court has broad discretion as to the disposition of those who fall within its jurisdiction. *Id*. Juvenile courts have broad discretion to accomplish the purpose of serving the best interests of the children involved. *Id*.

[7,8] A juvenile court has the discretionary power to prescribe a reasonable program for parental rehabilitation to correct the conditions underlying the adjudication that a child is within the Nebraska Juvenile Code. *In re Interest of Rylee S.*, 285 Neb. 774, 829 N.W.2d 445 (2013). While there is no requirement that the juvenile court must institute a plan for rehabilitation of a parent, the rehabilitation plan must be conducted under the direction of the juvenile court and must be reasonably related to the plan's objective of reuniting parent with child. *Id*.

[9,10] In analyzing the reasonableness of a plan offered by a juvenile court, the Nebraska Supreme Court has noted that the following question should be addressed:

> "Does a provision in the plan tend to correct, eliminate, or ameliorate the situation or condition on which the adjudication has been obtained under the Nebraska Juvenile Code? An affirmative answer to the preceding question provides the materiality necessary in a rehabilitative plan for a parent involved in proceedings within a juvenile court's jurisdiction. Otherwise, a court-ordered plan, ostensibly rehabilitative of the conditions leading to an adjudication under the Nebraska Juvenile Code, is nothing more than a plan for the sake of a plan, devoid of corrective and remedial measures. Similar to other areas of law, reasonableness of a rehabilitative plan for a parent

> depends on the circumstances in a particular case and, therefore, is examined on a case-by-case basis."

Id. at 779, 829 N.W.2d at 449, quoting *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987).

The material issue of this juvenile adjudication was Danielle's inappropriate discipline of Shayla. In fact, during the disposition hearing, the juvenile court noted that its orders were "going to be focused on the reason the Court took jurisdiction, which was the inappropriate discipline by [Danielle] of Shayla." Therefore, we must determine whether the court's nine-part rehabilitation plan related to David is reasonable based on the circumstances of the case. After our de novo review, we conclude that only certain provisions of this plan are reasonable. We disapprove of the remaining provisions.

Because David and his children live together with Danielle and her children, any juvenile court plan aimed at correcting the underlying reason for the adjudication will inevitably require some measure of cooperation from David. Therefore, the rehabilitation plan provisions requiring David's cooperation with DHHS services are reasonable, because they allow DHHS the opportunity to work at correcting the reason for the adjudication. Specifically, we approve the plan's provisions that require David to cooperate with

> a. [DHHS] and service providers in his home.
>
> b. . . . all drop-in services as arranged by [DHHS] and allow access to [his] children and the family home at all times.
>
> . . . .
>
> f. . . . family therapy as arranged by [DHHS].

Additionally, we find provision d., that David not use any unapproved form of physical discipline or place any child in a closet, and provision i., that David ensure that the children have adequate adult supervision at all times when they are in his care, to be material to this case. Even though David was not found to have used improper discipline on his children, ensuring that the children have adequate adult supervision and setting a proper example in the household regarding discipline are material to ameliorate the underlying reason for the

adjudication; namely, that inappropriate discipline had occurred when he was not home supervising the children.

Although we agree with the above provisions of the court's plan, we find that the remaining provisions are not material. The underlying reason for the adjudication was Danielle's inappropriate discipline of Shayla. The provisions that David refrain from discussing the children's mother (c.); provide the children access to mental health care (e.); schedule and attend his children's medical, dental, and vision examinations (g.); and schedule an appointment for Shania's speech and language evaluation (h.) are not material to the adjudication. Though these provisions may be good practices for David to follow as a father to three minor daughters, there is no evidence in the record that David's adherence to these provisions will correct Danielle's use of improper discipline.

To summarize, based on the circumstances of the present case, we approve of the plan's provisions requiring David to cooperate with DHHS' efforts in this case, restricting him from using unapproved physical discipline on his children, and requiring him to ensure the children have adequate adult supervision. However, we find the remainder of the plan's provisions to be unreasonable, because they are immaterial to the underlying reason for the adjudication. We therefore affirm the provisions in the order which we find to be material and reverse the provisions which we find to be immaterial to the reason for the adjudication.

Change in Family Therapist.

A substantial portion of the short disposition hearing in this case related to DHHS' request to change the family therapist. David opposed this change at the hearing and on appeal assigns error to the change in the therapist. He argues that the juvenile court should not have authority to "'micro-manage'" this case and claims that the evidence at the hearing did not support such a change. Brief for appellant at 20. He also argues that such a change was not material to the reason for adjudication in this case.

David's family has been involved with the juvenile court for an extended period of time that began with a prior case. For

the entirety of this time, the family has worked with the family therapist, Crayne. During therapy with Crayne, the family has formed a bond with her and she became a valuable support. However, DHHS believed that the children still displayed behavioral issues that had not been sufficiently addressed. Thus, DHHS recommended a change in the therapist and the juvenile court accepted this recommendation.

While the basis of the adjudication was a specific instance of inappropriate discipline of Shayla by Danielle, the juvenile court stated in the adjudication order:

> Because of the significant behavioral challenges presented by Shayla and her sisters Shania and Tanya, together with the fact that [Danielle], as their custodian, is their primary adult caretaker in charge of their discipline during their waking hours, the Court finds that all three children are at risk of harm as a result of [Danielle's] inappropriate physical discipline of Shayla on the 16th of January, 2013.

Thus, while the children's behavioral issues were not specifically listed in the juvenile petition, such issues are related to the reason for the adjudication. We find that the court's order requiring a change in the family therapist was reasonable under the circumstances of this case. Having the children's behavioral issues addressed from a new perspective may allow for the necessary progress to have this case reach a stage where it can be closed. We conclude that the juvenile court did not abuse its discretionary power in requiring the change in the therapist.

CONCLUSION

The juvenile court erred in failing to apply the active efforts standard set forth in ICWA to the disposition order. Additionally, the juvenile court erred, as outlined above, when it adopted certain provisions in its rehabilitation plan which are not material to the underlying reasons for the adjudication. We also conclude that the juvenile court did not err in permitting a change in the family therapist.

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

In re Interest of Jordana H. et al., children under 18 years of age. State of Nebraska, appellee, v. Carlos H., appellant, and Jennifer H., appellee.

846 N.W.2d 686

Filed May 27, 2014. Nos. A-12-1067 through A-12-1070.

1. **Parental Rights: Pleadings.** Under Neb. Rev. Stat. § 43-291 (Reissue 2008), facts may be set forth in an original petition, a supplemental petition, or a motion filed with the court alleging that grounds exist for the termination of parental rights.
2. **Juvenile Courts: Jurisdiction: Parental Rights.** The juvenile court shall have jurisdiction of the proceedings for termination of parental rights.
3. ____: ____: ____. The juvenile court properly acquires jurisdiction over an original action to terminate parental rights as provided in the Nebraska Juvenile Code without prior juvenile court action, including adjudication.
4. **Juvenile Courts: Jurisdiction: Parental Rights: Pleadings.** The juvenile court acquires jurisdiction to terminate parental rights when a motion to terminate containing the grounds for termination is filed, without prior juvenile court action, including adjudication.
5. **Juvenile Courts: Parental Rights: Pleadings.** The grounds contained in Neb. Rev. Stat. § 43-292(1) through (5) (Cum. Supp. 2012) do not require, imply, or contemplate juvenile court involvement, including adjudication, prior to the filing of the petition for termination of parental rights.
6. **Due Process: Juvenile Courts: Parental Rights.** When a juvenile court proceeds with a hearing on a termination of parental rights without a prior adjudication, the proceedings must be accompanied by due process safeguards.
7. **Juvenile Courts: Jurisdiction: Parental Rights.** A juvenile court has exclusive original jurisdiction as to a proceeding for termination of parental rights.
8. **Rules of Evidence: Parental Rights.** The Nebraska rules of evidence apply in adjudication proceedings but not in proceedings for termination of parental rights.
9. **Juvenile Courts: Expert Witnesses: Pretrial Procedure: Pleadings.** In an adjudication hearing, an opponent of expert testimony is required to file a concise pretrial motion to challenge the expert's testimony on the basis of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).
10. **Parental Rights: Rules of Evidence: Expert Witnesses.** In a termination of parental rights hearing, where the rules of evidence do not apply, neither do the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).
11. **Due Process: Parental Rights: Proof.** In termination of parental rights cases, due process controls and requires that fundamentally fair procedures be used by

the State in an attempt to prove that a parent's rights to his or her child should be terminated.

12. **Parental Rights: Proof.** Neb. Rev. Stat. § 43-292 (Cum. Supp. 2012) provides 11 separate conditions, any one of which can serve as the basis for the termination of parental rights when coupled with evidence that termination is in the best interests of the child.
13. ____: ____. A finding of abuse or neglect may be supported where the record shows (1) that a parent had control over the child during the period when the abuse or neglect occurred and (2) that multiple injuries or other serious impairment of health have occurred which ordinarily would not occur in the absence of abuse or neglect.
14. **Parental Rights: Circumstantial Evidence: Proof.** Circumstantial evidence may be used in a disposition proceeding in which the burden of proof is "clear and convincing."
15. **Circumstantial Evidence: Proof.** A fact proved by circumstantial evidence is nonetheless a proven fact.
16. **Circumstantial Evidence.** Circumstantial evidence is not inherently less probative than direct evidence.
17. **Parental Rights: Circumstantial Evidence: Proof.** In many cases of child neglect or child abuse, the only proof available is circumstantial evidence.
18. **Parental Rights.** Parental rights can be terminated only when the court finds that termination is in the child's best interests.
19. ____. Statutory grounds for termination of parental rights as contained in Neb. Rev. Stat. § 43-292 (Cum. Supp. 2012) are based on a parent's past conduct, but the best interests element focuses on the future well-being of the child.
20. ____. A court may not simply assume that the existence of a statutory ground for termination of parental rights necessarily means that termination would be in the best interests of the child.
21. **Parental Rights: Right to Counsel.** A parent in a juvenile court case has the right to appointed counsel if unable to hire a lawyer.
22. **Appeal and Error.** It is not the duty of a reviewing court to search the record for the purpose of ascertaining whether there is error, and any error must be specifically pointed out.

Appeal from the County Court for Scotts Bluff County: James M. Worden, Judge. Affirmed.

David S. MacDonald, Deputy Scotts Bluff County Public Defender, for appellant.

Tiffany Wasserburger, Deputy Scotts Bluff County Attorney, for appellee State of Nebraska.

Jeremy C. Jorgenson for appellee Jennifer H.

Audrey M. Elliott, of Kovarik, Ellison & Mathis, P.C., guardian ad litem.

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

RIEDMANN, Judge.

I. INTRODUCTION

Carlos H. appeals from the order of the county court for Scotts Bluff County, sitting as a juvenile court, terminating his parental rights to his four minor children. The cases have been consolidated for consideration on appeal. We note that the children's mother, Jennifer H., also filed a notice of appeal, but failed to file a brief. Thus, we grant her no affirmative relief. We find no merit to Carlos' assignments of error and therefore affirm the decision of the juvenile court.

II. BACKGROUND

Carlos and his wife, Jennifer, are the parents of three daughters: Skylar H., born in October 2004; Taylor H., born in February 2009; and Jordana H., born in December 2011. They also have one son, Ashton H., born in November 2005. When the juvenile court terminated Carlos' parental rights to the minor children, it also terminated Jennifer's parental rights. Jennifer filed a notice of appeal after Carlos perfected his appeal, and thus, pursuant to Neb. Ct. R. App. P. § 2-101(C) (rev. 2010), Jennifer is considered an appellee. In order to seek affirmative relief, Jennifer was required to file an appellee's brief containing a cross-appeal, but she failed to file a brief. Therefore, we cannot grant her any affirmative relief, and we will limit our discussion of her involvement to information necessary to address Carlos' arguments.

1. EVENTS LEADING TO REMOVAL IN 2011

In October 2011, the Nebraska Department of Health and Human Services (DHHS) received several telephone calls regarding Ashton's welfare. The caller expressed concerns about Ashton's small size, multiple bruises on his body, obsession with food, and absences from school. Based on the telephone calls, Nichole Kihlthau, a child and family services specialist with DHHS, attempted to locate Ashton to do a welfare check. She contacted Ashton's school on October 10 and learned that Carlos had informed the school that Ashton

was home sick because he had had an allergic reaction to a flu shot.

On October 12, 2011, Kihlthau learned that Ashton had never received a flu shot. Because Ashton had not yet returned to school, Kihlthau and a Scottsbluff police officer went to Carlos and Jennifer's house around 11 a.m. to look for him. Jennifer told them Ashton had gone on a trip with Carlos and would return in a few days. After checking on Taylor, who was asleep upstairs in the home, Kihlthau and the officer left. They went back to Carlos and Jennifer's home around 3 or 4 p.m. to gather more information about Ashton's whereabouts from Jennifer. They then left the home again and returned a third time, that evening, with two additional police officers.

While the officers searched the home for Ashton, Kihlthau went upstairs to talk to Skylar and Taylor. She observed two bedrooms upstairs at the house. One was Carlos and Jennifer's bedroom. The other bedroom was pink and contained only one bed and solely girls' clothes and toys. Kihlthau asked Skylar and Taylor where Ashton's things were, and they both said "downstairs." Skylar said Ashton's clothes were dirty because the girls were allowed to "spit and poop" on them. Kihlthau did not see any indication that a boy lived in Skylar's bedroom. When Kihlthau went to the basement of the home, she observed a rack and a laundry basket containing boys' clothes.

Finally, around 7:30 or 8 p.m., Jennifer admitted that Ashton had a large scrape across his face and that Carlos had taken him so that it did not look like Carlos and she had abused him. She said Ashton was with Carlos at Carlos' parents' house. Ashton was located there a short while later.

Subsequently, Investigator Joe Rohrer, one of the police officers who was involved in the search for Ashton, received a telephone call from Carlos. Carlos agreed to meet Rohrer at the police station. Carlos initially told Rohrer the same story that Jennifer had told: that he had taken Ashton on a trip. But when confronted with the truth, Carlos admitted that he got scared because Ashton's injuries "looked really bad" and he was afraid DHHS would take his children away. He claimed

that Ashton's injuries were the result of a fall down the stairs into the basement of Carlos and Jennifer's house.

Photographs taken of Ashton that night depict a large red mark on the right side of his face, a bump on his forehead, a black eye, a rash all over his skin, and a distended abdomen. The large mark on Ashton's face and a mark on his shoulder contained a similar, linear pattern. Kihlthau, Rohrer, and a Scottsbluff police captain observed that the imprint on Ashton's face was consistent with a shoe print. Police confiscated several pairs of "flip-flop" sandals from Carlos and Jennifer's house. Subsequent forensic testing concluded that one of the "flip-flops" could have caused the injuries to Ashton's face and shoulder, but the testing did not rule out other potential items as the cause.

Ashton was taken to the hospital the night of October 12, 2011, for examination. The nurse who examined him said that if he had not already been in DHHS' custody when he was brought in, she would have reported his condition because she suspected his injuries were caused by abuse. Her suspicions were raised because of the extent of the bruises and scratches on his body and his overall condition. She also noticed that his size was very small for a 5-year-old, his abdomen was distended, and his arms and legs were very skinny. Skylar, Ashton, and Taylor were removed from Carlos and Jennifer's custody that night and placed in foster care. Jordana had not yet been born, but upon her birth in December 2011, DHHS immediately removed her from Carlos and Jennifer.

2. Prior Concerns of Abuse and Removal of Children

The 2011 incident was not the first time the children had been removed from Carlos and Jennifer; nor was it the first time Carlos and Jennifer had been suspected of child abuse. In 1998, Carlos pled no contest to felony child abuse from an incident involving the 6-month-old child of his former wife. In December 2004, when Carlos and Jennifer lived in Kansas, 2-month-old Skylar was taken to a hospital by ambulance because she was unconscious and not breathing. Carlos and Jennifer provided conflicting stories about what

happened to her. The physician at the hospital suspected child abuse but could not substantiate it because of a lack of visible injuries.

A year later, in December 2005, Carlos and Jennifer took 2-month-old Ashton to the hospital, where it was discovered that he had a broken femur. He was also found to have older injuries that were in the process of healing, including a fractured rib and fractured elbow. Carlos and Jennifer explained that they had pulled Ashton out of the bathtub, causing his leg injury, but three physicians involved in Ashton's care agreed that the injuries were likely caused by abuse. As a result of Ashton's injuries, Skylar and Ashton were removed from Carlos and Jennifer's care and adjudicated through the Kansas juvenile court. Carlos moved out of the home for several months while he and Jennifer completed services as part of their case plan. Eventually, the children and Carlos were reintegrated into the home, and the case was closed in November 2007. The family moved back to Nebraska shortly thereafter.

In May 2009, Carlos took Ashton to a hospital emergency room with a laceration on the back of his head that required staples. The nurse who examined Ashton also noticed several areas of bruising on Ashton, including large bruises on his back and bruises in various stages of healing all over his body. The extent of the injuries was concerning to the nurse, so she reported it to the hospital's social worker. She was also concerned about Carlos' demeanor, because he was sitting 3 feet away from Ashton while Ashton was holding a dressing on his own head and because Carlos was on his cell phone throughout the entire examination. Carlos told the nurse that one of Ashton's sisters had caused the bruises on Ashton, but Ashton told the social worker that Carlos was the cause. Carlos also said to the nurse, "'I know you're suspecting abuse and you're not going to find anything.'"

Concerns about Ashton's welfare were also reported in January 2010. Scottsbluff police received a report that although Ashton was 4 years old, he could speak only a few words, appeared very skinny for his age, and had bruising on his

back, collarbone, and shoulders. An officer went to Carlos and Jennifer's home and observed bruises on Ashton's back and noted that he looked skinny and sickly with sunken eyes. However, Ashton was allowed to remain in his parents' care at that time.

3. Current Juvenile Court Proceedings

On October 14, 2011, the State filed petitions alleging that Skylar, Ashton, and Taylor came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). On December 14, the State filed motions to terminate the parental rights of Carlos and Jennifer to Skylar, Ashton, Taylor, and Jordana. Amended petitions were filed on May 8, 2012. The termination hearing was held in August 2012 and took place over the course of 7 days.

(a) School Personnel's Testimony

Several personnel from Ashton's school testified at the hearing. A school social worker testified that she made two reports to DHHS voicing her concerns that Ashton was being abused or neglected. Her concerns were based on numerous marks on Ashton's body, the fact that he was often hungry and seemed preoccupied with food, and his frequent absences from school. In the first 2 months of kindergarten, Ashton missed 10 days of school. Several teachers at the school also testified that Ashton would often miss school and come to school with scratches, bumps, and bruises on his body.

The school personnel also noticed Ashton's fixation with food. One teacher observed that Ashton always seemed hungry and would eat all of his food and ask for more. If he dropped any of it on the floor, he would pick it up and eat it off the floor. Another teacher testified that Ashton had been found going through other students' backpacks looking for food and trying to catch food that other children were dumping in the garbage. Carlos and Jennifer told the school that Ashton had to be on a special, limited diet because he had numerous, severe food allergies. But when the school asked them to sign

a release of information so the school could verify Ashton's allergies with a doctor, they refused.

(b) Skylar's Testimony

Skylar testified at the termination hearing. She described Carlos and Jennifer as "mean" because they would spank Ashton. She testified that Jennifer spanked Ashton with a belt on the back, arms, legs, and head. She said that he would cry when Jennifer hit him with the belt and that that made Skylar sad. Skylar also testified that she saw Jennifer spank Ashton with a "flip-flop" on his arms, legs, belly, and head and that the large mark on the right side of Ashton's face that was visible when the children were removed from the home was caused by Jennifer's hitting him with a "flip-flop." Skylar said that she also saw Carlos spank Ashton on the back, arms, and legs with a belt and a boot.

Skylar testified that she did not like how Carlos and Jennifer treated her either. According to Skylar, they spanked her with a belt on her back, arms, and legs and it hurt. Skylar said they also used their hands to hit Taylor.

Skylar explained that she slept upstairs in her bedroom and Taylor slept upstairs with Carlos and Jennifer, but that Ashton slept in a dog kennel in the basement. She stated Carlos and Jennifer would put Ashton in the kennel and close the door after he was inside. According to Skylar, no one would stay downstairs with Ashton and no lights were left on for him.

Skylar said that Carlos and Jennifer also denied Ashton food. According to Skylar, she, Taylor, Carlos, and Jennifer sat at a table in the kitchen to eat, but Ashton was at a separate table where he had to stand and eat by himself. Ultimately, Skylar said that she did not feel safe when she was living with Carlos and Jennifer because they were "mean" and that she did not want to go back and live with them.

(c) Expert Testimony

The court also heard testimony from Dr. Bruce Buehler, a physician board certified in pediatrics, clinical and biochemical genetics, and endocrinology. Dr. Buehler has worked with a genetics clinic, which specializes in working with people

who have special genetic, motoric, or educational needs, for 31 years. He saw Ashton on two occasions in 2010 when Carlos brought him in due to Ashton's short stature and developmental delays. Dr. Buehler noticed that Ashton was very delayed with his motor skills and speech and that he was very shy and withdrawn. He also noticed numerous bruises all over Ashton's body and a calcified area on Ashton's skull, which were not consistent with falling down. At that time, Dr. Buehler suggested to Ashton's pediatrician that Ashton was possibly being abused. He also expressed concern about psychosocial issues and was concerned that the cause of Ashton's delays was situational. Dr. Buehler conducted extensive genetic testing on Ashton to try to determine the cause of his delays, but he was unable to identify any underlying genetic conditions.

When Dr. Buehler saw Ashton again after he had been removed from Carlos and Jennifer's care, he observed that Ashton was "psycho-socially an amazingly different child." Ashton exhibited no autistic behaviors, he was very warm and friendly, he was trying to speak and joke, and he was much more interactive and played with toys. He had also grown approximately 3 inches in height, which was very notable and showed that his growth hormone had "turned on." The next time Dr. Buehler saw him, Ashton had grown several more inches in height and seemed friendlier yet with people.

Dr. Buehler opined to a reasonable degree of medical certainty that Ashton suffered from "psycho-social dwarfism." He explained that psychosocial dwarfism occurs when a child lives in an abusive environment and the environment depresses the growth hormone, causing the child to stop growing. Dr. Buehler's diagnosis was based on the fact that changing Ashton's environment caused Ashton to grow without any added growth hormone. A psychosocial dwarfism diagnosis is reached by ruling out other causes of lack of growth, and Dr. Buehler's conclusion came as an "evolution of [his] testing," because genetically he ruled out all possible conditions for Ashton's lack of growth. Dr. Buehler testified that he did testing as extensive as he knows how to do and that he

had two other doctors look at Ashton, but no one could find another diagnosis.

Dr. Buehler testified that it is in Ashton's best interests to remain in the environment he is currently in because it has caused him to grow and improve and has changed his social ability. Because Ashton is delayed, he is at risk for potential abuse, as are all children who are delayed, and therefore, it is even more important that Ashton's home be safe and stable. According to Dr. Buehler, the cause of psychosocial dwarfism is abuse, but it does not have to be physical abuse; it can be anything that a child perceives as a danger. Factors such as a lack of bonding, a lack of parenting, a fear, or someone in the house who frightens the child have all been shown to decrease the growth hormone.

Ashton's pediatrician, Dr. Cynthia Guerue, also testified. In the past, she had found that Ashton has allergies and eczema and that he appeared developmentally delayed. Based on his delays, she referred him to physical therapy, occupational therapy, and early intervention. She saw him on October 17, 2011, a few days after he had been removed from Carlos and Jennifer's care. She was concerned about his distended abdomen, and testing revealed that his liver enzymes were elevated but decreased quickly, which indicated some sort of trauma to his liver. At that time, she suspected he may have psychosocial dwarfism. She consulted with a child abuse expert, who also suggested looking into psychosocial dwarfism.

When Ashton presented for a followup appointment with Dr. Guerue in June 2012, he had grown significantly and his demeanor was much different. Dr. Guerue testified that Ashton was talkative, interactive, and playful. He had grown 4¾ inches in the previous 7½ months, whereas he had grown only 3½ inches in the previous 4 years when he was living with Carlos and Jennifer. Dr. Guerue also noticed that all of Ashton's eczema was gone, when it "was almost always present" at his previous visits. To a reasonable degree of medical certainty, Dr. Guerue diagnosed Ashton with psychosocial dwarfism based on his improved growth and social change. Dr. Guerue opined that it was important for Ashton's physical well-being

that he be maintained in the environment that caused him to achieve his current growth and progress.

Psychologist Dr. Alan Smith began seeing Ashton in November 2011 and saw him two to four times per month between November and August 2012. At Dr. Smith's first home visit with Ashton, Ashton needed assistance walking up two steps in the foster home; his legs were tremulous, which suggested muscle weakness; and he had an "odd gait." Dr. Smith noted that Ashton was also very small with a distended abdomen, he was obsessed with food and had to have it in his physical possession at all times, and he could not be separated from his foster mother for more than a few seconds. Dr. Smith observed that when Ashton would talk about innocuous topics, he was calm and self-contained, but if Carlos or Jennifer was mentioned, Ashton's breathing became shallow, his muscles became tense, and he "had to sit on [his] foster mother's lap."

During Dr. Smith's second home visit with Ashton, he noticed that Ashton dissociated when talking about his prior homelife, meaning that in addition to the above-mentioned shallow breathing and muscle tension, the amount of time it took him to respond increased considerably and he started talking in a very childlike tone of voice, using simple vocabulary, and talking about irrelevant things. He also looked "spacey," which is an emotional numbing that happens when someone dissociates. When Dr. Smith switched to a more neutral topic of discussion, Ashton's behaviors became more typical.

Two or three weeks later, Dr. Smith went to the foster home for a third visit. At that time, he noticed additional improvement in Ashton's food obsession and separation anxiety. Dr. Smith made a fourth visit to the foster home in January 2012, and at that time, he noticed continued improvement in Ashton's preoccupation with food. Ashton was also running through the house and showed Dr. Smith that he could pull himself into the bathtub and get out by himself. Ashton was also engaging in sustained play with his foster siblings. Ashton had spontaneously mentioned to his foster mother that he had to stay in the basement at home and was hit with a

shoe. But when Dr. Smith asked Ashton about those topics, he saw Ashton moving into a dissociative state and quickly changed the topic.

At Dr. Smith's most recent visit with Ashton, which occurred a week or two prior to the termination hearing, Ashton showed further improvement. He made eye contact, spoke to Dr. Smith's wife, initiated conversation, engaged in imaginative play without needing adult reassurance, and engaged in spontaneous play. He had also grown about 6 inches overall, and his abdomen was more proportionate to his body. In addition, Ashton's gait had improved considerably and he could run, jump, and tumble. His ability to communicate had improved, but he still lagged behind for his age. Dr. Smith testified that there are many things that the school will need to work on with Ashton's language skills and that therefore, it is very important that he have consistent school attendance.

Dr. Smith diagnosed Ashton with posttraumatic stress disorder and intermittent explosive disorder. In children, a diagnosis of posttraumatic stress disorder essentially means the fight-or-flight system is oversensitized to an event where an individual feels at risk for his or her safety or well-being or that of another. A diagnosis of intermittent explosive disorder means that the episodes of emotional disregulation are significant and severe. When asked for his recommendations for Ashton based on these diagnoses, Dr. Smith stated that Ashton needs a "care giver setting" and settings within the school system that re-create the type of environment that he needed when he was very young to develop a healthy, functional, and adaptive emotional system. It appeared to Dr. Smith that Ashton is currently in the setting that he needs. Dr. Smith opined that it would be in Ashton's best interests to remain where he is to allow him to continue to grow and reach a positive sense of security and safety.

Dr. Smith stated that Ashton also needs permanency. In Dr. Smith's opinion, Ashton's history was not indicative of his having had a secure, consistent place; his home was indicative of a neglectful and abusive home environment. Dr. Smith was concerned because even a discussion of having contact with Carlos or Jennifer caused Ashton to dissociate and because

Ashton experienced fear about returning home and did not want to return home. Dr. Smith also noted that Ashton referred to his parents by their names—Carlos and Jennifer—instead of calling them "Dad" and "Mom." Anytime Ashton was exposed to the possibility of testifying in court or having any possible contact with Carlos or Jennifer, with their house, or with anything that reminds him of it, he had "huge explosions." The topics which were the most significant triggers for Ashton were the beliefs that he will have contact with his parents, that he is going to be removed from his foster parents, and that he will be returned home and the discussion of events that bother him that happened in his home, such as those involving the dog kennel and being hit.

Jeanna Townsend is a licensed mental health practitioner and certified professional counselor. She began seeing Skylar and Taylor in November 2011 and saw them a total of 10 to 15 times. Initially, Skylar had a hard time making eye contact, she muttered, and she was very withdrawn and did not initiate conversation. She also had a "strange . . . vocal inflection" when asked about Carlos and Jennifer or her situation at home. Townsend said that the inflection was hard to describe, but that it was almost as though Skylar was swallowing her words and holding herself back from being able to finish her answer. When discussing her parents or homelife, she would also give very short answers, answer very quietly, and give only one- or two-syllable answers. Townsend also stated that when Skylar would discuss stories about Ashton, Skylar exhibited very little empathy, which Townsend said was not a normal sibling relationship, and that children Skylar's age are usually able to express empathy.

More recently, Skylar had stopped her verbal "halting" when discussing her home or parents. She also engaged in conversation more easily, she appeared to have a bond with the people that brought her to sessions with Townsend, and she acted more age appropriately.

Townsend testified that permanency is very important for Skylar because it is a fundamental need for children so they can further develop. In addition, because Skylar may have been exposed to some very negative situations, as she forms her

identity in the next few years, it is going to be very important for her to have a "healthy" female role model.

Townsend has concerns if Skylar were to be returned to Carlos and Jennifer's home. When she first met Skylar, Skylar was "shutting down emotionally" regarding empathy and did not demonstrate feelings of worry or empathy for Ashton, which indicated to Townsend that there might be a lifelong coping issue developing, because children who have been traumatized and do not have any sort of intervention have lifelong issues. However, Townsend has seen improvement in Skylar since Skylar has been in an out-of-home placement, and Skylar's progress has continued in the time that Townsend has seen her.

Taylor was only 2½ years old when Townsend first saw her, so Taylor was "kind of oblivious to everything"; however, when talking about "things at home," especially in the presence of Skylar, Taylor exhibited the same vocal inflection that Skylar did. Townsend believes that permanence is also important for Taylor, because it is such a fundamental need for a child. Townsend expressed concern if Taylor were returned to Carlos and Jennifer's home, because children who are in an abusive environment will identify with either the abused or the abuser.

Townsend also had concerns about Jordana's being in a home that was abusive to one of the other children, for the same reason, but even more so because a baby would be unable to verbalize any issues.

Dr. Suzanne Haney, a board-certified child abuse pediatrician, was contacted to consult and review Ashton's case. After reviewing medical records, school records, law enforcement reports, DHHS reports, and photographs, Dr. Haney had concerns that Ashton was subjected to abuse on at least two separate occasions and that he had significant enough neglect that he had stopped growing. She concluded that the injuries Ashton suffered when he was 2 months old resulted from abuse, because such a young child is not capable of sustaining those injuries on his or her own and there was no appropriate history to account for the injuries. The fact that Ashton had old and new injuries indicated multiple episodes

of injury, which indication is "more concerning for repetitive abuse."

Dr. Haney was also concerned about Ashton's injuries when Ashton was taken into DHHS custody in October 2011, particularly his facial injury, which was consistent with being hit with a shoe. She reviewed the photographs of Ashton's head depicting multiple locations without hair growth, which are consistent with his having previously received injury significant enough that it scarred.

Ashton's growth was also a significant concern for Dr. Haney. Ashton had essentially stopped growing from age 2½ to age 6, which, according to Dr. Haney, medically indicates something is very wrong. She observed that testing was unable to find a genetic cause and noted the "catch-up growth" he experienced after he was placed in foster care. To Dr. Haney, this indicated that solely the environmental change between Carlos and Jennifer's house and his foster home was enough to get him to start growing.

Ultimately, Dr. Haney concluded that Ashton was the victim of multiple instances of physical abuse and had psychosocial dwarfism. She believes the consequences of these diagnoses will be permanent and lifelong. As a result, Ashton needs a stable environment with caregivers understanding of what he has been through, and he needs long-term, ongoing therapy with a therapist who understands trauma. Part of the stable environment that Ashton needs means attending school regularly and being "a normal child as much as possible." Dr. Haney expressed concern that if Ashton were returned to his previous environment, his condition would continue and he would be left even more severely disabled.

(d) Parents' Denials

Throughout this case, Carlos and Jennifer continually denied ever abusing or neglecting Ashton. They insisted his injuries in 2005 were an accident caused by pulling him out of the bathtub, despite doctors' indications that such a high-force injury in such a young child could not have been an accident. Carlos and Jennifer also insisted that the injuries observed on Ashton in October 2011 were the result of a fall down the

stairs into their basement. However, forensic testing on a carpet sample from their stairs refuted their claim when it definitively excluded the carpet as the source of Ashton's injuries. They claimed that Ashton's numerous bumps, scrapes, and bruises were not caused by abuse, but, rather, that Ashton was easily injured, fell down more often than most children, and bruised easily.

Carlos and Jennifer denied making Ashton sleep in the basement, despite Skylar's and Ashton's claims to the contrary, and Carlos and Jennifer alleged that he slept on a mattress on the floor in Skylar's bedroom. Kihlthau observed a mattress standing up in the upstairs bathroom, but not until the third time she went to Carlos and Jennifer's house on October 12, 2011; Kihlthau testified that the mattress was not there when she was at the house earlier that day, and evidence established that Jennifer purchased a new toddler bed at 5 p.m. on October 12.

Carlos and Jennifer claimed that they had to limit Ashton's diet because of severe food allergies and because he suffered from a disorder where he could not recognize when he was full. However, after Ashton was placed in foster care, he was able to eat almost any food without having an allergic reaction to it, and a caseworker observed him walk away from food when he got full.

Carlos and Jennifer also claimed that Skylar had been coached to disclose the information that she did, but Townsend testified that Skylar's disclosures always remained consistent and that there was no evidence suggesting that she had been coached. In fact, when asked during her testimony if anyone had told her what to say, Skylar replied that Carlos and Jennifer told her not to tell the truth about what happened at their house.

Carlos and Jennifer admitted they lied to Ashton's school and to law enforcement when they said Ashton had an allergic reaction to a flu shot. Carlos acknowledged having kept Ashton home from school for fear of being suspected of child abuse due to Carlos' previous conviction in the 2005 case in Kansas and the incident where Ashton received staples for a laceration

on his head. They admitted they hid Ashton from DHHS for the same reason.

4. Juvenile Court's Order

The juvenile court entered an order on October 11, 2012, terminating Carlos' and Jennifer's parental rights to Skylar, Ashton, Taylor, and Jordana. The court concluded that Carlos' and Jennifer's explanations of Ashton's facial injury were unbelievable and that they covered up his injuries without regard to his safety. The court noted that Ashton was in "terrible physical condition" when he was brought into the police station and that Carlos and Jennifer had no reasonable explanation for his condition. Accordingly, the court found that the State established by clear and convincing evidence that Ashton had been the victim of chronic abuse and neglect.

The court also determined that Carlos and Jennifer had failed to provide the necessary care and protection Ashton needs and deserves and that therefore, it is in the best interests of Ashton that their parental rights be terminated. The court noted that the significant abuse and maltreatment a child must experience before he or she is a victim of psychosocial dwarfism are substantial, continual, and repeated and that both Carlos and Jennifer actively contributed to the maltreatment that resulted in Ashton's suffering from a condition that has caused physical and mental wounds that may never heal. Based on the foregoing, the court found that Carlos' parental rights to Ashton should be terminated pursuant to Neb. Rev. Stat. § 43-292(2) and (9) (Cum. Supp. 2012) and that termination was in Ashton's best interests.

The court also concluded that Skylar, Taylor, and Jordana came within the meaning of § 43-292(2) and (9) due to the abuse and neglect of Ashton and that termination was in their best interests as well. Carlos timely appealed.

III. ASSIGNMENTS OF ERROR

Carlos assigns, summarized, restated, and renumbered, that (1) the juvenile court never acquired jurisdiction over Jordana; (2) the court erred in finding that if the petitions to terminate parental rights were granted, the allegations under

§ 43-247(3)(a) would become moot; (3) the court erred in allowing physicians, a psychologist, mental health workers, and caseworkers to testify as experts as to psychosocial dwarfism without conducting a hearing under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001) (*Daubert/Schafersman*); (4) the court erred in accepting Dr. Buehler's diagnosis that Ashton suffered from psychosocial dwarfism; (5) the evidence did not sustain findings by clear and convincing evidence sufficient to terminate Carlos' parental rights under § 43-292; (6) the court erred in finding aggravating circumstances based on Dr. Haney's testimony; (7) the evidence did not sustain a finding that termination of Carlos' parental rights was in the children's best interests; and (8) the court erred in denying Carlos' request for an expert witness at the State's expense. Carlos also requests a review of the record for plain error.

IV. STANDARD OF REVIEW

Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010). However, when the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other. *Id.*

V. ANALYSIS

1. Jurisdiction Over Jordana

Carlos argues that the juvenile court never acquired jurisdiction over Jordana because a petition under § 43-247(3)(a) was not filed until nearly 3 months after the original motion to terminate Carlos' parental rights to Jordana was filed. This argument lacks merit because a juvenile court can acquire jurisdiction over a child via the filing of a motion to terminate parental rights.

[1-3] Neb. Rev. Stat. § 43-291 (Reissue 2008) states in part, "Facts may also be set forth in the original petition, a

supplemental petition, or motion filed with the court alleging that grounds exist for the termination of parental rights." Section 43-247(6) provides that the juvenile court shall have jurisdiction of "[t]he proceedings for termination of parental rights . . . ." In *In re Interest of Joshua M. et al.*, 256 Neb. 596, 608-09, 591 N.W.2d 557, 565 (1999), the Nebraska Supreme Court concluded that these two sections, taken together, "indicate that the juvenile court properly acquires jurisdiction over an original action to terminate parental rights as provided in the Nebraska Juvenile Code without prior juvenile court action, including adjudication."

[4] A motion to terminate parental rights is included in the relevant language of § 43-291. Thus, the juvenile court also acquires jurisdiction to terminate parental rights when a motion to terminate containing the grounds for termination is filed, without prior juvenile court action, including adjudication. In the instant case, the State filed a motion to terminate Carlos' parental rights to Jordana the day Jordana was born, prior to an adjudication.

[5,6] In *In re Interest of Joshua M. et al., supra*, the Supreme Court examined § 43-292(1) through (7) to determine upon what grounds a juvenile court may terminate parental rights without a prior adjudication. The court found that the grounds contained in § 43-292(1) through (5) do not "require, imply, or contemplate juvenile court involvement, including adjudication, prior to the filing of the petition for termination of parental rights." *In re Interest of Joshua M. et al.*, 256 Neb. at 609, 591 N.W.2d at 566. The court cautioned, however, that when a juvenile court proceeds with a hearing on a termination of parental rights without a prior adjudication, the proceedings must be accompanied by due process safeguards. *In re Interest of Joshua M. et al., supra*.

In this case, the State's motion to terminate Carlos' parental rights to Jordana was based upon § 43-292(2) and (9). We note that subsection (9) was not in effect at the time *In re Interest of Joshua M. et al.* was decided. Because we find that the State sufficiently proved subsection (2), as we explain in greater detail below, we need not address whether a prior adjudication was required under subsection (9). We must, however,

determine whether the requirements of due process were satisfied in the present case.

The first hearing held after the motion to terminate parental rights was filed was on December 20, 2011. Carlos and his counsel were present at the hearing. The court informed Carlos that the State had directly filed a motion to terminate parental rights and that the State had the burden of proving the allegations by clear and convincing evidence. The court advised Carlos of his rights, including the right to confront and question the State's witnesses; the right to present his own defense by calling witnesses, presenting his own testimony, and using the subpoena power of the court; and the right to appeal and obtain a record of the proceedings. Carlos indicated that he did not have any questions after the court explained his rights. The court asked Carlos if he wanted the motion to terminate read aloud in court, and Carlos responded, "No, I know what it says." This advisement occurred at the first court appearance on the State's motion to terminate. This was 8 months prior to the termination hearing, at which Carlos was represented by counsel, presented his own witnesses, and cross-examined the State's witnesses.

We have previously found that a similar rights advisement was sufficient to ensure that the parents were accorded their due process rights after the State filed a motion to terminate parental rights. See *In re Interest of Brook P. et al.*, 10 Neb. App. 577, 634 N.W.2d 290 (2001). Accordingly, we find that the content of the December 20, 2011, hearing was adequate to safeguard Carlos' due process rights. Therefore, the juvenile court had jurisdiction to terminate Carlos' parental rights to Jordana under § 43-292(2) without a prior adjudication via the motion to terminate parental rights filed on December 14.

2. Mootness of Allegations Under § 43-247(3)(a)

Carlos asserts that the juvenile court erred in finding that if it granted the petitions to terminate parental rights, the § 43-247(3)(a) allegations would become moot. He claims that the juvenile court lacked authority to extend its jurisdiction to the disposition phase without first proving the allegations in

the § 43-247(3)(a) petitions. We disagree because, as we determined above, a juvenile court may also obtain jurisdiction via the filing of a motion to terminate parental rights.

[7] Section 43-247 provides that "[t]he juvenile court shall have exclusive original jurisdiction as to . . . the parties and proceedings provided in subdivisions (5), (6), and (8) of this section." Subsection (6) includes the proceedings for termination of parental rights. A prior adjudication is not required in every instance where the State files a motion to terminate parental rights, and we determined that none was required in this case. See *In re Interest of Joshua M. et al.*, 256 Neb. 596, 591 N.W.2d 557 (1999).

A termination of parental rights is a final and complete severance of the child from the parent and removes the entire bundle of parental rights. *In re Interest of Angelina G. et al.*, 20 Neb. App. 646, 830 N.W.2d 512 (2013). The practical application of terminating a parent's rights is that no services will be provided by DHHS in an attempt to reunify the parent and child. Thus, when a juvenile court grants a motion to terminate, there is no need to address any allegations under § 43-247(3)(a). Accordingly, it was not erroneous for the juvenile court to grant the petitions to terminate without a prior adjudication under § 43-247(3)(a) and determine that the § 43-247(3)(a) allegations were moot.

3. Allowing Expert Testimony

[8] Carlos assigns that the juvenile court erred in allowing several witnesses to testify as experts as to psychosocial dwarfism without conducting a *Daubert/Schafersman* hearing. We note that Carlos does not argue that he requested such a hearing, and our review of the record does not indicate that one was requested. The procedural posture of this case as described above creates somewhat of an anomaly because in adjudication cases, the Nebraska rules of evidence apply, but in termination cases, they do not. Compare *In re Interest of Ashley W.*, 284 Neb. 424, 821 N.W.2d 706 (2012), with *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003). The trial court in the instant case recognized this difference as indicated in its order:

> Thus, under a Motion to Terminate Parental Rights the burden of proof is higher than an adjudication hearing. However, the [c]ourt does not have to apply the rules of evidence during a Motion to Terminate Parental Rights, but does have to apply the rules of evidence during an adjudication hearing.

The trial court's order indicates that it properly applied the differing evidentiary standards, stating: "During trial, the [c]ourt ruled on objections based on the rules of evidence, unless otherwise indicated. All evidence received, over objection, was considered by the [c]ourt for purposes of the [termination of parental rights] issues." Thus, it is presumed that the trial judge disregarded any evidence which should not have been admitted for purposes of adjudication, while giving proper consideration to it for purposes of termination. See *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003).

[9-11] In an adjudication hearing, an opponent of expert testimony is required to file a concise pretrial motion to challenge the expert's testimony on the basis of *Daubert/Schafersman*. See *In re Interest of Christopher T.*, 281 Neb. 1008, 801 N.W.2d 243 (2011). Carlos did not do so. And in a termination hearing, where the rules of evidence do not apply, neither do the *Daubert/Schafersman* standards. See *In re Interest of Rebecka P., supra*. Instead, due process controls and requires that fundamentally fair procedures be used by the State in an attempt to prove that a parent's rights to his or her child should be terminated. *Id*.

In *In re Interest of Rebecka P.*, the Nebraska Supreme Court determined that the father's due process rights were not violated by the testimony of a witness, because the father received notice of the termination hearing, he appeared at the hearing and was represented by counsel, and his counsel cross-examined the witness and raised several objections to the witness' testimony. The same is true in the present case. Carlos received notice of the termination hearing and the witnesses the State was going to question, he appeared at the hearing and was represented by counsel, and his counsel cross-examined

each witness and objected numerous times during the witnesses' testimonies. Carlos knew that the State was going to present evidence on psychosocial dwarfism, and he had the opportunity to prepare for the testimony prior to the termination hearing. We therefore find that due process requirements were satisfied and that the juvenile court did not err in allowing testimony regarding psychosocial dwarfism.

4. Dr. Buehler's Diagnosis

Carlos claims that "Dr. Buehler's certainty that Ashton suffered from psychosocial dwarfism is nothing more than post hoc, ergo propter hoc, a logical fallacy." Brief for appellant at 37. He complains that Dr. Buehler rendered a diagnosis of Ashton without investigating the home or using "basic diagnostic techniques to narrow down what in the environment was causing Ashton's medical problems." *Id*. at 35.

Carlos is essentially challenging the reliability of Dr. Buehler's diagnosis. Whether Dr. Buehler's testimony was credible was an issue for the juvenile court's determination, because Dr. Buehler's testimony regarding psychosocial dwarfism was properly admitted into evidence, as we concluded above. We note that even if Dr. Buehler's diagnosis was erroneous or unreliable, Drs. Guerue and Haney also diagnosed Ashton with psychosocial dwarfism. Thus, there was sufficient evidence beyond Dr. Buehler's testimony upon which the juvenile court could rely to find that Ashton did, in fact, suffer from psychosocial dwarfism. We therefore find this argument meritless.

5. Statutory Grounds for Termination

[12] Carlos argues that the evidence was not clear and convincing to terminate his parental rights under § 43-292. The bases for termination of parental rights are codified in § 43-292. Section 43-292 provides 11 separate conditions, any one of which can serve as the basis for the termination of parental rights when coupled with evidence that termination is in the best interests of the child. *In re Interest of Sir Messiah T. et al*., 279 Neb. 900, 782 N.W.2d 320 (2010).

In its order terminating Carlos' parental rights, the juvenile court found that the State had proved § 43-292(2) and (9) by clear and convincing evidence. Under § 43-292(2), the court may terminate parental rights when the parent has "substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection."

[13] Carlos argues that Ashton's disabilities were misdiagnosed as abuse. A finding of abuse or neglect may be supported where the record shows (1) that a parent had control over the child during the period when the abuse or neglect occurred and (2) that multiple injuries or other serious impairment of health have occurred which ordinarily would not occur in the absence of abuse or neglect. *In re Interest of Sarah C. & Jason C.*, 10 Neb. App. 184, 626 N.W.2d 637 (2001).

[14-17] The fact that only circumstantial evidence of abuse or neglect exists is not fatal to the State's allegations in this case, because circumstantial evidence may be used in a disposition proceeding in which the burden of proof is "clear and convincing." See *In re Interest of Ethan M.*, 15 Neb. App. 148, 723 N.W.2d 363 (2006). A fact proved by circumstantial evidence is nonetheless a proven fact. *Id.* Circumstantial evidence is not inherently less probative than direct evidence. *Id.* We have previously noted:

> In endorsing the use of circumstantial evidence to establish child neglect or child abuse, it has been stated that "[l]earned commentators have pointed out that in many such cases the only proof available is circumstantial evidence since abusive actions usually occur within the privacy of the home, the child is either intimidated or too young to testify, and the parents tend to protect each other."

In re Interest of McCauley H., 3 Neb. App. 474, 480-81, 529 N.W.2d 77, 82 (1995).

In the present case, we conclude the State proved by clear and convincing evidence that Carlos substantially and continuously or repeatedly neglected and refused to give Ashton necessary parental care and protection. Although Carlos and Jennifer never admitted to abusing or neglecting Ashton, their

explanations for Ashton's injuries were disproved by medical evidence and the circumstantial evidence suggests they did so. Various medical personnel expressed concerns about physical abuse of Skylar in 2004 and of Ashton in 2005 and 2009 through 2011. Ashton's numerous bruises and scrapes caused concern in his teachers at school, so much so that they notified DHHS about his condition.

In addition, three doctors diagnosed Ashton with psychosocial dwarfism, which is a result of serious, sustained neglect to the extent that it caused Ashton to stop growing. This is not something that occurs overnight, but, rather, is a condition that occurs after repeated, long-term neglect. Medical evidence refuted Carlos' explanation for how Ashton sustained the mark on his face in October 2011 when it was found that a fall down carpeted stairs could not have caused his injuries. Even more concerning is that Carlos failed to seek medical treatment for Ashton's injuries in October 2011 and instead chose to hide him from police and DHHS in order to protect himself and Jennifer.

Not only did the circumstantial evidence suggest abuse and neglect, Skylar and Ashton disclosed that they had been abused and neglected. Skylar described the "spanking[s]" that she and Ashton received from Carlos and Jennifer using belts and shoes. She explained that while the rest of the family slept upstairs in beds, Carlos and Jennifer made Ashton sleep in a dog kennel in the basement, alone and in the dark. Ashton was not even allowed to eat at the same table as the rest of the family, and his diet was so severely limited that he tried to eat food that his classmates were throwing in the garbage.

The evidence presented at the termination hearing clearly and convincingly establishes that Ashton was the victim of repeated abuse and neglect. Accordingly, the court properly found that termination of Carlos' parental rights was appropriate under § 43-292(2). Because subsection (2) also allows for termination of parental rights based on continuous neglect of a juvenile's sibling, the court correctly determined that Carlos' parental rights to Skylar, Taylor, and Jordana should be terminated.

Although we find that the State also sufficiently proved grounds for termination under § 43-292(9), we decline to specifically address that subsection. See *In re Interest of Justin H. et al.*, 18 Neb. App. 718, 791 N.W.2d 765 (2010) (if appellate court determines that lower court correctly found that termination of parental rights is appropriate under one of statutory grounds set forth in § 43-292, appellate court need not further address sufficiency of evidence to support termination under any other statutory ground).

6. Aggravated Circumstances

Carlos asserts that the juvenile court erred in finding aggravated circumstances based on Dr. Haney's testimony. Because we find that termination under § 43-292(2) was proper, we need not address the evidence the juvenile court relied on to terminate Carlos' parental rights under § 43-292(9).

7. Best Interests

[18] Carlos argues that the court erred in finding that terminating his parental rights was in the best interests of the children. Section 43-292 requires that parental rights can be terminated only when the court finds that termination is in the child's best interests. See *Kenneth C. v. Lacie H.*, 286 Neb. 799, 839 N.W.2d 305 (2013). It is well established that a juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code. *Kenneth C. v. Lacie H., supra*.

[19,20] As we have noted, termination of parental rights requires proof of two elements: (1) that one or more statutory grounds for termination exist and (2) that termination would be in the best interests of the child. Statutory grounds are based on a parent's past conduct, but the best interests element focuses on the future well-being of the child. *Id*. While proof of the former will often bear on the latter, a court may not simply assume that the existence of a statutory ground for termination necessarily means that termination would be in the best interests of the child. *Id*. Rather, that element must be proved by clear and convincing evidence. *Id*.

The record in this case was replete with evidence as to why the children's future well-being would be best served by terminating Carlos' parental rights. Townsend and Drs. Buehler, Guerue, and Smith all testified about the dangers of placing the children back in the environment from which they were removed. Skylar and Ashton both expressed fear at the thought of being returned to Carlos' and Jennifer's care. Not only did Carlos and Jennifer make excuses for all of Ashton's injuries and never accept any responsibility for his condition, they actively concealed him and never sought medical treatment for injuries that caused concern in everyone else who observed them.

The improvements that Skylar and Ashton made in a brief period of time were remarkable to the caseworker and medical professionals. Thankfully, Taylor and Jordana were too young to be significantly impacted by their parents' actions. The above-described evidence overwhelmingly supports the juvenile court's conclusion that terminating Carlos' parental rights would be in the children's best interests.

8. Expert Witness at State's Expense

Carlos claims that the juvenile court erred in denying his request for an expert witness at the State's expense. He cites no Nebraska authority to support his argument, except the general propositions of law that parents have a fundamental liberty interest in the care and custody of their children. He claims that fundamental fairness to defend against termination of parental rights is so paramount that a parent is disadvantaged by the inability to retain expert assistance. He also notes that other states have enacted statutes or court rules requiring the state to pay for an expert witness for an indigent parent and urges us to "make that fundamentally fair procedure available to Nebraska parents." Brief for appellant at 34.

[21] We are unable to locate any Nebraska authority allowing a parent who hires private counsel to retain an expert witness at the State's expense. Nebraska law provides that a parent in a juvenile court case has the right to appointed counsel if unable to hire a lawyer. Neb. Rev. Stat. § 43-279.01(1)(b)

(Reissue 2008); *In re Interest of N.M. and J.M.*, 240 Neb. 690, 484 N.W.2d 77 (1992). And, in fact, the juvenile court appointed backup counsel for Carlos at the initial hearing because he had not yet formally retained an attorney for representation at that point. However, Carlos thereafter hired counsel at his own expense, which he maintained throughout the juvenile court proceedings. As a result, we cannot find that the juvenile court erred in refusing to require the State to pay for an expert witness on Carlos' behalf.

9. Plain Error

[22] Carlos requests that we review the record for plain error. It is not the duty of a reviewing court to search the record for the purpose of ascertaining whether there is error, and any error must be specifically pointed out. *In re Interest of N.L.B.*, 234 Neb. 280, 450 N.W.2d 676 (1990). However, we have conducted a de novo review of the record as required by our standard of review in juvenile cases and found no plain error.

VI. CONCLUSION

We conclude that the juvenile court did not err in terminating Carlos' parental rights to Skylar, Ashton, Taylor, and Jordana. Therefore, the decision of the juvenile court is affirmed.

Affirmed.

In re Interest of Nathaniel P., a child under 18 years of age.
State of Nebraska, appellee, v. Ashley P., appellant.

846 N.W.2d 681

Filed May 27, 2014. No. A-13-620.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.

3. **Juvenile Courts: Jurisdiction: Appeal and Error.** In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by a tribunal from which the appeal is taken.
5. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
6. **Juvenile Courts: Appeal and Error.** A proceeding before a juvenile court is a special proceeding for appellate purposes.
7. **Juvenile Courts: Parental Rights: Parent and Child: Final Orders.** Whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed.
8. **Constitutional Law: Parental Rights.** Parents have a fundamental liberty interest in directing the education of their children.
9. **Parental Rights: Final Orders: Appeal and Error.** Orders which temporarily suspend a parent's education rights for a brief amount of time do not affect a substantial right and are therefore not appealable.

Appeal from the Separate Juvenile Court of Lancaster County: LINDA S. PORTER, Judge. Appeal dismissed.

Abby Osborn, of Shiffermiller Law Office, P.C., L.L.O., for appellant.

Joe Kelly, Lancaster County Attorney, and Ashley Bohnet for appellee.

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

RIEDMANN, Judge.

INTRODUCTION

Ashley P. appeals the order of the separate juvenile court of Lancaster County suspending her right to make educational decisions for her minor child, Nathaniel P. We conclude that the order appealed from was not a final order because it was temporary in nature and, thus, did not affect a substantial

right of Ashley. Accordingly, we dismiss the appeal for lack of jurisdiction.

BACKGROUND

Ashley is the mother of Nathaniel, who was born in 2006. Nathaniel was removed from Ashley's care in November 2012 due to reports of abuse and neglect. He was placed in the temporary custody of the Department of Health and Human Services (DHHS) at that time.

In February 2013, Nathaniel was adjudicated as a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). The juvenile court found that Nathaniel lacked proper parental care by reason of the fault or habits of his mother, Ashley, in that she had failed to provide a safe and stable residence for Nathaniel since at least September 2012 and had failed to recognize and address Nathaniel's specialized needs resulting from his developmental delays. It ordered temporary legal and physical custody of Nathaniel to remain with DHHS.

Following a dispositional hearing in March 2013, the juvenile court adopted a case plan and ordered Ashley to participate in various rehabilitative services, including a psychological evaluation, a parenting assessment, one-on-one family support services, and individual and family therapy, as arranged by DHHS. It further ordered that Nathaniel shall remain in the temporary custody of DHHS.

A review hearing was held in the juvenile court on June 17, 2013. DHHS presented evidence regarding Ashley's lack of participation in court-ordered rehabilitative services and ongoing concerns about her ability to make educational decisions in Nathaniel's best interests. A report submitted by Nathaniel's guardian ad litem recommended that Ashley's educational rights be suspended. At the conclusion of the hearing, the juvenile court stated on the record that it would "suspend [Ashley's] educational rights, *at least on a temporary basis at this time*," and authorize DHHS to appoint a surrogate to exercise those rights on her behalf. (Emphasis supplied.)

The court issued a written order the following day. It found that reasonable efforts had been made to return legal custody

of Nathaniel to Ashley, but that doing so would be contrary to Nathaniel's welfare. The court found that no progress had been made by Ashley to alleviate the causes of the adjudication and Nathaniel's out-of-home placement and therefore ordered that Nathaniel remain in the temporary custody of DHHS. Regarding Ashley's educational rights, the order states the following: "[Ashley's] educational rights as they [relate] to Nathaniel . . . are suspended by the Court at this time. [DHHS] may appoint the foster parent or any other individual to act as the surrogate for Nathaniel in exercising educational rights." The permanency planning hearing, which had been scheduled for January 6, 2014, was ordered to be advanced to December 16, 2013, to coincide with the next review hearing.

Ashley timely appeals.

ASSIGNMENT OF ERROR

Ashley alleges that the juvenile court erred in suspending her right to make educational decisions for Nathaniel.

STANDARD OF REVIEW

[1,2] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Danaisha W. et al.*, 287 Neb. 27, 840 N.W.2d 533 (2013). A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Id.*

ANALYSIS

Ashley appeals from the order entered by the juvenile court on June 18, 2013, which suspended her right to make educational decisions for Nathaniel. The State argues that this order was not a final, appealable order because it did not affect a substantial right of Ashley and that therefore, we lack jurisdiction to hear this appeal.

[3,4] In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Id.* For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by a tribunal from which the appeal is taken. *Id.*

[5,6] The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009). A proceeding before a juvenile court is a "special proceeding" for appellate purposes. *Id.* Thus, the pertinent inquiry is whether the June 18, 2013, order suspending Ashley's right to make educational decisions for Nathaniel affected a substantial right of Ashley.

[7,8] Whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed. *In re Interest of Danaisha W. et al., supra*. The U.S. Supreme Court has clearly established that parents have a fundamental liberty interest in directing the education of their children. See, *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923). Thus, there can be no doubt that the object of the June 18, 2013, order is of sufficient importance to affect a substantial right.

We must now consider the second prong of the substantial right analysis, which considers the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed. The Nebraska Supreme Court has held that "[o]rders which *temporarily* suspend a parent's custody and visitation rights do not affect a substantial right and are therefore not appealable." *In re Interest of Danaisha W. et al.*, 287 Neb. 27, 33, 840 N.W.2d 533, 537 (2013) (emphasis supplied). See, also, *Steven S. v. Mary S.*, 277 Neb. 124, 131, 760 N.W.2d 28, 34 (2009) (holding that order suspending mother's visitation with her children until further order of court did not affect substantial right of mother because it was

not permanent disposition and mother's relationship would be disturbed for only "brief" amount of time).

[9] While the parental rights at issue in this case relate to a parent's right to make educational decisions, rather than custody or visitation rights, we see no reason to apply a different rule. We note we have previously applied the same rule in analyzing whether a prohibition on parents' constitutional right to free speech regarding their child's medical condition was temporary and therefore not a final order. See *In re Interest of T.T.*, 18 Neb. App. 176, 779 N.W.2d 602 (2009). We therefore conclude that orders which temporarily suspend a parent's education rights for a brief amount of time do not affect a substantial right and are therefore not appealable.

The June 18, 2013, order did not permanently revoke Ashley's right to direct Nathaniel's education; rather, it "suspended" her education rights to Nathaniel "at [that] time." Although the order did not specifically state that the suspension was temporary, such finding can be made from the context of the order. See *In re Interest of Danaisha W. et al., supra*. The use of the word "suspend" denotes its temporary nature. The definition of "suspend" in this context is "[t]o *temporarily* keep [one] from performing a function, occupying an office, holding a job, or exercising a right or privilege." Black's Law Dictionary 1584 (9th ed. 2009) (emphasis supplied). The temporary nature of the order is further established by the court's statement on the record that it was suspending Ashley's educational rights "at least on a temporary basis at this time."

We recognize that the next review hearing in this matter was not scheduled to occur until December 16, 2013, almost 6 months later. However, the court ordered DHHS to submit a status report in 90 days and encouraged the parties to request an earlier review if Ashley's progress necessitated a change in the court's order. Specifically, the court stated on the record:

> I note that a permanency hearing is scheduled for January, which is right about six months and a couple of weeks. I think we'll keep that. But I'm going to have [DHHS] submit to the Court and parties a 90-day letter report just advising the Court and parties as to the status

> of [Ashley's] compliance with the court orders and the court-ordered services. And any party can always request an early review if [Ashley] has decided to participate in the rehabilitative plan and there needs to be a change in the court order. I'm always willing to consider that. But I think under these circumstances, we'll just leave the permanency hearing out there with the status report by [DHHS] in 90 days.

Thus, Ashley had the power to regain her education rights before the next scheduled review hearing by participating in the rehabilitative services provided by DHHS and showing that it would be in Nathaniel's best interests for her to regain them. See *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000) (holding that order suspending mother's visitation was not final order because it did not purport to terminate visitation and mother remained free to regain visitation upon showing that visitation was in best interests of her children).

Because the June 18, 2013, order was not a permanent disposition and was expected to disturb Ashley's education rights for a relatively short period of time, we conclude that a substantial right was not affected.

CONCLUSION

The juvenile court's order temporarily suspending Ashley's educational rights on June 18, 2013, was not a final order affecting a substantial right. Accordingly, we dismiss this appeal for lack of jurisdiction.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V.
JOSEPH J. FIORAMONTI, APPELLANT.

847 N.W.2d 95

Filed June 3, 2014. No. A-13-244.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.

2. **Judgments: Appeal and Error.** To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.
3. **Speedy Trial: Indictments and Informations: Time.** Neb. Rev. Stat. § 29-1207(1) (Cum. Supp. 2012) requires that every person indicted or informed against for any offense shall be brought to trial within 6 months, unless the 6 months are extended by any period to be excluded in computing the time for trial.
4. **Speedy Trial.** Under Neb. Rev. Stat. § 29-1208 (Cum. Supp. 2012), if a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he or she shall be entitled to his or her absolute discharge.
5. ____. To calculate the deadline for trial under the speedy trial statutes, a court must exclude the day the State filed the information, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Cum. Supp. 2012).
6. **Speedy Trial: Motions for Continuance.** The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel shall be excluded from the calculation of the time for trial.
7. **Speedy Trial: Words and Phrases.** The phrase "period of delay" in Neb. Rev. Stat. § 29-1207(4) (Cum. Supp. 2012) refers to a specified period of time in which trial did not commence.
8. **Speedy Trial: Proof.** Under Nebraska's speedy trial act, it is unnecessary to show factually that delay actually prevented commencement of trial, that is, a demonstration of a cause-and-effect relationship between a condemned delay and failure to commence a defendant's trial within 6 months as prescribed by Neb. Rev. Stat. § 29-1207(2) (Cum. Supp. 2012).
9. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.
10. **Speedy Trial: Waiver.** A defendant waives his or her statutory right to a speedy trial when the period of delay resulting from a continuance granted at the request of the defendant or his or her counsel extends the trial date beyond the statutory 6-month period.
11. **Speedy Trial: Waiver: Appeal and Error.** A defendant's motion to discharge based on statutory speedy trial grounds will be deemed to be a waiver of that right under Neb. Rev. Stat. § 29-1207(4)(b) (Cum. Supp. 2012) where (1) the filing of such motion results in the continuance of a timely trial to a date outside the statutory 6-month period, as calculated on the date the motion to discharge was filed, (2) discharge is denied, and (3) that denial is affirmed on appeal.
12. **Constitutional Law: Speedy Trial: Statutes.** The constitutional right to a speedy trial and the statutory right to a speedy trial are expressly distinct from each other.
13. **Appeal and Error.** In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.

Appeal from the District Court for Cheyenne County: DEREK C. WEIMER, Judge. Affirmed.

Stacy C. Nossaman-Petitt, of Nossaman Petitt Law Firm, P.C., for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

RIEDMANN, Judge.

INTRODUCTION

Joseph J. Fioramonti appeals from the decision of the district court for Cheyenne County denying his motion to dismiss on speedy trial grounds. We find that the district court did not err in determining that his motion was premature. Accordingly, we affirm.

BACKGROUND

On September 10, 2012, Fioramonti was charged by information with possession of marijuana with intent to deliver, possession of marijuana weighing more than 1 pound, and possession of a controlled substance without tax stamps. On September 26, Fioramonti filed a motion for statutory discovery and a motion for return of personal property. A hearing on these motions was originally scheduled for October 12, but the district court granted a continuance to October 16 on the State's motion. Although the hearing is not contained in the record, the district court's journal entry indicates that Fioramonti had no objection to the State's request for continuance. On October 16, the district court ruled on Fioramonti's motion for statutory discovery and motion for return of personal property.

The matter was set for trial to begin on January 28, 2013. On December 21, 2012, the State filed a motion to continue the trial from January 28 to January 31, 2013, due to the unavailability of one of the State's witnesses. The State did not identify the unavailable witness or offer any evidence regarding the materiality of such witness. The following exchange took place during the hearing:

> THE COURT: Okay, sounds good. Then let's talk about the motion to continue. Maybe the easiest way to start on that is to ask you if you have any objection to that?
>
> [Defense counsel]: Your honor, we don't have an objection as long as the time runs against the State. We have no objection. I don't think this case has been pending that long so it shouldn't be an issue.
>
> THE COURT: All right, I don't think so either.

The district court granted the State's motion for continuance without indicating whether the delay would run against the speedy trial clock. The matter was then rescheduled for trial to occur on March 20, 21, and 22.

During a pretrial conference on March 6, 2013, Fioramonti made an oral motion to use depositions due to unavailability of witnesses to appear at trial. Fioramonti filed a written motion the following day, and a hearing was held on the matter on March 8, at which time the court orally denied the motion.

On March 18, 2013, Fioramonti filed a motion to dismiss the case on speedy trial grounds, alleging that more than 6 months had elapsed since the date of filing of the information. The trial court entered an order denying the motion to dismiss on March 19. It found that the motion was premature because 23 days were excludable from the speedy trial calculation as follows: (1) 20 days during the pendency of Fioramonti's motion for statutory discovery, motion for return of personal property, and motion to withdraw, which motions were filed on September 26 and disposed of on October 16, and (2) 3 days during the pendency of Fioramonti's motion to use depositions, which motion was made orally on March 6 and denied on March 8. The district court did not address whether the delay resulting from the State's motion to continue the trial was excludable under the speedy trial statutes. It denied Fioramonti's motion to dismiss based on its finding that the speedy trial clock had not yet expired, but it did not make a finding regarding the number of days remaining on the speedy trial clock.

Fioramonti timely appeals.

ASSIGNMENTS OF ERROR

Fioramonti assigns that the district court erred in finding (1) that his discovery motion tolled the speedy trial clock and (2) that less than 6 months had elapsed since the information was filed. Because these assignments of error are related, we will address them together.

STANDARD OF REVIEW

[1,2] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Mortensen*, 19 Neb. App. 220, 809 N.W.2d 793 (2011) (*Mortensen I*). However, to the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below. *Id*.

ANALYSIS

Statutory Right to Speedy Trial.

[3,4] Neb. Rev. Stat. § 29-1207(1) (Cum. Supp. 2012) requires that every person indicted or informed against for any offense shall be brought to trial within 6 months, unless the 6 months are extended by any period to be excluded in computing the time for trial. *Mortensen I*. Under Neb. Rev. Stat. § 29-1208 (Cum. Supp. 2012), if a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he or she shall be entitled to his or her absolute discharge. *Mortensen I*.

[5] The rule in Nebraska is clear that to calculate the deadline for trial under the speedy trial statutes, a court must exclude the day the State filed the information, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4). *State v. Mortensen*, 287 Neb. 158, 841 N.W.2d 393 (2014) (*Mortensen II*). Here, the information in this matter was filed on September 10, 2012. Thus, if there were no time periods excluded under § 29-1207(4), the last day on which the State could have brought Fioramonti to trial would have been March 10, 2013.

Under § 29-1207(4)(a), "the time from filing until final disposition" of the defendant's pretrial motions is excluded from the speedy trial calculation. The excludable period commences on the day immediately after the filing of a defendant's pretrial motion, and final disposition occurs on the date the motion is granted or denied. See *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009).

[6] We agree with the district court's conclusion that 20 days are excludable from the speedy trial calculation due to Fioramonti's pretrial motions that were filed on September 26, 2012, and disposed of on October 16. Although the hearing on these motions was continued from October 11 to October 16 at the State's request, the record reflects that Fioramonti made no objection to the continuance. Pursuant to § 29-1207(4)(b), the period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel shall be excluded from the calculation of the time for trial. *Mortensen I*. Thus, the entire 20 days during which these motions were pending, including the 4 days attributable to the State's request for continuance, were properly excluded. See *State v. Hayes*, 10 Neb. App. 833, 639 N.W.2d 418 (2002) (State's continuance was properly excluded under § 29-1207(4)(a), because it fell within timeframe which was already excluded by pendency of defendant's motion to suppress).

Fioramonti argues that the filing of his motions did not cause a "delay," because they were filed and resolved while he was waiting to be arraigned, and that his arraignment date was unaffected by these motions. Although § 29-1207(4)(a) uses the language "period of delay" when identifying what time is excludable, the Nebraska Supreme Court has held that this language is synonymous with the phrase "period of time." See *State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004).

In *State v. Feldhacker*, 11 Neb. App. 608, 657 N.W.2d 655 (2003), *modified on denial of rehearing* 11 Neb. App. 872, 663 N.W.2d 143, the defendant requested transcripts of various hearings. In calculating the time to be excluded for speedy

trial purposes, the district court excluded the amount of time from the date the praecipe for the transcripts was filed until the transcripts were complete. We reversed, stating that there was no "delay." We said:

> "Here, the record shows nothing but a 'period of time' of 22 days as opposed to a 'period of delay' between praecipe and completion of transcript. There was no showing by the State that this period of time was outside the norm for preparation of such a record or that the court reporters were in any way delayed. . . ."

State v. Feldhacker, 11 Neb. App. at 874, 663 N.W.2d at 145.

[7] On further review, the Supreme Court reversed our decision and stated:

> We agree with the State's argument on further review that there is no meaningful distinction between the phrases "period of time" and "period of delay." Although § 29-1207(4) uses the phrase "period of delay," any such period is necessarily described and quantified in terms of time. Thus, in interpreting and applying the speedy trial act, we have used the words "time" and "delay" interchangeably.

State v. Feldhacker, 267 Neb. at 154-55, 672 N.W.2d at 634.

[8] Likewise, in *State v. Lafler*, 225 Neb. 362, 367, 405 N.W.2d 576, 581 (1987), *abrogated on other grounds, State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990), the Nebraska Supreme Court stated that "[u]nder Nebraska's speedy trial act, it is unnecessary to show factually that delay actually prevented commencement of trial, that is, a demonstration of a cause-and-effect relationship between a condemned delay and failure to commence a defendant's trial within 6 months as prescribed by § 29-1207(2)." In reaching this decision, the court relied upon *United States v. Velasquez*, 802 F.2d 104, 105 (4th Cir. 1986), which stated that "the 'causation' argument has been rejected by every circuit that has considered it."

Given the above, it was not necessary that Fioramonti's pretrial motion actually caused a delay in the trial; rather, § 29-1207(4)(a) requires the exclusion of all time from the filing of a defendant's pretrial motion until final disposition of that motion. Therefore, the district court did not err in

excluding the amount of time attributable to Fioramonti's pretrial motions.

The district court was also correct in excluding the period of time during the pendency of Fioramonti's motion to use depositions; however, we find plain error in the district court's determination that the excludable days were March 6, 7, and 8, 2013. The district court erred in excluding March 6, because the excludable period commences on the day immediately *after* the filing of a defendant's pretrial motion. Because Fioramonti made his motion orally on March 6, the excludable period began on March 7. See *State v. Shipler*, 17 Neb. App. 66, 758 N.W.2d 41 (2008) (indicating that excludable period begins upon oral motion, even if written motion is subsequently filed). The excludable period ended when the district court denied the motion on March 8, and thus, the total excludable period for this motion was only 2 days, rather than 3 days.

Given our finding that these 22 days are excludable under § 29-1207(4), the date upon which the State could have brought Fioramonti to trial was extended from March 10 to April 1, 2013. The date on which a court considers whether a defendant's right to speedy trial has been violated is the date on which a defendant files his or her motion for discharge. *State v. Miller*, 9 Neb. App. 617, 616 N.W.2d 75 (2000). Because Fioramonti's motion to dismiss was filed on March 18, it was premature. Thus, we affirm the district court's order denying Fioramonti's motion to dismiss.

[9] However, our analysis does not end there. The State contends that an additional period of time should be excluded from the speedy trial clock due to Fioramonti's failure to "unconditionally" object to the State's motion to continue. An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *State v. Craig*, 15 Neb. App. 836, 739 N.W.2d 206 (2007).

In light of the Nebraska Supreme Court's recent decision in *Mortensen II*, we determine that regardless of whether this additional time period is excluded, Fioramonti permanently waived his statutory speedy trial right.

[10,11] In *Mortensen II*, the Nebraska Supreme Court analyzed the recent amendment to § 29-1207(4)(b), which became operative on July 15, 2010. Section 29-1207(4)(b) provides a waiver of a defendant's statutory right to a speedy trial "when the period of delay resulting from a continuance granted at the request of the defendant or his or her counsel extends the trial date beyond the statutory six-month period." The Supreme Court construed the statute to include not only delays caused by traditional continuances, but also delays resulting from the filing of motions to discharge. It held as follows:

> We hold that a defendant's motion to discharge based on statutory speedy trial grounds will be deemed to be a waiver of that right under § 29-1207(4)(b) where (1) the filing of such motion results in the continuance of a timely trial to a date outside the statutory 6-month period, as calculated on the date the motion to discharge was filed, (2) discharge is denied, and (3) that denial is affirmed on appeal.

Mortensen II, 287 Neb. at 169-70, 841 N.W.2d at 402-03.

In determining whether Fioramonti permanently waived his right to a speedy trial, we first determine whether the filing of his motion to dismiss resulted in the continuance of a timely trial to a date outside the statutory 6-month period.

As previously discussed, 22 days were excludable from the speedy trial clock due to Fioramonti's pretrial motions, thereby extending the permissible trial date to April 1, 2013. However, the State argues on appeal that the delay attributable to the continuance of trial from January 28 to March 20 should also be excluded from the speedy trial calculation, because Fioramonti did not object to the State's request for such continuance. The record reflects that Fioramonti had no objection to the continuance, "as long as the time runs against the State." The State argues that a conditional objection is not permitted under Nebraska law and that therefore, Fioramonti did not object to the continuance.

We need not decide this issue because, regardless of whether the period attributable to the State's request for continuance is excluded from the speedy trial calculation, Fioramonti's

motion to dismiss continued his trial far beyond the 6-month period. In other words, even if we were to accept the State's argument and exclude the delay attributable to the State's request for continuance, it would add approximately 3 months to the speedy trial clock, extending the date upon which the State could have brought him to trial to July 2013. Fioramonti's motion to dismiss and the subsequent appeal have resulted in a continuance of trial from a date within the statutory 6-month period to a date far beyond July 2013. Thus, pursuant to *Mortensen II*, Fioramonti has permanently waived his statutory right to a speedy trial. The district court is directed to set the matter for trial once it reacquires jurisdiction over the cause.

Constitutional Right to Speedy Trial.

[12,13] Fioramonti also argues in his brief that an accused is constitutionally guaranteed a right to a fair and speedy trial. The constitutional right to a speedy trial and the statutory right to a speedy trial are expressly distinct from each other. See *State v. Kula*, 254 Neb. 962, 579 N.W.2d 541 (1998). However, Fioramonti does not specifically assign as error that he was denied his constitutional right to a speedy trial. In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *State v. Smith*, 286 Neb. 856, 839 N.W.2d 333 (2013). Accordingly, we do not address Fioramonti's constitutional argument.

CONCLUSION

The district court did not err in denying Fioramonti's motion to dismiss on speedy trial grounds. Pursuant to *Mortensen II*, we conclude that Fioramonti has permanently waived his statutory right to a speedy trial. The district court is directed to set a date to bring Fioramonti to trial once it reacquires jurisdiction over the cause.

AFFIRMED.

State of Nebraska, appellee, v. Juan Antonio Hernandez, appellant.

847 N.W.2d 111

Filed June 3, 2014. No. A-13-687.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
3. **Postconviction: Appeal and Error.** On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.
4. **Effectiveness of Counsel: Appeal and Error.** Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that an appellate court reviews independently of the lower court's decision.
5. **Effectiveness of Counsel: Plea Bargains.** The right to effective assistance of counsel extends to the negotiation of a plea bargain.
6. ____: ____. Claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
7. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
8. ____: ____. To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.
9. ____: ____. To show prejudice, the defendant must demonstrate reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
10. **Effectiveness of Counsel: Plea Bargains.** The prejudice inquiry in cases involving plea agreements focuses upon whether counsel's ineffective performance affected the outcome of the plea process.
11. **Effectiveness of Counsel: Plea Bargains: Proof.** To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability that they would have accepted the earlier plea offer had they been afforded effective assistance of counsel.
12. **Postconviction: Evidence: Witnesses.** In an evidentiary hearing for postconviction relief, the postconviction trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and the weight to be given a witness' testimony.

Appeal from the District Court for Dakota County: Paul J. Vaughan, Judge. Affirmed.

Stuart B. Mills for appellant.

Jon Bruning, Attorney General, and Melissa R. Vincent for appellee.

IRWIN, RIEDMANN, and BISHOP, Judges.

RIEDMANN, Judge.

INTRODUCTION

Juan Antonio Hernandez appeals from the order of the district court for Dakota County, which denied his motion for postconviction relief after an evidentiary hearing limited to the issue of whether trial counsel was ineffective during the plea negotiation process. Finding no error in the district court's decision, we affirm.

BACKGROUND

Hernandez was originally charged in January 2010 with two counts of first degree sexual assault of a child, both Class IB felonies, and two counts of child abuse, one a Class III felony and the other a Class IIIA felony. The State also alleged that Hernandez was a habitual criminal. Pursuant to a plea agreement, Hernandez pled guilty to one count of first degree sexual assault of a child, a Class II felony, and one count of child abuse, a Class IIIA felony. In exchange, the State agreed to dismiss the other two charges, forgo habitual criminal enhancement, and remain silent at sentencing. Hernandez was sentenced to 16 to 17 years' imprisonment for sexual assault and 18 to 20 months' imprisonment for child abuse, to be served consecutively.

On August 6, 2012, Hernandez filed a pro se motion for postconviction relief, alleging that (1) trial counsel was ineffective during the plea bargaining process, (2) trial counsel was ineffective for failing to consult with him about filing a direct appeal, (3) the State engaged in prosecutorial misconduct by failing to honor the plea agreement, and (4) the trial court abused its discretion by allowing the State to amend the information.

The district court issued an order on October 23, 2012, granting an evidentiary hearing on the limited issue of trial

counsel's alleged ineffectiveness in the plea negotiation process. The court dismissed the remaining allegations without an evidentiary hearing, and Hernandez did not appeal from that order. Counsel was appointed to represent Hernandez for the remainder of the postconviction proceedings. During the evidentiary hearing, Hernandez and his trial counsel testified regarding various plea negotiations that had occurred, as summarized below:

On March 5, 2010, trial counsel informed Hernandez of the State's plea offer under which Hernandez could plead guilty or no contest to one count of second degree sexual assault, a Class III felony, and, in exchange, the State would forgo habitual criminal enhancement and remain silent at sentencing. Trial counsel testified that he discussed the offer with Hernandez and encouraged him to accept it. Trial counsel told Hernandez that there was really no reason not to accept it, although the State did have some problems with its initial complaint. Trial counsel testified that Hernandez decided to reject the offer because he wanted to force the State to proceed with its problematic complaint.

Hernandez, on the other hand, testified that he rejected the March 5, 2010, plea offer because there had been no allegation by the alleged victim concerning the charges contained in the information and because trial counsel led Hernandez to believe that absent such an allegation, the State would be forced to dismiss the charges altogether. When asked whether he recalled advising Hernandez that the charges would be dismissed, trial counsel testified, "I don't believe I would have said that. I just don't believe it because I don't believe it would have been true." Trial counsel further explained that he had been practicing law for several years and could count on one hand the number of times the State had simply dismissed charges against a defendant.

Hernandez testified that after rejecting the March 5, 2010, offer, he planned to proceed to trial, with the expectation that the charges would be dropped. In mid-April, however, Hernandez discovered that the alleged victim was cooperating with the prosecution and had made a statement corroborating

another witness' allegations. At that point, Hernandez told trial counsel to accept the plea offer that he had initially rejected on March 5. When trial counsel advised him that the March 5 plea offer was no longer available, Hernandez instructed trial counsel to secure a plea agreement that would enable him to receive probation.

Trial counsel suggested making an offer to the State to plead guilty to one Class II felony and one Class IIIA felony, with the State remaining silent at sentencing so that trial counsel could argue for probation. Hernandez agreed, and trial counsel communicated that offer to the State. The State countered by offering an agreement that would allow Hernandez to plead guilty to one Class III felony and one Class IIIA felony, but would *not* require the State to remain silent at sentencing. For purposes of discussing these plea negotiations, we will refer to Hernandez' mid-April offer as "option A" and the State's counteroffer as "option B."

Trial counsel testified that he engaged in a long discussion with Hernandez about the pros and cons of the two options. Trial counsel advised Hernandez that option B would minimize his risk, since it involved a Class III felony rather than a Class II felony, but that it was not the best option for attempting to obtain probation. According to trial counsel, Hernandez was hoping for a short period of upfront jail time followed by an extended period of probation so that he could get out of jail as soon as possible to be with his family. Trial counsel advised Hernandez that option A was his best chance at receiving probation because it required the State to remain silent at sentencing, whereas option B would result in the State's arguing against probation and requesting prison terms on both counts. Trial counsel further advised Hernandez that probation was more likely under option A because the Class II felony would provide the sentencing judge with greater leverage over Hernandez if he were to violate the terms of his probation. Trial counsel testified that Hernandez discussed the options with his family and then decided to accept option A in hopes of obtaining probation. Trial counsel communicated

Hernandez' acceptance of option A to the State and scheduled a plea hearing.

According to Hernandez, he met with trial counsel just before his plea hearing on May 3, 2010, and discovered that trial counsel had conveyed the wrong plea deal to the State. Hernandez claims he told trial counsel to accept option B so that he could avoid the Class II felony. Hernandez testified that trial counsel advised the district court that he had made a mistake regarding the plea agreement and requested a continuance so he could try to correct it. Trial counsel denied having made a mistake, however, and maintained that Hernandez had instructed him to accept option A.

Thereafter, trial counsel approached the State and attempted to change the agreement to option B, but was advised that option B was no longer available because the State had recently acquired DNA evidence showing that Hernandez was the father of the victim's child. Faced with the choice of accepting option A or proceeding to trial on all of the charges in the amended information, Hernandez decided to accept option A and was sentenced accordingly.

At the close of the evidentiary hearing, the district court took the matter under advisement. It issued a written order on July 12, 2013, denying postconviction relief. In overruling Hernandez' motion, the district court stated:

> The essence of the allegation of ineffective assistance of counsel comes down to a dispute regarding the factual allegation of what plea offers were made and when and what advice was given by [trial counsel]. The Court finds that the testimony by [trial counsel] was more credible than the testimony of [Hernandez] and appeared to be more in line with the normal process of the give-and-take in the plea negotiation process. [Hernandez'] recollection of the offers that were made and the reasons for his rejection were [sic] unclear, while [trial counsel's] testimony appeared to be credible.
>
> The Court finds that [Hernandez] has failed to meet his burden of proof to establish that he received ineffective assistance of counsel in the plea negotiation process. All plea offers that were made were conveyed accurately

> to [Hernandez]. [Hernandez] made strategic decisions whether or not to accept plea offers. [Hernandez] ultimately accepted an offer where the State would remain silent. This was the objective he had advised [trial counsel] to pursue; even in his own testimony at the postconviction relief hearing he indicated that he wished to seek probation. Ultimately, [Hernandez] entered the plea agreement that was provided through the negotiation process. It appears that he is simply unhappy at this time that he did not receive probation rather than a substantial prison sentence.

Hernandez timely appeals.

ASSIGNMENT OF ERROR

Hernandez alleges that the district court erred in finding that he received effective assistance of counsel during the plea bargaining process.

STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Keyser*, 286 Neb. 176, 835 N.W.2d 650 (2013).

[2-4] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012). On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous. *Id*. Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that we review independently of the lower court's decision. *Id*.

ANALYSIS

[5,6] Hernandez contends on appeal that he received ineffective assistance of counsel during the plea negotiation process. The U.S. Supreme Court has clearly established that the right to effective assistance of counsel extends to the negotiation of a plea bargain. See *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012). Claims of

ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Missouri v. Frye, supra*.

[7-9] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Vanderpool*, 286 Neb. 111, 835 N.W.2d 52 (2013). To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. *Id*. To show prejudice, the defendant must demonstrate reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Id*.

[10,11] The prejudice inquiry in cases involving plea agreements focuses upon whether counsel's ineffective performance affected the outcome of the plea process. *State v. Lopez*, 274 Neb. 756, 743 N.W.2d 351 (2008). To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. *Missouri v. Frye, supra*.

On appeal, Hernandez' argument appears to focus primarily on trial counsel's advice regarding the March 5, 2010, plea offer. Hernandez argues that he rejected the March 5 plea offer based on trial counsel's erroneous advice that the charges would be dismissed. Hernandez asserts that but for trial counsel's deficient performance, he would have accepted the March 5 plea offer, which was more advantageous than the plea agreement he ultimately accepted.

Whether trial counsel's advice was deficient in this regard turns on a factual determination as to the content of the advice given. Hernandez testified that he rejected the March 5, 2010, plea offer because there had been no allegation by the victim concerning the charges contained in the information and trial counsel led Hernandez to believe that absent

such an allegation, the charges would be dismissed. Trial counsel acknowledged that there were some problems with the State's initial complaint, but he did not believe he advised Hernandez that the charges would be dismissed, because, based upon trial counsel's experience, he "[did not] believe it would have been true." Trial counsel testified that he actually encouraged Hernandez to accept the March 5 plea offer but that despite his advice, Hernandez decided to reject the offer in hopes that the State would be stuck with its problematic complaint.

[12] In an evidentiary hearing for postconviction relief, the postconviction trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and the weight to be given a witness' testimony. *State v. Benzel*, 269 Neb. 1, 689 N.W.2d 852 (2004). Here, after considering the testimony of Hernandez and trial counsel, the district court found that trial counsel's testimony was more credible. Based on the evidence presented at the evidentiary hearing, we cannot say that this finding was clearly erroneous. Thus, we conclude that trial counsel's performance was not deficient with respect to the March 5, 2010, plea offer.

To the extent that Hernandez is arguing that trial counsel was ineffective for accepting the wrong plea deal, we similarly find no merit to this argument. There was a conflict in the testimony at the evidentiary hearing regarding which plea agreement Hernandez instructed trial counsel to accept. Although Hernandez testified that he told trial counsel to accept option B to avoid the Class II felony, trial counsel testified that Hernandez told him to accept option A in hopes of obtaining probation. The district court considered the conflicting testimony and found that trial counsel's testimony was more credible. This finding is not clearly erroneous. In fact, it is consistent with Hernandez' own testimony that he instructed trial counsel to obtain a plea deal that would allow him to receive probation. We agree with the district court's conclusions that trial counsel accurately conveyed all plea offers to Hernandez and that Hernandez instructed trial counsel to accept option A. Thus, trial counsel was not deficient for acting in accordance with Hernandez' decision.

Finally, Hernandez argues that his pleas were not voluntary and intelligent, due to trial counsel's ineffectiveness during the plea bargaining process. Because we have found that trial counsel was not ineffective in the plea bargaining process, this argument is also without merit.

CONCLUSION

The district court did not err in finding that Hernandez was not deprived of his right to effective assistance of counsel in the plea bargaining process. Thus, we affirm the denial of Hernandez' motion for postconviction relief.

AFFIRMED.

IN RE INTEREST OF GABRIELLA H., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. RICARDO R., APPELLANT.

847 N.W.2d 103

Filed June 3, 2014. No. A-13-900.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
2. **Evidence: Appeal and Error.** When the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other.
3. **Parental Rights: Proof.** For a juvenile court to terminate parental rights under Neb. Rev. Stat. § 43-292 (Cum. Supp. 2012), it must find clear and convincing evidence that one or more of the statutory grounds listed in that section have been satisfied and that termination is in the child's best interests.
4. **Evidence: Words and Phrases.** Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved.
5. **Parental Rights: Time: Abandonment.** Neb Rev. Stat. § 43-292(1) (Cum. Supp. 2012) provides grounds for termination of parental rights when a parent has abandoned the juvenile for 6 months or more immediately prior to the filing of the petition for termination.
6. ____: ____: ____. The crucial time period for purposes of determining whether a parent has intentionally abandoned a child under Neb. Rev. Stat. § 43-292(1) (Cum. Supp. 2012) is determined by counting back 6 months from the date the petition was filed.

7. **Parental Rights: Abandonment: Words and Phrases.** For purposes of Neb. Rev. Stat. § 43-292(1) (Cum. Supp. 2012), "abandonment" is a parent's intentional withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child.
8. ____: ____: ____. "Just cause or excuse" for a parent's failure to maintain a relationship with a minor child has generally been confined to circumstances that are, at least in part, beyond the control of the parent.
9. **Parental Rights: Abandonment: Proof.** To prove abandonment in determining whether parental rights should be terminated, the evidence must clearly and convincingly show that the parent has acted toward the child in a manner evidencing a settled purpose to be rid of all parental obligations and to forgo all parental rights, together with a complete repudiation of parenthood and an abandonment of parental rights and responsibilities.
10. **Parental Rights: Abandonment: Intent: Proof.** Whether a parent has abandoned a child within the meaning of Neb. Rev. Stat. § 43-292(1) (Cum. Supp. 2012) is a question of fact and depends upon parental intent, which may be determined by circumstantial evidence.
11. **Parental Rights: Abandonment: Evidence: Intent.** A finding of abandonment must be based on evidence of the parent's intent to withhold parental care and maintenance, not on the parent's actual failure to provide such care and maintenance as a result of impediments which are not attributable to the parent.
12. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not necessary to adjudicate the case and controversy before it.

Appeal from the County Court for Colfax County: PATRICK R. MCDERMOTT, Judge. Reversed and remanded for further proceedings.

Jerod L. Trouba, of Knoepfle & Trouba, P.C., for appellant.

Leslie J. Buhl, Deputy Colfax County Attorney, for appellee.

Jacqueline M. Tessendorf, of Tessendorf & Tessendorf, P.C., guardian ad litem.

IRWIN, RIEDMANN, and BISHOP, Judges.

RIEDMANN, Judge.

INTRODUCTION

Ricardo R. appeals the order of the Colfax County Court, sitting as a juvenile court, terminating his parental rights to his minor child, Gabriella H. Ricardo asserts the juvenile court erred in finding that he intentionally abandoned Gabriella under Neb. Rev. Stat. § 43-292(1) (Cum. Supp. 2012), that

reasonable efforts at reunification were not required pursuant to Neb. Rev. Stat. § 43-283.01(4)(a) (Cum. Supp. 2012), and that termination was in Gabriella's best interests. Upon our de novo review of the record, we find that the juvenile court erred in terminating Ricardo's parental rights, because the State failed to adduce clear and convincing evidence of abandonment under § 43-292(1). Thus, we reverse, and remand for further proceedings.

BACKGROUND

Gabriella, born in November 2011, is the biological child of Dorothy G. Gabriella was immediately removed from Dorothy's care due to Dorothy's substance abuse and placed in the temporary custody of the Department of Health and Human Services (DHHS).

On November 28, 2011, the State filed a petition seeking to adjudicate Gabriella under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008), because she lacked proper parental care by reason of the fault or habits of her mother, Dorothy. The petition listed the father of Gabriella as "[u]nknown." An initial hearing on the petition was held on December 6, during which Dorothy advised the court that Ricardo was a potential father of Gabriella. The court ordered DHHS to determine the paternity of the child. Gabriella's caseworker attempted to contact Ricardo to conduct genetic testing, but was unable to reach him.

On December 12, 2011, the State filed an amended petition for adjudication, which again listed the father of Gabriella as "[u]nknown." An adjudication hearing was held on December 13 during which Dorothy admitted the allegations in the amended petition. The court accepted Dorothy's admission and found that Gabriella was a child within § 43-247(3)(a). DHHS continued its attempts to contact Ricardo on a monthly basis from December 2011 until September 2012, via telephone numbers provided by Dorothy. The caseworker left messages for Ricardo, but he never returned her calls. However, Ricardo does not speak English, and there is no evidence that he received the caseworker's messages.

In July 2012, Ricardo was arrested on an unrelated criminal charge, and he remained incarcerated awaiting trial throughout the pendency of this case. The State filed a motion for paternity testing, upon which a DNA sample was collected from Ricardo. The DNA test results were issued on November 12, establishing a 99.997-percent probability that Ricardo was Gabriella's biological father. On November 20, the court recognized Ricardo as Gabriella's biological father and appointed counsel to represent him.

Dorothy voluntarily relinquished her parental rights to Gabriella on January 31, 2013, and an order was entered in April terminating her parental rights. On May 3, the State filed a supplemental petition for adjudication of Gabriella and termination of Ricardo's parental rights. The supplemental petition alleged that Ricardo had abandoned Gabriella for 6 months or more immediately prior to the filing of the petition and that termination of Ricardo's parental rights was in Gabriella's best interests. The State filed an amended supplemental petition on June 18 which added allegations against Gabriella's legal father (Dorothy's husband) but made no changes to the allegations against Ricardo. Ricardo appeared at the hearing on the amended supplemental petition and denied the allegations. A termination hearing was held on July 30 during which evidence was adduced regarding Ricardo's alleged abandonment of Gabriella.

Dorothy testified at the termination hearing on behalf of the State. Dorothy discovered she was pregnant with Gabriella in late February 2011. Although she was married to another man at the time, they were separated and she was in a relationship with Ricardo, as well as a third man. Dorothy told Ricardo that she was pregnant and that she thought he was the child's father, although she could not be 100-percent sure. She told Ricardo that there was one other man that could also be the child's father. According to Dorothy, Ricardo said he would "be there."

Ricardo was not present during Gabriella's birth and is not listed as the father on her birth certificate. However, he was approved to be present during Dorothy's supervised visits with

Gabriella, because Dorothy had identified him as a potential father for Gabriella. Ricardo attended four of Dorothy's visits with Gabriella in late 2011 and early 2012. Dorothy referred to Ricardo as Gabriella's "dad" during the visits. Ricardo did not attend any further visits after February 2, 2012, and never requested his own visitation with Gabriella.

Once paternity was established by DNA testing in November 2012, the caseworker sent a letter to Ricardo at the detention center where he was incarcerated. The letter informed Ricardo that he was Gabriella's father and that he could contact the caseworker regarding Gabriella. The caseworker did not receive any contact from Ricardo or his attorney after sending notification of his paternity. In fact, Ricardo has never made contact with DHHS, the caseworker, or the foster parents to inquire about Gabriella at any time during this case; nor has he ever provided monetary support, cards, or gifts for Gabriella.

The caseworker testified that she did not believe permanency for Gabriella could be achieved with Ricardo, because he is incarcerated for an undetermined amount of time and Gabriella does not know him. Gabriella has been with her foster parents since she was 3 days old, and they are willing and able to provide permanency for her if Ricardo's parental rights are terminated. Gabriella is doing very well in the care of her foster parents, and they are the only family she has ever known. The caseworker testified that Gabriella is in need of permanency and that termination of Ricardo's parental rights would be in Gabriella's best interests.

The court found clear and convincing evidence that Ricardo had abandoned Gabriella for 6 months or more immediately prior to the filing of the petition to terminate and that reasonable efforts at reunification were not required due to Ricardo's abandonment of Gabriella. The court further found that termination of Ricardo's parental rights was in Gabriella's best interests. Ricardo timely appeals.

ASSIGNMENTS OF ERROR

Ricardo asserts the juvenile court erred in finding that (1) Ricardo intentionally abandoned Gabriella for 6 months or

more immediately prior to the filing of the petition to terminate his parental rights, (2) reasonable efforts at reunification were not required under § 43-283.01(4)(a) due to Ricardo's abandonment of Gabriella, and (3) termination of Ricardo's parental rights was in Gabriella's best interests.

STANDARD OF REVIEW

[1,2] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012). However, when the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other. *Id.*

ANALYSIS

Ricardo first asserts that the juvenile court erred in finding that he intentionally abandoned Gabriella for 6 months or more immediately prior to the filing of the petition to terminate his parental rights. We agree.

[3,4] For a juvenile court to terminate parental rights under § 43-292, it must find that one or more of the statutory grounds listed in that section have been satisfied and that termination is in the child's best interests. *In re Interest of Jacob H. et al.*, 20 Neb. App. 680, 831 N.W.2d 347 (2013). The State must prove these facts by clear and convincing evidence. *Id.* Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved. *Id.*

Calculating Period of Abandonment.

[5,6] Section 43-292(1) provides grounds for termination of parental rights when a parent has "abandoned the juvenile for six months or more immediately prior to the filing of the petition." The crucial time period for purposes of determining whether a parent has intentionally abandoned a child under § 43-292(1) is determined by counting back 6 months from the

date the petition was filed. *In re Interest of Dylan Z.*, 13 Neb. App. 586, 697 N.W.2d 707 (2005).

The State asserts that the crucial time period is the 6 months prior to the filing of the amended supplemental petition on June 18, 2013. We conclude, however, that the crucial time period is the 6 months prior to the filing of the supplemental petition on May 3, wherein the State first alleged that Ricardo had abandoned Gabriella for 6 months or more. The amended supplemental petition filed on June 18 merely added allegations against Gabriella's legal father and did not alter the allegations against Ricardo. See *id*. (utilizing 6-month period for abandonment from filing date of supplemental petition alleging abandonment, rather than filing date of amended supplemental petition which alleged additional statutory ground for termination but did not change abandonment allegation). Thus, the crucial time period for determining whether Ricardo has intentionally abandoned Gabriella is November 3, 2012, to May 3, 2013.

Defining Abandonment.

[7,8] For purposes of § 43-292(1), "abandonment" is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child. *In re Interest of Chance J.*, 279 Neb. 81, 776 N.W.2d 519 (2009). "'[J]ust cause or excuse'" for a parent's failure to maintain a relationship with a minor child has generally been confined to circumstances that are, at least in part, beyond the control of the parent. *Id*. at 91, 776 N.W.2d at 527.

[9,10] To prove abandonment, the evidence must clearly and convincingly show that the parent has acted toward the child in a manner evidencing a settled purpose to be rid of all parental obligations and to forgo all parental rights, together with a complete repudiation of parenthood and an abandonment of parental rights and responsibilities. *Id*. Whether a parent has abandoned a child within the meaning of § 43-292(1) is a question of fact and depends upon parental intent, which

may be determined by circumstantial evidence. *In re Interest of Chance J., supra*.

[11] The record before us clearly shows that Ricardo had no contact with Gabriella during the relevant 6-month time period from November 3, 2012, to May 3, 2013. There is no dispute that Ricardo has never provided monetary support for Gabriella, nor ever sent any cards, gifts, or letters to Gabriella. In other words, the evidence shows a complete abandonment of all parental rights and responsibilities. To sustain a finding of abandonment, however, such a finding must be based on evidence of the parent's *intent* to withhold parental care and maintenance, not on the parent's actual failure to provide such care and maintenance as a result of impediments which are not attributable to the parent. See *In re Interest of Dylan Z., supra*. Ricardo argues that he did not have the requisite intent to abandon Gabriella, due to his lack of knowledge that he was Gabriella's father.

We have previously held that in an out-of-wedlock situation, where a father's lack of contact with his child is directly attributable to his lack of knowledge that he is the child's father, the evidence is insufficient to establish that the abandonment was intentional. *In re Interest of Dylan Z.*, 13 Neb. App. 586, 697 N.W.2d 707 (2005). But see *In re Interest of Chance J., supra* (holding that husband's belief that he was not father of his wife's child, based upon child's physical appearance and husband's suspicion of wife's infidelity, was *not* just cause or excuse for abandoning child that was born into wedlock).

Here, although Ricardo knew there was a possibility that he was Gabriella's father, the DNA test results did not confirm this until November 12, 2012, which was during the relevant 6-month time period. The evidence shows that Dorothy was married to another man at the time of Gabriella's conception and birth and that Dorothy had three prior children with two different men, all of which facts Ricardo knew at the time. Although Dorothy told Ricardo that she thought he was the child's father, she told him she could not be 100-percent sure,

as she was involved in a relationship with both Ricardo and another man at the time Gabriella was conceived.

Ricardo was not present during Gabriella's birth, and he is not listed as the father on Gabriella's birth certificate. While he did attend four of Dorothy's supervised visits with Gabriella shortly after her birth, that alone is not enough to clearly and convincingly establish that Ricardo knew or believed that he was Gabriella's father. Absent such knowledge or belief, Ricardo could not possess the requisite intent to abandon Gabriella under § 43-292(1). Thus, we conclude that the evidence is insufficient as a matter of law to establish that Ricardo intentionally abandoned Gabriella under § 43-292(1), because he did not know he was Gabriella's father until he was notified of the DNA test results in late November 2012, which was during the 6-month period immediately prior to the filing of the supplemental petition.

Furthermore, we find that even if Ricardo had known that he was Gabriella's father for the entire 6-month period, his incarceration was a circumstance out of his control which impeded his ability to parent Gabriella and, thus, precludes a finding of intentional abandonment. The Nebraska Supreme Court has acknowledged that while the fact of incarceration is involuntary, the illegal activities leading to incarceration are voluntary. *In re Interest of R.T. and R.T.*, 233 Neb. 483, 446 N.W.2d 12 (1989). See, also, *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992). However, in those cases, the parent was incarcerated following a conviction. Ricardo was incarcerated awaiting trial. Under our justice system, he was presumed innocent at that time and had not been found guilty of any crime.

The State argues that even after being notified that he was Gabriella's biological father, Ricardo did nothing to indicate that he had any intention to parent Gabriella, thereby confirming his intent to abandon her. However, Ricardo's incarceration began on July 30, 2012, well before his paternity was established, and he remained incarcerated throughout the pendency of this case. The caseworker testified that she had no personal contact with him during the pendency of the case. The record does not disclose any showing by DHHS that it

had given Ricardo any information which would have allowed him to contact Gabriella. Although the caseworker testified she "attempted to send" Ricardo a letter after she received the paternity test results, the letter is not in evidence, and she testified it advised him that he was Gabriella's biological father and that "if he wanted to make contact with [the caseworker] he should." The monthly calls that she made to telephone numbers provided by Dorothy were made before the 6-month period prior to the filing of the supplemental petition and prior to the establishment of paternity.

Furthermore, there is nothing in the record to show what Ricardo could have done to parent Gabriella while he was incarcerated. While it is true that Ricardo never requested visitation with Gabriella, the State presented no evidence that visitation would have been permitted at the detention center where Ricardo was incarcerated. See *In re Interest of Josiah T.*, 17 Neb. App. 919, 773 N.W.2d 161 (2009). Aside from visitation, it would have been very difficult, if not impossible, for Ricardo to develop a relationship with Gabriella while he was incarcerated, given that she was too young to understand or participate in cards, letters, or telephone calls. There is no evidence that Ricardo had the means to offer any monetary support for Gabriella while he was incarcerated. Based upon this record, we cannot find that Ricardo demonstrated an intention to withhold parental care and maintenance from Gabriella, particularly when there is no evidence that his incarceration was attributable to any wrongdoing on his part.

We are mindful that "'"[i]ncarceration . . . does not insulate an inmate from the termination of . . . parental rights if the record contains the clear and convincing evidence that would support the termination of the rights of any other parent."'" *Id*. at 925, 773 N.W.2d at 166. Here, however, the record lacks clear and convincing evidence of Ricardo's intent to abandon Gabriella and, thus, does not support termination. Accordingly, we conclude that the juvenile court erred in terminating Ricardo's parental rights under § 43-292(1) and in finding that reasonable efforts at reunification were not required pursuant to § 43-283.01(4)(a).

[12] Because we have found that the juvenile court erred in terminating Ricardo's parental rights, we do not address whether termination was in Gabriella's best interests. An appellate court is not obligated to engage in an analysis which is not necessary to adjudicate the case and controversy before it. *In re Interest of Josiah T., supra*.

CONCLUSION

Upon our de novo review of the record, we conclude that the juvenile court erred in terminating Ricardo's parental rights to Gabriella because the State failed to adduce clear and convincing evidence of abandonment under § 43-292(1). Accordingly, we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JOSE AGUILAR, APPELLEE, V.
RACHEL SCHULTE, APPELLANT.

848 N.W.2d 644

Filed June 10, 2014. No. A-13-541.

1. **Child Custody.** The requirement in Neb. Rev. Stat. § 42-364 (Cum. Supp. 2012) that a court make a specific finding of best interests before awarding joint custody of a child is inapplicable when the parents were never married.
2. **Child Custody: Due Process.** The due process jurisprudence regarding joint custody under Neb. Rev. Stat. § 42-364 (Cum. Supp. 2012) is incorporated into parenting plan orders entered under the Parenting Act found in chapter 43 of the Nebraska Revised Statutes.
3. **Child Custody.** When a court has determined that joint physical custody is, or may be, in a child's best interests but neither party has requested joint custody, the court must give the parties an opportunity to present evidence on the issue before imposing joint custody.
4. **Child Custody: Due Process: Notice.** Without notice that joint custody will be considered, parties do not receive adequate due process in preparing for the custody hearing.
5. **Paternity: Parental Rights: Child Custody: Notice.** In a paternity case subject to the Parenting Act where neither party has requested joint custody, if the court determines that joint physical custody is, or may be, in the best interests of the child, the court shall give the parties notice and an opportunity to be heard by holding an evidentiary hearing on the issue of joint custody.

6. **Child Custody.** The factual inquiry necessary to impose joint physical custody is substantially different from that required for making a sole custody determination.
7. **Child Custody: Evidence.** The focus of evidence necessary for a determination of joint custody focuses on the parents' ability to communicate with each other and resolve issues together.
8. **Visitation.** A court determines the nature and extent of visitation rights on a case-by-case basis and may consider many factors and circumstances in each individual case, such as the age and health of the child, the character of the noncustodial parent, the place where visitation rights will be exercised, the frequency and duration of visits, the emotional relationship between the visiting parent and the child, the likely effect of visitation on the child, the availability of the child for visitation, the likelihood of disrupting an established lifestyle otherwise beneficial to the child, and, when appropriate, the wishes of the child.
9. ____. Although limits on visitation are an extreme measure, they may be warranted where they are in the best interests of the children.
10. ____. Allowing a child time with grandparents is in the child's best interests.
11. **Courts.** A court does not err in requiring one party to execute documents to comply with the court's order.
12. **Judgments: Final Orders.** Conditional judgments are ineffective and void.
13. **Pretrial Procedure.** Generally, the effect of a pretrial order is to control the subsequent course of the action.
14. ____. Litigants must adhere to the spirit of the pretrial procedure and are bound by a pretrial order to which no exception has been taken.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Affirmed.

James Walter Crampton for appellant.

Catherine Mahern, Nathaniel Romano, and Kathleen Kennedy, Jayne Wagner, and Ajla Aljic, Senior Certified Law Students, of Milton R. Abrahams Legal Clinic, for appellee.

IRWIN, RIEDMANN, and BISHOP, Judges.

RIEDMANN, Judge.

INTRODUCTION

Rachel Schulte appeals from the order of the Douglas County District Court awarding her and Jose Aguilar joint physical custody of their minor child and allowing Aguilar to travel out of the country with the child. We find no abuse of discretion by the district court and therefore affirm the court's order.

BACKGROUND

Aguilar and Schulte are the biological parents of a son, born in 2009. The parties never married, but Aguilar's paternity of the child was established by the court in December 2009, and he was ordered to pay child support. On March 24, 2010, Aguilar filed a complaint in the district court requesting joint custody of the minor child and reasonable parenting time. The district court entered a temporary order granting the parties joint legal custody and awarding primary physical custody of the child to Schulte, subject to Aguilar's parenting time.

Through mediation, the parties were able to agree on a partial parenting plan, including joint legal custody and holiday parenting time, but they were unable to agree on physical custody, weekday parenting time, or vacation time. Trial was held on these issues on March 6 and 7, 2013. Thereafter, the district court entered an order finding that Aguilar and Schulte were both fit and proper parents and awarding the parties joint legal and physical custody of the minor child. The partial parenting plan agreed upon by the parties was adopted by the court. The court also allowed Aguilar to travel with the minor child to Mexico during his parenting time, and it ordered Schulte to cooperate in obtaining a passport for the child and executing any documentation necessary for the child to travel internationally. Schulte timely appeals to this court.

ASSIGNMENTS OF ERROR

Schulte assigns that the district court erred in (1) awarding joint physical custody of the minor child, (2) ordering Schulte to cooperate in obtaining the child's passport and executing the necessary documents for the child to leave and reenter the United States, and (3) sustaining Aguilar's objection to a certified copy of an arrest warrant for his arrest.

STANDARD OF REVIEW

Child custody determinations, and parenting time determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an

abuse of discretion. *Hill v. Hill*, 20 Neb. App. 528, 827 N.W.2d 304 (2013).

ANALYSIS

Joint Physical Custody.

Schulte argues that the district court erred in awarding joint physical custody for two reasons. First, she claims the court erroneously did not make a specific finding that joint physical custody was in the child's best interests as required by Neb. Rev. Stat. § 42-364 (Cum. Supp. 2012). Additionally, she asserts that the court failed to satisfy procedural due process because neither party requested joint physical custody and the court failed to hold an evidentiary hearing on the issue. In addressing Schulte's claims, we look to *State ex rel. Amanda M. v. Justin T.*, 279 Neb. 273, 777 N.W.2d 565 (2010), for guidance.

[1] Amanda M. and Justin T. were the parents of a minor child, and pursuant to a paternity action, the district court awarded the parties joint legal and physical custody of the child. On appeal, the Nebraska Supreme Court first determined that because the parties had never married and the issues before the trial court were custody and parenting functions, the action was governed by the Parenting Act found in chapter 43 of the Nebraska Revised Statutes, as opposed to the dissolution of marriage statutes contained in chapter 42. Thus, the requirement in § 42-364 that a court make a specific finding of best interests before awarding joint custody was inapplicable. See *State ex rel. Amanda M. v. Justin T., supra*. Accordingly, the court found no error in the district court's failure to make a specific finding of best interests. See *id*.

The same is true here. Aguilar and Schulte were never married, and the action before the district court was solely to establish custody and parenting time of the minor child. Because the Parenting Act controls the present case, we reject Schulte's argument that the district court was required to make a specific finding that joint physical custody was in the minor child's best interests.

[2] In addition, we find that the issue of joint physical custody was properly before the district court based on the

language in Aguilar's complaint. In *State ex rel. Amanda M. v. Justin T., supra*, the Nebraska Supreme Court concluded that the due process jurisprudence regarding joint custody under § 42-364 is incorporated into parenting plan orders entered under the Parenting Act. As a result, whether custody and parenting time is awarded in a paternity action or dissolution of marriage action, the due process analysis is the same. See *State ex rel. Amanda M. v. Justin T., supra*. The Supreme Court, therefore, relied on the rationale of *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007), to determine what procedures are required by due process standards before a court can order joint physical custody. See *State ex rel. Amanda M. v. Justin T., supra*.

[3] In *Zahl v. Zahl, supra*, both parents in a marital dissolution action sought sole custody of their minor child. After holding a general custody hearing, the trial court awarded the parties joint legal and physical custody. On appeal, the Nebraska Supreme Court held that when a court has determined that joint physical custody is, or may be, in a child's best interests but neither party has requested joint custody, the court must give the parties an opportunity to present evidence on the issue before imposing joint custody. *Id.*

The *Zahl* court observed:

> Generally, procedural due process requires parties whose rights are to be affected by a proceeding to be given timely notice, which is reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by constitution or statute; and a hearing before an impartial decisionmaker.

273 Neb. at 1052, 736 N.W.2d at 373.

[4] In determining that the parties in *Zahl v. Zahl, supra*, had not received adequate due process, the court noted that joint physical custody must be reserved for cases where, in the judgment of the trial court, the parents are of such maturity

that the arrangement will not operate to allow the child to manipulate the parents or confuse the child's sense of direction and will provide a stable atmosphere for the child to adjust to, rather than perpetuating turmoil or custodial wars. Therefore, because the factual inquiry for awarding joint custody was substantially different from that for an award of sole custody, without notice that joint custody would be considered, the parties did not receive adequate due process in preparing for the hearing on custody and were entitled to a new hearing. *Id*.

[5] The court in *State ex rel. Amanda M. v. Justin T.*, 279 Neb. 273, 777 N.W.2d 565 (2010), relied on the reasoning set forth in *Zahl v. Zahl, supra*, to conclude that in a paternity case subject to the Parenting Act where neither party has requested joint custody, if the court determines that joint physical custody is, or may be, in the best interests of the child, the court shall give the parties notice and an opportunity to be heard by holding an evidentiary hearing on the issue of joint custody. Failure to do so results in reversible error. See *State ex rel. Amanda M. v. Justin T., supra*.

In the present case, the requirements of due process were satisfied because Aguilar's complaint provided notice to Schulte that Aguilar was asking the court to consider joint custody. His complaint read:

> [Aguilar] and [Schulte] are fit and proper persons to be awarded the temporary and permanent care, custody and control of the minor child of the parties and it is in the best interest of the minor child that [Aguilar] and [Schulte] be awarded joint temporary and permanent custody, subject to the reasonable parenting time of the other party.

He asked that the court grant "temporary and permanent joint legal custody of the minor child with reasonable parenting time for both parties" and "[a]ll other just and equitable relief" as determined by the court. Aguilar clarified at trial that he was intentionally not asking for sole custody because he believed Schulte had an equal right to parent their son. We therefore conclude that Aguilar requested joint physical custody and that the district court did not err in considering the issue.

[6,7] Having concluded that the issue of joint physical custody was properly before the district court for consideration, we next determine whether the evidence supports an award of joint custody based upon a de novo review of the record. The factual inquiry necessary to impose joint physical custody is substantially different from that required for making a sole custody determination. *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007). While *Zahl v. Zahl* does not identify exactly what type of evidence is necessary for a determination of joint custody, subsequent cases make it apparent that the focus is on the parents' ability to communicate with each other and resolve issues together. See, *Kamal v. Imroz*, 277 Neb. 116, 759 N.W.2d 914 (2009); *Coffey v. Coffey*, 11 Neb. App. 788, 661 N.W.2d 327 (2003); *Vesper v. Francis*, No. A-12-1168, 2013 WL 5530281 (Neb. App. Oct. 8, 2013) (selected for posting to court Web site).

Aguilar testified that he and Schulte have communicated well with respect to certain aspects of parenting and jointly set boundaries and agreed upon things such as "bedtime," "nap time," and "timeouts" for discipline. They also agreed on their son's current daycare provider and agreed to share the cost of it proportionally. Aguilar testified that he thinks he and Schulte have done a "marvelous" job raising their son so far. The record reveals, however, that communication has not been perfect. For example, Aguilar had to pay for an emergency room visit for their son because Schulte would not share his Medicaid number or Social Security number. Schulte doubts this emergency room visit ever occurred. Despite this, when asked if he thought he would be able to continue to work with Schulte in splitting time with their son, Aguilar replied, "Of course." Aguilar noted that he and Schulte have taken their son to the doctor together on several occasions, for example, when he had tubes put in his ears and when he had surgery on his finger.

Although the parties have not communicated effectively 100 percent of the time, the record indicates that they have successfully communicated on issues of primary importance. They appear to have been able to reach an agreement on major

decisions regarding their son; therefore, we find no abuse of discretion with respect to the district court's order of joint physical custody.

Travel to Mexico.

Schulte contends that the district court erred in allowing Aguilar to travel with the minor child to Mexico. She claims the court improperly placed the burden on her to prove why such travel should not be allowed.

[8,9] A court determines the nature and extent of visitation rights on a case-by-case basis and may consider many factors and circumstances in each individual case, such as the age and health of the child, the character of the noncustodial parent, *the place where visitation rights will be exercised*, the frequency and duration of visits, the emotional relationship between the visiting parent and the child, the likely effect of visitation on the child, the availability of the child for visitation, the likelihood of disrupting an established lifestyle otherwise beneficial to the child, and, when appropriate, the wishes of the child. *Walters v. Walters*, 12 Neb. App. 340, 673 N.W.2d 585 (2004). Although limits on visitation are an extreme measure, they may be warranted where they are in the best interests of the children. *Id.*

[10] Based on the evidence presented at the hearing, the district court did not abuse its discretion in refusing to limit the location where Aguilar's parenting time with the child could take place. Although Schulte expressed concerns for the child's safety if he was to travel to Mexico, there was no evidence that Aguilar would place the child in a dangerous situation. The district court concluded, and the evidence supported the conclusion, that Aguilar is a fit and proper parent who appropriately cares for his child. Schulte testified at trial that Aguilar is a responsible father, and she has no complaints about his parenting. Aguilar said that he remains close to his parents, despite the distance, and speaks to them daily via telephone, "Skype," or text message. He said they have met his son through photographs, Skype, and telephone calls. Allowing the child time with his grandparents is in the child's best interests.

See *Nelson v. Nelson*, 267 Neb. 362, 674 N.W.2d 473 (2004) (generally, strong and healthy relationship with grandparents is in best interests of children).

Because we find no error in allowing Aguilar to travel with the child to Mexico, we also conclude that the court did not abuse its discretion in ordering Schulte to cooperate in obtaining the child's passport and executing the necessary documents for the child to travel out of the country.

[11] This court has previously upheld a trial court's order requiring a parent to execute documents to fulfill a separate portion of the court's order. See *Coffey v. Coffey*, 11 Neb. App. 788, 661 N.W.2d 327 (2003). In *Coffey*, the mother of the parties' children initially had control over investment accounts for the children's college education expenses. A subsequent district court order of modification placed custody of the child with the father and provided that the father would have control of the children's accounts. The mother was ordered to execute any necessary documents to transfer her control of the accounts to the father. On appeal, because the trial court's modification order awarded custody to the father, we found no error in the portion of the order granting the father control of the children's accounts and requiring the mother to cooperate in transferring control. Similarly in the present case, because Aguilar was properly allowed to travel to Mexico with the child, we find no error in the portion of the order requiring Schulte's cooperation in securing documents to ensure that the child is able to leave and reenter the country.

We note that there are other circumstances in which courts order parties to cooperate and do what is necessary to comply with the court's order. For example, in a dissolution of marriage action, the trial court ordered the parties to execute any and all documents necessary or proper to fulfill the terms and/or requirements of their property settlement agreement. See *Blaine v. Blaine*, 275 Neb. 87, 744 N.W.2d 444 (2008). And in child custody cases, the Nebraska Supreme Court has upheld orders requiring one parent to execute a waiver of tax exemptions in favor of the other parent. See, *Hall v. Hall*, 238 Neb.

686, 472 N.W.2d 217 (1991); *Babka v. Babka*, 234 Neb. 674, 452 N.W.2d 286 (1990).

Schulte also claims that the district court's order coerces her into consenting that the child travel to Mexico. Specifically, she argues that if Mexican law requires a parent's consent in order for a child to enter the country, the district court's order becomes "trickery" because she would not be voluntarily consenting. Brief for appellant at 11. Schulte does not indicate whether Mexican law does, in fact, require parental consent, nor is there such evidence in the record.

[12] Without knowing whether Schulte's consent is required before the child can enter Mexico, we cannot conclude that the district court's order forces her to provide consent. A judgment from the district court or this court that orders Schulte to provide her consent if Mexican law requires it would constitute a conditional judgment, which would be ineffective and void. See *Garcia v. Platte Valley Constr. Co.*, 15 Neb. App. 357, 727 N.W.2d 698 (2007) (judgments that are dependent upon occurrence of uncertain future events, or conditional judgments, are wholly ineffective and void because they lead to speculation and conjecture as to what their final effect may be). Because there is no evidence that Schulte's permission is required in order for the child to enter Mexico, we reject this argument and affirm the district court's decision.

Evidentiary Objection.

Schulte also asserts that the district court erred when it sustained Aguilar's evidentiary objection to a certified copy of a warrant for his arrest. At trial, Schulte offered into evidence a certified copy of a warrant for Aguilar's arrest. Aguilar's counsel objected to the exhibit because it had not been provided to her prior to trial pursuant to the court's pretrial order. The court sustained the objection. Schulte now argues that compliance with the pretrial order was not possible because she only acquired the exhibit the morning of trial.

[13,14] Generally, the effect of a pretrial order is to control the subsequent course of the action. *Hillcrest Country Club v. N.D. Judds Co.*, 236 Neb. 233, 461 N.W.2d 44 (1990).

Litigants must adhere to the spirit of the pretrial procedure and are bound by a pretrial order to which no exception has been taken. *Cotton v. Ostroski*, 250 Neb. 911, 554 N.W.2d 130 (1996).

We agree with Schulte that the certificate attached to the warrant was dated March 6, 2013, the day trial began. However, the warrant itself was issued on January 10, nearly 2 months before trial began. Thus, Schulte had plenty of time prior to the day of trial to notify Aguilar of the existence of the warrant and her intention to offer it at trial. Accordingly, we find no error in the district court's decision to exclude the exhibit from evidence at trial.

CONCLUSION

We conclude that the district court did not abuse its discretion in awarding the parties joint custody of their minor child. We also find no abuse of discretion in the court's decision allowing Aguilar to travel to Mexico with the child, and Schulte was properly ordered to cooperate in obtaining a passport and the necessary travel documents for the child. Finally, the district court did not err in sustaining Aguilar's objection to the certified copy of the arrest warrant. Accordingly, we affirm the decision of the district court.

AFFIRMED.

GARY HENDERSON, APPELLANT, V. HEATH SMALLCOMB AND NIGHT LIFE CONCEPTS, INC., DOING BUSINESS AS THE LOFT, NIGHT LIFE CONCEPTS, INC., DOING BUSINESS AS CUNNINGHAM'S JOURNAL, APPELLEES.

847 N.W.2d 738

Filed June 17, 2014. No. A-13-093.

1. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.

2. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
3. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
4. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
5. **Municipal Corporations: Streets and Sidewalks: Property: Liability.** Historically, under the common law, cities were responsible for the care and condition of sidewalks within municipal boundaries, and no duty devolved upon an abutting owner to keep the sidewalk adjacent to such owner's property in a safe condition.
6. **Streets and Sidewalks: Property: Liability: Notice: Words and Phrases.** Under the "sidewalk rule," the owner of property which abuts a public sidewalk is liable for injuries that are caused by a condition on the sidewalk, if the owner has been notified by the city of the dangerous sidewalk condition and fails to act.
7. **Trial: Evidence: Words and Phrases.** The concept of "opening the door" is a rule of expanded relevancy which authorizes admitting evidence which otherwise would have been irrelevant in order to respond to (1) admissible evidence which generates an issue or (2) inadmissible evidence admitted by the court over objection.
8. **Trial: Evidence.** The "opening the door" rule is most often applied to situations where evidence adduced or comments made by one party make otherwise irrelevant evidence highly relevant or require some response or rebuttal.
9. **Trial: Evidence: Words and Phrases.** "Opening the door" is a contention that competent evidence which was previously irrelevant is now relevant through the opponent's admission of other evidence on the same issue.
10. **Trial: Evidence: Appeal and Error.** The admission or exclusion of evidence is generally reviewed for an abuse of discretion.
11. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Vincent M. Powers, of Vincent M. Powers & Associates, for appellant.

Daniel M. Placzek and, on brief, Sonya K. Koperski, of Leininger, Smith, Johnson, Baack, Placzek & Allen, for appellee Heath Smallcomb.

Nicholas R. Norton and Jeffrey H. Jacobsen, of Jacobsen, Orr, Lindstrom & Holbrook, P.C., L.L.O., for appellee Night Life Concepts, Inc.

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

INBODY, Chief Judge.

INTRODUCTION

This case involves an accident which occurred when Gary Henderson fell and sustained an injury as he left an establishment known as Cunningham's Journal, owned by Night Life Concepts, Inc., doing business as The Loft, Night Life Concepts, Inc., doing business as Cunningham's Journal (Night Life). Night Life leased the building from Heath Smallcomb. Henderson filed a negligence action against both Night Life and Smallcomb, and during a jury trial on the matter, the Buffalo County District Court granted Night Life's motion for directed verdict and the jury returned a verdict in favor of Smallcomb.

STATEMENT OF FACTS

Henderson, who was 75 years old at the time of trial, testified that in 2006, he was retired and living in Kearney, Nebraska, maintaining a rental property that he rented out to college students. Henderson testified that he had had several medical procedures prior to the incident in question and had undergone several surgeries and medical appointments prior to the incident, including a right knee replacement in the late 1970's or early 1980's, a spleen removal, a right-shoulder rotator cuff repair and neck fusion, open heart surgery, a laminectomy, a low-back fusion, and an appointment at an arthritis treatment center.

Every Tuesday evening, he and a group of friends met at a local Kearney establishment for dinner and then would go downstairs to Cunningham's Journal to play pool and have a drink. Henderson testified that he had played pool at Cunningham's Journal for a year or two. Henderson indicated that on April 18, 2006, the group followed its normal routine. Henderson parked his car in the Kearney city lot on the west side of Cunningham's Journal, entering the building through

the front door on 23d Street. Henderson testified that he entered the building by stepping up onto an elevated concrete landing or walking area and then taking additional wooden steps. Henderson had a drink and played pool at Cunningham's Journal until about 1 a.m. on April 19. As Henderson was leaving Cunningham's Journal, he descended the wooden stairs to the concrete landing and tripped on the last step "where you go down to the city sidewalk." Henderson testified that he tripped on a lip in the concrete landing and fell, hitting the concrete with his knees, elbow, wrists, and face. Henderson testified that he did not recall some of what happened after he fell. Henderson got a ride home and testified that he did not recall what happened until he awoke at around 7 a.m., at which point he first actually thought that he had fallen down his basement stairs.

Smallcomb testified that in 1995, he purchased the building where Cunningham's Journal is located, and that he ran Cunningham's Journal until 2003, when he sold that business to Night Life, but still retained ownership of the building. Smallcomb explained that Night Life now rents the space where Cunningham's Journal is and has maintained the business. Smallcomb explained that there is an elevated sidewalk or landing that is used to reach the wooden stairs which lead up to the building. Smallcomb testified that he knew that the concrete on the landing was not flush, that he did not repair the concrete, and that he did not ask Night Life to repair the concrete. Smallcomb estimated that the gap in the concrete was about 2 inches deep. Smallcomb testified that he did not know the deviation in the concrete was a problem or a hazard.

Smallcomb testified that he believed the sidewalk, raised concrete landing, and wooden steps belonged to the city of Kearney and that he had not received any notice from the city that repairs were necessary. Smallcomb testified that the property had changed little since he purchased the building in 1995. Smallcomb explained that he was familiar with the building before he owned it and that the raised concrete landing and wooden stairs had been there since the 1980's. Smallcomb did not know by whom, or for what reason, the

concrete landing was constructed. Smallcomb testified that since the lease of the property in 2003 to Night Life, repairs were made to the front steps and "handicap ramp" and interior improvements had been made. Smallcomb testified that Night Life had exclusive control of the property at the time of Henderson's fall and that he visited the property only every few months. Smallcomb also indicated that the landing leading up to the stairs benefited the property in that customers were able to enter the building, but that sidewalks in front of any business were a benefit.

Mike Anderson, the owner of Night Life, testified that he bought the Cunningham's Journal business from Smallcomb in 2003. Anderson testified that customers step onto the landing or elevated sidewalk and then ascend the wooden steps into the building. Anderson testified that he did not make any repairs to the concrete from the time that he leased the building until the date of Henderson's fall and did not ask Smallcomb to make any repairs at any time. Anderson further testified that he had never received any notice from the city of Kearney that sidewalk repairs were necessary. Anderson testified that exterior repairs had been made to the building, such as repairs to the wooden stairs and changes to the front facade and to the "handicap ramp."

Anderson testified that on the night of the fall, he was closing the establishment when someone indicated that a man had fallen. Anderson explained that Henderson was alert and standing on the sidewalk when Anderson went outside, but did have some blood on his face. Anderson testified that Henderson explained to him that he had missed a step and fallen.

At the conclusion of Anderson's testimony, counsel for Henderson made an offer of proof regarding Anderson's deposition testimony that since Henderson's fall, Anderson had hired someone to add concrete to the landing and it was now even. Counsel argued:

> [The offer of proof] would be the evidence, and I believe that when . . . counsel asked the question as to any repairs being made to the exterior, the full complete answer would include that repair, that he had knowledge

> of that repair being made. It didn't matter if the landlord made it.

Objections were made to the offer of proof, and the district court sustained those objections based upon a previous motion in limine which addressed and excluded any testimony regarding repairs made to the landing since Henderson's fall.

Thereafter, Night Life and Smallcomb made motions for directed verdicts. The district court found that the evidence reflects that the property where Henderson fell, which included the steps and the landing, "is property that is actually located on [c]ity of Kearney sidewalks." The court concluded that Night Life did not owe a duty to Henderson to make sure that the sidewalk was in proper repair and dismissed Night Life from the proceedings. The motion for directed verdict as to Smallcomb was overruled.

Smallcomb presented evidence and again made a motion for directed verdict which was overruled by the district court. At the jury instruction conference, Henderson objected to the district court's jury instruction on a preexisting condition and offered a proposed jury instruction in its place, marked as an exhibit. The district court did not accept the proposed jury instruction and overruled all objections to the exhibit. The case was submitted to the jury, which unanimously found that Henderson had not met his burden of proof to establish that Smallcomb was negligent in causing Henderson to fall, and the court entered judgment in favor of Smallcomb.

ASSIGNMENTS OF ERROR

Henderson assigns that the district court erred in granting Night Life's motion for directed verdict, in failing to find that Smallcomb "opened the door" with respect to questioning regarding repairs made to the concrete landing after Henderson's fall, and in failing to give his proposed jury instruction regarding preexisting conditions.

STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on

behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Wulf v. Kunnath*, 285 Neb. 472, 827 N.W.2d 248 (2013); *Lesiak v. Central Valley Ag Co-op*, 283 Neb. 103, 808 N.W.2d 67 (2012).

[2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *Simon v. Drake*, 285 Neb. 784, 829 N.W.2d 686 (2013).

[3] Whether jury instructions given by a trial court are correct is a question of law. *Kuhnel v. BNSF Railway Co.*, 20 Neb. App. 884, 834 N.W.2d 803 (2013), *reversed on other grounds* 287 Neb. 541, 844 N.W.2d 251 (2014).

ANALYSIS

Motion for Directed Verdict.

Henderson assigns that the district court erred by granting Night Life's motion for directed verdict.

[4] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law. *American Central City v. Joint Antelope Valley Auth.*, 281 Neb. 742, 807 N.W.2d 170 (2011).

[5,6] Historically, under the common law, cities were responsible for the care and condition of sidewalks within municipal boundaries, and no duty devolved upon an abutting owner to keep the sidewalk adjacent to such owner's property in a safe condition. See *Rod Rehm, P.C. v. Tamarack Amer.*, 261 Neb. 520, 623 N.W.2d 690 (2001). In contrast, the "sidewalk rule" recognizes that this common-law rule has been abrogated by city ordinance or by statute. See Neb. Rev. Stat. § 15-734 (Reissue 2012). Section 15-734 further provides, however, that an abutting property owner is liable for injuries sustained as a result of such owner's failure to

keep and maintain the sidewalk in a safe condition only upon the owner's failure to act after receiving notice from the city that the owner needs to remedy a dangerous condition present on the sidewalk. Thus, under the sidewalk rule, the owner of property which abuts a public sidewalk is liable for injuries that are caused by a condition on the sidewalk, if the owner has been notified by the city of the dangerous sidewalk condition and fails to act. *Rod Rehm, P.C. v. Tamarack Amer., supra*. See, generally, *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996); *Stump v. Stransky*, 168 Neb. 414, 95 N.W.2d 691 (1959). See, also, Restatement (Second) of Torts § 349 (1965).

In the case *Andresen v. Burbank*, 157 Neb. 909, 62 N.W.2d 135 (1954), an action was brought against an abutting property owner for injuries sustained in a fall caused by a deteriorated sidewalk. The Nebraska Supreme Court held:

> The fee of the street is in the city, and the sidewalk is part of the street. It is the duty of the city to keep its sidewalks in repair and in a safe condition for public use. A lot owner is not required to repair an adjacent sidewalk until he has been notified by the city to do so, and in absence of such notice he is not liable to pedestrians for damages for personal injuries.

Id. at 910, 62 N.W.2d at 136. See, also, *Sipprell v. Merner Motors*, 164 Neb. 447, 82 N.W.2d 648 (1957); *McAuliffe v. Noyce*, 86 Neb. 665, 126 N.W. 82 (1910).

In Henderson's case, the district court found that the evidence reflected that the property where Henderson fell, which included the steps and the landing of the sidewalk, was "property that is actually located on [c]ity of Kearney sidewalks." The court concluded that Night Life did not owe a duty to Henderson to make sure that the sidewalk was in proper repair and granted Night Life's motion for directed verdict. Our review of that evidence indicates that neither Night Life nor Smallcomb had ever received any notice from the city to make repairs to the sidewalk, and thus, neither Night Life nor Smallcomb could be liable for injuries caused by a condition on the sidewalk as neither had been notified by the city of the dangerous sidewalk condition.

In his brief, Henderson does not address or discuss the application of the sidewalk rule, any of the aforementioned cases, or the application of § 15-734, but instead argues that the court should have imposed liability upon Night Life on the basis of the "'special use doctrine.'" Brief for appellant at 9.

The special use doctrine is the exception to the general rule that where the sidewalk was constructed or altered for the special benefit of the abutting property owner and served a use independent of the ordinary use for which sidewalks are designed, or where a sidewalk, though not specifically constructed or altered for the special benefit of the abutting property, has been used for such benefit, the owner or occupant of the property, regardless of whether he or she constructed or altered the sidewalk, owes a duty to the public to maintain the sidewalk in a reasonably safe condition, and hence, he or she may be held liable for injuries resulting from a defective or dangerous condition created by such special use of the sidewalk, particularly where such use is improper, extraordinary, or excessive under the circumstances. Annot., 88 A.L.R.2d 331 (Cum. Supp. 2014). See, also, Restatement (Second) of Torts § 350 (1965).

Henderson argues that because Night Life obtained the benefit of the use of the concrete landing to provide ingress and egress for its customers, it was in exclusive possession of the premises and had the authority to make repairs. In support of his argument for the application of the special use doctrine, Henderson relies upon the case *Crosswhite v. City of Lincoln*, 185 Neb. 331, 175 N.W.2d 908 (1970).

In *Crosswhite v. City of Lincoln*, an action was filed against the City of Lincoln and owners of property adjoining the street and sidewalk by a pedestrian who sustained injuries after tripping on a stop box, which was a water pipe that protruded above the concrete sidewalk. The stop box, installed by the City of Lincoln, was utilized to shut off the flow of water from the city water main to the property of the water consumer. The main issue in the case was whether the city or the adjoining property owners, or both, had control over the stop box and a duty to maintain it and the sidewalk in a safe condition. *Id*. The Nebraska Supreme Court first found that the city

was not permitted to delegate its duty to the public in regard to the waterworks system. *Id*. With respect to the adjoining property owners, the court held that an "abutting landowner may be subject to liability for the dangerous condition of portions of the public sidewalk which have been altered or constructed for the benefit of his property and which serve a use independent of and apart from the ordinary and customary use for which sidewalks are designed." *Id*. at 335, 175 N.W.2d at 911.

Thereafter, the court further held:

> [W]here persons are injured by a dangerous sidewalk condition created and maintained subject to the joint control of the city and an abutting landowner, and where the condition is maintained for the benefit of a proprietary business operated by the city, and is also for the benefit of the property of the abutting landowner, the city and the abutting landowner are joint or concurrent tort-feasors and each is directly liable for his own wrong.

Id. at 336, 175 N.W.2d at 911.

Crosswhite v. City of Lincoln and its holding revolve around a "dangerous sidewalk condition created and maintained subject to the joint control of the city and an abutting landowner . . . where the condition [was] maintained for the benefit of a proprietary business operated by the city, and [was] also for the benefit of the property of the abutting landowner" and does not involve the liability of a tenant of abutting property. 185 Neb. at 336, 175 N.W.2d at 911.

Other examples of the application of the special use doctrine include *McKenzie v. Columbus Centre, LLC*, 40 A.D.3d 312, 835 N.Y.S.2d 190 (2007) (under special use doctrine, owner of premises being demolished owed duty to pedestrians to provide safe walkway under sidewalk protective shed erected at demolition site); *Margulies v. Frank*, 228 A.D.2d 965, 644 N.Y.S.2d 596 (1996) (generally, special use cases involve installation of some object in sidewalk or some variance in construction thereof, such as concrete step mounted upon sidewalk immediately beneath elevated doorway of restaurant, installation of terrazzo tile underneath theater's marquee, installation of rails in sidewalk to facilitate removal of refuse,

placement of pipe for heating oil, or installation of driveway cutout); *Cool v. Vesey*, 31 Colo. App. 1, 499 P.2d 642 (1972) (stop box installed by defendant in city right-of-way which benefited defendant's property gave rise to duty of care); *Mathison v. Newton*, 251 Or. 362, 446 P.2d 94 (1968) (maintenance of elevator with sidewalk grating constituted special use of sidewalk by defendant for his sole benefit); *Quinn v. I. C. Helmly Furniture Company*, 141 So. 2d 302 (1962) (discharge of water from abutting property owner's downspout); *Sill v. Lewis*, 140 Colo. 436, 344 P.2d 972 (1959) (defendant liable for injuries caused by ice when he discharged water onto sidewalk); and *Hippodrome Amusement Co. v. Carius*, 175 Ky. 783, 195 S.W. 113 (1917) (water service box existing in sidewalk). Cf., *Williams v. KFC Nat. Management Co.*, 391 F.3d 411 (2d Cir. 2004) (dragging Dumpster over sidewalk was not special use by restaurateur because there were no special features constructed on sidewalk for benefit and use was routine); *Jordan v. City of New York*, 23 A.D.3d 436, 807 N.Y.S.2d 595 (2005) (landowner's commercial tenant's use of sidewalk to gain access to nearby basement door is insufficient to establish existence of special use); *Weil v. Rigali*, 980 S.W.2d 89 (Mo. App. 1998) (snowplow driving across sidewalk to remove snow does not constitute special use of public sidewalk).

Specifically, in the case *Granville v. City of New York*, 211 A.D.2d 195, 627 N.Y.S.2d 4 (1995), the special use doctrine was addressed in regard to injuries sustained when an individual tripped and fell on a raised portion of a sidewalk in front of a building owned by the defendant, who leased the premises to a corporation which operated a restaurant therein. In *Granville*, the court noted that the "photographic record reveals a concrete step mounted upon the sidewalk immediately beneath the elevated doorway of the restaurant which step protrudes from the doorway for a short distance beyond the building's boundary." 211 A.D.2d at 197, 627 N.Y.S.2d at 5. The court found that the "concrete step, which runs the entire width of the entranceway of the restaurant, clearly constitutes a special use for [the] landlord's benefit which facilitates access to the restaurant premises." *Id.* The court determined that the issue

concerning the causal connection between the owner's special use and the defective condition of the public walkway was an issue for the trier of fact and precluded the granting of summary relief. *Id*.

In the present case, the photographic evidence illustrates that the concrete landing in question is a raised one mounted on the sidewalk set beside the entire length of the building. That concrete landing leads up to a set of wooden stairs located immediately beneath the elevated entrance to the building. We are aware of the line of cases which indicate that the special use doctrine is not applicable merely because a sidewalk provides a method of ingress and egress into a business, which in turn benefits the business, but find that those cases are distinguishable from the instant case due to the addition of the raised concrete landing to the sidewalk in front of the property. See, *Christian v. U.S.*, 859 F. Supp. 2d 468 (E.D.N.Y. 2012) (applying New York law to find that use of public sidewalk to enter and exit building does not constitute special use unrelated to public use); *Roe v. City of Poughkeepsie*, 229 A.D.2d 568, 645 N.Y.S.2d 856 (1996) (mere fact that patrons of defendants' restaurant used abutting sidewalk did not establish special use imposing obligation on defendants to maintain that sidewalk); *Whitlow v. Jones*, 134 Or. App. 404, 895 P.2d 324 (1995) (finding that although business establishment derives special advantage from use of sidewalk by its business invitees for ingress to and egress from business, that is not special use for liability purposes). Thus, in accordance with *Crosswhite v. City of Lincoln*, 185 Neb. 331, 175 N.W.2d 908 (1970), we find that under the circumstances of this case, an abutting landowner may be subject to liability for the dangerous condition of portions of the public sidewalk which have been altered or constructed for the benefit of the landowner's property and which serve a use independent of and apart from the ordinary and customary use for which sidewalks are designed.

That, however, does not end the inquiry in this case, because the issue which Henderson assigns as error concerns the directed verdict in favor of Night Life, the tenant of the abutting property, not the actual owner of the abutting property.

We are required to treat Night Life's motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, Henderson is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. See, *Wulf v. Kunnath*, 285 Neb. 472, 827 N.W.2d 248 (2013); *Lesiak v. Central Valley Ag Co-op*, 283 Neb. 103, 808 N.W.2d 67 (2012). The fact remains that Night Life is the tenant of the property, not the owner, and Henderson has not provided us with any authority which suggests that the liability of the property owner under the special use doctrine is imputed to a tenant in the same manner. No evidence was provided showing that under the terms of the lease between Night Life and Smallcomb, Night Life was responsible for the maintenance of the steps or raised concrete landing. The issue of the landowner's liability was submitted to the jury, which returned a verdict in favor of the landowner and not Henderson, a determination which we shall not second-guess. See *Wulf v. Kunnath, supra* (jury verdict will not be set aside unless clearly wrong, and it is sufficient if there is any competent evidence presented to jury upon which it could find for successful party). Therefore, we find that Night Life's motion for directed verdict was properly granted.

"Opening the Door."

Henderson assigns that the trial court erred in failing to find that Smallcomb opened the door with respect to questioning regarding repairs made to the concrete landing after Henderson's fall.

Prior to trial, Night Life and Smallcomb filed a joint motion in limine to specifically exclude any testimony or evidence regarding any repairs made to the landing after the accident, which motion was granted. However, Henderson contends that trial counsel for both Night Life and Smallcomb opened the door at trial by questioning Anderson about repairs made to the premises prior to the fall and then following up by asking Anderson if he had "made other repairs to the exterior of the property." Shortly thereafter, outside of the presence of the

jury, Henderson made an offer of proof from Anderson's deposition testimony that if Anderson would have made a full and complete answer to the question, the jury would have been able to hear the evidence that repairs were made to the landing since Henderson's fall. The district court found that the testimony was specifically covered in the motion in limine previously granted and was, thereby, excluded.

[7-10] The concept of "opening the door" is a rule of expanded relevancy which authorizes admitting evidence which otherwise would have been irrelevant in order to respond to (1) admissible evidence which generates an issue or (2) inadmissible evidence admitted by the court over objection. *Huber v. Rohrig*, 280 Neb. 868, 791 N.W.2d 590 (2010); *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008). The rule is most often applied to situations where evidence adduced or comments made by one party make otherwise irrelevant evidence highly relevant or require some response or rebuttal. *Huber v. Rohrig, supra*. Opening the door is a contention that competent evidence which was previously irrelevant is now relevant through the opponent's admission of other evidence on the same issue. See *id*. The admission or exclusion of evidence is generally reviewed for an abuse of discretion. See *id*.

In this case, the motion in limine was very specific and addressed only the exclusion of "[a]ny testimony or evidence with regard to the repairs made to the concrete landing, which landing, walkway, or step regardless of the terminology, near the entrance to the building . . . subsequent to the accident claimed . . . ." The district court did not allow the admission of evidence deemed inadmissible over objection. See, *id*.; *Sturzenegger v. Father Flanagan's Boys' Home, supra*. Thus, if this evidence were to be allowed, it would be in order for Henderson to respond to admissible evidence which generates an issue. See *id*.

Upon our review of the case, we find that the door was not opened as to Henderson's testimony regarding repairs to the exterior of the property. Testimony that repairs to the outside of the building were made does not render the issue of repairs made specifically to the concrete landing after the date of

Henderson's fall now relevant. The testimony that repairs were made after the fall to the place where Henderson fell is irrelevant to a determination of whether or not Smallcomb had a duty to repair the landing before the fall occurred. The district court did not abuse its discretion by not allowing the testimony before the jury regarding the repairs made after the fall. This assignment of error is without merit.

Jury Instruction.

Henderson argues that the trial court failed to give the appropriate jury instruction on the aggravation of a preexisting condition and should have given his proposed jury instruction.

[11] In Henderson's case, in a unanimous decision, the jury found for Smallcomb and returned a jury verdict form which set forth, "We the jury find that [Henderson] has not met his burden of proof, and we enter judgment for [Smallcomb]." By its returning that form, we know that the jury determined that Henderson failed to meet his burden of proof, from which we can conclude that the jury never reached the issue of preexisting conditions and damages. Therefore, we need not address this assignment of error, as it is not necessary to the disposition of this appeal. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013).

CONCLUSION

In conclusion, we find that the district court properly granted Night Life's motion for directed verdict. The district court also did not abuse its discretion by finding that the door had not been opened to include testimony that there had been repairs made to the concrete landing after the fall. Therefore, we affirm.

AFFIRMED.

In re Interest of Mischa S., a child under 18 years of age. State of Nebraska, appellee, v. Deanna R. and Chris S., appellants.

847 N.W.2d 749

Filed June 24, 2014. No. A-13-265.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the litigation's outcome.
3. **Moot Question: Jurisdiction: Appeal and Error.** Although mootness does not prevent appellate jurisdiction, it is a justiciability doctrine that can prevent courts from exercising jurisdiction.
4. **Moot Question: Appeal and Error.** Under the public interest exception to the mootness doctrine, an appellate court may review an otherwise moot case if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.
5. ____: ____. When determining whether a case involves a matter of public interest, an appellate court considers (1) the public or private nature of the question presented, (2) the desirability of an authoritative adjudication for future guidance of public officials, and (3) the likelihood of future recurrence of the same or a similar problem.
6. **Constitutional Law: Courts: Jurisdiction: Statutes.** The Nebraska Court of Appeals cannot determine the constitutionality of a statute, yet when necessary to a decision in the case before it, the court does have jurisdiction to determine whether a constitutional question has been properly raised.
7. **Juvenile Courts: Evidence: Proof.** Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) requires that the State prove the allegations set forth in the adjudication petition by a preponderance of the evidence in cases involving both non-Indian and Indian children.
8. ____: ____: ____. In adjudication cases, the standard of proof for the active efforts element in Neb. Rev. Stat. § 43-1505(4) (Reissue 2008) is proof by a preponderance of the evidence.
9. **Indian Child Welfare Act: Evidence: Appeal and Error.** In a foster care placement determination involving an Indian child, the failure to make findings under Neb. Rev. Stat. § 43-1505(4) (Reissue 2008) is harmless error where a de novo review indicates that evidence supports these findings.
10. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the County Court for Buffalo County: GRATEN D. BEAVERS, Judge. Reversed and remanded for further proceedings.

Mitchel L. Greenwall, of Greenwall, Bruner & Frank, L.L.C., for appellants.

Mandi J. Amy, Deputy Buffalo County Attorney, for appellee.

Mindy L. Lester, of Ross, Schroeder & George, L.L.C., guardian ad litem.

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

MOORE, Judge.

INTRODUCTION

Deanna R. and Chris S. appeal from the order of the county court for Buffalo County, sitting as a juvenile court, which ordered the removal of their daughter Mischa S. from the family home. Because we find that the juvenile court erred in finding that serious emotional damage would result if Mischa is not removed from the home, we reverse, and remand for further proceedings.

PROCEDURAL BACKGROUND

Deanna and Chris are the parents of Mischa, born in 1998, and six additional younger children. Deanna is a member of the Oglala Sioux Tribe. She has not enrolled her children, but does know how to do this, and she has indicated that her children will qualify for affiliation. Deanna reports that the family has never lived on the reservation, that she was raised Catholic, and that they periodically visit the reservation.

On January 3, 2012, the State filed a petition in the juvenile court, alleging that Mischa was a child under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) by reason of her parents' having allowed her and her siblings to have excessive absences and tardies at school over the previous 4 years, jeopardizing Mischa's education and well-being.

The parents entered a no contest admission to the petition, and Mischa was adjudicated on May 8, 2012. She was allowed

to remain at home with her parents under the supervision of the Nebraska Department of Health and Human Services (the Department). The permanency plan has been family preservation. On November 27, the case plan was modified to provide counseling for Mischa.

On January 24, 2013, the guardian ad litem (GAL) filed a motion to remove Mischa from her home due to continued school absences and a failure to participate in counseling as ordered by the court. A hearing was held on February 1, but because there was some question as to whether the tribe had been given proper notice, the hearing on the GAL's motion was continued until February 25, the date of a previously scheduled review hearing. In a journal entry following the February 1 hearing, the juvenile court found that Mischa had continued to incur absences from school and specifically ordered Deanna and Chris to take Mischa to school. The court noted that it had advised Deanna and Chris that they would be subject to actions for contempt if Mischa missed any additional school between February 1 and the hearing scheduled for February 25. The court also noted that Deanna and Chris had advised the court that they were considering an alternative education program for Mischa. The court found that they could continue to pursue alternatives, but that Mischa must attend school until an alternative education plan was created and such plan was determined to be in her best interests. On February 5, the GAL refiled her motion to remove Mischa from the home and notice was provided to all necessary parties.

On February 25, 2013, the juvenile court held a review hearing and heard the GAL's motion to remove Mischa from the family home. The court heard testimony from witnesses and received into evidence various exhibits, including a case plan and progress report dated February 15, a written report from the GAL, and documentation from the school concerning Mischa's absences and tardies.

Melissa Herrmann, the dean of students at the high school where Mischa is a freshman, testified concerning Mischa's school attendance. Mischa missed school from the third day of the school year through Halloween 2012. After she returned,

her attendance improved, and Mischa attended school approximately 2 or 3 days a week for a couple of weeks. In that time, she was able to salvage some of her credits, earning a credit in her geography class and her "foods" class. Around Thanksgiving or early December, her attendance began to drop again. Mischa's attendance did improve somewhat after February 1, 2013. On the first day of school after the February 1 hearing, she missed over half of the day. Between February 1 and 25, Mischa was tardy eight times and absent three times.

As of February 25, 2013, Mischa had missed each of her classes between 60 and 80 times and was significantly behind in her credits for the school year. During this time, her family requested homework for her only twice and Mischa never once returned any homework to the attendance office. Herrmann testified that to stay on track for graduation, a student needed 70 to 80 credits at the end of the freshman year and should have 35 to 40 credits at the end of the first semester. As of the February 25 hearing, Mischa had only 11 credits and was failing all of her classes for the third-quarter term. Herrmann testified that unless Mischa was able to bring up her grades, she would end the third quarter with only 11 credits, when she should have about 60 by that point. Herrmann testified that unless Mischa participated in some extensive summer schooling and online courses to supplement normal coursework, it would be virtually impossible for her to graduate in 4 years at that point in time.

The school has engaged in efforts to get Mischa to attend, including attempting to rearrange her class schedule, offering alternative education, and even considering the possibility of attending school for half days rather than full days. Herrmann testified that "whenever the school has made an attempt to make a concession or to try to get her to come so that we can keep her on track, it always seems to be something else that comes up that prevents her." Excuses given for Mischa's absences have included things such as car troubles, oversleeping, medical appointments, broken glasses, not having the right book or colored pencils for her art class, and not liking her algebra classroom due to a lack of windows.

Herrmann testified that it had been extremely difficult to identify and meet Mischa's needs because the school was being provided with lots of different reasons for her lack of attendance. Herrmann had spoken with Mischa the morning of the February 25, 2013, hearing about the family's application to do home schooling. Mischa informed Herrmann that she thought Deanna had filed the paperwork to begin home schooling. Herrmann had also spoken with Mischa's guidance counselor, who confirmed Mischa's impression, but also expressed concern about whether Deanna had an acceptable curriculum to follow for home schooling.

Herrmann has an undergraduate degree in "7-12 education," has taken college counseling courses, and has a master's degree in educational administration. Her duties at the school include everything from disciplining students and monitoring attendance to evaluating teachers. Herrmann testified regarding whether her education and training had given her the knowledge and experience to identify students struggling emotionally in school. Herrmann testified that a large portion of her day is spent identifying students who are at risk because of things such as attendance or inability to succeed in school for whatever reason. Part of her job as an administrator is to work with those students and their parents, teachers, and counselors as a team to ensure successful graduation from high school.

Collin Baer, a caseworker with the Department, was assigned to the case in November 2012. Baer has provided regular case management and family support services. He has been employed by the Department as a children and family services specialist since July 2012.

Baer testified that family support providers had been going into the home to help the family get ready for school in the morning, keeping track of activities, and then working directly with the schools to keep track of performance and attendance. Family support providers had been going to the home four times a week since the beginning of December 2012 to help with morning routines. Baer noted that there had been some improvement with attendance and tardiness issues corresponding with the provision of family support services. However,

Baer testified that there had been issues with Mischa "getting from the car to the school." Since the beginning of February 2013, the family support worker had been meeting Mischa and Deanna at the school to make sure that Mischa actually arrived, got out of the car, and went into the school. The Department added this service after attendance issues began recurring in January 2013. When the motion for removal was first filed, Baer met with both Mischa and Deanna to discuss what was preventing Mischa from being motivated to go to school. Even when he met privately with Mischa, she provided nothing to indicate what was going on. Baer doubted Mischa would be at school very much, if at all, absent the services being provided by the Department.

Mischa was ordered to attend counseling in November 2012. She went to one appointment that fall and then did not engage in counseling again until late January 2013, at which point the motion for removal had already been filed. At the time of the hearing, the Department had been working with Mischa's counselor, keeping in touch with respect to attendance at counseling sessions and progress made in counseling. For a few weeks prior to the February 25 hearing, family support providers had been responsible for transporting Mischa to counseling on Monday afternoons directly after school. As of the date of the hearing, Mischa had attended two counseling sessions with her current counselor.

As part of Baer's training with the Department, he was trained in ways to determine whether children are abused or neglected and to watch for indicators of emotional and physical well-being. Although his training does not give him "expertise in the field," it allows him to identify when referral to counselors and other experts is necessary. Baer testified that he was not qualified to diagnose, which was why he referred Mischa for counseling.

Baer testified that the Department had made active efforts to prevent Mischa's removal from the home. Baer testified that removal was in Mischa's best interests, not for safety reasons, but because the Department was struggling to come up with other ways to address the issue and actually get Mischa to school. Baer testified that he did not feel that Mischa would

suffer serious physical harm if she remained in the family home, but he did not know whether Mischa would suffer serious emotional damage or other damage if allowed to stay in the home. Baer indicated that the only benefit in removing Mischa would be to ensure that she gets to school and that her educational needs are being met.

In her report, the GAL observed that the family provided a new excuse for Mischa's lack of attendance each time it was discussed. She reported that at the February 1, 2013, hearing, Deanna asserted that Mischa was struggling in school due to "cultural" issues as well as "mental health problems." The GAL expressed her belief that these reasons were "largely excuses as well." The GAL stated:

> I have spoken with these children on numerous occasions, Mischa and [her sister] in particular are adamant that they like their schools and have friends there that they don't want to leave. They have never, on any occasion, cited difficulty fitting in culturally, even when directly asked about such matters. Teachers and counselors report that [they] have seen no signs of bullying, or the like, toward any of the . . . children [in the family]. I do not believe there is a genuine culture issue with this family.

With respect to home schooling for Mischa, the GAL reported that Deanna intended to do so only until the end of the school year and that Mischa wanted to finish the current year at home and return to school the following year.

After the GAL finished presenting evidence in support of the motion, Deanna and Chris' attorney asked the court to dismiss the motion and the juvenile court denied the request.

On February 26, 2013, the juvenile court ordered Mischa to be placed into foster care and the case plan was modified to allow for liberal visitation of Mischa with her family. In reaching this decision, the court noted the parents' argument that Neb. Rev. Stat. § 43-1505(5) (Reissue 2008) provides that foster care placement may not be ordered in the absence of a determination by clear and convincing evidence including testimony of qualified expert witnesses that continued custody by the parent or Indian custodian is likely to result in serious emotional and physical damage to the child. The

court found that serious emotional damage would result to Mischa as a result of insufficient education. The court found, however, that even in the absence of such proof, the statute is unconstitutional as applied in this case, stating that "Indian children are entitled to no less educational opportunity than other children and accordingly, as applied in this particular case, such statute is unconstitutional to the extent that it would deny Mischa educational opportunity even in the absence of serious emotional and physical damage . . . ." The order was silent on whether active efforts had been provided to prevent the breakup of this family. Deanna and Chris subsequently perfected their appeal to this court.

ASSIGNMENTS OF ERROR

Deanna and Chris assert, renumbered, that the juvenile court erred in (1) finding that there was sufficient expert witness testimony presented under § 43-1505(5), (2) determining that § 43-1505(5) was unconstitutional as applied in this matter, (3) failing to find that active efforts had been made under § 43-1505(4), and (4) denying their motion to dismiss at the close of evidence.

STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Danaisha W.*, 287 Neb. 27, 840 N.W.2d 533 (2013).

ANALYSIS

Mootness.

[2-5] Before turning our attention to the merits of Deanna and Chris' arguments, we must first address the contention in the joint brief from the State and the GAL that the issue of Mischa's removal from the family home is moot. The State and the GAL assert that Mischa was returned to her home on May 10, 2013, and that thus, the appeal from the removal order is moot. A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the litigation's outcome. *In re Interest of Thomas M.*, 282 Neb. 316, 803 N.W.2d 46 (2011).

Although mootness does not prevent appellate jurisdiction, it is a justiciability doctrine that can prevent courts from exercising jurisdiction. *Id*. Under the public interest exception to the mootness doctrine, an appellate court may review an otherwise moot case if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. *Id*. When determining whether a case involves a matter of public interest, an appellate court considers (1) the public or private nature of the question presented, (2) the desirability of an authoritative adjudication for future guidance of public officials, and (3) the likelihood of future recurrence of the same or a similar problem. *Id*.

There is no evidence in the record that Mischa has been returned to her home, and even if she has, the application of the Indian Child Welfare Act (ICWA) will continue to be an issue in any further proceedings. As long as Mischa remains under the jurisdiction of the juvenile court, the requirement of findings under § 43-1505 regarding serious emotional or physical damage and the Department's provision of active efforts to prevent the breakup of the Indian family may recur in the future in this case. In addition, guidance on the determination of what constitutes as qualified expert witness testimony and the burden of proving active efforts in ICWA cases would be helpful and causes these issues to be matters of public interest. Thus, we conclude that even if the issues in this appeal are moot, which we need not decide, they should be reviewed. Accordingly, we proceed to address Deanna and Chris' assignments of error.

Expert Testimony.

Deanna and Chris assert that the juvenile court erred in finding that there was sufficient expert witness testimony presented under § 43-1505(5). Section 43-1505(5) provides:

> No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

The Nebraska Supreme Court has recognized the existence of guidelines to assist courts in determining whether a witness qualifies as an expert with respect to ICWA. In *In re Interest of C.W. et al.*, 239 Neb. 817, 824, 479 N.W.2d 105, 111 (1992), *overruled on other grounds, In re Interest of Zylena R.*, 284 Neb. 834, 825 N.W.2d 173 (2012), the court noted that the Bureau of Indian Affairs had set forth the following guidelines under which expert witnesses will most likely meet the requirements of ICWA:

> "(i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
>
> "(ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards in childrearing practices within the Indian child's tribe.
>
> "(iii) A professional person having substantial education and experience in the area of his or her specialty."

Deanna and Chris argue that Baer was not a qualified expert under ICWA. Clearly, there was no evidence that he was a member of the tribe or that he had substantial experience in the delivery of child and family services to Indians. Baer had less than a year of experience in his position with the Department, and there was no testimony about his educational background or any experience he may have had involving Indian children and families. Although Baer was trained in ways to recognize signs of abuse and neglect, including indicators of emotional and physical well-being, he was admittedly not qualified to determine whether serious emotional damage would result if a child is allowed to remain in the family home. See *In re Interest of Shayla H. et al.*, 17 Neb. App. 436, 764 N.W.2d 119 (2009) (Department caseworker with 11 years of experience deemed not qualified expert witness for purposes of ICWA). Even if Baer were qualified as an expert witness, he testified that he did not believe there was a risk of physical harm to Mischa and that he did not

know whether Mischa would suffer emotional damage if left in the home.

Likewise, while Herrmann had substantial education in the area of her specialty of education and administration, she did not establish that she has substantial education and experience which qualifies her to recognize serious emotional damage in a child. Herrmann testified that Mischa is at risk of failing at school due to her attendance problems, but Herrmann did not testify that Mischa will suffer serious emotional damage if she remains in the family home.

Because there was not clear and convincing evidence, including testimony of qualified expert witnesses that continued custody of Mischa by her parents is likely to result in serious emotional damage, the juvenile court erred in finding evidence of emotional damage.

Constitutionality of § 43-1505(5).

[6] Deanna and Chris assert that the juvenile court erred in determining that § 43-1505(5) was unconstitutional as applied in this matter. The Nebraska Court of Appeals cannot determine the constitutionality of a statute, yet when necessary to a decision in the case before it, the court does have jurisdiction to determine whether a constitutional question has been properly raised. *Clark v. Tyrrell*, 16 Neb. App. 692, 750 N.W.2d 364 (2008). The question in this case is whether the juvenile court had authority, sua sponte, to determine that § 43-1505(5) was unconstitutional in this case.

In *Sarpy Cty. Farm Bureau v. Learning Community*, 283 Neb. 212, 808 N.W.2d 598 (2012), taxpayers sought a declaration that a levy made and distributed pursuant to certain statutes was unconstitutional. The trial court made this determination, and although not requested to do so, it also determined that certain other statutes were unconstitutional. On appeal, the Nebraska Supreme Court considered whether the trial court erred in making this sua sponte determination. The Supreme Court stated:

> The constitutionality of these statutes was not raised in the complaint. A pleading serves to guide the parties and

> the court in the conduct of cases, and thus the issues in a given case are limited to those which are pled. A sua sponte determination by a court of a question not raised by the parties may violate due process.

Sarpy Cty. Farm Bureau v. Learning Community, 283 Neb. at 221, 808 N.W.2d at 607. The Supreme Court held that the trial court's sua sponte determination was void and limited its analysis to the constitutionality of the statutes raised in the pleadings.

We likewise conclude that the juvenile court was without authority to determine that § 43-1505(5) was unconstitutional as applied in this matter. The constitutionality of § 43-1505(5) was not raised in the GAL's motion or in any other pleading, nor was it presented to the court during the course of the removal hearing. The juvenile court's sua sponte determination that § 43-1505(5) was unconstitutional as applied in this case was void.

Active Efforts.

Deanna and Chris also assert that the juvenile court erred in failing to find that active efforts had been made under § 43-1505(4). Section 43-1505(4) provides:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

Referring to the Nebraska Administrative Code, the Nebraska Supreme Court has stated: "[T]he 'active efforts' standard requires more than the 'reasonable efforts' standard that applies in non-ICWA cases. And at least some efforts should be 'culturally relevant.' Even with these guidelines, there is no precise formula for 'active efforts.' Instead, the standard requires a case-by-case analysis." *In re Interest of Walter W.*, 274 Neb. 859, 865, 744 N.W.2d 55, 61 (2008).

[7,8] Before addressing the merits of Deanna and Chris' argument, we first discuss the standard of proof for active

efforts in ICWA adjudication cases. Section 43-247(3)(a) requires that the State prove the allegations set forth in the adjudication petition by a preponderance of the evidence in cases involving both non-Indian and Indian children. *In re Interest of Emma J.*, 18 Neb. App. 389, 782 N.W.2d 330 (2010). With respect to the requirements found in § 43-1505 for adjudicating Indian children, § 43-1505(5) requires that no foster care placement may be ordered without "clear and convincing" evidence of "serious emotional or physical damage." In contrast, § 43-1505(4) does not contain a particular standard for proving active efforts. In *In re Interest of Walter W., supra*, the Nebraska Supreme Court declined to impose a higher standard for active efforts in ICWA termination of parental rights cases than that required under Neb. Rev. Stat. § 43-292 (Reissue 2008). The Supreme Court discussed the federal ICWA statute, stating:

> Congress did not intend in 25 U.S.C. § 1912 to create a wholesale substitution of state juvenile proceedings for Indian children. Instead, in § 1912, Congress created additional elements that must be satisfied for some actions but did not require a uniform standard of proof for the separate elements. As discussed, Congress imposed a "beyond a reasonable doubt" standard for the "serious emotional or physical damage" element in parental rights termination cases under § 1912(f). Congress also imposed a "clear and convincing" standard of proof for the "serious emotional or physical damage" element in foster care placements under § 1912(e). The specified standards of proof in subsections § 1912(e) and (f) illustrate that if Congress had intended to impose a heightened standard of proof for the active efforts element in § 1912(d), it would have done so. Because it did not impose a heightened standard of proof, we decline to interpret § 1912(d)—and its Nebraska counterpart, § 43-1505(4)—as requiring the State to prove active efforts beyond a reasonable doubt. Instead, we conclude that the element requires proof by clear and convincing evidence in parental rights termination cases—the

> standard required for terminating parental rights under Nebraska law.

In re Interest of Walter W., 274 Neb. at 864-65, 744 N.W.2d at 60-61. We apply that same reasoning here and likewise decline to impose a higher standard for the active efforts element in adjudication cases. We conclude that in adjudication cases, the standard of proof for the active efforts element in § 43-1505(4) is proof by a preponderance of the evidence.

[9] The order of removal entered by the juvenile court did not include an express finding that active efforts have been made to prevent the breakup of this family. However, the court's failure to make such an express finding is not fatal. In a foster care placement determination involving an Indian child, the failure to make findings under § 43-1505(4) is harmless error where a de novo review indicates that evidence supports these findings. See *In re Interest of Enrique P. et al.*, 14 Neb. App. 453, 709 N.W.2d 676 (2006).

In our de novo review of the record concerning the active efforts requirement, we note that Baer testified that the Department had made active efforts to prevent removal in this case, which efforts included helping the family get ready in the morning, meeting Mischa and Deanna at school, and escorting Mischa into the school if needed. The school was also working with the family to improve Mischa's attendance. In addition, the Department had set up counseling for Mischa to attempt to resolve the school problem. Baer testified that there was nothing else that could be done at that point except removal of Mischa from the home to attempt to correct the attendance and education problems. We agree that these efforts had been unsuccessful to resolve the education problems at the time of the hearing. On the other hand, there was evidence that the family was looking into home schooling for Mischa, which option had not been thoroughly explored at the time of the removal hearing.

We conclude there was a preponderance of evidence that the Department had made active efforts to provide remedial services to the family to ensure school attendance by Mischa but that such efforts had proved unsuccessful as of the time of the hearing.

Motion to Dismiss.

[10] Deanna and Chris assert that the juvenile court erred in denying their motion to dismiss at the close of evidence. Because we are reversing the order of removal by the juvenile court due to insufficient evidence of serious emotional damage, we need not address this assignment of error. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Carey v. City of Hastings*, 287 Neb. 1, 840 N.W.2d 868 (2013).

CONCLUSION

The juvenile court's sua sponte determination that § 43-1505(5) was unconstitutional as applied in this case was void. The court's failure to make an express finding with respect to active efforts is not fatal because in our de novo review, we find a preponderance of evidence that the Department had made active efforts which had proved unsuccessful as of the time of the hearing. However, the juvenile court erred in finding evidence of emotional damage under § 43-1505(5). Accordingly, we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

FRANCIS M. ZIMMERMAN, APPELLANT, V. TIFFANY L. BIGGS, APPELLEE.

848 N.W.2d 653

Filed July 1, 2014. No. A-13-879.

1. **Child Custody: Jurisdiction: Appeal and Error.** In considering whether jurisdiction existed under the Uniform Child Custody Jurisdiction and Enforcement Act, when the 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 the trial court.
2. **Child Custody: Jurisdiction: States.** The Uniform Child Custody Jurisdiction and Enforcement Act was enacted to serve the following purposes: (1) to avoid interstate jurisdictional competition and conflict in child custody matters, (2) to promote cooperation between courts of other states so that a custody

determination can be rendered in a state best suited to decide the case in the interest of the child, (3) to discourage the use of the interstate system for continuing custody controversies, (4) to deter child abductions, (5) to avoid relitigation of custody issues, and (6) to facilitate enforcement of custody orders.

3. ____: ____: ____. In order for a state to exercise jurisdiction over a child custody dispute, that state must be the home state as defined by the Uniform Child Custody Jurisdiction and Enforcement Act or fall under limited exceptions to the home state requirement specified by the act.
4. ____: ____: ____. The Uniform Child Custody Jurisdiction and Enforcement Act provides that a state has jurisdiction to make an initial custody determination only if it is the home state of the child on the date of the commencement of the proceeding or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from the state but a parent or person acting as a parent continues to live in the state.
5. ____: ____: ____. Under the Uniform Child Custody Jurisdiction and Enforcement Act, a court may exercise emergency temporary jurisdiction under the act, but such a determination remains in effect only until a court that would have jurisdiction to make an initial custody determination (i.e., the home state of the child) enters an order.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Remanded for further proceedings.

Andrew J. Hilger, of Law Office of Andrew J. Hilger, for appellant.

No appearance for appellee.

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

IRWIN, Judge.

I. INTRODUCTION

Francis M. Zimmerman appeals an order of the district court for Douglas County, Nebraska, holding that the court was without authority to address Zimmerman's request for custody under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). We find that the court erred in declining to exercise jurisdiction over the custody request, and we remand for further proceedings.

II. BACKGROUND

Appellee, Tiffany L. Biggs, has not filed any brief on appeal. Zimmerman asserts that the basic factual background

is generally undisputed, and our review of the record from the lower court confirms this suggestion.

The parties are the unwed parents of two sons, both born in Omaha. The older son was born in 2010, and the younger son was born in 2013. The parties had resided together in Omaha at least since the older son's birth.

Biggs appeared pro se at a hearing before the district court. Although she was not sworn in to testify, she answered questions asked by the court. Biggs indicated that in April 2013, the parties traveled to Iowa to visit Biggs' parents. Zimmerman returned to Omaha with both children, and Biggs came back to Omaha and took the younger son with her back to Iowa. Shortly thereafter, Biggs filed a motion in district court in Iowa, seeking a domestic violence protection order.

Zimmerman traveled to Iowa and appeared in the Iowa court proceeding. On May 10, 2013, the Iowa court granted the protection order. In that protection order, the Iowa court also granted Biggs temporary custody of both children. The actual protection order is not in the record presented to us on appeal, and it does not appear that Zimmerman filed an appeal from the Iowa court order.

On May 15, 2013, Zimmerman filed a complaint in the district court for Douglas County, seeking to establish paternity and to obtain custody of both children. Zimmerman alleged in his complaint that both children had resided in Douglas County since their births and that he continued to reside in Douglas County with the older son.

On September 4, 2013, the district court found that Biggs was in default regarding Zimmerman's request to establish paternity. Zimmerman presented evidence establishing that he was the father of both children. The court ultimately entered an order on October 2, finding Zimmerman to be the children's father, and entered a paternity decree on October 8.

The district court, however, concluded that it did not have jurisdiction to entertain Zimmerman's request for custody. The court held that the Iowa protection order had determined temporary custody, that such order was entitled to full faith and credit, and that there had not been any action brought in Nebraska to contest custody. This appeal followed.

III. ASSIGNMENT OF ERROR

Zimmerman's sole assignment of error on appeal is that the district court erred in finding that it lacked jurisdiction to entertain his request for custody.

IV. ANALYSIS

Zimmerman argues on appeal that under the UCCJEA, the district court had authority to make an initial custody determination, and that the court erred in finding the Iowa protection order precluded any such determination. He argues that the Iowa court did not have authority to enter a custody order under the UCCJEA which would have deprived the Nebraska district court from jurisdiction, as the children's home state, to make a custody finding. We agree.

[1] In considering whether jurisdiction existed under the UCCJEA, when the 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 the trial court. *Carter v. Carter*, 276 Neb. 840, 758 N.W.2d 1 (2008).

[2] The UCCJEA was enacted to serve the following purposes: (1) to avoid interstate jurisdictional competition and conflict in child custody matters, (2) to promote cooperation between courts of other states so that a custody determination can be rendered in a state best suited to decide the case in the interest of the child, (3) to discourage the use of the interstate system for continuing custody controversies, (4) to deter child abductions, (5) to avoid relitigation of custody issues, and (6) to facilitate enforcement of custody orders. *Carter v. Carter, supra*.

[3,4] The most basic proposition under the UCCJEA is that in order for a state to exercise jurisdiction over a child custody dispute, that state must be the home state as defined by the UCCJEA or fall under limited exceptions to the home state requirement specified by the act. Neb. Rev. Stat. § 43-1238 (Reissue 2008); *Carter v. Carter, supra*. The UCCJEA provides that a state has jurisdiction to make an initial custody determination only if it is the home state of the child on the date of the commencement of the proceeding or was the home state

of the child within 6 months before the commencement of the proceeding and the child is absent from the state but a parent or person acting as a parent continues to live in the state. § 43-1238; *Carter v. Carter, supra*.

[5] In the present case, the Iowa district court apparently made a temporary custody determination in the course of granting a domestic abuse protection order. Although a custody determination in a domestic violence case *could* be considered an initial child custody determination under Neb. Rev. Stat. § 43-1227 (Reissue 2008), such a determination is considered binding and conclusive on other courts only if such determination was made by a court with jurisdiction under the UCCJEA. See Neb. Rev. Stat. § 43-1231 (Reissue 2008). Similarly, Neb. Rev. Stat. § 43-1241 (Reissue 2008) provides that under the UCCJEA, a court may exercise emergency temporary jurisdiction under the act, but such a determination remains in effect only until a court that would have jurisdiction to make an initial custody determination (i.e., the home state of the child) enters an order.

Iowa has also enacted the UCCJEA, and Iowa's provisions concerning jurisdiction to make an initial custody determination likewise demand that the court be the home state of the child, in the absence of circumstances demonstrating that one of the narrow exceptions should apply. Iowa Code Ann. § 598B.201 (West 2001). None of the exceptions allowing an Iowa court to make an initial child custody determination without being the home state of the child appear to be relevant to this case.

In this case, any temporary custody order entered by the Iowa court as part of a domestic violence case would not serve as an initial custody order under the UCCJEA and would not be binding and conclusive on the issue in a court that would properly have jurisdiction to make an initial custody order. It would, instead, be merely a temporary order that could be in effect until such time as a court with jurisdiction to enter an initial custody order makes a determination on custody.

Zimmerman testified that both children had resided with him and Biggs in Omaha from the time of their births—2010 for the older son and 2013 for the younger son—until Biggs took the

younger son to Iowa in April 2013. This evidence was uncontroverted. Thus, it is apparent from the record that Nebraska was the home state of the children. The record presented on appeal indicates that the current proceeding was the first to establish paternity of the children, and there is no indication of any prior custody order concerning the children.

Under § 43-1238, the district court in the present case had jurisdiction to make an initial custody determination. Nebraska was the home state, and there is no indication that any other court had jurisdiction under the UCCJEA to make an initial custody determination. The initial custody determination of the district court would then supersede any temporary order entered by the Iowa court. See § 43-1241. The district court erred in concluding that it lacked jurisdiction to make an initial custody determination, and we remand for further proceedings.

V. CONCLUSION

We conclude that Nebraska was the home state of the children under the UCCJEA and that the district court erred in concluding it lacked jurisdiction to make an initial custody determination. We remand for further proceedings.

REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
KENNETH W. CLARK, APPELLANT.

849 N.W.2d 151

Filed July 8, 2014. No. A-13-545.

1. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
2. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
3. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: 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 evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.

4. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
5. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
6. **Effectiveness of Counsel: Records: Trial: Evidence: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. Rather, the determining factor is whether the record is sufficient to adequately review the question.
7. **Trial: Effectiveness of Counsel: Evidence: Appeal and Error.** An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.
8. **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.
9. **Words and Phrases.** The word "or," when used properly, is disjunctive.
10. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.
11. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
12. **Effectiveness of Counsel: Proof: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order.
13. **Effectiveness of Counsel: Proof.** To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.
14. ____: ____. To show prejudice on a claim of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.

15. **Proof: Words and Phrases.** A reasonable probability is a probability sufficient to undermine confidence in the outcome.
16. **Right to Counsel: Waiver: Effectiveness of Counsel.** Appointed counsel must remain with an indigent accused unless one of the following conditions is met: (1) The accused knowingly, voluntarily, and intelligently waives the right to counsel and chooses to proceed pro se; (2) appointed counsel is incompetent, in which case new counsel is to be appointed; or (3) the accused chooses to retain private counsel.
17. **Attorneys at Law: Conflict of Interest.** Appointed counsel may be removed because of a potential conflict of interest, and such a conflict could, in effect, render a defendant's counsel incompetent to represent the defendant and warrant appointment of new counsel.
18. **Attorney and Client: Conflict of Interest: Words and Phrases.** The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard of another or where a lawyer's representation of one client is rendered less effective by reason of his or her representation of another client.
19. **Effectiveness of Counsel: Proof: Appeal and Error.** An appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel when raising an ineffective assistance claim on direct appeal.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Affirmed.

Lisa F. Lozano for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

MOORE, Judge.

INTRODUCTION

Kenneth W. Clark appeals from his conviction and sentence following a jury trial in the district court for Lancaster County of a violation of the Sex Offender Registration Act (SORA). The court sentenced Clark to 90 days in jail with credit for time served. Clark assigns error to the court's failure to give a requested jury instruction, the overruling of his motion for directed verdict, and the sufficiency of the evidence to convict him. He also asserts that the court imposed an excessive sentence and that he was denied effective assistance of counsel. Finding no merit to the assignments of error, we affirm.

BACKGROUND

In 2008, Clark pled no contest to and was convicted of third degree sexual assault, a Class I misdemeanor. He was sentenced to 360 days in jail. His conviction and sentence were affirmed on appeal. See *State v. Clark*, 278 Neb. 557, 772 N.W.2d 559 (2009). As a result of the conviction, Clark was subject to the registration requirements of SORA. See, Neb. Rev. Stat. § 28-320 (Reissue 2008); Neb. Rev. Stat. § 29-4003 (Cum. Supp. 2012) (SORA applies to persons who, on or after January 1, 1997, plead to or are found guilty of certain listed crimes, including sexual assault). The present appeal arises out of Clark's conviction for failure to follow those registration requirements in 2012.

On October 5, 2012, the State filed an information in the district court, charging Clark with a SORA violation, pursuant to Neb. Rev. Stat. § 29-4011(l) (Cum. Supp. 2012), a Class IV felony.

On November 27, 2012, Clark's attorney filed a motion for competency evaluation. A hearing on the motion was held on November 28. During the course of the hearing, Clark objected to his attorney's motion and explained the nature of his objection to the district court. On November 28, the court ordered that a competency evaluation be conducted. On January 2, 2013, a hearing was held to determine Clark's competency following the evaluation, and an order was entered on January 3 finding that Clark was not competent to stand trial. This order committed Clark to the Lincoln Regional Center for treatment until such time as the disability may be removed. On February 1, the court found Clark competent to stand trial and ordered him to be released from the Lincoln Regional Center.

A jury trial was held on April 1 through 3, 2013. Testimony was presented from the civilian supervisor for the Nebraska State Patrol (NSP) Sex Offender Registry, a Lancaster County Department of Corrections officer, the records system supervisor for the Lancaster County sheriff's office, and a Lincoln Police Department officer. In addition, certain documentary evidence with respect to Clark's SORA registration and subsequent verifications was admitted.

The record shows that Clark completed his original registration under SORA in May 2008. Clark's original registration forms list his mother as another occupant at the same address. Clark completed a verification form in May 2009, showing no changes in his address. In December 2009, Timothy Kennett, a Lincoln Police Department sergeant whose duties include the investigation of SORA violations, contacted Clark as a part of his compliance checks on registered sex offenders. This contact was made in an effort to update registrants' information prior to an upcoming change in SORA verification requirements in January 2010. Kennett assisted Clark at that time in making sure his information was up to date.

Reporting requirements for verification by registrants changed in 2010. As of January 1, 2010, offenders were required to report to a sheriff's office for verification annually, biannually, or quarterly, depending on their registration duration. Offenders convicted of misdemeanors are required to register for 15 years, and as of January 2010, 15-year registrants were required to verify their information annually in their birth month. At the end of October 2009, the NSP sent a mass mailing to all actively registered offenders, advising them of their registration duration and new verification schedule. Clark was sent a letter dated October 26, 2009, via certified mail, informing him about the changes in verification requirements and that, beginning in 2010, as a 15-year registrant, he would have to verify his registration information every 12 months in his birth month, which is March. The October 2009 letter was returned unclaimed to the NSP, even though it was sent to Clark's last known address in the registration database.

On April 8, 2010, Clark was an inmate at a Lancaster County correctional facility. Following an inquiry regarding Clark by the Lincoln Police Department, a county department of corrections officer asked Clark to fill out a change of address form. This was necessary because sex offender registrants who are incarcerated for more than 3 working days are required to notify the sheriff's office of the change in address. The officer explained to Clark that he needed to complete the form which would be sent to the sheriff's office to correctly designate

Clark's address for SORA purposes. The officer testified that Clark appeared to understand what he needed to do and that he completed the form. Clark completed another change of address form with the sheriff's office in May 2010, showing a new address in Lincoln. The form lists his brother as another occupant at the address.

The NSP sent Clark a letter dated January 21, 2011, again informing him of his responsibilities with respect to registration verification and the changes made effective in January 2010. This letter was sent to the address Clark provided in May 2010. The evidence shows that the letter was actually delivered to Clark on January 28, 2011. Clark signed the notification acknowledgment form on January 28.

Clark completed a change of information form providing a new address, dated February 18, 2011, which was received by the sheriff's office and NSP in February. This form shows Clark again residing with his mother at the same address where he resided when he initially registered. The notification acknowledgment form was also returned to the sheriff's office. However, no verification form was completed by Clark in March, the month of his birthday. In April, the NSP referred Clark's name to Kennett because Clark had missed his sex offender verification in March. On April 18, Kennett contacted Clark regarding his failure to register in March. In explaining why he had not registered in March, Clark told Kennett he had gone to the sheriff's office in February and filled out an updated form because he thought he had to register prior to his birthday. Clark also told Kennett that he did not understand that he had to come in each year during the month of March to register. Kennett explained to Clark that he had to come in every year during March to complete his verification and told him to go to the sheriff's office after their conversation. Clark told Kennett that he understood and that he would not miss any more verifications. Clark completed an updated form on April 18. Kennett subsequently advised Clark that the county attorney's office was not going to file any charges with respect to Clark's failure to register in March. Kennett again explained to Clark that he had to come in every year during the month of March to complete

his registration verification. Clark again told Kennett that he understood.

Clark completed an additional updated form in June 2011. At that time, Clark also signed an acknowledgment form, acknowledging that he had read the notification explaining his duty to register and that he understood his obligations under SORA.

Clark again failed to verify and update his information in March 2012, and his name was referred to Kennett by the NSP. On May 10, Kennett and another detective contacted Clark at his registered address. Kennett explained to Clark that they were there because of the sex offender registry and asked him if he had registered in March. Clark told Kennett he thought he had gone with his mother to register a couple of months before. Kennett asked Clark if he thought it had been in March. Clark responded that he thought so, but that maybe he had forgotten. Kennett then called the sheriff's office to doublecheck Clark's verification status. While Kennett was on the telephone with the sheriff's office, Clark told Kennett that he might have forgotten and that he remembered Kennett contacting him the year before on the same issue. After the sheriff's office advised that Clark's last verification was dated in June 2011, Kennett arrested Clark for violating SORA. The NSP received an update of Clark's information from the sheriff's office in May 2012.

After Kennett's testimony, the State rested, and Clark moved for dismissal for failure to prove a prima facie case, which motion was overruled by the district court.

Clark then presented testimony from his mother, Linda Clark Moore. According to Moore, Clark was 29 years old at the time of trial and has lived with her all of his life except for a 6-month period when he lived with his brother. She testified that Clark has a learning disability; has difficulty reading and verbalizing his thoughts; and suffers from schizophrenia, phobias, and paranoia. Moore testified that she reminds Clark of things, takes him to appointments, reads his papers, and helps him with his paperwork. Clark works with Moore's father at a country club in the "pro shop" and in the kitchen.

Moore filled out the information on the notification acknowledgment form signed by Clark on January 28, 2011, and Clark then signed the form. Moore admitted that the verification document states that offenders have to register annually in the month of their birth at the sheriff's office. Moore took Clark to the sheriff's office in February 2011 to complete his registration. Moore testified that if she had known Clark had to register in March, she would have taken him then. She also testified that she did not think it would make a difference to register in February, since it was "almost a few days away from his birthday." Moore took Clark back to the sheriff's office on April 18 after the police visit to register again.

In May 2012, Moore received a telephone call from police about Clark's not registering again and informing her that Clark was in jail. Moore was very upset that she had failed to take Clark to the sheriff's office on time. However, Moore agreed that it was Clark's duty to complete his verifications as required and that her name only appears on Clark's registry papers as a person of interest because he was living with her.

Following Moore's testimony, Clark rested, and the State had no rebuttal evidence. Clark asked the district court for a directed verdict, which motion was denied by the court.

On April 3, 2013, the jury found Clark guilty of a SORA violation. The district court accepted the verdict and ordered a presentence investigation. On June 20, the court entered an order sentencing Clark to a jail term of 90 days and giving him credit for time served. Clark subsequently perfected his appeal to this court.

ASSIGNMENTS OF ERROR

Clark asserts, combined, that the district court erred in (1) overruling his proposed jury instruction No. 3, (2) overruling his motion for directed verdict and convicting him based on insufficient evidence, and (3) imposing an excessive sentence. Clark also asserts that he was denied effective assistance of counsel.

STANDARD OF REVIEW

[1,2] Whether jury instructions given by a trial court are correct is a question of law. *State v. Green*, 287 Neb. 212, 842 N.W.2d 74 (2014). When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *State v. Ely*, 287 Neb. 147, 841 N.W.2d 216 (2014).

[3] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: 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 evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011).

[4,5] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Rieger*, 286 Neb. 788, 839 N.W.2d 282 (2013). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Johnson*, 287 Neb. 190, 842 N.W.2d 63 (2014).

[6,7] A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013). Rather, the determining factor is whether the record is sufficient to adequately review the question. *Id*. An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing. *Id*.

ANALYSIS

Jury Instruction.

Clark asserts that the district court erred in overruling his proposed jury instruction No. 3. Clark's proposed instruction would have required the State to prove that Clark was subject to the provisions of SORA; that he was notified of his obligation to report in person to the sheriff's office every 12 months during the month of his birth; that he "knowingly and willfully (or intentionally) failed to report every twelve months in the month of his birth, in person, to the office of the sheriff of the county in which he resides for purposes of accepting verifications"; and that this occurred in Lancaster County between March 1 and 31, 2012.

The actual jury instruction given by the district court required the State to prove the following elements beyond a reasonable doubt in order to convict Clark of a SORA violation:

> 1. That . . . Clark, was a person subject to [SORA], and
> 2. That . . . Clark knew of his verification requirements under the [a]ct, and
> 3. That . . . Clark failed to verify his registration in person, with the Sheriff . . . , and
> 4. That he failed to verify his registration during the month of his birth, to wit: between March 1, 2012 and March 31, 2012, and
> 5. This failure occurred in Lancaster County, Nebraska.

[8] 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. Morgan*, 286 Neb. 556, 837 N.W.2d 543 (2013).

Neb. Rev. Stat. § 29-4008 (Cum. Supp. 2012) provides, "No person subject to [SORA] shall *knowingly and willfully* furnish any false or misleading information in the registration *or* fail to provide or timely update law enforcement of any of the information required to be provided by the act." (Emphasis supplied.) Clark argues that a failure to provide or timely

update information must be knowing and willful and that his proposed instruction clarified that requirement. The State argues that the phrase "knowingly and willfully" only modifies the phrase "furnish any false or misleading information" and does not apply to the requirement to provide or timely update information.

[9] We agree with the State. The word "or," when used properly, is disjunctive. *State v. Thacker*, 286 Neb. 16, 834 N.W.2d 597 (2013). Section 29-4008 is worded in the disjunctive with an "or" between the two types of violations contained in the section. Thus, the "knowingly and willfully" language applies only to the furnishing of false and misleading information and not to the failure to update information. As such, the district court did not err in failing to give Clark's requested instruction as it was not a correct statement of the law.

Further, Clark cannot show that he was prejudiced by the district court's refusal to give his proposed instruction. The instruction that was actually given required the jury to find that Clark knew of his verification requirements under SORA and that he failed to verify his registration. This assignment of error is without merit.

Sufficiency of Evidence.

Clark asserts that the district court erred in overruling his motion for directed verdict and that the evidence was insufficient to convict him. Section 29-4011(1) provides that "[a]ny person required to register under [SORA] who violates the act is guilty of a Class IV felony." Clark was previously convicted of third degree sexual assault and thus subject to SORA requirements for a period of 15 years, and as a 15-year registrant, he was required to report to the sheriff's office in person in his birth month to complete annual verifications. See, Neb. Rev. Stat. § 29-4005 (Cum. Supp. 2012); Neb. Rev. Stat. § 29-4006(4) (Cum. Supp. 2012).

There is undisputed evidence in the record that Clark's birthday is in March and that he did not complete his annual verification in March 2012. His argument in support of this assignment of error again focuses on his lack of a knowing and willful violation of SORA, but we have already determined

that § 29-4008 does not require a "knowing and willful" failure to provide or update information required by SORA. In any event, there is sufficient evidence in the record to show that Clark knew of his obligation to verify his registration in person in the sheriff's office in March each year and that he failed to do so in March 2012. This assignment of error is without merit.

Excessive Sentence.

Clark asserts that the district court imposed an excessive sentence. He argues that, given his unique circumstances, including his mental, intellectual, and academic deficiencies, the sentence of 90 days in jail is excessive and should be reduced or a sentence of probation should be imposed.

Clark was convicted of a Class IV felony, which carries a maximum of 5 years in prison and/or a $10,000 fine. See, § 29-4011(1); Neb. Rev. Stat. § 28-105(1) (Reissue 2008). Thus, Clark's sentence of 90 days in jail is well within the statutory guidelines.

[10,11] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id*.

Clark was 29 years old at the time of sentencing. He has a 10th grade education and has been identified as "mildly mentally handicapped" with "speech/language" impairment. Clark told the probation officer conducting the presentence investigation that he is diagnosed as having paranoid schizophrenia with a learning disorder. In 1996, he was diagnosed by a mental health professional as having oppositional defiant disorder and obsessive-compulsive personality features. Clark spent time

in the Lincoln Regional Center from August 2005 to March 2006 for purposes of restoration of competency. At that time, his final diagnosis was substance abuse, including alcohol, and delusional disorder, not otherwise specified. He was also diagnosed as having borderline intellectual functioning.

In addition to the sexual assault that led to his SORA obligation, Clark has been convicted of criminal offenses, including possession of marijuana less than an ounce, assault, possession of drug paraphernalia, resisting arrest, carrying a concealed weapon, and disturbing the peace. On the level of service/case management inventory, he was assessed as a high risk to reoffend and scored in the very high or high ranges with respect to criminal history, leisure/recreation, procriminal attitude/orientation, and antisocial pattern.

It is clear that the district court considered the relevant factors in sentencing Clark. The court spoke at length about the factors it considered. The court rejected a sentence of probation, noting Clark's failure to take responsibility for the current crime. The court noted Clark's extensive prior criminal history and his failure to be compliant with past court orders. Nevertheless, the court rejected a prison sentence and imposed a minimal jail sentence in light of Clark's circumstances. We find no abuse of discretion in the sentence imposed upon Clark.

Ineffective Assistance of Counsel.

Finally, Clark asserts that he was denied effective assistance of counsel, arguing that his trial counsel violated his right to a speedy trial by filing a motion for competency evaluation and by failing to withdraw as counsel because of a conflict of interest.

[12-15] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order. *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014). To

show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. *State v. Hernandez, ante* p. 62, 847 N.W.2d 111 (2014). To show prejudice on a claim of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Filholm, supra*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Robinson*, 287 Neb. 606, 843 N.W.2d 672 (2014).

With respect to the motion for competency evaluation, the record is sufficient to review this claim and reveals that Clark's counsel was not deficient in raising the question about Clark's competency. Following an evaluation of Clark, he was, in fact, found incompetent to stand trial. After Clark spent a short period of time in the Lincoln Regional Center, the district court found him competent to stand trial and he was released from the Lincoln Regional Center. Contrary to Clark's assertions, the motion was not unnecessary. Further, the motion delayed the trial time only briefly. The information in this case was filed on October 5, 2012, and trial began on April 1, 2013, within the 6-month period set forth in Neb. Rev. Stat. § 29-1207 (Cum. Supp. 2012). Clark was not denied his statutory right to a speedy trial, and thus, his counsel was not ineffective in this regard.

Clark's argument with respect to the alleged conflict of interest is somewhat unclear but appears to relate, in part, to his trial counsel's having filed the motion for competency evaluation against Clark's wishes. He also argues that trial counsel should have withdrawn from his representation of Clark because he had been represented by an attorney from the public defender's office in a previous case and that attorney withdrew due to a conflict of interest, after which Clark retained private counsel.

[16-18] Appointed counsel must remain with an indigent accused unless one of the following conditions is met: (1) The accused knowingly, voluntarily, and intelligently waives the right to counsel and chooses to proceed pro se; (2) appointed

counsel is incompetent, in which case new counsel is to be appointed; or (3) the accused chooses to retain private counsel. *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013). Appointed counsel may be removed because of a potential conflict of interest, and such a conflict could, in effect, render a defendant's counsel incompetent to represent the defendant and warrant appointment of new counsel. *Id*. The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard of another or where a lawyer's representation of one client is rendered less effective by reason of his or her representation of another client. *Id*. In the case before us, Clark did not waive his right to counsel, ask to proceed pro se, or indicate that he intended to retain private counsel.

As discussed above, Clark's trial counsel was effectively representing Clark when she asked for a competency evaluation and, in fact, may have been ineffective had she failed to do so. Trial counsel's filing of this motion did not amount to a conflict of interest.

[19] With regard to the suggestion that some other conflict of interest existed based upon a previous conflict with the public defender's office, Clark does not provide sufficient allegations to show that a current conflict of interest existed. An appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel when raising an ineffective assistance claim on direct appeal. *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

This assignment of error is without merit.

CONCLUSION

The district court did not abuse its discretion in failing to give Clark's requested jury instruction No. 3. The evidence was sufficient to sustain Clark's conviction, and the court did not impose an excessive sentence. Clark did not receive ineffective assistance of trial counsel.

AFFIRMED.

Ember M. Schrag, appellant, v. Andrew S. Spear, appellee.

849 N.W.2d 551

Filed July 15, 2014. No. A-13-258.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Modification of Decree: Child Support: Appeal and Error.** Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Child Custody.** Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.
5. **Child Custody: Proof.** The party seeking modification of child custody bears the burden of showing a material change in circumstances.
6. **Modification of Decree: Words and Phrases.** A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.
7. **Child Custody: Proof.** Prior to the modification of a child custody order, two steps of proof must be taken by the party seeking modification. First, the party seeking modification must show a material change in circumstances, occurring after the entry of the previous custody order and affecting the best interests of the child. Next, the party seeking modification must prove that changing the child's custody is in the child's best interests.
8. **Child Custody.** According to Neb. Rev. Stat. § 43-2923(1) (Cum. Supp. 2012), the best interests of the child require a parenting arrangement which provides for a child's safety, emotional growth, health, stability, and physical care and regular and continuous school attendance and progress.
9. ____. In addition to the statutory factors relating to the best interests of the child, a court may consider matters such as the moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension, regardless of chronological age, and when such child's preference is based on sound reasons; and the general health, welfare, and social behavior of the child.

10. **Modification of Decree: Child Custody.** Not every change warrants a change in custody. The best interests of the children are not served by constant custody disputes and a shifting of custody control from one parent to the other.
11. **Modification of Decree: Child Custody: Evidence: Time.** Evidence of the custodial parent's behavior during the year or so before the hearing on the motion to modify is of more significance than the behavior prior to that time.
12. **Modification of Decree: Child Custody.** In order to find that a material change in circumstances has occurred in child custody determinations, the changes in the parties' circumstances must be significant enough to have affected the best interests of the children involved.
13. **Child Custody.** In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her.
14. ____. Legitimate employment opportunities for a custodial parent may constitute a legitimate reason for leaving the state.
15. ____. Legitimate employment opportunities may constitute a legitimate reason for leaving the state when there is a reasonable expectation of improvement in the career or occupation of the custodial parent.
16. **Child Custody: Visitation.** In determining whether removal to another jurisdiction is in the child's best interests, the court considers (1) each parent's motives for seeking or opposing the move; (2) the potential the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in light of reasonable visitation.
17. **Child Custody.** The ultimate question in evaluating the parties' motives in seeking removal of a child to another jurisdiction is whether either party has elected or resisted a removal in an effort to frustrate or manipulate the other party.
18. ____. In determining the potential that removal to another jurisdiction holds for enhancing the quality of life of the child and the custodial parent, a court should evaluate the following considerations: (1) the emotional, physical, and developmental needs of the child; (2) the child's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the child and each parent; (7) the strength of the child's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the removal would antagonize hostilities between the two parties.
19. ____. The list of factors to be considered in determining the potential that removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the child should not be misconstrued as setting out a hierarchy of considerations, and depending on the circumstances of a particular case, any one consideration or combination of considerations may be variously weighted.

20. **Rules of the Supreme Court: Child Support.** The Nebraska Child Support Guidelines provide that earning capacity may be considered in lieu of a parent's actual, present income when the circumstances merit. Earning capacity may include factors such as work history, education, occupational skills, and job opportunities.
21. **Child Support: Evidence.** Earning capacity should be used in determining a child support obligation only when there is evidence that the parent can realize that capacity through reasonable efforts.
22. ____: ____. When the evidence demonstrates that the parent is unable to realize a particular earning capacity by reasonable efforts, it is clearly untenable for the trial court to attribute that earning capacity to the parent for purposes of determining child support.
23. **Child Support.** A reduction in child support is not warranted when an obligor parent's financial position diminishes due to his or her own voluntary wastage or dissipation of his or her talents and assets and a reduction in child support would seriously impair the needs of the children.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed in part, and in part reversed and remanded with directions.

Stephanie R. Hupp and Zachary L. Blackman, of McHenry, Haszard, Roth, Hupp, Burkholder & Blomenberg, P.C., L.L.O., for appellant.

Amie C. Martinez, of Anderson, Creager & Wittstruck, P.C., L.L.O., for appellee.

IRWIN, MOORE, and BISHOP, Judges.

PER CURIAM.

Ember M. Schrag appeals from an order of the district court for Lancaster County which modified custody of the parties' daughter, Lillian Schrag, to award her father, Andrew S. Spear (Andrew), primary physical custody; denied Ember's application to remove Lillian from Iowa to New York; removed a visitation restriction on Ember's adoptive mother; and ordered Ember to pay child support based upon a prior earning capacity. For the reasons that follow in our opinion below, we reverse the modification of custody and the denial of Ember's application to remove Lillian to New York. However, we affirm the removal of the visitation restriction on Ember's adoptive

mother and the award of child support for the time that Lillian has been in Andrew's primary physical custody.

I. FACTUAL BACKGROUND

Ember and Andrew are the biological parents of Lillian, who was born in November 2007. They were never married and did not live together after Lillian was born. At the time of Lillian's birth, Ember resided in Lincoln, Nebraska, and Andrew resided near Kansas City, Missouri. Ember filed a paternity action in the district court for Lancaster County on November 7, 2007, and a temporary order was entered in March 2008, approving the parties' stipulated agreement. The agreement provided for Ember to have temporary custody of Lillian subject to Andrew's parenting time, which consisted of every other Saturday in Lincoln. Andrew was also ordered to pay child support. On January 21, 2009, the district court entered a final order of paternity awarding Ember custody of Lillian, subject to Andrew's rights of parenting time set forth in the parties' parenting plan, and requiring Andrew to pay Ember child support and half of her incurred childcare costs. Andrew's regular parenting time consisted of every third weekend from 9 p.m. on Thursday until 9 p.m. on Tuesday, together with holiday parenting time and summer parenting time which began as two 1-week periods in 2009 and gradually increased each year, concluding with two 3-week periods in 2012. Andrew provided all transportation for his parenting time and was allocated a $100-per-month reduction in his child support obligation, from $349 per month to $249 per month, because of this. A judgment of $330 per month was also entered against Andrew to cover his share of childcare costs.

Just over 2 weeks later, on February 6, 2009, in response to an order to show cause filed by Ember on December 10, 2008, seeking payment for amounts due from Andrew under the prior temporary order, the district court entered an order adopting an agreement reached by the parties. That agreement included a judgment of $2,085 owed by Andrew to Ember, payable at $100 per month, with said judgment resolving childcare costs owed by Andrew through January 30, 2009. Based

on this agreement, the previously entered order to show cause was vacated.

On November 6, 2009, Ember again filed a motion for an order to show cause, claiming that Andrew was behind in child support by $797.27 and in childcare by $2,469.55 and that he still owed $1,988.94 on the judgment entered in the prior contempt proceeding. On December 18, a contempt order was entered against Andrew, committing him to 30 days in the Lancaster County jail, but which provided for a suspension of the sentence as long as Andrew paid the amounts indicated in the contempt order.

A little over a year later, in February or March 2011, Ember moved with Lillian from Lincoln to Decorah, Iowa. She made this move because she and Bryan Day, her boyfriend at the time, were not in a good financial situation in Lincoln and Day's parents had offered them a free place to live in their home in Decorah. In April 2011, Ember and Day married. Ember claimed that during a telephone call with Andrew in February, she requested permission from Andrew to move to Decorah. She stated that Andrew seemed "very amicable" when he told her, "'I don't care if you move anywhere in the world, as long as I still get to see Lillian.'" Ember told Andrew that he would need to sign modification papers, and she was under the impression he was in agreement. He even agreed to change the visitation exchange location to Des Moines, Iowa, and they met in Des Moines on a couple of occasions. But when she gave him the modification papers to sign during an exchange in April (when Andrew was picking up Lillian for his parenting time), he refused to sign the papers. And when he was supposed to meet in Des Moines to return Lillian to Ember, Andrew told Ember that he would no longer consent to meet in Des Moines and that Ember would have to drive to Lincoln, a 7-hour drive for Ember, to pick up Lillian. About 1 hour before the scheduled exchange time in Lincoln, Andrew texted Ember that he would not be bringing Lillian back because he had been given emergency custody of Lillian.

Andrew had filed an action to modify the paternity order and sought emergency custody of Lillian. On April 26, 2011, an order for ex parte custody was entered, awarding Andrew

custody of Lillian pending a later temporary custody hearing. On May 31, following the temporary custody hearing, the court restored custody of Lillian to Ember. In that order, the court noted that Andrew's affidavit in support of the ex parte custody order stated that Ember had moved without the court's approval and without Andrew's consent or agreement. The court then stated:

> As a result of the most recent hearing where both parties had an opportunity to present affidavits, that statement turns out not to be the case. It is true that the court has not approved the move. It is not true that the move was made without [Andrew's] consent. [Andrew's] own affidavit discloses that he knew of the move and agreed to it.

The court also noted that "[Andrew's] ex parte affidavit also states that he did not know the whereabouts of his child from January, 2011 to April 26, 2011. Again, following the hearing where both parties had an opportunity to present evidence, this proves not quite to be the fact." The court then stated, "These discrepancies are significant in that they formed the basis for the need for ex parte action on the part of the court." The court concluded that the ex parte order "should not have issued," vacated the order, and restored custody of Lillian to Ember.

On February 22, 2012, a modification order was entered which approved a joint stipulation and parenting plan submitted by Ember and Andrew and which granted Ember permission to move Lillian to Iowa. The parenting plan specified that Ember and Andrew would share joint legal custody of Lillian and stated that the parties "shall discuss educational, medical, religious and social decisions concerning the parenting functions necessary to raising the child. In the event of an impasse, [Ember] shall have the final say; however, [Andrew] retains the right to submit the issue to mediation or return to Court." The parenting plan also provided that the principal place of residence of Lillian during the school year would be with Ember. Andrew was provided parenting time which included various school breaks and holidays, together with all of the summer break from school except for the first and last full weeks of

the summer break. It was agreed that the most effective way to communicate regarding Lillian was for either parent to send an e-mail to the other parent and to follow up with a telephone call. The parties agreed to share transportation responsibilities, and the record shows that they met in Des Moines for parenting-time exchanges. The parties also included a provision in the plan stating that Ember's mother by adoption, Cindy Chesley, would not have any contact with Lillian unless such contact was supervised by either party. The parties further agreed to reside in the states of Nebraska, Missouri (including the Kansas City metropolitan area), and Iowa unless otherwise agreed to by the parties. The parties stated their intention for Nebraska to maintain jurisdiction as the home state for Lillian. Finally, the parties agreed that they "can temporarily change the terms of this Plan as long as they both agree to it in writing," but they also acknowledged that any permanent changes to the plan required court approval before the change would become binding and enforceable.

Lillian spent the summer of 2012 with Andrew, returning to Ember on August 27, 2012. On that day, the parties met at the agreed-upon location in Des Moines. They exchanged cordial conversation, and no mention was made by Ember that she was moving Lillian to New York that day. On August 30, Ember notified Andrew in an e-mail that she had separated from Day. (Ember's divorce from Day was finalized when an Iowa district court entered a decree of dissolution on September 6.) In the August 30 e-mail, Ember also informed Andrew that Day was her only connection to Iowa and that without him, there was no reason to stay in Iowa. Ember explained that she had "spent the summer working on the east coast and developing a new support system in Philadelphia and New York City." Ember noted that she had "gotten an opportunity to move to New York City that will greatly improve Lillian's situation." The e-mail also noted:

> Although this is the first you're hearing of it, this is not sudden, and it will be the best for Lillian. I'll be in a much better spot, better able to care for her and spend time with her. We'll be living in a very nice neighborhood in [New York City].

Ember stated that because of New York's age requirements for school, Lillian would be starting kindergarten that fall, and Ember included a list of schools that Lillian could attend. Ember stated, "I'd appreciate your response regarding input into her educational opportunities," and then she provided Internet links to a Montessori school, along with links to two public schools—one school which Lillian would be automatically "zoned" to attend based on where they would live and the other school in a closer location where the children of several of Ember's friends attended. Since Lillian would be in school, Ember noted that Andrew would no longer have to contribute to childcare expenses. In the e-mail, Ember also stated that she would pay for the travel expenses when Andrew had his parenting time, mentioned the "hugely increased cultural opportunities available to Lillian," and indicated that Lillian would be attending a highly regarded dance school (Mark Morris Dance Center). Andrew replied on September 1, saying only, "I do not agree moving Lillian to New York is what's best for her." Within the week, on September 7, he filed a complaint to modify, seeking a change in custody of Lillian. On September 20, Ember filed an answer and counterclaim, wherein she sought the court's permission to move Lillian to New York. That same day, Ember also filed a motion for order to show cause asserting that Andrew was willfully refusing to pay ongoing childcare costs in the amount of $7,758.91, a childcare judgment for $962.35, and an attorney fee judgment of $600. An order to show cause was issued on January 4, 2013, showing that the contempt matter would be heard on February 11, the same day the matter was scheduled for trial.

On February 11, 2013, trial was held on Andrew's complaint and Ember's counterclaim. Ember, age 27 at the time of trial, is a folk singer. During the summer of 2012, while Lillian was with Andrew and in light of her separation from Day, Ember was looking for a new living arrangement and support system either in Philadelphia, Pennsylvania, or New York City, New York. Since she and Day had been living with Day's parents, she could no longer stay there, and she had no other family or friends in Decorah. Ember did not consider moving back to Nebraska because the only family

there was her adoptive mother, Chesley (who lived in North Platte, Nebraska), and Ember had been estranged from her for 2 years. Ember believed Philadelphia and New York City seemed to offer the best options, so for part of the summer, she was "housesitting in Philadelphia," while she also engaged in musical opportunities. She had a Philadelphia record label put out her second full-length album, and she had a lot of friends with whom she could collaborate musically, so she also played several shows while there. In considering Philadelphia as a possible place to live, Ember evaluated neighborhoods. She had many people tell her that the public schools were not very good, which was also in the news. Ember noted that the "rent wasn't as expensive there as some places," but that it "just didn't feel as safe to me."

Ember ultimately decided to move to New York. Although Ember has no family in the New York area, she had many musician friends there, and she believed that New York would enhance Lillian's quality of life. The educational opportunities were significant, and Ember was going to be able to spend more time with Lillian than ever before. Ember stated, "I'm really happy to be able to pick her up every day, and I feel more relaxed because I'm in a supported place where I can work on my music in a way that doesn't take me away from her."

From the end of August 2012 until the district court's order in February 2013, Ember and Lillian resided with Robert Bannister in his two-bedroom apartment in New York City. Ember and Bannister share one of the bedrooms while Lillian has her own bedroom. Ember met Bannister in March 2011 at a concert. She reconnected with Bannister at a concert in Chicago in May 2012 and began a romantic relationship with him about a month later.

At the time of trial, Bannister was 52 years old and was the director of the quality assurance department at an educational software development company. Bannister had been estranged from his second wife for 5 years, but was not yet legally divorced. He testified that he still supported his second wife by paying certain bills for her. Bannister had a son studying science at a college north of New York City.

Bannister shared custody of his son, who, prior to college, resided with Bannister rather than his mother during the week because Bannister's apartment was closer to his high school. When Bannister's son occasionally visits from college, he and Lillian enjoy interacting with each other, including doing science experiments together.

Ember conceded at trial that she is dependent on Bannister to provide Lillian and her with a place to live, but was adamant that her relationship with him did not show any signs of instability. Bannister also testified that he did not anticipate his relationship with Ember would terminate in the foreseeable future.

Since moving to New York, Ember has essentially become a stay-at-home mother caring for Lillian. Ember testified that while Lillian is at school or asleep, Ember works on composition, rehearsal, and promotion of her music career. During the fall of 2012, Ember traveled to other cities to perform shows and was away from home for only two to three evenings, during which time Bannister cared for Lillian. Ember testified that New York has been beneficial for her career as a musician because she can perform at night while Lillian is sleeping and these performances have more impact on her career.

According to Ember, Lillian did not have much difficulty adjusting to life in New York. Ember described Lillian as outgoing, extroverted, creative, friendly, smart, and confident. Ember indicated that Lillian seems to be comfortable, secure, and happy in New York. Lillian was able to begin kindergarten at a nearby school, and she has generally done well at school. Lillian participates in afterschool programs, including science and music. Lillian attends a creative dance class, and a music instructor comes to their home to give Lillian violin lessons. Letters from her violin teacher and dance instructor were received into evidence and highlighted Lillian's budding abilities. Additionally, Ember presented evidence to suggest that Lillian has developed a strong relationship with Bannister.

Testimony from Ember, Bannister, and a friend and neighbor of Bannister was received concerning the neighborhood they live in and about Ember's care of Lillian. Various

photographs of the area were received in evidence. The area is residential with many different types of old buildings, and there are playgrounds and parks nearby. Bannister's friend described the neighborhood as "family oriented." None of these individuals had any concerns about the neighborhood with respect to criminal activity or violence. The building that Bannister lives in has a security doorman. Bannister's friend's youngest daughter and Lillian are close in age, and he sees Lillian and Ember nearly every day before and after school. He has no concerns about Ember's parenting. He testified that Bannister is protective of Lillian and that their home is a supportive environment for Lillian's creativity. Ember walks Lillian to and from school every day. According to Ember, Lillian has friends through school and in the neighborhood. Ember takes Lillian to the nearby playground, parks, and museums. Ember helps Lillian with her homework, cooks the meals, bathes her, and reads to her, and they sing and play instruments together. Bannister engages in and assists with many of these activities.

Ember does not believe that physical custody of Lillian should be modified, because Ember has always been Lillian's primary caregiver and because a change in custody would cause serious disruption. Although the record shows that Andrew was current on child support at the time of the modification hearing, Ember also questioned whether Lillian was a priority for Andrew, since he had not regularly paid his child support in the past. Ember was also concerned about Andrew's contact with Chesley.

Andrew married his wife, Holly Spear, in October 2010. They have a son who was nearly 2 years old at the time of trial, and they were expecting another baby boy due to be born in June 2013. Andrew works as a restaurant general manager for a franchisee of a pizza restaurant. He testified at trial that he was training to become an area manager. Andrew typically works Monday through Saturday, from 8 a.m. to 6 p.m. On Sundays, he and his family attend church together. Andrew earns 3 weeks of vacation each year, which he typically takes in the summer when Lillian is with him. Holly also works at a restaurant, and she testified that she will be changing her

hours to 9 a.m. to 3 p.m. so that she is available to take Lillian to and from school. Currently, Andrew's aunt provides daycare in her home for Andrew and Holly's son at no charge, and she will also do so for both Lillian and the new baby.

Andrew and Holly are currently renting a home in Liberty, Missouri, and are working toward being able to purchase a home. Photographs of their home were received in evidence, in addition to the public school that Lillian would attend and a nearby park. Andrew testified that Lillian is comfortable in his home and that the consistency he provides to Lillian is good for her.

Andrew has many relatives in the Kansas City area, including his parents, grandmother, brother, aunts and uncles, and numerous cousins. Lillian has several cousins near her age that she enjoys getting together with. Lillian also has friends in Andrew's neighborhood that she plays with. Andrew and Holly testified about some of the activities that they do with Lillian, including crafts, going to museums, and working with flashcards. Andrew and Holly both testified to having a close relationship with Lillian.

Chesley has been visiting Lillian at Andrew's home under his supervision since the previous court order. Chesley testified to her observations of the interaction between Andrew and Lillian. She indicated that Andrew is very tender with Lillian and that there is a lot of cuddling between the two. Chesley believes that Lillian feels safe with Andrew and respects him. According to Chesley, Andrew is firm and there are clear rules in his home, Andrew is very engaged with Lillian, and Lillian has a close relationship with her half brother. Chesley testified regarding concerns that she had about Ember's care of Lillian, but she has not been able to observe the relationship since Chesley and Ember's estrangement in early 2011. Chesley admitted that she has paid a portion of Andrew's attorney fees in connection with this proceeding and that she had previously assisted Ember with her attorney fees.

Andrew believes that Lillian's best interests require a change of custody. Andrew testified regarding his concerns about Ember's parenting, the move to New York, and the new relationship with Bannister. Specifically, he indicated, "I don't

think [New York City] is the neighborhood that I want my daughter growing up in." He also pointed to the instability in Lillian's life over the last couple of years with the frequent moves and changes of significant people in her life. Andrew testified that the "nomadic life" is not good for Lillian. Andrew highlighted the stability that he has had in his family life—he has lived and worked in the same area for several years and has regularly exercised the parenting time provided to him by the various orders.

On February 27, 2013, the district court entered its order denying Ember's request for removal and modifying custody of Lillian to Andrew. In its order, the court found that Ember did not have a legitimate motive to move to New York and that removal was not in Lillian's best interests. In granting Andrew's modification request, the court noted that this change in custody was going to be another abrupt change in Lillian's life, but believed that this change would stop the pattern of sudden, dramatic changes. The court also lifted the supervised contact restriction on Chesley, revised the parties' child support obligations, and indicated that the parties had reached an agreement on the contempt matter.

Ember filed a motion for a new trial. The district court denied this motion, but issued an amended order on March 18, 2013. Ember appeals from this order.

II. ASSIGNMENTS OF ERROR

Ember assigns and argues four errors. She alleges, summarized, restated, and reordered, that the district court erred in (1) modifying custody, (2) denying her application to remove Lillian to New York, (3) removing the requirement that Chesley's visitation with Lillian be supervised, and (4) calculating her child support obligation.

III. STANDARD OF REVIEW

[1] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Watkins v. Watkins*, 285 Neb. 693, 829 N.W.2d 643 (2013).

[2] Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Pearson v. Pearson*, 285 Neb. 686, 828 N.W.2d 760 (2013).

[3] An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Watkins v. Watkins, supra*.

IV. ANALYSIS

1. Modification of Custody

Ember argues that the district court erred when it determined that Andrew should be awarded primary physical custody of Lillian. She claims that there has been no material change in circumstances and also believes that a change in custody is not in Lillian's best interests.

[4-6] Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Id*. The party seeking modification of child custody bears the burden of showing a material change in circumstances. *State on behalf of Savannah E. & Catilyn E. v. Kyle E.*, 21 Neb. App. 409, 838 N.W.2d 351 (2013). A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004).

[7] Prior to the modification of a child custody order, two steps of proof must be taken by the party seeking modification. First, the party seeking modification must show a material change in circumstances, occurring after the entry of the previous custody order and affecting the best interests of the child. Next, the party seeking modification must prove that changing the child's custody is in the child's best interests. *Adams v. Adams*, 13 Neb. App. 276, 691 N.W.2d 541 (2005).

[8,9] According to Neb. Rev. Stat. § 43-2923(1) (Cum. Supp. 2012), the best interests of the child require a parenting

arrangement which provides for a child's safety, emotional growth, health, stability, and physical care and regular and continuous school attendance and progress. *Donscheski v. Donscheski*, 17 Neb. App. 807, 771 N.W.2d 213 (2009). Section 43-2923(6) states:

> In determining custody and parenting arrangements, the court shall consider the best interests of the minor child, which shall include, but not be limited to, consideration of the foregoing factors and:
>
> (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
>
> (b) The desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desires and wishes are based on sound reasoning;
>
> (c) The general health, welfare, and social behavior of the minor child;
>
> (d) Credible evidence of abuse inflicted on any family or household member. . . . and
>
> (e) Credible evidence of child abuse or neglect or domestic intimate partner abuse.

In addition to the statutory factors relating to the best interests of the child, a court may consider matters such as the moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension, regardless of chronological age, and when such child's preference is based on sound reasons; and the general health, welfare, and social behavior of the child. *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996).

[10] The Nebraska Supreme Court has explained that not every change warrants a change in custody and that "[t]he best

interests of the children are not served by constant custody disputes and a shifting of custody control from one parent to the other." *Hoschar v. Hoschar*, 220 Neb. 913, 915, 374 N.W.2d 64, 66 (1985), *disapproved on other grounds, Parker v. Parker*, 234 Neb. 167, 449 N.W.2d 553 (1989). The *Hoschar* court further stated that a decree fixing custody should not be modified "unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action." *Id*.

[11] Nebraska courts have also held that evidence of the custodial parent's behavior during the year or so before the hearing on the motion to modify is of more significance than the behavior prior to that time. *Hoins v. Hoins*, 7 Neb. App. 564, 584 N.W.2d 480 (1998) (citing *Kennedy v. Kennedy*, 221 Neb. 724, 380 N.W.2d 300 (1986), and *Hassenstab v. Hassenstab*, 6 Neb. App. 13, 570 N.W.2d 368 (1997)).

> The focus is on the best interests of the child now and in the immediate future, and how the custodial parent is behaving at the time of the modification hearing and shortly prior to the hearing is therefore of greater significance than past behavior when attempting to determine the best interests of the child.

Hoins v. Hoins, 7 Neb. App. at 569, 584 N.W.2d at 484.

In *Kennedy v. Kennedy, supra*, a district court modified custody from a mother to a father based on evidence that after the divorce, the mother had at different times cohabitated with two men to whom she was not married. The Nebraska Supreme Court reversed that decision. The *Kennedy* court pointed out that the mother had lived with her current husband for about 6 months prior to marrying him and that "[a]side from the fact that the parties lived together without first marrying, there is no evidence to indicate that the children were in any other way adversely affected by the relationship." 221 Neb. at 726, 380 N.W.2d at 302. In evaluating whether there had been a material change of circumstances for the district court to change custody, the *Kennedy* court concluded that other than the fact that the mother had at different times lived with three men at times she was not married to any of them,

there had been no significant material change in circumstances. The court also concluded that there was no evidence that the children were in any manner adversely affected by the living arrangements or exposed to any sexual activity. The *Kennedy* court stated:

> Where, as here, the evidence discloses that although the mother may have engaged in sexual activity with men not her husband when the children were home, absent a showing that the children were exposed to such activity or were in any manner damaged by reason of such activity, such sexual activity does not justify a change in custody.

221 Neb. at 727, 380 N.W.2d at 303. The *Kennedy* court also pointed out that just because the father now has a more stable home than at the time of the original order does not justify removing the children from the mother, noting that "'[t]he best interests of the children are not served by constant custody disputes and a shifting of custody control from one parent to the other. Rather, to the extent we can, we should attempt to provide some sense of stability for the children.'" *Id*. at 728, 380 N.W.2d at 303.

In *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996), a trial court modified custody of a child from the mother to the father. The Nebraska Supreme Court reversed that decision. Among other issues in that case, the mother admitted she had violated a provision of the dissolution decree which prohibited her from cohabitating with men not her husband. The *Smith-Helstrom* court noted:

> [V]iolation of a court decree is unquestionably a serious matter. But it is the best interests of the son which must be our paramount concern. While it is true that evidence concerning the moral fitness of the parents, including sexual conduct, can be considered as a factor in determining a child's best interests, . . . absent a showing that the mother's cohabitation adversely affected her son, we do not give this factor much weight.

249 Neb. at 460, 544 N.W.2d at 101 (citation omitted).

Of significance in our review of the district court's February 27, 2013, order in this case is its decision to consider a

number of matters occurring before the previous custody order was entered just a year earlier on February 22, 2012, as well as its decision to conduct an analysis on the removal issue before addressing the modification of custody issue. After concluding that Ember "has failed to carry the burden of establishing that moving Lillian to New York City is in Lillian's best interest," the trial court then addressed Andrew's request to change custody, noting that it was Andrew's burden to establish a material change in circumstances. Without providing any details, the trial court stated, "The court concludes that Andrew has met this burden. There has been a material change in circumstances since the last modification." The trial court then proceeded to analyze the best interests of the child, stating, "Ember's conduct as described above has been considered in reaching this decision to change custody. Further discussion of those facts is unnecessary." The trial court then proceeded to discuss the evidence adduced about Andrew and his wife, Holly.

[12] There is nothing in the record to indicate that in the year between the February 2012 custody order and the February 2013 custody order, there was any material change in circumstances adversely affecting Lillian's best interests. While it can be argued that Ember's decision to move to New York to live with Bannister after her divorce from Day might constitute a change in circumstances, there is no evidence to support that these changes had any adverse impact whatsoever on Lillian. In fact, there was substantial evidence to indicate that Lillian was flourishing in her new environment. However, the trial court elected to avoid consideration of that evidence, stating, "There was considerable evidence about Lillian's life in New York City. That evidence is, of course, relevant only if the court determines that the move is justified." The trial court then proceeded to first discuss the removal of Lillian from Iowa to New York, rather than to first evaluate whether a material change in circumstances affecting Lillian's best interests had occurred that would warrant a change in custody. The trial court did not consider Lillian's relationship with Ember, nor how happy and thriving Lillian appeared to be when she was with Ember; rather, the trial court focused more on the

fact that Ember moved without permission and viewed her lifestyle as less stable than Andrew's. However, not every change in the parties' circumstances justifies a change in custody. See *Youngberg v. Youngberg*, 193 Neb. 394, 227 N.W.2d 396 (1975). Instead, in order to find that a material change in circumstances has occurred, the changes in the parties' circumstances must be significant enough to have affected the best interests of the children involved. See *id*.

In this case, the trial court essentially based the change in custody on Ember's failure to obtain Andrew's and/or the trial court's permission to move before actually moving to New York. The trial court stated:

> Ember's email has been demonstrated to be nothing more than a rather blatant effort at manipulation. . . . Had Ember truly cared for Andrew's input she would have been honest about her desire to move to New York City three months earlier and given him an opportunity to truly consider possible schools. . . . Ember's actions were designed to prevent Andrew from seeking a court decision in advance of the move.

Although there is no doubt that an earlier discussion of a desire to move to New York City would have put Ember in a more favorable light, Ember's testimony that she waited until Lillian was back in her care before telling Andrew about moving to New York, based on "what happened the last time I requested permission to move out of state," was understandable in light of Andrew's filing for ex parte emergency custody the last time she talked to him about moving (to Iowa). And in fact, in this case, upon sending the e-mail on August 30, 2012, rather than responding or attempting to discuss the matter in any manner, Andrew filed a lawsuit to change custody within the next week.

In *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996), the Nebraska Supreme Court considered the mother's violation of a provision of the dissolution decree which prohibited her from cohabitating with men not her husband and concluded that absent a showing that the violation (cohabitation) adversely affected her child, it would not give that factor much weight. We agree with the *Smith-Helstrom* court that

a violation of a court order is a serious matter, but that our paramount concern must be the best interests of Lillian. There is no evidence to indicate that Lillian was adversely impacted by the move to New York in any way; in fact, all of the evidence shows that Lillian was doing well in school, had a lot of friends to play with, was happy with the people around her and her activities, and was "calm and secure and happy." Her reading had improved, she was in afterschool programs for science and singing, and she was attending creative dance class at Mark Morris Dance Center. According to Ember, Lillian's aptitude for dance was shown in Decorah, where a teacher there recommended private lessons. Upon moving to New York City, Ember enrolled Lillian at Mark Morris Dance Center and walks Lillian and a friend to class every Wednesday. Ember also enrolled Lillian in music lessons from a violinist/composer, who comes to Ember's home once a week to give violin and piano lessons and to also teach music theory.

The evidence presented at the modification hearing revealed that despite the moves in Ember's life, Lillian is generally a happy, healthy, and well-adjusted young child. Her mother's musical influence can be seen in Lillian's preference for listening to Beethoven's Violin Concerto in D during breakfast before school. According to Bannister, Lillian resists almost any other suggestion for breakfast music and they respect Lillian's preference for a melodic keyboard composition at bedtime. There is no cable television in Bannister's apartment, and Ember limits Lillian's time that "she can watch a DVD or be on the PBS Kids site" on the computer to weekend mornings only. At the time of the hearing, Ember had been Lillian's primary caregiver for over 5 years, during which time Lillian by all accounts has thrived. As discussed previously, since the move to New York, Lillian has done well in kindergarten and has begun music and dance lessons. Andrew did not present any specific evidence that the changes in Ember's life have had a negative impact on Lillian.

It is clear from the record that both parents love Lillian and that they have each generally provided for her safety, health, and physical care. Lillian appears to have a close relationship with both parents, and there is no evidence of abuse inflicted

by either parent. These facts have not changed since the entry of the previous order. While Andrew presented evidence of his greater stability than Ember with respect to his residence, family, and employment, such evidence in itself is insufficient to justify a change in custody. As set forth in *Kennedy v. Kennedy*, 221 Neb. 724, 380 N.W.2d 300 (1986), just because a parent now has a more stable home than at the time of the original order does not justify changing custody. Stability in this case required leaving Lillian in Ember's primary care where she had been for more than 5 years prior; stability should not be based solely upon a parent's relocation. If that were the case, custodial parents who have to move due to business, military, or other such transfers would be subject to constant modification actions because of relocations mandated by their jobs. It is particularly unfair in this case to remove Lillian from Ember's primary care when Ember has now found a way to be at home with Lillian more while still having opportunities to advance her music career. Looking at the best interests factors listed in § 43-2923(6), the factors relevant in this case are subsections "(a) [t]he relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing" and "(c) [t]he the general health, welfare, and social behavior of the minor child." There is absolutely no evidence to suggest that Ember and Lillian have anything but a loving and healthy parent-child relationship or that Lillian is lacking in proper parental care. After reviewing the record, although the move to New York may constitute a change in circumstances occurring since the last custody order, Andrew has failed to establish that those changes had any adverse impact on Lillian's best interests or that her best interests warrant a change in custody. Accordingly, we find that the district court abused its discretion in modifying Lillian's primary physical custody from Ember to Andrew.

2. Denial of Application to Remove Lillian to New York

[13] In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy

the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002); *Colling v. Colling*, 20 Neb. App. 98, 818 N.W.2d 637 (2012).

This case presents an unusual factual situation as it relates to the removal jurisprudence. While the Nebraska court has continued to exercise jurisdiction in this case (with the parties' agreement), neither parent resides in Nebraska. Ember previously resided in Nebraska but was granted permission to move to Iowa in the last modification order, and she now resides in New York. Andrew has never resided in Nebraska; rather, he has continuously resided in the Kansas City area since the inception of this action. Without acknowledging the unusual factual scenario in this case, the district court applied the above test for removal and concluded that Ember's application to remove Lillian should be denied. However, the court did not apply the entirety of that test in its order. Our review shows that the court's order omits analysis of the first factor—whether Ember had a legitimate reason to leave the state.

On appeal, Ember questions whether this part of the test should even apply to her case. She notes in her brief that the requirement for her to establish a legitimate reason for leaving the state may not apply in this case because of the "large geographic distance that already existed between the parties" while she lived with Lillian in Iowa and Andrew lived in Missouri. Brief for appellant at 21. Ember further argues that there should be no need for her to prove a legitimate reason to move from a state in which the noncustodial parent does not reside.

We note that the above test for removal was first established by the Nebraska Supreme Court in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). Since its inception, this test has been applied to numerous cases. Although many of these applications have occurred in situations in which both parents were residing in Nebraska, this court has held that the

test from *Farnsworth* applies when a court considers a custodial parent's request for permission to make a subsequent move to yet another state. *Maranville v. Dworak*, 17 Neb. App. 245, 758 N.W.2d 70 (2008). In addition, the Nebraska Supreme Court recently considered the *Farnsworth* analysis in a situation where the noncustodial parent did not reside in Nebraska but nevertheless sought to prevent the custodial parent from relocating from Nebraska to Texas. See *Steffy v. Steffy*, 287 Neb. 529, 843 N.W.2d 655 (2014) (relocation denial by district court upheld under plain error analysis). In *Steffy*, the Nebraska Supreme Court chose not to address the threshold question of whether the custodial parent had a legitimate reason to relocate, because its holding on best interests was dispositive. Nonetheless, Nebraska appellate courts have not considered whether this test (in particular the existence of a legitimate reason to relocate) should be applied in the present factual scenario—when neither parent lives in this state and the noncustodial parent is attempting to prevent the custodial parent's subsequent move to another state.

Having reviewed the facts of this case and the applicable law, we agree with Ember that this case does not present the traditional application of *Farnsworth*. However, we need not determine whether the test should be different in this case, because we conclude that application of the *Farnsworth* test, in its current form, would not alter the ultimate outcome of the case. Applying the *Farnsworth* test in its entirety, we conclude the district court erred when it denied Ember's application to remove Lillian.

(a) Legitimate Reason to Leave State

Ember testified that in light of her separation from Day in June 2012, she no longer had a home in which to live in Decorah, where she and Day had been living with Day's parents. Ember had been working two part-time jobs in Decorah, neither of which were career-related jobs. She did not consider moving back to Nebraska because the only family remaining there was Chesley, her adoptive mother, from whom she had been estranged for 2 years. Although she had

friends in Lincoln, Ember decided Philadelphia or New York City seemed to be the best options for her and Lillian. After spending some time in Philadelphia and having a Philadelphia record label put out her second full-length album, Ember learned the schools there were not very good, whereas she understood the New York public schools were "some of the best in the country." Ember also had many musician friends in New York who had children, and after she and Bannister started a romantic relationship in the summer of 2012, they discussed Ember's moving in with him. While concerns about Ember's living with and being supported by a man not yet divorced from his estranged wife are understandable, we do not see these concerns as a basis to conclude that her request to move to New York was illegitimate. Rather, in our opinion, the focus should be on whether it was legitimate for Ember to seek to move from Iowa to New York. We conclude that Ember's reasons to move to New York were legitimate, because they were based on her desire to continue enhancing her music career while also making more time to be at home with Lillian.

[14,15] Legitimate employment opportunities for a custodial parent may constitute a legitimate reason for leaving the state. *Rosloniec v. Rosloniec*, 18 Neb. App. 1, 773 N.W.2d 174 (2009); *Wild v. Wild*, 15 Neb. App. 717, 737 N.W.2d 882 (2007). Such legitimate employment opportunities may constitute a legitimate reason when there is a reasonable expectation of improvement in the career or occupation of the custodial parent. *Id*. Ember testified that the move to New York would be beneficial for her music career because she can accomplish more in New York than she could have in Iowa and because her performances in New York have had "a lot more impact" for her career.

In *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000), the mother requested to move from Nebraska to Pittsburgh, Pennsylvania, because she had extended family there and also believed that she could enhance her employment opportunities. As it turned out, she earned less money in Pittsburgh, but there was greater potential for salary advancement at the Pittsburgh job. The mother testified that there was also less

overtime required of her in Pittsburgh, which in turn allowed her to spend more time with the children. The Nebraska Supreme Court concluded that there was sufficient evidence that although the mother's Pittsburgh job did not pay as well as her prior Nebraska job, the mother had a reasonable expectation for improvement in her career. The same can be said in the instant case for Ember's expectations of career opportunities and advancement in New York versus Iowa. Ember testified that living in Iowa required her to be gone for extended overnights in order to do performances, while maintaining that performances and music opportunities in New York did not require her to be gone overnight and that the "shows that I do play have a lot more impact for me."

In *Kalkowski v. Kalkowski*, 258 Neb. 1035, 1046, 607 N.W.2d 517, 526 (2000), the Nebraska Supreme Court concluded a mother's wish to relocate to Canada to be near extended family and to pursue educational and employment opportunities there were legitimate even though the mother "did not investigate educational opportunities in Nebraska and conducted only a limited investigation of employment opportunities in this state." In Ember's case, she specifically testified to the advantages of pursuing her career in New York over staying in Iowa, where she worked two jobs not related to her music career and had to be away for extended overnights in order to perform. Ember's reasonable expectation of improvement in her music career by moving to New York is a legitimate reason to request to move there.

Because we conclude a legitimate reason exists for the move, it is not necessary to address Ember's argument that this factor need not be considered in light of the fact that both parties live in separate states outside of Nebraska. Accordingly, the next analysis is whether it is in Lillian's best interests to continue living with Ember in New York.

(b) Best Interests

[16] In determining whether removal to another jurisdiction is in the child's best interests, the court considers (1) each parent's motives for seeking or opposing the move; (2) the potential the move holds for enhancing the quality of

life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in light of reasonable visitation. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002).

(i) Each Parent's Motives

[17] The ultimate question in evaluating the parties' motives in seeking removal of a child to another jurisdiction is whether either party has elected or resisted a removal in an effort to frustrate or manipulate the other party. *McLaughlin v. McLaughlin, supra*; *Colling v. Colling*, 20 Neb. App. 98, 818 N.W.2d 637 (2012).

The record shows that Ember sought removal after she divorced Day and could no longer reside with Day's parents in Iowa. Ember was in a position where she had to move from her residence in Iowa and needed to make decisions about relocation. After considering Philadelphia and New York City, she decided New York was the best location based on career opportunities for herself and educational and cultural opportunities for Lillian. Ember offered to pay for Lillian's travel costs in order for Andrew to maintain the same level of parenting time. Ember's delay in notifying Andrew about moving to New York and her failure to get court approval first are discussed in the custody portion of the opinion and will not be repeated here. The trial court's statement, "Ember's motive in making the move is unclear," is not supported by the evidence. Rather, the evidence showed that she could no longer live with Day's parents and that her reasons for selecting New York as a point of relocation were reasonable given her aspirations as a musician. Andrew opposed this move, stating, "I don't think [New York City] is the neighborhood that I want my daughter growing up in," and he also had concerns about Ember's moving from place to place and the "inconsistencies of living a nomadic life."

We conclude that neither party in this case acted in a way to intentionally frustrate or manipulate the other. Little weight is attributed to this factor.

(ii) Potential for Enhancing Quality of Life

[18,19] In determining the potential that removal to another jurisdiction holds for enhancing the quality of life of the child and the custodial parent, a court should evaluate the following considerations: (1) the emotional, physical, and developmental needs of the child; (2) the child's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the child and each parent; (7) the strength of the child's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the removal would antagonize hostilities between the two parties. *Dragon v. Dragon*, 21 Neb. App. 228, 838 N.W.2d 56 (2013). See *McLaughlin v. McLaughlin, supra*. This list should not be misconstrued as setting out a hierarchy of considerations, and depending on the circumstances of a particular case, any one consideration or combination of considerations may be variously weighted. *Dragon v. Dragon, supra*. See *McLaughlin v. McLaughlin, supra*.

a. Emotional, Physical, and Developmental Needs of Child

Having reviewed the record, we conclude this factor weighs quite heavily in favor of removal. The trial court found that Ember's "repeated moving among relationships and geographic areas is not beneficial to Lillian's emotional or developmental needs" and that "[t]his particular move was done without sufficient recognition of the emotional impact on Lillian." However, the trial court also acknowledged:

> There is evidence that Lillian's development in musical areas may be enhanced by this move. In New York City she is surrounded by cultural influences which would be beneficial to her upbringing. It is certainly beneficial that she is surrounded by people who are not glued to a television set.

The trial court did not indicate if the weighting tipped one way or the other after indicating both negative and positive reasons related to this factor. We note that Lillian had primarily lived with Ember for all of her life and that all evidence pointed to Lillian's being a very well-adjusted, happy, and creative child. When considering the best interests of a child, in our opinion, the emotional and developmental stability of the child should not be determined solely or primarily by where they are living or the number of times they may have to move; rather, these factors are primarily influenced by the relationships with people involved in the child's life, most of all familial relationships, but also friends, schoolmates, teachers, and other regular contacts in that child's life. In this case, all of the evidence indicated a happy and outgoing child doing well in school and in her music and dance activities. This evidence all points to her emotional, physical, and developmental needs being more than satisfactorily met while having lived primarily in Ember's care. We see this factor as being one of the most significant factors to consider, and we assign it considerable weight in considering Lillian's best interests.

b. Child's Opinion or Preference

There is no evidence in the record to establish Lillian's opinion or preference, and this factor therefore does not weigh in favor of or against removal.

c. Enhancement of Custodial Parent's Income or Employment

The trial court stated that "Ember's income and employment have not been shown to be positively enhanced by the move." We disagree for the same reasons set forth in the discussion on whether Ember had a legitimate reason to move to New York. It is not just a matter of increased earnings. Ember's ability to stay at home with Lillian, walk her to and from school, and engage in more of Lillian's day-to-day activities is a significant advantage for Lillian. Ember's ability to enhance her own music career without extended overnight traveling is likewise an advantage for Lillian. Requiring a musician who has shown success in the industry to stay in Iowa, Nebraska,

or Missouri seems an inappropriate infringement of that parent's "right to travel between states and the right to 'migrate, resettle, find a new job, and start a new life.' We have stated that an award of custody is not and should not be a sentence of immobilization." *Daniels v. Maldonado-Morin*, 288 Neb. 240, 243, 847 N.W.2d 79, 82 (2014) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969), *overruled on other grounds, Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974)). We conclude this factor weighs in favor of removal.

d. Degree to Which Housing or Living Conditions Would Be Improved

The trial court found that Ember failed to carry her "burden of establishing any improvement in housing or living conditions," because there was no evidence of housing or living conditions while Ember was still living with Day versus after she separated from Day. We find there is insufficient evidence to compare the living conditions in Iowa to those in New York, and accordingly, we find this factor does not weigh in favor of or against removal.

e. Existence of Educational Advantages

The trial court concluded that "[w]hile the educational opportunities are different in New York City compared to Iowa, there is no evidence a New York City education is more advantageous to Lillian compared to an Iowa education." However, the trial court also noted, "Lillian's musical talents have thrived recently. However, it is not clear whether that is a function of New York City, or merely a function of Lillian's age." We agree with the trial court that there was insufficient evidence to compare an Iowa education to a New York education and that simply based on a comparison of school systems, there was insufficient evidence to weigh in favor of or against removal on that factor.

However, the evidence also showed that Lillian was able to start kindergarten at a younger age in New York and that she was able to participate in dance instruction and private music lessons in New York City, where her musical abilities

have flourished—as noted by the trial judge. There was also evidence of greater musical and cultural opportunities available to Lillian in New York City, such as the Metropolitan Museum of Art, which she visited a couple of times; the Brooklyn Museum, displaying art and artifacts; a new natural history museum; and the Mark Morris Dance Center. For those reasons, we would find that this factor slightly favors removal.

f. Quality of Relationship Between Child and Each Parent

On this factor, the trial court stated, "Lillian appears to have a good relationship with both parents. It is clearly a different relationship with each parent." We agree with the trial court the record shows that Lillian has a good relationship with each parent and that Ember has been the custodial parent for the majority of Lillian's life, while Andrew has exercised his allocated parenting time.

We conclude that Ember's being the primary custodial parent for all of Lillian's life weighs in favor of her continuing to primarily reside with Ember. When, by all indications, Lillian was thriving under Ember's primary care, that relationship should not be disrupted by a change in physical custody. "'The best interests of the children are not served by constant custody disputes and a shifting of custody control from one parent to the other. Rather, to the extent we can, we should attempt to provide some sense of stability for the children.'" *Kennedy v. Kennedy*, 221 Neb. 724, 728, 380 N.W.2d 300, 303 (1986). Continuing to primarily reside with Ember would be in Lillian's best interests in order to preserve that primary parent-child relationship, which the evidence shows has produced a healthy, thriving child.

g. Strength of Child's Ties to Present Community and Extended Family

The record shows that Lillian and Ember do not currently have any family ties in Iowa, nor had Lillian commenced school when removal was requested. There was absolutely nothing to tie Lillian to Decorah. Although Ember retained

friends in the Lincoln area, the only family connection in Nebraska was with Chesley in North Platte, from whom Ember had been estranged for 2 years. Ember has no family ties to Missouri. Andrew presented evidence of an extensive extended family network near the Kansas City area, and he argued that the considerable distance created by the removal would make it more difficult for Lillian to have these relationships. The trial court opined that "[a] move to New York makes it much more difficult for Lillian to have a relationship with other family members." However, those other family relationships were built despite the distance from Kansas City to Decorah or, previously, Lincoln. Andrew has never lived in the same community with Lillian and Ember, so traveling to spend time together is not a new challenge. Andrew admitted that he made no trips to Decorah for additional parenting time with Lillian. Given that Lillian has built relationships with Andrew's extended family in the Kansas City area while she was there during designated parenting times establishes that distance alone does not impact the ability to maintain such relationships. Given that neither Ember, Lillian, nor Andrew had any ties to Decorah, this factor weighs in favor of removal.

h. Likelihood That Allowing or Denying Move Would Antagonize Hostilities Between Parties

We agree with the trial court that there is no evidence in the record to suggest hostilities would be antagonized between the parties whatever the outcome, and this factor therefore does not have any weight in the removal analysis.

(iii) Impact on Noncustodial Parent in Light of Reasonable Visitation

As discussed above, Andrew has never lived in the same state as Ember and Lillian. Traveling distance has always been a necessary component to Andrew's exercising parenting time with Lillian. That has usually involved Andrew's or both parties' having to drive a good distance to facilitate parenting exchanges. Ember testified that with her moving to New York, the current parenting schedule could be maintained with the

exception of Andrew's parenting time on Lillian's birthday weekend. Ember proposed that this time be added to Andrew's parenting time in the summer. Ember proposed that she would take responsibility for transporting Lillian to Andrew for his parenting time and would be responsible for associated costs. Andrew argued that if Lillian lived in New York, it would no longer be feasible for him to drive to see her at any events that were outside his parenting time. However, he conceded that he never went to Decorah to see Lillian during the time she lived there, but explained that this was because she was "never in school." He acknowledged that Ember had provided him with some contacts to obtain information related to programs at the Montessori daycare Lillian was attending there. Ember testified that Lillian was in a dance class in Decorah and that she had told Andrew about a recital; however, Andrew never went to visit Lillian in Decorah.

There is no question that putting more miles between residences makes driving for parenting time less feasible, although not impossible. There was evidence in the record that Chesley, Lillian's grandmother, traveled (presumably drove, based on the number of days of travel) to New York City and took photographs of Ember's neighborhood on Lillian's birthday, shortly after a hurricane had hit parts of New York. The trial judge concluded, "If the move were approved, Andrew would no longer be able to pack the family in a car and drive to one of Lillian's school event's [sic] or a dance or violin recital." The trial judge further concluded, "Andrew and Lillian will never be able to be together for her birthday celebration. Those opportunities are gone." First of all, as noted previously, Andrew never "pack[ed] the family in a car" to drive to see Lillian in an activity when she was in a more manageable driving distance. Second, a family road trip can still be made for special events if desired; clearly, Chesley was willing to drive that distance, even without having made advanced arrangements to see Lillian on her birthday. As to enjoying a birthday with Lillian, there is no reason a parenting schedule could not address this; these opportunities are not just "gone." Although making arrangements will require greater cooperation, coordination, and flexibility between the parents, there

is no reason Andrew should have any less parenting time than previously available to him; it may just come in fewer, but longer, periods of time.

Due to there being no change to the amount of time Andrew can spend with Lillian, and in light of Ember's being willing to take responsibility for travel costs, we conclude this factor weighs neither in favor of nor against removal.

(iv) Conclusion on Move

In considering the factors above, all factors either weighed in favor of removal or were neutral. The weight of the evidence supports the move's being in Lillian's best interests. Ember has shown that she has a legitimate reason to move to New York and that such a move is in Lillian's best interests. Accordingly, we reverse the district court's decision denying Ember's request to move to New York with Lillian, and remand the cause for entry of an order (1) granting permission for the move, (2) revising the parenting plan to switch Andrew's and Ember's parenting time accordingly, and (3) requiring Ember to be responsible for the costs associated with transporting Lillian to and from Andrew for his scheduled parenting time.

3. Chesley's Visitation With Lillian

As noted above, Chesley is Ember's mother by adoption. Chesley had a significant relationship with Lillian after she was born. In fact, Chesley cared for Lillian for extended periods of time at her home in North Platte from 2008 through 2010 while Ember was on tour. However, Chesley's relationship with Ember soured when she informed Ember that she could not care for Lillian in January 2011 for the extended period of time Ember requested. Chesley testified that Ember reacted poorly to this refusal and that she has not seen Ember much since that time. Chesley also testified that she and her husband attempted to visit Ember and Lillian in New York City just after a hurricane occurred to make sure they were safe, but they were not able to make contact with Ember in spite of numerous efforts.

Ember contradicted Chesley's version of the events and argued that Chesley acted irrationally in January 2011. Ember

claimed that when she tried to leave with Lillian after a visit, Chesley became overly emotional and tried to take Lillian from her. Ember also stated that she and Lillian were not in any danger during the hurricane, because Bannister's apartment was on high ground. Ember became distressed and afraid when she learned that Chesley was attempting to visit her in New York City.

When Andrew and Ember reached agreement on a revised parenting plan in February 2012, they included a provision that Chesley was not to have any unsupervised contact with Lillian. Andrew testified at trial that he allowed this provision because of what he learned about Chesley from Ember. While this parenting plan was in effect, however, Andrew and his family developed a relationship with Chesley. He supervised a number of visits between Chesley and Lillian and concluded that Ember's concerns were unfounded. Andrew requested that the court lift the supervised contact restriction. As additional support for this request, Andrew also submitted a psychological evaluation of Chesley in which the psychologist concluded that she would be a dependable, stable, and loving influence in all of her relationships and unlikely to harm anyone.

The district court determined that there was no evidence to justify continuing Chesley's visitation restriction and vacated that part of the previous order. We agree with that conclusion. Although Ember may still not want a relationship with Chesley, there is nothing in the record to show that she is a bad influence in Lillian's life or that she is an unsafe person. The district court did not abuse its discretion when it lifted this restriction. This assigned error is without merit.

4. Child Support Modification

In her final assignment of error, Ember argues that the district court abused its discretion when it modified her child support obligation. Although we have found that the district court abused its discretion in modifying custody, because child support was due Andrew while Lillian was in his custody, we address this issue. However, consistent with our reversal of the custody modification, we remand the cause to the district court

with directions to enter an order terminating Ember's child support obligation and ordering payment of child support by Andrew, based upon the worksheet attached to the February 2013 order, to commence upon the first day of the month following the return of Lillian's custody to Ember.

Specifically, Ember contends that the court erred in using her earning capacity from 2009 to determine child support when the evidence at trial showed that she has earned minimal income since her move from Iowa to New York.

When the court determined child support in its order, it utilized the parties' 2009 total monthly incomes as reflected in the original paternity order and attached child support worksheet, since it noted that neither party had proposed a change to the child support calculation used in the 2009 order. Accordingly, the court assigned total monthly income of $1,733 to Andrew and $1,790 to Ember. The court utilized these incomes because it did not find any evidence that the parties' income or earning capacity had changed since 2009. The court also made adjustments to its calculations by reflecting Andrew's payment of Lillian's health insurance and granting Ember a deviation because of the transportation costs she will incur in exercising her parenting time with Lillian.

Andrew did not present any evidence of his current income at trial. Ember presented evidence that she earned $8,000 in 2012; however, this appears to be income earned in Iowa before her move to New York. Ember currently has no income and has voluntarily become a stay-at-home mother since moving to New York, consciously choosing to rely on Bannister for her housing and living expenses and on Andrew for child support.

[20-23] The Nebraska Child Support Guidelines provide that earning capacity may be considered in lieu of a parent's actual, present income when the circumstances merit. See Neb. Ct. R. § 4-204. Earning capacity may include factors such as work history, education, occupational skills, and job opportunities. *Id*. Earning capacity should be used in determining a child support obligation only when there is evidence that the parent can realize that capacity through reasonable efforts. *Johnson v. Johnson*, 20 Neb. App. 895, 834 N.W.2d

812 (2013). When the evidence demonstrates that the parent is unable to realize a particular earning capacity by reasonable efforts, it is clearly untenable for the trial court to attribute that earning capacity to the parent for purposes of determining child support. *Id*. A reduction in child support is not warranted when an obligor parent's financial position diminishes due to his or her own voluntary wastage or dissipation of his or her talents and assets and a reduction in child support would seriously impair the needs of the children. *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009).

We conclude that the district court did not abuse its discretion when it calculated the parties' child support based on their 2009 incomes. Because Ember has voluntarily chosen not to work in New York in a manner that would provide her with monthly income, her 2009 income reflects the best evidence of her earning capacity. There is no evidence that Ember is unable to work or to show that she could not achieve the same level of income, through reasonable efforts in New York, as she earned in 2009. This assigned error is without merit.

V. CONCLUSION

Because the district court abused its discretion in modifying Lillian's primary physical custody from Ember to Andrew, we reverse that portion of the district court's order and restore primary physical custody to Ember. We also reverse the district court's denial of Ember's request to move to New York with Lillian and direct the district court to enter an order granting permission for the move. We also direct the court to revise the parenting plan, switching Andrew's and Ember's parenting time accordingly and requiring Ember to be responsible for the costs associated with transporting Lillian to and from Andrew for his scheduled parenting time.

However, the district court did not abuse its discretion when it removed Chesley's visitation restriction and calculated Ember's child support during the period that Lillian has been in Andrew's custody. We remand the cause to the district court with directions to enter an order terminating Ember's child support obligation and ordering payment of child support by Andrew, based upon the worksheet attached to the February

2013 order, to commence upon the first day of the month following the return of Lillian to Ember's custody.

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

MOORE, Judge, concurring in part, and in part dissenting.

I respectfully disagree with the conclusion of the majority that the district court abused its discretion in modifying Lillian's custody from Ember to Andrew. Based upon my de novo review of the record, I agree with the district court that a material change in circumstances has occurred since the entry of the previous order of modification and that it is now in the best interests of Lillian to place her custody with Andrew. I also disagree with the majority's finding that the district court abused its discretion with respect to the denial of Ember's request to move Lillian to the State of New York. Based upon my de novo review of the record, not only did Ember fail to establish a legitimate reason to move Lillian to New York, but she also failed to show that it was in Lillian's best interests to move there.

I. STANDARD OF REVIEW

As a starting point, I refer again to our standard of review which I believe significantly controls the outcome in this case. Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *State on behalf of Savannah E. & Catilyn E. v. Kyle E.*, 21 Neb. App. 409, 838 N.W.2d 351 (2013). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id*. Where 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 court heard and observed the witnesses and accepted one version of the facts rather than another. *Collins v. Collins*, 21 Neb. App. 161, 837 N.W.2d

573 (2013). In fact, in contested custody cases, where material issues of fact are in dispute, the standard of review and the amount of deference granted to the trial judge, who heard and observed the witnesses testify, are often dispositive of whether the trial court's determination is affirmed or reversed on appeal. *Id*.

With respect to parental relocation cases, the Nebraska Supreme Court has recently recognized:

> In parental relocation cases, trial and appellate courts deal with the tension created by a mobile society and the problems associated with uprooting children from stable environments. Courts are required to balance the noncustodial parent's desire to maintain their current involvement in the child's life with the custodial parent's chance to embark on a new or better life. These issues are among the most difficult issues that courts face in postdivorce proceedings. It is for this reason that such determinations are matters initially entrusted to the discretion of the trial judge, and the trial judge's determination is to be given deference.

Steffy v. Steffy, 287 Neb. 529, 537, 843 N.W.2d 655, 662-63 (2014). And, as noted by Justice Stephan in his dissenting opinion in *McLaughlin v. McLaughlin*, 264 Neb. 232, 246, 647 N.W.2d 577, 592 (2002):

> Where, as in this case, there are no absolutes and no clearly right or clearly wrong answers, it is particularly important to bear in mind that our standard of review requires an appellate court to give deference to the discretion of the trial judge, who observed the demeanor of the witnesses as he or she heard their testimony.

II. MODIFICATION OF CUSTODY

1. Material Change in Circumstances

The trial court found that Andrew met his burden of establishing a material change in circumstances since the last modification order. The majority recognizes that Ember's decision to move to New York to live with Bannister after her divorce from Day *might* constitute a change in circumstances since the last custody order, but I believe that it fails to recognize

the extreme nature of this change. Rather, the majority rests its decision on the lack of concrete evidence that Lillian has been harmed in any visible way by this extreme change. In my opinion, the fact that Ember—less than 4 months after the February 2012 order was entered—separated from Day, left Iowa for the east coast without a job or solid housing, moved in with a married man nearly twice her age, and then moved Lillian into this situation without notifying Andrew, let alone seeking court approval, clearly constitutes a material change in circumstances.

The majority downplays Ember's blatant violation of the previous court order and suggests that the previous attempt by Andrew to gain custody of Lillian when Ember moved to Iowa without court approval somehow justifies this conduct. And the majority suggests that Ember's fears were realized (and therefore justified) when Andrew again sought custody in this proceeding. Certainly, Andrew should not be criticized for instituting this modification action after Ember again took matters into her own hands and moved Lillian halfway across the country, and certainly, such action by Ember should not be condoned. Less than 4 months before Ember left Iowa for the east coast, she agreed (1) that she would share joint legal custody of Lillian with Andrew; (2) that she would discuss with Andrew decisions concerning the parenting of Lillian; (3) that she would reside in the states of Nebraska, Missouri (including the Kansas City area), or Iowa unless otherwise agreed to by the parties; and (4) that the terms of the parenting plan could be temporarily changed as long as both parents agree in writing, but that any permanent changes to the plan required court approval before the change would become binding and enforceable. Clearly, Ember knew the significance of this agreement and her breach thereof, having been down the modification road so recently. The only conclusion that can be reached, in my opinion, is that she willfully chose to ignore the agreement and court order. Had the trial court, in February 2012, known that Ember was going to leave Iowa for the east coast 4 months later to secure a new living arrangement and support system and remove Lillian to New York, I strongly believe that it would have decreed differently.

2. Best Interests

Nevertheless, Ember's actions in defying the court order cannot solely form the basis for modification of custody. It is well established that in order to modify custody, there must also be evidence that the change in circumstances affects the best interests of the child. See *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004). In support of its finding that Lillian's best interests require returning her custody to Ember, the majority places much emphasis on the fact that Lillian has been "flourishing" in New York City since being moved there. Ember's evidence was that Lillian started kindergarten, attends afterschool programs, attends creative dance class at Mark Morris Dance Center, and has private music lessons. However, it is important to note that the evidence concerning Lillian's life in New York City was only developed as a result of Ember's unilateral decision to move Lillian there before obtaining either Andrew's consent or prior court approval. Both the Nebraska Supreme Court and this court have discussed this evidentiary conundrum in connection with the grant of temporary permission to remove children to another jurisdiction prior to ruling on the issue of permanent removal, which practice has been specifically discouraged. See, *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Wild v. Wild*, 15 Neb. App. 717, 737 N.W.2d 882 (2007). This court summarized the *Jack v. Clinton* discussion, stating:

> [U]nnecessary and unfortunate complications . . . arise when a trial court grants a motion for temporary removal of a minor pending resolution of an application for permanent removal. In addition to necessarily causing the record to include facts pertaining to the periods prior to and after relocation, an ultimate denial of the application for permanent removal will necessitate ordering the minor, who may have already recently adjusted to one move, to move again and return to the jurisdiction. . . . The Supreme Court held, "The grant of temporary permission to remove children to another jurisdiction complicates matters and makes more problematic the subsequent ruling on permanent removal and encumbers

> appellate evaluation of the ultimate decision on permanent removal."

Wild v. Wild, 15 Neb. App. at 735, 737 N.W.2d at 897.

In the case before us, it was Ember, not the trial court, who caused this "unnecessary and unfortunate complication" by unilaterally removing Lillian to a new jurisdiction, thus allowing Ember to adduce evidence of the results of Lillian's experience during the approximately 6 months that she was in New York before trial. Not only should this practice of absconding with a child to a new jurisdiction be discouraged, it should not be allowed to form the basis for a finding regarding best interests as it relates to either the custody modification decision or the removal decision. Thus, I would discount the evidence presented by Ember, that Lillian is "flourishing" since being moved to New York, in analyzing her best interests.

The majority substantially bases its decision on best interests by finding there was no evidence to support that any change in circumstances had an adverse effect upon Lillian. Admittedly, there is no evidence of any physical harm or any outward manifestation of emotional harm to Lillian during the 6 months between her moving to New York and the trial. Although Andrew was able to exercise his Christmas parenting time in Kansas City, he was not able to have any personal contact with Lillian in New York during this period of time or make any investigation into her living situation. Neither parent presented any expert testimony relating to the effect of this move on Lillian. Rather, the evidence of her "flourishing" in New York came solely from Ember, Bannister, and a friend of Bannister. Again, I believe that this evidence should be discounted as discussed above.

I further disagree that it is essential to a modification of custody that an adverse impact from a material change in circumstances must be explicitly shown by the evidence to the exclusion of the other relevant factors in determining best interests of a child. In addition, I believe that a trial court, and an appellate court, can find adverse impacts by implication from a review of the record. In other words, by evaluating the relevant best interests factors and choosing to

modify custody, a trial court can essentially find by implication that the change in circumstances has an adverse impact upon the child.

In our recent decision in *State on behalf of Savannah E. & Catilyn E. v. Kyle E.*, 21 Neb. App. 409, 838 N.W.2d 351 (2013), we were presented with a somewhat similar situation to the case at hand. In that case, the parents of the two minor children were not married and originally agreed that the mother would have primary physical custody, subject to the father's parenting time. Both parents subsequently married others and had additional children. Several years later, the father sought modification of custody. At the outset of the modification proceedings, the mother attempted to move the children from Nebraska to Colorado despite the father's objection, but she returned to Nebraska after an ex parte order modifying custody was entered, and the children were returned to her custody pending trial. The evidence at trial showed that the mother had frequently changed residences and employment since the original custody agreement. After the mother's marriage, she relied upon her husband to help her care for the children, but at the time of trial, she was separated from her husband and planning to get a divorce. She had convictions for domestic assault (relating to her husband), possession of marijuana, failure to appear, issuing a bad check, and disturbing the peace (twice), and she had recently been charged with driving under the influence. There was some evidence that the mother was spending time in bars rather than caring for the children. She was working part time, but only because she felt she had to "'to please the court's,'" and she preferred to stay home with her children. *Id.* at 421, 838 N.W.2d at 361. The children had numerous absences and tardies from school during the year prior to trial while in the mother's care, but there was no evidence that their schoolwork had been negatively affected. The evidence concerning the father, on the other hand, showed that he had steady employment and housing and demonstrated stability in his marriage.

The trial court in *Kyle E.* modified custody by awarding primary physical custody to the father, and we affirmed. We first concluded that the totality of the evidence amounted to a

material change in circumstances which had affected the children's best interests. In reaching this conclusion, we noted the evidence concerning the mother's lifestyle in the last couple of years, and "consequently the lifestyle to which these children are exposed," finding that such evidence presented a legitimate concern regarding their custody. *Id*. at 422, 838 N.W.2d at 361. We also noted the evidence demonstrating the father's stable lifestyle. After considering the best interests of the children under Neb. Rev. Stat. § 43-2923 (Cum. Supp. 2012) and related case law, we agreed that the best interests of the children would be served by being placed in the father's custody. We acknowledged this was a close case in that the children were "'typical, healthy, well-adjusted children'" thriving in the mother's care and that both parents "'enjoy a positive and healthy relationship with the minor children.'" *State on behalf of Savannah E. & Catilyn E. v. Kyle E.*, 21 Neb. App. at 423, 838 N.W.2d at 362. Nevertheless, we concluded that the father was able to offer a more stable environment for the children when compared to the mother's past conduct and current living situation. In reaching this conclusion, we gave deference to the fact that the trial judge heard and observed the witnesses and was in a better position to determine the credibility of the parties.

Thus, while there was no explicit evidence that the children had been adversely affected by the mother's conduct and the change in circumstances since entry of the previous custody order, as noted by the dissenting opinion, the majority concluded that the best interests analysis nevertheless supported a modification of custody. See *State on behalf of Savannah E. & Catilyn E. v. Kyle E.*, 21 Neb. App. 409, 838 N.W.2d 351 (2013) (Irwin, Judge, dissenting). The petition for further review was subsequently denied by the Supreme Court.

As noted in *Kyle E.*, the relative stability of the parents is an appropriate consideration in determining custody. See, also, § 43-2923(1) (stability in parenting arrangement is factor in determining best interests of child). In the instant case, a review of Ember's actions since the previous modification order reveals a continuing pattern of instability. While this evidence supports a finding of a material change in

circumstances as I concluded above, I believe it also speaks to Ember's judgment, which, albeit indirectly, speaks to her suitability as a custodial parent.

The prior modification order resulted from Ember's move from Nebraska to Iowa with a boyfriend due to financial difficulties she was experiencing. Although Ember married this boyfriend, this marriage lasted only a short time. When Ember's marriage ended, she found herself without a means of financial support and housing. Ember then decided that she would seek a new living arrangement and support system on the east coast, focusing on her music career. Ember picked Lillian up in Des Moines at the conclusion of the summer in 2012 without making any mention to Andrew that Ember had moved to New York or that she was taking Lillian there. Ember met Bannister in 2011 and began a romantic relationship with him, a married man nearly twice her age, on the same day that she separated from her husband in 2012. She moved in with Bannister within 2 to 3 months of beginning this romantic relationship and moved Lillian into Bannister's apartment and life without Lillian's having previously met him. In my opinion, this conduct of Ember shows great instability and poor judgment, which certainly affects Lillian's best interests.

The majority points to case law that indicates that cohabitation by a custodial parent does not necessarily support a modification of custody. See, *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996); *Kennedy v. Kennedy*, 221 Neb. 724, 380 N.W.2d 300 (1986). I agree that cohabitation alone does not amount to a material change in circumstances. However, we have more than mere cohabitation involved in this case. Not only is Ember cohabitating with a married man nearly twice her age, she moved Lillian into this situation without her ever having met Bannister and after uprooting her once again and moving her halfway across the country. Quite simply, Ember has not demonstrated that she is able to present a stable environment for Lillian.

Considered against the backdrop of the underhanded approach taken by Ember to move Lillian to New York City, the record does not reveal a parent who is making good

decisions with regard to her daughter. Lillian did not know anyone in New York City other than Ember when she was abruptly moved there. While Ember is able to spend more time with Lillian because Ember is presently not employed, she is also unable to financially support herself, let alone Lillian. Ember is entirely dependent upon Bannister for her support and housing, and Ember acknowledged that she and Lillian would have nowhere to live if her relationship with Bannister ends. Ember also testified that should Andrew be awarded custody of Lillian, New York City is the only place that Ember currently has a "workable situation."

The majority emphasizes that no evidence exists to show that Lillian has been adversely affected by Ember's living arrangements. While it is true that there was no evidence that Lillian has been exposed to the sexual activity of Ember and Bannister, as noted in *Kennedy*, the lack of such evidence does not necessarily equate with a finding that Lillian's best interests are being served in this environment. Rather, the evidence tends to show that Ember is making decisions, changes in relationships, and far-reaching moves that serve *her* desires and musical interests rather than a consideration of how these changes affect Lillian. And, as the majority opinion correctly concluded with respect to the removal issue, moving Lillian such a great distance from Andrew has a detrimental impact on their relationship, a matter not seriously considered by Ember prior to making this unilateral decision to relocate Lillian.

In determining the best interests of Lillian, we are to consider, among other things, the moral fitness of the parents, the respective environments offered by each parent, the effect on the child as the result of continuing or disrupting an existing relationship, and the attitude and stability of each parent's character. *Smith-Helstrom v. Yonker, supra*. In my opinion, all of these factors weigh in favor of Andrew. The environment that Andrew can provide Lillian includes an intact family unit with half siblings for Lillian. Andrew and his family currently live in a home in a good neighborhood, with a yard and a nearby school and playground. Andrew has many relatives in the Kansas City area and an aunt who provides daycare for

Andrew's children without charge. Kansas City also presents many cultural opportunities and family activities. Andrew's lifestyle shows much greater stability; he has lived in the same area and worked for the same employer for several years. Lillian is well cared for by Andrew and his wife and is a happy, healthy child when in his care. Ember, on the other hand, demonstrates very little stability, as evidenced by her abrupt life changes. Ember has shown a pattern of "uprooting [Lillian] from stable environments" throughout her life. See *Steffy v. Steffy*, 287 Neb. 529, 537, 843 N.W.2d 655, 663 (2014). Ember continues to disrupt relationships with people in Lillian's life, which relationships in the past have included her maternal grandmother, Chesley; Lillian's stepfather, Day; and now Andrew and his family—not to mention other relationships that Lillian undoubtedly formed in the various places she has lived. At this young stage of her life, Lillian has apparently been able to adapt to all of the changes brought on by Ember. However, the lack of "negative impact" evidence should not be the sole factor in determining whether a modification of custody is warranted. Certainly, a sense of stability would be in Lillian's best interests.

Before concluding my discussion of the modification of custody, I must respond to the majority's reference to Andrew's prior difficulties in timely paying his child support obligation. I agree that this does not reflect positively on Andrew and that we should not be unconcerned about this. However, the trial court was presented with this evidence and it was presumably considered in the court's final decision. Many custody disputes present conflicting evidence which calls into question the relative strengths and weaknesses of each parent with respect to their parenting skills and attention to the needs of the children. The Nebraska Supreme Court and this court have recognized that in such a situation, the standard of review is often controlling:

> [W]here neither parent can be described as unfit in a legal sense but neither can be described as an ideal parent, . . . we give particular weight to the fact that the trial court saw and heard the witnesses in making necessary findings as to the best interests and welfare of the children.

Davidson v. Davidson, 254 Neb. 357, 369, 576 N.W.2d 779, 786 (1998). See, also, *Edwards v. Edwards*, 16 Neb. App. 297, 744 N.W.2d 243 (2008).

In my opinion, the record, when taken as a whole, supports a finding that it is in Lillian's best interests to be placed in the custody of Andrew. Had the trial court known, at the time of the last modification order, that Ember would again, 6 months later, move Lillian to another state without prior court approval, it would likely not have granted Ember retained custody of Lillian and permission to move to Iowa. Andrew satisfied his burden of showing a material change in circumstances since the entry of the previous order, which change in circumstances affected Lillian's best interests and warranted a modification in custody.

III. REMOVAL TO NEW JURISDICTION

Regardless of whether modification of custody occurs in this case, for the following reasons, I conclude that the district court did not abuse its discretion in denying Ember's postmove application to remove Lillian to New York. As such, I would affirm the order of the district court.

1. Legitimate Reason to Leave State

Although the district court did not explicitly provide analysis of this portion of the test in its order, after my de novo review, I conclude that Ember did not prove that she had a legitimate reason to move Lillian to New York. From my review of the record, Ember presented evidence on two reasons which she believed would validate her move from Iowa to New York: a new living arrangement and advancement of her music career. I conclude that neither of these was a legitimate reason to leave Iowa and move to New York.

Ember testified that after her separation and divorce from Day, she had no remaining connections to Iowa. She spent the following summer looking for a new living arrangement and settled on New York City. Having chosen New York City, Ember began a romantic relationship with Bannister and moved in with him, despite having little previous contact.

It is well established in Nebraska case law that remarriage is commonly found to be a legitimate reason for a move in removal cases. See *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000). But in this case, Ember's desire to move was not based on remarriage or even a possibility of remarriage. In fact, Ember was moving in and beginning a relationship with a man she had known for only a little over a year before the move. Additionally, at the time of trial, Ember and Bannister were not even able to legally marry because Bannister was still married and supporting his estranged spouse. Ember's desire to establish a new living arrangement was not a legitimate reason for relocating to New York.

While legitimate employment opportunities for a custodial parent may constitute a legitimate reason for relocating, I do not believe that Ember carried her burden of showing that she had legitimate employment opportunities in New York.

Ember testified that the move to New York is beneficial for her music career because she can accomplish more in New York than she could have in Iowa. She also believed that the shows she plays in New York have "a lot more impact" for her career. Despite her belief that New York is a better location for her music career, Ember has not shown that moving to New York was for a legitimate employment opportunity or that the move has improved her music career. Ember did not produce any evidence to demonstrate exactly how her music career would be enhanced in New York. Ember is unemployed and, in fact, has argued that her lack of employment is beneficial in that she is able to spend more time with Lillian. While Ember has allegedly performed some shows and produced an album, there is absolutely no evidence that these activities have produced any income, record contracts, sales, or future bookings. At this stage, Ember has not realized any objective signs of success in the music industry gained from moving to New York and it appears that her music is more of a hobby. At the time of trial, Ember did not have any current income or means of financial support for Lillian besides Andrew's child support payments. She is also completely dependent on Bannister for her living expenses and a place to live. It is impossible

to conclude that the move to New York was for a legitimate employment opportunity.

Finally, Ember produced no evidence to support a conclusion that advancement of her music career could occur only in the New York area. A mere 4 months before leaving for the east coast, Ember agreed that the parties should continue to reside in the midwestern states of Iowa, Nebraska, or Missouri (the Kansas City area). Presumably, Ember was satisfied with the status of her music career at the time of such agreement. While Ember testified that she had no reason to stay in Iowa because of her separation and divorce from Day, she did not make any effort to seek a new living arrangement, support system, or employment in any of the agreed-upon states. There is no evidence that moving to the east coast was her only option. In fact, there is evidence in the record to support that Ember previously pursued her music career in a substantial way when she lived in Nebraska. While Ember may have quickly grown dissatisfied with her ability to actively pursue her musical ambitions in Iowa, she is the one who requested permission to move to Iowa (and thus represented that such a move was for a legitimate reason) before the last order. After recently being granted permission to move to Iowa, Ember's assertion that moving from Iowa is now necessary in order for her to find success in the music industry carries little weight, in my opinion. My review of the evidence shows that Ember made a hasty, unilateral decision to ignore the agreement and court order and to pursue a new living arrangement and support system in a place she had never lived, with a man she barely knew, and without any means of supporting herself or Lillian.

Thus, I believe that the evidence rather overwhelmingly shows that Ember has not demonstrated a legitimate reason for removing Lillian to New York.

2. Best Interests

Although I have concluded that Ember did not meet the threshold requirement of proving a legitimate reason for her move to New York, I will also engage in the best interests analysis for the sake of completeness. I conclude that Ember

did not demonstrate that allowing removal to New York is in Lillian's best interests.

(a) Each Parent's Motives

As noted by the majority, Ember sought removal after she divorced Day, could no longer reside with his parents in Decorah, and needed to make decisions about relocation. The majority finds that Ember's reasons for selecting New York as a point of relocation were reasonable, given her aspirations as a musician. However, the majority does not address Ember's failure to research relocation in the agreed-upon states of Iowa, Nebraska, or Missouri (the Kansas City area). While Ember's motives for leaving Decorah are understandable, her motive in choosing to settle in New York is questionable given her previous agreement to remain in the midwestern states noted in the agreement. Finally, and perhaps more important, Ember admitted that she did not advise Andrew before moving Lillian to New York, because of her fear that he would again pursue custody. This admission shows a motive to frustrate Andrew's relationship with Lillian. As opposed to discussing with Andrew her situation and what would be best for Lillian, she led Andrew to believe that she was returning Lillian to Iowa at the conclusion of his summer parenting time on August 27, 2012. Then, by way of an e-mail 3 days later, Ember informed Andrew that she had moved Lillian to New York City. Although Ember extols the virtues of living there, at no point does she advise Andrew what Lillian's living situation was going to be or how Ember was going to provide for Lillian.

Andrew first opposed the move by not agreeing with the suggestions in Ember's e-mail that it was beneficial for Lillian to be in New York City. Certainly, Andrew's response was not unreasonable, given the abrupt and after-the-fact manner in which the move was dropped on him by Ember. At trial, Andrew opposed this move because of the difficulty the distance would place on his ability to have a relationship with Lillian, the instability in Ember's (and Lillian's) life, and his concerns over the living arrangements in New York City. I do not find that Andrew acted in a way to frustrate or manipulate Ember.

Having examined each party's motive in this case, I find that this factor weighs against removal.

(b) Potential for Enhancing Quality of Life

(i) Emotional, Physical, and Developmental Needs of Child

Although it appears that Lillian has adapted to life in New York, this is the second substantial move that she has experienced at a young age. However, there was no evidence of how this move initially affected Lillian emotionally, although I note that Lillian had not even met Bannister at the time she moved in with him. There is nothing in the record to suggest that Lillian's physical needs are not being met in New York or were not being met previously.

The district court did note that the move to New York from Iowa has provided Lillian with exposure to dance and musical instruction as well as cultural influences which would be beneficial to her upbringing. However, there was no evidence presented as to what other options for dance and music instruction existed in the other agreed-upon states in order to determine whether the instruction in New York is superior, keeping in mind that this is a young child. In fact, the record shows that Lillian was also enrolled in a dance class while living in Iowa. And there are certainly cultural influences available in other areas than New York City.

I also feel inclined to note that while much emphasis has been placed by Ember on the artistic, creative, and cultural advantages existing in New York City, she fails to acknowledge that her recent agreement to live in Iowa, Nebraska, or Missouri (the Kansas City area) was presumably based upon her belief that living in such areas would be in Lillian's best interests. There are certainly advantages to children in having a midwestern upbringing, which seem to have been overlooked by Ember and the majority in this case. I believe the photographs of the respective neighborhoods contained in the record partially bear this out.

The majority gives great weight to Ember's having been the primary physical custodian of Lillian during her young life

and attributes the fact that Lillian is a happy, healthy child to Ember's influence. Without discounting Ember's abilities as a mother, the record shows that Ember has not been the sole caretaker of Lillian throughout her life. While Ember resided in Nebraska, her mother, Chesley, provided substantial care for Lillian when Ember was traveling for musical engagements, sometimes for weeks at a time. At some point, Ember moved in with Day and thereafter moved with him to Iowa, where they were married. Thus, Ember had the assistance of Day, and later his parents, in providing a home for and raising Lillian. And now, Ember and Bannister both testified to the assistance that he gives her in raising Lillian. Finally, and most important, Andrew has been a regular influence in Lillian's life, exercising all of his parenting time with Lillian, including school holidays and the bulk of the summer months. Thus, I disagree that we should attribute the meeting of Lillian's physical, emotional, and developmental needs to only Ember.

I conclude that this factor does not weigh in favor of or against removal.

(ii) Child's Opinion or Preference

There is no evidence in the record to establish Lillian's opinion or preference. This factor does not weigh in favor of or against removal.

(iii) Enhancement of Custodial Parent's Income or Employment

Ember argues that she has unlimited potential to enhance her income and employment by living in New York. She also notes that she can network within the music field without sacrificing time with Lillian. However, the evidence at trial showed that she has earned no income from this career while in New York and has actually assumed the role of a stay-at-home mother who is dependent on others to provide income. The majority emphasizes the benefit to Lillian of Ember's being able to be at home with Lillian during the day. While this certainly may be a benefit to a child in general, that is not the relevant consideration in this analysis. Rather, it is necessary to show

enhancement to income or employment in order to justify taking a child to a new jurisdiction farther away from the noncustodial parent. Ember has not shown in any concrete way how her music career has been improved by living in New York as opposed to living in any of the agreed-upon states. This factor weighs against removal.

(iv) Degree to Which Housing or Living Conditions Would Be Improved

Before her move to New York City, Ember and Lillian lived with Ember and Day in his parents' home in Decorah. There is no further description of Lillian's living conditions in Decorah. After her move to New York City, Ember and Lillian began living with Bannister in a two-bedroom apartment located near Lillian's school and dance classes. Lillian has her own room in this apartment.

Because the living conditions in Iowa and New York cannot be compared, I conclude that this factor does not weigh in favor of or against removal.

(v) Existence of Educational Advantages

Another factor to consider is whether New York provides Lillian with educational advantages that she would not receive in Iowa. After leaving Iowa, Lillian began kindergarten in New York. Ember testified that she heard New York public schools are some of the best in the country and that she opted Lillian into the best public school that was close to Bannister's apartment. Ember also testified that Lillian is receiving enhanced dance instruction and private music lessons in New York and that Lillian's musical abilities have flourished.

Despite the testimony about Lillian's school in New York, Ember did not show how an Iowa education compares with a New York education. Nor does the record indicate that Ember researched schools in any of the other agreed-upon states. This factor receives little or no weight when the custodial parent fails to prove that the new schools are superior. *Dragon v. Dragon*, 21 Neb. App. 228, 838 N.W.2d 56 (2012); *Maranville v. Dworak*, 17 Neb. App. 245, 758 N.W.2d 70 (2008). As noted above, Ember also failed to show that the dance and music

instruction in New York is superior to that which is available in any of the agreed-upon states. Therefore, I do not weigh this factor in favor of or against removal.

(vi) Quality of Relationship Between Child and Each Parent

The record shows that Lillian has a good relationship with each parent. Ember has been the primary custodial parent for the majority of Lillian's life (with assistance from others as noted above), while Andrew has exercised his allocated parenting time. This factor does not weigh in favor of or against removal.

(vii) Strength of Child's Ties to Present Community and Extended Family

The record shows that Lillian and Ember do not currently have any family ties in either Iowa or New York. Ember does have family ties in Nebraska, although she has chosen to not have a relationship with Chesley, her mother, at this time. On the other hand, Andrew presented evidence of an extensive extended family network near the Kansas City area (one of the agreed-upon locations) that includes his parents, brother, aunts and uncles, grandmother, and many cousins. Andrew testified that Lillian has been able to form relationships within Andrew's extended family and that she has many young cousins. These relationships exist in one of the locations in which Ember previously agreed to live. Andrew is concerned that the considerable distance created by the removal would make it more difficult for Lillian to have these relationships. This factor weighs against the removal.

(viii) Likelihood That Allowing or Denying Move Would Antagonize Hostilities Between Parties

There is no evidence in the record to suggest that either decision in this case would antagonize hostilities between the parties. This factor does not have any weight in the removal analysis.

(c) Impact on Noncustodial Parent in Light of Reasonable Visitation

The third factor in our consideration of the best interests is the impact this move will have on Andrew's parenting time. Ember argues that the move will actually make it more convenient for Andrew to exercise his parenting time, because he will no longer have to drive to Des Moines to pick up Lillian, but, rather, he will only have to make a short drive to the nearby Kansas City airport to pick her up. Ember also stated that she is willing to assume all of the transportation costs. Finally, Ember asked that the current visitation schedule be maintained with the exception of Andrew's parenting time on Lillian's birthday weekend. Ember proposed that this time be added to Andrew's parenting time in the summer.

Andrew disagreed with Ember's conclusion that the move would have little impact on his relationship with Lillian. He noted that if Lillian lived in New York, it would no longer be feasible for him to drive to see her at any events that were outside his parenting time. He conceded that he had not visited Lillian in Iowa during the time she lived there, but testified that he had not been made aware of any such opportunity. Further, Lillian only resided in Iowa for approximately 1 year, during which time she was not in school and did not have school activities for Andrew to attend.

I agree with Andrew that the distance involved in the move from Iowa to New York greatly inhibits his ability to participate in any of Lillian's activities that fall outside his parenting time. The ability to participate in these activities will become more important as Lillian continues to get older. Further, I reject the majority's suggestion that Andrew could feasibly drive his entire family to visit Lillian for special occasions. A simple Internet search reveals that such a trip is nearly 1,200 miles, requiring approximately 19 hours of driving, each way. It is not hard to imagine the difficulties and expenses this "family road trip" would present to a family with two small children, where both parents work full-time jobs. This factor weighs against the removal.

(d) Conclusion on Move

Having conducted a thorough review of the record in this case, I conclude Ember did not show that she has a legitimate reason to move Lillian to New York or that such a move is in Lillian's best interests. This case presents yet another difficult and unusual situation in the removal jurisprudence, which is the reason that I give deference to the trial judge's determination. See *Steffy v. Steffy*, 287 Neb. 529, 843 N.W.2d 655 (2014). I find that the district court's conclusion was not an abuse of discretion.

IV. REMAINING ASSIGNED ERRORS

I concur with the majority opinion with respect to removal of the visitation restriction on Lillian's maternal grandmother, Chesley, and with regard to the determination of child support. As such, I would affirm the decision of the district court in its entirety.

STATE OF NEBRASKA, APPELLEE, V.
LEWIS D. RAKOSNIK, APPELLANT.

849 N.W.2d 538

Filed July 15, 2014. No. A-13-663.

1. **Jury Instructions: Judgments: Appeal and Error.** An assigned error of incorrect jury instructions is a question of law, and an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **Jury Instructions: Appeal and Error.** 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 reversal.
3. **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.
4. **Trial: Testimony: Appeal and Error.** The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion.

5. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: 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.
6. ____: ____. On a challenge to the sufficiency of the evidence, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
7. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
8. **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.
9. **Appeal and Error.** An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.
10. **Trial: Evidence: Appeal and Error.** On appeal, a defendant may not assert a different ground for his objection than was offered at trial.
11. **Criminal Law: Trial: Juries: Appeal and Error.** In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.

Appeal from the District Court for Pawnee County: DANIEL E. BRYAN, JR., Judge. Affirmed.

John S. Berry, of Berry Law Firm, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

PIRTLE, Judge.

INTRODUCTION

Lewis D. Rakosnik appeals his convictions from the district court for Pawnee County where a jury found him guilty of 39 counts of knowing and intentional abuse of a vulnerable adult, attempted theft by deception, and attempted knowing and intentional abuse of a vulnerable adult. For the reasons that follow, we affirm.

BACKGROUND

Lewis is the nephew of Joseph M. Rakosnik (Mike). Lewis began to care for Mike in early 2011 when Mike was already in hospice care and his longtime partner, Evelyn Doeschot, could no longer care for him alone. Prior to that time, Lewis was a home health physical therapist for several years in Arizona, but he had not worked in that field since 2009. In 2008, his mother moved from Nebraska to Arizona to live with Lewis because she was ill. In 2010, they returned to Wilber, Nebraska. After his mother's death, he received a call from Doeschot asking him to help care for Mike and he moved into Mike's house to do so. During that time, Lewis obtained Mike's power of attorney and exercised control over Mike's finances and effected several financial and property transactions while acting under Mike's power of attorney.

Lewis was charged by information on April 16, 2012. Mike died April 27. The State sought leave to file an amended information on May 1, 2013, and the amended document was filed the same day. The information alleged 39 counts of knowing and intentional abuse of a vulnerable adult, attempted theft by deception, and attempted knowing and intentional abuse of a vulnerable adult. A jury trial took place on May 7 through 10.

Christina Hain, a registered nurse who provided home health and hospice care for Mike, testified at trial. She stated that she had over 20 years of experience, that she had the skills to evaluate the mental and physical status of her patients, and that such evaluations are done on each visit. Mike became Hain's patient in the home health area in 2010 and shifted to hospice in February 2011. She saw Mike roughly twice per week, and she talked to Mike, his family, and his caregivers about Mike's condition. She testified that Mike's mental state varied with each visit and that he was confused, sometimes to the point of not remembering who his caregivers were, though they were his longtime girlfriend, Doeschot, and his nephew, Lewis. Hain reported Mike displayed some impaired decisionmaking and was confused about new things happening in his life. Hain reported that in April, May, and June 2011, Mike's mental state varied, but that he was consistently confused.

Trooper Cory Townsend, an investigator with the Nebraska State Patrol, was assigned to investigate the complaints in this case. He interviewed Mike on October 19, 2011, at Mike's residence. Lewis said that when he came to Nebraska, Mike needed some help walking, but that Mike's condition declined quickly in the fall of 2010. Lewis told Townsend that Mike had a CT scan showing some brain shrinkage, which he later described as dementia. Lewis told Townsend that he initially lived in his parents' house in Wilber and visited Mike and Doeschot every 3 days or so. In February 2011, when Mike entered hospice care, Lewis moved into Mike's home.

Lewis told Townsend that he became the primary caregiver and that soon after, he acquired Mike's powers of attorney, both medically and "overall." Lewis said Mike's hospice care told him that Mike needed a medical power of attorney, so he contacted Mike's attorney, Loren Joe Stehlik, to draft both powers of attorney. The documents were signed in mid-March at Mike's home. Lewis told Townsend that it took a while for Mike to understand he was signing documents granting Lewis his powers of attorney but that Mike eventually said, "I guess that would be okay." Lewis testified that he had no doubt Mike knew what he was doing when he signed the powers of attorney.

Carolyn Yoble, an employee of a branch of the Table Rock Bank, testified that she is a notary public and was asked to notarize the power of attorney created for Mike. She testified that she was asked to go to Mike's house to notarize a document because it was hard for Mike to get around. When she arrived, she observed that Mike was eating. She said that he was having trouble keeping food on the fork and getting the fork into his mouth and that Doeschot was helping him with the meal. Yoble said Mike was quiet and seemed tired, and needed help signing the document, so Doeschot supported his hand while he signed. Doeschot testified that she was present, but did not know if Mike knew what he was signing.

About 10 days after the power of attorney was signed and notarized, Lewis came into the bank and asked to change the payable on death provision on multiple certificates of deposit (CD's). The CD's were in Mike's safety deposit box and were

payable on death to Doeschot. Yoble said she was not in the bank when Lewis arrived, but she came in during the process and asked the teller not to change the provisions on the CD's until she knew the bank had the authority to make the change. After speaking to Mike's attorney, Stehlik, Yoble again told the teller not to make any changes. Lewis left with two CD's unchanged, but the change had already been made on two other CD's.

The next day, Lewis received a telephone call from the bank telling him to return the CD's to the bank. He was told the CD's would need to be reverted to their original form because the bank's attorney stated the payable on death payee could not be changed from Doeschot to himself. Lewis did not return them, but, rather, he took them to a different branch of the bank in August 2011 and asked that they be cashed. The money was deposited into Mike's account. Lewis later told Townsend that in March 2011, he used the power of attorney to change the payee on two of the CD's from Doeschot to himself and his three siblings.

Townsend asked Lewis about his assets, and Lewis said he did not have any. Lewis later recalled that he had a house in Arizona, a pickup truck, and an ownership interest in his parents' property in Wilber. He reported that he "ran out of money" in April 2011. He also reported that his physical therapy license expired sometime in 2010, but that he was eligible to renew it anytime within 3 years. Lewis reported that he was not eligible for unemployment and had a number of expenses, including gas, electric bills for the Arizona property, utilities for the Wilber property, taxes, insurance, et cetera. He also indicated he went to a casino approximately one to three times per week. He told Townsend he paid his utilities and other expenses for his houses in Arizona and Wilber from Mike's account. He also used Mike's account to pay his bills, and when asked whether he and Mike discussed that, Lewis said "not really."

Lewis also told Townsend about an "Edward Jones account" worth about $97,000. Lewis asked the broker how the money could be kept from going through probate and was told that there could be no beneficiaries assigned to the account, but

that he could use his power of attorney to cash out the account. The money was deposited into Mike's account, and Lewis wrote checks to several family members with that money. Townsend testified that there were numerous and frequent transfers from Mike's account to Lewis' account, but that they were not scheduled transfers or for consistent amounts.

Townsend also testified that Lewis made real estate transfers in Mike's name. Lewis told Townsend that it was his understanding that Mike's will granted Lewis and his siblings the 280 acres of land on which Mike's home was situated. The will contained a stipulation that the land could not be sold for a generation, so Lewis and his siblings could not sell the land. The will also stipulated that Doeschot would have the right to stay in the house and have access to the property for the remainder of her life, as long as she did not move out. Lewis told Townsend that he asked an attorney to create a life estate transferring ownership of the property from Mike to Lewis and his three siblings, but allowing Mike rights and all privileges and income from the land for his lifetime. The transfer Lewis executed did not include any restrictions on the deed or any provisions benefiting Doeschot.

When Townsend spoke with Mike in October 2011, he asked to see Mike's credit card and noted Mike had difficulty with the task. Mike was given his wallet and had trouble locating the card. He initially handed Townsend a check made out to him for the sale of his truck. Mike could not accurately relate what type of vehicle he sold. When Mike found the card, he could not identify who the cardholder was, which bank issued the card, or how long he had had the card.

When Townsend returned in January 2012, Mike could not identify the relationship between himself and Lewis. Mike told Townsend that Lewis was a hunter who had shown up asking for permission to hunt and had then just moved into the house. Townsend testified that he did not ask Mike whether he authorized Lewis to spend his money, because Mike could not find his credit card or tell him what car he owned. Townsend was not confident that Mike could accurately or intelligently tell him about his life estate, his holdings, the contents of his bank account, or how he wanted

these items handled upon his death. He also testified that Lewis' name was not on Mike's accounts and that there were no payments to Lewis' credit card accounts prior to the signing of the power of attorney.

Doeschot testified that she became involved with Mike in 1993 and that she had lived with Mike since 1999. She said she moved out of Mike's house in August 2011 because of disagreements she had with Mike about the CD's. She said Lewis accused her of stealing from Mike and made other derogatory remarks about her. When Mike was moved to a nursing home in 2012, Doeschot resumed her relationship with Mike and visited him almost every day.

Lisa Hunzeker testified that she and her husband rented farm ground from Mike and bought some land from him in January 2011. She testified that she took a rent check to Mike on July 1, gave it to Lewis, and told him what it was for. Lewis asked Hunzeker if she would be interested in buying the farm, and she told him that Mike and her husband had discussed buying the rest of the farm when they bought the first half. Mike had told Hunzeker that his nieces and nephews would be given the farm in his will and that for a certain number of years, it was required to stay in the family. In August 2011, Hunzeker and her husband got a letter from Lewis with an amendment to the contract for a land purchase from Mike. The amendment stated that on Mike's death, the payments for the land would go to Lewis and his siblings.

Stehlik testified that he had known Mike all of his life and that Mike had been a client since Stehlik started his practice. He testified that neither Mike nor one of his brothers had any children, but that their other brother was a father of four, including Lewis. He testified that he knew Doeschot very well and knew Mike lived with her for approximately 20 years. He stated that he drafted Mike's will in 2005 and helped Lewis to prepare a power of attorney for Mike in February 2011. The will gave Doeschot certain personal property and the use, possession, and control of the house and premises for her natural life. Mike left all of the real estate to his nieces and nephews, with the proviso that the real estate not be sold or mortgaged during their lifetimes.

Stehlik said Mike's condition had declined significantly after his visit in late January 2011: Mike was pale, he dozed off, and he could not carry a conversation. He did not see Mike during the periods between March to April or June to December 2011. He testified that he did not have any basis to observe, evaluate, or form any type of opinion on Mike's mental state from June through December 2011. He testified that by January 2012, Mike was "the same old Mike." Stehlik said that he believed Mike's condition was good enough to execute a new will on March 1 and that he was sure Mike understood it.

Don Davis, an adult protective services worker, met Mike and Lewis at Mike's home on August 30, 2011. He performed a "Goldfarb" assessment, which is a 10-question assessment used to determine a person's cognitive abilities, such as memory and decisionmaking. Mike was unable to relate to Davis what the date was. Instead, he remarked that it was hot and humid and said they were not able to plant crops early this spring. When asked his birth date, Mike replied that he had a birthday party but could not remember when. Mike was not able to respond with his address.

Davis saw Mike again on November 1, 2011. Mike was asked about his family, and the only name Mike could remember was "Mike." Mike remembered Doeschot as a hired girl that worked on the farm or in the household. Davis asked Mike about a photograph of his nieces and nephews, and Mike replied that the photographs were of him, his father, and his brothers. Mike was asked about his finances, and Mike said that he had $1,000 left, but that Doeschot owed him $1,500 from a loan. Davis stated that on March 2, 2012, Mike was unable to communicate audibly and Davis could not understand what was said. Davis said Mike's condition on March 2 was the worst he had seen.

Lewis moved for a directed verdict at the close of the State's evidence on counts 1 through 33 and counts 36 through 39. The court dismissed any breach of fiduciary duty in counts 38 and 39 of the information, but did not dismiss the State's case.

Lewis testified that there were times between February and December 2011 when Mike seemed disoriented and confused,

and times when he seemed to know what was going on. Lewis testified that he had an agreement with Mike to compensate him for working in Mike's home and that the agreement was that Lewis could "use whatever [he] needed." He testified that he made distributions of Mike's money because Mike was in hospice care and his health was not good. Lewis talked to Stehlik and another attorney about estate planning and tax ramifications and then cashed in accounts and distributed funds prior to Mike's death. Lewis said he was never worried that Mike would run out of money or that there would not be enough money to pay for Mike's care. Lewis stated that he did not believe there was anything wrong with the way he used Mike's money and that there was no limit on how much of Mike's money he was allowed to spend. He testified that he believed he was acting in Mike's best interests using his power of attorney and that spending money at the casino was in Mike's best interests.

Lewis admitted that he used Mike's money to pay his credit card bills. Lewis admitted to changing the beneficiaries on several CD's Mike held to benefit his siblings and himself. He admitted to withdrawing all of the funds from the Edward Jones account. Lewis testified that he used his personal credit card at the casino and that he also charged some of Mike's expenses on his personal card. He admitted to using Mike's checking account to pay off his credit cards and to write checks to his siblings. He admitted to using Mike's account to pay his property taxes in Arizona and bills for his mother's home in Wilber. He admitted that he created a warranty deed transferring an interest in Mike's land to himself and to his siblings. Lewis admitted that he took a rent check from Hunzeker and her husband and distributed it to himself and his siblings, even though Mike was still alive, the land was still titled to Mike, and the lease did not involve Lewis or his siblings.

Lewis' twin sister testified that she visited Mike several times while Lewis was caring for him. She said that "for the most part," Mike was very alert and oriented, but that he had periods of confusion. She identified three checks written on July 11, 2011, to herself and to her husband for their shares of

Mike's Edward Jones accounts and her share of Mike's land rental. She testified that she was a party to a lawsuit contesting the version of Mike's will dated March 2012. She stated her position in that case was that Mike did not have the capacity to sign his will in March 2012. She said she had no concerns about the legitimacy of the checks written by Lewis, because Mike gave Lewis his power of attorney.

Dr. Richard Jackson was Mike's doctor for about 30 years, and he testified that he met with Mike monthly in 2011. On cross-examination, Jackson said he did not conduct any evaluations of Mike's mental state and did not make any assessment about whether Mike could live independently. On redirect, Jackson said he did not feel the need to perform a mental evaluation based on his observations. On recross-examination, Jackson was asked if he prescribed medication for Mike that would be consistent with something he would prescribe for someone with mental problems. Lewis objected that the question was outside of the scope of direct examination, and the objection was overruled as long as it was within the time period Jackson indicated he saw Mike. Jackson said he prescribed Seroquel, which is classified as an antipsychotic medication, for Mike in September 2011.

The jury found Lewis was guilty of all counts set forth in the amended information. Lewis' motion for new trial was denied, and he was sentenced to a total of no more than 5 years in prison, with his sentences to run concurrently. Lewis timely appeals.

ASSIGNMENTS OF ERROR

Lewis asserts the district court erred in giving the jury misleading, confusing, and incomplete instructions. He also asserts the trial court abused its discretion by allowing the State to go beyond the scope of direct examination in its cross-examination of Jackson. Lewis asserts the evidence was insufficient to prove his guilt beyond a reasonable doubt.

STANDARD OF REVIEW

[1] An assigned error of incorrect jury instructions is a question of law, and an appellate court has an obligation to

reach an independent conclusion irrespective of the decision of the court below. See *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

[2] 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 reversal. *Id*.

[3] 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. Podrazo*, 21 Neb. App. 489, 840 N.W.2d 898 (2013).

[4] The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion. *State v. Poe*, 276 Neb. 258, 754 N.W.2d 393 (2008).

[5,6] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: 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. *State v. Wiedeman*, 286 Neb. 193, 835 N.W.2d 698 (2013). On a challenge to the sufficiency of the evidence, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *id*.

ANALYSIS

Jury Instructions.

[7] Lewis asserts the district court erred in giving the jury misleading, confusing, and incomplete instructions. In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a

substantial right of the appellant. *State v. Huff*, 283 Neb. 78, 802 N.W.2d 77 (2011).

[8] 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. Podrazo, supra*. 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. *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

Lewis was charged with the crime of knowing and intentional abuse of a vulnerable adult. Neb. Rev. Stat. § 28-386 (Reissue 2008) states that a "person commits knowing and intentional abuse of a vulnerable adult if he or she through a knowing and intentional act causes or permits a vulnerable adult to be . . . exploited."

Lewis argues that the court erred in not including his proposed instruction on the meaning of "vulnerable adult" and that the need to find Mike fit that definition at the time of the alleged exploitation. His proposed instruction stated, "In order to find that [Lewis] exploited a vulnerable adult you must find beyond a reasonable doubt the exploitation occurred while the alleged victim was vulnerable." He asserts the court's failure to give the instruction prejudiced Lewis and misled the jury.

The evidence shows the district court declined to give the instruction proposed by Lewis because it was a restatement of instructions already prepared by the court to be given to the jury. Jury instruction No. 5 included definitions of "vulnerable adult" as defined in Neb. Rev. Stat. § 28-371 (Reissue 2008), "exploitation" as defined in Neb. Rev. Stat. § 28-358 (Reissue 2008), and "substantial mental impairment" as defined in Neb. Rev. Stat. § 28-369 (Reissue 2008). The jury instructions described the offense using the language of the statutes, and the Nebraska Supreme Court has previously held that it is proper for the court to describe the offense in the language of the statute. *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680

(2011). The definitions presented to the jury conformed to the statutes and are presumptively correct.

Jury instruction No. 4 includes a recitation of the elements of each crime, stating that the jury must find that on a particular date, at a particular location, Lewis knowingly and intentionally caused or permitted a "vulnerable adult" to be exploited, and the instruction set forth the particulars of the transaction for each count. In light of this fact, we find Lewis' assertion, that the jury instructions given did not require a finding that Mike was a vulnerable adult at the time of the alleged exploitation, is without merit. We find the jury instructions that were given adequately and properly instructed the jury on the elements and definitions of the crime and were not prejudicial to Lewis.

Lewis asserts instructions Nos. 6 and 7 misled and confused the jury as to what elements the State had to prove. He argues that the instructions described elements of civil claims, not elements of the crimes he was charged with, and that they did not correctly state the law. The district court overruled Lewis' objection to instructions Nos. 6 and 7, finding they did not state that breach of fiduciary duty or undue influence were crimes; rather, the instructions were definitional in nature, and when read together with the remaining instructions, the instructions were not misleading as to the law.

The definition of exploitation in § 28-358 includes "the taking of property of a vulnerable adult by means of *undue influence, breach of a fiduciary relationship*," et cetera. (Emphasis supplied.) Thus, the definitions of "undue influence" and "breach of fiduciary relationship" were given in instructions Nos. 6 and 7 to assist the jury in determining whether a vulnerable adult was exploited. Upon our review, we find instructions Nos. 6 and 7, when read in light of all of the other instructions given, were not misleading or confusing to the jury and did not lead to prejudicial error. See *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

Lewis also asserts jury instruction No. 6 was misleading because it stated he could not profit from his duty as Mike's attorney in fact. He asserts that this instruction is contrary to Nebraska law, allowing for reimbursement of expenses and

compensation for agents under a power of attorney, and that it was incomplete without some reference to Neb. Rev. Stat. § 30-4012 (Cum. Supp. 2012).

[9,10] An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground. *State v. Valverde*, 286 Neb. 280, 835 N.W.2d 732 (2013). On appeal, a defendant may not assert a different ground for his objection than was offered at trial. *State v. Watt, supra*.

Lewis' counsel objected to instruction No. 6 during the jury instruction conference, stating that "my concern is that it would be confusing to the jury and possibly unfairly prejudicial to [Lewis] because I'm concerned that breach of fiduciary duty is not necessarily a crime." There was no objection to the instruction on the basis that it was incomplete, nor was there any mention of § 30-4012, or whether it should apply. This issue was raised for the first time on appeal to this court, and therefore, we decline to address Lewis' assignment of error with regard to § 30-4012.

Scope of Cross-Examination.

Lewis further asserts the district court abused its discretion in allowing the State to go beyond the scope of the direct examination of Jackson in its recross-examination. Specifically, he asserts the State should not have been allowed to question Jackson regarding a medication prescribed to Mike because it was outside of the timeframe covered by the direct examination. Lewis' objection was overruled.

The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion. *State v. Poe*, 276 Neb. 258, 754 N.W.2d 393 (2008).

The evidence shows that Lewis' objection was to a line of questioning by the State during recross-examination. The rule of practice is that a party should not be permitted to cross-examine a witness as to a matter foreign to the scope of his direct examination. See *In re Estate of Camin*, 212 Neb. 490, 323 N.W.2d 827 (1982). See, also, Neb. Rev. Stat. § 27-611 (Reissue 2008). In such situations, a party is usually required

to call the witness as his own and thus present the evidence material to the case. *In re Estate of Camin, supra*.

Although there is no specific rule as to the scope of recross-examination, it stands to reason that if the scope of the original cross-examination is limited to the original direct examination, then the scope of recross-examination is limited to the scope of redirect examination. Certainly, this has been the local custom or practice throughout most if not all of the trial courts in the State of Nebraska. However, assuming without deciding that this is the appropriate approach, we conclude the court did not abuse its discretion in allowing the question regarding medication. The record shows the defense asked Jackson, on redirect examination, if he felt the need to perform a mental evaluation on Mike, even though he did not treat him for a mental health purpose. Then on recross-examination, the State asked Jackson if he, in fact, had prescribed medication consistent for someone with mental health needs. Though Lewis objected that it was outside the scope of direct examination, Jackson was permitted to answer that he had prescribed Seroquel, which is classified as an antipsychotic medication.

[11] Even if Lewis' objection had been sustained, Jackson was a witness endorsed by the State on the information. As such, even if Jackson had not been allowed to answer the question about medication on recross-examination, he could have been recalled by the State as a rebuttal witness and that information would have been permitted on the State's direct examination. Thus, Jackson's testimony could have been entered regardless, and the court's decision to overrule, rather than sustain, Lewis' objection would amount to harmless error. In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. See *State v. McKinney*, 273 Neb. 346, 273 N.W.2d 74 (2007).

We find the court did not abuse its discretion in overruling Lewis' objection to the State's recross-examination of Jackson.

Sufficiency of Evidence.

Lewis asserts the evidence was insufficient to prove him guilty of all counts. He asserts that the State did not prove beyond a reasonable doubt Mike was a vulnerable adult and that the State failed to show Mike had substantial mental or functional impairment during the pertinent time period.

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. *State v. Wiedeman*, 286 Neb. 193, 835 N.W.2d 698 (2013).

Under the statutes, a vulnerable adult is a person with substantial mental or functional impairment. See § 28-371. Substantial mental impairment means a "substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, or ability to live independently or provide self-care as revealed by observation, diagnosis, investigation, or evaluation." § 28-369. Multiple witnesses testified that Mike was confused at various times in 2011 and 2012 and that they questioned his ability to make decisions or understand the documents he was asked to sign.

The evidence shows that Lewis moved into Mike's home, because Mike was in hospice care; Mike could no longer care for himself; and Doeschot needed assistance because she could no longer care for Mike on her own. Mike's nurse testified that Mike was consistently confused and that only the degree of his confusion changed. There were days when he could not tell her who his caregivers were, even though they were Doeschot, with whom Mike had lived for many years, and Lewis, his nephew.

Lewis himself told Townsend on October 19, 2011, that Mike had a CT scan showing some brain shrinkage, which he later described as dementia. Lewis also stated that he obtained Mike's power of attorney in March 2011 and disclosed that he "ran out of money" in April 2011. The documentary evidence shows significant amounts were drawn from Mike's bank accounts in March 2011 and the following months. The evidence shows that Lewis paid bills for his mother's house in Wilber and his own house in Arizona from Mike's accounts and that Lewis spent large amounts at casinos. He changed

the beneficiaries on CD's to his and his siblings' names, then cashed and distributed the funds to his family members using Mike's account. Witnesses testified that Mike intended his land to remain in his family for one generation before it could be sold. The new will, executed in March 2012, removed this provision, as well as the provision allowing Doeschot a life estate after Mike's death.

Davis, an adult protective services worker, met with Lewis and Mike on August 30, 2011, and performed a 10-question mental examination of Mike. Mike could not relate his own address or birth date. Davis visited Mike on other occasions and found he was consistently confused. Davis asked Mike about photographs of his nieces and nephews, and Mike said the photographs depicted his father and his brothers. Davis also testified that around the time Mike signed a new version of his will, removing Doeschot as a beneficiary and removing restrictions regarding Lewis and his siblings' use of his land, Mike was in the worst mental condition Davis had seen him.

The evidence suggests Lewis did not use the power of attorney to promote Mike's best interests, but, rather, it was used to ensure Lewis and his siblings would profit from Mike's holdings. The jury was tasked with deciding whether Mike was a vulnerable adult as defined by the statute. The record shows the jury determined that Mike was, in fact, a vulnerable adult and that Lewis exploited Mike's finances.

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. *State v. Wiedeman*, 286 Neb. 193, 835 N.W.2d 698 (2013). After viewing the evidence in the light most favorable to the prosecution, we find any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The evidence was sufficient to support the conclusions reached by the jury, and we find this argument is without merit.

CONCLUSION

We find the district court did not give the jury misleading, confusing, or incomplete jury instructions. We find the district court did not abuse its discretion in overruling Lewis'

objection to the scope of the State's examination on recross-examination. We also find any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
TIM R. WULF, APPELLANT.

849 N.W.2d 588

Filed July 22, 2014. No. A-13-288.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Evidence.** Determining the relevancy of evidence is a matter entrusted to the discretion of the trial court, and the trial court's decision will not be reversed on appeal absent an abuse of discretion.
3. **Judgments: Collateral Attack.** When a judgment is attacked in a manner other than by a proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack.
4. **Collateral Attack: Jurisdiction.** Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter.
5. **Courts.** Vertical stare decisis compels lower courts to follow strictly the decisions rendered by higher courts within the same judicial system.
6. **Judgments: Jurisdiction.** A decree of court which is void for want of jurisdiction may be attacked in any proceeding in which any person seeks to assert a right under it. It may be attacked whenever it is sought to be enforced, or in any suit in which its validity is drawn in question.
7. **Courts: Jurisdiction.** Under the doctrine of jurisdictional priority, where different state courts have concurrent original jurisdiction over the same subject matter, basic principles of judicial administration require that the first court to acquire jurisdiction should retain it to the exclusion of another court. That is, a second court lacks jurisdiction over the same matter involving the same parties.
8. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** If reversible error exists in a criminal proceeding, an appellate court must determine whether the totality of the evidence admitted by the trial court was sufficient to sustain the conviction. If it was not, then the concepts of double jeopardy would not allow a remand for a new trial.

9. ____: ____: ____: ____. The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Washington County: DANIEL E. BRYAN, JR., Judge. Reversed and remanded for a new trial.

Steven W. Holland, of Holland Law Office, P.C., for appellant.

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

IRWIN, RIEDMANN, and BISHOP, Judges.

RIEDMANN, Judge.

INTRODUCTION

Tim R. Wulf was convicted in the Washington County District Court of theft in excess of $1,500. On appeal, he challenges the court's decision to allow into evidence a judgment from the Washington County Court and an execution of the judgment issued by the Washington County District Court. He also claims he should have been allowed to introduce evidence to collaterally attack the judgment and execution. We find the district court abused its discretion in refusing to allow a collateral attack on the judgment and, therefore, reverse Wulf's conviction and remand the cause for a new trial.

BACKGROUND

On January 12, 2012, Wulf was charged by information with theft of corn crops in violation of Neb. Rev. Stat. § 28-511 (Reissue 2008). Ownership of the land upon which the crops grew has been the subject of extensive litigation, beginning in 2002. A general overview of the various judicial proceedings involving the crops and the land on which they grew is set forth below.

Prior Proceedings.

Percy Hue was the original owner of the three parcels of land at issue in this litigation. Wulf was a beneficiary of Hue's

last will and testament, which was admitted to formal probate by the Washington County Court in July 2002.

In February 2004, the personal representative of Hue's estate filed an action against Wulf and various others in the Washington County District Court to quiet title to the land. The district court determined that the personal representative of the estate was the fee simple title holder of the parcels of land. That decision was appealed to this court in case No. A-06-951. On October 30, 2007, we reversed, and remanded to the district court for further proceedings.

During the pendency of the appeal, the personal representative of the estate filed a separate action in the Washington County Court against Wulf, alleging that Wulf had wrongfully occupied the premises, despite receiving notice to leave. The personal representative sought restitution of the land and rents and profits from 2002 through 2006. After remand of the quiet title case to the district court, and while that case was still pending, the county court entered a $103,609 default judgment against Wulf in the restitution action. As a result of the restitution judgment, the personal representative obtained a writ of execution from the Washington County District Court and levied on the crops.

Wulf was personally served with the execution, and a sign was posted in front of the parcels of land indicating that the property had been seized; however, Wulf harvested the crops sometime in November 2009.

Current Proceedings.

Wulf was charged with theft in excess of $1,500 for the harvesting of the crops. Prior to trial, Wulf filed a motion in limine asking that the court prohibit the State from introducing the restitution judgment and execution as evidence at trial. He also sought to exclude any evidence that the estate owned the parcels of land. The State also filed a motion in limine asking that the court prohibit Wulf from introducing evidence at trial regarding ownership of the parcels of land or any contest to the judgment and execution. Wulf argued that the judgment was invalid, because the county court did not have jurisdiction to enter it, and that therefore, the subsequent execution was

also invalid. The court denied Wulf's motion and granted the State's motion, finding that the evidence the State sought to prohibit was inadmissible, because it was immaterial and irrelevant to the issue in the criminal proceeding.

Wulf was ultimately convicted of theft. He now timely appeals to this court.

ASSIGNMENTS OF ERROR

Wulf assigns, consolidated and renumbered, that the district court erred in (1) admitting the restitution judgment and the execution into evidence and (2) excluding Wulf's evidence to collaterally attack the judgment and execution.

STANDARD OF REVIEW

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Ely*, 287 Neb. 147, 841 N.W.2d 216 (2014). Determining the relevancy of evidence is a matter entrusted to the discretion of the trial court, and the trial court's decision will not be reversed on appeal absent an abuse of discretion. See *id*.

ANALYSIS

Wulf argues that the district court erred in admitting the county court's judgment and the district court's execution into evidence because the judgment was void. He claims that the district court acquired jurisdiction to determine ownership and title to the parcels of land first and that therefore, the county court lacked subject matter jurisdiction when it entered the judgment against Wulf. He asserts that because the county court lacked jurisdiction, its judgment was void and inadmissible. Likewise, he claims that because the county court's judgment was void, it could be collaterally attacked at any time, and that thus, the court erred in excluding his evidence at trial which challenged the validity of the county court's judgment.

[3,4] Because Wulf's arguments on all three assigned errors hinge on his assertion that the judgment and execution were

invalid, we first address whether a civil judgment may be collaterally attacked in a criminal proceeding. When a judgment is attacked in a manner other than by a proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack. *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005). Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter. *Id*.

Wulf claims that the county court lacked subject matter jurisdiction and that therefore, the restitution judgment was void. He relies on *State v. Smith, supra*, for the proposition that a judgment entered by a court which lacks subject matter jurisdiction is void and may be attacked at any time in any proceeding.

[5] The trial judge refused to allow the collateral attack, stating that the civil judgment could not be attacked "in this type of proceeding." While we agree with the trial judge that a collateral attack of a civil judgment in a criminal case is unusual, we are bound by stare decisis to abide by Nebraska Supreme Court precedent. See *State v. Hausmann*, 277 Neb. 819, 765 N.W.2d 219 (2009) (vertical stare decisis compels lower courts to follow strictly decisions rendered by higher courts within same judicial system). Therefore, given Nebraska precedent, we determine that Wulf should have been allowed to collaterally attack the county court's restitution judgment in his criminal trial. See *Garrett v. State*, 118 Neb. 373, 224 N.W. 860 (1929).

Garrett involved a petition in error. Robert Garrett had been convicted of murder in the first degree. At the criminal trial, Clara Garrett testified against him. Robert and Clara had been married, but prior to the trial, she had filed for divorce and a decree was filed. Robert objected to her testimony on the basis that he and Clara were still married at the time of trial, because the divorce decree was entered less than 6 months after he was served with the divorce summons, in violation of state statute. He claimed the decree was void because the court did not have jurisdiction to render it. The trial court overruled his objection.

[6] In the petition in error proceeding, the Nebraska Supreme Court concluded that the divorce decree was void because the district court was without jurisdiction to hear the case before the 6-month time period expired. It further stated:

> A decree of court which is void for want of jurisdiction may be attacked in any proceeding in which any person seeks to assert a right under it. It may be attacked whenever it is sought to be enforced, or in any suit in which its validity is drawn in question.

Id. at 378, 224 N.W. at 862. As a result, the court concluded that the objection to Clara's testimony should have been sustained and the testimony excluded.

[7] In the present action, Wulf asserted that the county court did not have jurisdiction over the restitution case, because the quiet title action was already pending in district court, and that therefore, the judgment was void. Under the doctrine of jurisdictional priority, where different state courts have concurrent original jurisdiction over the same subject matter, basic principles of judicial administration require that the first court to acquire jurisdiction should retain it to the exclusion of another court. That is, a second court lacks jurisdiction over the same matter involving the same parties. *Molczyk v. Molczyk*, 285 Neb. 96, 825 N.W.2d 435 (2013).

The quiet title action was brought by the personal representative against Wulf and others in district court, seeking to quiet title in the estate to three parcels of land. Subsequent to the filing of the district court action, the personal representative brought suit in county court against Wulf, claiming ownership of the land and seeking restitution for its use. Under the doctrine of jurisdictional priority, it would appear that the district court had jurisdiction of the issues raised in both actions and that the restitution judgment was void. Under the principle set forth in *Garrett v. State, supra*, Wulf should have been allowed to collaterally attack the county court judgment when it was offered against him in the criminal proceeding.

The dissent in *Garrett v. State*, 118 Neb. 373, 224 N.W. 860 (1929), argued that the divorce decree was evidence of Clara's divorce in the criminal proceeding and that if there was to be

an attack on the decree, it should have occurred in a direct appeal. The argument is nearly identical to that of the State in the present action, and therefore, it is rejected.

Wulf also argues that he should have been able to collaterally attack the execution that was issued by the district court. We do not find *Garrett* controlling on this issue because it involved judgments from two equal courts, whereas here, the execution was issued by the district court and the criminal proceedings were conducted in the county court. We decline to address a county court's authority to inquire into the validity of a district court's proceedings, because resolution of the issue is not necessary to resolve this appeal. See *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012).

Having decided that the trial court abused its discretion in prohibiting Wulf from collaterally attacking the restitution judgment, we must decide whether this constituted reversible error. The State relied upon the judgment to prove the essential elements of the crime of theft. Without Wulf's being able to collaterally attack it, the jury was presented with the judgment as conclusive proof that the land in question belonged to the estate, that the personal representative was entitled to the rents and profits in the amount of $103,609, and that Wulf was indebted to the estate in that amount. We conclude that this constitutes reversible error.

[8,9] Having found reversible error, we must determine whether the totality of the evidence admitted by the district court was sufficient to sustain Wulf's conviction. If it was not, then the concepts of double jeopardy would not allow a remand for a new trial. See *State v. Borst*, 281 Neb. 217, 795 N.W.2d 262 (2011). The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *State v. Borst, supra*.

The evidence presented was sufficient to prove that the crops harvested by Wulf were property of another, that Wulf exercised control over them with the intent to benefit himself or another, and that the crops had a value of more than $1,500. The cause should therefore be remanded for a new trial.

CONCLUSION

For the foregoing reasons, we find the trial court abused its discretion in prohibiting Wulf from collaterally attacking the county court's judgment. We therefore reverse the conviction and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

DWAYNE SARTAIN AND LISA SARTAIN, APPELLANTS AND CROSS-APPELLEES, V. WOHLENHAUS APPRAISAL SERVICE AND DAN SPENCE, APPELLEES, AND COUNTRYWIDE HOME LOANS, A FOREIGN CORPORATION, APPELLEE AND CROSS-APPELLANT.

849 N.W.2d 594

Filed July 22, 2014. No. A-13-346.

1. **Dismissal and Nonsuit: Judgments: Appeal and Error.** Denial of a plaintiff's voluntary dismissal of claims presents a question of law, regarding which the appellate court reaches a conclusion independent of the lower court's ruling.
2. **Dismissal and Nonsuit.** An action may be dismissed without prejudice to a future action by the plaintiff, before the final submission of the case to the jury or to the court where the trial is by the court.
3. **Words and Phrases.** A final submission of a case contemplates a submission on both the law and the facts, and it exists only when nothing remains to be done to render it complete.
4. **Directed Verdict: Dismissal and Nonsuit.** After a defendant has moved for a directed verdict and both counsel have completed their argument on that motion, a case is under final submission as contemplated in Neb. Rev. Stat. § 25-601 (Reissue 2008), and the plaintiff no longer has an absolute right to dismiss without prejudice.
5. ____: ____. If a motion for directed verdict is made at the close of the plaintiff's case, the plaintiff loses the absolute right to dismiss without prejudice until such time as the court overrules the motion.
6. **Directed Verdict.** A motion for directed verdict is a request for the court to decide, as a matter of law, whether there are any questions of fact for a jury to decide.
7. **Summary Judgment.** In a motion for summary judgment, the court is requested to determine as a matter of law that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.
8. **Dismissal and Nonsuit.** A plaintiff has an absolute right to dismiss any time before final submission of the case, and when such right exists, the court can only exercise discretion in denying dismissal when it would result in the loss of a substantial right of the defendant.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Affirmed.

Ryan J. Lewis and W. Gregory Lake, of Lewis, Pfanstiel & Reed, L.L.C., for appellants.

Mary M. Schott, of Sodoro, Daly, Shomaker & Selde, P.C., L.L.O., for appellee Wohlenhaus Appraisal Service.

Douglas W. Ruge II for appellee Dan Spence.

Jennifer D. Tricker, of Baird Holm, L.L.P., for appellee Countrywide Home Loans.

MOORE, PIRTLE, and RIEDMANN, Judges.

RIEDMANN, Judge.

INTRODUCTION

Dwayne Sartain and Lisa Sartain sought to dismiss their negligence action against Wohlenhaus Appraisal Service (Wohlenhaus), Dan Spence, and Countrywide Home Loans (collectively the defendants) after the defendants filed, briefed, and argued summary judgment motions. The district court for Douglas County sustained the defendants' motions to strike the Sartains' notice of dismissal and granted the defendants' motions for summary judgment. The Sartains appeal the district court's order striking their notice of dismissal.

Countrywide Home Loans has also filed a cross-appeal, assigning as error the district court's refusal to grant its motion to dismiss the Sartains' claim on the basis that the statute of limitations had expired. Because we affirm the district court's order striking the notice of dismissal, and the Sartains have not appealed the grant of summary judgment, we need not address Countrywide Home Loans' cross-appeal.

BACKGROUND

The Sartains filed a second amended complaint in August 2011, alleging the defendants made negligent and fraudulent misrepresentations during the course of a real estate transaction that occurred in 2006. In May 2012, Wohlenhaus

served written discovery upon the Sartains, but they failed to respond, even after motions to compel were filed. The court imposed sanctions, including a provision that if the Sartains failed to timely respond, they would be prohibited from introducing evidence against Wohlenhaus at trial.

Trial was scheduled for March 18, 2013. The Sartains failed to timely identify expert witnesses as required by the court's scheduling order and failed to fully respond to discovery requests as required by the court's order compelling discovery responses. In an attempt to cure these deficiencies, the Sartains filed a late expert witness designation and served supplemental answers to interrogatories. The defendants moved to strike these submissions and further sought sanctions against the Sartains for their failure to allow the defendants' appraisal expert access to the property. All the defendants also filed motions for summary judgment. On March 5, a hearing was held on various motions filed by the defendants that sought to exclude the Sartains' experts, to prohibit them from offering evidence that would support a claim for damages, to impose sanctions of an adverse inference instruction relating to damages, and to grant summary judgment.

On the morning of March 13, 2013, the court sent an e-mail to all parties informing them that the court was granting the motions to strike, the motions in limine, and the motion for sanctions. As a result, the Sartains were informed that they would not be able to put forth any expert witnesses at trial and that an adverse inference jury instruction would be given. In essence, the e-mail advised the Sartains that they would be prohibited from proving the existence of any damages at trial. The court further advised that it would be ruling on the motions for summary judgment in the next few days. Later that same day, the Sartains filed a notice of dismissal of their complaint without prejudice.

The defendants filed motions to strike the notice of dismissal, and a hearing was held on March 15, 2013. The court sustained the motions to strike and issued summary judgment in favor of the defendants. The Sartains timely appeal.

ASSIGNMENT OF ERROR

The Sartains' sole assignment of error is that the trial court erred in sustaining the defendants' motions to strike the Sartains' notice of dismissal.

STANDARD OF REVIEW

[1] Denial of a plaintiff's voluntary dismissal of claims presents a question of law, regarding which the appellate court reaches a conclusion independent of the lower court's ruling. See *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999).

ANALYSIS

[2,3] Neb. Rev. Stat. § 25-601(1) (Reissue 2008) governs voluntary dismissals without prejudice. It states in part that "[a]n action may be dismissed without prejudice to a future action (1) by the plaintiff, before the final submission of the case to the jury, or to the court where the trial is by the court." A "final submission" contemplates a submission on both the law and the facts, and it exists only when nothing remains to be done to render it complete. See *Koll v. Stanton-Pilger Drainage Dist.*, 207 Neb. 425, 299 N.W.2d 435 (1980).

The Nebraska Supreme Court, long ago, articulated the reason for the rule:

> No case has been cited where under a statute like ours a plaintiff as a matter of right can dismiss his action after it has been submitted to the court. If he could do so litigation would become interminable, because a party who was led to suppose a decision would be adverse to him could prevent such decision and begin anew, thus subjecting the defendant to annoying and continuous litigation. The statute, therefore, limits the right of a plaintiff to dismiss to the final submission of the case.

State v. Scott, 22 Neb. 628, 640, 36 N.W. 121, 126-27 (1888).

[4,5] Our appellate courts have not addressed whether a case in which a motion for summary judgment has been briefed and argued constitutes a final submission of the case. However, after a defendant has moved for a directed verdict

and both counsel have completed their argument on that motion, a case is under final submission as contemplated in § 25-601 and the plaintiff no longer has an absolute right to dismiss without prejudice. See *Collection Specialists v. Vesely*, 238 Neb. 181, 469 N.W.2d 549 (1991). Even if the motion for directed verdict is made at the close of the plaintiff's case, the plaintiff loses the absolute right to dismiss without prejudice until such time as the court overrules the motion. See *Miller v. Harris*, 195 Neb. 75, 236 N.W.2d 828 (1975).

[6,7] The reason for considering the submission of a motion for directed verdict as a final submission to the court within the meaning of § 25-601 is that such a motion is a request for the court to decide, as a matter of law, whether there are any questions of fact for a jury to decide. See *Miller v. Harris, supra*. Likewise, in a motion for summary judgment, the court is requested to determine as a matter of law that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. See *Harris v. O'Connor*, 287 Neb. 182, 842 N.W.2d 50 (2014).

The Sartains rely upon *Kansas Bankers Surety Co. v. Halford*, 263 Neb. 971, 644 N.W.2d 865 (2002), to support their contention that a motion for summary judgment is not a final submission for purposes of § 25-601; however, their reliance on this case is misplaced because of the different posture of the motion at the time the dismissal was filed.

[8] In *Kansas Bankers Surety Co. v. Halford, supra*, the defendant had filed a motion for summary judgment, but the plaintiff had not yet filed his brief; instead, he filed a motion to dismiss *with* prejudice. Section 25-601 applies to motions to dismiss *without* prejudice; therefore, this statute arguably did not govern the dismissal in *Halford*. Furthermore, there had been no final submission of the case because the summary judgment motion had not yet been fully briefed and argued. The court noted it had previously held that a plaintiff has an absolute right to dismiss any time before final submission of the case and that when such right exists, the court can only exercise discretion in denying dismissal when it would result in the loss of a substantial right of the defendant. See *Blue River Power Co. v. Hronik*, 116 Neb. 405, 217 N.W. 604

(1928) (stating that under identical statutory language, plaintiff may dismiss his action as matter of right before final submission if it does not prejudice defendant). The *Halford* court ultimately concluded that the plaintiff had a right to dismiss its case because it would not result in the loss of a substantial right of the defendant because he had not filed a setoff or counterclaim.

Based upon the facts of this case, the Sartains no longer had an absolute right to dismiss without prejudice because there had been a final submission to the court. Therefore, we find the trial court did not err in striking the notice of dismissal. The Sartains have not appealed the granting of the defendants' motions for summary judgment, and therefore that issue is not before us.

CONCLUSION

Once the motion for summary judgment was taken under advisement, there was a final submission of the case and the Sartains no longer had an absolute right to dismiss their complaint without prejudice. The trial court did not err, therefore, in striking their notice to dismiss.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
MATHEW W. WORKMAN, APPELLANT.

857 N.W.2d 349

Filed July 29, 2014. No. A-12-888.

1. **Pleas: Appeal and Error.** A trial court is given discretion as to whether to accept a guilty plea; an appellate court will overturn that decision only where there is an abuse of discretion.
2. **Courts: Words and Phrases.** Drug court is a postplea or postadjudicatory drug and alcohol intensive supervision treatment program for eligible offenders.
3. **Courts: Pleas.** A drug court program participant pleads guilty and agrees to the terms and conditions of the program in exchange for the possibility of avoiding sentencing and, oftentimes, being allowed to withdraw the plea upon successful completion of the program.
4. **Courts: Convictions: Sentences.** If a drug court participant is terminated from the program or withdraws before successful completion, then the conviction stands and the case is transferred back to the original court for sentencing.

5. **Pleas.** Before accepting a guilty plea, the trial court must determine, among other things, whether a factual basis for the plea exists.
6. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Judgment reversed, sentences vacated, and cause remanded for further proceedings.

Patrick J. Boylan, Chief Deputy Sarpy County Public Defender, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

PER CURIAM.

INTRODUCTION

In our previous opinion, *State v. Workman*, 21 Neb. App. 524, 842 N.W.2d 108 (2013), filed on December 10, 2013, we reversed the order of the district court for Sarpy County which terminated Mathew W. Workman's participation in the drug court program, due to the court's failure to provide a written statement as to the evidence relied on and the reasons for terminating his participation in that program. Workman subsequently filed a motion for rehearing. We now withdraw our prior opinion in its entirety and issue this opinion in its place, wherein we reverse the orders of the district court which accepted Workman's guilty pleas to the underlying charges of possession of a controlled substance and which terminated Workman's participation in the drug court program. Because there was not a factual basis given for Workman's pleas of guilty to the underlying charges of possession of a controlled substance, we reverse and vacate Workman's convictions and sentences, and we remand the cause to the district court for further proceedings.

BACKGROUND

Workman was originally charged in the district court with three counts of delivery of a controlled substance, each a Class III felony. Pursuant to a plea agreement, the charges

were amended to three counts of possession of a controlled substance, each a Class IV felony. Arraignment on the amended information was continued to determine whether Workman could be accepted into drug court. On November 16, 2009, Workman pled guilty to the amended charges. At the plea hearing, Workman was asked if he understood that if he cannot complete drug court, he could be found guilty of three Class IV felonies, each punishable by a fine of up to $10,000 or confinement for a period of up to 5 years, along with other consequences, to which he responded in the affirmative. After advising Workman of his various constitutional rights, the court found that Workman's pleas were freely, voluntarily, intelligently, and knowingly made, and the court accepted the pleas. The court then stated that it would "defer factual basis for the completion of the plea, pending [Workman's] Drug Court." Workman's attorney did not object to the deferral of the factual basis or to the acceptance of Workman's pleas without a factual basis. The docket entry from November 16 filed in the district court shows that Workman entered pleas of guilty, the pleas were accepted, the factual basis was deferred, and he was referred to the drug court.

On February 21, 2012, the State filed a motion to terminate Workman's participation in the drug court program for violation of certain conditions of his drug court contract, the details of which we need not recite here. A hearing on the motion to terminate was held on March 6, at which Workman was present and represented by counsel. We need not detail the evidence that was adduced at the hearing for purposes of this opinion. However, we note that at no time during the hearing did Workman's attorney raise the issue that a factual basis had not been given prior to acceptance of the underlying pleas or that Workman had not been adjudged guilty of the underlying charges. At the conclusion of the hearing, the district court concluded that Workman's termination from participation in the drug court program was appropriate. A docket entry was made on March 6 by the district judge, finding that Workman was in violation of certain conditions in his drug court contract and that he should be terminated from participating in the drug court program. The entry then set the matter for a

later sentencing hearing. Workman filed an appeal from the March 6 docket entry which we dismissed on April 13 for lack of jurisdiction. After entry of our mandate, Workman was sentenced on August 27 to concurrent terms of 20 months' to 5 years' imprisonment on his original drug charges. At the sentencing hearing, Workman's attorney did not raise the issue of the district court's lack of authority to sentence Workman; instead, Workman's attorney agreed that there was no legal reason why sentence could not be pronounced.

In his original brief on appeal, Workman assigned as error that (1) the district court did not comply with the procedural and substantive due process safeguards required by *State v. Shambley*, 281 Neb. 317, 795 N.W.2d 884 (2011), thereby rendering erroneous the termination of Workman's participation in the drug court program, and (2) even if the *State v. Shambley* due process protections were honored, any violations by Workman of his drug court contract did not authorize imposition of a sentence, because he had agreed to the terms of a quasi-contract and not a sentence of probation.

In our previous opinion, we rejected Workman's argument that his due process rights were violated by not being provided with written notice of the hearing on the State's motion to terminate his participation in the drug court program. However, we found that the district court failed to provide Workman with a written statement as to the evidence relied on and the reasons for revoking the conditional liberty of participation in the drug court program and, as such, violated this due process right enunciated in *State v. Shambley, supra*. Accordingly, we reversed the district court's order of termination of Workman's participation in the drug court program and remanded the cause with instructions to the district court to enter an order which contains a written statement as to the evidence relied on and the reasons for revoking the conditional liberty of his participation in the drug court program, based upon the record made at the previous hearing. Because we reversed the order of termination and remanded the cause for entry of a new order which comported with due process, we also vacated the sentences imposed. As a result, we were not obligated to address Workman's second assigned error, although we noted that a

district court has authority to impose a criminal sentence if a drug court participant is terminated from the drug court program. See *State v. Shambley, supra*.

Workman moved for rehearing. In his brief in support of the motion, he assigned as error for the first time that the district court did not have authority to impose a criminal sentence on him following his termination from the drug court program, because his pleas had not been accepted and he had not been found guilty at the November 16, 2009, hearing. We granted the motion for rehearing.

ASSIGNMENTS OF ERROR

On rehearing, Workman assigns that this court (1) mistakenly construed his first assignment of error, (2) failed to correctly analyze the issue of the district court's authority to impose a criminal sentence, and (3) failed to consider his numerous citations to the record of the termination hearing and never cited to anything in the record to support its conclusions.

STANDARD OF REVIEW

[1] A trial court is given discretion as to whether to accept a guilty plea; an appellate court will overturn that decision only where there is an abuse of discretion. *State v. Lassek*, 272 Neb. 523, 723 N.W.2d 320 (2006); *State v. Brown*, 268 Neb. 943, 689 N.W.2d 347 (2004).

ANALYSIS

We turn to Workman's second assigned error on rehearing, as it is dispositive of this appeal. Specifically, Workman argues, for the first time, that the district court had no authority to impose a sentence on him because—unlike the circumstances in *State v. Shambley*, 281 Neb. 317, 795 N.W.2d 884 (2011)—his pleas were never accepted and he was not adjudged guilty at the proceeding on November 16, 2009.

We disagree with Workman's contention that his pleas were not accepted. The district court, both orally at the conclusion of the hearing and in its written docket entry, accepted Workman's pleas. Workman goes on to argue, however, that he was never adjudged guilty and that "[i]t is axiomatic that

without a factual basis there is no plea." Brief for appellant on rehearing at 6.

[2-4] Drug court is "a postplea or postadjudicatory drug and alcohol intensive supervision treatment program for eligible offenders." Neb. Ct. R. § 6-1206. See *State v. Shambley, supra*. A drug court program participant pleads guilty and agrees to the terms and conditions of the program in exchange for the possibility of avoiding sentencing and, oftentimes, being allowed to withdraw the plea upon successful completion of the program. *State v. Shambley, supra*. If the participant is terminated from the program or withdraws before successful completion, then the conviction stands and the case is transferred back to the original court for sentencing. *Id*.

[5] Having reviewed the record, we agree that there was not a factual basis given prior to the acceptance of Workman's guilty pleas. *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), sets forth the requirements for finding that a guilty plea has been entered freely, intelligently, voluntarily, and understandingly. Specifically, the court must inform and examine the defendant to determine that he or she understands (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. Workman does not contend that these advisements were not given, and the record shows that the court adequately examined Workman regarding the above matters. However, *State v. Irish* also requires that the record must show that there is a factual basis for the plea and that the defendant knew the range of penalties for the crime with which he or she was charged. Although Workman was advised of the range of penalties, no factual basis was given for the pleas. Before accepting a guilty plea, the trial court must determine, among other things, whether a factual basis for the plea exists. *State v. Cervantes*, 15 Neb. App. 457, 729 N.W.2d 686 (2007).

[6] Accordingly, we conclude that without a factual basis, the district court erred in accepting Workman's guilty pleas. We therefore reverse the orders of the district court which accepted Workman's guilty pleas and terminated his

participation in the drug court program. We further reverse and vacate Workman's convictions and sentences, and we remand the cause to the district court for further proceedings. We need not address Workman's remaining assigned errors. An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it. *State v. Merchant*, 285 Neb. 456, 827 N.W.2d 473 (2013).

CONCLUSION

The district court erred in accepting Workman's pleas of guilty without the existence of a factual basis for the pleas. We therefore reverse the orders of the district court which accepted Workman's guilty pleas and terminated his participation in the drug court program, we reverse and vacate Workman's convictions and sentences, and we remand the cause to the district court for further proceedings to allow Workman to move to withdraw his previous pleas of guilty.

JUDGMENT REVERSED, SENTENCES VACATED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

JEFF BOTT AND VICTORIA BOTT, HUSBAND AND WIFE, APPELLANTS, V. THOMAS L. HOLMAN AND SHARON A. HOLMAN, HUSBAND AND WIFE, APPELLEES.

850 N.W.2d 800

Filed July 29, 2014. No. A-13-301.

1. **Actions: Rescission: Equity.** An action for rescission sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a decision independent of the findings of the trial court. Where credible evidence is in conflict on a material issue of fact, the appellate court will consider and may give weight to the fact the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Actions: Fraud: Proof.** To maintain an action for fraudulent misrepresentation, a plaintiff must allege and prove the following elements: (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff reasonably did so rely; and (6) that the plaintiff suffered damage as a result.

4. **Fraud: Rescission: Proof.** The party alleging fraud as the basis for rescission must prove all the elements of the fraudulent conduct by clear and convincing evidence.
5. **Fraud.** A statement that is true but partial or incomplete may be a misrepresentation, because it is misleading when it purports to tell the whole truth and does not.
6. ____. When a party makes a partial or fragmentary statement that is materially misleading because of the party's failure to state additional or qualifying facts, the statement is fraudulent.
7. **Fraud: Proof.** To succeed on a claim of fraudulent misrepresentation, a plaintiff must prove not only a misrepresentation, but also justifiable reliance upon that representation.
8. **Fraud.** A party is justified in relying upon a representation made to the party as a positive statement of fact when an investigation would be required to ascertain its falsity.
9. ____. Nebraska law imposes a duty of ordinary prudence upon a party claiming fraudulent misrepresentation.
10. ____. In fraudulent misrepresentation cases, whether a plaintiff exercised ordinary prudence is relevant to whether the plaintiff justifiably relied on the misrepresentation when the means of discovering the truth was in the plaintiff's hands.
11. **Actions: Fraud.** The fact that a plaintiff made inquiries elsewhere which did not disclose the falsity of the representations is not, as a matter of law, a defense to a fraud action.

Appeal from the District Court for Scotts Bluff County: LEO DOBROVOLNY, Judge. Reversed and remanded for further proceedings.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Snyder, Chaloupka, Longoria & Kishiyama, P.C., L.L.O., for appellants.

Paul W. Snyder, of Smith, Snyder & Petitt, G.P., for appellees.

MOORE, PIRTLE, and RIEDMANN, Judges.

RIEDMANN, Judge.

INTRODUCTION

Jeff Bott and Victoria Bott brought an action for rescission of a purchase agreement they entered into with Thomas (Tom) L. Holman and Sharon A. Holman, based on allegations of fraudulent misrepresentation and fraudulent concealment. Following a bench trial, the district court for Scotts Bluff

County found insufficient evidence to establish the Botts' claims and entered judgment in favor of the Holmans. The Botts appeal from that judgment. Because we find that the Botts proved all of the elements of fraudulent misrepresentation, we reverse the district court's order and remand the matter for further proceedings.

BACKGROUND

In June 2011, the Botts entered into a purchase agreement with the Holmans for the purchase of a home in Scottsbluff, Nebraska. Shortly after moving in, the Botts hired a contractor to install a heating and cooling system in the crawl space of the residence. While working in the crawl space, the contractor discovered water damage on the floor joists and alerted the Botts. Jeff Bott went into the crawl space and observed that the floor joists in the northeast corner of the house were rotten, crumbling, and moldy.

The Botts hired an engineer, Larry McCaslin, to conduct a structural inspection of the home in September 2011. Upon inspecting the crawl space, McCaslin observed a considerable amount of damage in the flooring system. McCaslin observed multiple floor joists that were cracked and rotten. Some of the floor joists had rotted so severely that they no longer reached the sill plate, and they were being supported by floor jacks and shims. The insulation between the floor joists and above the sill plate was deteriorated and black, and there was mold and mildew throughout the crawl space.

A sill plate is a 1½-inch-thick piece of wood that sits on top of the concrete foundation. McCaslin explained that the purpose of the sill plate is to provide a smooth and level surface to which the floor joists are attached and to transfer the load from the floor joists down to the foundation. McCaslin observed that the sill plate had completely rotted away in the northeast corner of the home, causing the floor joists to sit 1½ inches lower in that area.

McCaslin noted damage in other areas as well, but the most severe damage was in the northeast corner of the home. He believed the damage was caused by moisture leaking into the crawl space. McCaslin described the status of the flooring

system as "critical," and he stated that it needed to be repaired right away to make the house safe. McCaslin recommended replacing the sill plate, floor joists, and insulation, and regrading the site to direct water drainage away from the house, among other possible repairs.

The Botts hired a contractor to provide an estimate for the necessary repairs. The contractor explained that the house would have to be jacked up in order to replace the sill plate and floor joists. He estimated that the total cost, including materials and labor, would be approximately $72,000.

The Botts brought this action to rescind the purchase agreement on the basis of fraudulent misrepresentation and fraudulent concealment in the property condition disclosure statement provided by the Holmans. The evidence at trial established that the Holmans were aware of at least some of the damage in the flooring system and did not fully disclose their knowledge to the Botts.

The Holmans had owned and lived in the home since July 1989, prior to selling it to the Botts. During that time, there were multiple occasions in which water had leaked into the crawl space below the flooring system. There had been a washing machine leak in the southwest corner of the house in 1989, a leak in the shower drain in the northeast corner of the house in 1993 and 1994, and a leak in a water line on the north side of the house in 1997. In addition to those plumbing leaks, there had been water leakage around the foundation into the crawl space due to rainstorms.

In 2007, the Holmans hired Dan Flammang to retile the bathroom floor in the northeast corner of the house. After noticing that the bathroom floor was sagging, Flammang went into the crawl space to investigate the problem. Flammang identified rotting in the sill plate and floor joists that appeared to have been caused by moisture. Some areas of the sill plate had rotted away completely, which Flammang believed was the primary cause of the sagging floor. Flammang testified that he advised the Holmans about the rotting sill plate and the sagging floor, but that they chose not to take any corrective action at that time. Tom Holman, however, testified that Flammang

advised them that the floor was sagging, but did not mention the rotten sill plate or floor joists.

The Holmans contacted Flammang approximately a year later in May 2008 when they noticed the grout in the tile floor was cracking. Flammang returned to the house and advised the Holmans that the cracking was due to the sagging floor. Flammang stabilized the floor by placing a beam and two jacks under the floor joists to prop up the floor in the northeast corner of the house. The Holmans did not request any additional work to be done to repair the rotting sill plate or floor joists. However, Tom Holman did instruct Flammang to run caulking along the north side of the house, where the sidewalk had separated from the foundation, to prevent further water leakage into the crawl space. In 2009, the Holmans hired Flammang to install cement siding on the house and recaulk around the foundation.

In June 2011, the Holmans contacted a real estate agent to assist them in selling their house. The agent discussed the procedures necessary to properly list the home for sale, including completion of a seller property condition disclosure statement. The agent instructed them to fill out the disclosure form completely, accurately, and honestly regarding the condition of the house, inside and out. Tom Holman testified that he knew the disclosure statement was going to be provided to potential buyers and that he intended for them to rely upon it.

The first page of the disclosure statement contains the following language:

> This statement is a disclosure of the condition of the real property known by the seller on the date on which this statement is signed. This statement is not a warranty of any kind by the seller or any agent representing a principal in the transaction, and should not be accepted as a substitute for any inspection or warranty that the purchaser may wish to obtain. Even though the information provided in this statement is not a warranty, the purchaser may rely on the information contained herein in deciding whether and on what terms to purchase the real property.

The disclosure statement contains several questions regarding the structural condition of the property, among other things, to which the seller must respond by checking one of three boxes: "Yes," "No," or "Do not know." If the answer to any question is "Yes," the seller is instructed to explain the condition in the comments section on the following page. The questions on the disclosure statement that are relevant to this case are as follows:

- "Has there been leakage/seepage in the basement or crawl space?"
- "Are there any structural problems with the structures on the real property?"
- "Have you experienced any moving or settling of the . . . floor?"

The Holmans checked "Yes" regarding "leakage/seepage" in the crawl space and wrote "Previous to new siding" in the margin. They checked "No" regarding structural problems and moving or settling of the floor. Tom Holman testified that he answered "No" to the question regarding moving or settling of the floor, because the issue with the sagging floor had been repaired. The Holmans did not disclose the sagging floor, the rotten sill plate and floor joists, the installation of the beam and floor jacks in the crawl space, or any of the prior plumbing leaks into the crawl space.

The disclosure statement was provided to the Botts soon after they became interested in purchasing the home. Jeff Bott testified that he and his wife reviewed the disclosure statement and relied upon it in deciding to purchase the property. They also visited the home with their real estate agent, Jane Heimbach, on at least three occasions and spent a total of 3 or 4 hours inspecting the home. The Botts took their time and checked out the home carefully, although they did not go into the crawl space. Heimbach testified that the Botts did everything a prudent buyer would do. Neither Heimbach nor the Botts observed anything in the home that led them to believe there was a defect in the flooring system.

The Botts entered into a purchase agreement with the Holmans on June 16, 2011. The purchase agreement was contingent upon a home inspection. Heimbach testified that

she recommends home buyers obtain an inspection regardless of the disclosure statement, so that they can learn as much as possible about the property before buying it. If there are conditions checked "Yes" on the disclosure statement, she makes sure those things are thoroughly addressed by the home inspector.

Heimbach made arrangements for a whole home inspection by Darrel Atchison. Atchison completed the inspection after the parties had signed the purchase agreement, but prior to closing. Atchison's inspection report did not indicate any problems with the crawl space or flooring system. The Botts did not actually receive a copy of the inspection report until after they closed on the purchase of the house; however, Heimbach had told them it was a clean inspection, with no deficiencies noted.

Unbeknownst to Heimbach and the Botts, Atchison went no more than 5 or 10 feet into the crawl space and spent only 3 minutes inspecting it. Atchison testified that he was unable to conduct a proper inspection of the crawl space, because he was having back problems and was in a lot of pain at the time. He did not inform Heimbach or the Botts that he had been unable to properly inspect the crawl space. Atchison testified that if he had done a proper inspection, he would have observed the damage to the sill plate, floor joists, and insulation, and that he would have reported those defects on his inspection report.

Jeff Bott testified that although the inspection should have disclosed the damage to the flooring system, he and his wife had already relied on the disclosure statement in making an offer and deciding to purchase the property prior to ordering an inspection. In fact, he testified that they would have walked away from the property without ever making an offer if the Holmans had disclosed the sagging floor on the disclosure statement. Additionally, Heimbach testified that she would have specifically mentioned the sagging floor to Atchison and directed him to check it thoroughly if she had known about it.

Following a bench trial, the district court found in favor of the Holmans. It found that the Holmans were aware of the

sagging floor and water damage under the bathroom and that they failed to disclose those conditions. Nonetheless, it concluded that the disclosure statement, considered as a whole, did not establish fraudulent misrepresentation or fraudulent concealment because it put the Botts on notice that there had been water leakage in the crawl space and a reasonable inspection would have disclosed the damage. The Botts timely appeal.

ASSIGNMENTS OF ERROR

On appeal, the Botts allege that the district court erred in (1) treating the Holmans' property condition disclosure statement as a contract, (2) failing to find that the Holmans' conduct constituted fraudulent concealment, and (3) failing to find that the Holmans' conduct constituted fraudulent misrepresentation.

STANDARD OF REVIEW

[1,2] An action for rescission sounds in equity. *Cao v. Nguyen*, 258 Neb. 1027, 607 N.W.2d 528 (2000). In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a decision independent of the findings of the trial court. *Id*. Where credible evidence is in conflict on a material issue of fact, the appellate court will consider and may give weight to the fact the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id*.

ANALYSIS

We begin our analysis by addressing the Botts' third assignment of error regarding their claim of fraudulent misrepresentation.

[3,4] To maintain an action for fraudulent misrepresentation, a plaintiff must allege and prove the following elements: (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff reasonably did so rely; and (6) that the plaintiff

suffered damage as a result. *Cao v. Nguyen, supra*. The party alleging fraud as the basis for rescission must prove all the elements of the fraudulent conduct by clear and convincing evidence. *Id*.

Representations.

The Holmans' representation on the disclosure statement that they had not experienced moving or settling of the floor was false. The evidence is clear and convincing that Flammang told the Holmans that the bathroom floor was sagging or settling. Tom Holman testified that the reason he marked "No" was because the problem had been corrected; however, the question asks, "Have you experienced any moving or settling . . . ," which clearly inquires into the past. See *Nelson v. Wardyn*, 19 Neb. App. 864, 820 N.W.2d 82 (2012).

[5,6] The Holmans also misled the Botts in their answer to the question regarding leakage in the crawl space by failing to disclose the history of plumbing leaks. Their partial disclosure that leakage had occurred only "[p]revious to new siding" gave the impression that it was an isolated occurrence that had been fully resolved. A statement that is true but partial or incomplete may be a misrepresentation, because it is misleading when it purports to tell the whole truth and does not. *Zawaideh v. Nebraska Dept. of Health & Human Servs*., 280 Neb. 997, 792 N.W.2d 484 (2011). When a party makes a partial or fragmentary statement that is materially misleading because of the party's failure to state additional or qualifying facts, the statement is fraudulent. *Knights of Columbus Council 3152 v. KFS BD, Inc*., 280 Neb. 904, 791 N.W.2d 317 (2010).

The Botts further claim that the Holmans made a misrepresentation of fact by answering "No" to the question regarding structural problems. The trial court determined that despite the conflicting testimony of Tom Holman and Flammang, the Holmans were aware of the damage to the floor joist ends, sill plates, and rim joists. The evidence is not clear and convincing, however, that either Tom Holman or Sharon Holman considered this a structural problem. Furthermore, the question is in the present tense, inquiring whether there "[a]re . . .

any structural problems . . . .” There is no evidence that the Holmans knew that the house had structural problems at the time they completed the disclosure statement.

Based upon the Holmans’ answers to the questions regarding movement or settling of the floor and leakage in the crawl space, we find that the first three elements of fraudulent misrepresentation have been met.

Reliance.

[7] To succeed on a claim of fraudulent misrepresentation, a plaintiff must prove not only a misrepresentation, but also justifiable reliance upon that representation. The disclosure statement provides that although not a substitute for an inspection, the purchaser may rely on the information contained therein in determining whether to purchase the property. Tom Holman admitted that he intended potential purchasers to rely upon the disclosure statement, along with any inspection report. Jeff Bott testified that he and his wife did in fact rely on the disclosure statement in deciding to make an offer and ultimately purchase the property.

[8-10] A party is justified in relying upon a representation made to the party as a positive statement of fact when an investigation would be required to ascertain its falsity. *Cao v. Nguyen*, 258 Neb. 1027, 607 N.W.2d 528 (2000). However, Nebraska law imposes a duty of ordinary prudence upon a party claiming fraudulent misrepresentation. *Precision Enters. v. Duffack Enters.*, 14 Neb. App. 512, 710 N.W.2d 348 (2006), *overruled on other grounds, Knights of Columbus Council 3152 v. KFS BD, Inc., supra*. In fraudulent misrepresentation cases, whether the plaintiff exercised ordinary prudence is relevant to whether the plaintiff justifiably relied on the misrepresentation when the means of discovering the truth was in the plaintiff’s hands. See *Lucky 7 v. THT Realty*, 278 Neb. 997, 775 N.W.2d 671 (2009).

The Nebraska Supreme Court has held that the ordinary prudence rule does not apply where the defects are latent. See *Foxley Cattle Co. v. Bank of Mead*, 196 Neb. 1, 241 N.W.2d 495 (1976). Rather, “[i]t is applicable where the party who claims to have been defrauded . . . purchased real estate after

inspecting the property and failed to notice obvious defects." *Omaha Nat. Bank v. Manufacturers Life Ins. Co.*, 213 Neb. 873, 883, 332 N.W.2d 196, 202 (1983). See, also, *Lucky 7 v. THT Realty*, 278 Neb. at 1003-04, 775 N.W.2d at 676 (noting that "we have rejected misrepresentation claims when the truth of the property's condition was obviously apparent to a potential buyer upon inspection").

The defects at issue in this case were not obviously apparent to a potential buyer and would have been discoverable only upon crawling underneath the house in a space that was unlit and only 36 inches in height. Heimbach testified that the Botts did everything that prudent home buyers would do. They visited the property on multiple occasions and spent 3 or 4 hours carefully inspecting the premises. Neither the Botts nor Heimbach, who was an experienced real estate agent, observed anything that led them to believe that the property had structural damage within the flooring system.

Although the home inspection should have disclosed the defects, the Botts relied on the disclosure statement in deciding to make an offer and purchase the home before an inspection was ever ordered. Jeff Bott testified that he would have walked away from the property without having made an offer if the Holmans had disclosed the sagging floor. In other words, although the flawed home inspection added to the Botts' belief that there were no serious problems with the house, they never would have formed such a belief had the Holmans properly disclosed the defects on the disclosure statement. The disclosure statement specifically states that it may be relied upon in deciding whether and on what terms to purchase the property. The Botts were entitled to rely on the disclosure statement, and we find that they did so reasonably.

[11] The fact that a plaintiff made inquiries elsewhere which did not disclose the falsity of the representations is not, as a matter of law, a defense to a fraud action. *Henderson v. Forman*, 231 Neb. 440, 436 N.W.2d 526 (1989); *Foxley Cattle Co. v. Bank of Mead*, 196 Neb. 1, 241 N.W.2d 495 (1976). Thus, we find that the fraudulent misrepresentations on the disclosure statement are not excused by the fact that a proper home inspection would have revealed the defects.

The evidence clearly shows that the Botts suffered damages as a result of the Holmans' fraudulent misrepresentations. Although there was conflicting testimony regarding the estimated repair costs, it was undisputed that the flooring system was damaged and in need of significant repairs.

Based on our de novo review of the record, we conclude that (1) the Holmans made representations that they had not experienced any moving or settling of the floor and that there had been "leakage/seepage" in the crawl space only prior to the installation of new siding; (2) such representations were false; (3) when such representations were made, they were known to be false or were made recklessly without knowledge of the truth and as positive assertions; (4) the Holmans intended for the Botts to rely upon such representations; (5) the Botts did in fact rely upon the representations; and (6) the Botts were damaged as a result. Therefore, the Botts have proved a cause of action for fraudulent misrepresentation.

Because the Botts have established their claim of fraudulent misrepresentation, we need not address the remaining assignments of error. We note, however, that the Holmans stated several affirmative defenses in their answer, and we remand the matter to the trial court for consideration of these defenses.

CONCLUSION

We conclude that the evidence established each of the required elements of fraudulent misrepresentation by clear and convincing evidence. Accordingly, the judgment of the district court is reversed and the matter is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

Christian A. Barth, appellee and cross-appellant, v. Mindi J. Barth, now known as Mindi J. Boettcher, appellant and cross-appellee.

851 N.W.2d 104

Filed August 5, 2014. No. A-13-709.

1. **Divorce: Judgments: Jurisdiction: Appeal and Error.** The standard of review in an appeal concerning a jurisdictional issue in an action for dissolution of marriage is the same standard for appellate review of any other judgment in a dissolution action. Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.
2. **Divorce: Venue.** An action for dissolution of marriage shall be brought in the district court of the county in which one of the parties resides.
3. **Courts: Jurisdiction.** When the jurisdiction of the county court and district court is concurrent, the basic principles of judicial administration require that the court which first acquires jurisdiction should retain it to the exclusion of the other court.
4. ____: ____. Courts enforce the jurisdictional priority doctrine to promote judicial comity and avoid the confusion and delay of justice that would result if courts issued conflicting decisions in the same controversy.
5. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.
6. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
7. **Divorce: Child Custody.** When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests.
8. **Child Custody.** When both parents are found to be fit, the inquiry for the court is the best interests of the children.
9. **Divorce: Child Custody.** In determining a child's best interests under Neb. Rev. Stat. § 42-364 (Cum. Supp. 2012), courts may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and the parents; the effect on the child as a result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; and many other factors relevant to the general health, welfare, and well-being of the child.

10. **Evidence: Appeal and Error.** Where 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 court heard and observed the witnesses and accepted one version of the facts rather than another.
11. **Child Custody: Appeal and Error.** In contested custody cases, where material issues of fact are in great dispute, the standard of review and the amount of deference granted to the trial judge, who heard and observed the witnesses testify, are often dispositive of whether the trial court's determination is affirmed or reversed on appeal.
12. **Child Custody: Visitation: Stipulations.** It is the responsibility of the trial court to determine questions of custody and visitation of minor children according to their best interests. This is an independent responsibility and cannot be controlled by the agreement or stipulation of the parties themselves or by third parties.
13. **Divorce: Costs.** Neb. Rev. Stat. § 42-367 (Reissue 2008) permits a court to direct costs against either party in an action for dissolution of marriage.
14. **Divorce: Expert Witnesses: Fees: Appeal and Error.** In a dissolution action, an appellate court reviews an award of expert witness fees de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
15. **Divorce: Child Support: Appeal and Error.** In dissolution of marriage actions, the trial court's determination of child support is reviewed for an abuse of discretion.
16. **Child Support: Rules of the Supreme Court: Presumptions.** The Nebraska Child Support Guidelines are to be applied as a rebuttable presumption to both temporary and permanent support, and any deviation from the guidelines must take into consideration the best interests of the children.
17. ____: ____: ____. A court may deviate from the Nebraska Child Support Guidelines when one or both of the parties have provided sufficient evidence to rebut the presumption.
18. **Child Support: Rules of the Supreme Court.** The Nebraska Child Support Guidelines provide that a deviation is permissible whenever the application of the guidelines in an individual case would be unjust or inappropriate.
19. ____: ____. The Nebraska Child Support Guidelines allow for a deduction in determining monthly net income for biological or adopted children for whom the obligor provides regular support.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS, Judge. Affirmed as modified.

Stephanie Flynn, of Stephanie Flynn Law Office, P.C., L.L.O., for appellant.

Shane M. Cochran, of Snyder, Hilliard & Bishop, L.L.O., for appellee.

IRWIN, RIEDMANN, and BISHOP, Judges.

RIEDMANN, Judge.

INTRODUCTION

Mindi J. Barth, now known as Mindi J. Boettcher, appeals and Christian A. Barth cross-appeals from the order of the district court for Lincoln County which dissolved their marriage. On appeal, Mindi argues that the district court erred in finding that it had jurisdiction over the action, granting Christian custody of the parties' minor child, placing restrictions on cohabitation, and ordering her to pay a portion of an expert witness fee. We find no error in the district court's findings as to jurisdiction, custody, or the expert witness fee. However, the restriction on cohabitation was an impermissible delegation of the court's duty, and we therefore strike that provision from the parenting plan.

On cross-appeal, Christian argues that the district court erred in deviating from the Nebraska Child Support Guidelines without good cause. We agree and modify that portion of the decree as explained below.

BACKGROUND

Christian and Mindi were married in August 2010. Their son, Graham Barth, was born in January 2011. Mindi also has a daughter, Berkley Nielsen, from a previous relationship.

Christian, Mindi, Graham, and Berkley lived in Lincoln, Lancaster County, Nebraska, until January 2012, when they moved to North Platte, Lincoln County, Nebraska. On April 26, Mindi filed a complaint for dissolution of marriage in the district court for Lancaster County. On May 1, Christian filed a complaint for dissolution of marriage in the district court for Lincoln County. Mindi moved to dismiss Christian's action because she filed her complaint first. After a hearing on the motion and consultation with the Lancaster County District Court judge, the Lincoln County District Court determined that the Lancaster County action would be dismissed and the Lincoln County action would proceed. Accordingly, Mindi's motion to dismiss in Lincoln County was denied.

Trial on the issues of property division, custody, and child support was held on June 13 and July 16, 2013. At the time of trial, Christian was working as a firefighter-paramedic for

the North Platte Fire Department. He works 24-hour shifts every other day for 9 days and then has 6 consecutive days off. So in an average month, Christian works 10 days of 24-hour shifts and has the other 20 days off. When Christian is working, Graham goes to a 24-hour licensed daycare. The daycare provider cares for Graham in her home and lives on a hobby farm with ducks, chickens, turkeys, dogs, cats, cows, a sheep, and a llama. Graham has his own bed at the daycare provider's home and his own drawer there for his clothing. The daycare provider testified Graham is always clean, well groomed, and dressed appropriately. Graham gets along well with the other children and is very good to the animals. According to the daycare provider, Christian and Graham are always happy to see each other when Christian comes to pick up Graham.

Christian's neighbor testified that her children have play dates with Graham and that she would "[a]bsolutely" feel comfortable allowing Christian to watch her children. She said that Graham is happy and well behaved and that it appears that Christian and Graham have a very healthy relationship with positive interactions and good boundaries.

Dr. Rebecca Schroeder, a clinical psychologist whom Christian requested to perform a parental fitness evaluation on him, found that Christian and Graham have a very good relationship and a strong bond, they interact very naturally together, there is open affection between them, and Christian displays appropriate parenting techniques and a loving regard for Graham. Dr. Schroeder cautioned that she had never met Mindi and therefore could not give an opinion as to what was in Graham's best interests. However, she believed that Christian had all of the skills necessary to be a good, effective parent for Graham.

At the time of trial, Mindi was working full time at a plasma center in Lincoln. Although her schedule varies somewhat, she generally worked Monday through Friday from 9 a.m. to 5 p.m. or 10 a.m. to 7 p.m. Graham goes to daycare when Mindi is working. Mindi's best friend testified that she has been friends with Mindi for 7 or 8 years and that her children are the same ages as Mindi's. She said Mindi is a great mother who loves her children. Mindi's best friend allows Mindi to

watch her children and said that she has never had any concerns about Mindi's ability to parent.

There was extensive evidence presented at trial regarding Mindi's alcohol use. Christian testified that Mindi's alcohol issues began causing problems in their marriage almost immediately. It appeared to Christian that Mindi tried to hide her drinking because he would find bottles of alcohol in laundry baskets, under clothes, under the bathroom sink, and tucked away in closets. He said it seemed that once Mindi started drinking, she could not stop; if she had one drink, then she would have more, and her drinking increased in amount and frequency the longer they were together. According to Christian, at one point, Mindi told him that she was drinking every day, even when he was at work and she was home alone with Graham and Berkley.

In addition to the amount and frequency of Mindi's drinking, Christian was concerned that Mindi was also taking a number of medications and having adverse reactions to the combination of alcohol and medication. According to Christian, mixing alcohol and medication caused Mindi to cry a lot; become very aggressive, hostile, and angry; and "flip out." Christian recounted several incidents that he claimed occurred as a result of Mindi's drinking.

He described an incident in August 2011 when Mindi became intoxicated while they were out with friends and she threw a beer bottle at another woman. After Christian escorted Mindi outside, she became very upset and starting crying and fighting with him. At one point, she sat on the ground and banged her head on a bicycle rack.

Five days later, Christian and Mindi were celebrating their first anniversary at home and each consumed three beers. Mindi's behavior then became extremely erratic. She started sobbing uncontrollably, thrashing around, and throwing herself into the wall. She knocked herself out momentarily, and after regaining consciousness, she had a blank stare on her face. Then, according to Christian, Mindi said that her name was "Joe" and that she was 75 years old. She got very aggressive, to the point that Christian had to physically restrain her from hitting him or hurting herself. She sat on some stairs,

rocking back and forth and continually hitting her head on the wall and the bannister.

Eventually, Mindi was taken to a hospital that night and admitted to inpatient psychiatric services overnight. While at the hospital, Mindi underwent a psychosocial assessment. She reported having hallucinations of a man named "Joe" and said that she had been struggling with anxiety, panic attacks, and depression since Graham's birth. She said that she had been working with her physician and was taking medication to help her cope. Ultimately, the hospital staff psychiatrist diagnosed Mindi with major depressive disorder, recurrent, moderate intensity with postpartum onset; anxiety disorder; and alcohol abuse. Mindi was referred to outpatient counseling and asked to follow up with her physician to continue with her medications.

One night, a week after Mindi's hospitalization, she woke up around 10 p.m. and turned into "Joe" again. She knocked pictures off the walls, acted very aggressively, and sat on the ground rocking back and forth. Christian called his mother and Mindi's mother to come over, and eventually, Christian's mother convinced Mindi to take her medication. Later that month, following an argument with Christian, Mindi went home and ingested a large amount of pain medication. When Christian arrived home, he found Mindi lying in bed and discovered an "empty" bottle of the medication. Mindi admitted that she had taken the remaining pills, and when Christian forced Mindi to vomit, he counted 12 or 15 pills in the sink.

In September and October 2011, Mindi attended five sessions with Cynthia Hollister, a licensed mental health therapist. Mindi reported to Hollister that she had been drinking alcohol since she was 15 years old and that her consumption had gradually increased over the years. Mindi said that she often drank during the day and had to hide it because of Christian's "hypervigilance" about her drinking. Mindi reported that her father and two of her sisters have issues with alcoholism, which indicated to Hollister that Mindi has a genetic predisposition to alcoholism or substance abuse. At one point during treatment, Mindi told Hollister that she considered herself to be an alcoholic. Hollister diagnosed

Mindi with anxiety disorder, depressive disorder, and alcohol dependence.

At the time Mindi began seeing Hollister, she had recently begun attending Alcoholics Anonymous (AA) meetings and obtained a sponsor. Mindi earned her "30 day [sobriety] chip" from AA during that time, but she had mixed feelings about the achievement, reporting that she felt resentful instead of happy because she could not go out and drink like other people are able to do. Mindi's last session with Hollister was on October 13, 2011. Mindi simply stopped attending counseling and AA and began drinking again.

Several more incidents occurred thereafter. In early January 2012, Christian was home one afternoon with Graham while Mindi and Berkley were out running errands. Christian was taking out the trash when he observed Mindi throw some empty "mini-shooters," which are small bottles of alcohol, in a Dumpster before pulling her car into the garage at their home. Later that month, Mindi and Berkley spent the night at Mindi's best friend's house for Mindi's birthday. The following day, Mindi was supposed to help Christian clean their apartment before they moved to North Platte, but she did not return home until around 4 p.m. Christian thought Mindi had been drinking, because of her behavior. They argued but reconciled, and Mindi apologized and said she would find counseling for herself in North Platte and begin attending AA again. However, she never did so.

Mindi began working at a medical center in North Platte in February 2012. She went out drinking with some of her coworkers after her first day of work. When she got home, it was obvious to Christian that she was intoxicated, because she stumbled through the door and went straight to the bathroom, where she vomited. After doing so, Mindi tried to play with Berkley, but she ended up passing out in Berkley's lap. When Christian tried to get Mindi to go to bed, she got angry and kicked Christian in the stomach, hit him in the testicles, and swung at him a third time before Christian pushed her away. This incident occurred in front of Berkley. Christian put Berkley to bed, and after he finally got Mindi to bed, she vomited on the floor next to the bed.

At trial, Mindi blamed the August 2011 incident resulting in her hospitalization on an adverse reaction to mixing her medications with alcohol. She said that her mental health issues were the result of postpartum depression and that she has not had any similar incidents since then. Mindi claimed that many of the other incidents Christian described were the result of postpartum depression and anxiety and that they were not all related to alcohol. Mindi denied getting intoxicated with her coworkers in North Platte. However, she was impeached with the statements she made during her deposition admitting that she had been intoxicated that night and that she did not remember going home.

At the time of trial, Mindi was in a relationship. The relationship began around August 2012, and Mindi's boyfriend moved into her residence in November or December 2012. Mindi claimed at trial that he moved out of her home in May 2013. However, evidence was presented that his vehicle was seen pulling out of Mindi's garage around 6 a.m. on June 21 and into the garage around 7:45 that evening.

Mindi's boyfriend's criminal history includes an arrest for possession of marijuana and "ecstasy" and three convictions for driving under the influence. Mindi and her boyfriend admitted they had consumed alcohol together despite the fact that neither of them was permitted to do so. Mindi's boyfriend was on probation at the time, which prohibited him from drinking alcohol. Mindi was forbidden from drinking alcohol by a temporary order entered in this case in June 2012. When asked what positive results could come from consuming alcohol, Mindi responded, "I do not believe that I have a problem, and I do believe I am able to handle myself and have an adult beverage if Graham is not there."

On July 19, 2013, the court entered an order dissolving Christian and Mindi's marriage. The court found that Christian and Mindi are both fit and proper people to have custody of Graham but that the best interests of Graham would be served by placing his legal and physical custody with Christian, subject to reasonable parenting time with Mindi. The court noted that generally, a parent with a work schedule such as

Christian's would not be in a position to be awarded custody of a child. But the court's concerns were alleviated by the testimony of Graham's daycare provider.

The court found Mindi to be a loving mother who has a close bond with Graham and would appropriately parent him. Several serious deficiencies were noted in Mindi's behavior and character, however. The court concluded that Mindi has a serious problem with alcohol, which she attempted to minimize during her testimony at trial. The court found that Mindi was not dealing with her alcohol problem and expressed concern about her minimization of the problem and the fact that she violated the court's temporary order. Mindi's credibility and her "choice of live-in-boyfriend" were also factors that the court considered in its custody determination. Ultimately, the court concluded that Mindi has many positive attributes as a loving mother. But her past mental instability and alcohol abuse, probable continuing problem with alcohol that she refuses to address, and cohabitation with someone who also has a serious alcohol problem prevented the court from awarding custody to her.

The court included a restriction on cohabitation in the parenting plan. The restriction provides that if Christian is not living with an unrelated member of the opposite sex but Mindi is doing so, Christian may refuse to allow her overnight visitation with Graham, and vice versa.

When calculating child support, the court noted that Mindi "has a child from a previous relationship, which requires this [c]ourt for good cause shown to deviate from the [child support] worksheet." As a result, the court ordered Mindi to pay $305 per month in child support. Finally, the district court divided the costs of the action, including Dr. Schroeder's fee, equally between the parties.

Mindi timely appeals, and Christian cross-appeals.

ASSIGNMENTS OF ERROR

On appeal, Mindi assigns that the district court erred in (1) finding that the Lincoln County District Court obtained jurisdiction before the Lancaster County District Court,

(2) granting Christian custody of Graham, (3) placing restrictions on cohabitation in the parenting plan, and (4) ordering that Mindi be required to pay a portion of an expert witness fee.

On cross-appeal, Christian assigns that the district court erred in deviating from the child support guidelines without good cause.

ANALYSIS

Jurisdiction.

[1] Mindi argues that the Lincoln County District Court erred in concluding that it obtained jurisdiction before the Lancaster County District Court. The standard of review in an appeal concerning a jurisdictional issue in an action for dissolution of marriage is the same standard for appellate review of any other judgment in a dissolution action. Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review. *Huffman v. Huffman*, 232 Neb. 742, 441 N.W.2d 899 (1989).

[2] Under Nebraska law, an action for dissolution of marriage shall be brought in the district court of the county in which one of the parties resides. Neb. Rev. Stat. § 42-348 (Reissue 2008). Mindi filed her action for dissolution of marriage in the Lancaster County District Court on April 26, 2012. Her complaint alleged that she was a resident of Lancaster County. On May 1, 2012, Christian filed his dissolution action in the Lincoln County District Court. His complaint asserted that he resided in Lincoln County. Based on the allegations of the two complaints, the district court of either county could have exercised jurisdiction over a dissolution action between them.

[3,4] When the jurisdiction of the county court and district court is concurrent, the basic principles of judicial administration require that the court which first acquires jurisdiction should retain it to the exclusion of the other court. *Washington v. Conley*, 273 Neb. 908, 734 N.W.2d 306 (2007). In the present action, both courts are district courts, but we find no reason not to apply the basic doctrine. Thus, under the

doctrine of judicial administration, Lancaster County could have demanded jurisdictional priority. However, the principles of judicial administration require the elimination of unnecessary litigation and the promotion of judicial efficiency and economy. Courts enforce the jurisdictional priority doctrine to promote judicial comity and avoid the confusion and delay of justice that would result if courts issued conflicting decisions in the same controversy. *Molczyk v. Molczyk*, 285 Neb. 96, 825 N.W.2d 435 (2013).

The record indicates that the judges from Lancaster County and Lincoln County conferred on the matter and decided that the Lancaster County action would be dismissed. In a collaborative effort, the courts apparently decided not to enforce the jurisdictional priority doctrine, but we have no record to determine the basis of that decision. We note, however, that through this joint decision, the principles of judicial administration were met, as there was no unnecessary litigation or danger of conflicting decisions. To reverse at this point in the litigation, when jurisdiction would have been proper in either district court, would not promote judicial efficiency or economy. Therefore, we find no abuse of discretion in allowing this case to proceed in Lincoln County.

Custody.

[5,6] Mindi argues that the district court erred in awarding Christian custody of Graham. In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion. *Bussell v. Bussell*, 21 Neb. App. 280, 837 N.W.2d 840 (2013). A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id.*

[7-9] When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best

interests. *Maska v. Maska*, 274 Neb. 629, 742 N.W.2d 492 (2007). When both parents are found to be fit, the inquiry for the court is the best interests of the children. *Id*. In determining a child's best interests under Neb. Rev. Stat. § 42-364 (Cum. Supp. 2012), courts may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and the parents; the effect on the child as a result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; and many other factors relevant to the general health, welfare, and well-being of the child. *Maska v. Maska, supra*.

The district court found that Mindi is a loving mother who has a close bond with Graham and would appropriately parent him. Despite this, the court determined that awarding custody of Graham to Christian was in Graham's best interests because of concerns over Mindi's past mental instability and her alcohol issues, including the fact that Mindi attempted to minimize her alcohol problem and refused to address it.

The record indicates that Christian and Mindi both love Graham and would appropriately care for him and parent him. They both have suitable residences for him, are suitably employed in order to provide for him, and have appropriate care for him when they are working. Thus, the record supports the district court's finding that Christian and Mindi are both fit parents.

The evidence also supports the district court's concerns about Mindi's mental health history and alcohol use. Mindi was diagnosed with depression and anxiety, and drinking alcohol exacerbated her conditions, especially when mixed with her medications. She admitted to Hollister that she considered herself to be an alcoholic, that her drinking had gradually increased over the years, and that she often drank during the day but hid it from Christian. Although Mindi attended therapy and AA meetings for a brief period of time, she quickly began drinking to excess again and continued to drink alcohol

at the time of trial despite the court's prohibiting her from doing so.

Mindi argues that Christian's work schedule is concerning when he is absent from Graham's life for several days in a row. We note that Christian's work schedule does not require him to be away from Graham for several days in a row, and in an average month, Christian's schedule allows him to be with Graham for 20 full days. Although his schedule is unusual because it requires him to find 24-hour care for Graham, we do not find it to be a basis upon which to reverse the award of custody to him. The record indicates that Graham is appropriately cared for while Christian is working, that Graham enjoys being in the daycare provider's home with her family, and that Graham is growing and developing very well.

[10,11] In this case, both Christian and Mindi presented evidence concerning their own parenting strengths and the weaknesses of the other. Where 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 court heard and observed the witnesses and accepted one version of the facts rather than another. *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004). In fact, in contested custody cases, where material issues of fact are in great dispute, the standard of review and the amount of deference granted to the trial judge, who heard and observed the witnesses testify, are often dispositive of whether the trial court's determination is affirmed or reversed on appeal. *Id*.

The record presents ample evidence to support the district court's decision to award custody to Christian, and given all of that evidence, our standard of review, and deference to the trial court's observation of the witnesses, we cannot find that the district court abused its discretion in awarding custody of Graham to Christian.

Cohabitation.

Mindi argues that the district court erred in placing restrictions on cohabitation in the parenting plan. We agree and conclude that the district court's order giving Christian the discretion to withhold overnight visitation with Mindi if she

cohabits with someone of the opposite sex, and vice versa, is an unlawful delegation of the trial court's duty.

[12] It is the responsibility of the trial court to determine questions of custody and visitation of minor children according to their best interests. This is an independent responsibility and cannot be controlled by the agreement or stipulation of the parties themselves or by third parties. *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980), *disapproved on other grounds, Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002). In *Deacon*, the Supreme Court reversed an order which granted a psychologist the authority to effectively determine visitation and to control the extent and time of such visitation, concluding that such an order was an unlawful delegation of the trial court's duty that could result in the denial of proper visitation rights of the noncustodial parent. As authority for its conclusion, the *Deacon* court cited *Lautenschlager v. Lautenschlager*, 201 Neb. 741, 272 N.W.2d 40 (1978). In *Lautenschlager*, the court observed:

> The rule that custody and visitation of minor children shall be determined on the basis of their best interests, long established in case law and now specified by statute, clearly envisions an independent inquiry by the court. The duty to exercise this responsibility cannot be superseded or forestalled by any agreements or stipulations by the parties.

201 Neb. at 743-44, 272 N.W.2d at 42. The Supreme Court in *Deacon* specifically took note that the reasoning of *Lautenschlager* was being extended to third parties. The reasoning of *Deacon* has also been applied in other contexts. See, *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992) (finding plain error in juvenile court's requirement that parent participate in support group and follow all directions of counselor); *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988) (disapproving of district court order authorizing child custody officer to control custody and visitation rights of minor child); *In re Interest of Teela H.*, 3 Neb. App. 604, 529 N.W.2d 134 (1995) (holding that juvenile court order granting psychologist authority to determine time, manner, and

extent of parental visitation was improper delegation of judicial authority).

In the present case, the delegation is not to a third party; rather, it is to the custodial parent. But, the rationale of the aforementioned cases applies with equal force when it is the custodial parent who is granted the authority to determine the visitation privileges of the noncustodial parent, because setting the time, manner, and extent of visitation is solely the duty of the court. Indeed, in *Deacon*, the Supreme Court said, "[The custodial parent's] position that visitation rights should be at his discretion, as in his judgment shall be reasonable and proper for the best interests of the children, is erroneous and cannot be sustained." 207 Neb. at 200, 297 N.W.2d at 761-62. We therefore find that the district court abused its discretion in allowing Christian to determine whether Mindi is entitled to overnight visits, and we modify the parenting plan to remove that provision.

Expert Witness Fee.

Mindi contends that the district court erred in ordering her to pay a portion of Dr. Schroeder's expert witness fee. She argues that Dr. Schroeder's opinion was not helpful to the court in determining what was in Graham's best interests and that she was earning less money than Christian at the time of trial.

[13,14] Neb. Rev. Stat. § 42-367 (Reissue 2008) permits a court to direct costs against either party in an action for dissolution of marriage. In *Lockwood v. Lockwood*, 205 Neb. 818, 290 N.W.2d 636 (1980), the Nebraska Supreme Court upheld the taxing of expert witness fees as costs under § 42-367 where there was evidence of a contract that the witness had been employed by the wife, the witness testified to the value of his services, and the documents and the testimony were accepted into evidence at trial. In a dissolution action, an appellate court reviews an award of expert witness fees de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Drew on behalf of Reed v. Reed*, 16 Neb. App. 905, 755 N.W.2d 420 (2008).

In this case, the evidence establishes that Christian requested Dr. Schroeder's services and her testimony at trial. She testified that she was charging $600 for her services. Although Dr. Schroeder could not opine as to which parent was a better fit for Graham, the district court cited her opinion of Christian in its analysis of Christian as a parent and ultimately awarded custody to Christian. Given this and the relative similarity in the parties' incomes as determined by the trial court, we find no abuse of discretion in ordering the parties to equally divide the costs of the action, including Dr. Schroeder's fee.

Child Support.

[15] On cross-appeal, Christian claims the district court erred in deviating from the child support guidelines without good cause. In dissolution of marriage actions, the trial court's determination of child support is reviewed for an abuse of discretion. See *Bussell v. Bussell*, 21 Neb. App. 280, 837 N.W.2d 840 (2013).

[16,17] The child support guidelines are to be applied as a rebuttable presumption to both temporary and permanent support, and any deviation from the guidelines must take into consideration the best interests of the children. *Wilkins v. Wilkins*, 269 Neb. 937, 697 N.W.2d 280 (2005). A court may deviate from the guidelines when one or both of the parties have provided sufficient evidence to rebut the presumption. *Id.*

[18,19] The guidelines provide that a deviation is permissible whenever the application of the guidelines in an individual case would be unjust or inappropriate. Neb. Ct. R. § 4-203(E) (rev. 2011). The guidelines also allow for a deduction in determining monthly net income for biological or adopted children for whom the obligor provides regular support. Neb. Ct. R. § 4-205(E).

As the custodial parent of Berkley, Mindi clearly provides regular support for her; however, Mindi did not provide any evidence of the amount of such support or request a deviation from the guidelines on that basis. In fact, Mindi did not request a deviation from the guidelines at all. Further, the district court did not conclude that a deviation was in the best interests of

Graham. Consequently, we conclude that there was insufficient evidence to rebut the presumption that the guidelines should be applied. Therefore, the district court abused its discretion when it entered a child support order that deviated from the child support guidelines without good cause.

Based on the child support worksheet completed by the district court, Mindi should have been required to pay $626 per month. We therefore modify the decree to award Christian $626 per month in child support. The trial court entered its decree on July 19, 2013. If the trial court had ordered child support to be paid as required by the guidelines, the first installment would have been due on August 1. The decree as modified by this opinion shall operate accordingly. See *Pursley v. Pursley*, 261 Neb. 478, 623 N.W.2d 651 (2001).

CONCLUSION

We find that the district court did not abuse its discretion in allowing the Lincoln County action to proceed, awarding custody of Graham to Christian, or dividing the costs of the action equally between the parties. However, the cohabitation restriction is impermissible, and we therefore remove it from the parenting plan. Likewise, it was an abuse of discretion for the district court to deviate from the child support guidelines without good cause. Accordingly, we modify the decree to order Mindi to pay $626 per month in child support in accordance with the child support guidelines.

AFFIRMED AS MODIFIED.

RITA A. SUTTON AND KAI CARLSON, APPELLEES, V.
HELEN KILLHAM ET AL., APPELLANTS.

854 N.W.2d 320

Filed August 19, 2014. No. A-13-635.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, 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 decision.

2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
4. **Final Orders: Appeal and Error.** Generally, only final orders are appealable.
5. ____: ____. Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.
6. **Final Orders: Words and Phrases.** A substantial right under Neb. Rev. Stat. § 25-1902 (Reissue 2008) is an essential legal right.
7. **Final Orders: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken.
8. **Final Orders.** An order that completely disposes of the subject matter of the litigation in an action or proceeding both is final and affects a substantial right because it conclusively determines a claim or defense.
9. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
10. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded.
11. **Evidence: Appeal and Error.** Evidence objected to which is substantially similar to evidence admitted without objection results in no prejudicial error.
12. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
13. **Equity.** Equity strives to do justice. Equity is not a rigid concept but, instead, is determined on a case-by-case basis according to concepts of justice and fairness.
14. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the party's brief.

Appeal from the District Court for Cheyenne County: LEO DOBROVOLNY, Judge. Affirmed.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellants.

Thomas D. Oliver for appellees.

MOORE, PIRTLE, and RIEDMANN, Judges.

MOORE, Judge.

INTRODUCTION

Helen Killham and the other defendants in this case (collectively the Appellants) appeal from an order of the district court for Cheyenne County, which directed the referee to sell the remaining interests of the parties in certain oil wells and removed the condition that the wells be placed into production before sale. Because we find no error in the district court's decision, we affirm.

BACKGROUND

This case, which originated as a dispute among the six sibling beneficiaries of a trust created by their parents, has been ongoing for well over 10 years and has resulted in numerous court orders and four previous appeals. The first two appeals were dismissed for lack of jurisdiction, on August 30, 2005, in case No. A-05-847 and on March 3, 2008, in case No. A-07-1133. An exhaustive summary of the background of the case can be found in *Sutton v. Killham*, 19 Neb. App. 842, 820 N.W.2d 292 (2012) (*Sutton III*), *affirmed* 285 Neb. 1, 825 N.W.2d 188 (2013). For purposes of the present appeal, we do not recite the full procedural background of the case here, but set forth only those facts necessary to resolve the issues before us.

In 2003, the district court created a receivership pursuant to Neb. Rev. Stat. § 25-1081 (Reissue 1995) and appointed a receiver. The receiver and successor receiver managed an oil well or wells (the wells), pending resolution of ownership issues related to the wells. The issues raised by the siblings in the underlying action were apparently resolved through mediation or court order, but the oil wells which are assets subject to the receivership have not been disposed of. In May 2006, upon the Appellants' request, the court appointed a referee. The referee filed a report with the court in December, stating his opinion that the property should be sold and the proceeds divided. He then described the property and owners

more specifically and set forth a proposed procedure for the marketing and sale of the property, "[p]roviding the [c]ourt enters an order confirming th[e] report and directing sale of the property."

In January 2007, an intervenor in the action filed a claim with the receiver for payment of operating expenses of an oil well, which claim was denied by the receiver. Thereafter, the receiver filed a motion for summary judgment which the district court sustained, thus approving the denial of the intervenor's claim. *Sutton III* is the appeal by the intervenor of the grant of summary judgment in favor of the receiver, under which appeal we affirmed the grant of summary judgment. That decision was likewise affirmed by the Nebraska Supreme Court on further review. *Sutton v. Killham*, 285 Neb. 1, 825 N.W.2d 188 (2013) (*Sutton IV*).

In August 2007, the district court ordered a partition sale of the working interest in the wells and personal property identified in the referee's report to the court and directed the referee to proceed with the sale, which was to be conducted in accordance with the procedure outlined in the referee's report. In December 2010, the district court (in the same order which granted the summary judgment to the receiver referenced above) ordered the receiver to become the operator of the wells and to "prepare for and commence oil production, expending whatever necessary funds are available to establish production again." The court ordered the referee to proceed with the sale as previously ordered after the receiver was producing oil.

The record reflects that during the pendency of the appeal addressed in *Sutton III* and *Sutton IV*, the receiver has apparently been denied permission by the director of the Nebraska Oil and Gas Conservation Commission (NOGCC) to reopen and operate the wells. In a May 20, 2011, journal entry made following a hearing on a motion for directives, the district court ruled on requests by the receiver, including whether the receiver should continue with efforts to bring the wells into production and whether the referee should continue to market the operating interests in the wells. The court ordered the receiver to comply with all requirements of law to bring

the wells into production. Because of the pending appeal, the court found, "[A] sale at this time may not achieve the optimal sales price, as buyers may not want to put forth their best offer while matters concerning the wells are being litigated." The court authorized, but did not order, the referee to postpone sale until the appeal was resolved. Following a status hearing on November 21, the court directed the receiver to make an assessment of what actions and expenses would be required to achieve production and to advise the parties of his findings before taking further action.

The receiver filed a motion for directives, which was heard by the district court on January 25, 2012. The receiver offered and the court received into evidence exhibits, including a copy of the oil and gas lease and certain correspondence between the receiver and the director of the NOGCC. The exhibits show that in 2008, in connection with efforts to change the operator of the wells, the receiver had correspondence from the director informing him that the oil and gas lease might no longer be valid and that the possibility existed that an application for a "force pooling" would have to be heard by the NOGCC. At such a hearing, the NOGCC would name the operator of the wells in its official order. In a letter dated December 23, 2011, the director informed the receiver as follows:

> [I]t is our opinion that the oil and gas lease, under which the continuous operations were formerly conducted, terminated due to non-production and is no longer valid. Given the fact that a large portion of the mineral real estate has been severed from the surface real estate, we have a number of entities now involved. Part of our statutory charge includes the protection of the correlative rights of all owners. Before [the NOGCC] executes any new [f]orm . . . to authorize the sale of oil and gas, we will require that you provide us with copies of the oil and gas leases and the new division order title opinion.
>
> In the event that new oil and gas leases are unable to be obtained, [the NOGCC] has the authority to force-pool unleased mineral interest owners under [Neb. Rev. Stat. §] 57-909. Since there would not be an operating agreement in such a situation, [the NOGCC] could also set

> the terms and conditions pertaining to unpaid balances and operating expenses. If you feel that this legal action might be useful in this situation, you may certainly visit with us concerning pooling in this particular case.

In a May 9, 2012, journal entry, entered following the issuance of our opinion in *Sutton III* but prior to the petition for further review that led to the Nebraska Supreme Court's decision in *Sutton IV*, the district court ruled on the receiver's request for directives. The court noted the substance of the director's December 2011 letter to the receiver.

The court then recognized that this court's opinion in *Sutton III* had no effect on the directions requested by the receiver and that the August 2007 order directing sale of the working interests in the wells and the December 2010 order directing sale after production was achieved were still valid orders. The court directed the receiver to attempt to satisfy the NOGCC's requirements for issuing a permit to operate the wells and to determine if a factual basis existed to administratively challenge the NOGCC's findings with regard to the lease at issue.

The receiver submitted a report, dated June 26, 2012, in response to the court's May 2012 order. In the report, the receiver detailed some of the early history of his pumping efforts when he was first appointed in April 2007. According to the receiver, he repeatedly requested local operators and pumpers to assist him in restarting the wells, but these contacts declined to assist him due to the ongoing litigation. The receiver applied to the NOGCC on at least three occasions to become the operator when it became clear that no operator "with knowledge" would consider helping him. He reported that the last time he applied to operate the wells, the NOGCC rejected his application and informed him the lease was void due to a period of nonproduction lasting more than 90 days. The receiver reported that he met with the director of the NOGCC and the director's deputy on June 21, 2012. According to the receiver, the director believed that the oil and gas lease was void due to a period of nonproduction lasting more than 90 days and that it would be inappropriate for the receiver to operate the wells under such a lease. The

receiver disagreed with the director's opinion that the lease was invalid, noting that the 90-day clause in the lease applied only to a well that has been abandoned, and expressed his opinion that neither well had been abandoned. The receiver also reported that the director had informed him of steps that any of the mineral interest holders in the wells could take in the event the lease was invalid, including efforts to have the other mineral interest holders sign a new lease or file a "pooling application" with the NOGCC. The receiver noted that the legal title to the minerals held by certain parties needed to be clarified. The receiver recommended that the referee take immediate steps to conduct a sale of the oil well equipment, the mineral interests of the parties, and the current oil and gas lease, regardless of the validity of the lease. He then laid out a suggested course of action to accomplish a sale without returning the wells to production. The receiver noted that some of the parties involved in the lawsuit wanted him to file a declaratory judgment or mandamus action to enforce the current lease, while other parties felt that the lease was void. The receiver opined that if he filed such an action, he would have to join all of the parties to the present action as well as multiple additional mineral interest holders and the NOGCC. He felt that such an action, with any likely subsequent appeals, would result in an additional 2 to 3 years during which the oil wells will continue not to operate and would require the present litigation to remain open until the partition sale took place and was approved by the court and final distributions were made. Given the time and resources that would be consumed in attempting to obtain a new lease or "force pooling" interests or in filing a declaratory judgment or mandamus action, the receiver felt that the best option was to proceed with the recommended sale.

On March 26, 2013, after spreading the mandate following *Sutton IV*, the district court heard several requests of the parties, including a motion to direct action by the receiver and the referee filed by the Appellants and an objection by the appellees to efforts by the receiver to restore production. The appellees called the receiver as a witness. He testified about his contact with the NOGCC, some of which had to do with

the steps he needed to take to become the operator of the wells. The receiver testified that there had been no production since 2007 because the NOGCC would not allow an operator. The receiver testified that since being appointed receiver in 2007, he had made multiple attempts to get the oil wells in production, all of which had been rejected by the NOGCC. He clarified that the rejections had come from the director and that he had not filed a request for or appeared for a hearing in front of the NOGCC. The receiver testified to his belief that under NOGCC policy, the director makes decisions with respect to who is allowed as an oil well operator. He testified further that he had never appealed any of the director's decisions to the NOGCC. The receiver testified that his options at that point to get the wells in production would require him either to request a hearing before the NOGCC, which might lead to further litigation under the Administrative Procedure Act if the NOGCC supported the director's decisions, or to file a mandamus-type action against the NOGCC to attempt to obtain a directive regarding production. He testified that either of those steps would require notice to parties involved in the present litigation as well as to a reasonably extensive list of mineral interest holders. He did not believe that it would be fair to the parties for him to take either action due to the time and expense involved; rather, he believed that it would be more fitting for one of the parties to pursue any such steps independently.

On June 27, 2013, the district court entered an order modifying its prior orders requiring that the wells be made productive before sale. The court stated, "The receiver now reports he is unable to achieve production. The [NOGCC] has denied the receiver permission to operate, apparently as there is no current lease covering the wells." The court modified the December 2010 order requiring production before sale and removed the condition requiring production. The court stated that in other respects, the August 2007 order for sale and the December 2010 order remained in effect. The court directed the referee to "forthwith" sell the remaining interests of the

parties in the wells. The court set a further hearing for October 2013 to "determine a proper division order" and to obtain current lists of the working interest owners and the mineral interest owners.

The Appellants filed a motion for reconsideration or, in the alternative, to alter or amend, which was heard by the district court on July 22, 2013. The Appellants offered into evidence numerous exhibits, including the receiver's June 2012 report to the court on whether the requirements to achieve production could be satisfied and the director's December 2011 letter to the receiver discussed above.

On July 24, 2013, the district court entered an order denying the Appellants' motion, stating:

> The primary concern of the [Appellants] is that they want production resumed before the partition sale. Their arguments imply the receiver has not been diligent in returning production.
>
> In his reports to the [c]ourt and the parties, the receiver has set forth the difficulties in achieving production, and the delays anticipated in what he sees as possible means by which to achieve production, based on the information he has from the [NOGCC]. Those are set forth in his [June 2012] report . . . which was submitted in response to the [c]ourt's May . . . 2012 order that the receiver report on whether the requirements to achieve production could be satisfied.
>
> The previous orders of the [c]ourt in this case . . . direct sale of the working interest. The [r]eferee has made reports, and updated the reports, as to what can be offered for sale. The order which the [Appellants] seek to have reconsidered simply provides that the partition sale go forward without production. No party has offered any solid suggestion or proposal which would cause the [c]ourt to find the receiver's recommendations should not be followed.

The Appellants subsequently perfected their appeal to this court.

ASSIGNMENTS OF ERROR

The Appellants assert that the district court erred in (1) receiving and relying on letters from the director of the NOGCC, (2) determining that the NOGCC had denied the receiver permission to operate and asserting that there was no current lease covering the wells, (3) directing the receiver to no longer pursue placing the oil wells into production prior to sale and directing the referee to proceed to sale without oil production, and (4) allowing the conduct of the receivership to continue when the receiver ignored, avoided, and failed to act upon numerous court directions.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, 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 decision. *Wisniewski v. Heartland Towing*, 287 Neb. 548, 844 N.W.2d 48 (2014).

[2] On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. *Gibbs Cattle Co. v. Bixler*, 285 Neb. 952, 831 N.W.2d 696 (2013).

ANALYSIS

Jurisdiction.

[3-5] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties. *Carney v. Miller*, 287 Neb. 400, 842 N.W.2d 782 (2014). Generally, only final orders are appealable. *Id.* Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered. *Carney v. Miller, supra.*

In determining the jurisdiction issue before the court in this appeal, we find it helpful to discuss the jurisdiction issues addressed in *Sutton III* and *Sutton IV*. In *Sutton III*, we concluded that the order appealed from was not a final order under Neb. Rev. Stat. § 25-1911 (Reissue 2008) because it did not fit under any of the three types of final orders described in § 25-1902. Nevertheless, we determined that we had appellate jurisdiction under Neb. Rev. Stat. § 25-1090 (Reissue 2008), which provides, in part, "All orders appointing receivers, giving them further directions, and disposing of the property may be appealed to the Court of Appeals in the same manner as final orders and decrees." We then proceeded to address the merits of the intervenor's appeal and found that the district court properly granted summary judgment to the receiver.

Our decision in *Sutton III* was affirmed by the Nebraska Supreme Court in *Sutton IV*, albeit on different grounds relative to the issue of jurisdiction. The Supreme Court disagreed with our analysis of § 25-1902, specifically our determination that the order in question did not fall within the second category of orders enumerated in § 25-1902, one that affects a substantial right made during a special proceeding. The Supreme Court disapproved of our determination that because the denial of the intervenor's claim was encompassed by the receivership created under chapter 25 of the Nebraska Revised Statutes, it was not a special proceeding, citing its abrogation of that proposition in later cases. The Supreme Court concluded instead that the order at issue was a final order from which an appeal may be taken. In view of that determination, the Supreme Court chose not to analyze the correctness of our determination that the order was final under § 25-1090. The Supreme Court affirmed this court's determination with respect to the grant of summary judgment in favor of the receiver.

Turning to the June 27, 2013, order at issue in this appeal, it essentially did three things: (1) It modified the December 2010 order requiring production before sale and removed the condition requiring production, (2) it confirmed that the previous orders for sale from August 2007 and December 2010 remained in effect, and (3) it directed the referee to "forthwith"

sell the remaining interests of the parties in the wells. The order also set a further hearing for October 2013 to determine a proper division order. The Appellants' motion for reconsideration or, in the alternative, to alter or amend was denied on July 24.

The Appellants assert that the order appealed from is a "final order" because it affects a substantial right in a special proceeding within the scope of § 25-1902 and because the order issued "further directions" which may be appealed under § 25-1090. The appellees and the successor receiver maintain that the order appealed from is not a final order under § 25-1902 and further that an interlocutory appeal under § 25-1090 regarding receivers is not merited.

With regard to § 25-1902, we must determine whether the order falls under the second type of orders enumerated therein, one which affects a substantial right made during a special proceeding. The appellees assert that the order in question merely continued the previous orders directing that the wells be sold and, as such, does not affect a substantial right. The Appellants point to the portion of the order removing the prior condition that the wells be placed into production before sale as affecting a substantial right. They argue that the order effectively changed numerous previous final orders and diminished the value of their property to be sold by the referee.

[6-8] A substantial right under § 25-1902 is an essential legal right. *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012). A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken. *Id*. Therefore, an order that completely disposes of the subject matter of the litigation in an action or proceeding both is final and affects a substantial right because it conclusively determines a claim or defense. *Id*.

It has been recognized that an order confirming a sale by a receiver is a final order from which an appeal can be taken. See, e.g., *Dickie v. Flamme Bros*., 251 Neb. 910, 560 N.W.2d 762 (1997); *Lewis v. Gallemore*, 173 Neb. 441, 113 N.W.2d 595 (1962). The question before us, however, is whether an

order which occurs prior to the final sale and confirmation is a final order. In *In re Estate of McKillip*, 284 Neb. 367, 820 N.W.2d 868 (2012), the Nebraska Supreme Court addressed whether an order directing a referee to sell real estate is a final order. The trial court had determined that physical partition of the real estate was not possible without great prejudice to the owners and therefore approved the referee's report and ordered the referee to sell the land at public sale. The Supreme Court concluded that the order was a final order under § 25-1902(2) as affecting a substantial right in a special proceeding. The Supreme Court noted:

> "In the context of multifaceted special proceedings that are designed to administer the affairs of a person, the word 'case' means a discrete phase of the proceedings. An order that ends a discrete phase of the proceedings affects a substantial right because it finally resolves the issues raised in that phase."

In re Estate of McKillip, 284 Neb. at 374, 820 N.W.2d at 875-76, quoting John P. Lenich, *What's So Special About Special Proceedings? Making Sense of Nebraska's Final Order Statute*, 80 Neb. L. Rev. 239 (2001).

The court in *In re Estate of McKillip*, in concluding that the order directing the referee to sell the real estate was a final, appealable order, recognized that while it may have been possible for the parties to appeal after a sale and confirmation, judicial economy, if nothing else, required resolution of that issue before a sale was held. The court further noted that distribution of the real estate was a major issue in the resolution of the proceedings and that resolving the distribution of the real estate would finally settle the issues raised in that phase of the probate.

Turning to the case at hand and applying the foregoing principles, we conclude that the orders appealed from affect a substantial right as defined above. The orders require the referee to *forthwith* sell the oil wells, without the necessity of their being placed into production prior to sale. The sale of the wells is the only remaining issue in this receivership proceeding. The removal of the requirement that the wells be placed into production prior to sale could arguably affect the marketability

of the wells and, as such, affects a substantial right of the parties who will receive the proceeds of the sale.

Further, even if the orders before us do not affect a substantial right, we conclude that the orders are appealable under § 25-1090, which provides, in part, "All orders appointing receivers, giving them further directions, and disposing of the property may be appealed to the Court of Appeals in the same manner as final orders and decrees." In *Sutton III*, 19 Neb. App. at 859, 820 N.W.2d at 305, this court noted that "the key last sentence of § 25-1090" had been in the statute intact (except for the reference to the Court of Appeals) since 1867 and that there is no legislative history available. Using the doctrine of statutory construction, this court concluded that the order being appealed in that case, that the receiver was not liable for the claim being brought by the intervenor, was a "direction" to the receiver from which an appeal is allowable. *Sutton III*, 19 Neb. App. at 860, 820 N.W.2d at 306. The Supreme Court in *Sutton IV* chose not to address the appealability of the order under § 25-1090, having determined that the order was in fact a final order under § 25-1902.

While there is little other case law available to assist us in applying § 25-1090, we note that under the predecessor statute, the Nebraska Supreme Court held that an order directing the receiver of a national bank to sell the property of the bank is an order giving a receiver "'further directions, and disposing of the property'" so as to be appealable. See *State v. Fawcett*, 58 Neb. 371, 374, 78 N.W. 636, 637 (1899).

The appellees argue that the order at issue is not a directive to a *receiver* because it directed the *referee* to proceed with the sale and because the Appellants, rather than the receiver, sought further direction from the court for the receiver. We disagree. The order in the instant case, removing the court's previous directive to the receiver to operate the wells and now permitting the wells to be sold before reaching operating status, is also a "direction" to the receiver, directing him to cease efforts at production. Further, we note Neb. Rev. Stat. § 25-1087 (Reissue 2008), which permits any party to apply to the court for further directions to the receiver "as may in the further progress of the cause become proper."

We conclude that § 25-1090, being a special statute relative to receivers, applies in this case such that we have jurisdiction to hear the appeal from the orders of June 27 and July 24, 2013, which orders contained directions to the receiver to cease efforts to bring the wells into production.

Having determined that we have jurisdiction to hear this appeal, we now turn to the merits of the Appellants' assigned errors.

Receipt of Letters From NOGCC.

The Appellants assert that the district court erred in receiving and relying on letters from the director of the NOGCC. Specifically, the Appellants argue that the court should not have received exhibits 602 through 607, which contain correspondence between the receiver and the director. Those particular exhibits were first offered by the receiver and received by the court at the January 2012 hearing without objection from the Appellants. Exhibits 602 through 607 were reoffered by the Appellants and received by the court at the July 2013 hearing on the motion for reconsideration. Presumably, the Appellants are actually referring to exhibit 619, a copy of the December 2011 letter from the director to the receiver offered by the appellees and received by the court at the March 2013 hearing. Exhibit 619 contains the same letter as does exhibit 607, the letter from the director containing his opinion that the lease had terminated because of nonproduction. The Appellants objected to the offer of exhibit 619 on the bases of foundation and hearsay and argued that the letter from the director did not purport to be an official act of the NOGCC.

[9-11] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *In re Invol. Dissolution of Wiles Bros.*, 285 Neb. 920, 830 N.W.2d 474 (2013). To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded. *Martensen v. Rejda Bros.*, 283 Neb. 279, 808 N.W.2d 855 (2012). Evidence objected to which

is substantially similar to evidence admitted without objection results in no prejudicial error. *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004).

At the March 2013 hearing, the receiver testified about his reasons for recommending that the wells be sold without the requirement of being placed into production. He testified about his unsuccessful attempts to bring the oil wells into production since his appointment as receiver and the rejection by the director. The NOGCC correspondence, including the letter marked as exhibit 619 at the March 2013 hearing, had previously been admitted without objection at the January 2012 hearing. This same letter concerning the director's opinion as to the validity of the lease was offered by the Appellants and admitted into evidence at the July 2013 hearing on the motion for reconsideration. Because the letter was admitted into evidence without objection at other hearings, we find no prejudicial error in the court's receipt of exhibit 619 at the March 2013 hearing. In addition, the letter from the director was referenced in the receiver's June 2012 report, which the Appellants offered as an exhibit in the July 2013 hearing, and as such, the letter itself is cumulative in nature insofar as it relates to whether the requirements to achieve production could be satisfied. This assigned error is without merit.

Denial of Permission to Operate Wells.

The Appellants assert that the district court erred in determining that the NOGCC had denied the receiver permission to operate and asserting that there was no current lease covering the wells. They argue that the court erroneously "applied the [d]irector[']s letters to be a final decision of the [NOGCC]" and that the "reliance of the [d]istrict [c]ourt to assert that the [NOGCC] had made any determination is simply mistaken, erroneous, and contrary to law and fact." Brief for appellants at 26 and 27.

In its June 2013 order, the district court stated, "The receiver now reports he is unable to achieve production. The [NOGCC] has denied the receiver permission to operate, apparently as there is no current lease covering the wells." Although

the court's statement was framed in terms of denial by the NOGCC, rather than by the director, we do not read the court's statement as a finding that the NOGCC has made an official determination with respect to the operation of the wells or the validity of the lease. Nor does the court's statement show that the court itself made a determination as to the validity of the lease. The receiver testified at the March 2013 hearing that he was unable to achieve production and that the director had denied him permission to operate the wells. He testified that he had not sought any formal determination from the entire NOGCC. The court's statement, although perhaps not worded as carefully as it might have been, simply summarizes the evidence presented to it. We see no indication that the court misinterpreted the evidence as to who actually denied the receiver permission to operate the wells.

Further, our de novo review of the record reveals that the receiver's unsuccessful attempts to bring the wells into production, based in part on the denial by the director, were only part of the evidence presented to the district court. While this evidence obviously played a big part in the district court's decision to remove the production requirement, the evidence also shows that it was the anticipated difficulty and additional delays involved in making further attempts to secure NOGCC permission to resume production which factored into the receiver's recommendation and the district court's decision. As such, we reject the Appellants' suggestion that the district court relied only on the letters from the director in making its decision.

This assignment of error is without merit.

Removal of Production Requirement.

The Appellants assert that the district court erred in directing the receiver to no longer pursue placing the oil wells into production prior to sale and in directing the referee to proceed to sale without oil production.

[12] The Appellants argue that the district court erroneously suggests no current lease existed and then proceed to argue that the evidence directly and legally established that a valid lease still existed. They then discuss, at length, certain

oil and gas law and terminology and various lease provisions. Despite arguing at length that the lease is still valid, the Appellants correctly note that this issue was never tried by the court. Accordingly, we decline to address the validity of the lease. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Carlson v. Allianz Versicherungs-AG*, 287 Neb. 628, 844 N.W.2d 264 (2014). Even if we were to consider the Appellants' arguments on this issue, there is still evidence in the record that the receiver has been denied permission to operate the wells and that the steps to achieve production will be time consuming and expensive.

The issue on appeal here is not whether the lease is valid but whether the district court erred in removing the requirement that the receiver bring the wells into production before sale by the referee. The Appellants argue that the court's decision "has wiped out and destroyed the partition of the mineral & leasehold interests," essentially leaving nothing for the referee to sell. Brief for appellants at 37. They argue further that sale of oil well equipment and interests in nonproducing wells will yield a minimal purchase price. We note again that the court did not make a determination about the validity of the lease. The court simply removed the requirement that the receiver bring the wells into production and directed the referee to "forthwith sell those remaining interests of the parties in the wells." There is nothing in the district court's decision or this opinion which prevents the parties from pursuing further action before the NOGCC with respect to the validity of the lease.

[13] Equity strives to do justice. Equity is not a rigid concept but, instead, is determined on a case-by-case basis according to concepts of justice and fairness. *Floral Lawns Memorial Gardens Assn. v. Becker*, 284 Neb. 532, 822 N.W.2d 692 (2012). The receiver presented evidence that he had sought permission on multiple occasions to operate the wells, that the director denied all of his requests, and that the steps to achieve production would be costly and time consuming. This case has been ongoing for more than 10 years. The amended petition in the underlying action in this case was filed at the

end of 2002 or beginning of 2003. Under the circumstances of this case, we conclude that the district court did not err in removing the production requirement and directing the referee to proceed to sale without production.

Receiver's Conduct.

[14] The Appellants assert that the district court erred in "allowing the conduct of the receivership to continue wherein the [r]eceiver ignored, avoided, and failed to act upon numerous directions and instructions to maintain and later commence operations of oil wells, contrary to law and the facts." It is not entirely clear what the Appellants mean by this assignment of error or where it is specifically argued in their brief. The Appellants do make several assertions about the receiver's lack of due diligence in bringing the wells into production, and they attempt to assign blame for the failure to achieve production to both the receiver and the court. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the party's brief. *Rodehorst Bros. v. City of Norfolk Bd. of Adjustment*, 287 Neb. 779, 844 N.W.2d 755 (2014). To the extent that the Appellants are arguing that the receiver disobeyed orders of the district court or committed some form of malfeasance, that issue was not presented to or passed on by the district court. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Carlson v. Allianz Versicherungs-AG*, 287 Neb. 628, 844 N.W.2d 264 (2014). This assignment of error is without merit.

CONCLUSION

We find no error in the district court's decision directing the referee to sell the remaining interests of the parties in the oil wells and removing the condition that the receiver place the wells into production before sale.

AFFIRMED.

Ismael Contreras, appellee, v. T.O. Haas, LLC, appellant.

852 N.W.2d 339

Filed August 19, 2014. No. A-13-673.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the Workers' 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.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court, an appellate court reviews the trial judge's findings of fact, which will not be disturbed unless clearly wrong.
3. ____: ____. Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own decisions.
4. **Workers' Compensation: Rules of Evidence.** As a general rule, the Nebraska Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence.
5. **Workers' Compensation: Rules of Evidence: Legislature: Due Process.** Subject to the limits of constitutional due process, the Legislature has granted the compensation court the power to prescribe its own rules of evidence and related procedure.
6. **Workers' Compensation: Expert Witnesses.** In a workers' compensation case, an expert witness must qualify as an expert and the testimony must assist the trier of fact to understand the evidence or determine a fact in issue.
7. ____: ____. Expert testimony in a workers' compensation case must be based on a reasonable degree of medical certainty or a reasonable probability.
8. ____: ____. Although expert medical testimony in workers' compensation cases must be based on a "reasonable degree of medical certainty" or "reasonable probability," the testimony need not be couched in those exact, magic words.
9. **Workers' Compensation: Proof.** Under the Nebraska Workers' Compensation Act, a claimant is entitled to an award for a work-related injury and disability if the claimant shows, by a preponderance of the evidence, that he or she sustained an injury and disability proximately caused by an accident which arose out of and in the course of the claimant's employment.
10. ____: ____. To recover workers' compensation benefits, an injured worker is required to prove by competent medical testimony a causal connection between the alleged injury, the employment, and the disability.
11. **Workers' Compensation: Expert Witnesses.** The Workers' Compensation Court is entitled to accept the opinion of one expert over another.
12. **Workers' Compensation.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.

Appeal from the Workers' Compensation Court: J. MICHAEL FITZGERALD, Judge. Affirmed.

John W. Iliff, of Gross & Welch, P.C., L.L.O., for appellant.

William V. Steffens and Jeremiah J. Luebbe, of Steffens Law Office, P.C., for appellee.

IRWIN and BISHOP, Judges.

PER CURIAM.

I. INTRODUCTION

On appeal, T.O. Haas, LLC, asserts that the Workers' Compensation Court erred in admitting certain exhibits into evidence and in finding that Ismael Contreras is permanently and totally disabled. We affirm.

II. FACTUAL BACKGROUND

In 2006, Contreras was hired by T.O. Haas as a certified tire technician. As a part of Contreras' job, he was required to remove old tires from vehicles, repair tires, and place either new or repaired tires back on the vehicles. On August 23, 2010, Contreras was working at T.O. Haas and was trying to change a tire on a "skid steer." In working with the tire, Contreras turned to his left to lower the tire to the ground when he felt "a sharp pain go through [his] back." Contreras reported the injury to his supervisor.

Contreras attempted to return to work the day after his injury, but was unable to work for even an hour. Contreras has not returned to work at T.O. Haas since the day after he incurred the injury to his back. In fact, other than working part time delivering newspapers for approximately 2 months in 2012, Contreras has not worked anywhere since August 24, 2010.

In September 2010, Contreras made an appointment with his family physician, Dr. Jason Citta, because the pain in his back had not improved since August 23. Dr. Citta prescribed Contreras pain medication, ordered an MRI, and referred him to a physical therapist. During the months of September and October, however, Contreras continued to see

Dr. Citta and continued to complain about severe back pain. Dr. Citta referred Contreras to Dr. Burt McKeag for further pain management.

On October 12, 2010, Contreras saw Dr. McKeag. After Dr. McKeag's examination, he noted the following in his report:

> [Contreras] is involved in litigation with workman's compensation. His story and injury are very reasonable, but he does tend to have an exaggerated presentation. I reviewed his MRI and he does have significant NF stenosis at L5/S1 on the left consistent with his symptoms. I feel that it is reasonable to proceed with a [lumbar epidural steroid injection].

Dr. McKeag administered the injection to Contreras on November 16. Contreras reported that he did not receive any significant relief from this injection. As a result of Contreras' reports of continued back pain, Dr. Citta referred him to a neurosurgeon, Dr. Omar Jimenez.

Dr. Jimenez diagnosed Contreras as suffering from "degenerative disc disease at L4-5 and also at L5-S1 with a large herniated disc on the right at L5-S1, which also extends centrally slightly to the left." He recommended that Contreras undergo back surgery. In March 2011, Contreras had back surgery. After the surgery, Contreras reported that he was "having significant right SI joint discomfort." Dr. Jimenez prescribed pain medication, including another injection. In addition, he advised Contreras to continue to attend physical therapy.

In June 2011, approximately 3 months after his surgery, Contreras reported that he was experiencing "excruciating pain lateral to [his] incision up in the hip area." Contreras stated that the pain was "disabling." Dr. Jimenez indicated he was "baffled by his symptoms and would like to proceed with [an] MRI . . . . It is likely that he may be suffering from sacroiliac joint pain, although he states this is better in addition to his trochanter pain." Ultimately, Dr. Jimenez prescribed Contreras additional pain medication and ordered him to be more "aggressive in his recuperation." Dr. Jimenez believed that physical therapy would help Contreras heal. However, Dr. Jimenez also noted that the MRI revealed "evidence of facet

hypertrophy bilaterally at 4-5 and 5-1 . . . which may be an issue that may need to be addressed in the future."

Contreras returned for a followup visit with Dr. Jimenez in August 2011, where he continued to report severe back pain. At this appointment, Dr. Jimenez recommended that Contreras undergo a spinal fusion surgery. After receiving a second opinion about the spinal fusion surgery, Contreras elected not to undergo the procedure.

After his August 2011 appointment with Dr. Jimenez, Contreras returned to the care of Drs. Citta and McKeag. The doctors continued to prescribe pain medication and recommended physical therapy. Contreras continued to report ongoing back pain.

III. PROCEDURAL BACKGROUND

On December 22, 2010, Contreras filed a petition in the Nebraska Workers' Compensation Court alleging that he had been injured in the scope and course of his employment with T.O. Haas. Contreras requested that, as a result of his injury, he be awarded temporary and permanent disability benefits. He also requested that T.O. Haas be ordered to pay for his medical bills.

On March 1, 2013, a trial was held. At the trial, T.O. Haas stipulated that Contreras injured his back on August 23, 2010, while at work. It also stipulated that the injury to Contreras' back required surgery in March 2011. However, T.O. Haas specifically disputed the extent of Contreras' work restrictions and loss of earning capacity as a result of his back injury.

Contreras testified at trial regarding the accident and his resulting injury. During his testimony, Contreras indicated that he continues to take pain medication for his back on a daily basis. In fact, he testified that he has taken some type of pain medication for his back continuously since August 23, 2010. He also testified that despite this pain medication, he continues to suffer from back pain. He explained that during his testimony, his back was "throbbing and ha[d] a burning sensation." He rated his pain at "a 7 to an 8" on a scale of 1 to 10. Contreras also testified that he has previously been convicted of a felony.

In addition to Contreras' testimony, both parties offered numerous exhibits, including Contreras' medical records from various doctors. Although we have reviewed this voluminous medical evidence in its entirety, we do not detail such evidence here. Rather, we simply note that there was conflicting evidence presented concerning the degree of Contreras' impairment, the cause of Contreras' ongoing back pain after his back surgery, and Contreras' ability to return to any type of employment. We will set forth the specific facts as presented at the trial as necessary in our analysis below.

After the parties' presentation of evidence, the trial court entered an extremely detailed, 11-page order in which it evaluated all of the evidence presented. Ultimately, the court found that Contreras reached maximum medical improvement in September 2011, after he had decided not to undergo the spinal fusion surgery. The court found that prior to September 2011, Contreras was entitled to temporary total disability benefits, and that after September 2011, he continued to be totally disabled and, as such, was entitled to permanent total disability benefits. The court also awarded Contreras compensation for past and future medical expenses.

T.O. Haas appeals from the trial court's order.

IV. ASSIGNMENTS OF ERROR

On appeal, T.O. Haas assigns the following as errors: (1) The trial court erred by admitting certain exhibits into evidence, (2) the trial court was clearly wrong in awarding permanent total disability when there was insufficient competent and qualified medical evidence to prove a causal connection between Contreras' injury (and injury-related surgery) and postsurgery restrictions, and (3) there was insufficient competent evidence to support an award of permanent total disability.

V. ANALYSIS

1. Standard of Review

[1-3] A judgment, order, or award of the Workers' 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. *Rader v. Speer Auto*, 287 Neb. 116, 841 N.W.2d 383 (2013). In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court, an appellate court reviews the trial judge's findings of fact, which will not be disturbed unless clearly wrong. *Id*. Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own decisions. *Id*.

2. Admission of Exhibits 22 and 23

On appeal, T.O. Haas alleges that the trial court erred by admitting into evidence portions of exhibit 22, which consists of records from Contreras' physical therapy and a copy of a functional capacity evaluation performed on Contreras, and portions of exhibit 23, which consists of Contreras' medical records from Dr. McKeag. We will address the admissibility of each exhibit; however, first we recount the relevant law that overlays our review of the trial court's determinations regarding the admission of evidence.

[4,5] As a general rule, the Nebraska Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence. Neb. Rev. Stat. §§ 48-168(1) (Reissue 2010) and 27-1101(4)(d) (Reissue 2008); *Veatch v. American Tool*, 267 Neb. 711, 676 N.W.2d 730 (2004). Subject to the limits of constitutional due process, the Legislature has granted the compensation court the power to prescribe its own rules of evidence and related procedure. § 48-168; *Veatch v. American Tool, supra*.

[6,7] The Nebraska Supreme Court has previously clarified the rules regarding the admissibility of expert testimony in workers' compensation cases. Specifically, the court has stated that in a workers' compensation case, an expert witness must qualify as an expert and the testimony must assist the trier of fact to understand the evidence or determine a fact in issue. *Veatch v. American Tool, supra*. The witness must

have a factual basis for the opinion, and the testimony must be relevant. *Id*. Expert testimony in a workers' compensation case must be based on a reasonable degree of medical certainty or a reasonable probability. *Id*. An expert opinion in a workers' compensation case based on a mere possibility is insufficient, but the standard also does not require absolute certainty. See *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996).

With these rules in mind, we now address T.O. Haas' assertions regarding the trial court's admission of portions of exhibits 22 and 23.

(a) Exhibit 22

Exhibit 22 consists of Contreras' records from physical therapy, authored by Contreras' physical therapist, Tyler Sexson. In addition, pages 36 through 45 of the exhibit consist of the results of a functional capacity evaluation performed on Contreras. This evaluation was performed by Sexson. The last three pages of the exhibit include Sexson's responses to questions posed by Contreras' counsel concerning the functional capacity evaluation. Sexson's answers indicate his professional opinion that Contreras "provided an accurate p[or]trayal of his current pain and limitations during the [functional capacity evaluation]."

At trial, T.O. Haas objected on the basis of relevance and foundation to the functional capacity evaluation and to Sexson's responses to counsel's questions about that evaluation. In response to T.O. Haas' objection, Contreras asserted that the entire exhibit, including the evaluation and Sexson's responses to the questions, was very relevant to its case: "So it's a critical piece of evidence for our case. And it's certainly very relevant. Why wouldn't the individual who performed the [functional capacity evaluation] in question, . . . Sex[s]on, be able to tell us why he believes the results are accurate?" The trial court overruled T.O. Haas' objections and allowed the exhibit into evidence.

On appeal, T.O. Haas asserts that the trial court erred in admitting pages 36 through 48 of exhibit 22. Specifically, it argues that the results of the functional capacity evaluation

are not valid because there was some indication of symptom magnification. In addition, it argues that Sexson erroneously indicated that his opinion about the validity of the results of the evaluation was given to a medical degree of certainty, even though he is not a medical doctor. T.O. Haas' assertions have no merit.

The results of Contreras' functional capacity evaluation demonstrate Contreras' level of impairment and his ability to perform a variety of movements and tasks in light of his injury. This information is clearly relevant to the trial court's determination about Contreras' disability and his loss of earning capacity. And, although there is some indication that Contreras was exaggerating his symptoms during the evaluation, this does not make the results inadmissible. Rather, this is an issue that T.O. Haas could have, and did, raise at trial. In fact, T.O. Haas offered the report of a different doctor who had evaluated Contreras and who had a very different opinion about Contreras' level of impairment and about the validity of the functional capacity evaluation.

Additionally, although we recognize that in Sexson's responses to counsel's questions he erroneously indicated that he "answer[ed] the . . . questions to a 'medical degree of certainty,'" even though he is not a licensed physician, we do not find that this misstatement equates to all of his answers' being inadmissible. Sexson is a physical therapist who has a great deal of experience in performing functional capacity evaluations. In addition, he has a great deal of experience with Contreras and with Contreras' injury and abilities because he was Contreras' physical therapist off and on for a 2-year period. Sexson is qualified to offer an opinion about whether Contreras was exaggerating his symptoms during the functional capacity evaluation, and such opinion is relevant to the trial court's determination about Contreras' disability and loss of earning capacity.

T.O. Haas' assertions regarding the admissibility of pages 36 through 48 of exhibit 22 are without merit. The exhibit, in its entirety, was properly admitted and considered by the trial court.

(b) Exhibit 23

Exhibit 23 consists of Contreras' medical records from Dr. McKeag. Such records include Dr. McKeag's notes from Contreras' numerous visits with him from October 2010 through October 2012. Also included in exhibit 23, on page 17, is a copy of the page from Contreras' functional capacity evaluation with Sexson, which includes Sexson's summary of Contreras' physical restrictions and recommendation that Contreras is "unable to return to prior job duties fully within the lightest Sedentary category of Physical Demand." At the bottom of this page is a handwritten note signed by Dr. McKeag. That note states: "I agree with the above recommendations." Additionally, on page 22 of exhibit 23, there is a letter from Contreras' counsel to Dr. McKeag which asks Dr. McKeag to further explain the handwritten note on the functional capacity evaluation. Dr. McKeag responded to this letter by indicating that he did, in fact, "sign off" and agree with the recommendations of the functional capacity evaluation. Dr. McKeag specifically noted, "I do not personally do [functional capacity evaluations]. I do not consider myself to be an expert regarding [functional capacity evaluations]. I read the [functional capacity evaluation] and I basically agree with it, but I don't know what that is worth."

At trial, T.O. Haas objected on the basis of relevancy and foundation to page 17 of exhibit 23, where Dr. McKeag indicated his agreement with the recommendations of the functional capacity evaluation. The trial court overruled the objection, stating, "And there's some doc[tors] that sign off on [functional capacity evaluations], even though the doc[tors] don't do them. They — Overruled. This is — This sounds reasonable to me. [Doctors] can also receive [functional capacity evaluations] and make some contradictory statements or hedge their bets a little bit. Okay." T.O. Haas did not object to page 22 of exhibit 23, which consisted of Dr. McKeag's further explanation of his agreement with the recommendations of the functional capacity evaluation.

On appeal, T.O. Haas argues that the trial court erred in overruling its objection to page 17 of exhibit 23. Specifically, T.O. Haas alleges that this page of the exhibit was not

admissible because Dr. McKeag admitted that he is not an expert regarding functional capacity evaluations, because Dr. McKeag did not indicate that his agreement with the recommendations in the functional capacity evaluation was made within a reasonable degree of medical probability, and because Dr. McKeag's statement does not assist the trial court in any way. T.O. Haas' assertions have no merit.

First, we note that at trial, T.O. Haas did not object to page 22 of exhibit 23, which consisted of Dr. McKeag's further explanation of his agreement with the recommendations of the functional capacity evaluation. This page of the exhibit reiterates that Dr. McKeag "sign[ed] off" on the recommendations of the functional capacity evaluation and that he had written, "I agree with the above recommendations." As such, page 22 contains the same information as page 17. And, page 22 was admitted into evidence without objection. Accordingly, even if the court erred in admitting page 17, such error would clearly be harmless as the same information was included in another, uncontested portion of the same exhibit.

Moreover, we cannot say that the trial court erred in admitting page 17 of exhibit 23 into evidence. Although Dr. McKeag indicated that he is not an expert with regard to functional capacity evaluations, presumably because he does not conduct this type of testing on his patients, he is clearly qualified to provide his opinion with regard to Contreras' physical health and his ability to perform certain tasks. Dr. McKeag, who specializes in pain management, saw Contreras on at least 10 occasions between October 2010 and October 2012. At each of these visits, Dr. McKeag evaluated Contreras' level of back pain, and often, he would evaluate Contreras' ability to perform certain movements in light of the pain.

Given Dr. McKeag's knowledge of Contreras' physical health, his general agreement with the results and recommendations of the functional capacity evaluation certainly provide relevant information to the trial court. Dr. McKeag was given two separate opportunities to contradict the results of the evaluation or, at the very least, to decline to agree with those recommendations. Dr. McKeag did not indicate any disagreement with the recommendations other than to note his lack of

expertise with functional capacity evaluations in general. Such information is associated with the weight of Dr. McKeag's opinion, rather than with its admissibility.

[8] Finally, we note that although expert medical testimony in workers' compensation cases must be based on a "reasonable degree of medical certainty" or "reasonable probability," the testimony need not be couched in those exact, magic words. See *Edmonds v. IBP, inc.*, 239 Neb. 899, 479 N.W.2d 754 (1992). As such, Dr. McKeag's medical opinion is admissible even though he did not explicitly state that it was based on a reasonable degree of medical certainty or reasonable probability. Dr. McKeag's agreement with the recommendations of the functional capacity evaluation must be read in conjunction with his medical expertise and with his experience as Contreras' physician. Although Dr. McKeag noted that he is not an expert in functional capacity evaluations, nowhere in his opinion does he provide any indication that his medical opinion was not based on a reasonable degree of medical certainty or reasonable probability.

T.O. Haas' assertions regarding the admissibility of page 17 of exhibit 23 are without merit. The exhibit, in its entirety, was properly admitted and considered by the trial court.

3. Finding of Permanent and Total Disability

In the trial court's order, it concluded that Contreras was permanently and totally disabled as a result of the injury he suffered while at work on August 23, 2010. In coming to this conclusion, the court found that the evidence presented at trial demonstrated that Contreras suffered a low-back injury which required surgery and which continues to cause him pain. The court went on to find that as a result of his injury, Contreras is limited in his ability to perform certain work functions, and that "[a]t best, [he] would be able to perform some light work jobs." The court also found that there are no light work jobs available to Contreras due to the combination of his physical restrictions, his lack of education, and his felony conviction. The trial court awarded Contreras permanent total disability benefits.

On appeal, T.O. Haas alleges that the trial court erred in two ways when it concluded that Contreras was permanently and totally disabled. First, T.O. Haas alleges that there was not competent medical evidence to demonstrate a causal connection between Contreras' back condition after the March 2011 surgery and the August 2010 injury or between his back condition and his physical restrictions as reported in the functional capacity evaluation. Second, T.O. Haas alleges that the only competent medical evidence presented regarding Contreras' physical limitations after surgery demonstrated that Contreras was capable of working and had suffered a loss of earning capacity of 25 percent.

(a) Causal Connection Between Postsurgery Restrictions and Work Injury

[9,10] Under the Nebraska Workers' Compensation Act, a claimant is entitled to an award for a work-related injury and disability if the claimant shows, by a preponderance of the evidence, that he or she sustained an injury and disability proximately caused by an accident which arose out of and in the course of the claimant's employment. *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992). Moreover, to recover workers' compensation benefits, an injured worker is required to prove by competent medical testimony a causal connection between the alleged injury, the employment, and the disability. *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998).

When testing the sufficiency of the evidence to support findings of facts made by the Workers' Compensation Court, 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. *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007).

At trial, T.O. Haas stipulated that Contreras injured his back on August 23, 2010, while at work. It also stipulated that Contreras' back injury required surgery in March 2011. As such, at trial and on appeal, T.O. Haas disputes only

the extent of Contreras' condition after the back surgery. T.O. Haas challenges the extent of Contreras' physical restrictions postsurgery and the resulting loss of earning capacity. To state T.O. Haas' argument more simply, it asserts that there is no medical evidence which ties Contreras' reports of ongoing back pain after surgery to the injury he suffered on August 23, 2010, or to his physical restrictions as reported in the functional capacity evaluation.

When we consider the evidence presented at trial in the light most favorable to Contreras, we conclude there is sufficient evidence to demonstrate that Contreras' condition after the March 2011 surgery was causally related to the injury he sustained on August 23, 2010, and that this condition caused physical restrictions, as reflected in the functional capacity evaluation.

On July 29, 2011, approximately 4 months after Contreras' back surgery, Dr. Jimenez reported that Contreras was suffering from a right L5-S1 herniated disk and that Contreras' "present back condition" was caused by the workplace accident that had occurred in August 2010. Dr. Jimenez also reported that Contreras had not yet reached maximum medical improvement for his injury. A few days after Dr. Jimenez reported these facts, he met with Contreras and recommended he "undergo a more aggressive approach" for his back condition. Dr. Jimenez recommended a spinal fusion surgery. This evidence demonstrates that in the months after the March 2011 back surgery, Contreras continued to suffer from a serious back condition that was a direct result of his August 2010 workplace injury.

In addition to the reports of Dr. Jimenez, the medical records of Dr. McKeag also indicate that after the back surgery, Contreras continued to suffer from severe back pain. Physical examinations of Contreras revealed some indication that his back condition and resulting back pain affected his ability to perform certain movements. And, at trial, Contreras testified that the March 2011 back surgery did not resolve his back pain. Contreras stated that after the surgery, he felt relief for only a "brief time." Contreras also testified that he has been on some

type of pain medication continuously since the August 2010 accident and that even with this medication, he continues to feel pain.

All of this evidence, taken together, is sufficient to support the trial court's finding that there was a causal connection between Contreras' condition after the back surgery and his August 2010 workplace accident. In its brief on appeal, T.O. Haas points to evidence in the record which demonstrates that Contreras' postsurgery condition was not a result of his workplace accident and that, in fact, Contreras was exaggerating his continuing pain and inability to perform certain movements. Essentially, T.O. Haas' argument is about the credibility of the various doctors who examined and treated Contreras.

[11,12] We recognize that the trial court was faced with conflicting opinions regarding Contreras' postsurgery condition and the cause of that condition. However, we also recognize that the Workers' Compensation Court is entitled to accept the opinion of one expert over another. See *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651, 558 N.W.2d 564 (1997). As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Id.* When the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court. *Lowe v. Drivers Mgmt., Inc.*, 274 Neb. 732, 743 N.W.2d 82 (2007).

The trial court accepted the opinion of Dr. Jimenez and relied on the medical records authored by Dr. McKeag when it found that Contreras "has had a low back injury which required surgery and continues to have pain. [He] is limited on his ability to perform work functions." Upon our review of the record, we conclude that there was sufficient evidence to support the trial court's findings that Contreras' condition after the March 2011 surgery was causally related to the injury he sustained on August 23, 2010, and that this condition caused physical restrictions, as reflected in the functional capacity evaluation.

(b) Ability to Work

T.O. Haas also asserts that the trial court erred in awarding permanent total disability, because such a finding is only warranted when the injured party is unable to perform any work which he has experience or capacity to perform, "or any other kind of work which a person of his mentality an[d] attainments could do." Brief for appellant at 27-28 (citing *Kleiva v. Paradise Landscapes*, 230 Neb. 234, 430 N.W.2d 550 (1988)). T.O. Haas claims that the only competent evidence regarding Contreras' loss of earning capacity shows that Contreras is capable of working at a medium level of work, and this results in a loss of earning capacity of 20 to 25 percent, not total disability. However, this argument is contradicted by other evidence in the record. For example, the functional capacity evaluation conducted by Sexson reveals that Contreras struggled to perform many movements and had limited strength. Sexson concluded that Contreras was

> unable to function completely within the lightest Physical Demand Category, as defined by the U.S. Dept. of Labor, of occasional lifting 10 lbs., frequent lifting 5 lbs., and constant lifting <5 lbs. He demonstrated deficiencies from normal values in all tested strength and mobility of upper and lower extremities, and trunk. These impairments severely limited his ability to perform material and non-material handling tasks. He was unable to complete a majority of presented tasks due to lower back pain, limiting his trunk and extremity mobility. All material and non-material handling testing elicited pain at the mid to lower back.

After the completion of the functional capacity evaluation, Sexson opined that the evaluation accurately portrayed Contreras' abilities and that Contreras had performed the tests with full participation. In addition, Dr. McKeag indicated his agreement with the restrictions and recommendations of the evaluation.

This evidence demonstrates that even after Contreras' March 2010 surgery, he had considerable physical restrictions as a result of the August 2010 workplace accident. T.O. Haas, however, asserts that this evidence does not prove anything

about Contreras' physical restrictions, because the functional capacity evaluation was invalid as a result of Contreras' exaggeration of symptoms and because Dr. McKeag's agreement with the evaluation should not be considered.

In making its arguments, T.O. Haas reiterates its previous assertions about why this evidence should have been excluded altogether at trial. In our analysis above, we rejected T.O. Haas' arguments and found that both the results of the functional capacity evaluation and Dr. McKeag's agreement with those results were properly admitted and considered by the trial court. As such, T.O. Haas' arguments about the validity of this evidence are without merit.

T.O. Haas also asserts that other medical evidence presented at trial contradicted the findings of the functional capacity evaluation and demonstrated that Contreras was, in fact, exaggerating his symptoms. However, as we stated above, as the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony, and when the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court. See *Lowe v. Drivers Mgmt., Inc.*, 274 Neb. 732, 743 N.W.2d 82 (2007); *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651, 558 N.W.2d 564 (1997).

Based upon the conflicting evidence in the record, the trial court noted in its award: "[Contreras] may not be as limited as set forth in the functional capacity evaluation but may also be limited more than Dr. Gammel finds. At best, [Contreras] would be able to perform some light work jobs." The court went on to conclude that there are no light work jobs available to Contreras, due to the combination of his physical restrictions, his lack of education, and his felony conviction. The trial court awarded Contreras permanent total disability benefits. Although the trial court does not specifically refer to the odd-lot doctrine, the rationale provided by the trial court is consistent with that doctrine.

> Under the odd-lot doctrine, "'"[t]otal disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that

> they will not be employed regularly in any well-known branch of the labor market. The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps."'"

Lovelace v. City of Lincoln, 283 Neb. 12, 14, 809 N.W.2d 505, 507-08 (2012).

Whether Contreras is totally or permanently disabled is a question of fact, and when testing the trial judge's findings of fact, we consider the evidence in the light most favorable to the successful party. Although the trial court's consideration of Contreras' felony conviction (along with his physical impairments and lack of education) is not a consideration found under this state's appellate authority currently, we find it unnecessary to determine whether such a consideration results in error, because (1) no assignment of error or argument was made on this basis and (2) we find there is sufficient evidence in the record to support the Workers' Compensation Court's decision that the employee is totally and permanently disabled based on its determination of the employee's physical limitiations combined with the evidence as to his limited educational background. The combination of those factors alone has been upheld by the Nebraska Supreme Court as a basis for total disability. See *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008) (evidence of employee's significant physical impairments after injury and her limited cognitive abilities was sufficient to support trial judge's finding of permanent and total disability). We find that to be the case here and affirm the trial court's award of permanent total disability.

VI. CONCLUSION

We find no merit to T.O. Haas' assignments of error. The trial court properly admitted into evidence and considered exhibits 22 and 23. In addition, there was sufficient evidence to support the trial court's conclusion that Contreras is

permanently and totally disabled. Accordingly, we affirm the trial court's order in its entirety.

AFFIRMED.

INBODY, Chief Judge, participating on briefs.

IN RE LOUISE V. STEINHOEFEL TRUST.
PIONEER MANOR FOUNDATION AND CAMPBELL COUNTY SCHOOL DISTRICT NO. 1, GILLETTE, WYOMING, APPELLANTS AND CROSS-APPELLEES, V. VICKI SCHLAUTMANN ET AL., APPELLEES, AND DAVID STEFFENSMEIER, TRUSTEE, APPELLEE AND CROSS-APPELLANT.

854 N.W.2d 792

Filed August 26, 2014. No. A-13-038.

1. **Decedents' Estates: Appeal and Error.** Absent an equity question, an appellate court reviews probate matters for error appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Decedents' Estates: Appeal and Error.** In reviewing a judgment of the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party.
4. **Evidence: Appeal and Error.** An appellate court resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
5. **Decedents' Estates: Appeal and Error.** The probate court's factual findings have the effect of a verdict, and an appellate court will not set those findings aside unless they are clearly erroneous.
6. **Negligence: Proof.** In order to prove a cause of action for breach of a fiduciary duty, the moving party must prove the elements of negligence.
7. **Trusts.** The Nebraska Uniform Trust Code requires that a trustee administer a trust in accordance with its terms.
8. ____. The Nebraska Uniform Trust Code establishes that trustees owe the beneficiaries the duties of loyalty, impartiality, prudent administration, protection of trust property, proper recordkeeping, and informing and reporting.
9. **Trusts: Liability: Damages.** A violation by a trustee of a duty required by law, whether willful, fraudulent, or resulting from neglect, is a breach of trust, and the trustee is liable for any damages proximately caused by the breach.
10. **Trusts: Words and Phrases.** A breach of trust includes every omission or commission which violates in any manner the obligation of carrying out a trust according to its terms.

11. **Damages.** The amount of damages to be awarded to a plaintiff is a question of fact.
12. **Principal and Agent: Proof: Damages.** To succeed on a claim for breach of fiduciary duty, a plaintiff must prove that the defendant's breach of fiduciary duty caused the plaintiff damages and the extent of those damages.
13. **Real Estate: Valuation: Words and Phrases.** Appraisals are estimates of the fair market value of a property based upon sales of comparable properties and other factors.
14. **Equity: Trusts.** Under Neb. Rev. Stat. § 30-3890(b) (Reissue 2008), the court may impose various equitable relief to remedy a violation by a trustee of a duty the trustee owes to a beneficiary.
15. **Trusts: Proof.** A party seeking to establish a constructive trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained.
16. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
17. **Equity: Trusts: Costs: Attorney Fees.** In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.
18. **Decedents' Estates: Costs: Attorney Fees.** In general, if a court concludes that a fiduciary breached his duty or requires him to account to the estate, the estate is not liable for his attorney fees. If the fiduciary's defense of his acts is fully successful, he is ordinarily entitled to recover the reasonable costs necessarily incurred.

Appeal from the County Court for Cuming County: RICHARD W. KREPELA, Judge. Affirmed in part, and in part vacated and remanded with directions.

Mark D. Fitzgerald, of Fitzgerald, Vetter & Temple, for appellants.

Andre R. Barry and Kara J. Ronnau, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee Vicki Schlautmann.

David E. Copple and Michelle M. Schlecht, of Copple, Rockey, McKeever & Schlecht, P.C., L.L.O., for appellees Michael Addison and Renee Wetherelt.

Kenneth W. Hartman and Erin E. Busch, of Baird Holm, L.L.P., for appellee David Steffensmeier.

IRWIN, RIEDMANN, and BISHOP, Judges.

RIEDMANN, Judge.

I. INTRODUCTION

Pioneer Manor Foundation and Campbell County School District No. 1, Gillette, Wyoming, appeal and David Steffensmeier cross-appeals from an order of the county court for Cuming County. The county court found that Steffensmeier breached his fiduciary duty as the trustee of the Louise V. Steinhoefel Trust, but that no damages resulted from the breach. We affirm these findings, but vacate the order granting interim attorney fees and remand the matter for further findings on this issue.

II. BACKGROUND

Steffensmeier is the trustee of the Louise V. Steinhoefel Trust, which was originally established in 1999. The appellants, along with the appellees Michael Addison and Renee Wetherelt, are among the beneficiaries of the trust. The trust was partially funded with approximately 1,471 acres of real property located in Gillette. After Louise V. Steinhoefel passed away in 2004, the trust was to provide funds to take care of her son, Robert Steinhoefel. At the time, the trust had sufficient funds to care for Robert, but his expenses increased when he was moved to a nursing home in 2006. Thus, Steffensmeier determined that he needed to sell some trust assets in order to continue to provide for Robert's care. Robert ultimately died in September 2007.

Steffensmeier contacted a bank in Gillette in the spring of 2007 and asked for the name of a real estate agent who could help him sell the 1,471-acre ranch property. He was given the name of Robert Ostlund, a broker with 30 years of experience selling real estate in Gillette. Steffensmeier spoke to Ostlund about selling the property and then sent him the most recent appraisal of the land, which had been completed in January 2004. Steffensmeier told Ostlund he thought they would need

an appraisal done on the property and another on the mineral interests, but Ostlund said no appraisals were necessary. Steffensmeier let Ostlund determine the fair market value of the property because Ostlund had more expertise in that area than Steffensmeier did. After reviewing the 2004 appraisal and conducting some market research in the area, Ostlund determined that an appropriate price for the property was $1,425,000. He was confident in this price and communicated his confidence to Steffensmeier.

The trust provided that upon the death of Robert, Vicki Schlautmann (Vicki), one of the beneficiaries, had the option to purchase the approximately 735-acre portion of the property described as "parcel A." Steffensmeier mistakenly believed that Vicki had an active option to purchase all of the real property at the time he was putting it up for sale. As a result of this mistaken belief, Steffensmeier gave Vicki the opportunity to purchase the entire property before Robert's death, and she and her husband submitted an offer for the full purchase price on June 8, 2007.

Steffensmeier testified that he signed his acceptance of the Schlautmanns' offer on June 12, 2007, but did not mail the signed offer back to Ostlund until June 25. In the meantime, a Gillette real estate broker, Jim Engel, submitted an offer to purchase the property under the name "BDG, LLC," to Ostlund on June 22 in the amount of $2,100,000. Ostlund testified that he had talked to Engel prior to his making the offer and told Engel that the Schlautmanns had already submitted an offer that had been verbally accepted. BDG's offer indicated that it was a backup offer contingent upon the cancellation of the existing sales contract and that if the existing contract was not canceled, then BDG's offer became null and void. Ostlund testified that he did not think BDG's offer was legitimate, and he told Steffensmeier so. Ultimately, the Schlautmanns' purchase of the property closed in August 2007.

After Steffensmeier filed an application with the trial court for final accounting and discharge, the appellants brought this action claiming that Steffensmeier breached his fiduciary duty as trustee of the trust by selling the property to the

Schlautmanns for less than fair market value. During the pendency of this action, the court granted Steffensmeier's applications for interim attorney fees and costs on September 1, 2009, and September 28, 2011.

Trial was held in August 2012. At trial, the appellants' expert witness, Carol McCracken, testified that she appraised the property and concluded that at the time of the sale, the fair market value was $3,480,000. McCracken is from Billings, Montana. She became a certified general real estate appraiser in 2006 and completed 29 ranch appraisals. At the time of trial, she was no longer working as an appraiser and was employed as a correctional counselor at a women's prison.

Steffensmeier also had an expert witness testify, as to his valuation of the property. This expert, Robert Zabel, estimated that the property's value at the time of the sale was $1,477,000. At the time of trial, Zabel had lived in Gillette for 31 years and been a real estate appraiser in Gillette for 20 years. He also worked as a real estate land developer in Gillette from 2002 until 2010. Zabel has been a certificated appraiser since 1994 and is a member of several professional organizations. He estimated that he has performed approximately 1,800 appraisals in his career, completing 1,600 of those prior to 2007.

Zabel did not believe that McCracken reached a reasonable conclusion as to the market value of the property. He did not believe that she was fully aware of the market, including the volume of sales that had occurred and the amount of property that was coming to market. He also recognized immediately that she did not understand which type of appraisal approach she was using. Zabel noted that among her errors, she assumed that if a smaller parcel of property could be sold for a certain price per acre, then a larger parcel could too, but she had no real evidence that that could happen.

After trial, the court concluded that the trust required Steffensmeier to sell the property at fair market value and that he failed to ascertain that value at the time of the sale by failing to get an updated appraisal, failing to promptly offer the property for public sale, and mistakenly giving Vicki an opportunity to purchase the property under the assumption that

she had an active option. The court determined that BDG's offer had so many contingencies and reservations that it was not a valid offer or true reflection of market value. It also concluded that Zabel's estimate of the property's value was substantially more credible than McCracken's. Consequently, the court held that although Steffensmeier breached his fiduciary duty, the property sold at or substantially close to the market value, and that therefore, the appellants failed to prove any damages as a result of the breach. The court therefore dismissed the appellants' complaints and ordered each party to pay its own costs and attorney fees.

The appellants filed this timely appeal, and Steffensmeier cross-appeals.

III. ASSIGNMENTS OF ERROR

The appellants assign, restated and renumbered, that the trial court erred in (1) determining that the property was sold at or near the fair market value and that there were therefore no damages, (2) discounting the offer from BDG, (3) failing to award any equitable remedies, and (4) failing to award the appellants attorney fees but allowing Steffensmeier, the trustee, to pay attorney fees from the trust assets.

On cross-appeal, Steffensmeier assigns that the court erred in finding that he breached his fiduciary duty and failing to allow him to recover costs and fees.

IV. STANDARD OF REVIEW

[1-5] Absent an equity question, we review probate matters for error appearing on the record. *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*. In reviewing a judgment of the probate court in a law action, we do not reweigh evidence, but consider the evidence in the light most favorable to the successful party. *Id*. And we resolve evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Id*. The probate court's factual findings have the

effect of a verdict, and we will not set those findings aside unless they are clearly erroneous. *Id*.

V. ANALYSIS

[6] Before addressing the claims before us, it is helpful to define what constitutes a cause of action for breach of fiduciary duties. The Nebraska Supreme Court has likened a claim for breach of fiduciary duties to professional malpractice. See *Community First State Bank v. Olsen*, 255 Neb. 617, 587 N.W.2d 364 (1998). Accordingly, we have previously determined that in order to prove a cause of action for breach of a fiduciary duty, the moving party must prove the elements of negligence. See *McFadden Ranch v. McFadden*, 19 Neb. App. 366, 807 N.W.2d 785 (2011). Therefore, in order for the appellants to prove that they are entitled to judgment on the breach of fiduciary duty cause of action, they needed to establish that Steffensmeier owed them a fiduciary duty, that Steffensmeier breached that duty, that his breach was the cause of the injury to them, and that they were damaged. See *id*. Establishing a breach of a fiduciary duty is but one element of a breach of fiduciary duty cause of action.

[7,8] The Nebraska Uniform Trust Code requires that a trustee administer a trust in accordance with its terms. Neb. Rev. Stat. § 30-3866 (Reissue 2008). The Nebraska Uniform Trust Code establishes that trustees owe the beneficiaries the duties of loyalty, impartiality, prudent administration, protection of trust property, proper recordkeeping, and informing and reporting. *In re Estate of Robb*, 21 Neb. App. 429, 437, 839 N.W.2d 368, 375 (2013).

[9,10] A violation by a trustee of a duty required by law, whether willful, fraudulent, or resulting from neglect, is a breach of trust, and the trustee is liable for any damages proximately caused by the breach. *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004). A breach of trust includes every omission or commission which violates in any manner the obligation of carrying out a trust according to its terms. *In re Estate of Linch*, 136 Neb. 705, 287 N.W. 88 (1939).

The trial court found that Steffensmeier acted contrary to the terms of the trust when he allowed Vicki to purchase the

entire property when her option to purchase parcel A alone was not yet active. Such action, according to *In re Estate of Linch*, constitutes a breach of Steffensmeier's fiduciary duty. In order to recover on their claim, however, the appellants were also required to prove that Steffensmeier's breach was a cause of injury to them and that they were damaged. This they failed to do.

1. Damages

[11] The trial court found that although there was a breach of fiduciary duty, no damages resulted from the breach because the property was sold at or as substantially close to fair market value as could be determined retroactively. The amount of damages to be awarded to a plaintiff is a question of fact. See *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012). As stated above, we will not set aside the court's factual findings unless they are clearly erroneous. *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009).

In this case, the trial court found Zabel's testimony substantially more credible than McCracken's. Zabel had significantly more experience doing appraisal work than McCracken and was very familiar with the market in Gillette. He thoroughly explained the process he used to arrive at a valuation of the property and explained why he disagreed with McCracken's estimated value. Zabel concluded that the value of the property at the time it was sold was $1,477,000, which, as the trial court found, was substantially close to the $1,425,000 purchase price. Consequently, the trial court's conclusion with respect to damages was not clearly erroneous.

The appellants argue that the trial court erred when it failed to make a separate determination of the fair market value of parcel A. Zabel testified that there would not be an increase in price per acre if parcel A were sold separately. He was asked if the property could have been subdivided, and he said that it could have, but he thought that it would be very difficult to establish a price and determine how long it might take to get sold. In fact, he estimated in 2007 that it would have taken more than 8 years to sell separate tracts of the property. So in his opinion, subdividing the property would not have been the

highest and best use of the property. Because the trial court found Zabel's testimony to be credible, it was not clearly erroneous for the court not to separately value parcel A when Zabel opined that that was not the best use of the property and would not result in a higher price per acre for parcel A.

The appellants also claim that the trial court improperly assigned the burden of proof on the appellants to prove the value of any mineral interests present on the property. We disagree.

[12] To succeed on a claim for breach of fiduciary duty, a plaintiff must prove that the defendant's breach of fiduciary duty caused the plaintiff damages and the extent of those damages. See *McFadden Ranch v. McFadden*, 19 Neb. App. 366, 807 N.W.2d 785 (2011). Thus, the burden is on the party making the claim to prove the extent of its damages. The trial court in this case found there was little competent evidence upon which to determine the value of the gas and mineral interests. This conclusion is supported by the record.

According to Steffensmeier, the value of the mineral interests on the property began decreasing in 2006. Vicki testified that although she received $30,342.65 immediately after the sale, that amount was for surface damages and rent, not mineral royalties. She said that as of the time of trial, she had not received any royalty payments for minerals. As such, the appellants failed to prove that the mineral interests had any value at the time of the sale.

We also note that the appellants assert the trial court erred in failing to account for an immediate royalty payment to the Schlautmanns in its analysis of fair market value. But based on Vicki's testimony that the amount the Schlautmanns received was not a royalty payment for mineral interests, we reject this argument.

[13] Finally, without citing any case law, the appellants argue that the trial court's use of the standard "substantially close" was improper. We disagree. Appraisals are estimates of the fair market value of a property based upon sales of comparable properties and other factors. See *In re Estate of Craven*, 281 Neb. 122, 794 N.W.2d 406 (2011). Thus, there was no requirement that the property be sold for the exact amount of

the appraised value, particularly when Zabel's appraisal was conducted 5 years after the sale.

Accordingly, the trial court did not err in concluding that the appellants failed to prove that any damages resulted from Steffensmeier's breach of fiduciary duty when the property was sold as close to fair market value as could be determined retroactively. This assignment of error lacks merit.

2. Competing Offer

The appellants assign that the trial court erred in finding that the offer from BDG was invalid and in placing the burden of proving the offer was valid on the appellants. Without citing any case law, the appellants claim that BDG's offer was "an effective offer" and that the burden should have been on Steffensmeier to prove that the offer was not viable. Brief for appellants at 37.

It is not apparent from the trial court's order that it placed the burden with respect to the BDG offer on the appellants. The trial court merely noted that the appellants point to BDG's offer as evidence of the value of the property; but the court found that the "back-up offer had so many contingencies and reservations . . . as to appear to be not a valid offer" and that "there is evidence to support a finding that it was less than a sincere effort to purchase the property and not a true reflection of market value."

The trial court's decision to discredit the backup offer and find that it was not a true reflection of market value was not clearly erroneous. When Engel discovered the property listed for public sale on June 18, 2007, the listing indicated that the property had been under contract since June 13. Engel then contacted Ostlund to inquire about the property, and Ostlund told him that it was under contract with the Schlautmanns and that the deal was "pretty solid." Ostlund told Engel that he had not received the paperwork back yet, but that the offer had been verbally accepted. Engel testified that at the time he submitted his offer, he understood that the property was under contract, but that he submitted his offer as a backup offer, which meant that if the original offer did not go through, his offer would move into the first position. The offer itself

contained this language, noting that it was a backup offer and contingent upon the cancellation of the existing sales contract. If the Schlautmanns' sales contract was not canceled, then BDG's offer was null and void. BDG also reserved the right to declare the offer null and void at any time prior to the cancellation of the Schlautmanns' offer. Based on this evidence, the trial court did not err in discounting the backup offer.

Similarly, the court did not err in concluding that BDG's offer was not a true reflection of the market value of the property. Engel testified that when he makes offers on properties as an investor, he typically determines the amount he is going to offer based on a 30-percent return on his estimated proceeds after the property is broken up and completely sold off. He did not indicate that his offer was based on what he estimated to be the fair market value. In fact, neither Zabel nor McCracken factored BDG's offer into their valuation estimates. Consequently, the trial court did not err in disregarding the backup offer and finding that it was not representative of the market value of the property.

3. Equitable Remedies

[14] The appellants argue that the trial court erred in failing to consider any equitable remedies, including removing the trustee, ordering an accounting, ordering an appraisal of the mineral interests, and imposing a constructive trust upon any trust distributions otherwise distributable to Vicki. Steffensmeier asserts that this claim was not properly preserved for appeal because such relief was not specifically requested from the trial court. We note, however, that the appellants' operative complaints requested monetary damages and other relief provided by Neb. Rev. Stat. §§ 30-3890, 30-3891, and 30-3893 (Reissue 2008). Under § 30-3890(b), to remedy a violation by a trustee of a duty the trustee owes to a beneficiary, the court may

> (1) compel the trustee to perform the trustee's duties;
>
> (2) enjoin the trustee from committing a breach of trust;
>
> (3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means;

(4) order a trustee to account;

(5) appoint a special fiduciary to take possession of the trust property and administer the trust;

(6) suspend the trustee;

(7) remove the trustee as provided in section 30-3862;

(8) reduce or deny compensation to the trustee;

(9) subject to section 30-38,101, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or

(10) order any other appropriate relief.

Accordingly, the option to impose equitable remedies was properly before the trial court. We review equity questions in a trust administration matter de novo on the record. See *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 794 N.W.2d 700 (2011).

We find no error in the denial of any equitable remedies. Because the trial court did not err in dismissing the complaints in this case, there was no reason for the court to remove Steffensmeier as trustee. It was Steffensmeier's application for final accounting and discharge that prompted the commencement of this action, and following the sale of the property, the only remaining trust administration duty left was the distribution of the proceeds. The court, therefore, did not err in denying equitable relief of removing the trustee, and a final accounting had already been filed.

In addition, the appellants claim that the court should have considered additional evidence relating to the value of the mineral interests. Ordering an appraisal of the mineral interests is not an equitable remedy, because the result would be additional monetary damages due to the beneficiaries of the trust. The appellants had the opportunity at trial to present sufficient evidence of the value of the mineral interests, and they failed to do so. The court did not err in refusing to allow them a second opportunity to prove the value of the mineral interests.

[15] Finally, the appellants argue that the trial court should have imposed a constructive trust on any further distributions to Vicki. A party seeking to establish a constructive

trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained. See *Eggleston v. Kovacich*, 274 Neb. 579, 742 N.W.2d 471 (2007). There was no evidence in this case that Vicki's purchase of the property was the result of any wrongdoing on her part. Steffensmeier mistakenly offered her the ability to purchase the entire property at fair market value, and she did so. Thus, the imposition of a constructive trust on any distributions due to her as a beneficiary of the trust was unnecessary. This assignment of error is without merit.

4. Attorney Fees

The appellants claim that the county court erred in failing to award them attorney fees and in permitting Steffensmeier to pay attorney fees from the trust assets. On cross-appeal, Steffensmeier argues that the county court erred in failing to award him costs and attorney fees after trial. We note that on two occasions during this action, the court approved interim attorney fees and costs for Steffensmeier payable from the trust assets. We presume it is these orders for payment that the appellants now challenge, as well as the order after trial denying appellants any attorney fees.

Because the county court determined after trial that the trustee had breached his fiduciary duty, we first discuss its decision denying either party attorney fees after trial. We will then turn to the award of interim fees.

(a) Attorney Fees After Trial

[16] The appellants and Steffensmeier argue that the county court erred in not awarding them attorney fees. On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. *In re Rolf H. Brennemann Testamentary Trust*, 288 Neb. 389, 849 N.W.2d 458 (2014).

[17] Neb. Rev. Stat. § 30-3893 (Reissue 2008) provides when attorney fees are appropriate in trust administration

cases. Section 30-3893 states: "In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy."

[18] In general, if a court concludes that a fiduciary breached his duty or requires him to account to the estate, the estate is not liable for his attorney fees. If the fiduciary's defense of his acts is fully successful, he is ordinarily entitled to recover the reasonable costs necessarily incurred. See *In re Guardianship of Bremer*, 209 Neb. 267, 307 N.W.2d 504 (1981).

In the present action, the appellants were successful in proving a breach of fiduciary duty; however, Steffensmeier was successful in proving that neither the appellants nor the trust was harmed. The Nebraska Supreme Court confronted a similar situation in *In re Rolf H. Brennemann Testamentary Trust, supra*.

In *In re Rolf H. Brennemann Testamentary Trust*, a trust beneficiary sued the trustees for breach of their fiduciary duties. The county court dismissed her complaint. On appeal to this court, we found that the trustees had breached their fiduciary duty, but found that the breach was harmless. See *In re Rolf H. Brennemann Testamentary Trust*, 21 Neb. App. 353, 838 N.W.2d 336 (2013). On further review to the Nebraska Supreme Court, that court agreed there was a harmless breach, but remanded to the county court the issue of whether the beneficiary was entitled to an attorney fee. In doing so, the Nebraska Supreme Court stated that it was reluctant to award fees itself, because the county court was in the best position to determine whether "'justice and equity'" required an award of attorney fees and, if so, in what amount. *In re Rolf H. Brennemann Testamentary Trust*, 288 Neb. at 404, 849 N.W.2d at 468.

As in *In re Rolf H. Brennemann Testamentary Trust*, the present case involves a situation in which the trustee breached his fiduciary duty, but no damage to the trust or beneficiaries was proved. In such a situation, whether attorney fees are to be awarded is left to the sound discretion of the trial court to determine if justice and equity require an award of attorney

fees. In the present case, the county court, being in the best position to determine this issue, denied both parties' requests for attorney fees. Given the county court's finding on the merits, that there was a breach but no damages, we find no abuse of discretion in its decision to deny both parties' requests for attorney fees.

(b) Interim Attorney Fees

The county court approved Steffensmeier's applications for interim attorney fees and costs on September 1, 2009, in the amount of $44,693.29 and on September 28, 2011, in the amount of $62,481.57. The trustee incurred these fees in connection with his preparation and filing of an accounting and in connection with the litigation from which this appeal stems. The county court approved these applications prior to its determination that Steffensmeier breached his fiduciary duty but after the complaints had been filed against him.

Because the county court ordered the interim fees prior to its determination that Steffensmeier breached his fiduciary duty, we vacate the award of the interim fees and remand the matter to the county court to determine whether justice and equity require that the trust bear the cost of these fees. See *In re Rolf H. Brennemann Testamentary Trust*, 288 Neb. 389, 849 N.W.2d 458 (2014). This determination is to be made in conjunction with the final accounting, because some of the fees requested relate to both the litigation and general trust administration, to which Steffensmeier may be entitled under Neb. Rev. Stat. § 30-3865 (Reissue 2008).

5. Steffensmeier's Cross-Appeal

On cross-appeal, Steffensmeier argues that the trial court erred in finding that he breached his fiduciary duty when it also determined there were no damages. Based on the terms of the trust and the requirements of § 30-3866, the trial court did not err in finding that Steffensmeier breached his duty to administer the trust in accordance with its terms. But as set forth above, that does not entitle the appellants to recover, because they failed to prove they suffered any damages as a result of the breach. Since a breach of a fiduciary duty is but

one element of a cause of action for breach of fiduciary duty, there is nothing inconsistent in the trial court's findings.

VI. CONCLUSION

We conclude that the trial court did not err in finding that the property was sold at or near fair market value and that therefore, the appellants suffered no damages. Additionally, the court did not err in discounting the offer from BDG; nor was it error for the court to decline to impose any equitable remedies. Although we find no abuse of discretion in denying each party attorney fees after trial, we vacate the orders granting interim attorney fees and remand the matter to the trial court for a determination of whether justice and equity require the trust to bear these costs.

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

JOHN CAMDEN AND MARY CAMDEN, APPELLEES, v. PAPIO-MISSOURI RIVER NATURAL RESOURCES DISTRICT, APPELLANT.

854 N.W.2d 334

Filed August 26, 2014. Nos. A-13-266 through A-13-268.

1. **Eminent Domain: Appeal and Error.** An appeal from the district court's determination that good faith negotiations occurred prior to the filing of a condemnation petition presents a mixed question of law and fact.
2. **Eminent Domain: Jurisdiction.** Statutory provisions requiring good faith attempts to agree prior to institution of condemnation proceedings are jurisdictional, and objection based on the failure of the record to show that the parties cannot agree may be raised at any time by direct attack.
3. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court.
4. **Actions: Eminent Domain: Courts.** Pursuant to Neb. Rev. Stat. § 76-704 (Reissue 2009), if any condemnee fails to agree with the condemnor with respect to the acquisition of property sought by the condemnor, a petition to condemn the property may be filed by the condemnor in the county court of the county where the property or some part thereof is situated.
5. **Eminent Domain.** In order to satisfy Neb. Rev. Stat. § 76-704.01(6) (Reissue 2009), there must be a good faith attempt to agree, consisting of an offer made in good faith and a reasonable effort to induce the owner to accept it.

6. **Words and Phrases.** Good faith is a state of mind consisting of honesty in belief or purpose and the absence of intent to defraud.
7. **Eminent Domain.** Extended negotiations are not required if the condemnor and condemnee cannot reach an agreement.
8. **Eminent Domain: Jurisdiction.** The statutory requirement that a condemnor make a good faith offer and reasonably attempt to induce settlement is mandatory and jurisdictional.
9. **Eminent Domain: Proof: Records.** A condemnor's unsuccessful attempt to reach an agreement with the condemnee must be alleged and proved in the condemnation proceedings and must appear on the face of the record.

Appeal from the District Court for Washington County, JOHN E. SAMSON, Judge, on appeal thereto from the County Court for Washington County, C. MATTHEW SAMUELSON, Judge. Judgment of District Court affirmed.

Paul F. Peters for appellant.

Wm. Oliver Jenkins and Benjamin M. Belmont, of Brodkey, Peebles, Belmont & Line, L.L.P., for appellees.

MOORE, PIRTLE, and RIEDMANN, Judges.

MOORE, Judge.

In this condemnation proceeding, the Papio-Missouri River Natural Resources District (NRD) appeals from a decree of dismissal entered by the district court for Washington County. The district court concluded that the NRD failed to show that it made a reasonable attempt to induce John Camden and Mary Camden to accept its offer to acquire an easement, which attempt is a jurisdictional requirement to a condemnation proceeding. After our review of the record, we agree with the district court and affirm.

FACTUAL BACKGROUND

The NRD is the owner and operator of approximately 85 dams and 100 miles of levees. In 1983, the NRD constructed a dam, designated as "W-3," to heal an eroding gully and stabilize a stream in Washington County. This was a joint project with the National Resources Conservation Service of the U.S. Department of Agriculture (USDA) under the USDA's "Public Law 566" program. In April 1982, the owners of the land on which the dam was to be constructed granted

the NRD an easement to allow the NRD to build, operate, and maintain the damsite. John's construction and excavation company was hired to construct this dam. The dam was initially constructed as a low-hazard dam with an expected lifespan of 50 years.

In November 1993, the Camdens purchased real property that included the damsite. While owner of this property, John constructed a number of features near the damsite which enabled him to harvest topsoil. According to John, he harvested this soil for over 20 years.

In approximately 2005, the Camdens learned that the NRD was considering rehabilitating the W-3 damsite. The Camdens were initially included in discussions with the NRD regarding the potential design of the site's structure. In 2008, following an environmental assessment, the NRD elected to upgrade the W-3 dam to a high-hazard dam. The NRD had an opportunity to receive federal stimulus funding for the rehabilitation of the dam, and the project was placed on "fast track" status to meet the federal deadlines.

Martin Cleveland, a construction engineer for the NRD, was the NRD representative responsible for acquiring the landrights needed for the dam upgrade. A public hearing was held in May 2009 during which the need for the project and the impact on associated landowners were discussed. John and his attorney attended and spoke at the hearing in opposition to the project. Following the hearing, legal descriptions were developed for the easements needed to complete the project and an appraisal of the impacted property was commissioned. The NRD sought to acquire a permanent easement around the original easement area and a temporary easement for ingress and egress during construction. The area of the permanent easement sought totaled approximately 11.23 acres.

An appraisal of the impacted property was completed, and in the appraiser's summary report, dated May 28, 2009, he concluded that the value of the NRD's proposed permanent easement and temporary construction easement on the property was $67,350. On June 15, Cleveland sent a letter on behalf of the NRD to the Camdens that included a proposed purchase agreement and proposed easements. The NRD offered the

Camdens $67,350 in exchange for the easements. Cleveland spoke with John by telephone sometime after the letter was sent, to ensure the Camdens had received the NRD's offer. During that conversation, John directed the NRD to send all future correspondence to the Camdens' attorney.

In early July 2009, Cleveland spoke with the Camdens' attorney and informed him that a revised purchase agreement and easement agreement would be sent. On July 30, Cleveland sent the Camdens' attorney a letter containing revised purchase and easement agreements. Cleveland's letter indicated the NRD had not adjusted the amount of its offer, but had clarified easement rights and corrected previous errors in the purchase agreement and easement documents. Cleveland testified that the NRD had lowered the elevation requirement for the flood pool, which lowering would allow the Camdens to use more of the permanent easement area for farming and other activities. The NRD requested a written response to the offer on or before August 10, 2009.

On August 4, 2009, the Camdens' attorney sent Cleveland a letter rejecting the NRD's offer. Through this letter, the Camdens communicated that their loss of land was valued at $750,000 because they would lose their ability to harvest soil. The Camdens also proposed an alternative that would mitigate their loss. This alternative, or counteroffer, consisted of the following five parts:

> 1. The present auxiliary/emergency spillway would remain to the North, but would be moved 100 feet to the South to enable access to [the Camdens'] proposed building site. The present alignment to stay as is to eliminate westerly dogleg on south end of structure. In addition, no dirt to be taken from Camden property to build the new structure.
>
> 2. The easement would set forth that the grantee would permanently maintain the conservation pool at the draw down elevation of 1,226 feet to allow Grantor to continue to harvest the silt dirt as will be designated on the plans.
>
> 3. Camden Excavating would supply the dirt for this project at its fair market value; in addition, Camden

> Excavating would not be disqualified from bidding or constructing this project.
>
> 4. The Camdens would receive $150,000.00 in compensation for this permanent easement, plus $5,000.00 in attorney fees.
>
> 5. Any damages sustained to the crops on the land would be directly reimbursed to the individual renting the land.

The Camdens' attorney requested that Cleveland contact him if he wanted to meet to review the Camdens' response.

On August 6, 2009, Cleveland responded to the Camdens' counteroffer with another letter. Cleveland notified the Camdens that their counteroffer would be presented to the NRD's board of directors (the Board) at the upcoming meeting on August 13 and invited the Camdens to make a presentation during that meeting. However, Cleveland also informed the Camdens that NRD management was not recommending that the Board accept the counteroffer. Specifically, Cleveland noted that NRD management viewed the counteroffer as "being unreasonable and/or disruptive of the project, and irrelevant to the real issue of the amount of the diminution in the fair market value of [the Camdens'] property resulting from acquisition of the easements."

At the August 13, 2009, meeting, John was allowed to briefly speak in front of the Board before being told to sit down. One of the Board members testified that the Camdens' proposal document was not physically presented at the subsequent closed session of the meeting. Nor, he testifed, was the Camdens' counteroffer completely explained to the Board; instead, NRD management only informed the Board that the Camdens "gave a frivolous offer." At the conclusion of the meeting, the Board adopted the condemnation resolution. No actual response to the Camdens' counteroffer was given by the NRD, and no further effort was made to negotiate an agreement with the Camdens prior to commencement of the condemnation proceedings.

The NRD filed a "Petition for Appointment of Appraisers" on August 14, 2009. On September 19, the report of the appraisers was filed in the county court and the Camdens were

awarded a total of $113,416. The Camdens appealed that award to the district court.

On October 13, 2009, the NRD filed a "Petition for Appointment of Appraisers for Corrected Easement" because an error was discovered in the legal description of the temporary ingress and egress easement. The Camdens were awarded an additional $600 for the corrected easement. That award was also appealed to the district court.

On February 16, 2010, after another error was discovered, the NRD filed a second "Petition for Appointment of Appraisers for Corrected Easement." That petition sought to correct the description of the temporary ingress and egress easement. Once again, the Camdens were awarded $600 in damages. That award, which was in addition to the above $600 award, was also appealed to the district court.

In their petitions on appeal to the district court, the Camdens raised a number of claims which they argued should invalidate the NRD's condemnation proceedings. Among these claims was that the NRD did not negotiate in good faith prior to initiating the condemnation process. The district court consolidated all three of the condemnation cases and held a bench trial on this issue on January 28, 2013.

On February 11, 2013, the district court entered an order of dismissal of all condemnation proceedings. The district court found that the NRD was under pressure to complete the project as quickly as possible to avoid losing federal stimulus funds. It found that because of this pressure, the NRD made a number of errors during the process, including having to initiate three separate condemnation proceedings in order to address legal description discrepancies. The court also concluded that the NRD did not negotiate in good faith, because it did not make a reasonable attempt to induce the Camdens to accept the offer.

In so holding, the district court found that the Camdens' counteroffer was not frivolous, unreasonable, or disruptive, for two reasons: First, the court noted the NRD made unilateral design-change plans in between its offers to the Camdens which could have signified to the Camdens that changes to the plan were still a subject of negotiation. Second, the court

noted the Camdens' $150,000 counteroffer was closer to the board of appraisers' award than the $67,350 offered by the NRD. The district court dismissed the proceedings due to a lack of jurisdiction.

The NRD appeals from the order of dismissal.

ASSIGNMENTS OF ERROR

Although assigning three separate errors, the NRD essentially argues that the district court erred when it determined that the NRD did not make a reasonable attempt to induce the Camdens to accept its offer and dismissed the action.

STANDARD OF REVIEW

[1-3] An appeal from the district court's determination that good faith negotiations occurred prior to the filing of a condemnation petition presents a mixed question of law and fact. *Krupicka v. Village of Dorchester*, 19 Neb. App. 242, 804 N.W.2d 37 (2011). Statutory provisions requiring good faith attempts to agree prior to institution of condemnation proceedings are jurisdictional, and objection based on the failure of the record to show that the parties cannot agree may be raised at any time by direct attack. *Id*. The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court. *Id*. However, findings as to any underlying factual disputes will be upheld unless clearly erroneous. *Id*.

ANALYSIS

The NRD contends that it met the statutory requirement to engage in good faith negotiations prior to initiating condemnation proceedings. The NRD provides three arguments to support its position. First, the NRD contends that it made substantial changes to its design of the rehabilitated dam in order to induce the Camdens to accept. Second, the NRD's invitation to the Camdens to present before the August 2009 meeting of the Board should have been considered an attempt to induce the Camdens' acceptance. Finally, the NRD asserts that the Camdens' counteroffer was so unreasonable and excessive that it excused the NRD from any further negotiation.

[4] Before addressing the NRD's arguments, we summarize the underlying law. Under Neb. Rev. Stat. § 76-704 (Reissue 2009),

> [i]f any condemnee shall fail to agree with the condemn[o]r with respect to the acquisition of property sought by the condemn[o]r, a petition to condemn the property may be filed by the condemn[o]r in the county court of the county where the property or some part thereof is situated.

The petition shall include, among other things, evidence of attempts to negotiate in good faith with the property owner. Neb. Rev. Stat. § 76-704.01(6) (Reissue 2009).

[5-7] In order to satisfy § 76-704.01(6), there must be a good faith attempt to agree, consisting of an offer made in good faith and a reasonable effort to induce the owner to accept it. See *State v. Mahloch*, 174 Neb. 190, 116 N.W.2d 305 (1962). This court has defined good faith as "a state of mind consisting of honesty in belief or purpose and the absence of intent to defraud." *Krupicka v. Village of Dorchester*, 19 Neb. App. at 256, 804 N.W.2d at 48, citing Black's Law Dictionary 762 (9th ed. 2009). The Nebraska Supreme Court has stated that extended negotiations are not required if the condemnor and condemnee cannot reach an agreement. *State v. Mahloch, supra*.

[8,9] The statutory requirement that a condemnor make a good faith offer and reasonably attempt to induce settlement is mandatory and jurisdictional. *Prairie View Tel. Co. v. County of Cherry*, 179 Neb. 382, 138 N.W.2d 468 (1965); *Higgins v. Loup River Public Power Dist.*, 157 Neb. 652, 61 N.W.2d 213 (1953). The condemnor's unsuccessful attempt to reach an agreement with the condemnee must be alleged and proved in the condemnation proceedings and must appear on the face of the record. See *Prairie View Tel. Co. v. County of Cherry, supra*. The Nebraska Supreme Court has analyzed this negotiation requirement in a number of cases, which we summarize below.

In *Higgins v. Loup River Public Power Dist.*, 159 Neb. 549, 68 N.W.2d 170 (1955), a public power district brought

condemnation proceedings against the owner of a farm in order to obtain an easement across the farm for an electric transmission line. The owner of the farm first refused to allow the district to complete a survey of the proposed easement, but eventually an agreement to complete the survey was reached with the help of the owner's attorney. However, after this survey, the district did not further negotiate with the owner or his attorney before instituting condemnation proceedings. Rejecting the district's arguments that it was not able to contact the owner, the court determined that the district did not meet its statutory requirement to negotiate in good faith.

In *State v. Mahloch, supra*, the State sought to obtain lands to be used as a right-of-way for an interstate highway. The State informed the landowner that it wished to purchase a portion of his land and offered $16,600 based upon an appraisal completed by the Department of Roads. The landowner declined the offer. The State then sent the landowner a letter describing the first meeting and reoffered the $16,600 as a final offer. Contracts for sale were included with the letter. The landowner did not respond to the letter or make any further effort to negotiate. The trial court found the State's offer was sufficient. On appeal, the Nebraska Supreme Court affirmed, finding that the State had met its duty to make a good faith offer to purchase and a reasonable bona fide attempt to have the offer accepted.

In *Wolfe v. State*, 179 Neb. 189, 137 N.W.2d 721 (1965), the State brought eminent domain proceedings to obtain a permanent easement for state control of outside advertising on an owner's land located next to a highway. Before initiating those proceedings, the State offered the landowner $25 for the easement. The landowner replied that he would not grant the easement for less than $7,000 or $8,000. The State then sent a letter confirming the $25 offer and advised that it could be accepted at any time prior to the condemnation hearings. The trial court found that the State made an offer in good faith. The Supreme Court affirmed, noting that the nominal offer was supported by the evidence at trial that the value of the landowner's property was the same after the taking as it was before the taking.

In *Prairie View Tel. Co. v. County of Cherry*, 179 Neb. 382, 138 N.W.2d 468 (1965), Cherry County, Nebraska, sought to condemn real estate for a county road. The county requested that the landowners attend a meeting before its board of commissioners in order to engage in negotiations. When the landowners did not attend the meeting, the county attempted one visit to their home to discuss acquiring the property, but did not find the landowners at home. The county then sent the landowners a letter offering $3,000 and requiring their attendance at a board of commissioners meeting to discuss the offer. The county's letter stated that if the landowners did not attend the meeting or otherwise inform the board, the board would conclude they refused to accept the offer and refused to further negotiate. However, the letter did not indicate the extent of the lands the county was seeking. During the condemnation proceedings, the landowners filed a motion for summary judgment contending that the county did not make a good faith offer and a reasonable attempt to induce them to accept the offer. The district court granted the motion and dismissed the county's condemnation proceedings. The district court held that there was no offer made in good faith because the county never informed the appellees as to the amount of land it intended to take. The Supreme Court agreed with the district court's holding and affirmed.

Finally, in *Suhr v. City of Seward*, 201 Neb. 51, 266 N.W.2d 190 (1978), the Nebraska Supreme Court concluded the City of Seward, Nebraska, had engaged in good faith negotiations with landowners before instituting condemnation proceedings to obtain a clear zone easement over a 2.32-acre parcel of the landowners' property for airport purposes. In that case, the city employed two appraisers, who estimated the landowners' damages at $1,200 and $1,600. A review appraiser concluded the initial estimates were excessive and valued the landowners' damages at $500. The city contacted the landowners and presented a written offer of $500 for the easement. When the landowners responded that the initial offer was inadequate, the city indicated that it would consider a counteroffer. The landowners did not make any counteroffer or raise any questions regarding the easement. Instead, the landowners contacted

an attorney who wrote to the city and informed the city that the landowners would not negotiate regarding the easement because the city's airport project violated county zoning ordinances. This allegation regarding violation of zoning ordinances was rejected by the Nebraska Supreme Court in another case. See *Seward County Board of Commissioners v. City of Seward*, 196 Neb. 266, 242 N.W.2d 849 (1976). Citing *Wolfe v. State*, 179 Neb. 189, 137 N.W.2d 721 (1965), and a number of decisions from other jurisdictions, the *Suhr* court found the letter from the landowners' attorney excused the city from any further attempts to negotiate.

In addition to the Nebraska Supreme Court's decisions regarding the negotiation requirement, this court has also recently confronted this requirement. In *Krupicka v. Village of Dorchester*, 19 Neb. App. 242, 804 N.W.2d 37 (2011), the landowner contended that the Village of Dorchester, Nebraska, never presented a valid offer because it did not include a legal description of the land to be condemned. Distinguishing our case from *Prairie View Tel. Co. v. County of Cherry*, 179 Neb. 382, 138 N.W.2d 468 (1965), we determined the village sufficiently described the land it was attempting to acquire in its offer. Thus, we concluded the village had engaged in good faith negotiations.

Applying the above statutory requirement and the corresponding case law to the present matter, we conclude the NRD failed to meet the requirement of making a reasonable attempt to induce the Camdens to accept its offer prior to initiating condemnation proceedings.

We conclude, as did the district court, that the NRD's offer to the Camdens occurred on July 30, 2009. The NRD's arguments that it made earlier design changes to the rehabilitation project in order to induce the Camdens to accept the offer are not convincing. Although the NRD did include the Camdens in initial discussions regarding the dam rehabilitation while the environmental impact was studied, at no time did the NRD convey to the Camdens that it was negotiating for easements on their property. Further, these discussions occurred before the Camdens were aware of the exact extent of the NRD's taking. Additionally, the NRD never conveyed to the

Camdens that it was changing the elevation of the spillway as part of the negotiations. Rather, the NRD stated that revisions to the offer were being made and a revised offer would be sent at some point. There is no evidence in the record that the Camdens were aware the NRD was lowering the spillway as part of the negotiations. Rather, the NRD made this change unilaterally.

We also reject the NRD's claim that affording the Camdens an opportunity to present at the August 2009 meeting of the Board was a reasonable attempt to induce acceptance of the offer. The record shows that John had a brief opportunity to address the Board before and after the Board went into a closed executive session. There is no evidence in the record that the Board gave a formal response to the Camdens' counteroffer, presented another offer in response to the Camdens' counteroffer, or even retendered its original offer during that meeting. In fact, the only evidence in the record regarding this meeting demonstrates that the Board was simply informed during its executive session that the Camdens' counteroffer was frivolous.

Finally, having independently analyzed the Camdens' counteroffer, we cannot say the district court erred when it found the counteroffer was not unreasonable to the degree that would have excused the NRD from further negotiations. When the Camdens made their counteroffer, it was in response to the NRD's revised offer which incorporated a design change in the spillway. The NRD never informed the Camdens that additional changes to the project could not be accommodated. Thus, the Camdens' proposals for design changes were not unreasonable.

Additionally, the Camdens' request for $150,000 in compensation and $5,000 in attorney fees was not irrational. This is especially true considering the fact that the board of appraisers concluded that the Camdens should be awarded $113,416 in damages resulting from the taking. The NRD's offer, $67,350, was approximately half of this amount.

To avoid this entire situation, the NRD simply had to respond to the Camdens' counteroffer and explain that it was adhering to its original offer. See *Wolfe v. State*, 179 Neb. 189,

137 N.W.2d 721 (1965). It failed to do so. The NRD's arguments that it negotiated in good faith are without merit.

CONCLUSION

We affirm the district court's conclusion that the NRD failed to show that it made a reasonable attempt to induce the Camdens to accept its offer to acquire an easement.

AFFIRMED.

DEBORAH ANN YANCER, APPELLEE, V.
MICHAEL KAUFMAN, APPELLANT.

854 N.W.2d 640

Filed September 2, 2014. No. A-13-214.

1. **Moot Question: Jurisdiction: Appeal and Error.** Mootness does not prevent appellate jurisdiction. But, because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, appellate courts review mootness determinations under the same standard of review as other jurisdictional questions.
2. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Courts: Jurisdiction.** While it is not a constitutional prerequisite for jurisdiction, the existence of an actual case or controversy is necessary for the exercise of judicial power.
5. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation.
6. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
7. **Moot Question: Time: Appeal and Error.** Appeals involving the granting of a protection order will almost always be moot before the case is heard because of the time-limited nature of a protection order.
8. **Moot Question: Appeal and Error.** Under certain circumstances, an appellate court may entertain the issues presented by a moot case when the claims presented involve a matter of great public interest or when other rights or liabilities may be affected by the case's determination.

9. ____: ____. In determining whether the public interest exception should be invoked, the court considers the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.
10. ____: ____. The public interest exception to the mootness doctrine applies where the activity sought to be prohibited is of a public nature.
11. **Judgments.** The proper disposition of applications for protection orders is a matter affecting public interest.
12. **Moot Question: Judgments: Appeal and Error.** The other rights or liabilities exception to the mootness doctrine is inapplicable absent proof of collateral consequences resulting from the issuance of a protection order.

Appeal from the District Court for Lancaster County: GALE POKORNY, County Judge. Appeal dismissed.

Tregg Lunn, of Law Office of Tregg Lunn, for appellant.

Kristina M. Morris, of Bowman & Krieger, for appellee.

IRWIN, RIEDMANN, and BISHOP, Judges.

RIEDMANN, Judge.

INTRODUCTION

Michael Kaufman appeals from an order of the district court for Lancaster County granting Deborah Ann Yancer a harassment protection order against him. Because we find that the protection order has, by its terms, expired, and because we find no reason to apply an exception to the mootness doctrine, the appeal is dismissed as moot.

BACKGROUND

On January 18, 2013, Yancer filed a petition and affidavit to obtain a harassment protection order against Kaufman. Yancer alleged in the petition that despite repeated requests that Kaufman stop, he continued to send her letters, e-mails, and text messages. In December 2012, she contacted an attorney who sent Kaufman a cease and desist letter. Kaufman continued to contact her, and according to the petition and its attachments, the continued contact caused Yancer to fear for her safety.

On January 18, 2013, the court entered an ex parte harassment protection order, pursuant to Neb. Rev. Stat.

§ 28-311.09 (Cum. Supp. 2012). The court specified that based on § 28-311.09, the protection order was to remain in effect for a period of 1 year unless modified by order of the court.

On January 25, 2013, Kaufman filed a request for hearing, which request was granted. A hearing was scheduled for February 13. Kaufman testified that the week before the hearing, he contacted the clerk's office and requested that the hearing be postponed because his witness was unavailable, but his request was denied. The transcript reveals that a letter dated February 11, 2013, was filed with the court requesting a continuance of the February 13 hearing and that the continuance request was denied on the date it was received.

Yancer appeared with counsel at the hearing, and Kaufman appeared pro se. Yancer testified that she had been in a romantic relationship with Kaufman, but that she had ended it on August 22, 2012. After the breakup, Kaufman continued to contact her through various means. According to Yancer, some of the communications were "sexually explicit" and it made her feel "very frightened." While most of the letters were mailed to her, she received a particular letter which she described as "very upsetting" because it was "sexually explicit and very detailed." She also explained that Kaufman personally, or someone acting on his behalf, had entered her property, come to her front door, opened the mailbox contained in her front door, and slid the detailed and sexually explicit letter inside her home. All of this happened sometime in the dark, during night hours. As a result, Yancer hired an attorney to send Kaufman a cease and desist letter. Kaufman continued to send communications, including letters and poems, which prompted Yancer to file the petition for a protection order.

At trial, Yancer's attorney offered the petition and affidavit, but the court refused the offer, stating that it would take judicial notice of them. Yancer's counsel questioned Yancer about each of the documents to which she had referred in her petition, and Kaufman was given an opportunity to cross-examine her.

Kaufman testified that he had "incurred considerable expenses as a result of [his] relationship with . . . Yancer"

and that he believed he was entitled to "some form of restitution for the work" he did for her. In an attempt to substantiate his claim, he submitted a spreadsheet of time and labor he expended on Yancer's home, which the court marked but never specifically received. Kaufman also submitted a spreadsheet of funds he expended on Yancer, which the court once again marked, but did not specifically receive. Kaufmann also submitted a letter from his unavailable witness, which the court agreed to "look at" without explicitly receiving it.

The court allowed Kaufman to deliver a narrative regarding his relationship with Yancer. In the end, the court stated that it was going to continue the protection order on the basis that Yancer said Kaufman was disturbing her peace and quiet, and the court agreed. The protection order was extended 1 year from January 18, 2013. Kaufman timely filed this appeal.

ASSIGNMENTS OF ERROR

Kaufman assigns that the district court erred in granting Yancer's request for a protection order because the evidence was insufficient and because he was denied his due process rights, his right to an impartial judge, and his right to call a nonparty witness.

STANDARD OF REVIEW

[1,2] Mootness does not prevent appellate jurisdiction. But, because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, we have reviewed mootness determinations under the same standard of review as other jurisdictional questions. *State v. York*, 278 Neb. 306, 770 N.W.2d 614 (2009). A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Id*.

ANALYSIS

[3,4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Greater Omaha Realty Co. v. City of Omaha*, 258 Neb. 714, 605 N.W.2d 472 (2000).

While it is not a constitutional prerequisite for jurisdiction, the existence of an actual case or controversy is necessary for the exercise of judicial power. *Id*. Thus, we must first determine whether the expiration of the protection order, which expired by its own terms on January 18, 2014, has rendered this appeal moot.

[5,6] A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation. *Id*. A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999). As a general rule, a moot case is subject to summary dismissal. *Id*.

[7,8] The protection order in the present case was entered on January 18, 2013, and by its own terms was effective until January 18, 2014. Because the protection order in this case has expired, the instant appeal is moot. Appeals involving the granting of a protection order will almost always be moot before the case is heard because of the time-limited nature of a protection order. *Hron v. Donlan*, 259 Neb. 259, 609 N.W.2d 379 (2000). However, it has been recognized that under certain circumstances, an appellate court may entertain the issues presented by a moot case when the claims presented involve a matter of great public interest or when other rights or liabilities may be affected by the case's determination. *Id*.

[9] In determining whether the public interest exception should be invoked, the court considers the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem. *Hauser v. Hauser*, 259 Neb. 653, 611 N.W.2d 840 (2000).

The dissent suggests that the court made "at least two errors" that should be addressed under the public interest exception: "(1) an error of law with regard to the harassment protection order statutes and (2) an evidentiary error." We note that Kaufman does not raise the first basis as an assigned error. Moreover, we fail to see how either alleged error rises to the

level of public interest so as to merit consideration under the exception. Rather, at best, we are presented with an isolated misinterpretation of the harassment statute and evidentiary errors committed by a single judge.

[10] A review of cases in which the Nebraska Supreme Court has applied the public interest exception leads us to the conclusion that the exception applies where the activity sought to be prohibited is of a public nature. See, e.g., *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009); *In re Interest of Anaya*, 276 Neb. 825, 758 N.W.2d 10 (2008).

Evertson v. City of Kimball, supra, was a mandamus action in which citizens sought to compel the City of Kimball to disclose an investigative report on racial profiling by police. The district court ordered the city to produce the report and also attached a redacted copy to its order. On appeal, the appellees contended the appeal was moot because of the court's disclosure. The Nebraska Supreme Court held that although the appeal was moot, the public interest doctrine applied because the court could foresee a public body hiring a private investigator to conduct an internal investigation of its officials to eliminate the appearance of impartiality and the courts and public bodies would find guidance from a review of the issues.

In *In re Interest of Anaya, supra*, the parents of a newborn infant objected to a State-required blood screening for their son. Based upon their refusal, the State filed a petition for adjudication, and the child was removed from his parents' home. See Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2013). He was ultimately tested and returned to his parents. The parents filed suit, claiming that the screening statutes were unconstitutional and that the evidence was insufficient to adjudicate the child. The court determined the case was moot because the screening had been performed and the adjudication petition had been dismissed. It proceeded to consider the appeal, however, under the public interest exception. In deciding to do so, the court stated:

> The validity of the newborn screening statutes and the proper statutory method of enforcing the statutes fall squarely within the public interest. Resolution of these

> issues involves the health and welfare of all children born in the state, an issue of paramount importance to the citizens of this state. Furthermore, this court's resolution of the constitutional and statutory issues in this case will provide guidance for state officials and the juvenile courts on the validity of the newborn screening statutes and the proper method of enforcing these statutes. Finally, the appellants in this case are of childbearing age, so the issues presented in this appeal are capable of recurring in the future, and in addition, similar cases are likely to arise.

In re Interest of Anaya, 276 Neb. at 832, 758 N.W.2d at 17.

[11] In the present action, Yancer sought to prevent her jilted paramour from making continued contact with her. We are unable to equate the public's interest in such a situation to that of the parties' activities in *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009), and *In re Interest of Anaya*, 276 Neb. 825, 758 N.W.2d 10 (2008), that gave rise to the application of the public interest exception. Even if we consider the "proper disposition of applications for protection orders" as a matter affecting public interest, as did the Nebraska Supreme Court in *Elstun v. Elstun*, 257 Neb. 820, 824, 600 N.W.2d 835, 839 (1999), we fail to see how the remaining two factors, desirability of an authoritative adjudication for future guidance of public officials and the likelihood of future recurrence of the same or a similar problem, are met. The dissent ignores the second consideration, the desirability of an authoritative adjudication for future guidance of public officials. Our review of Nebraska case law indicates that while it may have been error for the trial court to take judicial notice of the petition and affidavit, this does not require us to invoke the public interest exception because it would not provide any future guidance for public officials beyond that which the appellate courts have already provided in similar situations. See, *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010); *Hronek v. Brosnan*, 20 Neb. App. 200, 823 N.W.2d 204 (2012) (providing authoritative guidance on court's inability to take judicial notice of protection order and supporting affidavit); *Sherman v. Sherman*, 18 Neb. App. 342,

781 N.W.2d 615 (2010). The same is true for the trial court's failure to specifically rule on exhibits offered by the parties. See, e.g., *Mahmood v. Mahmud, supra*; *Sherman v. Sherman, supra* (stating that documents must be admitted into evidence at contested factual hearings in protection order proceedings to be considered by court). Nor do we find that addressing the judge's misinterpretation of the harassment statutes would provide future guidance on a problem likely to reoccur, given the plain and unambiguous nature of the statute itself. See, *State v. Johnson*, 287 Neb. 190, 842 N.W.2d 63 (2014) (applying public interest exception because question present involved area of law that had not yet been developed); *In re Interest of Thomas M.*, 282 Neb. 316, 803 N.W.2d 46 (2011) (applying exception because previous appellate cases have questioned juvenile court's authority of issue presented, but issue had evaded review).

If every error committed by a trial judge called into play the public interest exception, the mootness doctrine would be subsumed by the exception. Therefore, we decline to address the merits of this case under that exception.

The dissent goes on to further suggest "[f]or the sake of completeness" that "other rights or liabilities may be affected by the case's determination." The dissent ponders that when

> our review of a protection order appeal reveals errors or deficiencies in the record that warrant reversal and vacation of the protection order, having such an order vacated should qualify as a "right" belonging to the respondent that should invoke this other exception to the mootness doctrine.

But then the dissent changes course, claiming that

> the other rights or liabilities exception has not been examined by the Nebraska Supreme Court in this specific context, and an analysis of this other exception is unnecessary to the resolution of the appeal before us currently, since the public interest exception can be invoked instead.

[12] Nebraska jurisprudence reveals that the Nebraska Supreme Court has clearly rejected application of the other rights or liabilities exception absent proof of collateral

consequences resulting from the issuance of the protection order. See, *Hauser v. Hauser*, 259 Neb. 653, 611 N.W.2d 840 (2000); *Hron v. Donlan*, 259 Neb. 259, 609 N.W.2d 379 (2000); *State v. Patterson*, 237 Neb. 198, 465 N.W.2d 743 (1991). This court has followed suit. See *Gernstein v. Allen*, 10 Neb. App. 214, 630 N.W.2d 672 (2001). The dissent identifies no right of Kaufman that has been or may be affected by this protection order sufficient to bring it within the mootness exception for other rights or liabilities affected by the case's determination.

Because Kaufman does not allege any reasons which would justify the application of any exception to the mootness doctrine, nor is there any indication in the record that any exception should be invoked under the circumstances of this case, we decline to do so.

CONCLUSION

Because we have concluded that this appeal is moot and that no exceptions to the mootness doctrine apply, the appeal is dismissed.

APPEAL DISMISSED.

BISHOP, Judge, dissenting.

By no fault of Kaufman, his appellate review of the harassment protection order entered against him did not reach this court until more than 1 year after its entry. The majority has concluded that since the protection order expired by its own terms on January 18, 2014, the appeal should be dismissed as moot.

Citing to *Hron v. Donlan*, 259 Neb. 259, 609 N.W.2d 379 (2000), the majority acknowledges that appeals involving the granting of a protection order will almost always be moot before the case is heard, because of the time-limited nature of a protection order, but that under certain circumstances, an appellate court may entertain the issues presented by a moot case when the claims presented involve a matter of great public interest or when other rights or liabilities may be affected by the case's determination. The *Hron* decision tells us that in determining whether the public interest exception should be invoked, the court considers the public or private nature

of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem. In considering those factors, the majority concludes that "Kaufman does not allege any reasons which would justify the application of any exception to the mootness doctrine, nor is there any indication in the record that any exception should be invoked under the circumstances of this case." I respectfully conclude otherwise.

In support of a public interest exception to the mootness doctrine, there are at least two errors made by the court that are more public than private in nature, and may result in a future recurrence of the same or a similar problem if not addressed: (1) an error of law with regard to the harassment protection order statutes and (2) an evidentiary error.

Requirements for Harassment Protection Order.

The court erred in its interpretation and application of the harassment protection order statutes, concluding that evidence of threatening behavior was not necessary to the issuance of a harassment protection order. In fact, the court specifically told Kaufman that the harassment statute did not require evidence of threatening or dangerous behavior, only that the behavior is harassing and annoying. The court also later indicated that Kaufman had disturbed Yancer's "peace and quiet" and, in making that finding, entered the order. This is not consistent with the law and is not an error personal to Kaufman. There is clearly a public interest in making sure trial courts are applying the law correctly to the evidence before them.

A person filing a petition for a harassment protection order (the petitioner) has the burden to establish by a preponderance of the evidence the truth of the facts supporting a protection order. *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010). Neb. Rev. Stat. § 28-311.09(1) (Cum. Supp. 2012) states in part: "Any victim who has been harassed as defined by section 28-311.02 may file a petition and affidavit for a harassment protection order as provided in subsection (3) of this section."

"Harass" is defined at Neb. Rev. Stat. § 28-311.02(2)(a) (Reissue 2008) as follows: "Harass means to engage in a knowing and willful course of conduct directed at a specific person which seriously terrifies, threatens, or intimidates the person and which serves no legitimate purpose." And a "course of conduct" is defined at § 28-311.02(2)(b):

> Course of conduct means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including a series of acts of following, detaining, restraining the personal liberty of, or stalking the person or telephoning, contacting, or otherwise communicating with the person.

Based on the plain reading of these statutes, a harassment protection order should only issue against the perpetrator of such actions (the respondent) when a preponderance of the evidence establishes that the respondent engaged in a knowing and willful course of conduct directed at a specific person which *seriously terrifies, threatens, or intimidates that person* and which serves no legitimate purpose. Furthermore, when analyzing § 28-311.02, the Nebraska Supreme Court has concluded that Nebraska's stalking and harassment statutes are given an objective construction and that the victim's experience resulting from the perpetrator's conduct should be assessed on an objective basis. *In re Interest of Jeffrey K.*, 273 Neb. 239, 728 N.W.2d 606 (2007). Thus, the inquiry is whether a reasonable person would be seriously terrified, threatened, or intimidated by the perpetrator's conduct. *Id.*

In the case before us, Kaufman conceded that he likely engaged in a course of conduct, that he did send Yancer "a few letters and poems," but that "[i]n all of [his] communications to her, [he had] never said anything threatening." As noted earlier, the county court judge mistakenly informed Kaufman that the statute did not require proof of threatening behavior. When Kaufman, who appeared pro se, was given an opportunity to question Yancer about one of her allegations, the following exchange took place:

> [Kaufman:] Debbie, what have I done to make you feel threatened?

> THE COURT: Are you talking about this January 7 letter? We're talking about threatened, the statute doesn't talk about — doesn't necessitate threaten or danger, it says harass and annoy.
>
> [Kaufman:] Your Honor, I do have the statute, I don't know if I need to review it with you, or —
>
> THE COURT: I've got the statute, too . . . . Now ask her about the January 7 letter or [the attorney's] letter to you.

After Kaufman indicated that he did not have questions specific to the attorney's letter or the e-mail the court was referring to, the county court judge proceeded to read the next allegation in the petition regarding some poetry sent by Kaufman to Yancer. At the conclusion of the hearing, the county court judge stated, "Nobody said violence was a necessary part of it. She says you're disturbing her peace and quiet, and I believe you are. I'm going to sign this protection order."

Evidence of a respondent engaging in annoying behavior, or otherwise disturbing a petitioner's peace and quiet, does not satisfy the requirements of the harassment protection order statutes which seek to protect against behaviors that seriously terrify, threaten, or intimidate. If the court is under the mistaken impression that something less than "seriously terrifie[d], threaten[ed], or intimidate[d]" is sufficient for the entry of a harassment protection order, then this is a problem capable of recurrence with persons other than Kaufman, and accordingly, the appeal warranted consideration under a public interest exception to the mootness doctrine. As noted in *Elstun v. Elstun*, 257 Neb. 820, 824, 600 N.W.2d 835, 839 (1999), "[T]he proper disposition of applications for protection orders . . . is a matter affecting the public interest."

Court's Refusal to Receive Documentary Evidence.

Another error committed by the court affecting the proper disposition of applications for protection orders that supports a public interest exception to the mootness doctrine was the court's refusal to receive documentary evidence when offered by both parties. In addition to refusing other offered evidence,

the court specifically refused to receive Yancer's petition and affidavit, and announced that it would take judicial notice of those documents instead. The following colloquy took place:

> [Yancer's counsel:] Your Honor, I'd like to offer a copy of the Petition and affidavit in full, as an exhibit to this Court, and then I have one additional exhibit I'd like to discuss at this time, since it's an additional contact since the time of —
>
> THE COURT: We're not going to do that. Somebody has alleged three different things, and we start talking . . . . It is my policy to say that she laid down three different things, and that's what we're here talking about. If we start throwing out different events or occurrences of discourse, we'll be here all day.
>
> [Yancer's counsel:] Okay, Your Honor. I just want to make sure that —
>
> THE COURT: You don't need to offer the petition. I'll take judicial notice of it; I'm reading it.

The court erred in concluding that it could consider the petition and affidavit via judicial notice. In *Sherman v. Sherman*, 18 Neb. App. 342, 781 N.W.2d 615 (2010), this court considered the sufficiency of the evidence in a harassment protection order case, and like this case, the petitioner's petition and affidavit were not received as evidence at trial. Also like this case, the trial court in *Sherman* attempted to take judicial notice of the allegations contained in the petition and affidavit. We noted that "a court may not take judicial notice of disputed facts," and therefore "the allegations contained in [the petitioner's] petition and affidavit were not evidence upon which the court could base its findings and were not properly considered by the court in making its determination." *Id.* at 348, 349, 781 N.W.2d at 621.

Similarly in this case, the court's refusal to receive the petition and affidavit precluded it from considering anything contained in those documents. The only evidence before the court was the information revealed through the testimony of Yancer and Kaufman. As noted by the majority, that testimony revealed that Yancer and Kaufman had been in a romantic relationship, and after the breakup, Kaufman continued to

communicate with Yancer through letters and poems despite a cease and desist letter sent to Kaufman by Yancer's attorney. None of these documents were received as evidence, and the parties' testimony about them failed to reveal anything seriously terrifying, threatening, or intimidating by Kaufman toward Yancer.

Accordingly, in my opinion, we should reach the merits of this appeal under the public interest exception to the mootness doctrine, and because I conclude the law was not correctly applied and the evidence was insufficient to support the entry of a harassment protection order based on the plain language of the statute, I would have reversed the order and remanded the matter with directions to vacate the protection order.

For the sake of completeness, I would further note that *Hron v. Donlan*, 259 Neb. 259, 609 N.W.2d 379 (2000), indicates that in addition to the public interest exception to the mootness doctrine, under certain circumstances, an appellate court may also entertain the issues presented by a moot case when "other rights or liabilities may be affected by the case's determination." The majority states that *Hron v. Donlan, supra*, establishes that "the Nebraska Supreme Court has clearly rejected application of the other rights or liabilities exception absent proof of collateral consequences resulting from the issuance of the protection order." However, in addressing the mootness issue as related to the respondent's "stigma" argument in the *Hron* case, the *Hron* court "recognized that even when a sentence for a criminal conviction has already been fully served, an appeal from the conviction is not moot when the defendant is subjected to 'collateral consequences' as a result of the criminal conviction." 259 Neb. at 264, 609 N.W.2d at 384. The *Hron* court then goes on to state that "this exception to the mootness doctrine is inapplicable in the present case," because the respondent "was never criminally convicted as a result of the issuance of the protection order and therefore cannot articulate any 'collateral consequences' resulting from a criminal conviction that would cause him to 'suffer future penalties or disabilities.'" *Id*. I do not read *Hron* to mean that in every protection order case, a respondent must prove that a conviction resulted from the issuance of a protection order

before a court can consider whether "other rights or liabilities may be affected by the case's determination." In my opinion, when our review of a protection order appeal reveals errors or deficiencies in the record that warrant reversal and vacation of the protection order, having such an order vacated should qualify as a "right" belonging to the respondent that should invoke this other exception to the mootness doctrine. However, the other rights or liabilities exception has not been examined by the Nebraska Supreme Court in this specific context, and an analysis of this other exception is unnecessary to the resolution of the appeal before us currently, since the public interest exception can be invoked instead.

TROY BIRD, APPELLEE, V.
BREKK BIRD, APPELLANT.

853 N.W.2d 16

Filed September 2, 2014. No. A-13-912.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Evidence: Appeal and Error.** When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Child Custody.** Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.
4. **Modification of Decree: Child Custody: Proof.** The party seeking modification of child custody bears the burden of showing a material change of circumstances affecting the best interests of a child.
5. **Child Custody.** In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must also demonstrate that it is in the child's best interests to continue living with him or her in the new location.
6. **Child Custody: Intent.** When a parent sharing joint legal and physical custody seeks to modify custody and relocate, that parent must first prove a material change in circumstances affecting the best interests of a child by evidence of a legitimate reason to leave the state, together with an expressed intention to do so.

7. **Modification of Decree: Child Custody: Proof: Intent.** Proving an intent to leave the state does not necessitate that physical custody be modified, but the intent to move illustrates the likelihood that there is a need for considering some sort of modification that would reflect the new circumstances.
8. **Child Custody.** As a practical matter, the existence of a joint physical custody relationship is likely to make it more difficult for the relocating parent to meet the burden associated with relocation.
9. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.
10. **Modification of Decree: Child Custody.** Whether an appellate court is considering a modification of custody or a proposed removal from the state, the paramount consideration is the best interests of the children.
11. **Child Custody: Visitation.** In determining whether removal to another jurisdiction is in the child's best interests, the trial court evaluates three considerations: (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent.
12. **Child Custody.** The ultimate question in evaluating the parties' motives for relocation is whether either party has elected or resisted a removal in an effort to frustrate or manipulate the other party.
13. ____. In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the children and the parent seeking removal, a court should consider the following factors: (1) the emotional, physical, and developmental needs of the children; (2) the children's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the children and each parent; (7) the strength of the children's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties. This list should not be misconstrued as setting out a hierarchy of factors. Depending on the circumstances of a particular case, any one factor or combination of factors may be variously weighted.
14. **Child Custody: Visitation.** The impact that relocation will have on contact between the child and the noncustodial parent must be viewed in light of the court's ability to devise reasonable visitation arrangements.
15. ____: ____. Generally, a reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Affirmed.

Brandie M. Fowler and Matthew Stuart Higgins, of Higgins Law, for appellant.

Troy Bird, of Bird Law Firm, pro se.

MOORE, PIRTLE, and RIEDMANN, Judges.

RIEDMANN, Judge.

I. INTRODUCTION

Brekk Bird appeals the decision of the district court for Lancaster County which denied her request to modify the parties' dissolution decree to award her sole legal and physical custody of their minor children, denied her request to remove the children from Nebraska to Utah, and granted Troy Bird's request to decide where the children would attend school. For the reasons set forth below, we affirm.

II. BACKGROUND

Troy and Brekk were married in Salt Lake City, Utah, in 2003. They moved to Nebraska in 2009 and were divorced in September 2011. Two minor children were born of the marriage: a son, Cohen Bird, born in 2008, and a daughter born in 2010. In its divorce decree, the district court for Lancaster County denied Brekk's request to remove the children from Nebraska to Utah and instead awarded the parties joint legal and physical custody, with each parent having physical custody of the children on alternating weeks. The court noted that Brekk's request to remove the children to Utah was "premature," because the parties had agreed to remain in Nebraska for the duration of Troy's law school education, of which he had 1 year remaining at that time.

In May 2012, Brekk filed a complaint for modification of the decree requesting sole legal and physical custody of the children and permission to remove the children to Utah. She alleged there had been a material change of circumstances since the entry of the decree because Troy had completed law school and she had been offered enhanced employment in St. George, Utah. Troy filed a countercomplaint seeking permanent legal custody of the minor children, as Cohen was scheduled to begin kindergarten in the fall and the parties could not agree on where he would attend school. Troy also sought primary legal and physical custody of the children, in the event that Brekk relocated to Utah.

Troy and Brekk moved to Lincoln, Nebraska, in 2009 so Troy could attend law school at the University of Nebraska. Prior to moving to Nebraska, they resided in Troy's hometown of Orem, Utah. Brekk testified that Troy wanted to attend a law school in Utah but was not able to gain admission. They made a joint decision to move to Nebraska, but planned to move back to Utah to be close to their families after Troy finished law school.

Both parties have extended family in Utah, albeit in different cities. Neither party has any relatives in Nebraska. Troy did not dispute that the parties had discussed moving back to Utah after law school; however, he testified that they had never agreed to move to St. George. Orem, where the parties resided before moving to Nebraska, is approximately 400 miles from St. George.

Brekk testified that she wanted to relocate with the children to St. George, because the majority of her family lived there, including her parents, with whom she had a very close relationship. In addition, Brekk had obtained an offer of employment to work as a substitute teacher at a crisis center and school for troubled youth in St. George. The center is a family-owned business, owned in part by Brekk's father.

According to the terms of the job offer, Brekk would work 30 to 35 hours per week at a rate of $25 per hour and receive health care, dental, and retirement benefits. She would also have the opportunity to obtain the necessary credentials to become a permanent teacher in Utah by working under the supervision of another teacher at the school. Brekk's mother would provide care for the children while Brekk was working, including transportation to and from school if necessary. In the event that Brekk's mother was not available, other relatives and close friends would be available to help care for the children.

Brekk believed that the offer of employment in St. George was far better than anything she could hope to obtain in Nebraska. After Troy and Brekk separated, Brekk moved from Lincoln to Gretna, Nebraska. She was currently employed as a substitute teacher at a school near Gretna, where she worked 10 hours every other week and earned approximately $400 per

month. However, she would not be able to continue teaching certain classes at that school the following year unless she became a certified teacher, which would require her to complete at least 1 to 2 years of additional schooling. Brekk testified that she had applied for various other positions in Omaha, Nebraska, and Lincoln, but was unable to find suitable employment that would allow her to stay home with her children every other week.

If permitted to move to St. George, Brekk and the children would live rent free in a home owned by her father that was currently for sale. Brekk would be responsible for paying the utilities, keeping the house clean, and showing the house to potential buyers. If and when that house sold, Brekk and the children could live in other homes owned by her father under the same arrangement. Brekk testified that the home had a fenced backyard in which the children could play and would be a significant improvement from her apartment in Nebraska. She believed it would improve the quality of life for herself and her children.

Brekk researched and submitted applications for three possible schools for Cohen to attend in St. George, including a charter school that emphasized technology and performing arts. Brekk testified that it was the top-rated charter school in St. George and that she believed it offered a much better education than public schools. Brekk wanted Cohen to attend school there, but stated that she would be willing to discuss all three schools with Troy.

Brekk offered a calendar from the charter school with all of the school holidays and surrounding weekends highlighted. She explained that those were all of the days that Cohen would be available to have visitation with Troy. According to this calendar, Cohen would have approximately 45 days during the school year that he could spend with Troy, not including travel time, plus 12 weeks during the summer. Brekk testified that she would be willing to split Troy's travel expenses and accommodate his visitations with the children in Utah.

Brekk believed her financial circumstances would be greatly improved if she were permitted to relocate to St. George. Currently, Brekk was reliant on financial support from her

father in the amount of $25,000 to $30,000 per year, as well as public assistance for food and medical care for herself and the children. Relocating to St. George would allow her to earn a substantially higher wage while having access to rent-free housing and free daycare for the children.

Troy admitted that he had not made any attempts to obtain employment in St. George or the surrounding areas. He testified that he did not want to live in St. George, because it is a "small town" in which Brekk's father is "well known," and that he believed his career opportunities would be limited there. Additionally, Troy was not eligible to practice law in Utah, and he testified that he intended to continue practicing law in Nebraska.

Troy opened his own law practice in Lincoln in November 2012. Although it was slow in the beginning, Troy testified that his business was growing and that he continued to add new clients on a regular basis. The evidence showed that from January through June 2013, his firm earned approximately $10,500. After deducting the firm's expenses, however, its net income was approximately $5,600 over those 6 months.

Troy admitted that he was not currently able to support himself and his children on his own, but he stated that he was getting closer each month. He relied on financial support of $1,200 to $1,800 per month from his parents and $200 per month in public food assistance. Nonetheless, he believed his firm was doing well for having been open for only 8 months, and he expected his monthly gross income to reach $4,000 to $5,000 by the end of the year.

Troy managed his work schedule in such a way as to maximize his time with his children. He worked only 10 to 15 hours during the weeks that he had the children, and he then worked extra hours during the weeks that the children were with Brekk. If he had to work or attend a hearing during his parenting time, he had friends and church members that were available to watch the children.

Troy testified that the alternating weekly custody arrangement was working well and that the children were accustomed to it. Ideally, he would like Brekk to move to Lincoln so that they could continue the shared custody arrangement and

avoid transporting Cohen back and forth between Lincoln and Gretna for school each day. Troy testified that there was no reason Brekk could not relocate to Lincoln. Brekk admitted that there was no employment that prevented her from leaving Gretna and that she could move to Lincoln.

Troy testified that he was requesting legal custody due to concerns about Brekk's ability to make decisions for the children, particularly regarding school. He explained that Cohen would be starting kindergarten the following month and that he and Brekk were unable to agree on a school for Cohen to attend. Troy believed it would be best for Cohen to attend school in Lincoln; however, he stated that if granted sole legal custody, he would be happy to consider Brekk's opinion on the matter. Brekk wanted Cohen to attend the charter school in Utah. She testified that she had visited a school near her apartment in Gretna, but she did not indicate whether she desired or was willing to send Cohen to school there.

Troy did not believe it would be in the children's best interests to move to Utah, because they have a very close bond with both parents and he believed it would be very difficult on them to go long periods of time without seeing one parent or the other. Brekk acknowledged that she and Troy were the two most important people in the children's lives and that the children's time with Troy would be diminished if they moved to Utah. She further stated that she did not think it was the ideal situation, but that it was "the best [they had] right now."

Both parents agreed that hostilities between them would not be significantly affected if Brekk were allowed to move to Utah with the children. Brekk believed that she and Troy would be able to "figure it out" whether she stayed in Nebraska or moved to Utah. She believed Troy loved their children and that no matter where they lived, Troy would make an effort to see them.

The district court entered an order of modification on September 19, 2013. It found that a material change in circumstances had occurred and that Brekk had demonstrated a legitimate reason for leaving Nebraska. However, it denied her request to remove the children to Utah, based on its finding

that removal would not be in the best interests of the children. The court further found that it was in Cohen's best interests to attend school in Lincoln, and it awarded Troy the authority to decide where the child would attend school in Lincoln. Brekk timely appeals.

III. ASSIGNMENTS OF ERROR

Brekk assigns that the district court erred in (1) determining that removal of the minor children from the jurisdiction was not in their best interests; (2) determining that Troy's motives for opposing removal did not appear to be spiteful, vindictive, or improper; (3) finding that the emotional, physical, and developmental needs of the children would not be enhanced by a move to Utah; (4) determining that the quality of life for the minor children would not be substantially different in Utah; (5) failing to consider a reasonable visitation schedule for Troy which would afford Brekk the ability to relocate with the children; and (6) determining that Troy should be granted the authority to determine the school district of the minor children.

IV. STANDARD OF REVIEW

[1] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Watkins v. Watkins*, 285 Neb. 693, 829 N.W.2d 643 (2013).

[2] When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Keig v. Keig*, 20 Neb. App. 362, 826 N.W.2d 879 (2012).

V. ANALYSIS

1. Modification of Custody and Removal From Jurisdiction

Brekk's first five assignments of error allege various reasons the district court erred in determining that removal of the children from Nebraska to Utah was not in their best interests.

Because these assignments of error are related, we will address them together. We begin our analysis by setting forth the general propositions of law that apply to modifications of child custody and requests for removal, followed by the specific propositions that apply in cases where the parent seeking removal is not the sole custodial parent but instead shares joint legal and physical custody with the other parent.

[3,4] Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000). The party seeking modification of child custody bears the burden of showing such a change of circumstances. See *id*.

[5] In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. *Steffy v. Steffy*, 287 Neb. 529, 843 N.W.2d 655 (2014). After clearing that threshold, the custodial parent must also demonstrate that it is in the child's best interests to continue living with him or her in the new location. *Id*.

[6,7] The application of these standards is slightly different in cases where, as here, the parent seeking removal does not have sole custody. When a parent sharing joint legal and physical custody seeks to modify custody and relocate, that parent must first prove a material change in circumstances affecting the best interests of a child by evidence of a legitimate reason to leave the state, together with an expressed intention to do so. See *Brown v. Brown, supra*. Proving such an intent does not necessitate that physical custody be modified, but the intent to move illustrates the likelihood that there is a need for considering some sort of modification that would reflect the new circumstances. *Id*.

[8] Once the party seeking modification has met this threshold burden, the separate analyses of whether custody should be modified and whether removal should be permitted necessarily become intertwined. *Id*. The question becomes whether the best interests of the child are furthered by the relocating parent's obtaining sole physical custody and moving the child

out of state. See *id*. As a practical matter, the existence of a joint physical custody relationship is likely to make it more difficult for the relocating parent to meet the burden associated with relocation. *Id*.

(a) Legitimate Reason to Leave State

The district court found that Brekk had a legitimate reason for leaving the state. On appeal, neither party assigns error with respect to this determination.

We note that in *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000), the Nebraska Supreme Court held that the threshold question of whether a party seeking removal has a legitimate reason to leave the state must be analyzed first, before considering whether removal is in the child's best interests. However, more recently, in *Steffy v. Steffy, supra*, the court declined to address whether there was a legitimate reason for relocation because its holding on best interests was dispositive.

[9] In the present case, because this issue is not assigned as error and our analysis on best interests is dispositive of our decision to affirm the denial of Brekk's request for removal, we need not address whether Brekk had a legitimate reason for leaving the state. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *In re Interest of Nicole M.*, 287 Neb. 685, 844 N.W.2d 65 (2014).

(b) Best Interests of Children

[10,11] Whether we are considering a modification of custody or a proposed removal from the state, the paramount consideration is the best interests of the children. See *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000). In determining whether removal to another jurisdiction is in the child's best interests, the trial court evaluates three considerations: (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child

and the noncustodial parent. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002). We will address each of these considerations in turn.

(i) Each Parent's Motives

[12] The ultimate question in evaluating the parties' motives is whether either party has elected or resisted a removal in an effort to frustrate or manipulate the other party. *Id*. Based on our review of the record, we find no evidence that either party has acted in bad faith.

Brekk's primary motive in seeking removal is to be near her parents and extended family in Utah. She has no family and few friends in Nebraska. Brekk agreed to move to Nebraska only temporarily while Troy attended law school, and she never agreed or intended to reside in Nebraska permanently. We find that her desire to return to Utah is reasonable and genuine, and is not based on a desire to interfere with Troy's custody rights or any other ulterior motive.

Troy's desire to remain in Nebraska is based on the fact that he has invested time and resources in developing professional contacts in Nebraska and has opened his own law practice, which he believes will become more profitable in the near future. In order to practice law in Utah, Troy would have to prepare for and pass the Utah bar examination and essentially start over with his legal career in Utah. He has a close relationship with his children, which would be significantly impacted if the children were removed from Nebraska. Thus, Troy's motives for resisting removal do not appear to be spiteful or vindictive, but based on his desire to have a continuing relationship with his children.

We find that both parents have valid reasons for their respective positions on the removal of the children from Nebraska to Utah. As such, their motives do not weigh in favor of or against removal.

(ii) Quality of Life

[13] In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the children and the parent seeking removal, a court should

consider the following factors: (1) the emotional, physical, and developmental needs of the children; (2) the children's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the children and each parent; (7) the strength of the children's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties. *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000). This list should not be misconstrued as setting out a hierarchy of factors. *Id*. Depending on the circumstances of a particular case, any one factor or combination of factors may be variously weighted. *Id*.

We find that both Troy and Brekk are equally capable of meeting the emotional, physical, and developmental needs of the children. Other than the potential for the children to develop relationships with their extended families in Utah, there is no evidence that their emotional, physical, or developmental needs could be better served by relocating to Utah with Brekk. In fact, the evidence shows that the children have a strong bond with both Troy and Brekk and that the children have become accustomed to spending alternating weeks with each parent. We conclude that maintaining a quality relationship with both parents will provide a greater benefit to the children than living in close proximity to extended family members in Utah with whom they may form a bond. Thus, we find the first and sixth factors of the quality-of-life consideration weigh against removal.

We are unable to determine whether Brekk's employment or income would be enhanced by relocating to St. George, because she has made no effort to secure comparable employment in Nebraska. The terms of the job offer in St. George require her to work weekdays from approximately 9 a.m. to 4 p.m. for a total of 30 to 35 hours per week. Significantly, Brekk testified that she was not willing to accept employment in Nebraska unless it allowed her to stay home with

her children every other week. In other words, even if this very same job offer and salary were available to Brekk in Nebraska, she would not accept it. We therefore conclude that Brekk's lower income and lack of employment opportunities in Nebraska are directly related to her unwillingness to accept comparable employment in Nebraska. This factor does not weigh in favor of removal.

We find that the living conditions for Brekk and the children would be improved in St. George, insofar as they would be living in a very comfortable home with a fenced backyard, rather than a small apartment. However, Brekk's father intends to sell the house that Brekk and the children would be living in, and once it is sold, they would have to move into another home that her father desires to sell. This perpetual "house sitting" arrangement would not provide a permanent home for the children. Brekk's alternative housing plan was to rent an apartment similar to her apartment in Nebraska, which would not be a significant improvement in housing. Overall, we find this factor to be neutral and give it little weight in our de novo review.

We find no evidence to suggest that relocating to St. George would offer educational advantages to the children. Brekk testified extensively regarding the educational opportunities at the charter school to which Cohen had been accepted in St. George. However, there was no evidence presented to show that the schools in Nebraska were inferior to that school in any way. This factor does not weigh in favor of removal.

There is no indication that allowing or denying the move would antagonize hostilities between the two parties. Troy testified that allowing the move would not make a significant difference in hostilities between them. Brekk agreed that she and Troy would be able to work together regardless of whether she relocated to Utah or stayed in Nebraska. This factor appears to be neutral, and it does not merit much weight in our de novo review.

Upon considering all of the relevant factors, we agree with the district court's conclusion that there is little evidence to suggest that the children's quality of life would be significantly improved in Utah. Any potential advantages associated

with relocating to Utah are clearly outweighed by the harm of separating the children from Troy. Thus, we find that the overall quality-of-life consideration weighs against removal.

(iii) Impact on Noncustodial Parent's Visitation

[14,15] The final consideration in the best interests analysis is the impact such a move will have on contact between the children and the noncustodial parent. This effect must be viewed in light of the court's ability to devise reasonable visitation arrangements. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002). Generally, a reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent. *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). Of course, the frequency and the total number of days of visitation and the distance traveled and expense incurred go into the calculus of determining reasonableness. *Id*. The determination of reasonableness is to be made on a case-by-case basis. *Steffy v. Steffy*, 287 Neb. 529, 843 N.W.2d 655 (2014).

Although Brekk appears to be in favor of Troy's having extensive visitation with the children during school holidays and summers, there is little doubt that allowing removal would have a significant adverse impact on the children's relationship with Troy. Brekk's proposed visitation arrangement, based on Cohen's school schedule, would allow the children to spend approximately 45 days with Troy during the 9-month school year, plus 12 weeks during the summer. We find it highly unlikely that Troy would be able to spend all of those days with his children each year due to the necessary travel time and the likelihood of some scheduling conflicts with Troy's practice. Furthermore, it does not appear that either party currently has the ability to pay the travel expenses necessary to accommodate all of these visits.

Even absent any issues with scheduling or travel expenses, this arrangement would drastically reduce the amount of time that Troy currently spends with his children. The children are accustomed to spending every other week with Troy and

have developed a close bond with him. Given the distance between Nebraska and Utah and the fact that the children will be attending school, we do not believe a reasonable visitation arrangement could be devised that would provide a satisfactory basis for preserving and fostering the children's relationship with Troy. Therefore, this consideration weighs against removal.

(iv) Conclusion on Best Interests

We agree with the district court's conclusion that the shared custody arrangement set forth in the parenting plan continues to be in the best interests of the children. Troy and Brekk have been alternating physical custody of the children every other week for at least a year, and there is no evidence that this arrangement was not working. Because Brekk was the one seeking a modification of custody and permission to remove the children from Nebraska, it was her burden to establish that doing so would be in the children's best interests, which she has failed to do. Therefore, we conclude that the trial court did not err in denying Brekk's request for modification of custody and permission to remove the children to Utah. Brekk's first through fifth assignments of error are without merit.

2. Choice of School

For her final assignment of error, Brekk asserts that the district court erred in granting Troy the authority to determine the school of the minor children. We agree with the district court's conclusion that it was in Cohen's best interests to attend school in Lincoln, rather than Gretna.

The evidence at trial established that Cohen was scheduled to begin kindergarten the following month, but the parties were unable to agree on where he would attend school. Troy testified that it would be in Cohen's best interests to attend a public school in Lincoln, but Brekk desired for Cohen to attend a charter school in St. George. The charter school in Utah is no longer a viable option, in light of our decision that removing the children to Utah would not be in their best interests. With respect to where Cohen should attend school in Nebraska,

Brekk presented no opinion on the matter at trial. She testified generally that she had looked into an elementary school in Gretna, but she never indicated that she wanted Cohen to attend school there.

The evidence shows that the parties agreed to move to Lincoln and resided there together until they separated, at which point Brekk moved to Gretna. Troy has a developing law practice in Lincoln, while Brekk has no employment tying her to Gretna. In fact, Brekk acknowledged that there was no reason she could not relocate to Lincoln. Given these facts, we find that there is a greater potential for permanency in Lincoln, as opposed to Gretna.

Because the parties could not agree on where Cohen would attend school, the court made the decision that it was in Cohen's best interests to attend school in Lincoln, and the court allowed Troy to determine which specific school Cohen would attend. We find no abuse of discretion in this decision.

VI. CONCLUSION

The district court did not err in determining that removal of the children from Nebraska to Utah would not be in the children's best interests and that it would be in Cohen's best interests to attend school in Lincoln. We affirm the district court's judgment in all respects.

AFFIRMED.

IN RE INTEREST OF SETH K. AND DINAH K., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. DEBORAH P., APPELLANT.

853 N.W.2d 217

Filed September 2, 2014. No. A-14-002.

1. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.

2. **Parental Rights: Evidence: Proof.** A court will terminate a parent's natural right to the custody of his or her child when the two requirements of Neb. Rev. Stat. § 43-292 (Cum. Supp. 2012) have been met: First, there must be clear and convincing evidence of one of the conditions prescribed in subsections (1) through (11) of § 43-292, and second, there must be an additional showing that termination of parental rights is in the child's best interests by clear and convincing evidence.
3. **Evidence: Proof: Words and Phrases.** Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proven.
4. **Parental Rights: Words and Phrases.** A termination of parental rights is a final and complete severance of the child from the parent and removes the entire bundle of parental rights; therefore, given such severe and final consequences, parental rights should be terminated only in the absence of any reasonable alternative and as the last resort.
5. **Parent and Child.** The law does not require perfection of a parent; instead, courts should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child.

Appeal from the Separate Juvenile Court of Douglas County: DOUGLAS F. JOHNSON, Judge. Reversed and remanded for further proceedings.

Anne E. Troia, P.C., L.L.O., for appellant.

Donald W. Kleine, Douglas County Attorney, and Amy Schuchman for appellee.

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

IRWIN, Judge.

I. INTRODUCTION

Deborah P. appeals from the order of the juvenile court which terminated her parental rights to her two children. On appeal, Deborah challenges the juvenile court's findings that her parental rights should be terminated pursuant to Neb. Rev. Stat. § 43-292(2) (Cum. Supp. 2012) and that termination of her parental rights is in the children's best interests. Upon our de novo review of the record, we reverse the juvenile court's order which terminated Deborah's parental rights. We do not find clear and convincing evidence that termination of Deborah's parental rights is in the children's best interests.

II. BACKGROUND

These juvenile court proceedings involve two children: Seth K., born in July 2009, and Dinah K., born in December 2010. Deborah is the children's biological mother. The children's biological father, Matthew K., is not a party to this appeal. His parental rights to both children were terminated by the juvenile court during previous proceedings. As such, Matthew's involvement in the children's lives will be discussed only to the extent necessary to provide context.

The current juvenile court proceedings were initiated in March 2013. However, this is not the first time that the family has been involved in the juvenile court system. The family's history with the juvenile court is relevant to the current proceedings because such history provides insight into Deborah's ability to independently parent the children. As a result, we briefly recount that history here.

In September 2009, Seth, who was then about 2 months old, was removed from Deborah and Matthew's home after Matthew admitted to subjecting Seth to inappropriate physical contact which resulted in a fracture to Seth's arm and bruising on his ankles. As a result of Matthew's actions and Deborah's failure to protect Seth from Matthew's actions, Seth was adjudicated as a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) and placed in foster care. While the juvenile court proceedings were still pending, Dinah was born. Immediately after her birth, Dinah was removed from Deborah and Matthew's custody and placed in foster care with Seth.

Shortly after Dinah's birth, the juvenile court terminated Matthew's parental rights to both Seth and Dinah. At this time, Deborah and Matthew were, apparently, no longer residing together. The juvenile court and the Department of Health and Human Services (the Department) continued to assist Deborah in obtaining reunification with the children. Deborah was provided with various services, including those of a family support worker, individual therapy, parenting classes, domestic violence classes, and supervised visitation with the children.

In April 2012, Seth and Dinah were returned to Deborah's home, and a few months later, in September 2012, the juvenile court case involving the family was closed. At that time, Deborah declined any further services from the Department to assist her with the children.

In January 2013, approximately 4 months after the previous juvenile court case was closed, the Department received information that Deborah's home was unsanitary and inappropriate for the children. Department workers visited Deborah's home and observed that the house was very dirty and cluttered and had a strong odor. In addition, the workers observed a baggie of marijuana on Deborah's couch. This baggie was within the reach of Seth and Dinah. Deborah admitted to the workers that she was struggling and needed help caring for the children. She also admitted that she used marijuana on a daily basis.

As a result of the condition of Deborah's home and her admission that she was struggling, the Department created a safety plan to assist Deborah. As a part of this plan, the children were temporarily placed in the care of their paternal grandparents while Deborah cleaned up her home. A few days later, after Deborah cleaned the home, Seth and Dinah were returned to Deborah's care. At that point, Deborah agreed to allow the children's paternal grandparents to assist her in taking care of the children and agreed to participate in such services as intensive family preservation, a pretreatment assessment, and a chemical dependency evaluation.

Shortly after this safety plan was initiated, Deborah was evicted from her home due to nonpayment of rent. A new safety plan was then created. Deborah and the children moved in with the children's paternal grandparents. Deborah agreed that she would continue to voluntarily participate in services to assist her with her parenting and with her substance abuse problem.

In March 2013, Deborah was asked to leave the home of the children's paternal grandparents because the grandparents believed that she was not properly caring for the children when she was not working. Deborah would not get up

with the children in the mornings and often would not come home on the weekends after her work shift ended. Deborah left the home, but Seth and Dinah remained with their grandparents.

On March 20, 2013, the State filed a petition alleging that the children were within the meaning of § 43-247(3)(a) due to the faults or habits of Deborah. Specifically, the petition alleged that the children were at risk for harm because of, among other things, Deborah's use of alcohol or controlled substances and Deborah's failure to provide safe, stable, or appropriate housing.

After the petition was filed, the juvenile court entered an order continuing the children's placement outside of Deborah's home. The children remained in the home of their paternal grandparents. In this same order, the court "invited" Deborah to voluntarily participate in the following services: supervised visitation with the children, parenting classes, intensive outpatient substance abuse treatment, random drug testing, family support, and a psychological evaluation.

On April 29, 2013, the State filed an amended petition. This petition again alleged that the children were within the meaning of § 43-247(3)(a) due to the faults or habits of Deborah. However, the amended petition also alleged provisions concerning termination of Deborah's parental rights to Seth and Dinah. Specifically, the amended petition alleged that the children were within the meaning of § 43-292(2) because Deborah had substantially and continuously or repeatedly neglected and refused to provide the children necessary parental care or protection and that termination of Deborah's parental rights was in the children's best interests.

A hearing on the State's amended petition began in August 2013 and continued in December. During the first portion of the hearing, the State presented its case about Deborah's parenting abilities and her minimal efforts to achieve reunification with the children. Then, 4 months later, during the second portion of the hearing, Deborah presented her case about the recent progress she had made toward reunification and about her bond with the children.

1. State's Evidence

During the August 2013 hearing, the State presented evidence to demonstrate that Deborah was not making sufficient efforts to take care of herself or improve her circumstances and, as such, was not making sufficient efforts to obtain reunification with the children.

The State presented evidence that between March and August 2013, Deborah did not make any effort toward managing her substance abuse or mental health issues. She did not enroll in any type of treatment program, she did not participate in an individual therapy program, she did not participate in a Narcotics Anonymous group, and she was not compliant with drug testing. In fact, the State offered evidence to indicate that during this period of time, on the few occasions that Deborah had submitted to a drug test, she tested positive for marijuana four times. Deborah stopped submitting to any drug tests in June 2013.

The State presented evidence that at the time of the August 2013 hearing, Deborah was not employed. In fact, there was evidence that Deborah had lied to the Department workers about having employment, when she was actually unemployed. In August 2013, Deborah was living with her boyfriend and his two children in a two-bedroom apartment. The family's caseworker testified that this housing was problematic for two reasons: First, there was "no room for" Seth and Dinah to live there with Deborah. Second, Deborah did not want the Department to perform a background check on her boyfriend, so the children were not permitted to have any contact with him.

The State presented evidence that initially, in March 2013, Deborah did not want to participate in supervised visitations with the children. Deborah indicated that she did not have time for such visitations and that she did not want to see the children if someone was going to be watching her. There was also evidence that when Deborah did decide to participate in visitations, she managed the children appropriately for short periods of time; however, she could not care for the children for longer periods of time.

The Department caseworker testified that during their lives, both Seth and Dinah had spent more time in foster care than they had with Deborah. The caseworker also opined that Deborah was in a worse place in August 2013 than she had been in when the case was initiated in March 2013.

2. Deborah's Evidence

In December 2013, Deborah presented evidence that she had made beneficial progress toward achieving reunification with the children and that she had a strong bond with the children.

Deborah's evidence revealed that during the fall of 2013, she successfully completed an intensive outpatient treatment program for her substance abuse. Deborah's treating therapist testified that Deborah attended and actively participated in her program. In addition, Deborah completed a relapse prevention program and passed all of the drug tests given to her during the program. The same therapist testified that Deborah's prognosis was "excellent."

Deborah also presented evidence to demonstrate that by the time of the December 2013 hearing, she had acquired full-time employment. This employment provided Deborah with benefits.

Finally, Deborah presented evidence that she had successfully completed a parenting class in August 2013 and that her parenting skills had improved after that class. Visitation workers who supervised visits between Deborah and the children testified that Deborah was attentive to the children and would develop and implement age-appropriate activities for the children during visits. Deborah also had appropriate meals and "supplies" for the children, and the children appeared to love Deborah very much. Both Seth and Dinah were happy to see Deborah during visits, and Deborah was very affectionate with them.

At the close of all the evidence, the juvenile court entered an order finding that "all counts of the amended petition" filed herein "are true . . . by clear and convincing evidence." The court adjudicated Seth and Dinah to be within the meaning of § 43-247(3)(a) as a result of the faults or habits of Deborah.

The court also found that Seth and Dinah were within the meaning of § 43-292(2) and that termination of Deborah's parental rights was in their best interests. The court then terminated Deborah's parental rights to Seth and Dinah.

Deborah appeals from the juvenile court's order.

III. ASSIGNMENTS OF ERROR

On appeal, Deborah challenges the juvenile court's finding that her parental rights should be terminated pursuant to § 43-292(2) and the court's finding that termination of her parental rights is in the children's best interests.

IV. STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006). When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *Id.*

V. ANALYSIS

[2,3] A court will terminate a parent's natural right to the custody of his or her child when the two requirements of § 43-292 have been met. See *In re Interest of Crystal C.*, 12 Neb. App. 458, 676 N.W.2d 378 (2004). First, there must be clear and convincing evidence of one of the conditions prescribed in subsections (1) through (11) of § 43-292, and second, there must be an additional showing that termination of parental rights is in the child's best interests by clear and convincing evidence. See *In re Interest of Crystal C., supra*. Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proven. See *In re Interest of Jagger L., supra*.

In this case, the juvenile court determined that both of the requirements of § 43-292 had been met. The court found that Seth and Dinah were within the meaning of § 43-292(2) because Deborah had substantially and continuously or repeatedly neglected and refused to give them necessary parental

care and protection. The court also found that termination of Deborah's parental rights was in the children's best interests.

On appeal, Deborah asserts that both of these findings of the juvenile court were in error. We first address her assertions concerning whether the juvenile court erred in determining that termination of her parental rights was in the children's best interests, because our ultimate resolution of this issue is dispositive of Deborah's appeal.

Deborah asserts that the juvenile court erred in determining that termination of her parental rights was in the best interests of the children. Specifically, Deborah argues that she has made progress toward reunification with the children, that she has a strong bond with the children, and that she is willing to continue to work to become a better parent.

Upon our review of the record, we conclude that Deborah's assertions have merit. We find insufficient evidence to demonstrate that terminating Deborah's parental rights to Seth and Dinah is in the children's best interests. As such, we reverse that portion of the juvenile court's order which terminated Deborah's parental rights to these two children.

[4,5] A termination of parental rights is a final and complete severance of the child from the parent and removes the entire bundle of parental rights; therefore, given such severe and final consequences, parental rights should be terminated only in the absence of any reasonable alternative and as the last resort. See, *In re Interest of Justin H. et al.*, 18 Neb. App. 718, 791 N.W.2d 765 (2010); *In re Interest of Crystal C., supra*. The law does not require perfection of a parent; instead, courts should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child. *Id.*

The current juvenile court proceedings were initiated in March 2013 when the State filed a petition alleging that the children were within the meaning of § 43-247(3)(a) as a result of the faults or habits of Deborah. However, 1 month after the initial petition was filed and before the children could even be adjudicated pursuant to that petition, the State filed an amended petition which included allegations that Deborah's parental rights should be terminated. Four months after the

amended petition was filed, the hearing on the amended petition began. The hearing was both an adjudication proceeding and a termination proceeding.

At the August 2013 hearing, the State presented evidence that since March 2013, when the initial petition was filed, Deborah had not made sufficient efforts toward achieving reunification with the children. Deborah had not made any effort toward managing her substance abuse or mental health issues. Specifically, she had not enrolled in a treatment program, she had not participated in therapy, and she was not compliant with requested drug testing. Deborah was not employed and did not have suitable housing for the children. Deborah also exhibited an inability to appropriately care for Seth and Dinah for extended periods of time.

During the State's case, it conceded that because Seth and Dinah had not yet been adjudicated at the time of the August 2013 hearing, Deborah's participation in any of the services offered to her was entirely voluntary. She had not yet been ordered by the court to participate in any specific rehabilitation plan.

The hearing on the amended petition continued in December 2013. At that time, Deborah presented evidence that she had made substantial progress toward achieving reunification with the children and that she had a strong bond with the children. Deborah presented evidence that during the fall of 2013, she successfully completed an intensive outpatient treatment program for her substance abuse. As a part of that program, Deborah cooperated with and passed regular drug tests. Deborah's prognosis for maintaining her sobriety was considered "excellent." Deborah had obtained full-time employment, and such employment provided Deborah with benefits. In addition, Deborah had completed a parenting class in August 2013 and was successfully applying the lessons she learned from this class to her interactions with Seth and Dinah. Visitation workers who supervised visits between Deborah and the children testified that Deborah was good with the children, always had fun activities for the three of them to engage in together, and always provided the children with appropriate food and other supplies. In addition, these

workers observed a bond between Deborah and the children. The children appeared to enjoy spending time with Deborah, and the family members exhibited a lot of affection with each other.

Clearly, the evidence presented by Deborah at the December 2013 portion of the hearing is in stark contrast to the evidence presented by the State at the August portion of the hearing. The reason for such a disparity in the evidence appears to be due to Deborah's failure to make sufficient efforts toward reunification in the early stages of the juvenile court proceedings. However, we must note that only 5 months passed between the filing of the initial petition and the August hearing. And, we must also note that during those 5 months, Deborah's participation in any sort of rehabilitation plan was considered voluntary. As such, we find Deborah's situation distinguishable from those cases where last-minute attempts by parents to comply with a rehabilitation plan did not prevent termination of parental rights. See, e.g., *In re Interest of Kassara M.*, 258 Neb. 90, 601 N.W.2d 917 (1999) (last-minute efforts of mother were not sufficient to prevent termination where 2½ years passed between initial rehabilitation plan order and termination proceedings); *In re Interest of V.M.*, 235 Neb. 724, 457 N.W.2d 288 (1990) (last-minute efforts of mother were not sufficient to prevent termination where child had been in out-of-home placement for over 2½ years).

When we view as a whole the evidence presented at both the August and December 2013 portions of the hearing, we conclude that Deborah has made notable progress toward achieving reunification with the children. She has made active efforts toward taking care of herself and improving her circumstances and, in addition, has made efforts to improve her parenting skills and her relationship with the children. Deborah clearly loves the children, and the children love Deborah.

In its brief on appeal and during oral arguments, the State dismissed Deborah's recent efforts toward reunification as inconsequential because Deborah has exhibited a pattern of making progress when she is involved with the juvenile court and then reverting back to harmful behavior once there is

no longer court involvement. Clearly, the State's argument references the previous juvenile court proceedings involving Deborah and the children. During that previous case, Deborah successfully achieved reunification with Seth and Dinah, but then, approximately 4 months after the case was closed, the Department began receiving reports that Deborah was neglecting the children. The State argues that Deborah is simply unable to sustain the progress she has made when not under the constant supervision of the juvenile court.

We recognize that "'one's history as a parent speaks to one's future as a parent.'" See *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 908, 782 N.W.2d 320, 328 (2010). However, one's history does not alone determine his or her future. Deborah's past involvement with the juvenile court system is relevant to her ability to appropriately and effectively parent the children and, accordingly, relevant to the children's best interests. Nevertheless, in this case, we do not find that Deborah's past history with the juvenile court is dispositive of her future as a parent.

There is no evidence to suggest that the improvements Deborah has made during the pendency of the current juvenile court proceedings are only temporary in nature. Deborah's prognosis for maintaining her sobriety is considered excellent. She worked to obtain stable, full-time employment. And, after completing her parenting class, she has consistently utilized positive and appropriate parenting skills with the children. Deborah appears motivated and committed to achieving and maintaining reunification with the children. We cannot assume that she will revert to her previous, harmful behaviors if given the chance simply because this has happened once before. As we stated above, we cannot turn a blind eye to the severe consequences of finally and completely severing a child from the parent. See *In re Interest of Crystal C.*, 12 Neb. App. 458, 676 N.W.2d 378 (2004).

We appreciate that Deborah still has work to do before achieving reunification with Seth and Dinah. In particular, we point to the need for Deborah to obtain appropriate and safe housing and the requirement that she demonstrate the ability to maintain her sobriety and stability. However, we do not

require perfection of a parent when deciding whether termination of parental rights is appropriate.

We conclude that there is insufficient evidence to prove that termination of Deborah's parental rights to Seth and Dinah is in the children's best interests. We reverse that portion of the juvenile court's order which terminated Deborah's parental rights to Seth and Dinah.

VI. CONCLUSION

We find that the juvenile court erred when it found that the State had proven, by clear and convincing evidence, that terminating Deborah's parental rights would be in Seth's and Dinah's best interests. Accordingly, we reverse that portion of the juvenile court's order which terminated Deborah's parental rights and remand the matter for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CIZEK HOMES, INC., APPELLEE, V. COLUMBIA NATIONAL INSURANCE COMPANY, APPELLANT.

853 N.W.2d 28

Filed September 9, 2014. No. A-13-585.

1. **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.
2. **Summary Judgment: Final Orders: Appeal and Error.** When adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as the court deems just.
3. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy presents a question of law that an appellate court decides independently of the trial court.
4. **Insurance: Contracts.** To determine whether coverage exists under an insurance policy, the first determination is whether there is an initial grant of coverage for the claimed loss. If so, it must then be determined whether any exclusion applies.

5. **Insurance: Contracts: Liability: Pleadings.** Coverage under an insurance policy contains two obligations—the duty to defend and the duty to indemnify. The duty to defend is broader than the duty to indemnify, and in the first instance, it is measured by the allegations of the complaint against the insured.
6. ____: ____: ____: ____. To determine whether a duty to defend exists, an insurer must investigate and discover the relevant facts, in addition to looking at the allegations of the complaint. An insurer bears a duty to defend whenever it ascertains facts which give rise to the potential of liability under the policy.
7. **Insurance: Contracts: Liability.** Faulty workmanship, standing alone, is not an occurrence under a standard commercial general liability policy.
8. **Insurance: Contracts: Pleadings.** When the allegations of the complaint support a conclusion that no insurance coverage exists, and in the absence of any other facts which would support an inference of coverage, an insurer has no duty to defend or indemnify an insured.
9. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Reversed and remanded with directions.

John C. Brownrigg, Heather B. Veik, and Thomas J. Culhane, of Erickson & Sederstrom, P.C., L.L.O., for appellant.

John D. Stalnaker and Robert J. Becker, of Stalnaker, Becker & Buresh, P.C., for appellee.

IRWIN, MOORE, and RIEDMANN, Judges.

RIEDMANN, Judge.

INTRODUCTION

Columbia National Insurance Company (Columbia) appeals from the order of the Douglas County District Court denying its motion for summary judgment and entering judgment in favor of Cizek Homes, Inc. (Cizek). Finding that the claims settled did not arise out of an "occurrence" as that term is defined in Columbia's commercial general liability (CGL) policy issued to Cizek, we reverse, and remand with directions to enter judgment in favor of Columbia.

BACKGROUND

Underlying Claim.

Cizek is a building contractor that has been in the home building business for nearly 40 years. In 1995, Cizek

purchased a parcel of real estate known as Lot 75. In 2003, Cizek sold Lot 75 to Carl and Zoe Riekes and constructed a residence thereon. In 2006, the Riekeses notified Cizek that the soil beneath the residence was settling and causing physical damage to their residence. Cizek monitored the settling, and in June 2007, an engineer determined that the settling had ceased.

During this process, Cizek notified Columbia, its insurance carrier, of the claim. Columbia denied any coverage associated with the Riekeses' claim for damage to the residence. When the Riekeses decided on a method of repairing the damage to their home, they presented a settlement agreement to Cizek to complete the repairs, and in the event Cizek did not agree to complete the repairs, the Riekeses presented a draft complaint that they intended to file against Cizek for breach of contract and negligence. The draft complaint contained allegations that negligence and faulty workmanship had purportedly caused the damage to the home.

Cizek reached a settlement with the Riekeses prior to the filing of the underlying complaint, and it completed the repairs to their home. In the settlement agreement, the parties described the Riekeses' claim as one "for damages to the Residence due to soil conditions and/or improper construction of the Residence by [Cizek], which claims [Cizek] denies." Cizek submitted the claim to Columbia, which again denied coverage for the cost of the repairs, claiming that the damages did not arise from an "occurrence" as that term was defined in the CGL policy.

Policy Terms.

According to the terms of the CGL policy, Columbia agreed to "pay those sums that [Cizek] becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." The insurance applies to "'bodily injury'" or "'property damage'" only if the "'bodily injury'" or "'property damage'" is caused by an "'occurrence'" that takes place in the "'coverage territory.'" The policy defines "'[o]ccurrence'" as "an accident, including

continuous or repeated exposure to substantially the same general harmful conditions."

The policy also included an exclusion entitled "Recall Of Products, Work Or Impaired Property." This provision excluded coverage for the following:

> Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:
>
> **(1)** "Your product";
>
> **(2)** "Your work"; or
>
> **(3)** "Impaired property";
>
> if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

Under the policy, the definition of the term "your product" includes any goods or products, other than real property, manufactured, sold, handled, distributed, or disposed of by Cizek. The definition of the term "your work" includes work or operations performed by Cizek or on Cizek's behalf.

Declaratory Judgment Action.

Based on Columbia's denial of coverage, Cizek filed a declaratory judgment action in the district court. In its complaint, Cizek alleged that it constructed a residence for the Riekeses and that the residence sustained damage as a result of settling of the soil on which it was constructed. Cizek further alleged that "[a]s a result of the damages, [Cizek] became legally obligated to engage in repairs to the Reikes's [sic] home, and to incur costs to do so, including costs and expenses to make repairs, architect costs, and costs to provide alternative housing to the Reikes's [sic] during the required repairs."

The parties moved for summary judgment on several occasions. The dispositive ruling came in the district court's order entered on May 20, 2013. In that order, the district court noted that at a pretrial conference on January 25, the parties agreed that there were no disputed facts and that Columbia was not

contending that Cizek was negligent in building the Riekeses' house on Lot 75 as the lot was on the date of construction, nor was it contending that Cizek was guilty of any faulty workmanship; rather, Columbia took the position that it was not relevant to this issue of coverage whether or not Cizek was negligent. Based upon Columbia's position, the district court found that there was no faulty workmanship on the part of Cizek and that therefore, there was an "occurrence" and an initial grant of coverage under the policy. The district court also determined that the "Recall" exclusion did not apply because Columbia never alleged that Cizek did anything wrong, was negligent, or was guilty of any defective or faulty workmanship. Because there was no work of Cizek that resulted in a loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal, or disposal, the exclusion was inapplicable. As a result, the court denied Columbia's motion for summary judgment and granted summary judgment in favor of Cizek.

Columbia subsequently filed a motion to alter or amend the judgment, alleging that the court erred in granting summary judgment in favor of Cizek or, in the alternative, that the amount of damages stipulated to by the parties was incorrectly reflected in the court's order. The district court amended its prior order to reflect the parties' stipulation that the amount of damages suffered by Cizek was $158,114.93. The court also granted Cizek's motion for attorney fees and taxation of costs, and awarded $42,707.70 as taxable costs to Cizek. Columbia timely appeals to this court.

ASSIGNMENTS OF ERROR

Columbia assigns that the district court erred in (1) granting summary judgment in favor of Cizek, (2) denying Columbia's motion for summary judgment, (3) finding that there was an "occurrence" as that term is defined in the insurance policy issued by Columbia to Cizek and finding that there was an initial grant of coverage for Cizek's claim, and (4) finding that the "Recall Of Products, Work Or Impaired Property" exclusion in the policies at issue did not apply to preclude coverage for Cizek's claim.

STANDARD OF REVIEW

[1] 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. *Auto-Owners Ins. Co. v. Home Pride Cos.*, 268 Neb. 528, 684 N.W.2d 571 (2004).

[2] When adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as the court deems just. *City of Columbus v. Swanson*, 270 Neb. 713, 708 N.W.2d 225 (2005).

[3] The interpretation of an insurance policy presents a question of law that we decide independently of the trial court. *Federated Service Ins. Co. v. Alliance Constr.*, 282 Neb. 638, 805 N.W.2d 468 (2011).

ANALYSIS

[4] To determine whether coverage exists under an insurance policy, we must first determine whether there is an initial grant of coverage for the claimed loss. If so, we must then determine whether any exclusion applies. See *Auto-Owners Ins. Co. v. Home Pride Cos., supra*.

Initial Grant of Coverage.

The insuring agreement of Columbia's policy states in pertinent part: "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." It further states that the insurance only applies if the property damage is caused by an "'occurrence'" that takes place in the "'coverage territory.'" "'Occurrence'" is further defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

The Riekeses alleged in their draft complaint against Cizek that the lot was unsuitable for construction, that the home

was not constructed in accordance with the terms and conditions of the building contract, and that the residence was not constructed in conformance with acceptable construction and industry standards. In its declaratory judgment complaint against Columbia, Cizek alleged that the damage to the home was caused by the settling of the soil and admitted that it was legally obligated to pay for the cost of repairs to the Riekeses' home.

Prior to denying coverage, Columbia investigated the Riekeses' claim against Cizek and concluded that the damage to the home was caused by construction of the house on soil that later settled.

Although Cizek denies that it was negligent or that it engaged in faulty workmanship, the facts do not reveal a cause for the house settling other than its having been built on soil that was not properly compacted. As Columbia contends, it is not necessary to determine whether Cizek was in fact negligent or engaged in faulty workmanship in order to determine coverage; rather, given the posture of this case, coverage is determined based upon the allegations contained in the Reikeses' complaint against Cizek and the facts revealed in an investigation of that claim. See *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006).

Peterson v. Ohio Casualty Group, supra, was a declaratory judgment action in which an anesthesiologist, John C. Peterson, sought coverage under his homeowner's and umbrella policies for a defamation claim. The defamation claim was brought by a former coworker for statements Peterson allegedly made pertaining to his former coworker's competence. Each insurance policy contained a business pursuit exclusion that generally precluded coverage for damages arising out of an insured's business pursuits. The insurer denied Peterson's request for a defense and for indemnity, citing the exclusion. Peterson filed a declaratory judgment action and, during the pendency of the action, settled the underlying defamation action.

[5,6] The *Peterson* court recognized that coverage under an insurance policy contains two obligations—the duty to defend and the duty to indemnify. The duty to defend is broader than

the duty to indemnify, and in the first instance, it is measured by the allegations of the complaint against the insured. *Id*. To determine the duty to defend, an insurer must investigate and discover the relevant facts, in addition to looking at the allegations of the complaint. An insurer bears a duty to defend whenever it ascertains facts which give rise to the potential of liability under the policy. *Id*.

Applying these principles, the *Peterson* court noted that the record provided a complete set of facts in the underlying litigation and that the "record made by the parties on their cross-motions for summary judgment discloses no facts outside the pleadings which would bear on the issue of whether Ohio Casualty had a duty to defend Peterson in the now completed [underlying] litigation." *Id*. at 710-11, 724 N.W.2d at 774-75.

In determining that the trial court did not err in granting summary judgment in favor of the insurer, the Nebraska Supreme Court analyzed the allegations of the complaint which included the statements that were alleged to be defamatory. The court determined that these allegations asserted a claim arising out of Peterson's professional practice and that therefore, they fell within the business pursuit exclusion. The court concluded:

> The allegations and claims against Peterson contained in the [underlying] pleadings fall squarely within the policy exclusions, and in the absence of any other facts which would support an inference of coverage, we conclude that Ohio Casualty had no duty to defend or indemnify Peterson with respect to the claims asserted against him in the [underlying] lawsuit.

Id. at 712, 724 N.W.2d at 775-76.

In *Peterson v. Ohio Casualty Group, supra*, the court looked to the allegations of the complaint and the facts developed during the insurer's investigation to determine whether the insurer had a duty to defend or indemnify the insured. In the present action, Cizek did not seek a duty to defend, because the underlying claim was settled prior to the Riekeses filing a complaint. Despite this factual distinction about the duty to defend, we nevertheless find the *Peterson* framework of analysis is

appropriate for us to employ to determine whether Columbia had a duty to indemnify Cizek in the present case.

The Riekeses alleged in their complaint that the home sustained damage because Cizek failed to construct the home in accordance with the terms and conditions of the contract, the applicable building codes and manufacturers' recommendations, and the accepted construction and industry standards. They further alleged that Cizek was negligent in designing and constructing the home and did not take into consideration the nature of the land upon which it was built. The investigation undertaken by both Cizek and Columbia reveal that the cause of the damage was the settling of the soil upon which the home was built. Cizek admits this in its declaratory judgment complaint.

In essence, the Riekeses assert a claim for faulty workmanship as it relates to Cizek's preparation of the soil, and Cizek admits that a problem existed in the soil upon which the home was built. Cizek further admits that it was legally obligated to pay for the cost of repairs, but denies that it was negligent. The evidence reveals that the damage was only to the home itself and that no other property was damaged. This fact is relevant to whether there was an "occurrence," as further discussed below.

The issue of insurance coverage turns upon whether there has been an "occurrence" as that term is defined in the policy. Both parties direct us to *Auto-Owners Ins. Co. v. Home Pride Cos.*, 268 Neb. 528, 684 N.W.2d 571 (2004), to resolve this question.

[7] In *Auto-Owners Ins. Co. v. Home Pride Cos., supra*, Auto-Owners Insurance Company (Auto-Owners) brought a declaratory judgment action to determine its obligations under a CGL policy issued to its insured, Home Pride Companies, Inc. (Home Pride). Home Pride had hired a subcontractor to roof an apartment building. After the project was completed, the owner began noticing problems with the roof. The owner ultimately filed suit against Home Pride, alleging faulty workmanship that it claimed damaged the roof structures and buildings. Home Pride tendered defense of the claim to Auto-Owners, which assumed the defense under a reservation

of rights. Auto-Owners then initiated a declaratory judgment action. The issue on appeal was whether damage caused by faulty workmanship was covered under a CGL policy. The answer hinged on the question of whether faulty workmanship constituted an "occurrence" as that term was defined in the policy. The Nebraska Supreme Court determined as a matter of first impression that faulty workmanship, standing alone, is not an occurrence under a CGL policy. *Id*.

Looking to the allegations of the underlying complaint, the *Home Pride Cos*. court noted that the owners alleged that Home Pride, through its subcontractor, negligently installed the shingles, which negligence caused the shingles to fall off and, as a consequence, damage the roof structures and buildings. Because more than just Home Pride's "work" was damaged, there was an "occurrence," and Auto-Owners owed a duty to defend the underlying complaint. Of import, the court also noted that "to the extent that Home Pride may be found liable for the resulting damage to the roof structures and the buildings, Auto-Owners is obligated to provide coverage." *Id*. at 539, 684 N.W.2d at 580. The court did not require indemnification for the cost incurred in replacing the shingles, which is consistent with its holding that a CGL policy does not provide coverage for faulty workmanship that damages only the resulting work product.

The decision by the *Home Pride Cos*. court does not discuss whether the insured denied that it was engaged in faulty workmanship and that issue appears irrelevant to the court in making its decision. Rather, the court looked to the allegations of the complaint to determine whether there was a duty to defend, and the court required indemnification only for the damage to the roof structure and buildings in the event Home Pride was held liable for the resulting damage.

[8] From *Auto-Owners Ins. Co. v. Home Pride Cos*., 268 Neb. 528, 684 N.W.2d 571 (2004), and *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006), we glean that when the allegations of the complaint support a conclusion that no insurance coverage exists, and in the absence of any other facts which would support an inference of coverage, an insurer has no duty to defend or indemnify an

insured. In the present action, the allegations of the complaint support a conclusion that the damage to the home was caused by faulty workmanship or a similar impropriety in Cizek's performance. According to *Auto-Owners Ins. Co. v. Home Pride Cos., supra*, this does not constitute an "occurrence" under the terms of the policy. While Cizek denied that it was negligent, no facts were presented that would support an inference that the damage was caused by an occurrence. Therefore, the district court erred when it determined that Columbia had a duty to indemnify Cizek for the costs incurred in repairing the Riekeses' home.

[9] Having determined that there was no occurrence, there can be no initial grant of coverage under the policy; therefore, it is unnecessary to address the application of the "Recall" exclusion. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Hall v. County of Lancaster*, 287 Neb. 969, 846 N.W.2d 107 (2014).

CONCLUSION

Under the facts of this case, we find that the property damage was not caused by an occurrence; therefore, we reverse the trial court's order of summary judgment in favor of Cizek and remand the cause with directions to enter an order granting summary judgment in favor of Columbia.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF ZOEY S., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. JESSE S., APPELLANT.

853 N.W.2d 225

Filed September 9, 2014. No. A-13-811.

1. **Juvenile Courts: Judgments: Appeal and Error.** Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. However, when the evidence is in conflict, the appellate court will consider and

give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.

2. **Parental Rights: Proof.** The burden is on a natural parent challenging the validity of a relinquishment of parental rights to prove that it was not voluntarily given.
3. **Parental Rights.** In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights signed by a natural parent knowingly, intelligently, and voluntarily is valid.
4. ____. A change of attitude subsequent to signing a relinquishment of parental rights is insufficient to invalidate it.
5. ____. There are four requirements for a valid and effective revocation of a relinquishment of parental rights: (1) There must be a duly executed revocation of a relinquishment, (2) the revocation must be delivered to the licensed child placement agency or the Department of Health and Human Services, (3) delivery of the revocation must be within a reasonable time after execution of the relinquishment, and (4) delivery of the revocation must occur before the agency has, in writing, accepted full responsibility for the child.
6. ____. Pursuant to Neb. Rev. Stat. § 43-106.01 (Reissue 2008), when a child shall have been relinquished by written instrument, as provided by Neb. Rev. Stat. §§ 43-104 and 43-106 (Reissue 2008), to the Department of Health and Human Services or to a licensed child placement agency and the agency has, in writing, accepted full responsibility for the child, the person so relinquishing shall be relieved of all parental duties toward and all responsibilities for such child and have no rights over such child.

Appeal from the County Court for Dodge County: KENNETH VAMPOLA, Judge. Affirmed.

Mary Michele Ellis, of Ellis Law Office, for appellant.

Timothy E. Sopinski, Deputy Dodge County Attorney, for appellee.

Neleigh N. Boyer, Special Assistant Attorney General, of Department of Health and Human Services, for appellee.

Christina C. Boydston, for guardian ad litem.

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

BISHOP, Judge.

Jesse S. appeals from the order of the county court for Dodge County, sitting as a juvenile court, affirming Jesse's relinquishment of his parental rights to his daughter, Zoey S. The juvenile court found that Jesse relinquished his parental

rights to Zoey through a validly executed relinquishment and that his attempt at revocation of said relinquishment was invalid. We affirm.

BACKGROUND

Jesse is the biological father of Zoey, born in March 2006. Raquel D. is Zoey's biological mother. Jesse and Raquel never married. In March 2007, a juvenile court case commenced due to allegations that Jesse and Raquel physically abused and neglected Zoey and another child. Zoey was removed from the parental home and placed into foster care. The juvenile court case remained open until 2008.

Jesse last had contact with Zoey in 2007 after a protection order hearing in Dodge County Court where a "no-contact order" was put into place between Jesse and Raquel. In 2009, Jesse was ordered to pay child support in the amount of $50 per month. However, Jesse paid no support until November 2012. Jesse and Raquel are estranged.

On August 24, 2011, Zoey was taken into emergency protective custody and placed with the Nebraska Department of Health and Human Services (DHHS) because she had been exposed to frequent and ongoing domestic violence between Raquel and her live-in boyfriend. On August 26, the juvenile court entered an order continuing the emergency temporary custody and placement with DHHS. The juvenile court also appointed Pam Hopkins to be Zoey's guardian ad litem. DHHS placed Zoey in a foster home. The State filed a petition on September 6, alleging that Zoey was a child as defined in Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). On November 2, Zoey was adjudicated pursuant to § 43-247(3)(a).

Although many pleadings, motions, and orders appear in our record, we discuss only those necessary to address the issue on appeal, i.e., those documents relating to Jesse's relinquishment of his parental rights to Zoey.

From August 2011 through October 2012, Toni Garcia, a DHHS children and family services specialist, attempted to locate Jesse. In August 2011, Garcia reviewed the "N-FOCUS database," the centralized computer system utilized by DHHS, to see if the investigating caseworker found any information

on Jesse's whereabouts, but there was no updated address. Garcia also noted that "the social service part" of DHHS had documented a couple of failed attempts to get information to Jesse. Garcia also asked Raquel more than once if she had Jesse's contact information, but Raquel did not. In December, Garcia contacted Jesse's last-known address, but was informed that he no longer lived there and had left no forwarding address or other contact information. From December 2011 to August 2012, Garcia would occasionally check DHHS' computer database to see if Jesse's contact information had been updated. In September 2012, Garcia found an address for Jesse's mother and sent her a letter requesting that she let Jesse know DHHS was trying to contact him. Jesse's mother contacted Garcia and gave her Jesse's father's address. On September 26, Garcia then sent a letter to Jesse's father asking him to have Jesse contact DHHS. On October 5, Jesse called Garcia. Jesse told Garcia that he thought his parental rights to Zoey had been terminated, but that he did want to have her. After doing some research, Garcia could find no information stating that Jesse's rights had been terminated. She arranged to meet with Jesse in November.

On November 1, 2012, Garcia met with Jesse at a library. She explained what the process would be if Jesse became involved in Zoey's case and what services would be offered to him. Garcia told Jesse she would contact him after talking to "the team" regarding a plan to start therapeutic visits between Jesse and Zoey.

Garcia invited Jesse to a family team meeting scheduled for December 28, 2012, and she also let him know about a court date on January 9, 2013.

Jesse attended the team meeting on December 28, 2012, with his father, Larry S., accompanying him. Also present at the meeting were Raquel and her counsel, the foster father, Hopkins, and Garcia. Toward the end of the meeting, Jesse said that he would relinquish his parental rights to Zoey. After waiting 30 to 40 minutes for the relinquishment paperwork to be prepared, Jesse signed the paperwork. DHHS signed its acceptance of the relinquishment that same day.

Jesse later notified the juvenile court that he did not want to relinquish his parental rights to Zoey. On January 11, 2013, the court appointed counsel to represent Jesse.

A hearing to determine the validity of Jesse's relinquishment of his parental rights to Zoey was held on June 20 and July 25, 2013.

Hopkins, Zoey's guardian ad litem, testified that at the team meeting on December 28, 2012, she advised Jesse that if he wanted to give Zoey up for adoption, he could sign relinquishment papers. Jesse said, "I just as well sign the papers, I guess I have no choice." Hopkins advised him that he did have a choice and that he had the right to an attorney. When Jesse said that he could not afford an attorney, Hopkins told Jesse that he could have the court appoint an attorney for him. According to Hopkins, Jesse said it would not make a difference. Hopkins testified that Jesse said he would sign the relinquishment papers. Although Hopkins told Jesse that she did not think it was in Zoey's "best interests for [Jesse] to resume a relationship with [Zoey] after this many years," Hopkins testified that she did not threaten Jesse or make him any promises, nor did she see anyone else make threats or promises to Jesse. Hopkins was not present when Jesse signed the relinquishment papers.

Garcia testified that during the team meeting on December 28, 2012, Hopkins asked Jesse if he would be willing to relinquish his parental rights. Although he was upset, Jesse said that he would sign the relinquishment papers for Zoey. Garcia testified that either she or Hopkins asked Jesse if he would be interested in relinquishment counseling, but he said no. After the team was dismissed, Garcia, Jesse, and Larry remained in the conference room. Garcia asked Jesse if he would like to be represented by an attorney, but Jesse stated that he wanted to move forward with signing the papers. Jesse and Larry waited 30 to 40 minutes while the relinquishment paperwork was prepared. Garcia testified that she never told Jesse that he could not leave.

Because Garcia had never taken a relinquishment before, she enlisted the help of coworker Sheena Wesch, now known

as Sheena Mikoloyck. Garcia testified that when she and Wesch returned to the conference room, Jesse was again offered relinquishment counseling and an attorney, but he declined. When Jesse said, "No matter what, you guys are going to push me out . . . ," Wesch explained to Jesse that he did not have to go forward with the relinquishment, but Jesse chose to move forward. Wesch went through the relinquishment process, going over each document and obtaining Jesse's signature. Jesse's signatures were witnessed by a notary. Garcia testified that after Jesse signed the paperwork, she prepared the acceptance letter from DHHS, got her supervisor's signature, and sent the letter by certified mail that same day. The next day (Saturday, December 29, 2012), Jesse left a voice mail for Garcia stating that he was upset. However, because it was a weekend and there was a holiday at the beginning of the workweek, Garcia did not get the voice mail until she had already received the certified mail receipt that Jesse signed on January 2, 2013, indicating his receipt of DHHS' letter of acceptance.

Garcia testified that during the December 28, 2012, relinquishment process, Jesse was upset, but that he listened to and acknowledged Wesch when she asked if he understood what the documents meant. Garcia testified that at no point during the team meeting or when the relinquishment was being taken did anyone threaten Jesse or force him to sign the relinquishment papers. Garcia also testified that Jesse was not pressured into signing the relinquishment. According to Garcia, Jesse said that he was signing the relinquishment because he wanted what was best for Zoey. Garcia testified that in her opinion, Jesse's relinquishment was in Zoey's best interests, because he had not had any contact with Zoey since 2007.

Wesch is a DHHS child and family services specialist. She testified that on December 28, 2012, she was informed by Garcia that Jesse wanted to relinquish his parental rights to Zoey. Because Garcia had never taken a relinquishment before, Wesch agreed to take Jesse's relinquishment and teach Garcia in the process. Wesch testified that she asked Jesse several times if he wanted an attorney (and that one could be provided to him at no cost), if he was sure he wanted to relinquish, and

if he wanted relinquishment counseling; however, he declined all offers of an attorney and relinquishment counseling, and wanted to move forward with the relinquishment.

Wesch reviewed all of the relinquishment documents with Jesse. According to Wesch, Jesse was angry, upset, and in tears, but he was cognizant and understood the purpose of the relinquishment. Wesch filled out the forms based on what Jesse said, quoting his answers on the forms. Jesse was also able to read what Wesch wrote on the forms. Wesch testified that no threats or promises were made to get Jesse to sign the relinquishment of his parental rights and that nothing caused her concern about accepting the relinquishment.

Tammy Cich is a notary public. She testified that she notarized Jesse's signatures on the relinquishment documents. Cich stated that Wesch read each document aloud to Jesse before obtaining his signature. Cich heard no threats being made toward Jesse, and she never heard Jesse say that he did not want to sign the documents. Cich testified that she would not have notarized the documents if she felt Jesse was forced or coerced into signing the documents.

Jesse testified that he has had no contact with Zoey since 2007 because he had a "no-contact order" regarding Raquel and had been told not to make contact. Jesse stated that he did not pay any child support for Zoey from 2007 to 2012 because he did not know where to send a payment or how much to send.

Jesse testified that eventually, his father called and said that he got a registered letter that Jesse was supposed to call Garcia. Jesse called Garcia immediately and arranged to meet with her. When they met at the library, Jesse asked Garcia about visits, and she said that she would get back to him. Jesse testified that after his meeting with Garcia in the library, he was under the impression that he would be reunited with Zoey and that he would get visits. He testified that no one contacted him until he got a foster care review board letter regarding a meeting in December 2012. Jesse went to that meeting, but there was no mention of starting visits.

Jesse testified that he then attended a family team meeting later in December 2012. Also present at that meeting

were his father, Raquel and her attorney, Hopkins, Garcia, a caseworker, and the foster father. The first part of the meeting related specifically to Raquel. Once that part was over, everyone left except for Jesse, his father, Hopkins, Garcia, the foster father, and one other person. Hopkins asked what Jesse wanted for Zoey, and he responded that he wanted the best for Zoey. According to Jesse, Hopkins told him that no one on his income should have children and that he needed to let Zoey go and let someone else have her. He said that Hopkins brought up the relinquishment papers and said that "these people are good people, she'd have a better life with them." Jesse said that Hopkins was very loud and "gruff." Jesse testified that Hopkins told him he would never see Zoey again and that Hopkins and Garcia kept saying he needed to sign a relinquishment so Zoey could be "adopted out." Jesse said that he "lost it" and said yes. Jesse testified that he did not want to relinquish his parental rights to Zoey, but that he was "pushed into doing it" and "forced into doing it" and that Garcia and Hopkins "badgered" him.

Jesse testified that during the 40 minutes he waited for the relinquishment paperwork, he thought that he had to stay and that things would "work out." He testified that if someone would have told him he could leave, he would have.

Jesse testified that no one asked him if he wanted an attorney. He said that when he asked if he should have an attorney, he was told that he could not afford one and that "this is going to happen anyways." Jesse testified that Garcia offered him relinquishment counseling one time during the process of signing the paperwork, but that Wesch never offered relinquishment counseling. Jesse testified that he thought Garcia asked him the relinquishment questions and that Wesch wrote down his answers, but that he was in a "daze" during the relinquishment and cried until halfway through. Jesse testified that he did not really understand what the relinquishment meant and that he felt trapped and just "wanted away from them." Jesse then testified that he did not remember if the relinquishment papers were explained to him, but that he did read the documents and understood them. Later in the cross-examination, he also admitted that when Wesch was

recording his answers on the relinquishment forms, he said that he understood that signing the relinquishment meant that he "g[o]t nothing."

Jesse testified that no one threatened him into signing the relinquishment. But he said that he was "forced" into relinquishing his rights to Zoey. Jesse testified that he felt "pressured, way, way pressured" to sign the paperwork. Jesse testified that he did not tell anyone other than Larry that he did not want to sign the relinquishment papers. When asked when he decided that the relinquishment was not a good choice, Jesse responded, "the minute I left."

Larry testified that at the meeting on December 28, 2012, "they" brought in papers for Jesse to sign, and that when Jesse asked what the papers were, he was told by Garcia that they were papers he had to sign because he was going to relinquish his parental rights. Larry testified that when Jesse told Garcia and Hopkins that he did not want to sign the papers, they said, "[W]ell, you have to sign." Larry testified that Jesse said he wanted custody of Zoey, but Hopkins "more or less told him that he would probably never see her if she had anything to do with it." Larry also testified that Hopkins said, "[I]t doesn't matter anyway whether you sign it or not, we'll just get a judge — take it to a judge and have a judge sign over on it for you." Larry testified that Garcia told Jesse that he could get a lawyer, but that Jesse said he could not afford one. Larry testified that Garcia and Hopkins kept telling Jesse to sign and that Jesse said, "[O]kay, I'll sign it, but . . . I'm signing it under duress." Larry testified that there were no threats made, but there was a lot of pressure put on Jesse, and that they were using raised voices, close to yelling.

In its order filed on September 3, 2013, the juvenile court found that Jesse relinquished his parental rights to Zoey through a validly executed relinquishment and that his attempt at revocation of said relinquishment was invalid. Jesse now appeals.

ASSIGNMENTS OF ERROR

Jesse assigns that the juvenile court erred in finding that his "'voluntary' relinquishment was given voluntarily; given the

fact that he had no legal counsel and was led to believe he had no other legal option."

STANDARD OF REVIEW

[1] Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. However, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Justine J. et al.*, 286 Neb. 250, 835 N.W.2d 674 (2013).

ANALYSIS

Validity of Relinquishment.

[2,3] The burden is on a natural parent challenging the validity of a relinquishment of parental rights to prove that it was not voluntarily given. See *Auman v. Toomey*, 220 Neb. 70, 368 N.W.2d 459 (1985). In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights signed by a natural parent knowingly, intelligently, and voluntarily is valid. See *id*.

In his brief, Jesse contends that he had been deliberately led to believe two things: "One, that he did not have a right to legal counsel, and two, that he had no options other than to sign the paperwork presented to him." Brief for appellant at 8. Despite Jesse's testimony at the hearing that he was not offered an attorney and was forced to sign the relinquishment papers, several other witnesses testified to the contrary.

Hopkins testified that she advised Jesse that if he wanted to give Zoey up for adoption, he could sign relinquishment papers. When Jesse said, "I just as well sign the papers, I guess I have no choice," Hopkins advised him that he did have a choice and that he had the right to an attorney. When Jesse said that he could not afford an attorney, Hopkins told Jesse that he could have the court appoint an attorney for him. Garcia testified that she also asked Jesse if he would like to be represented by an attorney, but that Jesse stated he wanted to move forward with signing the papers. Garcia and Wesch both

testified that when they brought the relinquishment paperwork into the conference room, Jesse was again offered relinquishment counseling and an attorney, but he declined. When Jesse said, "No matter what, you guys are going to push me out . . . ," Wesch explained to Jesse that he did not have to go forward with the relinquishment, but Jesse chose to move forward. Wesch testified that she asked Jesse several times if he wanted an attorney (and that one could be provided to him at no cost), if he was sure he wanted to relinquish, and if he wanted relinquishment counseling; however, he declined all offers of an attorney and relinquishment counseling, and wanted to move forward with the relinquishment.

When the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Justine J. et al., supra*. The juvenile court in this case clearly chose to believe the testimony from Hopkins, Garcia, and Wesch, and we agree that their testimony was more credible. Therefore, we find unpersuasuve Jesse's arguments that he was deliberately led to believe he did not have a right to legal counsel and that he had no options other than to sign the paperwork presented to him.

Jesse also argues that he was not offered relinquishment counseling. Again, Garcia testified that either she or Hopkins asked Jesse if he would be interested in relinquishment counseling, but he said no. And Wesch testified that she asked Jesse several times if he wanted relinquishment counseling, but he declined. Even Jesse testified that Garcia offered him relinquishment counseling one time during the process of signing the paperwork. Thus, Jesse's argument that his relinquishment was not voluntary because he was not provided relinquishment counseling is unpersuasive.

The testimony of Hopkins, Garcia, and Wesch was that no one threatened Jesse or made any promises to him to get him to sign the relinquishment paperwork. Wesch reviewed all of the relinquishment documents with Jesse. According to Wesch, Jesse was angry, upset, and in tears, but he was cognizant and understood the purpose of the relinquishment. Garcia also testified that Jesse was upset, but that he listened

to and acknowledged Wesch when she asked if he understood what the relinquishment documents meant. Wesch filled out the relinquishment forms based on what Jesse said, quoting his answers on the forms. Jesse was also able to read what Wesch wrote on the forms. According to Garcia, Jesse said that he was signing the relinquishment because he wanted what was best for Zoey. Cich, the notary public, also testified that Wesch read each document aloud to Jesse before obtaining his signature. Cich heard no threats being made toward Jesse and never heard Jesse say that he did not want to sign the documents. Cich testified that she would not have notarized the documents if she felt Jesse was forced or coerced into signing the documents.

Jesse testified that he does not remember if the relinquishment papers were explained to him, but that he did read the documents and understood them. Later in the cross-examination, he also admitted that when Wesch was recording his answers on the relinquishment forms, he said that he understood that signing the relinquishment meant that he "g[o]t nothing." Jesse testified that no one threatened him into signing the relinquishment. But he said that he was "forced" into relinquishing his parental rights to Zoey. Jesse testified that he felt "pressured, way, way pressured" to sign the paperwork. Larry testified that Garcia and Hopkins kept telling Jesse to sign and that Jesse said, "[O]kay, I'll sign it, but . . . I'm signing it under duress." (This contradicts Jesse's testimony that he did not tell anyone, other than Larry, that he did not want to sign the relinquishment papers.) Larry testified that there were no threats made, but there was a lot of pressure put on Jesse, and that they were using raised voices, close to yelling. Again, the juvenile court in this case clearly chose to believe the testimony of Hopkins, Garcia, Wesch, and Cich. Upon our de novo review of the record, we agree that Jesse was not subjected to threats, coercion, fraud, or duress. Therefore, we find that his relinquishment of parental rights was made knowingly, intelligently, and voluntarily, and is valid. See *Auman v. Toomey*, 220 Neb. 70, 368 N.W.2d 459 (1985).

[4] Although Jesse regretted his decision to relinquish "the minute I left," his change of heart does not invalidate the relinquishment. See *id*. (change of attitude subsequent to signing relinquishment is insufficient to invalidate it).

Attempted Revocation.

[5] Although Jesse does not challenge the juvenile court's finding that his attempt at revocation of relinquishment was invalid, we address the issue for the sake of completeness. There are four requirements for a valid and effective revocation of a relinquishment of parental rights: (1) There must be a duly executed revocation of a relinquishment, (2) the revocation must be delivered to the licensed child placement agency or DHHS, (3) delivery of the revocation must be within a reasonable time after execution of the relinquishment, and (4) delivery of the revocation must occur before the agency has, in writing, accepted full responsibility for the child. *In re Interest of Nery V. et al*., 20 Neb. App. 798, 832 N.W.2d 909 (2013). See, also, *Kellie v. Lutheran Family & Social Service*, 208 Neb. 767, 305 N.W.2d 874 (1981).

[6] In the instant case, it does not appear that Jesse complied with the third requirement for a valid and effective revocation, i.e., that the revocation must be delivered to DHHS. The only evidence in our record is that Jesse left a voice mail for Garcia on Saturday, December 29, 2012, stating that he was very upset. There is no indication that he expressed his desire to revoke his relinquishment. Regardless of his compliance with the third requirement, Jesse clearly failed to comply with the fourth requirement for a valid and effective revocation, i.e., that delivery of the revocation must occur before the agency has, in writing, accepted full responsibility for the child. Jesse relinquished his parental rights to Zoey on Friday, December 28, and DHHS signed its written acceptance of Jesse's relinquishment that same day. Therefore, Jesse's voice mail on December 29, and his subsequent notification to the juvenile court that he did not want to relinquish his parental rights to Zoey, came too late. See, *In re Interest of Nery V. et al., supra*; *Kellie v. Lutheran Family & Social Service, supra*.

See, also, Neb. Rev. Stat. § 43-106.01 (Reissue 2008) (when child shall have been relinquished by written instrument, as provided by Neb. Rev. Stat. §§ 43-104 and 43-106 (Reissue 2008), to DHHS or to licensed child placement agency and agency has, in writing, accepted full responsibility for child, "the person so relinquishing shall be relieved of all parental duties toward and all responsibilities for such child and have no rights over such child"). Accordingly, Jesse's attempt at revoking his relinquishment was invalid.

CONCLUSION

For the reasons stated above, we affirm the juvenile court's finding that Jesse relinquished his parental rights to Zoey through a validly executed relinquishment and that his attempt at revocation of said relinquishment was invalid.

AFFIRMED.

IN RE ESTATE OF JOHANNA M. MORRELL, DECEASED. DAVID THOMPSON AND KATHLEEN THOMPSON, COPERSONAL REPRESENTATIVES OF THE ESTATE OF JOHANNA M. MORRELL, DECEASED, AND MARCELLA NAU ET AL., APPELLEES, V. LEE LORENZ, APPELLANT.

853 N.W.2d 525

Filed September 16, 2014. No. A-13-568.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or 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 the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all favorable inferences deducible from the evidence.
3. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
4. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at

trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

5. **Summary Judgment.** If a genuine issue of fact exists, summary judgment may not properly be entered.
6. **Wills: Undue Influence: Proof.** To show undue influence, a will contestant must prove the following elements by a preponderance of the evidence: (1) The testator was subject to undue influence; (2) there was an opportunity to exercise such influence; (3) there was a disposition to exercise such influence; and (4) the result was clearly the effect of such influence.
7. **Wills: Undue Influence.** Not every exercise of influence will invalidate a will.
8. ____: ____. Undue influence sufficient to defeat a will is manipulation that destroys the testator's free agency and substitutes another's purpose for the testator's.
9. **Undue Influence: Proof.** It is not necessary for a court in evaluating the evidence to separate each fact supported by the evidence and pigeonhole it under one or more of the four essential elements for showing undue influence. The trier of fact should view the entire evidence and decide whether the evidence as a whole proves each element of undue influence.
10. ____: ____. A party seeking to prove the exercise of undue influence is entitled to all reasonable inferences deducible from the circumstances proved.
11. ____: ____. One does not exert undue influence in a crowd. It is usually surrounded by all possible secrecy; it is usually difficult to prove by direct evidence; and it rests largely on inferences drawn from facts and circumstances surrounding the testator's life, character, and mental condition.
12. **Wills: Undue Influence: Presumptions: Proof.** In determining whether undue influence existed, a court must consider whether the evidence shows that a person inclined to exert improper control over the testator had the opportunity to do so. Thus, a presumption of undue influence exists if the contestant's evidence shows a confidential or fiduciary relationship, coupled with other suspicious circumstances.
13. ____: ____: ____: ____. Suspicious circumstances, when coupled with proof of a confidential or fiduciary relationship, can give rise to a presumption of undue influence. Those circumstances include (1) a vigorous campaign by a principal beneficiary's family to maintain intimate relations with the testator, (2) a lack of advice to the testator from an independent attorney, (3) an elderly testator in weakened physical or mental condition, (4) lack of consideration for the bequest, (5) a disposition that is unnatural or unjust, (6) the beneficiary's participation in procuring the will, and (7) domination of the testator by the beneficiary.

Appeal from the County Court for Douglas County: LAWRENCE E. BARRETT, Judge. Affirmed.

Gerald D. Johnson, of Johnson & Pekny, L.L.C, for appellant.

Mallory N. Hughes and Stuart Dornan, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellees David Thompson and Kathleen Thompson.

Steven J. Riekes and David P. Wilson, of Marks, Clare & Richards, L.L.C., for appellees Marcella Nau, Frida Brohan, and Edmund Roessler.

MOORE, PIRTLE, and RIEDMANN, Judges.

PIRTLE, Judge.

INTRODUCTION

Lee Lorenz appeals from two orders of the county court for Douglas County. The first is an order finding that a will executed by Johanna M. Morrell in March 2011 was of no force and effect. The trial court found there was no genuine issue of material fact in regard to whether the March 2011 will was the result of Lorenz' undue influence and granted partial summary judgment in favor of Marcella Nau, Frida Brohan, and Edmund Roessler, Johanna's siblings, and of David Thompson and Kathleen Thompson, the copersonal representatives of Johanna's estate under a September 2010 will. The second order from which Lorenz appeals is an entry of summary judgment in favor of the siblings resulting in the dismissal of Lorenz' objection to probate of Johanna's September 2010 will. For the reasons that follow, we affirm both orders of the county court.

BACKGROUND

Lorenz befriended an elderly couple—Johanna and her husband, Wilson Morrell—in approximately 2007. Wilson was ill at the time, and Lorenz drove Johanna back and forth to see Wilson while he was in a hospital, skilled nursing care, and later, hospice care. Lorenz also made changes to the couple's home to make it handicapped accessible for Wilson so he could be released from skilled nursing care and live at home. As Wilson's health continued to decline, Lorenz helped the Morrells with their financial affairs and in completing their tax returns. Wilson died in November 2009. After Wilson died, Lorenz continued to assist Johanna with various matters.

Lorenz contends that he regarded Johanna as a second mother and that she treated him like a son.

Johanna and Wilson had one son, who predeceased them both. Johanna had three living siblings, namely Nau, Brohan, and Roessler. The three siblings all lived on the east coast and had visited Johanna only twice in the 40 years prior to her death, the last time being in September 2010. On September 13, 2010, Johanna executed a will leaving her property to her siblings, the only family she had.

Johanna began showing some signs of dementia in 2009. On October 28, 2010, Lorenz filed a petition for appointment of a guardian-conservator, requesting that he be appointed guardian-conservator for Johanna. The petition was prepared and submitted by Ralph E. Peppard, an attorney in Omaha. On the same day, the Department of Health and Human Services, Adult Protective Services (the Department), also filed a petition for appointment of a guardian-conservator based on its investigation regarding Johanna's finances' being taken advantage of and her inability to protect herself. The Department requested that Mark Malousek, an attorney, be appointed as Johanna's guardian-conservator. The Department also filed an objection to the appointment of Lorenz as Johanna's guardian-conservator because the Department was investigating Lorenz for the financial exploitation of Johanna. Malousek was appointed temporary guardian-conservator on October 28 and was appointed permanent guardian-conservator in April 2011.

On March 11, 2011, Johanna executed another will, this time leaving her entire estate to Lorenz. Johanna died in January 2012, at the age of 84.

On January 25, 2012, the Thompsons, as copersonal representatives of Johanna's estate under her September 2010 will, petitioned for the probate of the September 2010 will. Lorenz filed an objection to probate of the will.

On February 9, 2012, Lorenz petitioned for the probate of Johanna's will dated March 11, 2011. Johanna's siblings and the Thompsons objected to the probate of that will.

On March 14, 2013, Johanna's siblings filed a motion for partial summary judgment asking the court to declare the

March 2011 will invalid and of no effect. The motion alleged that the will was invalid because at the time it was executed, Johanna was under guardianship and lacked the capacity to make the will as propounded, and because the will was the product of undue and unlawful influence by Lorenz, who manipulated Johanna into signing an instrument which left all of her possessions to him upon her death.

A hearing was held on the motion for partial summary judgment. The evidence presented by the siblings and copersonal representatives showed that in March 2009, Johanna's physician, Dr. Heather Morgan, diagnosed Johanna with "mild cognitive impairment," and that by October 2009, her memory had declined and testing showed that she most likely had "dementia of the Alzheimer's type." In September 2010, Morgan indicated that "[d]ue to [Johanna's] functional and cognitive impairments, she is unable to make informed decisions about her general over all well being and health." Morgan recommended that a guardian-conservator be appointed on Johanna's behalf. Morgan opined that Johanna had lacked decisionmaking capacity since October 2009.

In October 2010, Johanna underwent a neuropsychological evaluation done by Dr. Nadia Pare which confirmed a diagnosis of "[d]ementia, possible Alzheimer's disease etiology, very mild severity." Pare concluded that Johanna had the capacity to make her own medical and financial decisions, but found her to be a vulnerable adult, at risk of being financially exploited, "given . . . Lorenz' emotional manipulation described by [Johanna] and by her current [power of attorney]." Pare testified at the guardianship proceedings that Lorenz had reportedly told Johanna that he had all her money and did not need her anymore. Johanna reportedly said that she felt "stupid" because she believed that she and Lorenz were in a romantic relationship.

The siblings and copersonal representatives also presented a report from the Department, dated December 1, 2010, determining that Johanna was considered a vulnerable adult because she had lacked capacity and been "unable to make complex medical and financial decisions since October 23, 2009," based on a letter by her physician, Morgan, dated

September 29, 2010. The report also detailed the investigation the Department performed based on three "intakes" it received alleging that Lorenz was financially exploiting Johanna. The report stated that in the month before Wilson's death, Wilson (while in hospice care) signed documents removing himself as the beneficiary of a life insurance policy on Johanna and making Lorenz the new beneficiary. Wilson also made Lorenz the new beneficiary for one of his annuities. The Department's report also notes that in March 2010, about 4 months after Wilson died, a total of $38,000 was taken out of Johanna's bank accounts.

During a Department interview with Lorenz, he stated that Johanna bought him a $41,000 boat in March 2010 in appreciation for all the things he had done for her. He also disclosed that Johanna and Wilson gave him one of their cars and that he is keeping their other car at his house and had himself "added as" an owner of the car to lower the insurance rates. The report also states that there were "multiple questionable cash withdrawals from Johanna's accounts and shifting of monies from one account to another and to new accounts." The Department found the allegations of financial exploitation by Lorenz against Johanna to be substantiated. The Department sent Lorenz a letter on December 7, 2010, informing him of its finding and notifying him that his name would be entered in the "Adult Protective Services . . . Central Registry." The registry contains names of perpetrators of reported abuse or neglect of vulnerable adults, which reports have been substantiated through investigation.

An affidavit of Malousek, the guardian-conservator of Johanna, was entered into evidence. The affidavit states that in December 2010, after Malousek's appointment as temporary guardian-conservator, he received a telephone call from an attorney who told him that Lorenz brought Johanna to his office seeking his services in drafting a power of attorney. The affidavit also states that Malousek had no knowledge of any preparation or execution of any will by Johanna dated March 11, 2011, which will was drafted by Peppard, and that Malousek gave no consent or authority to participate in any way in the drafting of any will during the entire time he was

temporary or permanent guardian-conservator for Johanna. Malousek also indicated that in his opinion as Johanna's guardian-conservator, her condition would have made her highly susceptible to undue influence.

Johanna told John C. Chatelain, the attorney who helped prepare her September 2010 will, that she was concerned that Lorenz had become involved in her financial affairs and was concerned about his access to her assets. Johanna was upset that Lorenz had been manipulating her accounts and told Chatelain that she did not want any of her assets to go to Lorenz. Chatelain stated in his affidavit that Lorenz had acquired an interest in Johanna's bank accounts, safe deposit box, cars, and certificates of deposit and also had become a beneficiary on certain life insurance policies.

Mary Elizabeth Keitel, a longtime friend and neighbor of Johanna's, stated in an affidavit that Lorenz adopted a pattern of trying to isolate Johanna from contact with her and her husband. Johanna told her on multiple occasions that Lorenz would get mad at Johanna if he found out she was socializing with them. Keitel also stated that Lorenz made it so that Johanna became more and more dependent upon him. In late August or early September 2010, Johanna told Keitel that Lorenz did not love her anymore and that she wanted him out of her life.

The evidence presented by the siblings and copersonal representatives also showed that Johanna had maintained a close relationship with her siblings through telephone calls and the mail, even though they came to visit her only twice in the preceding 40 years. Johanna's mother died when Johanna was a teenager, and her siblings then looked to Johanna as a mother figure who took care of them.

In opposition to the motion for partial summary judgment, Lorenz presented an affidavit of Gail D. Bierman, a friend of Johanna's since 2007 or 2008. Bierman stated that Johanna told her at some point that Johanna's brother and sisters had come for a visit and indicated to Johanna that they wanted her to either come live with one of them or be placed in some type of a "'home.'" Bierman indicated Johanna was furious as a result. Bierman also stated that during 2011, she never witnessed

anyone coerce, bully, threaten, intimidate, or otherwise influence Johanna. She stated she was aware that two neighbors were trying to keep her away from Lorenz.

Lorenz also presented an affidavit of Peppard, the attorney who prepared and helped Johanna execute the March 2011 will. Peppard stated that he first met with Johanna in October 2010 (the month following the September 2010 will). Lorenz was present, and they discussed initiating a guardianship for Johanna. Peppard stated that he represented Johanna in the guardianship proceedings. He also stated that he represented Lorenz in a meeting with the Department regarding an allegation that Lorenz was taking advantage of Johanna as a vulnerable adult and also represented him in a meeting with the Douglas County Attorney involving the same allegations.

Lorenz also offered answers to interrogatories from each of Johanna's three siblings. Roessler, Johanna's brother, confirmed in his interrogatory answers that Johanna and her siblings were close and recounted several experiences they have shared that made them close. All three siblings indicated that they had regular communication with Johanna.

Both parties asked the court to take judicial notice of the transcript from the guardianship proceedings. The transcript was marked as an exhibit and is in the record before us.

On April 24, 2013, following the hearing, the court granted partial summary judgment in favor of the siblings, finding that there were no genuine issues of material fact as to whether the March 2011 will was a result of Lorenz' undue influence, and declared the will to be of no force and effect.

On May 2, 2013, the siblings and copersonal representatives filed a motion for summary judgment asking the court to declare Lorenz' objection to probate of the September 2010 will to be without merit and to declare the will valid. Lorenz filed an objection to the motion for summary judgment and also filed a motion to alter or amend the court's April 24 order granting partial summary judgment.

A summary judgment hearing was held on May 13, 2013, and in support of the motion, the siblings offered a supplemental affidavit of Chatelain, affidavits of their own, and affidavits of the Thompsons. The evidence showed that Chatelain

met Johanna's siblings for the first time on September 27, 2010, and that he had no communication with them prior to that date. Chatelain also stated that in drafting the September 2010 will, all matters were between him and Johanna and did not involve Johanna's siblings.

Chatelain and the Thompsons all indicated that the Thompsons did not participate in the preparation or execution of Johanna's September 2010 will and did not communicate with Chatelain regarding any matter or provision that should be contained in the will.

The evidence also shows that the siblings came to visit Johanna on September 26, 2010, after receiving a telephone call from Kathleen Thompson, who indicated she was concerned about Johanna's well-being and safety based on Lorenz' involvement in her life. The siblings had no knowledge of the will executed on September 13, 2010, or of its making or its contents, until meeting with Chatelain on September 27. During their visit, the siblings also met with Johanna's physician, who recommended that Johanna move to an assisted living facility. Johanna made it clear to her siblings that she wanted to continue living in her own home.

Lorenz offered his own affidavit and answers to interrogatories from the Thompsons. All of the exhibits entered into evidence at the hearing on the motion for partial summary judgment were entered into evidence at the May 13, 2013, hearing as well.

Following the hearing, the court entered an order on May 23, 2013, denying Lorenz' motion to alter or amend the court's April 24 order and granting summary judgment in favor of the siblings and copersonal representatives, finding that the September 2010 will "was validly executed and allowed to [be] probate[d]."

ASSIGNMENTS OF ERROR

Lorenz assigns that the trial court erred in granting partial summary judgment in favor of the siblings and copersonal representatives in April 2013; in invalidating the March 2011 will; and in granting summary judgment in favor of the

siblings and copersonal representatives in May 2013, finding the September 2010 will to be Johanna's final will.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Klingelhoefer v. Parker, Grossart*, 20 Neb. App. 825, 834 N.W.2d 249 (2013). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all favorable inferences deducible from the evidence. *Id*.

ANALYSIS

Partial Summary Judgment Regarding March 2011 Will.

Lorenz first challenges the partial summary judgment entered in April 2013 in favor of the siblings and copersonal representatives, in which judgment the court found that the March 2011 will was of no force and effect. He argues that the trial court erred in concluding that no genuine issue of material fact existed as to whether he exercised undue influence over Johanna, inducing her to execute the March 2011 will making him the only beneficiary. Before proceeding with the analysis, we set forth some general principles regarding summary judgment and undue influence.

[3-5] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Durre v. Wilkinson Development*, 285 Neb. 880, 830 N.W.2d 72 (2013). After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id*.

If a genuine issue of fact exists, summary judgment may not properly be entered. *Id*.

[6-8] To show undue influence, a will contestant must prove the following elements by a preponderance of the evidence: (1) The testator was subject to undue influence; (2) there was an opportunity to exercise such influence; (3) there was a disposition to exercise such influence; and (4) the result was clearly the effect of such influence. *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009). Yet not every exercise of influence will invalidate a will. *Id*. Undue influence sufficient to defeat a will is manipulation that destroys the testator's free agency and substitutes another's purpose for the testator's. *Id*.

[9,10] But it is not necessary for a court in evaluating the evidence to separate each fact supported by the evidence and pigeonhole it under one or more of the above four essential elements. The trier of fact should view the entire evidence and decide whether the evidence as a whole proves each element of undue influence. *Id*. And a party seeking to prove the exercise of undue influence is entitled to all reasonable inferences deducible from the circumstances proved. *Id*.

[11,12] One does not exert undue influence in a crowd. It is usually surrounded by all possible secrecy; it is usually difficult to prove by direct evidence; and it rests largely on inferences drawn from facts and circumstances surrounding the testator's life, character, and mental condition. *Id*. In determining whether undue influence existed, a court must also consider whether the evidence shows that a person inclined to exert improper control over the testator had the opportunity to do so. *Id*. Thus, the Nebraska Supreme Court has recognized a presumption of undue influence if the contestant's evidence shows a confidential or fiduciary relationship, coupled with other suspicious circumstances. *Id*.

[13] The Nebraska Supreme Court has previously summarized suspicious circumstances that, when coupled with proof of a confidential or fiduciary relationship, can give rise to a presumption of undue influence. Those circumstances include (1) a vigorous campaign by a principal beneficiary's family to maintain intimate relations with the testator, (2) a lack of advice to the testator from an independent attorney, (3) an

elderly testator in weakened physical or mental condition, (4) lack of consideration for the bequest, (5) a disposition that is unnatural or unjust, (6) the beneficiary's participation in procuring the will, and (7) domination of the testator by the beneficiary. *Id*.

Having set forth the law applicable to this case, we now turn to the evidence of undue influence in the present case to determine whether a genuine issue of material fact exists.

We first note the relationship between Johanna and Lorenz. Lorenz had helped out Johanna and Wilson in various ways over multiple years and had established a relationship with Johanna. Lorenz claims to have been like a son to Johanna. However, there was also evidence that Johanna believed she and Lorenz were in a romantic relationship. Either way, Lorenz had more than sufficient opportunity to exercise his influence over Johanna concerning her assets and estate planning. He prepared her taxes and acted at times as a financial advisor. Further, Lorenz held powers of attorney for Johanna and Wilson.

Keitel, Johanna's longtime friend and neighbor, indicated that Lorenz tried to isolate Johanna from contact with Keitel and her husband and indicated that Lorenz would get mad if he found out Johanna was socializing with Keitel and her husband. Keitel also stated that Lorenz made it so that Johanna became more and more dependent upon him.

The evidence also established that Johanna was in a weakened mental condition and subject to undue influence by Lorenz at the time the March 2011 will was executed. Johanna began showing signs of dementia in 2009. Malousek, Johanna's temporary guardian in March 2011, stated that her condition would have made her highly susceptible to undue influence. In October 2010, Pare, in her neurophysiological evaluation of Johanna, came to the same conclusion. She concluded that Johanna had the capacity to make her own medical and financial decisions, but found her to be a vulnerable adult at risk of being financially exploited by Lorenz. Further, following an investigation by the Department, it concluded that the allegations of financial exploitation by Lorenz against Johanna were substantiated and that Johanna was being abused as a

vulnerable adult by Lorenz. The Department notified Lorenz of its findings and filed a guardianship-conservatorship petition on Johanna's behalf to protect her and her assets. Lorenz filed a similar petition asking that he be named Johanna's guardian-conservator.

The evidence also shows that Lorenz had acquired an interest in Johanna's bank accounts, safe deposit box, and certificates of deposit and had become a beneficiary on certain life insurance policies. Johanna also gave him $41,000 to buy a boat, and he had acquired the Morrells' cars. Lorenz did not challenge any of this evidence. These actions indicate that he was predisposed to having himself named the beneficiary of her entire estate.

Johanna indicated to Chatelain, the attorney who prepared and executed the September 2010 will, that she was concerned that Lorenz had become involved in her financial affairs and was concerned about his access to her assets. Johanna was upset that Lorenz had been manipulating her accounts and told Chatelain that she did not want any of her assets to go to Lorenz.

Further, the March 2011 will was prepared and executed without the knowledge of the duly appointed and acting guardian-conservator. Malousek stated in his affidavit that he had no knowledge of any preparation or execution of the March 2011 will and that he gave no consent or authority to participate in any way in the drafting of any will during the time he was temporary or permanent guardian-conservator for Johanna.

The siblings and copersonal representatives' evidence established that the March 2011 will was the product of Lorenz' undue influence as a matter of law. The burden shifted to Lorenz to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law. See *Durre v. Wilkinson Development*, 285 Neb. 880, 830 N.W.2d 72 (2013). We conclude that Lorenz did not satisfy his burden.

Lorenz offered into evidence an affidavit of Bierman, a friend of Johanna's, who stated that during 2011, she never

witnessed anyone coerce, bully, threaten, intimidate, or otherwise influence Johanna.

Lorenz also presented an affidavit of attorney Peppard, which states that Peppard first met Johanna in October 2010, when Lorenz brought Johanna to Peppard's office and the three of them discussed Lorenz' becoming Johanna's guardian-conservator. Lorenz subsequently filed a petition for appointment of guardian-conservator that was prepared and submitted by Peppard. Peppard's affidavit also states that he represented Lorenz in regard to the allegations being investigated by the Department. Peppard was the same attorney who prepared and helped Johanna execute the March 2011 will. Therefore, the admission of Peppard's affidavit shows that Peppard had represented both Johanna and Lorenz, indicating that Johanna did not have advice from an independent attorney when she executed the March 2011 will. As the trial court found, Lorenz, through his attorney Peppard, sought to influence Johanna into changing her will.

Lorenz' evidence also establishes that despite Peppard's knowing about the Department's investigation into Lorenz' financial exploitation of Johanna and despite a temporary guardian-conservator's having been appointed, Peppard imprudently drafted and executed the March 2011 will for Johanna, giving all of her estate to the very person whom the Department was trying to protect her from. We find this conduct by a Nebraska lawyer to be deeply troubling.

The answers to interrogatories from each of Johanna's siblings simply showed that Johanna and her siblings all had a good relationship and stayed in regular contact with each other.

In summary, the evidence showed that Lorenz had the opportunity to exercise influence over Johanna and that she was susceptible to such undue influence at the time the March 2011 will was executed. Lorenz tried to isolate Johanna from her friends and had manipulated her assets such that he had acquired an interest in many of them. The Department concluded that Johanna was a vulnerable adult and that Lorenz was financially exploiting her. Further, the March 2011 will

was not drafted by independent counsel, but, rather, by the same attorney who represented Lorenz in regard to the allegations investigated by the Department. The March 2011 will was also executed without the knowledge of Johanna's court-appointed guardian-conservator. We find this evidence sufficient to establish that Lorenz exercised undue influence over Johanna, inducing her to execute the March 2011 will making him the sole beneficiary. The only evidence offered by Lorenz to counter this evidence was the Bierman affidavit stating she had never witnessed anyone exert undue influence over Johanna and the Peppard affidavit previously discussed. As explained above, undue influence is not exerted in public; therefore, we do not consider the Bierman affidavit to raise a genuine issue of material fact as to whether Lorenz exercised undue influence over Johanna in executing the March 2011 will. Nor do we consider Peppard's affidavit to raise a genuine issue of material fact as to this question, given the circumstances of his involvement with Lorenz. Therefore, while Lorenz may have presented evidence that created issues of fact, we find he failed to present evidence showing the existence of a genuine issue of material fact to prevent judgment as a matter of law. We conclude that the trial court did not err in sustaining the siblings' and copersonal representatives' motion for partial summary judgment, thereby invalidating the March 2011 will. Lorenz' first assignment of error is without merit.

Summary Judgment Regarding September 2010 Will.

Lorenz next assigns that the trial court erred in granting summary judgment in favor of the siblings and copersonal representatives, finding there was no genuine issue of material fact as to whether the September 2010 will was validly executed.

Lorenz' objection to the probate of the September 2010 will was based on two distinct grounds. The first ground alleged that if the court invalidated or disallowed the probate of the March 2011 will based on Johanna's lack of testamentary capacity to validly execute the will, then the court should

invalidate or disallow the probate of the September 2010 will based on the same reasoning. Because the court's order granting partial summary judgment invalidates the March 2011 will on the basis of undue influence and not on the basis of lack of capacity, which invalidation we affirm, Lorenz' objection to probate of the September 2010 will on the basis of lack of capacity is not at issue.

Lorenz' second ground for objecting to the probate of the September 2010 will was that it resulted from "undue influence, duress and/or mistake on the part of [Johanna]." Lorenz argues that the siblings' unexpected visit in September 2010 creates a genuine issue of material fact as to whether the September 2010 will was the result of undue influence or duress by the siblings. Lorenz relies on the affidavits of Peppard and Bierman as evidence of the siblings' undue influence or duress.

Peppard's affidavit states Johanna told him at a meeting in October 2010, with Lorenz present, that her siblings came to visit her in September 2010 and that they had not come to visit her in the last 30 years. It stated that Johanna informed Peppard that her siblings "had taken her to an attorney, told her what to say, told her to sign the documents provided by the attorney and if she failed to follow their instructions they would remove her from her home and put her into a nursing home."

We note that Peppard's affidavit does not state that Johanna told him she was forced to sign a will, just "documents." The affidavit stated that when Peppard asked Johanna what she signed, she stated she did not know.

Bierman's affidavit states that Johanna told her that Johanna's siblings had come to visit her and indicated that they wanted her to go back to either live with them or be placed in some type of "'home.'" The affidavit further states that Johanna was furious and told her siblings to get out of her house.

Despite Peppard's and Bierman's affidavits, there is uncontradicted evidence that the September 2010 will was executed before the siblings came to visit Johanna. The will was executed on September 13, and the siblings arrived in Nebraska on September 26. The evidence shows that the siblings came

to visit Johanna after receiving a call from Kathleen Thompson indicating she was concerned about Johanna's well-being and safety. The siblings met Chatelain for the first time in his office on September 27 and, prior to that time, had no communication with him. The siblings had no knowledge of the will executed on September 13, or of its making or its contents, until meeting with Chatelain on September 27.

During the siblings' visit, there was some discussion about where Johanna should live. During the visit, the siblings met with Johanna's physician, who recommended that Johanna move to an assisted living facility. However, Johanna made it clear to her siblings that she wanted to continue living in her own home.

Further, although the siblings all lived on the east coast and visited Johanna only twice in the 40 years before her death, the evidence shows that she maintained a consistent relationship with them through telephone calls and through the mail. There was also evidence that Johanna had told both her neighbor Keitel and Chatelain that she wanted to give her property to her family.

We conclude that the siblings and copersonal representatives presented sufficient evidence to show that there was no genuine issue of material fact as to whether the September 2010 will was validly executed. The evidence showed that the September 2010 will was executed about 2 weeks before the siblings came to visit Johanna and that they came after receiving a call from Kathleen Thompson, who was concerned about Johanna. The attorney who assisted Johanna with the September 2010 will had no contact or communication with the siblings prior to their visit, and the siblings had no knowledge of the will or its contents prior to their visit. The evidence also showed that Johanna had a good relationship with her siblings, despite the lack of visits between them.

Although Lorenz offered affidavits from Peppard and Bierman which raised issues of fact regarding Johanna's future place of residence and unidentified legal documents, he did not meet his burden of showing a genuine issue of material fact as to the validity of the September 2010 will. Therefore,

Lorenz' assignment of error in regard to the September 2010 will is without merit.

CONCLUSION

We conclude that the trial court did not err in granting partial summary judgment in favor of the siblings and copersonal representatives in April 2013; in invalidating the March 2011 will; and in granting summary judgment in favor of the siblings and copersonal representatives in May 2013, finding the September 2010 will to be Johanna's final will. Accordingly, we affirm the orders of the Douglas County Court entered on April 24 and May 23, 2013.

AFFIRMED.

HERITAGE BANK, A NEBRASKA BANKING CORPORATION, APPELLANT, V. JAMES A. KASSON AND ROBERTA JANE KASSON, HUSBAND AND WIFE, AND THOMAS F. KASSON, APPELLEES.

853 N.W.2d 868

Filed September 23, 2014. No. A-13-563.

1. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents a question of law, an appellate court decides the question independently of the conclusion reached by the trial court.
3. **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 disturbed on appeal unless clearly wrong.
4. **Declaratory Judgments: Equity: Appeal and Error.** In appellate review of an action for declaratory judgment in an equity action, the standard of review for an equity case applies.
5. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.
6. **Evidence: Appeal and Error.** When credible evidence is in conflict on material issues of fact, an appellate court considers and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.

7. **Partnerships.** The existence of a partnership is a question of fact under the evidence.
8. **Partnerships: Proof.** The party asserting the partnership relationship exists has the burden of proving that relationship by a preponderance of the evidence.
9. ____: ____. If the parties' voluntary actions form a relationship in which they carry on as co-owners of a business for profit, then they may inadvertently create a partnership despite their expressed subjective intention not to do so. Intent of the parties to form a partnership is ascertained objectively rather than subjectively, from all the evidence and circumstances.
10. **Joint Ventures.** For a joint venture to exist, there must be an agreement to enter into an undertaking; the parties must have a community of interest in the object of the undertaking and a common purpose in performance, and each of the parties must have an equal voice in manner of performance and control over the agencies used.
11. ____. The mere pooling of property, money, assets, skill, or knowledge does not create a relationship of a joint venture.
12. ____. The primary criterion for existence of a joint venture is that the parties enter into an agreement as principals in the endeavor; therefore, even a close relationship between two parties does not create an implied joint venture.
13. ____. A joint venture can exist only by voluntary agreement of the parties and cannot arise by operation of law.
14. **Joint Ventures: Intent.** The relationship of joint venturers depends upon the legal intent of the parties as determined by examining the facts and circumstances of the case.
15. **Livestock.** A brand on livestock is only prima facie evidence of ownership which may be rebutted.
16. **Livestock: Evidence: Presumptions.** When evidence to the contrary of ownership of livestock is introduced, any presumption of ownership disappears and ownership becomes a question of fact to be determined by the preponderance of the evidence.

Appeal from the District Court for Howard County: KARIN L. NOAKES, Judge. Affirmed as modified.

Kent E. Rauert and Matthew R. Watson, of Svehla, Thomas, Rauert & Grafton, P.C., for appellant.

Gregory G. Jensen, P.C., L.L.O., for appellees.

MOORE, PIRTLE, and RIEDMANN, Judges.

PIRTLE, Judge.

INTRODUCTION

Heritage Bank appeals the order of the district court for Howard County finding James A. Kasson and Roberta Jane

Kasson (the Kassons) did not breach their obligations to Heritage Bank under two promissory notes and did not operate a joint venture or partnership with their son, Thomas Kasson. The district court found that the Kassons were not jointly and severally liable for the financial debts and obligations of Thomas and that the Kassons were entitled to a monetary judgment from Heritage Bank. For the reasons that follow, we affirm.

BACKGROUND

Heritage Bank is a corporation organized and existing under the laws of the State of Nebraska. The Kassons are husband and wife, and both are residents of Howard County, Nebraska. Thomas is the son of the Kassons and is also a resident of Howard County.

The Kassons and Thomas each individually began banking with Heritage Bank in 2001. The Kassons and Thomas maintained separate financial statements, promissory notes, security agreements, and checking accounts. In the past, Heritage Bank has asked owners engaged in informal partnerships to cosign or guarantee each other's loans. The Kassons and Thomas were not asked to guarantee or cosign for each other's indebtedness to Heritage Bank in this case.

The Kassons and Thomas owned and operated separate farming and livestock operations, though they used the same business practices to buy and sell livestock, buy and sell grain, raise grain, harvest crops, lease pastures and cropland, and market their farm products. They shared some equipment and feed. They also helped each other with work responsibilities.

On or about May 7, 2009, the Kassons executed and delivered to Heritage Bank a promissory note representing a line of credit upon which Heritage Bank agreed to advance various sums, not to exceed $250,000 at any one time. The Kassons agreed to pay interest at a rate of 6.25 percent and to pay all principal and accrued interest on the note on its maturity date, April 1, 2010.

On or about May 7, 2009, the Kassons executed and delivered to Heritage Bank a second promissory note in the

amount of $76,000 with interest at a rate of 6.25 percent per annum. The note required the Kassons to make four annual payments of $18,099.42 beginning April 1, 2010, and one payment of $18,099.44 on April 1, 2014.

Contemporaneously to the execution of both notes, the Kassons entered into two separate commercial security agreements granting Heritage Bank a security interest in certain property owned by the Kassons. Both agreements granted Heritage Bank a security interest in "[a]ll farm products including, but not limited to, all poultry and livestock and their young, along with their produce, products, and replacements . . ." owned by the Kassons.

Heritage Bank maintained a separate lending relationship with Thomas. Thomas also granted Heritage Bank a similar security interest in "[a]ll farm products including, but not limited to, all poultry and livestock and their young, along with their produce, products, and replacements . . . " owned by Thomas. In 2009, Heritage Bank denied Thomas an additional operating loan.

Thomas filed a chapter 7 bankruptcy proceeding with the U.S. Bankruptcy Court for the District of Nebraska as it relates to all sums due and owing to Heritage Bank. Thomas was made a party to this action, because it relates to his ownership interest in cattle sold at auction.

In March 2010, the Kassons and Thomas sold the majority of their respective cattle at auction. The Kassons and Thomas counted the number of cattle marked with differently colored ear tags—cattle with white or blue tags belonged to the Kassons and cattle with red or yellow tags belonged to Thomas. The sale of the cattle resulted in two checks issued by a livestock market company in the amounts of $55,529.86 and $65,634.69. Both checks were made payable to "Roberta J Kasson & Heritage/Bank."

The proceeds from the sale were deposited into the Kassons' account with Heritage Bank and apportioned between the Kassons and Thomas according to the number of head they respectively sold. The Kassons retained $80,132.90 for the sale, and $41,031.65 was to be applied to Thomas' lending

obligations with Heritage Bank. During their years of farming, it was customary for the Kassons and Thomas to divide the sales in this manner, regardless of the difference in price per head between "fat cattle," steers, heifers, and calves.

On March 8, 2010, the Kassons attempted to pay Heritage Bank in full for the balance on both promissory notes. The payment was submitted in the form of three checks in the amounts of $6,700, $6,256.74, and $72,000. Heritage Bank refused the tender on both promissory notes. Though the Kassons deposited the proceeds from the livestock sale into their personal account, Heritage Bank unilaterally removed the $80,132.90 sales proceeds and converted the funds into a cashier's check. On May 20, Heritage Bank's president directed the check to be deposited into Thomas' account and applied to Thomas' indebtedness to Heritage Bank.

A dispute arose between the parties as to the proper application of the funds totaling $80,132.90, and the sum was deposited with the Howard County District Court clerk. Heritage Bank brought this action against the Kassons and Thomas. The first two causes of action related to the Kassons' obligations on the promissory notes made payable to Heritage Bank. Heritage Bank's third cause of action requested declaratory relief relating to the $80,132.90.

The Kassons filed an answer and cross-claim alleging Heritage Bank miscalculated a credit on the account of Thomas, which altered the amount due to Heritage Bank from the Kassons.

Trial was held on May 7, 2013. On May 31, the district court ruled in favor of the Kassons, holding that Heritage Bank failed to show the Kassons had breached their duty on either of the promissory notes. The district court also held the Kassons were not jointly and severally liable for the debts of Thomas to Heritage Bank, because the Kassons and Thomas were not engaged in a joint venture or partnership. Thus, the full $80,132.90 deposited with the trial court at the commencement of this action was to be applied to the Kassons' obligations to Heritage Bank, not to any obligation Thomas had to Heritage Bank. Heritage Bank timely appealed.

The district court also ruled on the Kassons' cross-claim, holding that the Kassons failed to demonstrate that Heritage Bank was responsible for any misapplication of proceeds. The Kassons did not appeal this determination.

ASSIGNMENTS OF ERROR

Heritage Bank asserts the trial court erred in finding that the Kassons and Thomas were not engaged in a partnership or joint venture, in failing to find that the cattle at issue were jointly owned by the Kassons and Thomas, and in finding that the contested funds were to be applied to the Kassons' obligations to Heritage Bank and not to Thomas' outstanding debts to it. Heritage Bank asserts the trial court erred in finding the $80,132.90 represented the balance of the Kassons' obligations to Heritage Bank and was to be considered payment in full.

STANDARD OF REVIEW

[1] An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *American Amusements Co. v. Nebraska Dept. of Rev.*, 282 Neb. 908, 807 N.W.2d 492 (2011).

[2] When a declaratory judgment action presents a question of law, an appellate court decides the question independently of the conclusion reached by the trial court. *Vlach v. Vlach*, 286 Neb. 141, 835 N.W.2d 72 (2013).

[3] 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 disturbed on appeal unless clearly wrong. *Schiefelbein v. School Dist. No. 0013*, 17 Neb. App. 80, 758 N.W.2d 645 (2008).

[4-6] In appellate review of an action for declaratory judgment in an equity action, the standard of review for an equity case applies. See *OB-GYN v. Blue Cross*, 219 Neb. 199, 361 N.W.2d 550 (1985). On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. *American Amusements Co. v. Nebraska Dept. of*

Rev., supra. But when credible evidence is in conflict on material issues of fact, an appellate court considers and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another. *Id*.

ANALYSIS

Existence of Partnership or Joint Venture.

The district court found the facts did not support Heritage Bank's assertions that the Kassons and Thomas were engaged in a partnership or joint venture. The court noted that although the Kassons and Thomas helped each other in the basic operations of the business and shared some equipment, this was not enough to prove that their businesses were jointly held. The Kassons and Thomas obtained their own loans and tagged their livestock to track ownership, and the court found the evidence supported the claim that they intended to conduct their own separate livestock operations.

[7-9] The existence of a partnership is a question of fact under the evidence. *In re Dissolution & Winding Up of Keytronics*, 274 Neb. 936, 744 N.W.2d 425 (2008). The party asserting the partnership relationship exists has the burden of proving that relationship by a preponderance of the evidence. See *id*. If the parties' voluntary actions form a relationship in which they carry on as co-owners of a business for profit, then they may inadvertently create a partnership despite their expressed subjective intention not to do so. *Id*. Intent of the parties to form a partnership is ascertained objectively rather than subjectively, from all the evidence and circumstances. See *id*.

The evidence shows that the Kassons and Thomas intended to be treated as separate owners of similar property. They obtained separate financing for the operating expenses of their farming operations, and they maintained separate checking accounts, promissory notes, and security agreements. They also owned separate equipment and livestock, obtained separate insurance, and filed separate tax returns. An officer of Heritage Bank acknowledged that the Kassons desired Thomas to stand on his own and that they did not cosign or personally guarantee any of Thomas' loans. The evidence also shows

Heritage Bank treated the Kassons and Thomas as if they were separate entities; if they were a partnership, Heritage Bank would not likely have denied Thomas and approved the Kassons for operating loans during the same time period. Upon our review of the evidence, we find the district court did not clearly err in determining that the Kassons and Thomas were not engaged in a partnership.

On appeal, Heritage Bank also asserts the Kassons and Thomas were engaged in a joint venture in their farming operations, particularly those operations related to livestock production.

[10-12] For a joint venture to exist, there must be an agreement to enter into an undertaking; the parties must have a community of interest in the object of the undertaking and a common purpose in performance, and each of the parties must have an equal voice in manner of performance and control over the agencies used. See *Lackman v. Rousselle*, 7 Neb. App. 698, 585 N.W.2d 469 (1998). The mere pooling of property, money, assets, skill, or knowledge does not create a relationship of a joint venture. *Id*. The primary criterion for existence of a joint venture is that the parties enter into an agreement as principals in the endeavor; therefore, even a close relationship between two parties does not create an implied joint venture. See *id*.

[13,14] Though the Kassons and Thomas assisted one another from time to time, and shared equipment and resources, there is no evidence that they intended to engage in a joint venture. A joint venture can exist only by voluntary agreement of the parties and cannot arise by operation of law. *Evertson v. Cannon*, 226 Neb. 370, 411 N.W.2d 612 (1987). In *Evertson*, the Nebraska Supreme Court stated that the agreement need not be express, but may be implied from the apparent purposes and the acts and conduct of the parties. *Id*. The relationship of joint venturers depends upon the legal intent of the parties as determined by examining the facts and circumstances of the case. *Id*.

Here, the Kassons and Thomas held themselves out to be separate businesses; they obtained separate financing,

maintained separate accounts and records, used different identifying marks on their cattle, and represented to Heritage Bank that they desired to be treated separately. Though they shared equipment and some labor, they maintained separate insurance on their equipment and herds and paid taxes as separate individuals. We find the district court did not clearly err in finding that the Kassons and Thomas were not engaged in a joint venture.

Jointly Owned Cattle.

In addition to the assertion that the Kassons and Thomas were engaged in a partnership or joint venture, Heritage Bank also asserts the evidence supports a finding that the cattle were jointly owned. Heritage Bank contends that if the cattle were jointly owned, one-half of the sale proceeds would be attributable to the Kassons, one-half of the sale proceeds would be attributable to Thomas, and Heritage Bank would be entitled to Thomas' share, as a creditor.

Heritage Bank asserts the brands owned and used by the Kassons and Thomas to mark their cattle are prima facie evidence that they were joint owners of all of the cattle, because the brands were jointly owned and registered. The evidence presented from the Nebraska Brand Committee indicates one brand, identified as "backward C, lazy K," was owned by the Kassons and Thomas. Another brand, identified as "C-over-a-quarter-circle," was owned by James, Thomas, and James' other son. It was undisputed that James' other son had no interest in the cattle sold.

[15,16] While it is true that a brand is prima facie evidence of ownership, the Nebraska Supreme Court has held that a "'brand on livestock is only prima facie evidence of ownership which may be rebutted.'" *Broken Bow Prod. Credit Assn. v. Western Iowa Farms*, 232 Neb. 357, 361, 440 N.W.2d 480, 482 (1989). See, also, Neb. Rev. Stat. § 54-1,107 (Reissue 2010). The Supreme Court held that the statute regarding ownership of livestock did not create a true presumption of ownership, but, rather, it shifted the burden of proof. *Id*. The court stated that when evidence to the contrary of ownership

of livestock is introduced, any presumption of ownership disappears and ownership becomes a question of fact to be determined by the preponderance of the evidence. *Id*.

Here, there was evidence of joint ownership of the two brands, but there was also evidence of how the brands and other identification techniques were used to distinguish the cattle. Though the Kassons and Thomas jointly owned the brands, they testified that Thomas exclusively used the "C-over-a-quarter-circle" to identify his cattle and that the Kassons exclusively used the "backward C, lazy K" to identify theirs. James testified that to him, a brand was an identification mark, not a sign of ownership. Thomas and James testified that they also used differently colored ear tags as an indication of ownership—Thomas' cattle were marked with red or yellow tags, and the Kassons' cattle were marked with white or blue tags. The Nebraska Revised Statutes provide that brands and tags are both satisfactory evidence of ownership. Neb. Rev. Stat. § 54-189 (Reissue 2010).

Upon our review of the evidence, we find that the presumption of ownership created by the jointly owned brands was rebutted by the evidence of how the brands were used, as well as the ear tags that were employed to separate the herds. Therefore, we find that the trial court did not clearly err in finding that the cattle were separately owned.

Award.

Heritage Bank asserts that, even if the district court was correct in holding the full $80,132.90 was to be applied to the Kassons' obligation, the court erred in stating that the payment represented "payment in full." Heritage Bank asserts the Kassons would still have an outstanding obligation of $4,823.84 to it after the application of $80,132.90 to their debt. This point was conceded by counsel for the Kassons and Thomas during oral argument.

The evidence shows that on March 8, 2010, the Kassons attempted to pay Heritage Bank in full for the balance on both promissory notes. The payment was submitted in the form of three checks in the amounts of $6,700, $6,256.74, and $72,000. The bank officer testified that Heritage Bank refused

tender of the three checks, totaling $84,956.74, which would have paid off, in full, the Kassons' principal and interest on both notes.

The district court found the Kassons were entitled to a check for $80,132.90 to be applied to their outstanding debt to Heritage Bank. The district court stated that "[t]his satisfies the principal and interest obligations in full as of March 8, 2010, the date [the Kassons] tendered payment. No further interest is awarded to either party."

We affirm the court's determination that $80,132.90 should be applied to the Kassons' note and the determination that no one was entitled to interest. However, we find the evidence is undisputed that the Kassons' remaining balance was $84,956.74. The sum of $80,132.90 received from the Kassons' portion of the cattle sale does not equal the full balance of the note. Thus, we modify the judgment to strike the language of the court's order indicating this constitutes payment "in full."

CONCLUSION

We find the district court did not clearly err in finding the Kassons and Thomas were not engaged in a partnership or joint venture and, thus, were not jointly and severally liable for Thomas' financial obligations to Heritage Bank. We also find the court did not clearly err in finding the cattle sold at auction were not jointly owned by the Kassons and Thomas. We affirm the award of $80,132.90 to be applied to the Kassons' debt.

AFFIRMED AS MODIFIED.

Lyman-Richey Corporation, appellant, v. Nebraska Department of Revenue et al., appellees.

855 N.W.2d 814

Filed October 7, 2014. No. A-13-269.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
2. **Taxation: Notice: Time.** Pursuant to the plain language of Neb. Rev. Stat. § 77-2709(7) (Cum. Supp. 2012), a person must file a petition for redetermination within 60 days after service of the notice, which service is complete at the time of mailing of the notice by the Nebraska Department of Revenue to the taxpayer.
3. **Pleadings.** Pleadings are the written statements by the parties of the facts constituting their respective claims and defenses.
4. **Ordinances: Presumptions: Proof.** In considering the validity of regulations, courts generally presume that legislative or rulemaking bodies, in enacting ordinances or rules, acted within their authority, and the burden rests on those who challenge their validity.
5. **Administrative Law.** Agency regulations that are properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Affirmed.

Nicholas K. Niemann and Matthew R. Ottemann, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and L. Jay Bartel for appellees.

Inbody, Chief Judge, and Irwin and Bishop, Judges.

Inbody, Chief Judge.

INTRODUCTION

The question presented in this appeal is the legal issue of whether the 3-day mailing rule set forth in Neb. Ct. R. Pldg. § 6-1106(e) applies to extend the 60-day period for a taxpayer to file a petition for redetermination with the Nebraska Department of Revenue (the Department) pursuant to Neb. Rev. Stat. § 77-2709(7) (Cum. Supp. 2012). We conclude that it does not.

STATEMENT OF FACTS

On April 16, 2012, the Department issued a "Notice of Deficiency Determination" claiming Nebraska sales and use taxes and waste reduction and recycling fees were owed by Lyman-Richey Corporation (Lyman-Richey) over a 3-year period and seeking $247,545.94 in taxes, interest, and penalties. This deficiency notice was sent to Lyman-Richey by certified mail on April 16 and was received by Lyman-Richey on April 17. Lyman-Richey mailed its petition for redetermination to the Department on Monday, June 18. The petition was received by the Department on June 19. On July 2, the Department issued its final determination denying Lyman-Richey's appeal on the sole ground that Lyman-Richey had failed to file its appeal within 60 days of the April 16 service of the deficiency notice as required by § 77-2709. Lyman-Richey filed a petition for review with the Lancaster County District Court, which affirmed the decision of the Department that Lyman-Richey's petition for redetermination was not timely filed with the Department. Lyman-Richey has timely appealed to this court.

ASSIGNMENT OF ERROR

Lyman-Richey's assignments of error on appeal can be consolidated into the following issue: The district court erred in failing to add the 3-day filing extension of § 6-1106(e) to the time it had to file its petition for redetermination and thereby concluding that its petition for redetermination was not timely filed under § 77-2709(7).

STANDARD OF REVIEW

[1] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court. *Strasburg v. Union Pacific RR. Co.*, 286 Neb. 743, 839 N.W.2d 273 (2013).

ANALYSIS

As we previously stated, at issue in this appeal is whether the 3-day mailing rule set forth in § 6-1106(e) applies to a petition for redetermination filed by a taxpayer with the Department pursuant to § 77-2709(7). Lyman-Richey contends

that § 6-1106(e) extended the date for it to file its petition for redetermination by 3 days, i.e., until June 18, 2012. Lyman-Richey further argues that the decision in *Roubal v. State*, 14 Neb. App. 554, 710 N.W.2d 359 (2006), requires application of the 3-day mailing rule to this case. Thus, Lyman-Richey argues that its petition for redetermination was timely filed on June 18. In contrast, the Department contends that § 6-1106(e) does not apply to deficiency notices mailed by the Department pursuant to § 77-2709(5) and that Lyman-Richey's petition for redetermination was not timely filed.

Relevant Statutes—Nebraska Revenue Act of 1967.

The Department's mailing of the deficiency notice was performed pursuant to § 77-2709 of the Nebraska Revenue Act of 1967, which provides, in pertinent part:

> (5)(a) Promptly after making his or her determination, the Tax Commissioner shall give to the person written notice of his or her determination.
>
> (b) The notice may be served personally or by mail, and if by mail the notice shall be addressed to the person at his or her address as it appears in the records of the Tax Commissioner. In case of service by mail of any notice required by the Nebraska Revenue Act of 1967, the service is complete at the time of deposit in the United States post office.

[2] The procedure for challenging a notice of deficiency determination is set forth in § 77-2709(7), which provides:

> Any person against whom a determination is made under subsections (1) and (2) of this section or any person directly interested may petition for a redetermination within sixty days after service upon the person of notice thereof. For the purposes of this subsection, a person is directly interested in a deficiency determination when such deficiency could be collected from such person. If a petition for redetermination is not filed within the sixty-day period, the determination becomes final at the expiration of the period.

Thus, pursuant to the plain language of § 77-2709(7), a person must file a petition for redetermination within 60 days after service of the notice, which service is complete at the time of mailing of the notice by the Department to the taxpayer.

In the instant case, it is undisputed that the Department mailed the notice to Lyman-Richey on April 16, 2012, and that the April 16 date of mailing is also the date of service. The parties agree that 60 days after service on April 16 was June 15. Since Lyman-Richey's petition for redetermination was not filed until June 18, the petition for redetermination was not timely filed unless some other rule extended the time of filing.

Nebraska Rules—Applicability of § 6-1106(e).

The rule which Lyman-Richey seeks to apply to extend the 60-day time period for filing its petition for redetermination is § 6-1106(e), which provides:

> **Additional Time After Service by Mail, Electronic, or Certain Other Methods.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served under § 6-1105(b)(2)(B), (D), (E), or (F), three days shall be added to the prescribed period.

Neb. Ct. R. Pldg. § 6-1105(b)(2)(B) (rev. 2011) provides for service by first-class mail, which was the method that Lyman-Richey served the petition for redetermination upon the Department.

Although the parties do not cite to any Nebraska cases applying § 6-1106(e), and our independent research has likewise failed to uncover any Nebraska cases applying this rule, we find guidance from case law interpreting the 3-day rule when it was previously codified at Neb. Rev. Stat. § 25-534 (Reissue 1995), prior to being transferred to the Nebraska Supreme Court Rules. Three cases interpreting § 25-534 are especially helpful in providing guidance as to when the 3-day rule is to be applied: Two cases determined that the 3-day rule

was applicable, *Schwarz v. Platte Valley Exterminating*, 258 Neb. 841, 606 N.W.2d 85 (2000), and *Roubal v. State*, 14 Neb. App. 554, 710 N.W.2d 359 (2006); and one case held that the 3-day rule was not applicable, *In re Estate of Lienemann*, 277 Neb. 286, 761 N.W.2d 560 (2009).

In *Schwarz v. Platte Valley Exterminating*, the Nebraska Supreme Court allowed 3 days to be added to the time to respond to interrogatories which had been served by mail where "rule 36" provided that "'[t]he matter is admitted unless, within thirty days *after service* of the request . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter . . . .'" 258 Neb. at 847-48, 606 N.W.2d at 90 (emphasis supplied). Likewise, in *Roubal v. State*, in a discussion of the timeliness of a petition for review of the denial of certain medical benefits by the Nebraska Department of Health and Human Services filed pursuant to the Administrative Procedure Act, this court approved of the addition of 3 days due to service by mail based on statutory language providing for filing a petition "within 30 days *after service* of the final decision." 14 Neb. App. at 556, 710 N.W.2d at 361 (emphasis supplied). See Neb. Rev. Stat. § 84-917(2)(a) (Reissue 1999), (Cum. Supp. 2006), (Reissue 2008), and (Cum. Supp. 2012) (subsequent amendments to statute have not changed pertinent statutory language providing that proceedings for review must be instituted by filing petition in district court of county where action is taken within 30 days after service of final decision by agency).

In determining that the 3-day period was not applicable in *In re Estate of Lienemann, supra*, the Nebraska Supreme Court distinguished *Schwarz v. Platte Valley Exterminating, supra*, and *Roubal v. State, supra*. In *In re Estate of Lienemann, supra*, the Nebraska Supreme Court affirmed the dismissal of a petition for allowance of a probate claim that was filed outside of the 60-day period specified in the Nebraska Probate Code, specifically Neb. Rev. Stat. § 30-2488(a) (Reissue 2008), regarding the allowance of claims. In doing so, the court rejected an argument that an additional 3-day period for

mailing should be allowed pursuant to the 3-day rule as set forth in § 25-534. The court noted that the language regarding the allowance of claims contained in § 30-2488(a) provided that "a disallowed claim is 'barred' unless a petition for allowance is filed or a proceeding commenced 'not later than' 60 days after the mailing of notice of disallowance." *In re Estate of Lienemann*, 277 Neb. at 289, 761 N.W.2d at 563. Thus, the court found that the claimant must act within 60 days *after mailing* of the notice, that the plain language of the statute provided for finality 60 days after the mailing of a notice of disallowance after which the claim was barred, and that it was unwarranted and not sensible to add 3 days due to mailing to § 30-2488, which explicitly states an action is barred "sixty days after the mailing."

[3] Thus, in both *Schwarz v. Platte Valley Exterminating*, 258 Neb. 841, 606 N.W.2d 85 (2000), and *Roubal v. State*, 14 Neb. App. 554, 710 N.W.2d 359 (2006), 3 days was added to the performance of the act in question because the statutory period for acting was *after service*, whereas in *In re Estate of Lienemann*, 277 Neb. 286, 761 N.W.2d 560 (2009), where the 3-day period was determined not to be applicable, the statutory period for acting was *after mailing*. In the instant case, as in *Schwarz* and *Roubal*, the language contained in § 77-2709(7) provides that a petition for a redetermination of a tax deficiency determination must be made "within sixty days after service." Thus, it appears that if we are to apply the dictates of *Schwarz* and *Roubal*, the 3-day mailing rule set forth in § 6-1106(e) would apply to the petition for redetermination filed by Lyman-Richey. However, there is an important common element present in the analysis of the application of the 3-day rule in each of these cases that is missing in the instant case: In each of the three aforementioned cases, *In re Estate of Lienemann*, *Schwarz*, and *Roubal*, the pleadings at issue were part of a civil action. Pleadings are the written statements by the parties of the facts constituting their respective claims and defenses. See, *Sydow v. City of Grand Island*, 263 Neb. 389, 639 N.W.2d 913 (2002); *Russell v. Clarke*, 15 Neb. App. 221, 724 N.W.2d 840 (2006). The tax deficiency

notices mailed by the Department to a taxpayer pursuant to § 77-2709(5) contain the summary of tax assessments determined at the conclusion of an audit, but are not pleadings. Since deficiency notices mailed by the Department pursuant to § 77-2709(5) are not pleadings, the Nebraska Court Rules of Pleading in Civil Cases, including § 6-1106(e), do not apply to them, including the 3-day mailing rule.

Nebraska Administrative Code.

Further, even if the rules were applicable, Neb. Ct. R. Pldg. § 6-1101 also provides, in pertinent part: "These Rules govern pleading in civil actions filed on or after January 1, 2003. They apply to the extent not inconsistent with statutes governing such matters. These Rules shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

Although not a statute, a section of the Nebraska Administrative Code provides language inconsistent with application of the 3-day rule in the instant case. That section provides, in part: "The period fixed by statute within which to file a petition cannot be extended. If a petition is not filed within the statutory period, it will not be considered by the Tax Commissioner but will be returned to the petitioner by mail." See 316 Neb. Admin. Code, ch. 33, § 003.07 (2013).

[4,5] In considering the validity of regulations, courts generally presume that legislative or rulemaking bodies, in enacting ordinances or rules, acted within their authority, and the burden rests on those who challenge their validity. *Smalley v. Nebraska Dept. of Health & Human Servs.*, 283 Neb. 544, 811 N.W.2d 246 (2012). There is no such challenge in this case. Agency regulations that are properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law. *Id*. Since agency regulations that are properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law, we conclude that the plain language of the code is applicable in this case and that Lyman-Richey's time to file the petition for redetermination could not be extended.

CONCLUSION

Pursuant to the Department's rules, the time to file a petition for redetermination cannot be extended. We find that this rule is controlling and that as a result, the district court properly affirmed the decision of the Department that Lyman-Richey's petition for redetermination was not timely filed with the Department. An appellate court will affirm a lower court's ruling that reaches the correct result, although based on different reasoning. *Feloney v. Baye*, 283 Neb. 972, 815 N.W.2d 160 (2012). Thus, the decision of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
COREY A. BROOKS, APPELLANT.

854 N.W.2d 804

Filed October 14, 2014. No. A-13-760.

1. **Constitutional Law: Miranda Rights: Self-Incrimination.** In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the U.S. Supreme Court sought to protect the Fifth Amendment privilege against compelled self-incrimination from the inherently compelling pressures of custodial interrogation. To do so, the Court required law enforcement to give a particular set of warnings to a person in custody before interrogation: that he has the right to remain silent, that any statement he makes may be used as evidence against him, and that he has the right to an attorney, either retained or appointed.
2. **Miranda Rights: Self-Incrimination.** While the particular rights delineated under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), are absolute, the language used to apprise suspects of those rights is not.
3. ____: ____. The inquiry in reviewing *Miranda* warnings is simply whether the warnings reasonably convey to a suspect his rights.
4. **Constitutional Law: Right to Counsel.** Once the adversary process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceedings.
5. **Constitutional Law: Right to Counsel: Waiver.** The Sixth Amendment right to counsel may be waived by a defendant, so long as the relinquishment of the right is voluntary, knowing, and intelligent.
6. **Constitutional Law: Miranda Rights: Right to Counsel: Waiver.** When a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically "does the trick" with regard to the requirement that such waiver be voluntary,

knowing, and intelligent, even though the *Miranda* rights purportedly have their source in the Fifth Amendment.

7. ____: ____: ____: ____. As a general matter, an accused who is admonished with the warnings prescribed in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one.
8. **Right to Counsel.** Once an accused has invoked his right to counsel, he is not subject to further interrogation by the authorities until counsel has been made available, unless he initiates the contact.
9. **Constitutional Law: Right to Counsel: Attorney and Client.** Inherent in the Sixth Amendment right to counsel is the assurance of confidentiality and privacy of communication with counsel.
10. **Right to Counsel.** The right to counsel is violated when a state agent is present at confidential attorney-client conferences.
11. **Effectiveness of Counsel: Proof: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.
12. **Effectiveness of Counsel: Records: Appeal and Error.** On direct appeal, the resolution of ineffective assistance of counsel claims turns upon the sufficiency of the record.
13. ____: ____: ____. The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question.
14. **Criminal Law: Effectiveness of Counsel: Records: Appeal and Error.** The trial record reviewed on appeal in a criminal case is devoted to issues of guilt and innocence and does not usually address issues of counsel's performance.
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16. **Effectiveness of Counsel: Records: Proof: Appeal and Error.** On direct appeal, an appellate court can determine whether the record proves or rebuts the merits of a claim of ineffective assistance of trial counsel only if it has knowledge of the specific conduct alleged to constitute deficient performance.
17. **Effectiveness of Counsel: Appeal and Error.** Specific allegations of prejudice are not required when the issue of counsel's performance is raised on direct appeal.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Michael J. Wilson, of Schaefer Shapiro, L.L.P., for appellant.

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

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

IRWIN, Judge.

I. INTRODUCTION

Corey A. Brooks appeals his convictions for manslaughter, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. On appeal, Brooks challenges the denial of motions to suppress and alleges his various trial attorneys provided ineffective assistance of counsel. We find that Brooks' assertions regarding counsel cannot be resolved on the record provided, and we otherwise find no merit to Brooks' assertions on appeal. We affirm.

II. BACKGROUND

This case is closely related to and interwoven with *State v. Brooks, post* p. 435, 854 N.W.2d 816 (2014). The charges in that case arose largely out of evidence seized upon Brooks' arrest upon the execution of an arrest warrant issued related to the charges in the instant case. Because of the interwoven nature of the evidence and procedural posture of the two cases, we take judicial notice of the appellate record presented in *State v. Brooks*. See *Dowd Grain Co. v. County of Sarpy*, 19 Neb. App. 550, 810 N.W.2d 182 (2012) (appellate court may examine and take judicial notice of proceedings and judgment of interwoven cases). See, also, *Pennfield Oil Co. v. Winstrom*, 276 Neb. 123, 752 N.W.2d 588 (2008) (appellate court may take judicial notice of documents filed in separate but related action).

The events giving rise to this case occurred during the evening hours of September 2, 2011. On that date, Omaha Police Department (OPD) officers answered a radio call of a shooting and found the victim, James Asmus, deceased, in a detached garage. Officers observed a gunshot wound to Asmus' head. Asmus had also been shot in the leg.

OPD officers investigated Asmus' death and conducted numerous interviews with several witnesses and suspects, executed search warrants, and investigated telephone records. As

a result of that investigation, officers determined that Brooks and a number of other individuals had been in the garage or near the door to the garage at the time of Asmus' shooting. Information obtained during the investigation suggested that on the date in question, Brooks and Asmus got into an argument, during which Brooks grabbed Asmus by the hair and threw him to the floor. A few minutes later, Asmus was apparently seated on a stool and Brooks fired a shot toward Asmus' feet and then shot Asmus in the leg. Two other suspects apparently also fired shots at Asmus, and one of the shots struck Asmus in the head. Throughout the investigation, Brooks denied possessing a gun or shooting Asmus.

On or around September 3, 2011, OPD Sgt. Donald Ficenec was contacted by an attorney, Bill Eustice, who indicated that he represented Brooks and that Brooks "wanted to come make a statement to the Omaha police," but Eustice was at that time out of town and wanted to arrange a statement for the following week. Prior to arrangements' being made and Brooks' making a statement, however, OPD officers obtained and executed an arrest warrant.

OPD officers executed the arrest warrant on September 10, 2011. After conducting surveillance on a location at which they believed Brooks to be located, officers identified Brooks getting into a vehicle. As officers approached, Brooks ran. Numerous officers gave chase and eventually apprehended Brooks. A search of Brooks' person and the area through which he had run resulted in the location of drugs, cash, and a gun.

On September 11, 2011, after being arrested and booked, Brooks indicated to corrections officers that he wished to speak to OPD officers. Brooks was transported to an OPD interview room. In light of the fact Brooks' attorney, Eustice, had contacted Ficenec previously, as noted above, Ficenec called Eustice and allowed Brooks to speak with Eustice on the telephone, privately, prior to any OPD interview of Brooks. After Brooks finished speaking with Eustice, Brooks gave the telephone to Ficenec and Eustice indicated to Ficenec that "Brooks had indicated to [Eustice] that he was going to tell [OPD officers] the same information that . . . Brooks had

already told . . . Eustice." After Brooks spoke with Eustice, he was advised of his *Miranda* rights and was interviewed by another OPD officer.

During the September 11, 2011, interview, Brooks maintained repeatedly that he had not possessed a gun at the time that Asmus had been shot. The OPD officer who interviewed Brooks indicated that throughout the interview, Brooks "changed his statement several times about where he was in the garage when all this happened," but the officer agreed that Brooks had not changed his statement in terms of not possessing a gun. During the interview, Brooks minimized his involvement. Although Brooks may have made a statement during the interview concerning being caught with a gun at the time of his arrest, the record indicates that the gun located at the time of Brooks' arrest was not one of the guns used to shoot Asmus.

Brooks also spoke with OPD officers in interviews that occurred on October 30 and December 22, 2011. Both times, in events comparable to the September 11 interview, Brooks requested to speak with OPD officers despite having counsel. Ficenec indicated that Brooks contacted him approximately 13 times between late October and December 2011. During the October and December interviews, Brooks continued to maintain that he had not possessed a gun on the date of the homicide.

In February 2012, Eustice was allowed to withdraw from representing Brooks. Another attorney entered an appearance on behalf of Brooks. In August, this second attorney was allowed to withdraw from representing Brooks. A third attorney was appointed to represent Brooks. Additionally, another attorney appeared as cocounsel with the third attorney on behalf of Brooks.

In July 2012, during the second attorney's argument to the court concerning his request to withdraw from representation of Brooks, he indicated that he had given Brooks a copy of police reports concerning the investigation into Brooks' case. Brooks' personal possession of police reports while incarcerated was contrary to a "Receipt of Discovery" agreement that had been signed on behalf of Eustice, during his

representation of Brooks, and signed by the second attorney during his representation of Brooks. The State alleged that Brooks' personal possession of police reports violated "office policies and create[d] a risk of witness interference, harassment and tampering." As a result, the State contacted the Douglas County Department of Corrections and asked that all police reports be confiscated from Brooks' possession. The confiscated materials were then sealed and eventually turned over to the State.

The State then attempted to have Brooks' then-counsel in *State v. Brooks, post* p. 435, 854 N.W.2d 816 (2014), the aforementioned third attorney (who had not yet been appointed in the instant case), review the materials and remove any work product. The sealed materials were opened, and the attorney was requested to take possession of the materials and remove any work product; he refused to take possession of the materials. The materials were then locked in an evidence room.

In July 2012, Brooks filed a second amended motion to suppress, in which he sought to suppress, "from use against [Brooks], any and all evidence contained in the police reports associated with" the instant case. Brooks alleged that a variety of his constitutional rights had been violated by the confiscation of police reports from his cell. In August, the State filed a motion seeking to have Brooks compelled to review the confiscated material and remove any work product.

At a hearing on Brooks' motion to suppress evidence contained in the police reports, Brooks testified at length about the police reports that had been confiscated from his possession. He testified that he had previously reviewed the police reports with his counsel, that together they had made notes and underlined information on the police reports, and that the reports had his "writing, underlining and notes written on almost every page." When Brooks was shown the reports confiscated from his possession, he testified that a number of pages appeared to be missing.

The two exhibits that compose the reports confiscated from Brooks' possession are together more than 500 pages in length. Although the testimony before the trial court reflected

that the reports were contained in a variety of "envelopes" and were testified to in conjunction with references to the reports in each of approximately nine envelopes, the exhibits presented to this court on appeal do not contain those envelopes and, instead, include simply a series of police reports with a blank blue sheet inserted occasionally between them, throughout; our review suggests that the blue sheets and the contents between them do not correspond to any particular envelopes or to any indication of the specific reports within a particular envelope as testified to before the trial court. A review of the police reports presented to this court indicates that few of the more than 500 pages include any kind of markings, and the markings that do appear generally consist of either underlining of small portions of a report or a handwritten reference, at the top of a page, to the name of the particular witness that the report concerns.

At the conclusion of the hearing on Brooks' motion to suppress, the trial court expressed confusion about what Brooks was seeking to suppress. When the court specifically asked Brooks' counsel what he was seeking to suppress, counsel indicated, "the evidence that is contained in the police reports." The court indicated that it was not going to suppress all of the evidence contained in police reports on the basis of copies of the reports' being confiscated from Brooks. The court ultimately granted the State's motion to compel and denied Brooks' motion to suppress.

Brooks pled not guilty to an amended information charging him with manslaughter, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. Brooks waived his right to a jury trial, and the case was tried to the court. The State offered the police reports dealing with the investigation into the homicide involving Asmus. The court found Brooks guilty on all charges. Brooks was sentenced, and this appeal followed.

III. ASSIGNMENTS OF ERROR

In this appeal, Brooks has assigned three errors. First, Brooks asserts that "[t]he trial court erred in failing to suppress the evidence obtained during Brooks' September 11,

2011 interview." Second, Brooks asserts that his case should be dismissed as a result of the State's confiscation of the police reports that had been in his possession; alternatively, he asserts that he should be granted a new trial. Third, Brooks asserts that his "respective trial counsels [sic] provided prejudicial ineffective assistance."

IV. ANALYSIS

1. September 11, 2011, Interview

Brooks first assigns as error that the district court erred "in failing to suppress the evidence obtained during Brooks' September 11, 2011 interview." The record demonstrates that Brooks was advised of his rights, was afforded the opportunity to speak with his counsel, initiated contact with law enforcement, and voluntarily waived his right to counsel. This assigned error is without merit.

[1-3] In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the U.S. Supreme Court sought to protect the Fifth Amendment privilege against compelled self-incrimination from the inherently compelling pressures of custodial interrogation. *State v. Nave*, 284 Neb. 477, 821 N.W.2d 723 (2012). To do so, the Court required law enforcement to give a particular set of warnings to a person in custody before interrogation: that he has the right to remain silent, that any statement he makes may be used as evidence against him, and that he has the right to an attorney, either retained or appointed. *Id*. While the particular rights delineated under *Miranda* are absolute, the language used to apprise suspects of those rights is not. *State v. Nave, supra*. The inquiry is simply whether the warnings reasonably convey to a suspect his rights. *Id*.

[4-7] The U.S. Supreme Court has noted that once the adversary process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceedings. *Montejo v. Louisiana*, 556 U.S. 778, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009). Interrogation by the State is such a stage. *Id*. The Sixth Amendment right to counsel may be waived by a defendant, so long as the relinquishment of the right is voluntary,

knowing, and intelligent. *Montejo v. Louisiana, supra*. When a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically "does the trick," even though the *Miranda* rights purportedly have their source in the Fifth Amendment. *Montejo v. Louisiana*, 556 U.S. at 786. As a general matter, an accused who is admonished with the warnings prescribed in *Miranda* has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one. *Montejo v. Louisiana, supra*, quoting *Patterson v. Illinois*, 487 U.S. 285, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988).

In this case, Brooks was read his rights verbatim from the OPD's rights advisory form, *after* he had already been afforded the opportunity to speak to his counsel. Brooks indicated that he understood his rights and proceeded to speak with officers. The warnings were reasonably conveyed to Brooks, he actually spoke with counsel, and he waived his rights.

[8] In *Montejo v. Louisiana, supra*, the Court recognized that once an accused has invoked his right to counsel, he is not subject to further interrogation by the authorities until counsel has been made available, *unless he initiates the contact*. See, also, *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). Brooks points to *Edwards* as support for his argument that he had invoked his right to counsel and that the right was infringed by the September 11, 2011, interrogation. We disagree.

The record in this case is clear. Brooks initiated the contact with law enforcement before each interview, including the September 11, 2011, interview. Indeed, at the time of the September 11 interview, Brooks requested to speak to law enforcement and law enforcement contacted Brooks' counsel and had Brooks speak with his counsel. Brooks indicated a desire to speak with law enforcement after speaking with his counsel and affirmatively waived his rights.

Brooks argues on appeal that evidence should have been suppressed because his waiver was limited to an authorization "to elicit a specific statement regarding the homicide" and that

the specific statement was an exculpatory statement. Brief for appellant at 9. Specifically, Brooks argues in his brief that law enforcement "accepted Brooks' subsequent waiver of his [*Miranda*] rights after [counsel] advised both Brooks and [law enforcement] that police were authorized to elicit a specific statement regarding the homicide charged in the instant case." *Id*. The record does not support this assertion.

The portion of the record cited by Brooks in support of the above assertion does not include any such testimony. Rather, the record indicates that Ficenec spoke with Brooks' counsel, Eustice; that Eustice did not communicate any issues or problems with an interview of Brooks; and that Eustice indicated that Brooks "was going to tell [law enforcement] the same information that [he] had already told" Eustice. Ficenic testified that Eustice did not put any parameters on the interview that was to take place and did not indicate that anything was "off limits." Eustice also testified, but he did not testify that he put any restrictions or limitations on the interview of Brooks.

Eustice was asked if, during his telephone conversation with Brooks on September 11, 2011, any information was given to him "about [Brooks'] actually being in the homicide interrogation room and being under arrest for murder," and Eustice indicated that although "[n]othing specifically" had been said, he "just assumed that [Brooks] was" because Ficenec had initiated the telephone call. Eustice also testified that his "reasoning behind suggesting that . . . Brooks talk to [officers] is because [Brooks'] version of what occurred was exculpatory."

Brooks repeatedly asserts throughout his argument that OPD officers violated his rights and did not effectively make counsel available because they "knowingly exceeded the scope of the authorization granted . . . by Eustice when [they] rejected the specific statement authorized by Eustice and elicited incriminating statements regarding the homicide." Brief for appellant at 9. Brooks argues that officers "failed to recognize or failed to honor the limitations placed on the interview by Eustice" and that the information Eustice authorized officers to get from Brooks "consisted of a specific

exculpatory statement concerning the homicide." *Id*. at 11 and 12. The record presented by Brooks, however, does not support this suggestion.

Finally, we note that although the interviews of Brooks were recorded, sometimes with both audio and visual recording and sometimes with only audio recording, the actual recordings of the interviews were not offered as evidence in the bench trial. Rather, the State offered two exhibits which comprised the police reports regarding the homicide and the autopsy report. Those police reports do include references to the statements Brooks made during the interviews, but the totality of the interviews was never offered or received as evidence in the bench trial.

In this case, Brooks initiated contact with law enforcement, was afforded the opportunity to speak with his counsel, was advised of all of his rights, and voluntarily waived those rights. The district court did not err in overruling the motion to suppress.

2. Confiscation of Police Reports

Brooks next assigns as error that the charges brought against him "should be dismissed because the State violated Brooks' constitutional right to private communications with counsel when it raided Brooks' cell without his knowledge and confiscated his confidential work product." In the alternative, Brooks seeks to have the convictions reversed and the matter remanded for a new trial. This assigned error is meritless.

As noted above in the background section, during the course of these proceedings, one of Brooks' attorneys provided him with copies of police reports, in violation of Douglas County policies and discovery agreements signed by Brooks' counsel. The State then had law enforcement confiscate the materials and took steps to have Brooks' counsel review the materials and remove any work product. The evidence adduced at trial uniformly indicated that the State never looked at any of the materials and was not aware of whether any work product appeared on any of the materials.

Brooks argues that the privacy of his communications with his counsel was violated because the confiscated materials included "work product generated by Brooks both independently and during meetings with his attorney." Brief for appellant at 17. Brooks urges us to reach a conclusion similar to that of the California Supreme Court in *Barber v. Municipal Court, etc.*, 24 Cal. 3d 742, 598 P.2d 818, 157 Cal. Rptr. 658 (1979). We decline to do so.

In *Barber v. Municipal Court, etc.*, participants of a "sit-in" near a nuclear power facility as a demonstration of opposition to the use of nuclear power were charged with trespassing and unlawful assembly. As it turned out, one of the codefendants was actually an undercover police officer, who had become intimately involved with the group and attended numerous planning meetings. After the participants were arrested, attorneys arrived at the jail and conducted a confidential attorney-client conference with the arrestees, including the undercover officer. The undercover officer was present for the confidential attorney-client conference with the defendants and testified that he was sure defense strategy had been discussed, but that he had not paid close attention.

At or around the time of the defendants' arraignment, the presiding judge and the prosecuting attorney were informed that one of the defendants was an undercover officer, but defense counsel was not informed. The undercover officer continued to pose as a codefendant with the defendants and as a client of defense counsel. He attended numerous confidential attorney-client conferences that included detailed discussions about the case and defense strategy. He participated in discussion about the defense.

Throughout the pretrial proceedings, the undercover officer reported to his superiors. His superiors testified that they could not remember what information he had conveyed to them, but that they were sure he had given them no information about defense strategy.

At some point, approximately 2 months after the arrests, the undercover officer's identity as an undercover officer was made known to defense counsel and to the defendants. Evidence indicated that after this information was revealed,

the defendants became paranoid, distrustful of one another and their counsel, and reluctant to actively participate in preparing a defense.

The defendants filed a motion seeking to have the charges dismissed. The trial court denied the motion on the ground that there was no evidence any confidential information had been transmitted to the prosecution, but ordered suppression of any evidence gained from the undercover officer or derived from his presence at any meetings between the defendants and their counsel.

[9,10] On appeal, the California Supreme Court reversed. *Id*. The court recognized that inherent in the Sixth Amendment right to counsel is the assurance of confidentiality and privacy of communication with counsel. Thus, the court held that the right to counsel is violated "when a state agent is present at confidential attorney-client conferences." *Barber v. Municipal Court, etc*., 24 Cal. App. 3d at 752, 598 P.2d at 823, 157 Cal. Rptr. at 663.

The California Supreme Court, relying heavily on the evidence of the impact on the relationship between the defendants and their counsel of discovering the undercover officer's true identity, concluded that on the facts of that case, dismissal was the only appropriate remedy. *Id*.

The present case, however, is substantially distinguishable. This case does not involve any situation where any representative of the State was "sitting in on" any conversations between Brooks and counsel. The present case does not present a situation where any member of the prosecution or the investigating officers was privy to any discussions between Brooks and his counsel or aware of any aspects of defense strategy. The unrefuted evidence in this case is that once the materials were confiscated, nobody associated with the State actually read or reviewed any of the contents of the materials.

In this case, Brooks did not move for dismissal at the trial level. Rather, he moved that "any evidence contained in the police reports, . . . containing [Brooks'] protected defense work product, be excluded from use against him at trial." Although it was not entirely clear what relief Brooks was seeking at trial and the trial court expressed confusion

about the relief being sought, there was no request for dismissal of any charges. Brooks has not assigned as error the district court's denial of the relief he actually requested at trial, suppression.

We are thus left with a situation where Brooks requested a particular relief at trial, was denied that relief, and has not assigned error to the denial of that relief, but where he asserts on appeal that the district court erred in not granting other relief that was never requested. The only way this assigned error could be found to have merit would be on the basis of a finding of plain error.

To the extent Brooks appears to have requested the trial court to suppress the entire contents of all police reports in this case because copies of them were confiscated from his cell—confiscated on the basis that his possession thereof violated Douglas County policies and disclosure agreements signed by his counsel—we find no plain error in the district court's denial of the motion.

To the extent Brooks seeks to have us grant relief never requested below, either in the form of dismissal of all charges or in the form of a new trial, we similarly find no plain error meriting such relief. The record in this case is clear that the State did not look at any of the confiscated materials to determine any content therein, contrary to the undercover officer's continued participation and awareness of specific defense strategies in *Barber v. Municipal Court, etc.*, 24 Cal. 3d 742, 598 P.2d 818, 157 Cal. Rptr. 658 (1979). Moreover, although the confiscated materials are presented as exhibits that together appear to be at least 500 pages in length, our review of the materials indicates that there is little to no information contained therein that was added to the original reports by Brooks or his counsel. Indeed, the most that can be said about the confiscated reports appears to be that someone underlined some portions of witness testimony on a handful of the police reports and wrote the name of particular witnesses who are mentioned in the reports at the top of a handful of pages. The vast majority of the 500 or more pages contain absolutely no markings whatsoever.

The denial of the relief requested at trial has not been appealed to us. The relief urged on appeal was not requested at trial. We find no plain error and find this assigned error to be meritless.

3. Assistance of Counsel

Finally, Brooks assigns as error that his "respective trial counsels [sic] provided prejudicial ineffective assistance." He argues that "all of his trial counsels [sic]" provided ineffective assistance "at various points throughout the proceedings." Brief for appellant at 23. Brooks asserts that his trial attorneys were ineffective in a variety of ways, including failing "to independently interview, depose, or subpoena" a variety of witnesses, and that Eustice was ineffective in advising Brooks to speak with police without his presence on several occasions. *Id*. at 25. We find that these assertions cannot properly be considered in this direct appeal.

[11] The test for ineffective assistance of counsel is well settled. To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

[12-14] On direct appeal, the resolution of ineffective assistance of counsel claims turns upon the sufficiency of the record. *Id*. The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question. *Id*. This is because the trial record reviewed on appeal in a criminal case is devoted to issues of guilt and innocence and does not usually address issues of counsel's performance. *Id*.

[15-17] A defendant alleging that trial counsel was ineffective is required to specifically assign and argue his trial counsel's allegedly deficient conduct. *Id*. On direct appeal, an appellate court can determine whether the record proves or rebuts the merits of a claim of ineffective assistance of trial

counsel only if it has knowledge of the specific conduct alleged to constitute deficient performance. *Id*. Specific allegations of prejudice, however, are not required when the issue is raised on direct appeal. *Id*.

In this case, the record presented on direct appeal is not sufficient for us to resolve Brooks' assertions that his trial counsel performed ineffectively. Although Brooks asserts that counsel performed ineffectively in failing to independently interview, depose, or subpoena a variety of witnesses, there is no record presented to us to demonstrate that counsel actually did fail to interview or depose any of the witnesses. Although Brooks makes assertions in his brief about what the various witnesses would have testified, there is obviously no record to support his assertions or to indicate what any of the witnesses might have testified.

Finally, although the record does indicate that Eustice advised Brooks to speak with law enforcement without his presence, the record has not been developed to fully indicate Eustice's motivations for such a decision, beyond his expectation that Brooks would provide an exculpatory statement. Moreover, it is not apparent from the record presented how Eustice's advice in this regard resulted in prejudice, inasmuch as there was substantial evidence adduced to the trial court concerning Brooks' involvement in the homicide.

On the record presented on direct appeal, we cannot find that Brooks' trial counsel performed deficiently or that any alleged deficient performance prejudiced Brooks' defense. At this time, the record is insufficient to further address the merits of Brooks' assertions about the effectiveness of his counsel.

V. CONCLUSION

We find no merit to Brooks' assertions on appeal. We affirm.

AFFIRMED.

State of Nebraska, appellee, v. Corey A. Brooks, appellant.

854 N.W.2d 816

Filed October 14, 2014. No. A-13-761.

1. **Constitutional Law: Miranda Rights: Self-Incrimination.** In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the U.S. Supreme Court sought to protect the Fifth Amendment privilege against compelled self-incrimination from the inherently compelling pressures of custodial interrogation. To do so, the Court required law enforcement to give a particular set of warnings to a person in custody before interrogation: that he has the right to remain silent, that any statement he makes may be used as evidence against him, and that he has the right to an attorney, either retained or appointed.
2. **Miranda Rights: Self-Incrimination.** While the particular rights delineated under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), are absolute, the language used to apprise suspects of those rights is not.
3. ____: ____. The inquiry in reviewing *Miranda* warnings is simply whether the warnings reasonably convey to a suspect his rights.
4. **Constitutional Law: Right to Counsel.** Once the adversary process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceedings.
5. **Constitutional Law: Right to Counsel: Waiver.** The Sixth Amendment right to counsel may be waived by a defendant, so long as the relinquishment of the right is voluntary, knowing, and intelligent.
6. **Constitutional Law: Miranda Rights: Right to Counsel: Waiver.** When a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically "does the trick" with regard to the requirement that such waiver be voluntary, knowing, and intelligent, even though the *Miranda* rights purportedly have their source in the Fifth Amendment.
7. ____: ____: ____: ____. As a general matter, an accused who is admonished with the warnings prescribed in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one.
8. **Right to Counsel.** Once an accused has invoked his right to counsel, he is not subject to further interrogation by the authorities until counsel has been made available, unless he initiates the contact.
9. **Constitutional Law: Right to Counsel: Attorney and Client.** Inherent in the Sixth Amendment right to counsel is the assurance of confidentiality and privacy of communication with counsel.
10. **Right to Counsel.** The right to counsel is violated when a state agent is present at confidential attorney-client conferences.
11. **Criminal Law: Trial: Evidence.** Where objects pass through several hands before being produced in court, it is necessary to establish a complete chain of evidence, tracing the possession of the object or article to the final custodian;

and if one link in the chain is missing, the object may not be introduced in evidence.

12. **Trial: Evidence.** In determining whether the State has established a sufficient chain of custody, a court decides the issue on a case-by-case basis, considering the following factors: the nature of the evidence, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object.
13. ____: ____. Objects which relate to or explain the issues or form a part of a transaction are admissible in evidence only when duly identified and shown to be in substantially the same condition as at the time in issue.
14. ____: ____. It must be shown to the satisfaction of the trial court that no substantial change has taken place in an exhibit so as to render it misleading. As long as the article can be identified, it is immaterial in how many or in whose hands it has been.
15. **Trial: Evidence: Proof.** Proof that an exhibit remained in the custody of law enforcement officials is sufficient to prove a chain of possession and is sufficient foundation to permit its introduction into evidence.
16. **Trial: Evidence: Appeal and Error.** Appellate review concerning the admissibility of evidence is for an abuse of discretion.
17. **Effectiveness of Counsel: Proof: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.
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23. **Effectiveness of Counsel: Appeal and Error.** Specific allegations of prejudice are not required when the issue of counsel's performance is raised on direct appeal.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Michael J. Wilson, of Schaefer Shapiro, L.L.P., for appellant.

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

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

IRWIN, Judge.

I. INTRODUCTION

Corey A. Brooks appeals his convictions for possession of a deadly weapon by a prohibited person and possession with intent to deliver methamphetamine. On appeal, Brooks challenges the denial of motions to suppress and alleges his various trial attorneys provided ineffective assistance of counsel. We find that Brooks' assertions regarding counsel cannot be resolved on the record provided, and we otherwise find no merit to Brooks' assertions on appeal. We affirm.

II. BACKGROUND

This case is closely related to and interwoven with *State v. Brooks, ante* p. 419, 854 N.W.2d 804 (2014). The charges in the instant case arose largely out of evidence seized upon Brooks' arrest upon the execution of an arrest warrant issued related to the charges in *State v. Brooks*. Because of the interwoven nature of the evidence and procedural posture of the two cases, we take judicial notice of the appellate record presented in *State v. Brooks*. See *Dowd Grain Co. v. County of Sarpy*, 19 Neb. App. 550, 810 N.W.2d 182 (2012) (appellate court may examine and take judicial notice of proceedings and judgment of interwoven cases). See, also, *Pennfield Oil Co. v. Winstrom*, 276 Neb. 123, 752 N.W.2d 588 (2008) (appellate court may take judicial notice of documents filed in separate but related action).

As set forth in the opinion in *State v. Brooks, supra*, Brooks was implicated in the homicide of James Asmus that occurred in September 2011. The investigation into that homicide eventually led Omaha Police Department (OPD) officers to obtain and execute an arrest warrant to take Brooks into custody.

OPD officers executed the arrest warrant on September 10, 2011. After conducting surveillance on a location at which they believed Brooks to be located, officers identified Brooks getting into a vehicle. As officers approached, Brooks ran. Numerous officers gave chase and eventually apprehended Brooks. A search of Brooks' person and the area through which he had run resulted in the location of drugs, cash, and a gun.

On September 11, 2011, after being arrested and booked, Brooks indicated to corrections officers that he wished to speak to OPD officers. Brooks was transported to an OPD interview room. Brooks' attorney, Bill Eustice, had previously contacted OPD Sgt. Donald Ficenec during OPD's investigation into the homicide of Asmus and had indicated that Brooks "wanted to come make a statement to the Omaha police," but Eustice was at that time out of town and wanted to arrange a time for Brooks to make a statement. Prior to arrangements' being made and Brooks' making a statement, however, OPD officers obtained and executed the arrest warrant. In light of Eustice's prior contact, Ficenec called Eustice and allowed Brooks to speak with Eustice on the telephone, privately, prior to any OPD interview of Brooks. After Brooks finished speaking with Eustice, Brooks gave the telephone to Ficenec and Eustice indicated to Ficenec that "Brooks had indicated to [Eustice] that he was going to tell [OPD officers] the same information that . . . Brooks had already told . . . Eustice." After Brooks spoke with Eustice, he was advised of his *Miranda* rights and was interviewed by another OPD officer.

During the course of the interview, Brooks made statements about the drugs found on his person "two to three" times. When Ficenec made a statement about OPD's having "located four and a half grams" of drugs, Brooks "corrected him and said ounces." Brooks also stated during the interview, "I got caught with the drugs, I did get caught with the gun, that's mine." Finally, Brooks also made a statement about the cash found on his person; Ficenec made a statement indicating that approximately $2,500 had been located, and Brooks indicated that "it should be closer to [$]4,000."

Brooks also spoke with OPD officers in interviews that occurred on October 30 and December 22, 2011. Both times, in events comparable to the September 11 interview, Brooks requested to speak with OPD officers despite having counsel. Ficenec indicated that Brooks contacted him approximately 13 times between late October and December 2011.

In February 2012, Eustice was allowed to withdraw from representing Brooks. Another attorney entered an appearance on behalf of Brooks. In July, this second attorney was allowed to withdraw from representing Brooks. A third attorney was appointed to represent Brooks. Additionally, another attorney appeared as cocounsel with the third attorney on behalf of Brooks.

In July 2012, during the second attorney's argument to the court concerning his request to withdraw from representation of Brooks, he indicated that he had given Brooks a copy of police reports concerning the investigation into Brooks' case. Brooks' personal possession of police reports while incarcerated was contrary to a "Receipt of Discovery" agreement that had been signed on behalf of Eustice, during his representation of Brooks, and signed by the second attorney during his representation of Brooks. The State alleged that Brooks' personal possession of police reports violated "office policies and create[d] a risk of witness interference, harassment and tampering." As a result, the State contacted the Douglas County Department of Corrections and asked that all police reports be confiscated from Brooks' possession. The confiscated materials were then sealed and eventually turned over to the State.

The State then attempted to have Brooks' then-counsel, the aforementioned third attorney, review the materials and remove any work product. The sealed materials were opened, and the attorney was requested to take possession of the materials and remove any work product; he refused to take possession of the materials. The materials were then locked in an evidence room.

In July 2012, Brooks filed a second amended motion to suppress, in which he sought to suppress, "from use against [Brooks], any and all evidence contained in the police reports

associated with" the instant case. Brooks alleged that a variety of his constitutional rights had been violated by the confiscation of police reports from his cell. In August, the State filed a motion seeking to have Brooks compelled to review the confiscated material and remove any work product.

At a hearing on Brooks' motion to suppress evidence contained in the police reports, Brooks testified at length about the police reports that had been confiscated from his possession. He testified that he had previously reviewed the police reports with his counsel, that together they had made notes and underlined information on the police reports, and that the reports had his "writing, underlining and notes written on almost every page." When Brooks was shown the reports confiscated from his possession, he testified that a number of pages appeared to be missing.

The two exhibits that compose the reports confiscated from Brooks' possession are together more than 500 pages in length. Although the testimony before the trial court reflected that the reports were contained in a variety of "envelopes" and were testified to in conjunction with references to the reports in each of approximately nine envelopes, the exhibits presented to this court on appeal do not contain those envelopes and, instead, include simply a series of police reports with a blank blue sheet inserted occasionally between them, throughout; our review suggests that the blue sheets and the contents between them do not correspond to any particular envelopes or to any indication of the specific reports within a particular envelope as testified to before the trial court. A review of the police reports presented to this court indicates that few of the more than 500 pages include any kind of markings, and the markings that do appear generally consist of either underlining of small portions of a report or a handwritten reference, at the top of a page, to the name of the particular witness that the report concerns.

At the conclusion of the hearing on Brooks' motion to suppress, the trial court expressed confusion about what Brooks was seeking to suppress. When the court specifically asked Brooks' counsel what he was seeking to suppress, counsel indicated, "the evidence that is contained in the police reports."

The court indicated that it was not going to suppress all of the evidence contained in police reports on the basis of copies of the reports' being confiscated from Brooks. The court ultimately granted the State's motion to compel and denied Brooks' motion to suppress.

In December 2012, Brooks filed a third amended motion to suppress, seeking to exclude from evidence the drugs, the cash, and the gun located at the time of his arrest. In support of the motion, Brooks asserted that OPD reports related to the evidence listed "recovery date[s]" that were inconsistent with his September 11, 2011, arrest. Brooks asserted that problems with the chain of custody required exclusion of the evidence.

This case was tried before a jury in July 2013. The jury returned verdicts of guilty on the charges of possession with intent to deliver methamphetamine and possession of a deadly weapon by a prohibited person. The trial court entered judgment, Brooks was sentenced, and this appeal followed.

III. ASSIGNMENTS OF ERROR

In this appeal, Brooks has assigned four errors. First, Brooks asserts that "[t]he trial court erred in failing to suppress the evidence obtained during Brooks' September 11, 2011 interview." Second, Brooks asserts that his case should be dismissed as a result of the State's confiscation of the police reports that had been in his possession; alternatively, he asserts that he should be granted a new trial. Third, Brooks asserts that "[t]he trial court erred when it admitted gun and drug evidence despite the State's failure to adequately demonstrate that the evidence remained in the custody of law enforcement . . ." prior to trial. Fourth, Brooks asserts that his "respective trial counsels [sic] provided prejudicial ineffective assistance."

IV. ANALYSIS

1. September 11, 2011, Interview

Brooks first assigns as error that the district court erred "in failing to suppress the evidence obtained during Brooks' September 11, 2011 interview." The record demonstrates that

Brooks was advised of his rights, was afforded the opportunity to speak with his counsel, initiated contact with law enforcement, and voluntarily waived his right to counsel. This assigned error is without merit.

[1-3] In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the U.S. Supreme Court sought to protect the Fifth Amendment privilege against compelled self-incrimination from the inherently compelling pressures of custodial interrogation. *State v. Nave*, 284 Neb. 477, 821 N.W.2d 723 (2012). To do so, the Court required law enforcement to give a particular set of warnings to a person in custody before interrogation: that he has the right to remain silent, that any statement he makes may be used as evidence against him, and that he has the right to an attorney, either retained or appointed. *Id*. While the particular rights delineated under *Miranda* are absolute, the language used to apprise suspects of those rights is not. *State v. Nave, supra*. The inquiry is simply whether the warnings reasonably convey to a suspect his rights. *Id*.

[4-7] The U.S. Supreme Court has noted that once the adversary process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceedings. *Montejo v. Louisiana*, 556 U.S. 778, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009). Interrogation by the State is such a stage. *Id*. The Sixth Amendment right to counsel may be waived by a defendant, so long as the relinquishment of the right is voluntary, knowing, and intelligent. *Montejo v. Louisiana, supra*. When a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically "does the trick," even though the *Miranda* rights purportedly have their source in the Fifth Amendment. *Montejo v. Louisiana*, 556 U.S. at 786. As a general matter, an accused who is admonished with the warnings prescribed in *Miranda* has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one. *Montejo v. Louisiana, supra*, quoting *Patterson*

v. Illinois, 487 U.S. 285, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988).

In this case, Brooks was read his rights verbatim from the OPD's rights advisory form, *after* he had already been afforded the opportunity to speak to his counsel. Brooks indicated that he understood his rights and proceeded to speak with officers. The warnings were reasonably conveyed to Brooks, he actually spoke with counsel, and he waived his rights.

[8] In *Montejo v. Louisiana, supra*, the Court recognized that once an accused has invoked his right to counsel, he is not subject to further interrogation by the authorities until counsel has been made available, *unless he initiates the contact*. See, also, *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). Brooks points to *Edwards* as support for his argument that he had invoked his right to counsel and that the right was infringed by the September 11, 2011, interrogation. We disagree.

The record in this case is clear. Brooks initiated the contact with law enforcement before each interview, including the September 11, 2011, interview. Indeed, at the time of the September 11 interview, Brooks requested to speak to law enforcement and law enforcement contacted Brooks' counsel and had Brooks speak with his counsel. Brooks indicated a desire to speak with law enforcement after speaking with his counsel and affirmatively waived his rights.

Brooks argues on appeal that evidence should have been suppressed because his waiver was limited to an authorization "to elicit a specific statement regarding the homicide" and that the specific statement was an exculpatory statement. Brief for appellant at 14. Specifically, Brooks argues in his brief that law enforcement "accepted Brooks' subsequent waiver of his [*Miranda*] rights after [counsel] advised both Brooks and [law enforcement] that police were authorized to elicit a specific statement regarding the homicide charged [in *State v. Brooks, ante* p. 419, 854 N.W.2d 804 (2014)]." Brief for appellant at 14. The record does not support this assertion.

The portion of the record cited by Brooks in support of the above assertion does not include any such testimony. Rather, the record indicates that Ficenec spoke with Brooks' counsel,

Eustice; that Eustice did not communicate any issues or problems with an interview of Brooks; and that Eustice indicated that Brooks "was going to tell [law enforcement] the same information that [he] had already told" Eustice. Ficenic testified that Eustice did not put any parameters on the interview that was to take place and did not indicate that anything was "off limits." Eustice also testified, but he did not testify that he put any restrictions or limitations on the interview of Brooks.

In his brief on appeal, Brooks asserts that "Ficenec knew that Eustice did not have any information concerning the new gun and drug offenses that the State eventually filed in the case" and that "Eustice advised both Brooks and Ficenec that police were authorized to elicit a specific statement regarding the homicide" at issue in *State v. Brooks, supra*. Brief for appellant at 14. Our review of the portions of the record cited by Brooks, however, indicates that the cited portions of the record do not include any such testimony. Rather, the cited portions of the record indicate that Ficenec testified that Eustice did not communicate any issues or problems with interviewing Brooks and that Eustice told Ficenec that Brooks "was going to tell [law enforcement] the same information that [he] had already told" Eustice.

There is no indication in our record of what, precisely, Brooks had previously told Eustice. There is, obviously, no indication in our record of what Brooks and Eustice discussed or whether Brooks had informed Eustice of anything related to the charges in the instant case. It does not appear that Eustice was ever actually asked if he had been aware of anything related to the charges in the instant case.

Eustice was asked if, during his telephone conversation with Brooks on September 11, 2011, any information was given to him "about [Brooks'] actually being in the homicide interrogation room and being under arrest for murder," and Eustice indicated that although "[n]othing specifically" had been said, he "just assumed that [Brooks] was" because Ficenec had initiated the telephone call. Eustice also testified that his "reasoning behind suggesting that . . . Brooks talk

to [officers] is because [Brooks'] version of what occurred was exculpatory."

Brooks repeatedly asserts throughout his argument that OPD officers violated his rights and did not effectively make counsel available because they "knowingly exceeded the scope of the authorization granted . . . by Eustice when [they] questioned Brooks regarding the gun and drug offenses the State eventually charged in the case at bar." Brief for appellant at 14. Brooks argues that officers "failed to recognize or failed to honor the limitations placed on the interview by Eustice" and that the information Eustice authorized officers to get from Brooks "consisted of a specific exculpatory statement concerning only the homicide." *Id.* at 17. The record presented by Brooks, however, does not support this suggestion.

Finally, we note that although the interviews of Brooks were recorded, sometimes with both audio and visual recording and sometimes with only audio recording, the actual recordings of the interviews were not offered as evidence to the jury. Rather, the State offered exhibits which comprised two of the interviews and a "redacted" version of the interviews "for limited purpose for the Court and the record." Evidence was adduced in the form of testimony of Ficenec and another officer concerning the interviews and statements that Brooks had made, but it is not apparent that any recording of the interviews was ever played for the jury.

In this case, Brooks initiated contact with law enforcement, was afforded the opportunity to speak with his counsel, was advised of all of his rights, and voluntarily waived those rights. The district court did not err in overruling the motion to suppress.

2. Confiscation of Police Reports

Brooks next assigns as error that the charges brought against him "should be dismissed because the State violated Brooks' constitutional right to private communications with counsel when it raided Brooks' cell without his knowledge

and confiscated his confidential work product." In the alternative, Brooks seeks to have the convictions reversed and the matter remanded for a new trial. This assigned error is meritless.

As noted above in the background section, during the course of these proceedings, one of Brooks' attorneys provided him with copies of police reports, in violation of Douglas County policies and discovery agreements signed by Brooks' counsel. The State then had law enforcement confiscate the materials and took steps to have Brooks' counsel review the materials and remove any work product. The evidence adduced at trial uniformly indicated that the State never looked at any of the materials and was not aware of whether any work product appeared on any of the materials.

Brooks argues that the privacy of his communications with his counsel was violated because the confiscated materials included "work produced by Brooks both by himself and while working on his case with trial counsel." Brief for appellant at 21. Brooks urges us to reach a conclusion similar to that of the California Supreme Court in *Barber v. Municipal Court, etc.*, 24 Cal. 3d 742, 598 P.2d 818, 157 Cal. Rptr. 658 (1979). We decline to do so.

In *Barber v. Municipal Court, etc.*, participants of a "sit-in" near a nuclear power facility as a demonstration of opposition to the use of nuclear power were charged with trespassing and unlawful assembly. As it turned out, one of the codefendants was actually an undercover police officer, who had become intimately involved with the group and attended numerous planning meetings. After the participants were arrested, attorneys arrived at the jail and conducted a confidential attorney-client conference with the arrestees, including the undercover officer. The undercover officer was present for the confidential attorney-client conference with the defendants and testified that he was sure defense strategy had been discussed, but that he had not paid close attention.

At or around the time of the defendants' arraignment, the presiding judge and the prosecuting attorney were informed that one of the defendants was an undercover officer, but

defense counsel was not informed. The undercover officer continued to pose as a codefendant with the defendants and as a client of defense counsel. He attended numerous confidential attorney-client conferences that included detailed discussions about the case and defense strategy. He participated in discussion about the defense.

Throughout the pretrial proceedings, the undercover officer reported to his superiors. His superiors testified that they could not remember what information he had conveyed to them, but that they were sure he had given them no information about defense strategy.

At some point, approximately 2 months after the arrests, the undercover officer's identity as an undercover officer was made known to defense counsel and to the defendants. Evidence indicated that after this information was revealed, the defendants became paranoid, distrustful of one another and their counsel, and reluctant to actively participate in preparing a defense.

The defendants filed a motion seeking to have the charges dismissed. The trial court denied the motion on the ground that there was no evidence any confidential information had been transmitted to the prosecution, but ordered suppression of any evidence gained from the undercover officer or derived from his presence at any meetings between the defendants and their counsel.

[9,10] On appeal, the California Supreme Court reversed. *Id*. The court recognized that inherent in the Sixth Amendment right to counsel is the assurance of confidentiality and privacy of communication with counsel. Thus, the court held that the right to counsel is violated "when a state agent is present at confidential attorney-client conferences." *Barber v. Municipal Court, etc*., 24 Cal. App. 3d at 752, 598 P.2d at 823, 157 Cal. Rptr. at 663.

The California Supreme Court, relying heavily on the evidence of the impact on the relationship between the defendants and their counsel of discovering the undercover officer's true identity, concluded that on the facts of that case, dismissal was the only appropriate remedy. *Id*.

The present case, however, is substantially distinguishable. This case does not involve any situation where any representative of the State was "sitting in on" any conversations between Brooks and counsel. The present case does not present a situation where any member of the prosecution or the investigating officers was privy to any discussions between Brooks and his counsel or aware of any aspects of defense strategy. The unrefuted evidence in this case is that once the materials were confiscated, nobody associated with the State actually read or reviewed any of the contents of the materials.

In this case, Brooks did not move for dismissal at the trial level. Rather, he moved "that any evidence contained in the police reports, . . . containing [Brooks'] protected defense work product, be excluded from use against him at trial." Although it was not entirely clear what relief Brooks was seeking at trial and the trial court expressed confusion about the relief being sought, there was no request for dismissal of any charges. Brooks has not assigned as error the district court's denial of the relief he actually requested at trial, suppression.

We are thus left with a situation where Brooks requested a particular relief at trial, was denied that relief, and has not assigned error to the denial of that relief, but where he asserts on appeal that the district court erred in not granting other relief that was never requested. The only way this assigned error could be found to have merit would be on the basis of a finding of plain error.

To the extent Brooks appears to have requested the trial court to suppress the entire contents of all police reports in this case because copies of them were confiscated from his cell—confiscated on the basis that his possession thereof violated Douglas County policies and disclosure agreements signed by his counsel—we find no plain error in the district court's denial of the motion.

To the extent Brooks seeks to have us grant relief never requested below, either in the form of dismissal of all charges or in the form of a new trial, we similarly find no plain error meriting such relief. The record in this case is clear that

the State did not look at any of the confiscated materials to determine any content therein, contrary to the undercover officer's continued participation and awareness of specific defense strategies in *Barber v. Municipal Court, etc.*, 24 Cal. 3d 742, 598 P.2d 818, 157 Cal. Rptr. 658 (1979). Moreover, although the confiscated materials are presented as exhibits that together appear to be at least 500 pages in length, our review of the materials indicates that there is little to no information contained therein that was added to the original reports by Brooks or his counsel. Indeed, the most that can be said about the confiscated reports appears to be that someone underlined some portions of witness testimony on a handful of the police reports and wrote the name of particular witnesses who are mentioned in the reports at the top of a handful of pages. The vast majority of the 500 or more pages contain absolutely no markings whatsoever.

The denial of the relief requested at trial has not been appealed to us. The relief urged on appeal was not requested at trial. We find no plain error and find this assigned error to be meritless.

3. Chain of Custody

Brooks next assigns as error that the district court erred "when it admitted gun and drug evidence despite the State's failure to adequately demonstrate that the evidence remained in the custody of law enforcement for the entire period prior to trial." Brooks' argument in this regard is primarily focused on the fact that "[w]ritten forms relating to both the gun and the drugs introduced during Brooks' trial contained dates of recovery that did not match the dates of recovery testified to by the officers." Brief for appellant at 28. We find no merit to this assigned error.

[11,12] Where objects pass through several hands before being produced in court, it is necessary to establish a complete chain of evidence, tracing the possession of the object or article to the final custodian; and if one link in the chain is missing, the object may not be introduced in evidence. *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011); *State*

v. Veatch, 16 Neb. App. 50, 740 N.W.2d 817 (2007). In determining whether the State has established a sufficient chain of custody, a court decides the issue on a case-by-case basis, considering the following factors: the nature of the evidence, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object. *State v. Kofoed*, 283 Neb. 767, 817 N.W.2d 225 (2012). See, also, *State v. Glazebrook, supra*.

[13-16] Objects which relate to or explain the issues or form a part of a transaction are admissible in evidence only when duly identified and shown to be in substantially the same condition as at the time in issue. *State v. Glazebrook, supra*; *State v. Veatch, supra*. It must be shown to the satisfaction of the trial court that no substantial change has taken place in an exhibit so as to render it misleading. *Id*. As long as the article can be identified, it is immaterial in how many or in whose hands it has been. *State v. Veatch, supra*. Proof that an exhibit remained in the custody of law enforcement officials is sufficient to prove a chain of possession and is sufficient foundation to permit its introduction into evidence. *Id*. Appellate review concerning the admissibility of evidence is for an abuse of discretion. See *id*.

In this case, Brooks first filed a motion to suppress the drugs found on his person at the time of his arrest and the gun found at the time of his arrest, arguing that there was a problem with the chain of custody because OPD forms concerning the evidence included a "recovery date" that was not consistent with the date of his arrest. At the hearing on Brooks' motion, the OPD employees responsible for completing the forms testified that it appeared that a mistake had been made concerning the recovery date. The State argued that a motion to suppress was not the proper way to challenge the chain of custody, because the State could prove the chain of custody through testimony at trial. See, e.g., *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990) (assertion concerning chain of custody goes to weight to be given to evidence presented rather than to admissibility of evidence). The trial court agreed and held that the testimony concerning clerical error was sufficient to support denial of the motion to suppress.

At trial, the State adduced additional evidence concerning the chain of custody for the drugs and the gun. Officer Robert Laney testified that he counted the money and put the money and drugs that were found on Brooks' person into evidence. An OPD crime laboratory technician testified that she received the drugs from Laney and made sure that the packaging all matched up with the actual contents and that the paperwork was properly completed to check the drugs in as evidence. An employee in OPD's property and evidence unit testified that the crime laboratory technician booked the drugs into a locker and that he then took the drugs from the locker to the property room and documented everything in the crime laboratory book.

Laney testified about the process of putting items into evidence and testified that another employee was responsible for then filling out the form identifying the drugs and allowing for tracking of the drugs while they remained in the custody of law enforcement and for checking them out for testing. That employee testified that she filled out the form and that she put the wrong date on the form as the date of recovery. A forensic chemist testified that he checked out the drugs for testing, that he personally picked the drugs up from OPD, and that the drugs were in his possession while checked out. He testified that another employee returned the drugs to OPD. Another employee of the property and evidence unit testified that he checked the drugs back in when the forensic chemist returned them after testing.

With respect to the gun, an OPD crime laboratory technician testified that she went to the scene of Brooks' arrest on September 11, 2011, marked items of evidence for photographing, collected items of evidence, and transported evidence back to OPD's crime laboratory. She testified that the gun and ammunition located at the time of Brooks' arrest were placed into a safe and that she made the necessary notations in the property book. An employee of the property and evidence unit testified that the crime laboratory technician checked the gun into a property locker and that the employee then retrieved the gun from the locker and placed it into an OPD evidence storage location.

The evidence adduced at trial demonstrated that the drugs and the gun were in the possession of OPD from the time they were located at Brooks' arrest until trial. The evidence demonstrated that logbooks and records were kept to document each person who took possession of the items throughout the time leading up to trial. The evidence indicated that a clerical error was made with regard to the date of recovery on two of the chain of custody forms, but there was no evidence adduced to suggest that the items were ever out of law enforcement's control, tampered with by any intermeddlers, or subject to any substantial change so as to render them misleading. See *State v. Veatch*, 16 Neb. App. 50, 740 N.W.2d 817 (2007). We find no abuse of discretion in the district court's allowing admission of the evidence at trial. This assigned error is without merit.

4. Assistance of Counsel

Finally, Brooks assigns as error that his "respective trial counsels [sic] provided prejudicial ineffective assistance." He argues that "all of his trial counsels [sic]" provided ineffective assistance "at various points throughout the proceedings." Brief for appellant at 32. Brooks asserts that his trial attorneys were ineffective in a variety of ways, including failing to interview, depose, or subpoena a variety of witnesses, and that Eustice was ineffective in advising Brooks to speak with police without his presence on several occasions. We find that these assertions cannot properly be considered in this direct appeal.

[17] The test for ineffective assistance of counsel is well settled. To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

[18-20] On direct appeal, the resolution of ineffective assistance of counsel claims turns upon the sufficiency of the record. *Id*. The fact that an ineffective assistance of counsel claim is

raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question. *Id*. This is because the trial record reviewed on appeal in a criminal case is devoted to issues of guilt and innocence and does not usually address issues of counsel's performance. *Id*.

[21-23] A defendant alleging that trial counsel was ineffective is required to specifically assign and argue his trial counsel's allegedly deficient conduct. *Id*. On direct appeal, an appellate court can determine whether the record proves or rebuts the merits of a claim of ineffective assistance of trial counsel only if it has knowledge of the specific conduct alleged to constitute deficient performance. *Id*. Specific allegations of prejudice, however, are not required when the issue is raised on direct appeal. *Id*.

In this case, the record presented on direct appeal is not sufficient for us to resolve Brooks' assertions that his trial counsel performed ineffectively. Although Brooks asserts that counsel performed ineffectively in failing to independently interview, depose, or subpoena a variety of witnesses, there is no record presented to us to demonstrate that counsel actually did fail to interview or depose any of the witnesses. Although Brooks makes assertions in his brief about what the various witnesses would have testified, there is obviously no record to support his assertions or to indicate what any of the witnesses might have testified.

Finally, although the record does indicate that Eustice advised Brooks to speak with law enforcement without his presence, the record has not been developed to fully indicate Eustice's motivations for such a decision, beyond his expectation that Brooks would provide an exculpatory statement. Moreover, it is not apparent from the record presented how Eustice's advice in this regard resulted in prejudice, inasmuch as there was substantial evidence adduced to the trial court concerning Brooks' involvement in the homicide.

On the record presented on direct appeal, we cannot find that Brooks' trial counsel performed deficiently or that any alleged deficient performance prejudiced Brooks' defense.

At this time, the record is insufficient to further address the merits of Brooks' assertions about the effectiveness of his counsel.

V. CONCLUSION

We find no merit to Brooks' assertions on appeal. We affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JOHN P. THARP, APPELLANT.

854 N.W.2d 651

Filed October 14, 2014. No. A-13-959.

1. **Criminal Law: Trial: Pretrial Procedure: Motions to Suppress: Appeal and Error.** In a criminal trial, after a pretrial hearing and order denying a motion to suppress, the defendant must object at trial to the admission of evidence sought to be suppressed to preserve an appellate question concerning the admissibility of that evidence.
2. **Trial: Evidence: Motions to Suppress: Waiver: Appeal and Error.** A failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and that party will not be heard to complain of the alleged error on appeal.
3. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
4. ____: ____. An appellate court gives statutory language its plain and ordinary meaning.
5. **Statutes: Legislature: Intent.** In construing a statute, a 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.
6. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: 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 evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed.

Stacy C. Nossaman-Petitt, of Nossaman Petitt Law Firm, P.C., for appellant.

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

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

INBODY, Chief Judge.

INTRODUCTION

John P. Tharp appeals his convictions and sentences, after a jury trial, in Scotts Bluff County District Court for terroristic threats, third degree domestic assault, and two counts of being a felon in possession of a firearm. For the following reasons, we affirm Tharp's convictions and sentences on all four counts.

STATEMENT OF FACTS

In April 2013, Tharp was charged with count I, terroristic threats, in violation of Neb. Rev. Stat. § 28-311.01 (Reissue 2008), a Class IV felony; count II, third degree domestic assault, in violation of Neb. Rev. Stat. § 28-323(1) (Cum. Supp. 2012), a Class I misdemeanor; and counts III and IV, being a felon or fugitive in possession of a firearm, in violation of Neb. Rev. Stat. § 28-1206(1)(a) (Cum. Supp. 2012), Class ID felonies.

Motion to Suppress Proceedings.

On July 12, 2013, Tharp filed a motion to suppress any and all evidence of items seized from his home, including two black powder guns. At the hearing, it was revealed that on April 19, late in the evening, a "hysterical" female, identified as Linda Clary, reported to Scottsbluff police officer William Howton that her boyfriend, Tharp, had assaulted her and put a gun to her head at the residence where she and Tharp resided in Scottsbluff, Scotts Bluff County, Nebraska. Clary reported that the two had been engaged in an argument which led to physical violence and Tharp's chasing after her with a black powder handgun with a brown handle.

Scottsbluff police officer Matt Dodge was directed to the residence, where he made contact with Tharp, who reported that he had been previously convicted of a felony and had two firearms, specifically "muzzle loaders," in the house. Tharp reported to Dodge that it was legal for him to possess the firearms. Tharp was arrested and transported by police to a detention center.

Police were aware of the volatile relationship between Tharp and Clary as a result of previous police contacts involving domestic arguments between the two, and also involving Clary's ex-husband. Dodge testified that he was aware that Tharp's parents also resided in the home and that he was their primary caregiver. Police officers indicated that Clary reported to police that she and Tharp resided in the enclosed porch area of the residence, which information was consistent with the police officers' previous information and knowledge.

After Tharp was taken into custody, Howton and Clary returned to the residence, where Howton requested that Clary retrieve the two guns. Clary agreed and found one black powder handgun, which she indicated was not the gun Tharp had used to threaten her. Clary gave consent to police to search the residence for the second gun. Police searched what they described as an enclosed front porch area consisting of a living room and bedroom, and no other places in the residence were searched. During the course of the search of the enclosed porch area of the residence, police located a second, fully loaded .44-caliber Fillipietta handgun between two dressers in the bedroom.

The district court found that Dodge's initial encounter with Tharp was not a seizure and, as a first-tier police-citizen encounter, did not invoke Fourth Amendment protection. The court found that based upon the disturbance involving a gun, it was reasonable for Dodge to contact Tharp, and Tharp volunteered that he was a convicted felon who possessed two muzzle-loading handguns inside the residence. The court determined that Tharp's claim it was lawful for a prior convicted felon to possess a muzzle-loading firearm in Nebraska was misplaced and that Dodge had probable cause to arrest Tharp without a warrant.

The district court further determined that Clary had actual or apparent authority to consent to the search of the enclosed porch area of the residence, as Clary had advised police that she lived with Tharp in the enclosed porch area, which information was corroborated by the officers' prior knowledge and was not disputed by any evidence to the contrary. The court concluded that Clary had common authority with Tharp to consent to the search of the enclosed front porch area. For all of those reasons, the court ordered that Tharp's motion to suppress be overruled.

Jury Trial Proceedings.

Prior to trial, both parties stipulated that Tharp was a convicted felon, his status arising out of a 1985 felony conviction in Iowa.

Clary testified that she had been in a relationship with Tharp for 1½ years and explained that although the relationship began well, it became violent and aggressive. Clary testified that she had lived with Tharp for 6 months at his home, the residence at issue in the present case. Clary testified that Tharp's parents also resided in the home, but that his parents utilized the majority of the house, while she and Tharp stayed only in the enclosed front porch area, which is divided into two rooms, one-half as a living room and the other half as a bedroom. Clary explained that Tharp kept knives and two black powder guns at the residence, in the bedroom. Clary testified that Tharp purchased the guns at a store in Sidney, Nebraska, and also that he previously informed her that he was an ex-felon.

Clary testified that on April 19, 2013, Tharp had been drinking and became verbally aggressive, which aggression eventually turned into physical violence wherein Tharp pushed her onto a bed, straddled her, and wrapped both his hands around her neck. Clary was able to escape Tharp's grip and attempted to leave the residence in her vehicle when Tharp grabbed a black powder handgun from inside the residence and put the gun to Clary's head, threatening to kill her. Clary attempted to pull out of the driveway and hit a lightpost, damaging the door to the vehicle. Clary then drove away from the

residence and to a convenience store down the street, where police were contacted.

Clary testified that at times, she had maintained an apartment of her own, but that that was not the case in April 2013. Clary testified that on the night of the incident, she had no personal belongings at Tharp's residence because she had planned to move into her own residence in May. Tharp's sister and brother-in-law refuted Clary's assertion that she resided with Tharp by testifying that Clary visited Tharp at his residence, but did not live there because she had an apartment of her own. Tharp's mother, who resides in the main area of the residence, testified that she did not hear any arguments occur on the night of April 19, 2013, and that Clary did not live with Tharp because she had her own residence.

At trial, both police officers, Howton and Dodge, gave testimony similar to the testimony they each gave at the hearing on the motion to suppress. Additionally, Howton testified that he observed redness and bruising along both sides of Clary's neck and bruising on her right arm. Howton also gave more detailed testimony regarding the two guns taken from Tharp's residence. Howton testified that Clary retrieved the first gun and turned it over to police and that she then gave permission for police to help her find the second gun. Howton testified that both guns were black powder handguns and that in the chamber of the other gun, found between the two dressers, there was a round of ammunition, which indicated that the gun was loaded. Howton testified that he had to remove the percussion caps from the gun and explained that percussion caps are not the same as bullets, but that the gun shoots a bullet. Howton testified that he was not specifically aware of the difference between a "black powder gun and a regular firearm."

Dodge explained that the black powder in guns such as those involved in this case is located in the gun's cylinder and that to make a projectile go down the barrel, a percussion cap is placed on the outside of the cylinder to set the black powder on fire. Dodge further testified that the hammer of the gun strikes the percussion cap, causing an explosion that "blows

all the black powder at once" and "throws the bullet down the barrel."

The owner of a sporting goods company in Scottsbluff testified that there are no federal regulations on the sale of black powder guns. He testified that Tharp's guns were black powder handguns which were classified as replicas of firearms produced and manufactured before 1898. He explained that this differentiation was significant because guns produced before 1898 are considered antique and do not require firearm dealers to record their sale. He testified that the black powder acts as the propellant to push a lead ball out of such a gun's barrel.

Tharp testified in his own behalf, stating that he resides in the residence at issue herein with his parents. Tharp admitted that he had previously been convicted of a felony in 1985, in Iowa. Tharp was in an intimate relationship with Clary, but testified that he did not consider it to be a "boyfriend/girlfriend relationship." Tharp testified that Clary had never lived at the residence with him and did not keep any personal belongings there.

Tharp explained that on the evening of April 19, 2013, Clary was at the residence watching television with him and an argument ensued. Tharp denied that there was any yelling during the argument or that he assaulted Clary, but stated that she backed her vehicle into the pole and "clipped [his] legs in the [vehicle's] door" such that he could not move until she pulled forward. Tharp further denied that he pulled a gun on her at any time during the evening. Tharp testified that the redness on Clary's upper body was caused by chemicals that she came into contact with at her job.

Tharp admitted that he owned two "muzzle loader" guns but testified that even as a felon, he could legally purchase and possess black powder guns because a background check was not required. Tharp testified that under federal law, he could possess the guns, but that "[i]t's [just] this place that's got their [sic] own statutes."

The matter was submitted to the jury, which found Tharp guilty of all four crimes charged in the information. The

district court sentenced Tharp to 12 to 24 months' imprisonment on count I, 6 months' imprisonment on count II, and 3 to 5 years' imprisonment each on counts III and IV, with all sentences ordered to run consecutively and 188 days' credit for time served.

ASSIGNMENTS OF ERROR

Tharp assigns that the district court erred by overruling his motion to suppress and in excluding certain evidence regarding the purchase of firearms by a prohibited person, specifically the difference between a "firearm" and an "antique firearm."

ANALYSIS

Motion to Suppress.

Tharp argues that the warrantless search conducted by law enforcement violated his constitutional right against unreasonable searches and seizures.

[1,2] Upon our review of the record, it does not appear that Tharp properly preserved this issue for review, because he did not timely renew his motion to suppress at trial. In a criminal trial, after a pretrial hearing and order denying a motion to suppress, the defendant must object at trial to the admission of evidence sought to be suppressed to preserve an appellate question concerning the admissibility of that evidence. *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002). A failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and that party will not be heard to complain of the alleged error on appeal. *Id.*

Prior to trial, Tharp made a motion to sequester witnesses and a motion to endorse two witnesses, but no further motions or objections were made. During trial, Tharp did not object to the testimony of either Howton or Dodge or to the photographic evidence submitted during their testimony. At the conclusion of the State's case, Tharp made a motion for summary dismissal on the two counts of felon in possession of a firearm, which motion was overruled. By failing to object to the testimony of either Howton or Dodge, Tharp waived his right to appeal the admission of this evidence.

At oral argument, Tharp argued that the case of *State v. Van Ackeren*, 200 Neb. 812, 265 N.W.2d 675 (1978), provides that the renewal of an objection to the denial of the motion to suppress is not essential to preserve this question for our review on appeal. However, in the case of *State v. Pointer*, 224 Neb. 892, 895, 402 N.W.2d 268, 271 (1987), the Nebraska Supreme Court addressed the holding of *Van Ackeren* and held that "in a criminal trial, after a pretrial hearing and order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement in order to preserve the question for review on appeal." See, also, *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006); *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005); *State v. Timmens, supra*; *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995); *State v. Rodgers*, 237 Neb. 506, 466 N.W.2d 537 (1991). Accordingly, this issue has not been properly preserved for our review on appeal.

Felon in Possession of Firearm.

Tharp specifically assigns that the district court erred by excluding evidence that he wanted to present regarding his firearms. However, in the argument section of his brief, he argues only a mixture of inappropriate statutory interpretation and insufficiency of the evidence.

[3-5] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court. *State v. Ramirez*, 285 Neb. 203, 825 N.W.2d 801 (2013). An appellate court gives statutory language its plain and ordinary meaning. *State v. Schanaman*, 286 Neb. 125, 835 N.W.2d 66 (2013). And in construing a statute, a 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. *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011).

Tharp argues that he should not have been charged with or convicted of two counts of felon in possession of a firearm, because he is exempt from the definition of a felon in possession of a firearm under Nebraska statutes because he legally purchased his firearms, which are considered antique. Tharp

contends that under Neb. Rev. Stat. § 69-2403(2)(b) (Cum. Supp. 2012), the certificate required for the purchase of a gun is not required if the handgun is an "antique handgun," and that his two handguns are antique. Section 69-2403 governs the sale, lease, rental, and transfer of a handgun. Tharp was charged with two counts of a possession crime in accordance with § 28-1206; there were no allegations or charges of violations of Neb. Rev. Stat. § 69-2402 (Cum. Supp. 2012), and the jury was not charged with making any determinations regarding the purchase of the firearms.

Neb. Rev. Stat. § 69-2404 (Reissue 2009) provides that any person "desiring to purchase, lease, rent, or receive transfer" of a handgun must apply with law enforcement for a certificate. At oral argument, Tharp argued that under § 69-2403(2)(b), a person does not need a certificate to purchase an antique firearm; that that allows anyone, including felons, to purchase an antique firearm; and that as such, the Nebraska statutes allow for felons to purchase firearms. Section 69-2403 allows certain handguns to be purchased without a certificate pursuant to § 69-2404. Those exceptions include a federally licensed firearms dealer acquiring a handgun, the purchase of an antique handgun, a person acquiring a handgun on behalf of a law enforcement agency, and certain transfers of handguns. In relevant part, § 69-2402(1) defines an antique handgun as

> any handgun or pistol, including those with a matchlock, flintlock, percussion cap, or similar type of ignition system, manufactured in or before 1898 and any replica of such a handgun or pistol if such replica (a) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition or (b) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade.

The problem with Tharp's arguments is that neither § 69-2403 nor any other Nebraska statute includes any language which specifically indicates that the Legislature intended any circumstances under which felons are allowed to purchase firearms or handguns. Instead, the Nebraska

statutes clearly and specifically prohibit felons from possession of any type of firearm. Section 28-1206(2)(b) provides that it is a Class ID felony for a person who has previously been convicted of a felony to possess a deadly weapon which is a firearm as a first offense. Neb. Rev. Stat. § 28-1201(1) (Cum. Supp. 2012) defines a firearm as "any weapon which is designed to or may readily be converted to expel any projectile by the action of an explosive or frame or receiver of any such weapon." Thus, we find no merit to Tharp's argument that under § 69-2403, felons are allowed to purchase antique firearms because no certificate is required.

The remainder of Tharp's argument centers upon federal statutes regarding firearms which are much more specific and detailed than the Nebraska statutes in regard to federal definitions and classifications of firearms. However, Tharp was not charged in federal court with a violation of federal law, but was charged with violations of Nebraska criminal statutes.

[6] As to Tharp's sufficiency of the evidence argument, regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: 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 evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011).

The plain language of § 28-1201(1) is that a firearm is "any weapon which is designed to or may readily be converted to expel any projectile by the action of an explosive or frame or receiver of any such weapon." The Legislature has not indicated that it intends for the definition of firearm to be any more specific than that definition.

The undisputed evidence presented at trial was that Tharp had previously been charged with a felony, that Tharp was in possession of two black powder handguns, and that both

handguns were designed or had the ability to expel a projectile by the action of the explosive black gunpowder. Clearly, the evidence was sufficient for the jury to find Tharp guilty of both counts of felon in possession of a firearm. This assignment of error is without merit.

CONCLUSION

In conclusion, Tharp failed to preserve the issue of the motion to suppress for appellate review, and given the plain language of § 28-1201, the evidence presented at trial was sufficient for the jury to convict Tharp of two counts of felon in possession of a firearm. Tharp's assignments of error are without merit, and as such, we affirm.

AFFIRMED.

VILLAGE OF DONIPHAN, A MUNICIPAL CORPORATION, APPELLANT,
V. STAROSTKA GROUP UNLIMITED, INC.,
A NEBRASKA CORPORATION, APPELLEE.

855 N.W.2d 598

Filed October 21, 2014. No. A-13-658.

1. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
3. **Judgments: Verdicts.** On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted that is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence.
4. ____: ____. To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.

5. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of discretion.
6. **Verdicts: Juries: Appeal and Error.** A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Affirmed.

Austin L. McKillip, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., and James H. Truell, of Truell, Murray & Associates, for appellant.

Larry E. Welch, Jr., of Welch Law Firm, P.C., for appellee.

IRWIN, MOORE, and PIRTLE, Judges.

PIRTLE, Judge.

INTRODUCTION

The Village of Doniphan, a municipal corporation, appeals from an order of the district court for Hall County, which entered judgment upon the verdict of the jury finding that Doniphan's breach of contract claim against Starostka Group Unlimited, Inc. (Starostka Group), a Nebraska corporation, was barred by the statute of limitations. Doniphan contends that the trial court erred in failing to grant its motion for directed verdict and erred in failing to grant its motion for judgment notwithstanding the verdict or, in the alternative, a motion for new trial. Based on the reasons that follow, we affirm the judgment of the district court.

BACKGROUND

This action arises from a breach of contract claim brought by Doniphan against Starostka Group. Specifically, in August 2005, Starostka Group entered into an agreement with Doniphan to construct a sanitary sewer system and water lines according to prescribed specifications for a new residential development known as Hoffman subdivision. In the spring of 2006, the subdivision experienced significant drainage and standing water problems which caused sinking and damage to

the paving above the sanitary sewer system and water lines constructed by Starostka Group.

On February 11, 2010, Doniphan commenced this action to recover damages, alleging that Starostka Group breached the construction contract by failing to comply with the specifications for the design and construction of the project. In its amended answer filed October 21, Starostka Group raised the affirmative defense that Doniphan's claims were barred by the applicable statute of limitations.

Starostka Group filed a motion for summary judgment, which the trial court overruled. The court found that the substantial completion date of the project presented a genuine issue of material fact.

The case proceeded to a jury trial on the issue of when substantial completion of the project occurred, thereby determining whether Doniphan's claim against Starostka Group was barred by the statute of limitations. The evidence presented showed that Doniphan and Starostka Group entered into a written construction contract whereby Starostka Group agreed to complete the work necessary for "[t]he installation of water and sewer mains for the proposed [s]ubdivision as well as the earthwork needed to bring the site to the proposed elevations." The contract listed a start date in August 2005, listed the total price for Starostka Group's work on the project as $197,475.34, and provided for progress payments of the total contract price as the work was completed. The contract named JEO Consulting Group, Inc. (JEO Consulting), as the project engineer and authorized it to act as Doniphan's representative. The contract specifically stated that JEO Consulting would act as the initial interpreter of the requirements of the contract and the judge of the acceptability of the work thereunder. As such, upon receipt of an application for progress payment from Starostka Group, JEO Consulting inspected the work completed by Starostka Group before it recommended that Doniphan make partial payments under the contract.

The contract also addressed the specifications for disinfection of the water distribution system and required that Starostka Group disinfect the water lines and document that the lines had passed two consecutive bacteriological tests. The

contract further provided that separate payment for disinfection and bacteriological testing of the water lines would not be made and that such work is considered subsidiary to the work indicated in the project.

On or about August 29, 2005, Starostka Group was given a notice to proceed by Doniphan to construct the project's sewer system and water lines. At the end of September, Starostka Group submitted its first "Contractor Application for Payment" to JEO Consulting requesting payment in the amount of $142,144.63 for work on the project completed through September 29.

At the October 2005 meeting of Doniphan's board of trustees (the Board), Dale Sall, who served as the project engineer for JEO Consulting, presented Starostka Group's payment request for approval by the Board. Upon unanimous approval by the Board, Doniphan issued to Starostka Group a check in the amount requested.

On October 31, 2005, Starostka Group submitted its second "Contractor Application for Payment" to JEO Consulting requesting payment in the amount of $46,163.84 for work on the project completed through October 28. At the Board's November 2005 meeting, Sall presented Starostka Group's second payment request for approval. The Board decided to postpone payment of the second payment request until Starostka Group could sanitize the water system and provide passing bacteriological tests.

On December 5, 2005, Starostka Group submitted its third and final "Contractor Application for Payment" to JEO Consulting requesting payment in the amount of $13,324.10 for work completed on the project through December 5. At the Board's December 12 meeting, Sall presented Starostka Group's third and final pay request for approval. According to the Board's meeting minutes, Sall also reported that the water lines constructed by Starostka Group had now successfully passed the water tests. The Board unanimously approved payment of Starostka Group's second payment request, in the amount of $46,163.84, which had been postponed the previous month. The Board also agreed to approve final payment of all but $2,000 of the total contract price. The $2,000 was

withheld to ensure that Starostka Group finished two items on the final "punch list," which included the valve boxes and sealing of the electrical and the lift station. The money withheld did not have anything to do with sanitizing the water or water testing.

In addition to submitting Starostka Group's third and final partial payment application for approval at the Board's December 12, 2005, meeting, Sall also submitted a "Recommendation of Acceptance" of Starostka Group's completed work on the project. Sall testified that he did not prepare a separate certificate of substantial completion for the Board's approval, because when Starostka Group submitted its third and final payment request, it was for 100 percent of all the items in the contract. Sall testified, "Instead of issuing one for substantial and another one that was final, we just issued the one, the final Pay Application or pay request and a final acceptance." Although the Board had approved final payment, less $2,000, the "Recommendation of Acceptance" was not signed by the parties at that time.

On December 20, 2005, Mike Schultes, a JEO Consulting employee, sent an e-mail to Mike Huffaker, a Starostka Group employee, stating that the Department of Health and Human Services was requesting copies of the final bacteriological testing results and that JEO Consulting did not have copies of the results for two locations. Schultes asked Huffaker to fax the missing results to JEO Consulting. On February 27, 2006, Huffaker sent Schultes a fax indicating that the fax included copies of the bacteriological testing results for the two locations that Schultes asked for in December. The test results included in the fax had been performed in February.

During the spring of 2006, at Doniphan's request, Starostka Group performed additional sanitization work and bacteriological testing on the water line in the southeast quadrant of the project. There had been problems with contamination of that water line, and Starostka Group was made aware that the water quality in the southeast quadrant had to be improved before final acceptance of the project would occur. After flushing and chlorinating the line proved unsuccessful, another method for cleaning out the line was used.

In May 2006, Huffaker, on behalf of Starostka Group, sent a fax to Schultes with passing test results from the southeast quadrant and asking for immediate approval of the project in its entirety. The Department of Health and Human Services approved the water system in May 2006, when it received proof of all the necessary passing water tests.

At the Board's June 12, 2006, meeting, Schultes presented the "Recommendation of Acceptance" of all work completed by Starostka Group in the project. The Board unanimously approved and signed the "Recommendation of Acceptance."

Evidence was also presented at trial specifically in regard to substantial completion. Sall testified that he considered Starostka Group's work to be substantially complete as of December 12, 2005, when all but two punch list items were complete and when Doniphan had paid Starostka Group all but $2,000 of the total contract price. He testified that when he signed the final application for payment in December 2005, he believed the project was "100 percent complete" at that time. He added that the two punch list items that were incomplete could be done under the warranty. Sall testified that prior to the Board's December 2005 meeting, he did a walk-through of the total project with Marc Starostka, an owner of Starostka Group, and a Doniphan representative, and that they all agreed everything had been completed according to the contract. He further testified that at the Board's December meeting, he told the Board that the water tests had passed and that the Board should now pay the second application for payment, which it had previously delayed. Sall testified that at the end of the Board's December meeting, the Board wanted Starostka Group to complete the two remaining punch list items, but that there was no request for additional water testing. Sall testified that he did not remember why additional water tests were done after December 2005.

Starostka testified that at the time of the Board's December 2005 meeting, the water lines and sanitary sewer system were capable of being put to effective use. He testified that there was one house in the subdivision at that time that was using a portion of the water lines. Starostka testified that he considered the additional sanitization work and bacteriological testing

done in the spring of 2006 to be warranty work. However, Starostka acknowledged that pursuant to the contract, Starostka Group's 1-year warranty commenced when Doniphan signed a "Recommendation of Acceptance."

Francis Hannon, the maintenance supervisor for Doniphan, testified that Starostka Group's work was completed by December 2005, with the assumption that the water samples had passed testing. Hannon testified that he tests Doniphan's water lines for bacteria on a monthly basis as part of his maintenance-related functions. Hannon testified that in January 2006, he ran water tests from various locations and discovered that several water samples did not pass. He testified that Starostka Group was notified and became involved in trying to get the water lines to pass testing. Hannon stated that Doniphan was able to utilize the entire work done by Starostka Group only after getting passing water tests in May 2006.

Doniphan called two witnesses to testify at trial: Daniel Treat, a member of the Board, and Dana Peterson, a civil engineer called as an expert witness. Treat testified that at the Board's December 2005 meeting, it was his understanding that the water tests had passed. He testified that after the Board's meeting, it was discovered that the water tests had not passed. Treat testified that Doniphan could not utilize Starostka Group's entire work until after the water tests passed in May 2006.

Peterson testified that based on industry standards, substantial completion occurs when the project has been sufficiently completed such that it can serve its intended purpose. He testified that in his opinion, the project at issue was substantially completed in May 2006, because that is when all the test results passed. Peterson also testified that the water test results were not a minor and unimportant aspect of the project, but, rather, were a critical part of the project. Peterson testified that there is no guarantee that a section of water line that passes testing will not later become contaminated such that the section does not pass testing.

At the close of Starostka Group's case in chief, both parties moved for a directed verdict. The trial court overruled

both motions. After Doniphan presented its evidence, both parties renewed their motions for directed verdict, which were overruled.

The jury returned a verdict in favor of Starostka Group, finding that Starostka Group substantially completed its work under the contract prior to February 11, 2006, more than 4 years prior to the filing of the complaint. The trial court entered judgment upon the verdict of the jury, found that Doniphan's breach of contract claim was barred by the statute of limitations, and dismissed Doniphan's claim.

Doniphan subsequently filed a motion for judgment notwithstanding the verdict pursuant to Neb. Rev. Stat. § 25-1315.02 (Reissue 2008) or, in the alternative, a motion for new trial under Neb. Rev. Stat. § 25-1144.01 (Reissue 2008). The trial court overruled the motions.

ASSIGNMENTS OF ERROR

Doniphan assigns that the trial court erred in (1) failing to grant its motion for directed verdict and (2) failing to grant its motion for judgment notwithstanding the verdict or, in the alternative, for new trial.

STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Wulf v. Kunnath*, 285 Neb. 472, 827 N.W.2d 248 (2013).

[2] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law. *Id*.

[3,4] On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted that is favorable to the party

against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007). To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Id.*

[5] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of discretion. *R & D Properties v. Altech Constr. Co.*, 279 Neb. 74, 776 N.W.2d 493 (2009).

ANALYSIS

Doniphan assigns that the trial court erred in failing to grant its motion for directed verdict and its motion for judgment notwithstanding the verdict or, in the alternative, a new trial. Doniphan argues that the court erred because, based on the evidence presented, reasonable minds can draw only one conclusion—that substantial completion of the project did not occur until May 2006. It contends that because the lawsuit was filed on February 11, 2010, less than 4 years thereafter, its breach of contract claim cannot be barred by the statute of limitations.

The parties stipulated at trial that Doniphan's claims were controlled by the 4-year statute of limitations period that applies to actions against builders and contractors arising from construction activities. See Neb. Rev. Stat. § 25-223 (Reissue 2008). The parties further agreed that the 4-year statute of limitations commenced to run from the date of substantial completion of Starostka Group's work under the contract. The instructions submitted to the jury defined the term "substantial completion" as follows:

> In a construction contract, substantial completion is shown when all the essential elements necessary for the full accomplishment of the purposes of the contract have been performed with such an approximation to complete performance that the owner obtains substantially what is called for by the contract and the resultant work can be

> put to its intended purpose. Thus, to establish substantial completion, any deviations from the contract must be relatively minor and unimportant.

See, *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993); *Pioneer Enterprises v. Edens*, 216 Neb. 672, 345 N.W.2d 16 (1984).

The contract at issue also provided a definition of the term "substantial completion" and a process by which substantial completion could have been determined for the project:

> *Substantial Completion*—The time at which the Work (or a specific part thereof) has progressed to the point where, in the opinion of ENGINEER, the Work (or a specified part thereof) is sufficiently complete, in accordance with the Contract Documents, so that the Work (or a specified part thereof) can be utilized for the purposes for which it is intended.

The contract further provided that "[w]hen CONTRACTOR considers the entire Work ready for its intended use CONTRACTOR shall notify OWNER and ENGINEER in writing that the entire Work is substantially complete (except for items specifically listed by CONTRACTOR as incomplete) and request that ENGINEER issue a certificate of Substantial Completion."

Although the contract provided a process that could have been used for determining the substantial completion date, the process was not initiated by Starostka Group, no substantial completion was ever declared, and no certificate of substantial completion was ever issued. Sall testified that it was not unusual for a certificate of substantial completion to not be issued and to move forward to final completion. Starostka testified that Starostka Group typically does not ask that a certificate of substantial completion be issued. Because there was no substantial completion date determined by the parties, it became a question of fact for the jury to decide, ultimately leading to a determination of whether Doniphan's cause of action against Starostka Group was filed within the 4-year statute of limitations.

The jury had to determine whether the date of substantial completion of the project was in December 2005, as argued by

Starostka Group, or was in May 2006, as argued by Doniphan. Doniphan argues that substantial completion did not occur until May 2006, because the water line in the southeast quadrant did not have passing bacteriological test results until then, and therefore, the entire water system could not be used for its intended purpose before May 2006. It further suggests that Starostka Group's contractual work of disinfecting the water lines and obtaining passing bacteriological test results was critical to Doniphan's ability to use the water system and not a "minor and unimportant" deviation from the contract.

A provision in the contract specifically required Starostka Group to disinfect the water system and provide passing bacteriological tests for the entire system. The specification required two consecutive passing test results taken in a set at least 24 hours apart, from various stations, so as to ensure that the entire system had been properly tested and sanitized. In the event of a bacteriological test failure, Starostka Group was required to repeat the disinfection process and repeat the testing. Doniphan contends that Starostka Group's work in meeting this specification continued into the spring of 2006, because portions of the system remained contaminated by coliform, specifically the southeast quadrant, and no passing tests were achieved on that quadrant until May 2006.

There was evidence presented that Starostka Group was sanitizing and testing the water line in the southeast quadrant in the spring of 2006 and that passing test results were obtained in May 2006. In May 2006, Starostka Group sent JEO Consulting a fax containing passing tests for the southeast quadrant and asking for immediate approval of the project in its entirety. The "Recommendation of Acceptance" was not approved and signed by Doniphan until June 2006, after the southeast quadrant had passing tests. Further, the Department of Health and Human Services did not approve the water system until May 2006, when it received proof of all passing water tests. Hannon and Treat testified that Doniphan was able to utilize the entire work done by Starostka Group only after getting passing water tests in May 2006. In addition, Peterson testified that in his opinion, the project was substantially completed in May 2006.

Although there is evidence to support Doniphan's position that substantial completion did not occur until May 2006, there is also evidence to support Starostka Group's position that substantial completion occurred in December 2005. An exhibit was entered into evidence containing two consecutive passing tests from the water line in the southeast quadrant in the fall of 2005, specifically November 10 and 16. Doniphan contends that these two passing tests do not satisfy the contract provision because they are not part of the same set. Doniphan also points out that the exhibit contains another water test from November 17 that shows a failed result. However, there is no indication in the evidence as to whether or not the subsequent failed test rendered the two passing tests void. On the face of the testing provision in the contract, the two consecutive tests result in the segment's passing the testing requirement. Peterson, Doniphan's own expert, testified that there is no guarantee that a water line that passes bacteriological testing at one point will never be contaminated in the future. Peterson agreed that the purpose of Hannon's performing monthly tests of the water lines in Doniphan was to ensure that the water had not been compromised.

Further, even if there were no passing tests from the water line in the southeast quadrant in accordance with the contract until May 2006, there was other evidence presented such that reasonable minds could differ and draw more than one conclusion from the evidence in regard to when substantial completion occurred.

First, the contract specifically stated that disinfection of the water lines and bacteriological testing were not considered primary to the work indicated in the project.

Second, in December 2005, the Board approved Starostka Group's second payment request, which it had postponed the month before until Starostka Group could sanitize the water system and provide passing bacteriological tests. The Board approved the second payment request based on Sall's report that the water lines had passed water tests. The $2,000 that was withheld in December 2005 related to the third and final request for payment and had nothing to do with the testing of the water lines. At this point, the Board had

approved payment of all but $2,000 on a $200,000 contract. The "Recommendation of Acceptance" submitted by Sall at the Board's December 2005 meeting was denied based only on the two punch list items that needed to be completed for which the $2,000 was withheld.

Third, Sall testified that he considered Starostka Group's work to be substantially complete as of December 12, 2005, when all but two punch list items were complete and when Doniphan had paid Starostka Group all but $2,000 of the total contract price. Pursuant to the contract, Sall, on behalf of JEO Consulting, had a duty to inspect Starostka Group's work and judge the work completed before submitting his recommendation to Doniphan for final acceptance. Sall testified that when he signed the final application for payment in December 2005, he believed the project was complete at that time, with the exception of two small punch list items. He also testified that prior to the Board's December meeting, he did a walk-through of the total project with Starostka and a Doniphan representative, and that they all agreed that everything had been completed according to the contract.

Fourth, Starostka testified that at the time of the Board's December 2005 meeting, the water lines and sanitary sewer system were capable of being put to effective use. He also testified that a newly constructed home in the subdivision was receiving service from the water lines constructed by Starostka Group at that time. Although the home was not using the entire water system, its use is still evidence that the water lines were being used for their intended purpose.

A directed verdict is proper only when reasonable minds can draw but one conclusion from the evidence, where an issue should be decided as a matter of law. See *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007). Similarly, to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Id*. The jury in the instant case was presented with the question of fact as to when substantial completion of the contract occurred. Both parties submitted evidence supporting their opposing positions as to when substantial

completion occurred. Because reasonable minds could differ and draw more than one conclusion from the evidence, including a conclusion that substantial completion occurred prior to February 11, 2006, the trial court did not err in overruling Doniphan's motion for directed verdict or its motion for judgment notwithstanding the verdict.

[6] In regard to Doniphan's alternative motion for new trial, a motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of discretion. See *R & D Properties v. Altech Constr. Co.*, 279 Neb. 74, 776 N.W.2d 493 (2009). Doniphan argues that it was entitled to a new trial because the jury's verdict and the judgment entered thereon were not supported by sufficient evidence and were contrary to law. A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party. *Wulf v. Kunnath*, 285 Neb. 472, 827 N.W.2d 248 (2013).

As set forth above, Starostka Group presented substantial and competent evidence to support its position that it had substantially completed its work in December 2005. The trial court did not abuse its discretion in overruling Doniphan's motion for new trial.

CONCLUSION

We conclude that the trial court did not err in overruling Doniphan's motion for directed verdict and motion for judgment notwithstanding the verdict or, in the alternative, motion for new trial. There was sufficient and competent evidence presented for the jury to conclude that Starostka Group had substantially completed its work under the contract prior to February 11, 2006. Accordingly, the judgment of the district court entering judgment on the verdict and dismissing Doniphan's breach of contract action against Starostka Group as being barred by the statute of limitations is affirmed.

AFFIRMED.

In re Guardianship and Conservatorship of James D. Forster, an alleged incapacitated and protected person. Mark D. Forster, former temporary guardian, appellant, v. Mark J. Milone, third successor temporary guardian and conservator, appellee.

856 N.W.2d 134

Filed October 28, 2014. No. A-13-893.

1. **Guardians and Conservators: Appeal and Error.** An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. ____: ____. An appellate court, in reviewing a judgment of the trial court for errors appearing on the record, will not substitute its factual findings for those of the trial court where competent evidence supports those findings.
4. **Moot Question: Words and Phrases.** A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
5. ____: ____. Mootness refers to events occurring after the filing of a suit which eradicate the requisite personal interest in the resolution of the dispute that existed at the beginning of the litigation.
6. **Moot Question: Dismissal and Nonsuit.** Unless an exception applies, a court or tribunal must dismiss a moot case when changed circumstances have precluded it from providing any meaningful relief because the litigants no longer have a legally cognizable interest in the dispute's resolution.
7. **Moot Question: Appeal and Error.** Although an issue has become moot, an appellate court may review the issue under the public interest exception to the mootness doctrine if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.
8. ____: ____. When determining whether a case involves a matter of public interest, an appellate court considers (1) the public or private nature of the question presented, (2) the desirability of an authoritative adjudication for future guidance of public officials, and (3) the likelihood of future recurrence of the same or a similar problem.
9. **Guardians and Conservators: Pleadings.** An evidentiary hearing should be held expediently on a guardianship or conservatorship petition, and temporary

guardians and conservators are intended to exercise their powers in a limited manner and for a limited period of time.

10. **Statutes: Time.** A statute will be held to operate prospectively and not retrospectively unless the legislative intent or purpose that it should operate retrospectively is clearly disclosed.
11. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
12. **Jurisdiction: Final Orders: Time: Appeal and Error.** An appellate court has jurisdiction over final orders that are appealed within 30 days from their entry.
13. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.
14. **Decedents' Estates: Final Orders.** Proceedings under the Nebraska Probate Code are special proceedings within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 2008).
15. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
16. **Final Orders.** Substantial rights under Neb. Rev. Stat. § 25-1902 (Reissue 2008) include those legal rights that a party is entitled to enforce or defend.
17. **Final Orders: Appeal and Error.** If a substantial right is affected, an order is directly appealable as a final order even though it does not terminate the action or constitute a final disposition of the case.
18. **Guardians and Conservators: Fees: Final Orders: Appeal and Error.** Awards of fees for services pursuant to Neb. Rev. Stat. § 30-2620.01 (Reissue 2008) that do not finally determine a guardian and conservator's claim for compensation are not final and appealable until the guardian and conservator is discharged from his or her duties.
19. **Trial: Waiver: Appeal and Error.** The failure to make a timely objection waives the right to assert prejudicial error on appeal.
20. **Affidavits: Records: Appeal and Error.** The existence or contents of affidavits filed with the clerk of the trial court and found in the transcript, but not preserved in the bill of exceptions, cannot be noted by an appellate court.
21. **Appeal and Error.** In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
22. **Pretrial Procedure: Proof: Appeal and Error.** The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion.
23. **Evidence: Records: Appeal and Error.** A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.

24. **Records: Appeal and Error.** Appellate courts cannot rely upon information in the transcript to establish facts, even a stipulation of facts.
25. **Judicial Notice: Evidence: Records: Appeal and Error.** Items judicially noticed are to be separately marked, offered, and received as evidence to enable efficient review by an appellate court.

Appeal from the County Court for Douglas County: SHERYL L. LOHAUS, Judge. Affirmed in part, and in part vacated and remanded with directions.

Stephanie S. Shearer, of Reagan, Melton & Delaney, L.L.P., for appellant.

Mark J. Milone, of Govier & Milone, L.L.P., pro se.

MOORE, PIRTLE, and RIEDMANN, Judges.

RIEDMANN, Judge.

I. INTRODUCTION

Mark D. Forster (Mark), a son of an alleged incapacitated person, appeals from the order of the county court for Douglas County approving the final accounting and inventory filed by the third successor temporary guardian and conservator, Mark J. Milone. For the reasons set forth below, we affirm the county court's judgment in all respects, with the exception of the court's awards of attorney fees to Milone on March 6 and April 23, 2012, because such awards were not supported by competent evidence.

II. BACKGROUND

On August 10, 2011, Mark filed a petition to establish a guardianship and conservatorship for his father, James D. Forster (James). He alleged that James was incapacitated due to vascular dementia and was no longer capable of meeting his own physical needs, nor of making or communicating responsible decisions concerning his person and his property. Mark simultaneously filed an application for the appointment of himself as temporary guardian and conservator, alleging that an emergency existed because James was currently hospitalized and lacked the ability and understanding to make decisions for himself. The county court issued an order that same day

appointing Mark as James' temporary guardian for a period not to exceed 90 days.

On September 2, 2011, Jeffrey Stoehr, counsel for James, filed an objection to Mark's petition for appointment of a guardian and conservator, as well as a motion to remove Mark as temporary guardian and to appoint a new temporary guardian and conservator. A hearing was held on September 6 during which the court removed Mark as temporary guardian and appointed an attorney, Sally Hytrek, as successor temporary guardian and conservator. As to Mark's petition for appointment of a permanent guardian and conservator, the court found that the matter was contested and "should be set for a pre-trial hearing at which time a date will be set for an evidentiary hearing." The pretrial hearing was scheduled for November 25; however, it does not appear that the hearing was ever held.

On September 30, 2011, Hytrek moved to resign as temporary guardian and conservator and suggested a suitable person to replace her. The court entered an order the same day allowing Hytrek's resignation and appointing her successor, James' second successor temporary guardian and conservator, whom the court ordered to issue a written report within 30 days as to the issues that may require an evidentiary hearing. The record does not disclose that such a report was ever issued.

On November 29, 2011, Hytrek's successor moved to withdraw as temporary guardian and conservator. A hearing was held on December 6 during which the court permitted him to withdraw and indicated to the parties that it would appoint another temporary guardian within a week. The court issued an order the following day appointing Milone, an attorney, as third successor temporary guardian and conservator. It ordered Milone to issue a written report within 30 days as to the issues that may require an evidentiary hearing. Milone never issued such a report.

Various hearings were held to address attorney fees and other motions filed by the parties from December 2011 through August 2012. However, an evidentiary hearing on the issues raised in the petition for guardianship was never scheduled

or held. James died on August 26, 2012, at which point the temporary guardianship was still in place.

Upon James' death, Milone filed a final inventory and accounting as well as a petition for approval of the same, termination of the guardianship and conservatorship, and discharge of the guardian and conservator and a request for fees. Mark filed objections to the final inventory and accounting, alleging numerous failures by Milone. After several continuances, a hearing was held on the final inventory and accounting on May 21 and July 2, 2013. The county court subsequently issued a written order approving the final inventory and accounting. This appeal followed.

Additional facts as needed to address each assignment of error are contained in the appropriate section of our analysis below.

I. ASSIGNMENTS OF ERROR

Mark assigns that the county court erred by (1) failing to hold an evidentiary hearing on the guardianship and conservatorship petition; (2) failing to require the temporary guardian to post bond and failing to hold a hearing regarding bond after statutory changes went into effect on January 1, 2012; (3) issuing an ex parte order without supporting evidence and without following proper procedures; (4) granting certain requests for attorney fees; (5) overruling Mark's motion to compel and motion to continue; and (6) failing to rule on Mark's objections to the final inventory and accounting.

II. STANDARD OF REVIEW

[1-3] An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record made in the county court. *In re Guardianship & Conservatorship of Herrick*, 21 Neb. App. 971, 846 N.W.2d 301 (2014). When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*. An appellate court, in reviewing a judgment of the trial court for errors appearing on the record, will not substitute its factual findings for those

of the trial court where competent evidence supports those findings. *Id.*

III. ANALYSIS

1. Failure to Hold Evidentiary Hearing

Mark first asserts that the county court erred by failing to hold an evidentiary hearing on the guardianship and conservatorship petition. We agree, but we find that this issue became moot upon James' death.

[4-6] A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006). Mootness refers to events occurring after the filing of a suit which eradicate the requisite personal interest in the resolution of the dispute that existed at the beginning of the litigation. *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010). Unless an exception applies, a court or tribunal must dismiss a moot case when changed circumstances have precluded it from providing any meaningful relief because the litigants no longer have a legally cognizable interest in the dispute's resolution. *Id.*

We find that the county court's failure to hold an evidentiary hearing on Mark's petition to establish a guardianship and conservatorship for James is moot because the issues raised in such petition were relevant only while James was still living. Upon his death, the issues raised in the petition ceased to exist and Mark no longer had a legally cognizable interest in the outcome of the petition.

[7,8] Although an issue has become moot, an appellate court may review the issue under the public interest exception to the mootness doctrine if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. See *In re Interest of Thomas M.*, 282 Neb. 316, 803 N.W.2d 46 (2011). When determining

whether a case involves a matter of public interest, an appellate court considers (1) the public or private nature of the question presented, (2) the desirability of an authoritative adjudication for future guidance of public officials, and (3) the likelihood of future recurrence of the same or a similar problem. *Id*.

Considering these factors, we believe the public interest exception applies to this issue. The question presented is public in nature because it deals with the obligation of trial courts to follow statutory procedures designed to protect the rights of persons who are alleged to be incapacitated. Due to the importance of the rights involved and the likelihood of recurrence, we think it is appropriate to provide authoritative guidance regarding a trial court's responsibility in the protection of rights of allegedly vulnerable persons.

Neb. Rev. Stat. § 30-2619(b) (Reissue 2008) provides that upon the filing of a petition for guardianship, "the court shall set a date for hearing on the issues of incapacity." If an emergency exists, the court may enter an ex parte order appointing a temporary guardian with powers limited to those necessary to address the emergency. Neb. Rev. Stat. § 30-2626(a) (Reissue 2008). Under § 30-2626(e), the temporary guardianship shall terminate after 90 days or earlier if the court deems the circumstances leading to the order for temporary guardianship no longer exist or if a proper order for a permanent guardianship is entered. For good cause shown, the court may extend the temporary guardianship for successive 90-day periods. § 30-2626(d). Similar procedures apply to the appointment of a conservator. See Neb. Rev. Stat. §§ 30-2630.01 (Cum. Supp. 2012) and 30-2636 (Reissue 2008).

[9] As expressed by the Nebraska Supreme Court, temporary guardianships are statutorily limited in both their extent and their duration and the probate court has an obligation to adhere to these limitations:

> Read together, [§§ 30-2619 and 30-2626] provide that an evidentiary hearing should be held expediently on a guardianship or conservatorship petition and that temporary guardians and conservators are intended to exercise their powers in a limited manner and for a limited period

> of time. We have recognized in guardianship proceedings that a true evidentiary hearing is required to support a finding of incompetency. . . . This rule cannot be circumvented by continuous extensions of a temporary guardianship, nor are numerous reports by a [guardian ad litem] a substitute for an evidentiary hearing.
>
> While § 30-2626(d) does provide that the 90-day temporary guardianship period may be extended for good cause shown, it is hard to imagine what "good cause" could justify a delay of 8 months. . . .
>
> . . . .
>
> It is clear that the failure of the court to follow the statutory mandates with regard to the limited nature of the powers and duties of the temporary guardian and conservator, as well as its failure to follow the mandate of a timely evidentiary hearing on competency, constitutes plain error.

In re Guardianship & Conservatorship of Larson, 270 Neb. 837, 853-55, 708 N.W.2d 262, 275-77 (2006).

In the present action, Mark's petition for the appointment of a guardian and conservator was filed on August 10, 2011. James died over a year later on August 26, 2012, at which point a hearing on the petition still had not been held and a temporary guardian and conservator was still in place. No court orders were issued finding good cause for extending the temporary guardianship. Thus, we find that the trial court clearly erred in failing to hold an evidentiary hearing on the petition and in allowing the temporary guardianship and conservatorship to continue beyond the statutory 90-day period without a determination of incapacity. However, because James has died, we find this assignment of error is moot.

Mark argues that this issue is not moot, because the failure to hold an evidentiary hearing resulted in substantial expense to James' estate. He seems to assert that if an evidentiary hearing had been held, he could have been appointed permanent guardian, which would have reduced the fees charged to the estate. We reject that argument as speculative, especially given the fact that the court removed him as temporary guardian. Therefore, we hold that the issue is moot, but under the

public interest exception to the mootness doctrine, we determine that the trial court erred in failing to hold an evidentiary hearing.

2. Failure to Require Bond

Mark argues that the county court erred in failing to require the temporary guardians and conservators to post bond and in failing to hold a hearing after Neb. Rev. Stat. § 30-2641 (Reissue 2008) was amended to require such bond.

At the time each of the temporary guardians and conservators was appointed in this case, the posting of a bond was not statutorily required, but was left to the court's discretion. The relevant statute in effect at that time stated in part: "The court *may* require a conservator to furnish a bond conditioned upon faithful discharge of all duties of the trust according to law, with sureties as it shall specify and may eliminate the requirement or decrease or increase the required amount of any such bond previously furnished." Neb. Rev. Stat. § 30-2640 (Reissue 2008) (emphasis supplied). See, also, Neb. Rev. Stat. § 30-2627(e) (Reissue 2008) ("[t]he court *may* require a guardian to furnish a bond in an amount and conditioned in accordance with the provisions of sections 30-2640 and 30-2641" (emphasis supplied)).

The court's orders appointing Hytrek, Hytrek's successor, and then Milone as temporary guardians and conservators specifically stated that no bond was required. There were no objections filed in response to those orders, nor any motions asking the court to require a bond. Pursuant to Neb. Rev. Stat. § 30-2645(a) (Reissue 2008), "[a]ny person interested in the welfare of a person for whom a conservator has been appointed may file a petition in the appointing court for an order . . . requiring bond or security or additional bond or security." Because a bond was not required by statute and no request for bond was made, we find no error in the court's failing to require the temporary guardians and conservators to post bond.

Mark also asserts that the court should have held a hearing to address the bond requirement after the relevant statutes were

amended. Section 30-2640 was amended, operative January 1, 2012. The amended version reads in part:

> For estates with a net value of more than ten thousand dollars, the bond for a conservator shall be in the amount of the aggregate capital value of the personal property of the estate in the conservator's control plus one year's estimated income from all sources minus the value of securities and other assets deposited under arrangements requiring an order of the court for their removal. The bond of the conservator shall be conditioned upon the faithful discharge of all duties of the trust according to law, with sureties as the court shall specify. The court, in lieu of sureties on a bond, may accept other security for the performance of the bond, including a pledge of securities or a mortgage of land owned by the conservator. For good cause shown, the court may eliminate the requirement of a bond or decrease or increase the required amount of any such bond previously furnished.

§ 30-2640 (Cum. Supp. 2012).

[10] Nothing in the statute, as amended, indicates that the Legislature intended for it to be retroactive. A well-recognized rule of statutory construction, and one firmly established in this jurisdiction, is that a statute will be held to operate prospectively and not retrospectively unless the legislative intent or purpose that it should operate retrospectively is clearly disclosed. *War Finance Corporation v. Thornton*, 118 Neb. 797, 226 N.W. 454 (1929). See, also, *Smith v. Mark Chrisman Trucking*, 285 Neb. 826, 832, 829 N.W.2d 717, 722 (2013) ("[s]tatutes covering substantive matters in effect at the time of the transaction or event govern, not later enacted statutes").

Because the statute was not retroactive, the county court did not err by failing to require Milone, who had been appointed as temporary guardian and conservator prior to the amendment, to post bond. If Mark desired to revisit the issue, he could have filed a motion for an order requiring bond pursuant to § 30-2645. He failed to do so. This assignment of error has no merit.

3. Ex Parte Order

Mark's next assignment of error challenges the county court's ex parte order allowing one of James' daughters access to James and restricting the access of other relatives. Mark argues that the ex parte order was issued with no evidentiary basis and without the opportunity for an expedited hearing. We decline to address this assignment of error because we find it is moot.

A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006). The ex parte order granting and restricting access to James was relevant only while he was still living. Because he is now deceased, any errors in issuing the ex parte order are now moot. Accordingly, we decline to address this assignment of error.

4. Attorney Fees

Mark asserts that the county court erred by granting the following requests for attorney fees: (1) $4,643 awarded to Hytrek following a December 22, 2011, hearing; (2) $7,000 awarded to James Reisinger, counsel for Mark who withdrew in 2012, on February 28, 2012; (3) $17,074 awarded to Milone on March 6, 2012; (4) $27,723.05 awarded to Milone on April 23, 2012; and (5) $5,000 awarded to Stoehr on February 28, 2012. We note that Mark does not challenge the final fees awarded in the county court's order from which he has appealed.

[11,12] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *In re Estate of Gsantner*, 288 Neb. 222, 846 N.W.2d 646 (2014). This court has jurisdiction over final orders that are appealed within 30 days from their entry. See Neb. Rev. Stat. § 25-1912 (Reissue 2008). The notice of appeal in this case was filed on October 8, 2013. Because the fee orders challenged in this

appeal were issued more than 30 days prior to that, we must determine whether they were final orders at the time they were entered. If so, we do not have jurisdiction to consider them now.

[13] Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered. *In re Estate of Gsantner, supra*.

[14] The requests for fees and the orders granting such fees in this case were made pursuant to Neb. Rev. Stat. §§ 30-2620.01 and 30-2643 (Reissue 2008), which are contained within the Nebraska Probate Code. Our law is clear that proceedings under the Nebraska Probate Code are special proceedings within the meaning of § 25-1902. *In re Estate of Muncillo*, 280 Neb. 669, 789 N.W.2d 37 (2010). See, also, *In re Guardianship & Conservatorship of Larson, supra* (proceedings initiated to appoint guardian and conservator are special proceedings).

[15-17] Having determined that the fee orders were made in a special proceeding, we next consider whether they affected a substantial right. A substantial right is an essential legal right, not a mere technical right. See *In re Estate of Muncillo, supra*. Substantial rights under § 25-1902 include those legal rights that a party is entitled to enforce or defend. *In re Estate of Gsantner, supra*. If a substantial right is affected, an order is directly appealable as a final order even though it does not terminate the action or constitute a final disposition of the case. See *In re Estate of Snover*, 233 Neb. 198, 443 N.W.2d 894 (1989).

The Nebraska Supreme Court recently held that an order awarding a personal representative fee affected a substantial right because it finally determined the personal representative's claim for reasonable compensation under Neb. Rev. Stat. § 30-2480 (Reissue 2008). See *In re Estate of Gsantner, supra*. The court noted that although the personal representative's

service was not yet complete at the time the fee was awarded, the order in question was nonetheless final because it did not include any language indicating that the award was subject to later revision or augmentation, whereas a previous award to the personal representative noted that the award was a partial fee. *Id*.

Similarly, here, the orders awarding fees to Hytrek, Reisinger, and Stoehr finally determined each of their respective claims for fees and the amount of compensation payable to each from the estate. Hytrek was entitled to reasonable compensation for her services as temporary guardian and conservator pursuant to § 30-2620.01. Reisinger's request for attorney fees was based on his representation of Mark in initiating the guardianship and conservatorship proceedings. See *In re Guardianship & Conservatorship of Donley*, 262 Neb. 282, 631 N.W.2d 839 (2001) (petitioner entitled to payment from protected person's estate for attorney fees incurred in guardianship and conservatorship proceedings initiated in good faith). Stoehr had a claim for attorney fees under § 30-2620.01 for his representation of James. The orders awarding fees to each of these individuals were final determinations and not subject to later revision, as the awardees' services in the case were complete at the time the orders were entered.

[18] Milone's services as temporary guardian and conservator, on the other hand, were still ongoing at the time the fees in question were awarded to him. Each of the requests for fees set forth the specific time period of services for which he was seeking compensation under § 30-2620.01. Unlike the award of fees to the personal representative in *In re Estate of Gsantner*, 288 Neb. 222, 846 N.W.2d 646 (2014), the awards of March 6 and April 23, 2012, did not finally determine Milone's claim for reasonable compensation for his service as temporary guardian and conservator. Therefore, we find that these awards were not final and appealable at the time they were entered and did not become final and appealable until the court entered its final order terminating the guardianship and conservatorship and discharging Milone from his duties. As a result, we have jurisdiction to review these orders.

In early 2012, Milone filed a motion for attorney fees seeking approximately $17,000 in attorney fees for services from December 8, 2011, to January 26, 2012. Mark and his counsel were both present at the hearing on March 5, and his counsel specifically stated he had no objection to the attorney fee request. Milone filed another motion for attorney fees on March 21, seeking approximately $28,000 in fees for services performed from January 26 to March 16. A hearing was held on April 23, and Mark's counsel was present. Once again, he advised the court that he had no objection to the fees being requested.

[19] The failure to make a timely objection waives the right to assert prejudicial error on appeal. *State v. Nadeem*, 284 Neb. 513, 822 N.W.2d 372 (2012). Since Mark did not object to the attorney fees awarded on March 6 and April 23, 2012, to Milone, these issues have been waived. However, an appellate court's standard of review in guardianship and conservatorship cases is for error appearing on the record. See *In re Guardianship & Conservatorship of Herrick*, 21 Neb. App. 971, 846 N.W.2d 301 (2014). When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*.

In *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005), the Nebraska Supreme Court vacated an award of fees to a trustee based on its finding that there had been no witness testimony or other evidence adduced to support the request for fees. It remanded the matter to the county court with directions to hold an evidentiary hearing. *Id*. Similarly, in *In re Trust Created by Crawford*, 20 Neb. App. 502, 826 N.W.2d 284 (2013), this court vacated an award of accounting fees, finding the award was not supported by competent evidence where no witnesses testified and no evidence was received to support payment of the fees.

[20] Upon our review of the record in this case, we note that there was no testimony or evidence received at the hearings held on March 5 and April 23, 2012, in support of Milone's

requests for attorney fees. Although Milone offered a motion and affidavit in support of his request for attorney fees at the March 5 hearing, the exhibit was not received into evidence and is not contained in our record on appeal. During the hearing on April 23, Milone stated that his affidavit was "on file," but he did not offer that affidavit, nor any other evidence in support of his fee request, into evidence. The existence or contents of affidavits filed with the clerk of the trial court and found in the transcript, but not preserved in the bill of exceptions, cannot be noted by an appellate court. *Murphy v. Murphy*, 237 Neb. 406, 466 N.W.2d 87 (1991). Because no evidence was received in support of these two requests for attorney fees, we find that the court's award of such fees was not supported by competent evidence. Therefore, we vacate the court's orders awarding fees on March 6 and April 23 and remand the matter to the county court with directions to hold an evidentiary hearing.

5. Motion to Compel and Motion to Continue

[21] Mark asserts that the county court erred in overruling his motion to compel discovery and his motion to continue the hearing on the final inventory. However, we note that the argument section of his brief addresses only the motion to compel. In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Irwin v. West Gate Bank*, 288 Neb. 353, 848 N.W.2d 605 (2014). Because Mark makes no argument with respect to the motion to continue, we will not address that portion of his assignment of error on appeal.

(a) Facts

On May 21, 2013, the day on which the petition for approval of the final inventory and accounting was set to be heard, Mark filed a motion to compel Milone to provide all "'memo to file'" documents referenced in the billing statements presented in Milone's fee applications. Mark's motion alleged that he submitted a discovery request for such documents and that Milone objected to the request on May 9, on the bases of

attorney-client privilege and attorney work product. The county court overruled the motion as untimely filed.

(b) Resolution

Mark argues that the requested documents were not subject to the attorney-client privilege and that his access to such documents was necessary in order to adequately prepare for the hearing on the final inventory and accounting. We decline to address the merits of Mark's motion to compel, because we agree with the county court's conclusion that the motion was untimely filed.

Mark was afforded ample time to conduct discovery in preparation for the final hearing. Milone's petition for approval of the final inventory and accounting was filed on October 18, 2012, and his final affidavit in support of his fee application was filed on January 24, 2013. Therefore, Mark had several months in which to serve discovery requests and, if necessary, seek a court order compelling Milone to comply with such discovery requests.

Although the record does not reflect the precise date on which Mark's discovery requests were served, it does reflect that Milone responded to the requests on May 9, 2013. Milone asserted at the hearing that this was approximately 1 week prior to the expiration of the 30-day period in which he was entitled to respond, and Mark did not dispute that assertion. Thus, it appears that Mark served such discovery requests on or about April 18, which was approximately 1 month prior to the scheduled hearing.

Despite receiving Milone's objection to the discovery request on May 9, 2013, Mark did not file his motion to compel until May 21, the day the final hearing was scheduled to be held. Mark provides no justification for waiting until approximately 1 month before the final hearing to request what he characterizes as "necessary" documents, and we conclude that he did so at his own peril.

[22] The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion. *U.S. Bank Nat. Assn. v. Peterson*, 284 Neb. 820, 823 N.W.2d 460 (2012). We find no abuse of discretion in the

county court's decision to overrule Mark's motion to compel as untimely filed.

6. Failure to Rule on Objections

Mark argues that the county court erred by failing to rule on his objections to the final inventory and accounting. We find that the county court's order implicitly overruled Mark's objections, and we find no error in such ruling.

(a) Facts

Mark filed an objection to the final inventory and accounting alleging the following: Milone failed to work with "the Department of Adult Protective Services" to investigate James' companion, who Mark alleged had financially exploited James; Milone failed to comply with the court's order to submit a written report within 30 days as to any issues that may require an evidentiary hearing; Milone failed to provide appropriate notice of sale of James' real and personal property; Milone failed to account for James' insurance business; Milone failed to provide proper notice of hearing on his motion for fees; Milone failed to identify with sufficient specificity how James' assets were valued, marketed, and sold so that James' family could assess the fairness of the sale and exclude the possibility of self-dealing; Milone failed to properly investigate the estate planning documents presented to him; Milone's request for fees failed to provide sufficient information as to the work he did and whether adequate services were rendered to James.

At the hearing, Milone presented evidence in support of his final inventory and accounting and testified regarding the actions he took as temporary guardian and conservator. On cross-examination, Mark's counsel questioned Milone extensively regarding many of the allegations raised in Mark's objections to the final inventory and accounting. After Milone rested his case, Mark's counsel indicated to the court that she would need at least half of a day to present Mark's case. The matter was continued to accommodate this request.

The hearing resumed on July 2, 2013. Counsel for Mark asked the court to take judicial notice of "the court file in this case, PR11-1103, and any exhibits that are part of that file." Milone had no objection, and the court agreed to "take judicial notice of the court file and exhibits." At that point, Mark's counsel informed the court that Mark would not be presenting any further evidence. The county court subsequently issued an order approving the final inventory and accounting, but did not expressly rule on Mark's objections.

(b) Resolution

Mark argues that the county court erred by failing to rule on his objections to the final inventory and accounting. Although the county court's order does not specifically address Mark's objections, we find that it implicitly overruled them by approving the final inventory and accounting. It is clear that the county court considered Mark's objections, as its order states that the matter came on for hearing "upon [Milone's] Petition for Approval of Final Inventory and Accounting, Termination of Guardianship and Conservatorship, and Discharge and Approval of Final Fees, and *Objections to the same filed by Mark* [and four of his siblings]." Mark has not cited any authority which requires the court to specifically address the merits of each objection to a petition for approval of a final inventory and accounting; nor are we aware of any such authority. We find that by granting Milone's request to approve the final inventory and accounting, the court implicitly overruled Mark's objections.

Because Mark's assignment of error is limited to the court's alleged failure to rule on his objections, we are not required to address the merits of each of Mark's objections. However, we have reviewed the record on appeal and find no error in the county court's order implicitly overruling such objections.

[23-25] We note that Mark asked the court to take judicial notice of the court file and exhibits contained within the court file and that the court agreed to do so. However, because those records were not offered or received into evidence, we cannot consider them on appeal. A bill of exceptions is the

only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered. *State v. Patton*, 287 Neb. 899, 845 N.W.2d 572 (2014). Appellate courts cannot rely upon information in the transcript to establish facts, even a stipulation of facts. *City of Lincoln v. Nebraska Pub. Power Dist.*, 9 Neb. App. 465, 614 N.W.2d 359 (2000). Items judicially noticed are to be separately marked, offered, and received as evidence to enable efficient review by this court. *Saunders Cty. v. Metropolitan Utilities Dist.-A*, 11 Neb. App. 138, 645 N.W.2d 805 (2002).

The record before us reflects that Mark was given an opportunity to present evidence in support of his objections, but he declined to do so. Mark's counsel questioned Milone at length regarding many of the allegations raised in the objections, but fell short in proving those allegations. The county court heard the testimony and observed the witnesses, and ultimately ruled in favor of Milone. Based on the evidence properly before us, we find no error in the county court's having done so.

VI. CONCLUSION

For the foregoing reasons, we affirm the judgment of the county court, with the exception of the court's orders awarding attorney fees to Milone on March 6 and April 23, 2012. Because those awards were not supported by competent evidence, we vacate those orders and remand the matter to the county court with directions to hold an evidentiary hearing.

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

In re Estate of Ellen M. Panec, deceased. Rebecca Griffin, appellant, v. William J. Panec, Personal Representative of the Estate of Ellen M. Panec, deceased, appellee.

856 N.W.2d 331

Filed November 4, 2014. No. A-13-777.

1. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. ____: ____. When reviewing questions of law, an appellate court has an obligation to review the questions independently of the conclusion reached by the trial court.
4. **Actions: Decedents' Estates: Abatement, Survival, and Revival: Wrongful Death.** In Nebraska, there are two types of causes of action which vest in and can be brought only by the personal representative of a decedent's estate—a survival action and a wrongful death action.
5. **Actions: Decedents' Estates: Abatement, Survival, and Revival: Words and Phrases.** Nebraska's statutory provisions allow a cause of action, referred to as a "survival action," held by a person who is fatally injured to be prosecuted by the personal representative of the decedent.
6. **Actions: Decedents' Estates: Abatement, Survival, and Revival.** A survival action is not a new cause of action but is a continuation in the deceased's personal representative of the cause of action which accrued to the deceased under the common law.
7. **Wrongful Death: Damages.** Wrongful death recovery is limited to the loss suffered by a decedent's next of kin, and it provides no basis upon which to recover a decedent's own damages.

Appeal from the County Court for Jefferson County: Steven B. Timm, Judge. Affirmed.

Eric B. Brown, of Atwood, Holsten, Brown & Deaver Law Firm, P.C., L.L.O., for appellant.

Vincent M. Powers and Elizabeth Govaerts, of Vincent M. Powers & Associates, for appellee.

Moore, Chief Judge, and Irwin and Pirtle, Judges.

PIRTLE, Judge.

INTRODUCTION

Rebecca Griffin (Rebecca) appeals from the August 7, 2013, order of the county court for Jefferson County, distributing settlement proceeds of $616,000 between herself and William J. Panec, the surviving spouse, personal representative, and appellee herein. For the reasons that follow, we affirm.

BACKGROUND

Ellen M. Panec and her husband, William, were involved in a serious automobile collision in Lincoln, Nebraska, on September 19, 2011. Both sustained injuries, and Ellen was hospitalized for 5⁴⁄₇ weeks following the collision before she passed away. William eventually recovered from his injuries. The parties stipulated that the medical expenses incurred for the care of Ellen after the collision were fair and reasonably necessary. The total cost for her medical care was approximately $215,000. The parties further stipulated that Ellen's injuries ultimately caused her death on October 28 and that the reasonable funeral and burial costs were $21,341.84.

Prior to Ellen's death, on October 3, 2011, a lawsuit was filed in the district court for Lancaster County on Ellen's behalf for claims arising from Ellen's personal injuries resulting from the collision. A companion complaint was also filed in the district court for Lancaster County on William's behalf for the injuries he suffered as a result of the same collision.

On August 22, 2012, an amended complaint was filed in the district court for Lancaster County on behalf of Ellen's estate. This amended complaint alleged that Ellen's injuries were fatal, but that prior to her death, she had required hospitalization, and that she had "suffered pain, suffering, inconvenience, disability and incurred healthcare expenses."

Prior to the collision, Ellen had been diagnosed with "stage 4" lung cancer, as well as brain cancer and esophageal cancer. At the time of the collision, Ellen was 68 years old and she and William had been married for almost 7 years. It was a second marriage for both Ellen and William. Ellen had one daughter, Rebecca, from her prior marriage. Ellen was not working at

the time of the collision and had retired from employment years earlier.

The parties further stipulated that between Ellen, William, and Rebecca, it was likely that Ellen had the shortest life expectancy at the time of the collision. The parties also stipulated that Ellen was of sound mind when she executed her last will and testament, as well as a postnuptial agreement with William, both dated November 12, 2010. The parties further stipulated that the documents accurately reflected Ellen's wishes.

The will generally gave William all of Ellen's household goods and furniture and any vehicles she might own. It gave him a life estate in certain real estate. The will further provided, "All of the rest, residue and remainder of my property of every nature and kind and wheresoever situated I give and devise to my daughter, [Rebecca]."

Ellen's estate was opened on November 10, 2011. The parties stipulated that several documents would be received into evidence without objection. These documents included Ellen's will, the postnuptial agreement, probate documents, pleadings from the district court actions related to the collision, medical bills, and correspondence with legal counsel. The parties stipulated to the value of Ellen's medical bills and liens, as well as the value of the settlements with the tort-feasor and the Panecs' insurance company. The parties stipulated that the settlement with the tort-feasor responsible for the cause of the automobile accident was valued at $100,000. The parties also stipulated that a settlement was reached with the Panecs' insurance company for $516,000 for underinsured motorist coverage.

The county court considered the parties' stipulations and the testimony of William, as Ellen's husband and personal representative, and Rebecca. The court found that William suffered the greatest loss, as compared to Ellen's adult daughter, Rebecca. The court ordered the settlement funds to be distributed as follows:

> 1. Reasonable attorney fees to [William's attorney] in the sum of $154,000.00.

2. A Medicare lien in the sum of $6,415.20.

3. A Madonna Rehabilitation lien in the sum of $11,101.51.

4. Promed Services lien in the sum of $5,738.75.

5. $63,873.45 to Rebecca . . . (10% + $20,000.00; as suggested in [William's] reply brief).

6. Balance of proceeds to William . . . .

ASSIGNMENTS OF ERROR

Rebecca asserts the county court erred in (1) holding it did not have jurisdiction to allocate the damages other than as provided by Neb. Rev. Stat. § 30-810 (Reissue 2008), (2) failing to allocate any of the approximately $616,000 settlement to Ellen's estate for its personal injury survivor claim, and (3) determining the medical bills were not relevant to any personal injury claim.

STANDARD OF REVIEW

[1-3] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Conservatorship of Hanson*, 268 Neb. 200, 682 N.W.2d 207 (2004). When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*. When reviewing questions of law, an appellate court has an obligation to review the questions independently of the conclusion reached by the trial court. *Id*.

ANALYSIS

Distribution of Settlement Under Nebraska Revised Statutes.

In the "Amended Petition for Distribution of Settlement," William, as personal representative, requested that the court enter an order approving a distribution allotting $20,000 to Ellen's estate. Rebecca would be entitled to those funds as Ellen devised "all of the rest, residue and remainder" of her property of every nature to Rebecca, with the exception of

the personal property awarded to William and his life estate in the residence he shared with Ellen. The "Amended Petition for Approval of Settlement" stated that the Panecs' insurance company "has offered the sum of $515,000.00 to settle said Claim. $495,000.00 for wrongful death and $20,000.00 for the pain and suffering from September 19, 2011 to [Ellen's] death on October 28, 2011."

In its order, issued August 7, 2013, the county court for Jefferson County determined how the settlement proceeds would be divided. The court found it did not have jurisdiction to allocate the damages between William and Rebecca, other than as provided by § 30-810.

Applying § 30-810, the court found that after payment of reasonable attorney fees and a negotiated reduction in medical bills, the funds should be split by allocating $63,873.45 to Rebecca and the remainder to William. The court determined that Rebecca was entitled to 10 percent of the settlement plus the $20,000 allocated by the Panecs' insurance company for Ellen's predeath pain and suffering. The court then awarded the balance of the proceeds to William. The court reasoned that as Ellen's husband, William suffered a greater pecuniary loss of counsel and companionship than Ellen's adult daughter, Rebecca. Rebecca asserted at the hearing that she should receive a greater portion of the wrongful death settlement, because her loss was greater. Though the court's reasoning is supported by the evidence, Rebecca did not raise this issue on appeal.

Instead, Rebecca asserts the county court erred in "failing to allocate and distribute any of the $615,000 [sic] settlement recovery to the Estate for its Neb. Rev. Stat. § 25-1401 personal injury survivor claim." Brief for appellant at 12. Thus, she asserts the court erred in determining that it could not distribute the settlement funds according to Neb. Rev. Stat. § 25-1401 (Reissue 2008). Section 25-1401 recognizes that a decedent's predeath pain and suffering survive death as a separate cause of action which is a claim that inures to the benefit of the estate. See *Corona de Camargo v. Schon*, 278 Neb. 1045, 776 N.W.2d 1 (2009). Rebecca cites *Reiser v. Coburn*, 255 Neb. 655, 587 N.W.2d 336 (1998), in support of her

argument that damages should have been recovered on behalf of Ellen's estate for Ellen's predeath damages.

[4-6] In Nebraska, there are two types of causes of action which vest in and can be brought only by the personal representative of a decedent's estate—a survival action and a wrongful death action. *In re Diers*, 320 B.R. 166 (D. Neb. 2004). See, also, §§ 25-1401 and 30-810; Neb. Rev. Stat. §§ 25-322 and 30-809 (Reissue 2008). The statutory provisions allow a cause of action, referred to as a "'survival action,'" held by a person who is fatally injured to be prosecuted by the personal representative of the decedent. *In re Diers*, 320 B.R. at 168. A survival action is not a new cause of action but is a continuation in the deceased's personal representative of the cause of action which accrued to the deceased under the common law. *Id*. The purpose of the survival action is to recover the loss to the decedent's estate resulting from the tort. *Id*.

[7] In contrast, §§ 30-809 and 30-810 provide a "wrongful death" cause of action, not to the decedent and the decedent's estate but to the personal representative of the decedent for the exclusive benefit of the widow or widower and next of kin. Wrongful death recovery is limited to the loss suffered by a decedent's next of kin, and it provides no basis upon which to recover a decedent's own damages. *Corona de Camargo v. Schon, supra*. The losses arising from the decedent's death include loss of future income and maintenance, and for present and future loss of society and companionship. § 30-809; *Miers v. Central Mine Equipment Co*., 604 F. Supp. 502 (D. Neb. 1985).

In this case, William, the personal representative of Ellen's estate, negotiated a settlement with the sole purpose of maximizing the net recovery for those benefiting from the settlement, without regard for each potential individual element of damages that might or might not be before a jury if the case were tried.

The county court found that once the funds were received, it was obligated to apply § 30-810, because a jury's potential estimation of damages was merely hypothetical. The court noted that the complaint did not set forth separate causes

of action for predeath and postdeath damages, but simply requested a judgment "'in an amount which will fairly and justly compensate [Ellen] for [her] injuries under the laws of the State of Nebraska.'"

Rebecca requested that the funds be distributed other than as provided by § 30-810, but did not provide any authority to support such a disposition. The request was based upon the case's hypothetically being tried before a jury as a common-law tort action, rather than as a probate matter. In this scenario, the jury would have to find that damages were owed and would have to separately determine the amount which would be allocated to Ellen's estate and the amount which would be due to Ellen's widower and next of kin. However, this case was not before a jury, and the amount of the settlement was determined prior to the issue's being presented to the county court. Thus, the county court was simply tasked with distributing the settlement proceeds. The court acknowledged that it seemed likely that the estate would have prevailed had the matter gone to trial, but stated that it was less certain that the jury's estimate of damages would have equaled the amount of the generous settlement.

Reiser v. Coburn, 255 Neb. 655, 587 N.W.2d 336 (1998), and its progeny recognize that two causes of action may be joined: one for wrongful death and one for predeath pain and suffering and medical and funeral expenses. Though the court applied § 30-810, it is clear from our review of the record that the causes of action were joined. The order provided for wrongful death and medical expenses, and an additional $20,000 distribution to Rebecca, beyond the 10 percent the court allotted for the wrongful death claim. Though the words "pain and suffering" are not explicitly used, $20,000 was the amount suggested by William and the amount the Panecs' insurance company allotted for the pain and suffering portion of the $616,000 settlement.

After reviewing the county court's decision, we find the court's distribution of the proceeds from the settlement conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

Medical Bills.

Rebecca asserts the county court erred in "analyzing that the $215,000 in medical bills were implicitly not relevant to any personal injury claim because they were paid by insurance or written off and that both parties would be responsible for the medical bills." She argues that the Nebraska statutes provide that the measure of damages for medical expenses in personal injury claims shall be the private party rate, not the discounted amount, citing Neb. Rev. Stat. § 52-401 (Reissue 2010).

In its order, the county court noted that the estate would be liable for medical expenses pursuant to Neb. Rev. Stat. § 30-2486 (Reissue 2008) and that William would also be obligated because spouses are jointly responsible for medical expenses. See *Choat v. Choat*, 218 Neb. 875, 359 N.W.2d 810 (1984). The court's order did not deduct the outstanding medical expenses from either party's share of the settlement, nor add to either party's share of the settlement for the cost of medical expenses already paid from the settlement proceeds. Essentially, the court found that both parties would be responsible for the outstanding balances, but that there was no need to split the expenses or assign them as damages, because they were already accounted for. Therefore, the court did not include a provision entitling either party to medical expenses.

Rebecca asserts on appeal she is entitled to the retail value of Ellen's medical bills. She cites the "'collateral source rule,'" which allows a party who has been wholly or partially indemnified for a loss by insurance to recover for the full amount of damages. Brief for appellant at 16, citing *Mahoney v. Nebraska Methodist Hosp.*, 251 Neb. 841, 560 N.W.2d 451 (1997). While this rule would have certainly factored into the presentation of the claim on its merits to a jury, the argument has no bearing on this particular distribution. This action was not aimed at proving the cost of medical expenses as damages; rather, it was for the distribution of settlement funds. The parties had already recovered the maximum value of the insurance proceeds, and the parties stipulated to the cost of medical services already paid and to the remaining amounts owed. The parties also stipulated that the majority of the bills

had already been paid to the appropriate providers and that the remaining balances were to be paid directly to the medical providers and to Medicare as subrogor. We find Rebecca's assignment of error with regard to her entitlement for medical expenses is without merit.

CONCLUSION

We find the county court did not err in finding it had jurisdiction to distribute the settlement proceeds only according to § 30-810 and in allocating the settlement proceeds accordingly. We also find the county court did not err in finding the parties were not entitled to recover the value of medical expenses incurred for Ellen's care and paid directly to the medical providers out of the settlement proceeds.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
ELIJAH D. WATTS, APPELLANT.

856 N.W.2d 151

Filed November 4, 2014. Nos. A-13-1105, A-13-1136.

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 trial court.
2. **Rules of the Supreme Court: Appeal and Error.** Interpretation of a court rule 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 trial court.
3. **Prior Convictions: Sentences.** To constitute a basis for enhancement of punishment on a charge of a second or subsequent offense, the prior conviction relied upon for enhancement must be a final conviction.
4. **Prior Convictions: Sentences: Appeal and Error.** A prior conviction that is pending on appeal will not support enhanced penalties because it has not yet become final and may be reversed by the appellate court.
5. **Sentences: Prior Convictions: Drunk Driving: Time.** The finality of a prior driving under the influence conviction offered for purposes of enhancement is determined as of the date the subsequent offense was committed.

Appeal in No. A-13-1105 from the District Court for Lancaster County, PAUL D. MERRITT, JR., Judge, on appeal

thereto from the County Court for Lancaster County, JEAN A. LOVELL, Judge. Judgment of District Court affirmed. Appeal in No. A-13-1136 from the District Court for Lancaster County: JODI NELSON, Judge. Affirmed.

Chad J. Wythers, of Berry Law Firm, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

INBODY, RIEDMANN, and BISHOP, Judges.

RIEDMANN, Judge.

INTRODUCTION

This is a consolidated appeal in which Elijah D. Watts challenges two separate orders of the district court for Lancaster County involving two separate convictions for driving under the influence (DUI). In case No. A-13-1105, he appeals the district court's dismissal of his appeal from his 2005 county court conviction for DUI. In case No. A-13-1136, he appeals his most recent conviction for DUI, third offense, asserting that the district court erred in finding that his 2005 DUI conviction was a valid prior conviction for purposes of enhancement. These cases have been consolidated for briefing and disposition to address whether Watts' 2005 DUI conviction, which is on appeal in case No. A-13-1105, can be used to enhance his present DUI conviction, which is on appeal in case No. A-13-1136.

BACKGROUND

Watts was convicted of DUI after pleading guilty in the county court for Lancaster County in 2005. He was sentenced to probation, and he completed his probation in early 2007. Watts did not attempt to appeal his conviction or sentence at that time.

Watts was arrested for the present DUI on January 18, 2013. He was charged in the district court for Lancaster County with DUI, third offense, with a breath alcohol concentration of .15 of a gram of alcohol per 210 liters of breath or greater. Watts entered a guilty plea to the underlying offense on

October 11. The district court accepted his plea and found him guilty beyond a reasonable doubt.

An enhancement hearing was held immediately following the acceptance of Watts' plea, during which hearing the State offered certified copies of the court files containing Watts' prior DUI convictions from 2005 and 2009. None of the court records associated with the 2005 conviction contained a file stamp.

Watts objected to the use of the 2005 conviction on the basis that it was not a final conviction, because it was currently pending on appeal. Defense counsel advised the court that he had filed a notice of appeal from the 2005 conviction that morning. Watts took the stand and testified as to the filing of the notice of appeal that morning as well. The district court found that both of Watts' prior convictions were valid for enhancement purposes, and it enhanced Watts' current DUI to a third offense.

Watts filed a motion for reconsideration of the district court's ruling. During a hearing on the motion, he offered a certified copy of the county court file for the 2005 conviction, which showed that a notice of appeal was in fact filed in the county court on October 11, 2013. It also contained an order issued by the county court on October 17, in which the court dismissed Watts' appeal as premature because the final order from which he appealed had never been file stamped. The court ordered the clerk of the court to file stamp the judgment, upon which, it indicated, Watts' time to appeal would begin to run. The clerk of the court file stamped the final order on October 17, and Watts filed a new notice of appeal in the county court on October 22.

Watts also offered a certified copy of the district court file showing that the 2005 conviction was currently before the court on appeal. Contained within the district court file was a notice issued by the clerk of the county court informing the clerk of the district court that no request had been received for preparation of the appeal transcript in this case, nor had any payment for the transcript fee been received.

The district court overruled the motion for reconsideration. Watts was sentenced to serve 300 days in the county jail, and

his driver's license was revoked for a period of 15 years. Watts timely appeals from that judgment.

On December 2, 2013, the district court dismissed Watts' appeal from the 2005 county court conviction for failure to request or pay for an appeal transcript as required by Neb. Ct. R. § 6-1452(A)(4)(b) (rev. 2011). Watts timely appeals from that judgment as well.

ASSIGNMENTS OF ERROR

Watts asserts that the district court erred in (1) dismissing his appeal from the 2005 county court conviction and (2) finding that his 2005 DUI conviction was valid for purposes of enhancement, even though it was pending on appeal at the time of the enhancement hearing.

STANDARD OF REVIEW

[1,2] 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 trial court. *State v. Macek*, 278 Neb. 967, 774 N.W.2d 749 (2009). The Nebraska Supreme Court has not previously enunciated the standard of review applicable to the interpretation of court rules; however, we find it most analogous to the interpretation of statutes, so we apply the same standard here. Thus, interpretation of a court rule 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 trial court.

When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *State v. Anderson*, 279 Neb. 631, 781 N.W.2d 55 (2010).

ANALYSIS

Dismissal of Appeal From 2005 Conviction

Watts argues on appeal that the district court should have made a decision on the merits rather than dismissing his appeal from county court for failure to pay the transcript fee. We disagree.

The procedures for obtaining transcripts for appeals from a county court to a district court are set forth in the Nebraska Supreme Court Rules. The rules require appellants to file a request for preparation of the transcript at the time of filing the notice of appeal and to pay the estimated cost of the transcript to the county court before preparation of the transcript may begin. See § 6-1452(A)(1)(a) and (4)(a). In the event of non-payment, § 6-1452(A)(4)(b) provides the following:

> An appeal may be dismissed for failure to make payment for the transcript except in cases where a poverty affidavit has been filed. If payment for the transcript has not been received within the time allowed under Neb. Rev. Stat. § 25-2731, and no poverty affidavit has been filed, the clerk of the county court shall send a certified copy of the notice of appeal to the clerk of the district court, together with a statement that the fee has not been paid.

The record before us reflects that Watts failed to request or make payment for the county court transcript, and the clerk of the county court notified the district court of the same in accordance with this rule. There is no evidence that a poverty affidavit was ever filed, and Watts does not argue otherwise. Based on the plain language of § 6-1452(A)(4)(b), the district court was authorized to dismiss the appeal upon Watts' failure to pay for the transcript. We find no error in its having done so.

Watts acknowledges that the language of the court rule supports the district court's decision, but argues that the rule should be interpreted in light of precedent set forth by the Nebraska Supreme Court. Specifically, he cites to *Riggert v. King*, 192 Neb. 607, 223 N.W.2d 155 (1974), and *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995), for the well-established proposition that it is incumbent upon the appellant to present a record supporting the errors assigned and that absent such a record, the lower court's decision will be affirmed. However, we note that in *Riggert v. King, supra*, there is no indication that the appellant failed to request or pay for a transcript. It is evident from the opinion that the court had the transcript before it and that it

was the appellant's failure to provide a bill of exceptions containing *evidence* to support his position which led the reviewing court to presume the evidence supported the findings of the lower court and affirm the decision.

WBE Co. v. Papio-Missouri River Nat. Resources Dist., supra, was an action that originated in a district court. The appellant failed to include a copy of one of the motions from which it received an adverse ruling. The court held that because the motion was not part of the record, the record was not properly preserved. After reviewing the bill of exceptions, the court determined the appellant's assignment of error as to this issue was without merit. The appellant did not fail to provide a transcript; rather, he failed to include one of the motions on which he received an unfavorable ruling. Furthermore, the case originated in a district court and did not involve § 6-1452(A)(4)(b), which is applicable only to cases appealed from a county court to a district court.

The proposition of law that Watts urges us to apply is generally applied in situations where the bill of exceptions containing the trial court evidence is either missing or incomplete. As a result, the appellate court examines the transcript to determine whether the pleadings support the trial court's judgment, and if so, it affirms the judgment. See, *Centurion Stone of Neb. v. Whelan*, 286 Neb. 150, 835 N.W.2d 62 (2013); *Groene v. Commissioner of Labor*, 228 Neb. 53, 54, 421 N.W.2d 31, 32 (1988) ("[i]n the absence of a bill of exceptions, the judgment of the trial court will be affirmed if the pleadings support the judgment"). It is not applicable in a situation where, as here, a party appeals from a county court to a district court and does not request or pay for a transcript. In this situation, the district court may dismiss the appeal pursuant to § 6-1452(A)(4)(b). See *State v. Hanus*, 3 Neb. App. 881, 534 N.W.2d 332 (1995).

In *State v. Hanus, supra*, the appellant did not request a transcript or file a poverty affidavit within 10 days of filing his notice of appeal. Our opinion primarily addressed the lower courts' shortcomings as they related to the appellant's in forma pauperis status. However, as to the district court's authority to dismiss the appeal, we relied upon what is now

§ 6-1452(A)(4)(b) and stated: "If in forma pauperis status was properly denied, [the] appeal was clearly subject to dismissal for failure to advance the costs of the appeal." *Id*. at 893, 534 N.W.2d at 340.

In the present action, Watts failed to advance the costs of the transcript, and we find no error in the district court's dismissal of the appeal of his 2005 DUI conviction based upon § 6-1452(A)(4)(b).

Enhancement of 2013 Conviction

Watts asserts that the district court erred in using his 2005 DUI conviction to enhance his present sentence. He argues that the 2005 conviction was not final, because it was pending on appeal at the time of the enhancement hearing.

[3-5] To constitute a basis for enhancement of punishment on a charge of a second or subsequent offense, the prior conviction relied upon for enhancement must be a final conviction. *State v. Estes*, 238 Neb. 692, 472 N.W.2d 214 (1991). A prior conviction that is pending on appeal will not support enhanced penalties because it has not yet become final and may be reversed by the appellate court. See *id*. However, in *State v. Estes, supra*, the Nebraska Supreme Court held that the finality of a prior DUI conviction offered for purposes of enhancement is determined as of the date the subsequent offense was committed, not the date of the enhancement hearing. It stated:

> The defendant's habitual offender status is determined at the time the subsequent offense is committed. . . . Therefore, even if the first conviction is affirmed before sentencing on the second conviction, it may not be used for sentencing enhancement purposes, since it was not final at the time the second offense was committed.

Id. at 695-96, 472 N.W.2d at 216.

Here, Watts' 2005 DUI conviction was not on appeal at the time the present offense was committed. He committed the present offense on January 18, 2013, and then subsequently filed his notice of appeal from the 2005 DUI conviction on October 11. We note that the time to appeal the 2005

conviction had not yet expired due to the failure of the clerk to place a file stamp on the final sentencing order. See Neb. Rev. Stat. § 25-1301(3) (Reissue 2008) ("[f]or purposes of determining the time for appeal, the date stamped on the judgment, decree, or final order shall be the date of entry"). However, the Nebraska Supreme Court has determined that the lack of a file stamp does not invalidate a prior conviction for purposes of enhancement. See *State v. Macek*, 278 Neb. 967, 774 N.W.2d 749 (2009).

In *State v. Macek, supra*, the appellant argued that the district court erred in using two of his prior DUI convictions to enhance his sentence, because the prior convictions lacked file stamps and therefore were not final convictions. The Supreme Court rejected this argument, in part, because there was no dispute that the prior convictions had occurred years before the present offense was committed and had not been appealed. See *id*. The Supreme Court further held that the appeal was an impermissible collateral attack on the prior proceedings and found that the prior convictions were properly used for enhancement. See *id*.

Reading *State v. Estes, supra*, and *State v. Macek, supra*, together, we conclude that Watts' 2005 DUI conviction is valid for purposes of enhancement, because no appeal had been taken at the time the present offense was committed and because any attempt to attack the prior conviction based on the lack of a file stamp would have been an impermissible collateral attack, since there was no appeal pending at that time. Thus, the district court was correct in enhancing Watts' conviction to a third offense.

CONCLUSION

The district court did not err in dismissing Watts' appeal from his 2005 DUI conviction, nor did it err in finding that such conviction was valid for purposes of enhancement. Accordingly, we affirm.

AFFIRMED.

State of Nebraska, appellee, v. Jacob D. Armagost, appellant.

856 N.W.2d 156

Filed November 4, 2014. No. A-14-058.

1. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: 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 evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Arrests: Motor Vehicles: Proof.** An attempt to arrest or cite the defendant is an essential element of the offense of fleeing in a motor vehicle to avoid arrest, but proof that the defendant actually committed the law violation for which the arrest or citation was attempted is not required.
3. **Arrests: Motor Vehicles: Proof: Statutes.** Neb. Rev. Stat. § 28-905 (Reissue 2008) has been amended to now prohibit operating a motor vehicle to avoid arrest or citation, whereas before, it prohibited operating a motor vehicle to avoid arrest only. Thus, based on the amendment of the statute, the State may prove this element of the crime by evidence of an attempt to arrest or cite the defendant.
4. **Verdicts: Appeal and Error.** Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
5. **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.
6. **Jury Instructions.** In giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute.
7. **Criminal Law: Jury Instructions.** Jury instructions that set forth only the statutory elements of a crime are insufficient when they do not set forth all the essential elements of the crime.
8. **Jury Instructions: Appeal and Error.** A jury instruction that omits an element of the offense from the jury's determination is subject to harmless error review.
9. **Verdicts: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict surely would have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.

10. **Criminal Law: Judgments: Verdicts.** Motions for judgment notwithstanding the verdict are limited to civil proceedings and are unavailable under Nebraska criminal procedure.

Appeal from the District Court for Merrick County: MICHAEL J. OWENS, Judge. Affirmed.

Mitchell C. Stehlik, of Lauritsen, Brownell, Brostrom & Stehlik, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Laura A. Nigro for appellee.

INBODY, RIEDMANN, and BISHOP, Judges.

RIEDMANN, Judge.

I. INTRODUCTION

Jacob D. Armagost appeals his jury conviction for operating a motor vehicle in a willful reckless manner to avoid arrest. Armagost assigns that the district court erred in failing to direct a verdict, instructing the jury, finding sufficient evidence to support his conviction, and overruling his motion for new trial and motion for judgment notwithstanding the verdict. Finding no merit to Armagost's assigned errors, we affirm.

II. BACKGROUND

Armagost was charged in the district court for Merrick County with operating a motor vehicle in a willful reckless manner to avoid arrest. A jury trial was held, during which the following evidence was adduced:

On June 6, 2013, Central City Police Lt. Mark Hogue was stopped at the intersection of 10th Avenue and U.S. Highway 30 in Central City, Nebraska, when he observed a vehicle stopped at an intersection approximately 30 feet to his left. Lieutenant Hogue observed the driver of the vehicle for approximately 15 seconds and was "[o]ne hundred percent" certain that it was Armagost. Lieutenant Hogue testified that he had known Armagost for approximately 13 years and was very familiar with him. He estimated having seen him approximately 50 times over the years, including "[a]t least a half-dozen times, if not more," in the same particular vehicle. Lieutenant Hogue

knew that the vehicle belonged to a person whom he knew to be associated with Armagost.

Lieutenant Hogue intended to initiate a traffic stop immediately, because he knew Armagost's driver's license was suspended at that time. He testified that individuals who are found to be driving under suspension are generally arrested and transported to the sheriff's office, where they are booked and released. When Lieutenant Hogue observed the vehicle turn west onto Highway 30, he pulled behind it and activated his cruiser's overhead emergency lights, which triggered its dashboard camera to begin recording. The pursuit that followed was captured on video and played for the jury at trial.

Armagost did not pull over in response to the attempted traffic stop; rather, he executed a quick left turn onto 11th Avenue and accelerated rapidly down a residential street. Lieutenant Hogue immediately activated his cruiser's siren and began pursuing the vehicle. There were numerous vehicles parked along the street, and recent occupants of one vehicle had to move quickly toward the curb to avoid being hit. Armagost continued down 11th Avenue for approximately four blocks, traveling at speeds up to 55 miles per hour in the 25-mile-per-hour residential zone.

Once he reached Horde Lake Road, Armagost headed eastbound out of town at speeds over 100 miles per hour. He proceeded around a "fairly decent sharp curve" in the road at approximately 80 miles per hour while two vehicles were approaching from the opposite direction. Both of those vehicles moved to the shoulder to get out of the way, and a third vehicle that was driving in front of Armagost went into the ditch. After clearing the curve, Armagost accelerated again as he approached a bridge. Lieutenant Hogue observed a parked vehicle and a woman fishing from the bridge, so he sounded his cruiser's air horn to alert the woman to move to safety.

After crossing the bridge, the pursuit continued onto a gravel road. Lieutenant Hogue was not able to keep up due to the dust trail from Armagost's vehicle ahead of him. Lieutenant Hogue described the road as "loose gravel" and testified that he was having a hard time keeping his vehicle on the road at such speeds. He decided to discontinue the pursuit

primarily for safety reasons, but also because he had already identified Armagost as the driver.

On cross-examination, Lieutenant Hogue testified that Armagost was not apprehended the day of the chase. He acknowledged that he was not able to make or attempt an actual or constructive seizure of Armagost because he discontinued the pursuit. However, he later clarified that he "attempted [to seize or detain Armagost] up to the point [he] disengaged the pursuit."

At the conclusion of Lieutenant Hogue's testimony, the State rested and Armagost moved for a directed verdict. The motion was overruled. Armagost rested without presenting any evidence and then moved for a directed verdict once again at the close of all of the evidence. The motion was again overruled.

At the jury instruction conference, Armagost offered a proposed jury instruction setting forth a definition of "arrest." Defense counsel argued that it was important for the jury to know the definition of arrest so that it could determine whether the essential element of an attempt to arrest Armagost was satisfied. The district court declined to give the proposed instruction, indicating that such instruction could confuse the jury, since an actual arrest was not necessary for a conviction. Armagost also objected to instruction No. 3, which set forth the elements of the offense, on the basis that it omitted the element of an attempt to arrest Armagost. The district court overruled the objection and gave the elements instruction as written, without including the element of an attempted arrest.

The jury found Armagost guilty of operating a motor vehicle in a willful reckless manner to avoid arrest. The district court accepted the jury's verdict.

Armagost timely filed a motion for new trial asserting that the district court erred in (1) failing to grant his motions for directed verdict, (2) declining to give his proposed jury instruction containing the definition of arrest, and (3) overruling his objection to instruction No. 3. Armagost also filed a motion for judgment notwithstanding the verdict on the basis that the evidence was insufficient to sustain the jury's verdict. The

district court overruled both motions. Following his sentencing, Armagost timely appealed to this court.

III. ASSIGNMENTS OF ERROR

Armagost assigns six errors on appeal. He alleges the district court erred in (1) failing to grant his motions for directed verdict at the close of the State's evidence and at the close of all evidence presented in the case; (2) failing to offer his proposed jury instruction containing the definition of arrest; (3) overruling his objection to instruction No. 3, which did not include the essential element of an attempt to arrest; (4) accepting the jury's guilty verdict when the evidence was insufficient to prove his guilt beyond a reasonable doubt; (5) failing to grant his motion for new trial; and (6) failing to grant his motion for judgment notwithstanding the verdict. We have consolidated his assignments of error to four, as set forth below.

IV. ANALYSIS

1. Sufficiency of Evidence

In his first assignment of error, Armagost asserts that the district court erred in overruling his motions for directed verdict, because the evidence was insufficient to convict him. Armagost's fourth assignment of error similarly challenges the sufficiency of the State's evidence to sustain his conviction. Because both assignments of error relate to the sufficiency of the evidence, we will address them together.

[1] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: 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 evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011).

Armagost makes the same three arguments in support of both assignments of error. He argues that (a) there was no evidence of an attempt to arrest Armagost, (b) there was insufficient evidence to identify Armagost as the driver of the vehicle, and (c) there was insufficient evidence of willful reckless operation of the vehicle. We will address each argument in turn.

(a) Attempted Arrest

[2] A person commits the offense of operating a motor vehicle to avoid arrest if he or she "operates any motor vehicle to flee in such vehicle in an effort to avoid arrest or citation." Neb. Rev. Stat. § 28-905(1) (Reissue 2008). An attempt to arrest or cite the defendant is an essential element of the offense of fleeing in a motor vehicle to avoid arrest, but proof that the defendant actually committed the law violation for which the arrest or citation was attempted is not required. See, *id.*; *State v. Claussen*, 276 Neb. 630, 756 N.W.2d 163 (2008).

[3] We note that § 28-905 has been amended since the Nebraska Supreme Court held in *State v. Claussen, supra*, that an attempt to arrest the defendant is an essential element of the offense. The statute now prohibits operating a motor vehicle to avoid arrest *or citation*, whereas before, it prohibited operating a motor vehicle to avoid arrest only. Compare § 28-905 (Reissue 2008) (effective July 18, 2008), with § 28-905 (Cum. Supp. 2006). Thus, based on the amendment of the statute, we conclude that the State may prove this element by evidence of an attempt to arrest *or cite* the defendant.

Nonetheless, we find the evidence presented at trial clearly established that Lieutenant Hogue attempted to arrest Armagost. Lieutenant Hogue testified that he attempted to initiate a traffic stop because he was aware that Armagost's driver's license was suspended. He further testified that it is normal protocol to arrest individuals that are found to be driving on a suspended license. Lieutenant Hogue activated his cruiser's overhead emergency lights and siren to initiate a traffic stop and then engaged in a high-speed chase in an effort to apprehend Armagost. The fact that Lieutenant Hogue

was not able to effect an arrest of Armagost does not negate the fact that he attempted to do so. The dashboard camera video admitted into evidence depicts the pursuit as described by Lieutenant Hogue. Viewing this evidence in the light most favorable to the State, we conclude that a rational trier of fact could reasonably conclude that Lieutenant Hogue attempted to arrest Armagost.

Armagost argues that the evidence was insufficient to prove that there was an attempted arrest, based on Lieutenant Hogue's testimony that he was never able to attempt an arrest because he disengaged the pursuit for safety reasons. Although Lieutenant Hogue testified that he was not able to attempt an arrest, he later clarified that he "attempted up to the point [he] disengaged the pursuit." The evidence clearly shows that he attempted to initiate a traffic stop, which is a necessary step in attempting to make an arrest. We find that Lieutenant Hogue's attempt to stop the vehicle with his cruiser's overhead emergency lights and siren activated was sufficient to satisfy this element of the offense.

(b) Identification of Armagost

Armagost argues that the evidence was insufficent to prove that he was the driver of the vehicle, because Lieutenant Hogue was the only person that identified him. Essentially, Armagost argues that Lieutenant Hogue's testimony was not credible.

[4] It is well established that 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, as such matters are for the finder of fact to resolve. See *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011). Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011).

It is apparent from the jury's verdict that it found the testimony of Lieutenant Hogue to be credible, and its determination on this issue is supported by the evidence. Lieutenant Hogue testified that he was very familiar with Armagost and

had known him for many years. He had seen Armagost approximately 50 times over the years, as well as "[a]t least a half-dozen times" in the same vehicle he pursued on June 6, 2013. Lieutenant Hogue knew the vehicle belonged to a person whom he knew to be associated with Armagost. Lieutenant Hogue observed the driver of the vehicle for approximately 15 seconds and testified that he was "[o]ne hundred percent" certain that it was Armagost. Viewing this evidence in the light most favorable to the State, we find that a reasonable jury could conclude that Armagost was driving the vehicle that fled from Lieutenant Hogue on June 6.

(c) Willful Reckless Operation of Vehicle

Operating a motor vehicle to avoid arrest is a Class IV felony if it includes the willful reckless operation of the motor vehicle. § 28-905(3)(a)(iii) (Reissue 2008). Willful reckless driving is defined as operating a motor vehicle in such a manner as to indicate a willful disregard for the safety of persons or property. Neb. Rev. Stat. § 60-6,214 (Reissue 2010).

There is sufficient evidence in the record to support the jury's finding that Armagost was operating the motor vehicle in a willful reckless manner. Lieutenant Hogue testified that Armagost traveled up to 55 miles per hour in a 25-mile-per-hour residential zone. Numerous vehicles were parked along the residential street, and recent occupants of one vehicle hurried toward the curb to get out of harm's way. During the pursuit, Lieutenant Hogue was traveling at approximately 80 miles per hour while traversing a sharp curve in the road and reached over 100 miles per hour on Horde Lake Road. Despite traveling at such high speeds, Lieutenant Hogue was not able to catch up to Armagost.

Armagost's actions indicated a willful disregard for the safety of persons and property that he encountered during the pursuit, including parked cars and individuals on the residential street, three vehicles that moved onto the shoulder or into the ditch on Horde Lake Road, and the woman who was standing on the bridge fishing. Viewing this evidence in the light most favorable to the State, any rational trier of

fact could have found Armagost guilty of operating a motor vehicle in a willful reckless manner to avoid arrest.

Because the evidence was sufficient to support Armagost's conviction, his first and fourth assignments of error have no merit.

2. Jury Instructions

Armagost's second and third assignments of error relate to the jury instructions given by the district court. Armagost asserts that the district court erred by (a) failing to tender his proposed jury instruction regarding the definition of arrest and (b) overruling his objection to instruction No. 3, which failed to include an attempt to arrest as one of the essential elements of the offense.

(a) Proposed Instruction

Armagost requested the district court to instruct the jury on the definition of arrest so that it could determine whether the essential element of an attempt to arrest Armagost was satisfied. Armagost's proposed instruction states: "An arrest is taking custody of another person for the purpose of holding or detaining him or her to answer to a criminal charge, and to effect an arrest, there must be an actual or constructive seizure or detention of the person arrested."

[5] 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. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009).

Although Armagost's proposed instruction is a correct statement of the law, we do not find it to be applicable here. Armagost's proposed instruction comes from *State v. Heath*, 21 Neb. App. 141, 838 N.W.2d 4 (2013), in which we set forth the definition of arrest while analyzing the sufficiency of the evidence to support a conviction for resisting arrest. Significantly, our opinion in *Heath* did not address whether the jury must be instructed on the definition of arrest.

We note, however, that an instruction containing the definition of arrest was given in *State v. White*, 209 Neb. 218, 306 N.W.2d 906 (1981), which involved a prosecution for escape from official detention after the defendant fled from an officer as he was being placed under arrest. Unlike the present offense, a conviction for escape requires evidence that the defendant unlawfully removed himself from official detention or arrest. In other words, the State had to prove that the defendant was under arrest at the time of the alleged escape in order to obtain a conviction. Thus, an instruction on the definition of arrest and how an arrest is effected was warranted in that case.

Here, Armagost was charged with operating a motor vehicle in a willful reckless manner to avoid arrest. In order to be convicted of this charge, it was not necessary for the State to prove that an arrest had been effected. To the contrary, a charge of operating a motor vehicle to avoid arrest necessarily implies that the defendant attempted to avoid arrest. In the present case, Armagost successfully avoided an effected arrest. Therefore, a jury instruction defining arrest and how one is effected was not required.

(b) Objection to Instruction No. 3

Armagost objected to instruction No. 3 on the basis that it omitted the essential element of an attempt to arrest him. Instruction No. 3, as given to the jury, states, in relevant part:

> The material elements which the State must prove beyond a reasonable doubt in order to convict [Armagost] of the offense of operating a motor vehicle in a willful reckless manner to avoid arrest are:
>
> 1. That . . . Armagost . . . operated a motor vehicle;
>
> 2. That [Armagost] fled in such vehicle in an effort to avoid arrest or citation;
>
> 3. That [Armagost] did so in a willful reckless manner; and
>
> 4. That [Armagost] did so on or about June 6, 2013, in Merrick County, Nebraska.
>
> A person drives in a willful reckless manner if he or she drives any motor vehicle in such a manner as

to indicate a willful disregard for the safety of persons or property.

[6] The Nebraska Supreme Court has held that "in giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute." *State v. Sanders*, 269 Neb. 895, 913, 697 N.W.2d 657, 672 (2005). We agree with the State's observation that instruction No. 3 mirrors the language of the statute, which states: "Any person who operates any motor vehicle to flee in such vehicle in an effort to avoid arrest or citation commits the offense of operation of a motor vehicle to avoid arrest." § 28-905(1).

[7] However, "[j]ury instructions that set forth only the statutory elements of a crime are insufficient when they do not set forth all the essential elements of the crime." *State v. Williams*, 247 Neb. 931, 939, 531 N.W.2d 222, 229 (1995), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). As previously discussed, an attempt to arrest or cite the defendant is an essential element of the offense. See *State v. Claussen*, 276 Neb. 630, 756 N.W.2d 163 (2008). Thus, we conclude that because an attempt to arrest or cite the defendant is an essential element of this offense, the district court erred in failing to include it in instruction No. 3.

[8,9] Our analysis, however, does not end there. A jury instruction that omits an element of the offense does not require automatic reversal, but, rather, it is subject to harmless error review. See *State v. Merchant*, 288 Neb. 439, 848 N.W.2d 630 (2014). Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict surely would have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *Id*. Where a court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error, it should not find the error harmless. *Id*.

We conclude beyond a reasonable doubt that the jury's guilty verdict in this case was unattributable to the omission of this element in instruction No. 3, because the requirement

of an attempt to arrest Armagost was implicit in the instruction given. In other words, in determining that Armagost fled in a motor vehicle in an effort to avoid arrest or citation, the jury necessarily considered and determined that there was an attempt to arrest or stop Armagost, because otherwise there would be nothing from which to flee or to avoid. We find that the jury's verdict would have been the same if this element had been expressly included in instruction No. 3. Thus, the instructional error was harmless beyond a reasonable doubt and does not require reversal of Armagost's conviction.

3. Motion for New Trial

Armagost argues that the district court erred in failing to grant his motion for a new trial on the bases that (a) the evidence was insufficient to sustain his conviction, (b) instruction No. 3 was erroneous in that it failed to include an attempt to arrest as an essential element of the offense, and (c) the court failed to give his proposed jury instruction containing the definition of arrest. Because we have already analyzed and disposed of each of these issues above, we will not address them further here. This assignment of error has no merit.

4. Motion for Judgment Notwithstanding Verdict

[10] Armagost's final assignment of error argues that the district court erred in overruling his motion for judgment notwithstanding the verdict. The Nebraska Supreme Court has held that motions for judgment notwithstanding the verdict are limited to civil proceedings and are unavailable under Nebraska criminal procedure. See *State v. Miller*, 240 Neb. 297, 481 N.W.2d 580 (1992). Accordingly, we conclude that the district court did not err in failing to grant such motion in this case.

V. CONCLUSION

For the reasons set forth above, we affirm the judgment of the district court.

Affirmed.

James A. Adams, appellant, and Rebecca Z. Adams, appellee, v. Manchester Park, L.L.C., a Nebraska limited liability company, and Southfork Homes, Inc., a Nebraska corporation, appellees.

855 N.W.2d 819

Filed November 10, 2014. No. A-13-429.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts 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 the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment.** Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.
4. ____. If a genuine issue of fact exists, summary judgment may not properly be entered.
5. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
6. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
7. **Summary Judgment.** In the summary judgment context, a fact is material only if it would affect the outcome of the case.
8. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations commences to run must be determined from the facts of each case.
9. **Limitations of Actions: Pleadings.** If a petition alleges a cause of action ostensibly barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

James A. Adams, of Law Offices of James A. Adams, P.C., L.L.O., pro se.

Larry E. Welch, Sr., of Welch Law Firm, P.C., for appellee Manchester Park, L.L.C.

Patrick S. Cooper, of Fraser Stryker, P.C., L.L.O., for appellee Southfork Homes, Inc.

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

INBODY, Chief Judge.

INTRODUCTION

James A. Adams appeals the order of the Douglas County District Court granting the motions for summary judgment of appellees Manchester Park, L.L.C. (Manchester), and Southfork Homes, Inc. (Southfork). For the reasons that follow, we affirm in part, and in part reverse and remand for further proceedings.

STATEMENT OF FACTS

Manchester previously owned a subdivision in Omaha, Douglas County, Nebraska, consisting of numerous residential lots near 168th and Locust Streets. The specific lot at issue in this case is lot 178. In September and October 2003, the subdivision was graded and tested for soil compaction and field density by an engineering and inspection firm under the supervision of a professional engineer registered in the State of Nebraska. On October 3, a field density report was completed for those lots, including lot 178, and the results for lot 178 were reported as "Adeq[uate]." On October 4 and 8, the lot was retested and the results on both days were reported as "Pass."

In 2004, Southfork entered into a purchase contract with Manchester Park for the purchase of lot 178. The contract contains a provision which provides:

> [Manchester] makes no representation or warranty concerning the soil compaction, buildable quality or bearing capacity of the soil of the Property. [Southfork] agrees that it is solely [Southfork's] responsibility to make appropriate tests to determine the buildable quality of the Property. If any tests conducted by [Southfork] with regard to bearing values be unsatisfactory to [Southfork], [Southfork] may rescind this Purchase Contract, and the Purchase Price, or so much thereof as has been paid, will be refunded, provided that [Southfork's] right to

> rescind and recover such Purchase Price shall expire at closing, or upon commencement of any grading or excavation operations on the Property, whichever date is earlier. [Southfork] acknowledges in the preparation of the lot for sale, certain changes in the contour of the Property's terrain and slope may have been made which could have an effect upon the drainage of both the lot and area in general. [Southfork] does hereby acknowledge these circumstances and does hereby release and discharge [Manchester] from any and all responsibility for the buildable quality of the lot and the control of surface water of any kind.

On August 9, 2006, James and Rebecca Z. Adams, as husband and wife, executed a purchase agreement with Southfork for the purchase and construction of a residence upon lot 178. The purchase agreement between Southfork and the Adamses provides the following:

> **Buyer-Owned Job Site**
>
> Special consideration is needed when building on a home site that is not owned or optioned by **Southfork/Highland Homes**. In the event additional (or removal) fill dirt is required and/or unforeseen grading becomes necessary, all associated costs will be borne by the purchaser. It is also the responsibility of the purchaser to be certain the home site is buildable. . . . Special design footings or foundation costs caused by the nature of the building site will also be borne by the purchaser/buyer.

It was not until August 18 that the warranty deed for lot 178 between Southfork and Manchester was executed.

On September 19, 2007, the Adamses completed the final walk-through and homeowner orientation inspection of the home. At that time, Southfork issued a 1-year "New Home Limited Warranty" to the Adamses for material defects in workmanship or materials. The warranty specifically provided that the builder would repair certain repairs during the first year and informs that "[n]on-structural cracks are not unusual in concrete foundation walls," that "[m]inor cracks in concrete basement floors are common," and that "[s]mall non-structural cracks are not unusual in mortar joints of masonry

foundation walls." The warranty deed was filed with the Douglas County register of deeds on October 3.

According to the Adamses, within approximately 6 months, they began to notice problems with the home, including cracking, heaving, and other defects in the foundation. The Adamses' home experienced roof leaks, basement tiles that were heaving and cracking, and numerous windows that would not open. The Adamses immediately contacted Southfork for inspection and repair of the conditions pursuant to the 1-year limited warranty. In her affidavit, Rebecca indicated that she was told by Southfork to wait "until the one year mark" for any and all drywall repairs, because those would only be completed one time pursuant to the 1-year limited warranty. In or around September 2008, Southfork hired a contractor to repair the cracks in the drywall, but shortly thereafter, the cracking reappeared. Several service providers were contacted from 2007 to 2009 to repair the drywall cracks, roof leaks, windows, doors, and cracking tile in the basement floor. In December 2009, the Adamses hired a company specializing in basement repair to inspect the problems, which company reported to the Adamses that there was a potential issue with the foundation of the home.

In July 2011, Thiele Geotech, Inc., performed site visits, test borings, and laboratory testing on the Adamses' residence. The Thiele Geotech representative, Bob Matlock, observed a separation of the poured wall from the framing in the northwest corner of the residence and a similar gap between the poured wall and west edge of the garage floor. Matlock further observed that the conditions in the interior of the residence were consistent with movement observed at the exterior of the residence. In its testing, Thiele Geotech performed three test borings on the soil of lot 178. Matlock reported to the Adamses that the grading and compaction in lot 178 did not meet "City of Omaha compaction specifications." Matlock concluded that the movement and related damage "is likely related to consolidation and settlement of fill placed across the rear of the residence during original development." Matlock indicated that currently there was no severe structural

damage, but that additional movement should be expected and would continue.

On September 22, 2011, the Adamses filed a complaint against Manchester and Southfork which alleged a breach of implied duty to perform in a workmanlike manner and warranty of habitability, negligence, fraudulent concealment, and breach of express warranty. Southfork filed an answer and affirmative defenses that the Adamses failed to state a claim upon which relief may be granted, that the Adamses failed to plead with particularity, and that the complaint was barred by the statute of limitations and the parties' purchase agreement. Manchester filed a similar answer.

Thereafter, both Manchester and Southfork filed motions for summary judgment. A hearing on the motions was held, and evidence was received by the district court.

On February 13, 2013, the district court entered an order granting Manchester's and Southfork's motions for summary judgment. The court found there was no question of fact that lot 178 was graded and tested in September and October 2003 and that the Adamses moved into the residence on lot 178 in September 2007 and received a warranty deed in October 2007. The court further found there was no question that the applicable statute of limitations ran in September 2007, 4 years after the grading was completed in 2003. However, because the Adamses did not occupy the residence until September 2007, they could not have discovered or learned facts which would have reasonably led to the discovery of the alleged deficiencies within the original 4-year statute of limitations. The court determined there was no genuine issue of material fact that the Adamses discovered the deficiencies

> which while not necessarily indicative of the specific cause of said deficiencies would have led persons of ordinary intelligence and prudence on inquiry, if pursued, to the discovery of facts constituting the basis of the cause of action and which in fact did lead in this instance to the discovery of the alleged deficiency constituting the basis of the cause of action herein.

The court found that those deficiencies were discovered by the Adamses between March and September 2008 and that in applying the 2-year discovery exception to the statute of limitations, the result was the statute of limitations expired, at the latest, in September 2010, which was 1 year prior to the filing of the complaint.

The court further determined that in addition to the statute of limitations, there was no dispute that the Adamses had the obligation to be sure that the lot was buildable pursuant to the August 2006 purchase agreement with Southfork. Further, the court found there was no genuine issue of material fact that neither Manchester nor Southfork had fraudulently concealed, either by deception or by a violation of a duty, material facts which prevented the Adamses from discovering the alleged soil compaction deficiency.

The Adamses filed a motion for new trial and rehearing, which was overruled. On April 23, 2013, the district court entered an amended order finding that the previous order dismissing the complaint be amended to include sustaining the motion for summary judgment as to count VI as well. It is from this order that James has timely appealed to this court.

ASSIGNMENT OF ERROR

James assigns, rephrased and consolidated, that the district court erred in granting Manchester's and Southfork's motions for summary judgment and dismissing the Adamses' complaint.

STANDARD OF REVIEW

[1,2] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts 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. *Harris v. O'Connor*, 287 Neb. 182, 842 N.W.2d 50 (2014). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

James argues the district court erred by sustaining Manchester's and Southfork's motions for summary judgment on the bases that the Adamses' complaint was time barred by the statute of limitations and that the Adamses had a contractual obligation to ensure that lot 178 was buildable under the terms of the purchase agreement. Further, James argues that the district court erred in failing to find that the doctrine of fraudulent concealment barred the statute of limitations defense.

[3,4] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts 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. *Harris v. O'Connor, supra*. Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute. *Peterson v. Homesite Indemnity Co.*, 287 Neb. 48, 840 N.W.2d 885 (2013). If a genuine issue of fact exists, summary judgment may not properly be entered. *Id*.

[5-7] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Id*. After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id*. In the summary judgment context, a fact is material only if it would affect the outcome of the case. *Id*.

James argues that summary judgment was not proper because there was a genuine issue of material fact related to the statute of limitations.

Neb. Rev. Stat. § 25-223 (Reissue 2008) provides:

> Any action to recover damages based on any alleged breach of warranty on improvements to real property or

> based on any alleged deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property shall be commenced within four years after any alleged act or omission constituting such breach of warranty or deficiency. If such cause of action is not discovered and could not be reasonably discovered within such four-year period, or within one year preceding the expiration of such four-year period, then the cause of action may be commenced within two years from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. In no event may any action be commenced to recover damages . . . more than ten years beyond the time of the act giving rise to the cause of action.

[8,9] The point at which a statute of limitations commences to run must be determined from the facts of each case. *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999); *Teater v. State*, 252 Neb. 20, 559 N.W.2d 758 (1997); *Gordon v. Connell*, 249 Neb. 769, 545 N.W.2d 722 (1996); *Georgetowne Ltd. Part. v. Geotechnical Servs.*, 230 Neb. 22, 430 N.W.2d 34 (1988). If a petition alleges a cause of action ostensibly barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute. *Teater v. State, supra*.

James argues that the district court erred by granting Manchester's and Southfork's motions for summary judgment and dismissing the Adamses' complaint. In this case, well before the Adamses became involved in any contracts to purchase lot 178, Southfork entered into a purchase contract with Manchester for the purchase of lot 178 in 2004. The contract contains a provision which provides:

> [Manchester] makes no representation or warranty concerning the soil compaction, buildable quality or bearing capacity of the soil of the Property. [Southfork] agrees that it is solely [Southfork's] responsibility to make appropriate tests to determine the buildable quality of the Property. If any tests conducted by [Southfork] with regard to bearing values be unsatisfactory to [Southfork],

> [Southfork] may rescind this Purchase Contract, and the Purchase Price, or so much thereof as has been paid, will be refunded, provided that [Southfork's] right to rescind and recover such Purchase Price shall expire at closing, or upon commencement of any grading or excavation operations on the Property, whichever date is earlier. [Southfork] acknowledges in the preparation of the lot for sale, certain changes in the contour of the Property's terrain and slope may have been made which could have an effect upon the drainage of both the lot and area in general. [Southfork] does hereby acknowledge these circumstances and does hereby release and discharge [Manchester] from any and all responsibility for the buildable quality of the lot and the control of surface water of any kind.

On August 18, 2006, the warranty deed between Manchester and Southfork was executed. Thus, in 2004, when Southfork entered into a contractual agreement with Manchester, Southfork knew or should have known about possible defects in the grading of the lot and was in a position of knowledge regarding the buildable quality of lot 178, well before any agreement was entered into with the Adamses. The record indicates that Southfork, at no time, performed any testing on the grading or soil for lot 178.

Southfork argues that the Adamses assumed responsibility for the buildable quality of lot 178 through the contractual language contained within the purchase agreement between Southfork and the Adamses. That specific language provides:

> **Buyer-Owned Job Site**
>
> Special consideration is needed when building on a home site that is not owned or optioned by **Southfork/Highland Homes**. In the event additional (or removal) fill dirt is required and/or unforeseen grading becomes necessary, all associated costs will be borne by the purchaser. It is also the responsibility of the purchaser to be certain the home site is buildable. . . . Special design footings or foundation costs caused by the nature of the building site will also be borne by the purchaser/buyer.

On August 9, 2006, although Southfork and the Adamses entered into a purchase agreement for the sale of lot 178 and

the construction of a new home, the Adamses did not own lot 178. Instead, Southfork had previously entered into a contract to purchase the lot from Manchester, which lot was deeded to Southfork on August 18. The Adamses are not contractually responsible to ensure the buildable quality of the lot, and instead, the responsibility remains with Southfork. The district court erred in its determination that the Adamses were contractually required to ensure that the lot was buildable, which responsibility rested, pursuant to the 2004 contract between Manchester and Southfork, with Southfork. Manchester had no contractual obligation to the Adamses, and the district court did not err in granting Manchester's motion for summary judgment and in dismissing the Adamses' complaint as to Manchester.

As noted above, the basic statute of limitations applicable in this case is "four years after any alleged act or omission constituting [a] breach of warranty or deficiency." § 25-223. The statute of limitations pursuant to § 25-223 between Southfork and the Adamses for a breach of warranty would not begin at the time the lot was graded in 2003, as Southfork argues, because the Adamses were not in any position to have any knowledge about the grading completed at that time.

On September 19, 2007, Southfork issued a 1-year limited warranty to the Adamses. Almost immediately thereafter, the Adamses began to have problems with the home, which problems Southfork indicated were natural in the first year of a newly built home. Those problems included, but are not limited to, cracks in the drywall, windows which would not open, roof leaks, "nail pops," door misalignment, and tile cracking in the basement. The Adamses contacted Southfork for repair pursuant to the limited warranty and were instructed to wait until the end of the warranty, at which time repairs would be made all at one time. In or around September 2008, a year after the warranty was issued, Southfork hired a contractor to make repairs to the drywall. The 1-year limited warranty expired at that time in September 2008.

The record indicates that almost immediately after the expiration of Southfork's warranty, the Adamses began to observe recurring problems as they had since moving into the home.

The Adamses contacted Southfork, which refused to do anything further, and so through September 2010, the Adamses contacted and hired various contractors to make repairs on the foundation, windows, drywall, flooring, and doors.

It is at this point in the case, at the expiration of the 1-year limited warranty on September 19, 2008, that the statute of limitations pursuant to § 25-223 commenced for an action based on an "alleged breach of warranty on improvements to real property or based on any alleged deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property" between Southfork and the Adamses. The Adamses filed their complaint against Southfork with the district court in September 2011, which is well within the 4-year statute of limitations pursuant to § 25-223. The district court erred when it determined, as a matter of law, that the statute of limitations had run, preventing the Adamses from pursuing their action against Southfork when the statute of limitations had clearly not yet expired. Therefore, we reverse the order of the district court granting Southfork's motion for summary judgment and dismissing the Adamses' complaint against Southfork, and we remand the matter for further proceedings.

Having determined that the district court erred in determining there was no genuine issue of material fact and that the Adamses timely filed their complaint prior to the expiration of the statute of limitations in § 25-223, we need not address James' contention that the district court erred by finding there to be no fraudulent concealment which would estop Southfork from claiming a statute of limitations defense. See *Svehla v. Beverly Enterprises*, 5 Neb. App. 765, 567 N.W.2d 582 (1997) (appellate court need not engage in analysis which is not needed to adjudicate case and controversy before it).

CONCLUSION

In sum, we conclude that the district court did not err in granting Manchester's motion for summary judgment and dismissing the Adamses' complaint. However, with regard to Southfork, we find that the district court erred in finding that there were no genuine issues of material fact as to the

statute of limitations, in granting Southfork's motion for summary judgment, and in dismissing the Adamses' complaint. Therefore, we reverse the order of the district court granting Southfork's motion for summary judgment and remand the matter as to the Adamses' complaint against Southfork back to the district court for further proceedings consistent with this opinion.

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

STATE OF NEBRASKA, APPELLEE, V.
AGOK AROK AGOK, APPELLANT.

857 N.W.2d 72

Filed November 10, 2014. No. A-14-141.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Constitutional Law: Proof.** A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the state or federal Constitutions.
3. **Attorneys at Law: Appeal and Error.** Attorneys of record of the respective parties in the court below shall be deemed the attorneys of the same parties in the appellate court, until a withdrawal of appearance has been filed.
4. **Criminal Law: Attorneys at Law: Appeal and Error.** Counsel in any criminal case pending in an appellate court may withdraw only after obtaining permission of the appellate court.
5. **Criminal Law: Attorneys at Law: Notice: Appeal and Error.** Counsel appointed in the district court to represent a defendant in a criminal case other than a postconviction action shall, upon request by the defendant after judgment, file a notice of appeal and continue to represent the defendant unless permitted to withdraw by the appellate court.
6. **Effectiveness of Counsel: Appeal and Error.** A defendant's desire to argue that trial counsel was ineffective gives rise to a potential conflict of interest, precluding trial counsel from continued representation of the defendant on appeal.
7. **Right to Counsel: Courts: Appeal and Error.** When trial counsel files a motion to withdraw in the appellate court due to a conflict of interest, the appellate court shall issue an order to the district court directing it to appoint counsel if the defendant requests counsel be appointed and shows by affidavit to the district court that he is indigent.

8. **Right to Counsel: Appeal and Error.** When an indigent defendant is deprived of his constitutional right to counsel by not being furnished an attorney to present his direct appeal to an appellate court, the defendant is not afforded an effective appeal, and the decision thereon is deemed a nullity.

Appeal from the District Court for Hall County: JAMES D. LIVINGSTON, Judge. Reversed and remanded with directions.

Agok Arok Agok, pro se.

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

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

RIEDMANN, Judge.

INTRODUCTION

Agok Arok Agok appeals from the order of the district court for Hall County dismissing his motion for postconviction relief without an evidentiary hearing. Because we find that Agok was denied his constitutional right to be represented by counsel on direct appeal, we reverse the dismissal of Agok's motion for postconviction relief and remand the matter to the district court with directions to grant Agok a new direct appeal and to appoint new counsel to represent him for such appeal.

BACKGROUND

In April 2013, Agok was convicted by a jury of terroristic threats and use of a weapon to commit a felony. He was sentenced to concurrent prison terms of 1 to 2 years and 5 to 8 years, respectively. After sentencing, Agok's trial counsel, a deputy public defender, informed Agok that she would not be able to represent him on appeal due to his claim that she provided ineffective assistance of counsel. She did, however, assist him in preparing and filing the necessary documents to perfect his appeal.

Agok, appearing pro se, timely filed a notice of appeal, an application to proceed in forma pauperis, and a poverty affidavit, as well as a document titled "Assignment of Errors," listing ineffective assistance of trial counsel as the sole error assigned.

The district court granted Agok's application to proceed in forma pauperis, and his appeal was docketed in this court as case No. A-13-578.

After his appeal was perfected, Agok filed a pro se motion for the appointment of new counsel in the district court. The district court entered an order the following day stating that the appellate court obtained exclusive jurisdiction over the case upon the filing of his notice of appeal and that therefore, any motions must be made to the appellate court. Accordingly, Agok filed a subsequent pro se motion for appointment of counsel in this court, which we "[o]verruled without prejudice to filing in the sentencing court." We subsequently dismissed Agok's appeal in case No. A-13-578 on October 18, 2013, due to his failure to file a brief.

Agok filed a motion for postconviction relief in the district court, alleging that trial counsel was ineffective for failing to file an appeal. The district court dismissed the motion without an evidentiary hearing. It noted that counsel was not ineffective for failing to file an appeal, because Agok's appeal had been perfected.

Agok timely appeals the district court's judgment.

ASSIGNMENTS OF ERROR

Agok assigns that the district court erred in dismissing his motion for postconviction relief, because his counsel was ineffective for failing to file an appellate brief, and that he was denied counsel at a critical stage of the proceedings.

STANDARD OF REVIEW

[1,2] A defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000). A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the state or federal Constitutions. *Id.*

ANALYSIS

[3-5] The Nebraska court rules of appellate practice provide that the attorneys of record of the respective parties in the

court below shall be deemed the attorneys of the same parties in the appellate court, until a withdrawal of appearance has been filed. See Neb. Ct. R. App. P. § 2-101(F)(1) (rev. 2010). Counsel in any criminal case pending in an appellate court may withdraw only after obtaining permission of the appellate court. *Id*. Counsel appointed in the district court to represent a defendant in a criminal case other than a postconviction action shall, upon request by the defendant after judgment, file a notice of appeal *and continue to represent the defendant unless permitted to withdraw by the appellate court*. Neb. Ct. R. App. P. § 2-103(A).

[6] The record before us reflects that trial counsel is a deputy public defender that was appointed to represent Agok at the trial court level. Although counsel assisted Agok in preparing and filing a notice of appeal, she violated the foregoing rules by ceasing to represent him without filing a motion to withdraw in this court after his appeal had been perfected. We recognize that trial counsel could not continue to represent Agok on appeal due to his claim that she provided ineffective assistance of counsel. See *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006) (defendant's desire to argue that trial counsel was ineffective gave rise to potential conflict of interest, because it placed trial counsel in position of having to argue his or her own ineffectiveness). However, Agok's trial counsel was required to file a motion in this court requesting permission to withdraw and stating the reason for the request. See § 2-103(B).

[7] We note that Agok filed a motion for appointment of counsel in this court in August 2013, and we denied the motion without prejudice to filing in the trial court. See *Pennfield Oil Co. v. Winstrom*, 276 Neb. 123, 752 N.W.2d 588 (2008) (stating that in interwoven and interdependent cases, appellate court may examine its own records and take judicial notice of proceedings and judgment in former action involving party). At that time, although Agok had filed pro se pleadings in this court, the transcript revealed that he was represented by the Hall County public defender's office through trial and sentencing and that there was no indication of counsel's withdrawal. Had the public defender properly filed a motion

to withdraw as counsel in our court, we would have issued an order directing the district court to appoint counsel to represent Agok on direct appeal, provided he asked that counsel be appointed and satisfactorily showed by affidavit to the district court that he was indigent. See *State v. Dawn*, 246 Neb. 384, 519 N.W.2d 249 (1994).

[8] Because this procedure was not followed in this case, Agok was forced to proceed with his direct appeal without counsel. When an indigent defendant is deprived of his constitutional right to counsel by not being furnished an attorney to present his direct appeal to an appellate court, the defendant is not afforded an effective appeal, and the decision thereon is deemed a nullity. *State v. Dawn, supra*. Agok's indigence was established when the district court granted his application to proceed in forma pauperis on appeal. Thus, he had a right to appointed counsel for his direct appeal. See, *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963).

Because Agok was deprived of his right to be represented by counsel on appeal, we reverse the dismissal of Agok's motion for postconviction relief and remand the matter to the district court with directions to grant Agok a new direct appeal and to appoint new counsel to represent him for such appeal.

CONCLUSION

For the foregoing reasons, we reverse the dismissal of Agok's motion for postconviction relief and remand the matter to the district court with directions to grant Agok a new direct appeal and to appoint new counsel to represent him.

REVERSED AND REMANDED WITH DIRECTIONS.

Buck's, Inc., appellant, v. City of Omaha, appellee.

857 N.W.2d 580

Filed November 25, 2014. Nos. A-13-980, A-13-981.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Trial: Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
3. **Rules of Evidence: Expert Witnesses.** 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.
4. **Trial: Witnesses.** If a witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue.
5. **Affidavits.** Statements in affidavits as to opinion, belief, or conclusions of law are of no effect.
6. **Trial: Witnesses: Proof.** The party offering testimony has the burden to lay foundation by showing that the witness has personal knowledge of the subject matter of the testimony.
7. **Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
8. **Constitutional Law: Highways: Easements.** The right of an owner of property which abuts on a street or highway to have ingress to and egress from his premises by way of the street is a property right in the nature of an easement in the street, and the owner cannot be deprived of such right without due process of law and compensation for loss.
9. **Property: Highways.** The right of access of an abutting property owner to a public road is not an unlimited one.
10. **Property.** A property owner is entitled to reasonable access to abutting private property if reasonable access remains.
11. **Property: Highways: Damages.** As a general rule, an abutting landowner has no vested interest in the flow of traffic past his premises and any damages sustained because of a diversion of traffic are not compensable. This rule applies to the control of turns by double lines, islands, and median strips.
12. **Property: Highways.** Mere circuity of travel to and from real property, resulting from a lawful exercise of the police power in controlling traffic, does not of itself constitute an impairment of the right of ingress and egress to and from

such property where the resulting interference is but an inconvenience shared in common with the general public and is necessarily in the public interest in making highway travel safer and more efficient.

13. **Property: Highways: Damages.** If a property owner has the same access to the general highway system as before a diversion of traffic, this injury is the same in kind as that suffered by the general public and is not compensable.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

Jason M. Bruno and Robert S. Sherrets, of Sherrets, Bruno & Vogt, L.L.C., for appellant.

Bernard J. in den Bosch, Deputy Omaha City Attorney, and William Acosta-Trejo for appellee.

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

RIEDMANN, Judge.

INTRODUCTION

Buck's, Inc., appeals from the order of the district court for Douglas County denying a motion for summary judgment filed by Buck's and granting summary judgment in favor of the City of Omaha (the City). On appeal, Buck's also challenges certain evidentiary rulings. Finding no merit to the arguments on appeal, we affirm the district court's decision.

BACKGROUND

Buck's is a Nebraska corporation that owned and operated a gas station on the northwest corner of 144th Street and Stony Brook Boulevard in Omaha, Douglas County, Nebraska. In August 2009, the City eliminated a cut in the median on Stony Brook Boulevard, which then prevented eastbound traffic from turning left in order to directly access Buck's property. Before the City closed the median cut, Buck's had two access points to Stony Brook Boulevard and one access point via an easement across a neighboring property. After the median cut was eliminated, Buck's continued to have the same three access points, but direct access to the property by eastbound traffic on Stony Brook Boulevard was eliminated.

Buck's instituted an inverse condemnation action against the City in August 2010. A board of appraisers was appointed,

and Buck's was awarded $30,000 in damages. Buck's and the City both appealed to the district court, and the parties filed cross-motions for summary judgment. At the summary judgment hearing, the City offered into evidence the affidavits of Todd Pfitzer and Tim Phelan.

Pfitzer has been the City's engineer since October 2010, and he previously served as the City's traffic engineer, beginning in 2006. In his affidavit, Pfitzer stated that he was involved in reviewing plans for the project concerning the elimination of the median cut and made recommendations for the best and safest method for handling the traffic movement. He claimed that the decision to eliminate the median cut was made to address the anticipated increased traffic accessing the area due to the development of a grocery store site. He said that in order to minimize traffic conflict and allow for smoother and safer traffic flow, the median cut was eliminated. Pfitzer indicated that prior to this project, Buck's had two access points to Stony Brook Boulevard and a third access point onto neighboring property, and that the same three access points existed after construction on the median. Pfitzer opined that from his point of view as a traffic engineer, Buck's suffered no decrease of ingress or egress.

Phelan is the City's right-of-way manager. His affidavit indicated that in the course of performing his job duties, he is involved in the acquisition of rights-of-way for various public projects. Phelan indicated that he is familiar with the project regarding the median on Stony Brook Boulevard and that the City, in conjunction with this project, did not acquire any property interests because the median improvements were made solely in the City's right-of-way. Specifically, Phelan averred that the City did not acquire any property or property interest from Buck's for this project. Phelan stated that prior to the project's completion, Buck's had three entrances to its property, and that after construction on the median, Buck's continued to have the same three entrances.

The affidavits were received into evidence over objections by Buck's. Ultimately, the district court denied the motion for summary judgment filed by Buck's and entered summary judgment in favor of the City. Buck's now appeals.

ASSIGNMENTS OF ERROR

Buck's assigns, renumbered and restated, that the district court erred in (1) receiving the affidavits into evidence, (2) failing to grant its motion for summary judgment, and (3) granting the City's motion for summary judgment.

STANDARD OF REVIEW

Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts 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. *Latzel v. Bartek*, 288 Neb. 1, 846 N.W.2d 153 (2014). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id*.

ANALYSIS

Evidentiary Rulings.

[1,2] Buck's argues that the district court erred in receiving the affidavits of Pfitzer and Phelan into evidence because the City failed to disclose them as experts by the discovery deadline and because the affidavits lacked foundation and were irrelevant. In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *In re Invol. Dissolution of Wiles Bros*., 285 Neb. 920, 830 N.W.2d 474 (2013). A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion. *Id*.

[3,4] Neb. Rev. Stat. § 27-702 (Reissue 2008) governs the admissibility of expert testimony and provides that the witness must be qualified as an expert: "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." If a witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue. Neb. Rev. Stat. § 27-701 (Reissue 2008).

[5] We have reviewed the affidavits and find that the district court did not err in overruling the objections and receiving the affidavits into evidence. Pfitzer's and Phelan's affidavits contained statements based on their own experiences and personal knowledge from their involvement in the median project. This is proper lay testimony under § 27-701. Although Pfitzer's affidavit included his opinion that Buck's suffered no decrease of ingress or egress, the court was required to give no effect to that opinion. See *Whalen v. U S West Communications*, 253 Neb. 334, 570 N.W.2d 531 (1997) (statements in affidavits as to opinion, belief, or conclusions of law are of no effect), *disapproved on other grounds, Gaytan v. Wal-Mart*, 289 Neb. 49, 853 N.W.2d 181 (2014).

[6,7] Buck's also contends that the affidavits lacked foundation and were irrelevant based on the mistaken belief that Pfitzer and Phelan were expert witnesses. The party offering testimony has the burden to lay foundation by showing that the witness has personal knowledge of the subject matter of the testimony. *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993). 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. Rev. Stat. § 27-401 (Reissue 2008).

We find no abuse of discretion in the district court's conclusion that the affidavits were supported by sufficient foundation and contained relevant evidence. Pfitzer and Phelan both stated that they were involved in the construction project on the median. Thus, their personal knowledge formed the basis of their factual statements. In addition, both affidavits indicated the witnesses' observations regarding the three access points to Buck's. Because ingress to and egress from Buck's

was at issue in this case, the affidavits contained relevant information. Consequently, the district court did not abuse its discretion in overruling the foundational and relevancy objections and in receiving the affidavits into evidence.

Summary Judgment.

Buck's asserts that the district court erred in denying its motion for summary judgment and granting summary judgment in favor of the City. Buck's argues that the City substantially impaired ingress to and egress from its property, resulting in a compensable taking. We disagree.

[8-10] The right of an owner of property which abuts on a street or highway to have ingress to and egress from his premises by way of the street is a property right in the nature of an easement in the street, and the owner cannot be deprived of such right without due process of law and compensation for loss. *Maloley v. City of Lexington*, 3 Neb. App. 976, 536 N.W.2d 916 (1995). The right of access of an abutting property owner to a public road is not an unlimited one, however. *Painter v. State*, 177 Neb. 905, 131 N.W.2d 587 (1964). He is entitled to reasonable access to abutting private property if reasonable access remains. *Id*.

The district court in the present case relied on *Painter* to hold that because Buck's has the same access it did before the City closed the median cut, the injury to Buck's was the same in kind as that suffered by the general public and is not compensable. We agree and likewise find that *Painter* controls the outcome of this case.

[11-13] In *Painter*, the plaintiff contended that the construction of islands in the street which prevented left turns onto the plaintiff's property from the west constituted a compensable damage. On appeal, the Supreme Court reiterated the general rule that an abutting landowner has no vested interest in the flow of traffic past his premises and that any damages sustained because of a diversion of traffic are not compensable. *Id*. This rule applies to the control of turns by double lines, islands, and median strips. *Id*. Mere circuity of travel to and from real property, resulting from a lawful exercise of the police power in controlling traffic, does not of itself constitute

an impairment of the right of ingress and egress to and from such property where the resulting interference is but an inconvenience shared in common with the general public and is necessarily in the public interest in making highway travel safer and more efficient. *Id*. If the owner has the same access to the general highway system as before, this injury is the same in kind as that suffered by the general public and is not compensable. *Id*.

In other words, the Supreme Court in *Painter* summarized the situation as follows:

> Property owners abutting upon a public thoroughfare have a right to reasonable access thereto. This right of ingress and egress attaches to the land. It is a property right as complete as ownership of the land itself. But as to damages claimed by reason of a change in the flow of traffic by placing medians in the center of a street, they result from the exercise of the police power by the state and are noncompensable as being incidental to the doing of a lawful act. As such, they are wholly unrelated to the taking of the land for the purpose of widening the street and constitute no element of damage to the land remaining after the taking.

177 Neb. at 911, 131 N.W.2d at 591.

The argument made by Buck's in the present case is identical to that asserted by the plaintiff in *Painter*, which the Supreme Court rejected. Elimination of the median cut constitutes a change in the flow of traffic and affects Buck's in the same manner as the general public. After the median cut was closed, Buck's still had access to Stony Brook Boulevard. The fact that left-hand turns are now restricted is but an inconvenience shared with the general public.

In addition, according to Pfitzer's affidavit, if the median cut had not been closed, traffic queuing could not be contained within "channelized left turn pockets" and safety would be compromised. Thus, the City determined that closing the cut in the median was necessary for traffic safety. After the change to the median, Buck's retains the same three access points that it previously had and retains the ability to access Stony Brook Boulevard. As a result, Buck's is not entitled to any

compensation. We therefore find that the district court did not err in denying Buck's motion for summary judgment and granting summary judgment in favor of the City.

Buck's directs our attention to *Maloley v. City of Lexington*, 3 Neb. App. 976, 536 N.W.2d 916 (1995), to support its position, but we find this reliance misplaced. In *Maloley*, the evidence established that the City of Lexington temporarily closed the street directly in front of the plaintiff's property. Here, there is no allegation that the City closed Stony Brook Boulevard, prohibiting access to Buck's. Rather, the City modified the median in the middle of Stony Brook Boulevard, which, according to *Painter v. State*, 177 Neb. 905, 131 N.W.2d 587 (1964), is the lawful exercise of the police power and is noncompensable.

CONCLUSION

We conclude that the district court properly overruled the objections to the affidavits and received them into evidence. In addition, we find no error with respect to the district court's rulings on the parties' motions for summary judgment. Accordingly, we affirm.

AFFIRMED.

IN RE ESTATE OF WILLIAM LORENZ, DECEASED. THERESA LORENZ, PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM LORENZ, DECEASED, APPELLEE, V. ALICE SHEA, APPELLANT.

858 N.W.2d 230

Filed December 2, 2014. No. A-13-528.

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: Judgments: Appeal and Error.** When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law that an appellate court independently reviews.

4. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
5. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
6. **Appeal and Error.** In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court.
7. **Decedents' Estates: Final Orders.** Pursuant to Neb. Rev. Stat. § 30-2436 (Reissue 2008), subject to appeal and subject to vacation, a formal testacy order under Neb. Rev. Stat. §§ 30-2433 to 30-2435 (Reissue 2008) is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, and to the determination of heirs.
8. **Decedents' Estates: Wills: Judgments: Time: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 30-2437 (Reissue 2008), for good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal. Pursuant to Neb. Rev. Stat. §§ 30-1601(1) (Cum. Supp. 2014) and 25-1912(1) (Reissue 2008), notice of an appeal must be filed within 30 days after the entry of a final order.
9. **Decedents' Estates: Executors and Administrators.** A personal representative and a special administrator can coexist; there is no requirement to petition to suspend or remove the personal representative as a prerequisite to filing a motion for the appointment of a special administrator.
10. **Appeal and Error.** Cases are heard in an appellate court on the theory upon which they were tried.
11. **Decedents' Estates.** A payable-on-death account passes outside the estate and belongs to the surviving beneficiary and not to the estate; therefore, pursuant to Neb. Rev. Stat § 30-2725 (Reissue 2008), such a transfer is not testamentary or subject to estate administration.
12. **Decedents' Estates: Time.** When a decedent's payable-on-death asset has been transferred outside his or her estate, Neb. Rev. Stat. § 30-2726 (Reissue 2008) provides the mechanism by which such nonprobate transfer may be recovered by the estate if the estate is not otherwise able to meet its obligations. To employ the process set forth in § 30-2726(b) to recover nonprobate transfers, a written demand must be made upon the personal representative and then a proceeding to recover those nonprobate assets must be commenced within 1 year of the decedent's death.
13. **Decedents' Estates: Executors and Administrators.** After a special administrator is appointed, the administrator has the same power as a personal representative, except the power is limited to the duties prescribed in the trial court's order.

14. **Decedents' Estates: Claims: Notice.** Claims filed against an estate set forth sufficient written demand pursuant to Neb. Rev. Stat. § 30-2726 (Reissue 2008) to put the personal representative on notice that nonprobate transfers may need to be collected for the estate to meet its obligations.
15. **Rules of the Supreme Court: Appeal and Error.** Assignments of error consisting of headings or subparts of the argument section do not comply with the mandate of Neb. Ct. R. App. P. § 2-109(D)(1)(e) (rev. 2012); an appellate court may, at its discretion, examine the proceedings for plain error.
16. **Decedents' Estates: Courts: Costs: Attorney Fees: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 30-1601(6) (Cum. Supp. 2014), if it appears to the Nebraska Court of Appeals that an appeal of a probate matter was taken vexatiously or for delay, the court shall adjudge that the appellant shall pay the cost thereof, including an attorney fee, to the adverse party in an amount fixed by the Court of Appeals.

Appeal from the County Court for Douglas County: SHERYL L. LOHAUS, Judge. Affirmed as modified.

Jeffrey A. Silver for appellant.

Richard A. DeWitt, Robert M. Gonderinger, and David J. Skalka, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C., for appellee.

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

BISHOP, Judge.

I. INTRODUCTION

Alice Shea (Alice) is the ex-wife of decedent William Lorenz. The county court for Douglas County granted summary judgment in favor of the personal representative of William's estate (Estate) on two issues: (1) Alice's petition for the appointment of a special administrator and (2) her challenge to a codicil to William's will (Second Codicil). The county court concluded, in essence, that a request to remove a personal representative must precede a request for appointment of a special administrator and that Alice did not follow that procedure. The court further held that Alice made an untimely demand for the personal representative to compel beneficiaries of payable-on-death (POD) transfers to pay such transfers over to the Estate as a basis for the appointment of a special administrator. The court also held that Alice's challenge to the

validity of the Second Codicil was untimely. The court did find that Alice was entitled to claims made against the Estate, including: (1) interest for delinquent alimony; (2) alimony in the amount of $2,000 per month, commencing September 1, 2010, and continuing each month thereafter until she dies or remarries, whichever occurs first; and (3) interest in the amount of $129.78 on a late property settlement payment. Alice appeals; we affirm as modified.

II. BACKGROUND

William passed away in Douglas County on February 20, 2010, at the age of 91. William left behind seven children. Alice is not the mother of any of William's children.

William was single at the time of his death, having been divorced from Alice since 2006. Pursuant to their Iowa divorce decree, and relevant to this appeal, William was ordered to pay Alice (1) a property settlement in the amount of $113,761 and (2) alimony in the amount of $2,000 per month until Alice dies or remarries. The decree provided, "In the event William predeceases Alice, this alimony award shall be a lien against" the Estate.

On May 4, 2010, Theresa Lorenz, one of William's children, filed a "Petition for Formal Probate of Will, Determination of Heirs, and Appointment of Personal Representative" in the matter of the Estate. The petition sought to admit William's "Last Will and Testament" dated June 6, 1989, and two codicils dated February 24, 2005, and May 11, 2007, to probate. The petition also sought to appoint Theresa as the personal representative of the Estate. A notice of the petition was published in the "Daily Record of Omaha" for 3 consecutive weeks in May 2010.

On June 24, 2010, the county court entered an order admitting the will and two codicils to formal probate as "valid, unrevoked and the last Will of [William]." The court also appointed Theresa as the personal representative of the Estate. In her affidavit filed on July 9, Theresa stated that she mailed a copy of the notice of the proceedings (albeit the notice was for "informal probate") to numerous interested parties, including Alice, on July 2.

On August 30, 2010, Alice filed three separate claims (all relating back to the 2006 divorce decree) against the Estate in the probate proceeding. The claims were for (1) future alimony in the amount of $2,000 per month for Alice's lifetime; (2) delinquent alimony as of August 1, 2010, in the amount of $6,000 plus interest; and (3) past due property settlement funds in the amount of $1,189.65 plus interest.

On September 23, 2010, Theresa, as personal representative, filed a "Short Form Inventory" of the "probate property" owned by William at the time of his death. The assets listed were (1) a checking account ($12,007.11), (2) an investment account ($100,163), and (3) household goods and furnishings and miscellaneous tangible personal property ($500). The total value of the probate property listed was $112,670.11. Nonprobate transfers were not listed on the inventory.

On October 28, 2010, Theresa disallowed all three of the claims Alice had filed on August 30.

Following the disallowance of her claims, on December 21, 2010, Alice filed a "Petition for Allowance of Claims, Appointment of Special Administrator Pursuant to Neb. Rev. Stat. §30-2457, and Challenge to Second Codicil" (Petition). (Emphasis omitted.) In the Petition, Alice alleged that on August 30, she filed three claims against the Estate in the probate proceeding, for (1) future alimony in the amount of $2,000 per month for Alice's lifetime; (2) delinquent alimony as of August 1, 2010, in the amount of $6,000 plus interest; and (3) past-due property settlement funds in the amount of $1,189.65 plus interest. Alice alleged that Theresa's disallowance of the claims was improper based on the clear and unambiguous language of the 2006 divorce decree. Alice alleged that "[b]ased on the Divorce Decree and [Alice's] expected life expectancy, the amount that will be due [Alice] under the Decree of Dissolution is $224,400.00" Alice asked the court to allow each of her three claims, including, but not limited to, an award of $224,400.

Alice also requested the appointment of a special administrator. She alleged that Theresa had a general power of attorney for William since June 29, 2006, and was also the personal representative of the Estate and that from the time

Theresa's power of attorney became activated through the date of William's death, William's liquid assets were reduced from approximately $1 million to $112,000, all while Theresa had actual knowledge of the alimony award under the divorce decree. Alice alleged that Theresa, acting as both power of attorney and personal representative, had "a conflict of interest to properly administer and/or preserve the [E]state, including but not limited to collecting assets belonging to the Estate and therefore a special administrator [was] necessary pursuant to and in accordance with Neb. Rev. Stat. §30-2457." (Emphasis omitted.)

Additionally, Alice challenged the Second Codicil executed by William on May 11, 2007, as being "subsequent to the date he was declared unable to conduct and manage his business affairs, pursuant to a Certificate of Disability." Alice alleged that because William was incompetent to execute the Second Codicil, it should be declared null and void and of no force and effect. (We note that relevant to these proceedings, the Second Codicil effectively removed Alice from William's will, except that it did provide that if Alice survived him, his executor "may" in his or her sole discretion allocate a portion of the "rest, residue and remainder" of the Estate to Theresa, "as Trustee of the William F. Lorenz Alimony Trust," which funds she may in her sole discretion use to pay Alice $2,000 per month to satisfy any obligation ordered by an Iowa court. (Emphasis omitted.))

On January 25, 2011, Theresa, as personal representative, filed her answer to the Petition. In her answer, Theresa affirmatively stated that the amounts claimed to be due in Alice's three statements of claim were incorrect and that therefore, the disallowance of claims was proper. She also affirmatively stated:

> [Theresa] has paid all amounts due to Alice . . . under and pursuant to the "Divorce Decree" described in the Petition other than future alimony payments and . . . adequate provision has been made for the payment of future alimony payments through [William's] Last Will and Testament and Codicils thereto that have been filed with the Court, including particularly Item III of the

> Second Codicil which provides for establishment of the William F. Lorenz Alimony Trust. The Divorce Decree specifically contemplated and authorized satisfaction of future alimony obligations through a trust funded by [William], as specifically set forth in paragraph 12 of the Petition.

Theresa asked the court for an order denying each of the claims submitted by Alice, except for the claim for future alimony in the amount of $2,000 per month until Alice's death or remarriage. Theresa also asked the court for a further order authorizing and approving the satisfaction of such claim for future alimony through the funding of the "William F. Lorenz Alimony Trust" pursuant to the Second Codicil of William's will.

With regard to the appointment of a special administrator, Theresa affirmatively stated that Alice "lack[ed] standing to seek the appointment of a special administrator and [was] improperly seeking to require the Estate to incur expenses for the sole benefit of [Alice], which expenses should in equity be borne by [Alice]." Theresa also affirmatively stated that the Petition filed by Alice failed to state a cause of action for the appointment of a special administrator. Finally, Theresa affirmatively stated that William made adequate provision for the payment of future alimony payments to Alice via the alimony trust provision in the Second Codicil.

With regard to the Second Codicil, Theresa affirmatively stated that "[Alice], as a creditor of the Estate, has no interest or standing to assert the invalidity of the Second Codicil." Theresa also affirmatively stated that "the Second Codicil was formally admitted to probate by Order of [the Douglas County] Court after notice to interested persons, including [Alice], and formal hearing, which Order is final and nonappealable." Theresa alleged that Alice's prayer to have the Second Codicil declared to be null and void was barred by the doctrines of res judicata and collateral estoppel.

More than a year after the filing of the pleadings just described, on May 10, 2012, Alice and Theresa filed a stipulation regarding the life expectancy of Alice, agreeing that for purposes of the adjudication of Alice's claim against the

Estate, the life expectancy of Alice would be determined pursuant to "the Commissioners 2001 Standard Ordinary Mortality Table as approved by the Nebraska Department of Insurance," a copy of which was attached to the stipulation and incorporated by reference. However, the parties further stipulated that the Estate objected to the relevancy of Alice's life expectancy with regard to the adjudication of her claim against the Estate and that both parties reserved the right to present evidence regarding Alice's health or physical condition which may justify a departure from the mortality table in determining her life expectancy.

The county court granted continuances requested by Theresa in November 2011, August and December 2012, and January 2013.

On March 14, 2013, Theresa filed a motion for summary judgment as to the Petition dated December 21, 2010. Theresa alleged that the Estate was entitled to judgment as a matter of law on all of the claims in the Petition and asked the court to dismiss the Petition with prejudice, with the exception of the following claims: (1) Alice's statement of claim for alimony in the amount of $2,000 per month commencing September 1, 2010, and continuing each month thereafter should be allowed, with the additional condition that such claim and obligation terminates upon Alice's death or remarriage, whichever shall first occur, and (2) Alice's statement of claim for a property settlement in the amount of $1,189.65 plus interest should be partially allowed in the amount of $129.78, but otherwise disallowed.

A hearing on Theresa's motion for summary judgment was held on April 15, 2013. At the hearing, the county court took judicial notice of its June 24, 2010, order admitting the will and two codicils to formal probate as "valid, unrevoked and the last Will of [William]." Evidence was offered and received in support of and in opposition to the motion for summary judgment. The contents of such evidence will be discussed as necessary later in our analysis.

The county court's final order was filed on May 10, 2013. In that order, the court noted that the parties submitted briefs in support of their respective positions at the hearing on the

motion for summary judgment (however, those briefs do not appear in our record on appeal). The court also stated that after the hearing, "each party stipulated that the court consider additional argument by written correspondence dated April 17 [and] 24 and May 6, 2013" (similarly, neither the stipulation nor the written correspondence appears in our record on appeal, and the county court did not elaborate on what was contained in that correspondence).

The county court found: (1) A genuine issue of material fact existed regarding Alice's claim for interest for delinquent alimony, but both parties stipulated and conceded that the actual amount of delinquent alimony had been paid; (2) Alice's claim for alimony commencing September 1, 2010, in the amount of $2,000 per month should be allowed until she dies or remarries, whichever occurs first, and Alice's previous request for a lump sum based upon her life expectancy was withdrawn; (3) Alice's claim for interest as a result of a late property settlement payment should be allowed in the amount of $129.78; (4) Alice's demand for Theresa to compel beneficiaries of POD transfers to pay such transfers over to the Estate as a basis for the appointment of a special administrator was not timely as required by "Neb. Rev. Stat. Section 30-746" (later corrected by order nunc pro tunc to read Neb. Rev. Stat. § 30-2726 (Reissue 2008)); (5) the Petition for a special administrator was not warranted, because "the procedure by which to suspend and remove [Theresa as] Personal Representative and thereby [for] Appointment of a Special Administrator was not followed as required pursuant to Neb. Rev. Stat. Sections 30-2454 and 30-2457"; and (6) Alice's challenge to the validity of the Second Codicil was untimely, the court's order dated June 24, 2010, having validated William's will and both codicils, which order was final and appealable. Accordingly, the county court granted Theresa's motion for summary judgment, except for (1) Alice's claim for interest for delinquent alimony; (2) Alice's claim for alimony in the amount of $2,000 per month, commencing September 1, 2010, and continuing each month thereafter until she dies or remarries, whichever occurs first; and (3) Alice's claim for interest in the amount of $129.78 on a late property

settlement payment. The county court dismissed with prejudice Alice's request for appointment of a special administrator and challenge to the Second Codicil.

Alice timely appeals the county court's May 10, 2013, order.

III. ASSIGNMENT OF ERROR

Alice assigns that the county court erred as a matter of law in sustaining Theresa's motion for summary judgment.

IV. STANDARD OF REVIEW

[1-3] An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of Odenreider*, 286 Neb. 480, 837 N.W.2d 756 (2013). When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below. *Id*. Statutory interpretation presents a question of law that an appellate court independently reviews. *Id*.

[4,5] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *U.S. Bank Nat. Assn. v. Peterson*, 284 Neb. 820, 823 N.W.2d 460 (2012). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id*.

V. ANALYSIS

1. Challenge to Second Codicil

[6] Alice argues that the Second Codicil was executed without the proper testamentary capacity. She also argues for the first time, on appeal, that she was not given sufficient notice of the probate proceedings wherein the will and codicils were admitted to formal probate (specifically arguing that the notice by publication was insufficient). However, Alice never raised an alleged lack of sufficient notice to the county court. And

in appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court. *Watson v. Watson*, 272 Neb. 647, 724 N.W.2d 24 (2006); *In re Estate of Rosso*, 270 Neb. 323, 701 N.W.2d 355 (2005).

[7,8] Notice of Theresa's "Petition for Formal Probate of Will, Determination of Heirs, and Appointment of Personal Representative" in the matter of the Estate, and of a hearing thereon, was published in the "Daily Record of Omaha" for 3 consecutive weeks in May 2010. On June 24, the county court entered an order admitting the will and two codicils to formal probate as "valid, unrevoked and the last Will of [William]." The court also appointed Theresa as the personal representative of the Estate. Pursuant to Neb. Rev. Stat. § 30-2436 (Reissue 2008), the June 24 order was a final, appealable order. Section 30-2436 provides:

> Subject to appeal and subject to vacation as provided herein and in section 30-2437, a formal testacy order under sections 30-2433 to 30-2435, including an order that the decedent left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, and to the determination of heirs . . . .

According to her affidavit filed on July 9, Theresa mailed a copy of the notice of the proceedings to numerous interested parties, including Alice, on July 2. Despite having notice of the order, Alice neither appealed nor filed a motion to vacate the June 24 order. See Neb. Rev. Stat. § 30-2437 (Reissue 2008) (for good cause shown, order in formal testacy proceeding may be modified or vacated within time allowed for appeal). See, also, Neb. Rev. Stat. §§ 30-1601(1) (Cum. Supp. 2014) and 25-1912(1) (Reissue 2008) (notice of appeal must be filed within 30 days after entry of final order). Because there was no appeal or motion to vacate the June 24 order, it was a final order; Alice cannot now challenge the validity of the Second Codicil. Accordingly, we affirm the county

court's finding that Alice's challenge to the Second Codicil was untimely, and we affirm its dismissal of such challenge with prejudice.

2. Appointment of Special Administrator

Alice argues that the appointment of a special administrator was necessary to preserve the Estate or secure its proper administration. According to Alice, "Theresa has colluded with [William and with] her . . . siblings to deprive the Estate of assets to settle creditor claims and is conflicted to properly administer the Estate, since she personally benefits from the [POD] and Individual Retirement Accounts, all of which justifies the appointment of a Special Administrator." Brief for appellant at 26. The county court dismissed Alice's request for appointment of a special administrator on two grounds: (1) The proper procedure for such an appointment was not followed, and (2) the demand for Theresa to compel POD beneficiaries to pay such transfers over to the Estate was not timely.

(a) Procedure for Appointment of Special Administrator

The county court concluded that the Petition was not warranted, because

> the procedure by which to suspend and remove [Theresa as] Personal Representative and thereby [for] Appointment of a Special Administrator was not followed as required pursuant to Neb. Rev. Stat. Sections 30-2454 and 30-2457 (Reissue 2008). See also, [*In re Estate of Cooper*], 275 Neb. 322, 746 N.W.2d 663 (2008).

The county court's statement about not following the required procedure and then its cite to *In re Estate of Cooper*, 275 Neb. 322, 746 N.W.2d 663 (2008), indicate that the court must have read that case to mandate that a petition to suspend and remove a personal representative be filed before a motion to appoint a special administrator can be filed. We do not read the statutes, or *In re Estate of Cooper*, to require that two-step procedure in every circumstance.

With regard to the removal of a personal representative, Neb. Rev. Stat. § 30-2454(a) (Reissue 2008) states:

> *A person interested in the estate may petition for removal of a personal representative for cause at any time*. Upon filing of the petition, the court shall fix a time and place for hearing. Notice shall be given by the petitioner to the personal representative, and to other persons as the court may order. Except as otherwise ordered as provided in section 30-2450, after receipt of notice of removal proceedings, the personal representative shall not act except to account, to correct maladministration or preserve the estate. If removal is ordered, the court also shall direct by order the disposition of the assets remaining in the name of, or under the control of, the personal representative being removed.

(Emphasis supplied.) Alice is an "[i]nterested person" as defined by Neb. Rev. Stat. § 30-2209(21) (Reissue 2008).

With regard to a special administrator, Neb. Rev. Stat. § 30-2457 (Reissue 2008) permits a special administrator to be appointed after notice when a personal representative cannot or should not act and also permits the appointment of a special administrator without notice when an emergency exists. Section 30-2457 provides:

> A special administrator may be appointed:
>
> (1) informally by the registrar on the application of any interested person when necessary to protect the estate of a decedent prior to the appointment of a general personal representative or if a prior appointment has been terminated as provided in section 30-2452.
>
> (2) in a formal proceeding by order of the court on the petition of any interested person and finding, after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act. If it appears to the court that an emergency exists, appointment may be ordered without notice.

Nothing in § 30-2457 states that a personal representative must be suspended or removed prior to the filing of an application to appoint a special administrator.

Both the county court and Theresa rely on *In re Estate of Cooper*, 275 Neb. 322, 746 N.W.2d 663 (2008), to say that a personal representative must be suspended or removed prior to the filing of an application to appoint a special administrator. In *In re Estate of Cooper*, 275 Neb. at 330, 746 N.W.2d at 669, the Nebraska Supreme Court said:

> Taken together, [§§ 30-2454 and 30-2457] set forth a procedure by which to suspend and remove a personal representative and appoint a special administrator. Pursuant to § 30-2454, an interested person may petition the county court for the removal of the personal representative. The statute provides for notice of the petition to be given to the personal representative and others. It is important to note that under § 30-2454, once the personal representative receives such notice, he or she "shall not act," except in limited circumstances. Thus, notice to the personal representative under § 30-2454 effectively suspends the personal representative. Once a personal representative is prohibited from acting under § 30-2454, an interested party may thereafter move under § 30-2457 for the appointment of a special administrator, based on the facts that the personal representative has received notice under § 30-2454 and "cannot . . . act" and that the appointment of a special administrator would be appropriate "to preserve the estate or to secure its proper administration." § 30-2457.

However, *In re Estate of Cooper* is a case in which the interested person wanted to remove the personal representative and have a special administrator appointed. That two-step process may not always be necessary. Numerous situations could arise wherein an interested person would want a special administrator to be appointed to deal with specific issues that the personal representative cannot or should not handle, even though the personal representative is otherwise fully capable of handling the rest of the estate's administration.

In re Estate of Muncillo, 280 Neb. 669, 789 N.W.2d 37 (2010), was a case in which the Nebraska Supreme Court addressed whether a county court erred in refusing to appoint a special administrator; there was no mention of the need to suspend or remove the personal representative as a prerequisite prior to the filing of a motion to appoint a special administrator. In *In re Estate of Muncillo*, the decedent's attorney was appointed as the personal representative of the estate. Relevant to the issue on appeal, the decedent had three bank accounts, listing one of her daughters either as the joint owner or as the POD beneficiary. The decedent's other two children objected to the distribution of the accounts to their sister, claiming that their mother's signatures on the account agreements had been obtained by undue influence. The other two children also filed for the appointment of a special administrator to pursue the accounts for the estate, claiming that the appointed personal representative was not pursuing the matter. The county court denied the application to appoint a special administrator, finding that a special administrator was not necessary because the personal representative could adequately protect the assets of the estate. On appeal, the Nebraska Supreme Court said:

> A special administrator should not be appointed every time a potential beneficiary disagrees with the personal representative's administration decisions, absent some showing that the personal representative is not lawfully fulfilling his or her duties under the [Nebraska Probate Code]. We determine that such a showing, at minimum, necessitates an allegation that the personal representative is perpetrating fraud, has colluded with another to deprive the estate of a potential asset, is conflicted to properly administer the estate, or cannot act to preserve the estate, or the existence of some other equitable circumstance, plus some evidence of the personal representative's alleged dereliction of duty.

In re Estate of Muncillo, 280 Neb. at 676-77, 789 N.W.2d at 43-44. The Nebraska Supreme Court then found that no such showing had been made in that case. Accordingly, the court "[could not] say that the county court's decision to deny the

application was arbitrary, capricious, or unreasonable." *Id*. at 678, 789 N.W.2d at 44.

Again, we note that the Supreme Court in *In re Estate of Muncillo, supra*, made no mention of the need to suspend or remove the personal representative as a prerequisite to the filing of a motion to appoint a special administrator. The implication is that the personal representative would have been fully capable of administering the remainder of the decedent's estate, even if the court would have found that a special administrator should have been appointed to pursue the three bank accounts for the estate.

We are further guided by discussion from other sources that state a personal representative and a special administrator can coexist. 31 Am. Jur. 2d *Executors and Administrators* § 1005 at 697-98 (2012) states:

> Under certain circumstances, the probate court may appoint a special administrator with limited powers over the decedent's estate. Such *special administrator is also known as an administrator ad litem* or a receiver. The special administrator is a fiduciary charged with acting in the best interests of the successors to the estate.
>
> *A general administrator and special administrator serve in different fiduciary capacities and are separate and distinct parties*. The appointment of an administrator ad litem may precede the appointment of the general administrator and *the two administrations may subsist together*. The administrator ad litem is appointed for a special and limited purpose. A typical situation for the appointment is when there is a delay in the appointment of a personal representative and a fiduciary is needed to take charge of the estate assets.

(Emphasis supplied.) Additionally, 31 Am. Jur. 2d, *supra*, § 1005 at 698, contains an observation note which states:

> A special administrator is solely responsible to the estate for that portion of its affairs entrusted to him or her by the court, to that extent supplanting the authority of the general personal representative, who continues to be responsible for the administration of all other aspects of the estate's business.

See, also, 31 Am. Jur. 2d, *supra*, § 1006 (commenting that appointment of special administrator enables estate to participate in transaction which general personal representative could not, or should not, handle because of conflict of interest); 34 C.J.S. *Executors and Administrators* § 952 b. (1998) (while ordinarily administrator ad litem will not be appointed where there is general administrator, those two administrators may subsist together; person appointed administrator ad litem becomes solely responsible for performance of specific duties authorized by court).

[9] Because a personal representative and a special administrator can coexist, Alice was not required to petition to suspend or remove Theresa as a prerequisite to filing a motion for the appointment of a special administrator. Accordingly, the county court erred in its decision to dismiss the Petition with prejudice on the basis that Alice failed to follow the proper procedure. Ordinarily, such an error would warrant reversing the judgment and remanding the cause for further proceedings with regard to the county court's decision to deny the appointment of a special administrator on this basis. However, we must also consider the county court's second basis for denying appointment of a special administrator.

(b) Timeliness of Demand to Recover POD Transfers

In its order, the county court also found that "[Alice's] demand for [Theresa] to compel beneficiaries of [POD] transfers to pay such transfer[s] over to the [E]state as a basis for the Appointment of a Special Administrator was not timely as required by Neb. Rev. Stat. Section 30-[2726]." No explanation is provided in the order as to why the court concluded "[Alice's] demand" was not timely.

Alice argues on appeal that "[t]he [POD] claim was not an issue raised in [the] Petition," that Theresa's answer to the Petition did not affirmatively raise untimeliness as a defense, and that "[s]ince these matters were not pled as affirmative defenses, Alice had no notice as to what she had to meet in opposition to Theresa's Motion for Summary Judgment and was therefore not allowed the opportunity to present evidence

in opposition thereto under a multitude of available theories." Brief for appellant at 18-19. Thus, before considering the trial judge's determination that "[Alice's] demand" was not timely, we first address Alice's argument that the POD issue was not properly before the court.

(i) Was POD Issue Properly Raised Before County Court?

Although Alice is correct that a specific request for recovery of nonprobate transfers is not pled in the Petition, which is dated December 21, 2010, we note that in the section of the Petition pertaining to her request for the appointment of a special administrator, Alice alleges that Theresa had knowledge of the alimony award; that there was a "significant dissipation of assets of [William] from the date of the Divorce Decree"; that Theresa, "acting as both Power of Attorney and Personal Representative, . . . has a conflict of interest to properly administer and/or preserve the [E]state, including but not limited to collecting assets belonging to the Estate"; and that therefore, "a special administrator is necessary." Additionally, included in the evidence offered and received in opposition to the summary judgment motion was an affidavit from Alice's son, to which he attached pleadings from a pending Iowa case wherein Alice was suing Theresa and other beneficiaries of the Estate for assets transferred outside the Estate. Further, Alice's attorney argued at the hearing on the summary judgment motion that "there's nothing in the [E]state," that the Iowa lawsuit alleges "a conspiracy to dissipate the [E]state," that a special administrator is needed to recover assets, and that Theresa "refuses to join [the lawsuit] and has refused to go out and do anything to recover those assets to make provision for [Alice's] $2000 a month alimony award." He continued, "All we are asking for is that there be sufficient assets put back into the [E]state so that that $2000 a month alimony award can be satisfied. And [Theresa] has failed and refused to do that."

Theresa states in her brief:

> The probate court also properly rejected [Alice's] argument that a special administrator should be appointed

> to recover [POD] transfers from [William's] accounts, because a special administrator would be prohibited from making such demands and recovery just as much as [Theresa] is prohibited, because [Alice] failed to make a written demand upon [Theresa] to recover those amounts within one year of [William's] death. Neb. Rev. Stat. § 30-2726(b).

Brief for appellee at 21-22.

[10] Based on our review of the record, the assertions of the parties at the hearing on the motion for summary judgment, and the county court's determination on the issue, it is clear that the issue of recovering POD transfers was raised as a justification for the appointment of a special administrator. Cases are heard in an appellate court on the theory upon which they were tried. See *Sunrise Country Manor v. Neb. Dept. of Soc. Servs.*, 246 Neb. 726, 523 N.W.2d 499 (1994). Accordingly, we find that the issue was properly before the county court for determination. Alice asserts that if this court determines that the POD issue was properly before the county court, the court nevertheless "erred in finding that the claim was barred by the one year period in Neb. Rev. Stat. §30-2726(b)." Brief for appellant at 20 (emphasis omitted). We now consider that argument.

(ii) Recovery of POD Transfers Requires Both Written and Timely Demand

To determine if a "demand" was timely, we first have to determine if there was a "demand." Therefore, we start by looking at the operative statute to see if the statute itself sheds any light on what constitutes a "written demand." Section 30-2726 provides a mechanism by which some nonprobate transfers, like those from a POD account, may be recovered if the estate is insufficient to pay certain obligations. Section 30-2726 provides in relevant part:

> (a) If other assets of the estate are insufficient, a transfer resulting from a right of survivorship or POD designation under sections 30-2716 to 30-2733 is not effective

> against the estate of a deceased party to the extent needed to pay claims against the estate . . . .
>
> (b) A surviving party or beneficiary who receives payment from an account after death of a party is liable to account to the personal representative of the decedent for a proportionate share of the amount received to which the decedent, immediately before death, was beneficially entitled under section 30-2722, to the extent necessary to discharge the amounts described in subsection (a) of this section remaining unpaid after application of the decedent's estate. *A proceeding to assert the liability for claims against the estate . . . may not be commenced unless the personal representative has received a written demand by . . . a creditor . . . . The proceeding must be commenced within one year after death of the decedent.*
>
> . . . .
>
> (d) Sums recovered by the personal representative must be administered as part of the decedent's estate.

(Emphasis supplied.)

[11] Although the statute does not provide clarity on what might suffice as a "written demand," it is clear that the POD accounts at issue in the case before us are of the types of accounts contemplated by the statute. In *Newman v. Thomas*, 264 Neb. 801, 805, 652 N.W.2d 565, 570 (2002), the Nebraska Supreme Court specifically addressed the distinction between POD (nonprobate) and non-POD (probate) accounts, stating:

> Article 27 of the Nebraska Probate Code governs nonprobate transfers, including POD accounts. See Neb. Rev. Stat. §§ 30-2715 through 30-2746 (Reissue 1995). In 1993, the Legislature repealed the previous version of article 27 and replaced it with a version based on the revised article VI of the Uniform Probate Code. . . .
>
> Under the revised article 27, when the owner of a POD, single-party account dies, the sums on deposit belong to the surviving beneficiary or beneficiaries. § 30-2723(b)(2). A non-POD, single-party account, however, is not affected by the death of the owner.

> Instead, the amount the owner was beneficially entitled to immediately before death is transferred to the estate. § 30-2723(c).

As noted, a POD account passes outside the estate and belongs to the surviving beneficiary and not to the estate; therefore, such a transfer "is not testamentary or subject to sections 30-2201 to 30-2512 (estate administration)." Neb. Rev. Stat. § 30-2725 (Reissue 2008).

[12] When a decedent's POD asset has been transferred outside his or her estate, § 30-2726 provides the mechanism by which such nonprobate transfer may be recovered by the estate if the estate is not otherwise able to meet its obligations. To employ the process set forth in § 30-2726(b) to recover nonprobate transfers, a "written demand" must be made upon the personal representative and then a proceeding to recover those nonprobate assets must be commenced within 1 year of the decedent's death. Accordingly, it follows that a "written demand" must be made within 1 year of the decedent's death in order for a proceeding to be commenced to recover those nonprobate assets within that same 1-year timeframe.

[13] Theresa argues that Alice failed to make a written demand upon Theresa (as personal representative) to recover any POD transfers within 1 year of William's death as required by the statute. William died on February 20, 2010. Therefore, based on § 30-2726, a written demand on Theresa had to occur in advance of February 20, 2011, and presumably with sufficient time left to permit the commencement of a proceeding to recover any nonprobate transfers before that 1-year deadline. Thus, if Alice did not make a "written demand" on Theresa within 1 year after William's death, it would be too late for Theresa (or an appointed special administrator) to pursue any of the POD transfers in this case. See *In re Estate of Robb*, 21 Neb. App. 429, 839 N.W.2d 368 (2013) (after special administrator is appointed, administrator has same power as personal representative, except power is limited to duties prescribed in trial court's order). See, also, Neb. Rev. Stat. § 30-2460 (Reissue 2008). So, if Alice's only basis for requesting the appointment of a special administrator was so that he or she could retrieve William's

nonprobate transfers, and if it was too late to do that, then the county court was correct to deny the appointment of a special administrator for that purpose. We now consider whether any such "written demand" was made by Alice on Theresa, and if there was such a demand, we will then examine whether it was timely.

(iii) Did Alice Make Timely, Written Demand?

Alice argues that sufficient written demand was made upon Theresa. She specifically argues that in addition to a letter sent by her son to Theresa (among others) on April 19, 2010, which inquired about William's family's intentions with regard to Alice's alimony, Alice also timely filed her claims against the Estate, and that when they were disallowed, she timely filed a proceeding to establish the claims. Alice states, "In this case[,] demands in the form of correspondence from [Alice's son] and Alice's written claims described above were made well within the four month claims period and were served on [Theresa] well within the one year time frame." Brief for appellant at 21. Alice then suggests that "[o]nce Alice filed her claims[,] Theresa knew the Estate's assets would be insufficient to pay Alice's alimony claim, a fact evidenced by the present insolvent condition of the Estate." *Id*. Alice further stated:

> Once that demand has been received, the last sentence of Neb. Rev. Stat. §30-2726 provides that the proceeding must be commenced, by the Personal Representative, within one year after death of the decedent by the Personal Representative, not by the creditor. After all, it is the Personal Representative's duty, not a creditor's duty, to collect all assets of the Estate. Neb. Rev. Stat. §30-2464.

Brief for appellant at 21 (emphasis omitted). While we agree with Alice's position that it is the personal representative's role to commence a proceeding pursuant to § 30-2726, as discussed below, we must first determine whether the documents filed by Alice within a year of William's death suffice as an appropriate "written demand" pursuant to § 30-2726(b).

Alice filed a separate "Statement of Claim" for each of the following obligations alleged to be owed to her from the Estate: (1) property settlement funds of $1,189.65 plus interest, (2) delinquent alimony of $6,000 plus interest, and (3) future alimony of $2,000 per month for life. All three claims were filed on August 30, 2010, within 6 months of William's February 20 death, so they meet the 1-year requirement under § 30-2726. The claims, by themselves, make no reference to § 30-2726; nor do they make any reference to recovering nonprobate assets. However, in addition to the three separate claims filed against the Estate, putting Theresa on notice of the obligations allegedly due to Alice, Alice also filed the Petition, seeking allowance of her claims. Further, in that same Petition, which was also filed within a year of William's death, Alice sought the appointment of a special administrator because of the "significant dissipation of assets" and Theresa's "conflict of interest to properly administer and/or preserve the [E]state, including but not limited to collecting assets belonging to the Estate."

[14] We conclude that Alice's filing of her claims, particularly when considered along with the filing of the Petition, set forth sufficient "written demand" to have put Theresa on notice that nonprobate transfers may need to be collected for the Estate to meet its obligations to Alice. See, also, *In re Estate of Reinek*, No. A-95-1195, 1997 WL 618740 (Neb. App. Sept. 30, 1997) (not designated for permanent publication) (written demand requirement of § 30-2726(b) was met based upon claims being filed against estate).

Accordingly, since the three claims and the Petition were filed within a year of William's death, the county court erred in concluding that Alice's written demand was not timely. However, § 30-2726(b) involves another step once a timely written demand has been made. We now consider that next step.

Following a written demand made upon a personal representative, a proceeding must be brought to assert the liability for claims against the estate and such a proceeding "must be commenced within one year after death of decedent." *Id*. The statute does not state specifically who can or must bring such

a proceeding; however, the statutory language does indicate that the beneficiary of such nonprobate transfers "is liable to account to the personal representative of the decedent for a proportionate share of the amount received . . . to the extent necessary to discharge the amounts described in subsection (a) of this section remaining unpaid after application of the decedent's estate." § 30-2726(b). Additionally, § 30-2726(d) states in part that "[s]ums recovered by the personal representative must be administered as part of the decedent's estate." Based on this statutory language, particularly the language stating that the beneficiaries of such nonprobate transfers have to account only to the personal representative, we conclude that only a personal representative has standing to bring such an action against those beneficiaries. As such, it is the duty of the personal representative to bring an action to recover nonprobate transfers pursuant to § 30-2726 when a timely written demand has been made. See, also, *In re Estate of Reinek, supra* (duty of personal representative to bring proceedings pursuant to § 30-2726; breach of fiduciary duty upon failure to do so was not decided). The ramifications of Theresa's failure to bring a proceeding pursuant to § 30-2726 in the instant case are not before us. Rather, the issue before us is whether the county court erred in concluding that "[Alice's] demand for [Theresa] to compel beneficiaries of [POD] transfers to pay such transfer[s] over to the [E]state as a basis for the Appointment of a Special Administrator was not timely as required by Neb. Rev. Stat. Section 30-[2726]." As noted above, we conclude that the county court did err in finding that Alice's "demand" was not timely. That error, however, does not change the fact that by the time the matter was heard before the county court, it was too late for either a personal representative or an appointed special administrator to commence an action pursuant to § 30-2726, because more than 1 year had passed since William's death. Therefore, although for the wrong reason, it was not error for the county court to conclude that there was no basis to appoint a special administrator for purposes of § 30-2726. We do, however, reverse the county court's dismissal "with prejudice," insofar as that may have precluded any future effort to appoint

a special administrator for reasons other than commencing an action under § 30-2726. The order is therefore modified accordingly.

(iv) Procedural and Timeliness Problems With § 30-2726(b)

For the sake of completeness, and as apparent from what took place in the proceedings below, we note that § 30-2726(b) in its current form presents procedural and timeliness issues by first placing a burden on a creditor to make a timely demand to the personal representative to pursue nonprobate transfers and then shifting the burden to the personal representative to commence a proceeding against nonprobate beneficiaries within 1 year of the decedent's death. This "recovery" process may first be frustrated by the fact that a creditor may not even know whether nonprobate assets exist, because they are nontestamentary and not subject to estate administration. See § 30-2725. Additionally, § 30-2726(b) can create a conflict of interest when, as in this case, a personal representative is also a nonprobate transfer beneficiary, potentially leading to increased litigation, costs, and delays.

We observe that although the Uniform Probate Code has been amended since Nebraska adopted "[Uniform Probate Code] Article VI, Nonprobate Transfers on Death (1989)," in 1993, Nebraska has not yet adopted any of the new proposed uniform provisions dealing with nonprobate transfers. See Introducer's Statement of Intent, L.B. 250, Committee on Judiciary, 93d Leg., 1st Sess. (Mar. 10, 1993). Accord *Newman v. Thomas*, 264 Neb. 801, 652 N.W.2d 565 (2002). Relevant to this case, the new proposed uniform provisions give creditors a more direct option to pursue nonprobate transfers. See Unif. Multiple-Person Accounts Act § 15, 8B U.L.A. 25 (2001) (noting that Uniform Probate Code was amended in 1998).

In line with the discussion above related to nonprobate transfers and the difficulty they can create for creditors, we briefly touch on Alice's final argument with regard to the nonprobate transfers in this case and the timeliness of her demand. Alice contends that nonprobate assets (e.g., William's

individual retirement and POD accounts) should have been listed on the Estate's inventory but were not. Alice argues that to the extent she failed to make a timely demand, it would be "unconscionable" to bar her claim, because Theresa never disclosed the existence of nonprobate assets in the inventory filed with the court. Brief for appellant at 22. However, as discussed earlier, nonprobate assets pass outside the estate. And while the listing of such transfers on a probate inventory may be preferred in practice for administrative and tax purposes, we are unable to find any Nebraska authority to indicate such a practice is mandatory. We note that a commonly used resource for probate practitioners, the Nebraska Probate System V, Administration Series, Notes and Instructions to Nebraska Continuing Legal Education Forms 330 and 331 (Nebraska State Bar Association 2006), states, "Items marked by asterisk [including 'Non-Probate Property subject to Nebraska inheritance tax'] on Forms 330 ['Inventory'] and 331 ['Short Form Inventory'] are not required in the Inventory under Nebraska Probate Code § 30-2467, but may be included for convenience for Determination of Inheritance Tax." Further, § 30-2725 states that "a transfer resulting from the application of section 30-2723 [which includes POD accounts]" becomes effective by reason of the nonprobate statutes "and is not testamentary or subject to" the estate administration statutes. Also, in this case, Alice was aware of the possibility of significant nonprobate transfers in light of information available to her about marital assets distributed to William at the time of their divorce in 2006. Finally, in light of this court's conclusion that a written demand was timely made, the inventory issue becomes irrelevant in this appeal, other than to incorporate the idea of the adequacy of estate inventories into our discussion on problematic issues facing creditors, like Alice in this instance, in obtaining satisfaction of their claims against otherwise insufficient estates.

3. Petition for Allowance of Claims

[15] The county court did not dismiss the Petition Alice filed for allowance of claims pursuant to summary judgment.

The county court granted Theresa's motion for summary judgment, *except for* (1) Alice's claim for interest for delinquent alimony; (2) Alice's claim for alimony in the amount of $2,000 per month, commencing September 1, 2010, and continuing each month thereafter until she dies or remarries, whichever occurs first; and (3) Alice's claim for interest in the amount of $129.78 on a late property settlement payment. Therefore, these three matters were not included in the court's summary judgment determination. Alice's assignment of error states only, "The county court erred as a matter of law in sustaining [Theresa's] Motion for Summary Judgment," so although she discusses these three issues briefly in subparts of her brief, she does not specifically assign them as errors. Accordingly, we decline to address those matters here. See *Steffy v. Steffy*, 287 Neb. 529, 843 N.W.2d 655 (2014) (assignments of error consisting of headings or subparts of argument section do not comply with mandate of Neb. Ct. R. App. P. § 2-109(D)(1)(e) (rev. 2012); appellate court may, at its discretion, examine proceedings for plain error). The county court's handling of these three issues has been detailed previously, and we find no plain error in the determinations made by the county court with regard to the Petition.

4. Attorney Fees on Appeal

[16] In her brief, Theresa asks this court to award her attorney fees because Alice prosecuted this appeal for delay or vexation, in violation of § 30-1601. Pursuant to § 30-1601(6), if it appears to the Nebraska Court of Appeals that an appeal of a probate matter was taken vexatiously or for delay, the court shall adjudge that the appellant shall pay the cost thereof, including an attorney fee, to the adverse party in an amount fixed by the Court of Appeals.

Theresa specifically states, "As the Court can observe none of [Alice's] appeal is supported by the law, and to a great extent is even newly founded." Brief for appellee at 26. Given our conclusions that the county court erred in some aspects of its determinations, and given the lack of authority on § 30-2726, we cannot say that this appeal was taken

vexatiously or for delay. We therefore deny Theresa's request for attorney fees on appeal.

VI. CONCLUSION

For the reasons stated above, we affirm the county court's order as to the Second Codicil. However, we affirm as modified the court's order with respect to the appointment of a special administrator to reflect that Alice's request should have been dismissed without prejudice.

AFFIRMED AS MODIFIED.

VILLAGE OF FILLEY, NEBRASKA, APPELLEE AND CROSS-APPELLEE, v. MARK SETZER AND KATHY SETZER, APPELLANTS, AND THOMAS SETZER, APPELLEE AND CROSS-APPELLANT.

858 N.W.2d 258

Filed December 9, 2014. No. A-13-356.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts 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 the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Judgments: Final Orders: Appeal and Error.** A judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record.
4. **Contracts: Guaranty: Limitations of Actions: Liability: Debtors and Creditors.** A statute of limitations begins to run against a contract of guaranty the moment a cause of action first accrues and a guarantor's liability arises when the principal debtor defaults.
5. **Contracts: Acceleration Clauses: Limitations of Actions: Debtors and Creditors.** In the absence of a contractual provision allowing acceleration, where an obligation is payable by installments, the statute of limitations runs against each installment individually from the time it becomes due. Where a contract contains an option to accelerate, the statute of limitations for an action on the whole indebtedness due begins to run from the time the creditor takes positive action indicating that the creditor has elected to exercise the option.
6. **Contracts: Acceleration Clauses: Limitations of Actions.** In the absence of a contractual provision allowing acceleration, where an obligation is payable by

installments, the statute of limitations runs against each installment individually from the time it becomes due.

7. **Affidavits.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Appeal from the District Court for Gage County: DANIEL E. BRYAN, JR., Judge. Affirmed.

John C. Hahn and Brent C. Stephenson, of Jeffrey, Hahn, Hemmerling & Zimmerman, P.C., L.L.O., for appellants.

Eric J. Adams and Thomas O. Ashby, of Baird Holm, L.L.P., for appellee Village of Filley.

Daniel E. Klaus, of Rembolt Ludtke, L.L.P., for appellee Thomas Setzer.

MOORE, Chief Judge, and IRWIN and PIRTLE, Judges.

PIRTLE, Judge.

INTRODUCTION

The Village of Filley loaned money to HeatSource 1, Inc. (HeatSource), pursuant to a community development block grant program. Mark Setzer, Kathy Setzer, and Thomas Setzer (collectively appellants) were guarantors on the loan. HeatSource defaulted on the loan, and Filley filed suit against appellants. The district court for Gage County granted partial summary judgment in favor of Filley, finding that Filley's cause of action was not barred by the statute of limitations, and subsequently found appellants were liable to Filley in the amount of $116,469.67. Mark and Kathy appealed, and Thomas cross-appealed. Based on the reasons that follow, we affirm.

BACKGROUND

In February 2002, the State of Nebraska Department of Economic Development (Department) approved Filley and HeatSource for a community development block grant in the amount of $242,400. Of those funds, $236,440 was to be loaned from Filley to HeatSource, and in exchange for the

loan, HeatSource was to provide 12 full-time job positions for 2 years in Filley.

On April 25, 2002, HeatSource and appellants, individually, signed and delivered a promissory note to Filley in the principal amount of $236,440, interest free, to be paid in 120 consecutive monthly payments in the amount of $1,970.33 each. The Department had no direct role in the making or the administration of the promissory note; Filley was the administrator and holder of the note. HeatSource and appellants, individually, also entered into a loan agreement with Filley on April 25, 2002, which further outlined the parties' rights and obligations.

Although appellants signed and were obligated under the terms of the promissory note, they also personally guarantied payment and performance of HeatSource's indebtedness to Filley by signing a guaranty dated April 29, 2002.

On November 4, 2003, Thomas transferred his interest in HeatSource to Mark and Kathy and/or HeatSource. In 2004, Filley learned that Thomas had transferred his interest and was no longer affiliated with the company. The promissory note contained an acceleration clause pertaining to the transfer of ownership in HeatSource which stated, "It is further understood and agreed that, in the event of the sale or transfer of any ownership interest in the Borrower, then this note shall become immediately due and payable." Filley did not take any action to collect the full amount due on the note.

Subsequently, HeatSource defaulted on its obligations owed to Filley pursuant to the promissory note by failing to make scheduled payments on the promissory note. The last payment Filley received was on June 8, 2009. The promissory note also had an acceleration clause in regard to a default in payments, which provided that "if there is a default in the payment of the debt, and it is not cured within Fifteen (15) days, or if default is made under the terms of the Loan Agreement . . . the principal sum, with accrued interest, will become due and collectible."

On November 18, 2011, Filley filed a complaint against appellants alleging that HeatSource was "in default of its obligations owed to Village of Filley pursuant to the Note for,

among other things, failure to make scheduled payments on said Note." Filley declared the note, and all amounts owed based on the note, due and payable in full. The complaint further alleged that HeatSource owed Filley the principal amount of $116,469.67, plus interest, and that pursuant to the terms of the note and guaranty, appellants were liable to Filley for the principal amount and interest.

Mark and Kathy filed an answer with a general denial as to the claim and alleged a number of affirmative defenses, including Filley's failure to mitigate damages and exhaust administrative remedies. Mark and Kathy were later granted leave to file a first amended answer to affirmatively allege that Filley's cause of action was barred by the statute of limitations.

Thomas filed a separate answer and subsequently a first amended answer, denying Filley's allegations and asserting a number of affirmative defenses, including failure to mitigate damages, failure to exhaust administrative remedies, and expiration of the statute of limitations. Thomas also filed a cross-claim against Mark and Kathy asking that if he is found liable to Filley on the promissory note and/or guaranty, that judgment be entered in his favor and against Mark and Kathy for the full amount of his liability to Filley.

On March 8, 2012, Filley filed a motion for summary judgment. At the summary judgment hearing, Filley submitted three affidavits in support of its motion: an affidavit and supplemental affidavit of David A. Norton, the village clerk for Filley, and an affidavit of Bob Doty, the housing program manager for the Department. In opposition to the motion for summary judgment, Thomas submitted his own affidavit, and Mark and Kathy submitted their own affidavits.

Following the summary judgment hearing, the trial court entered an order on July 5, 2012, granting partial summary judgment in favor of Filley. The court determined that Filley's claim was not barred by the statute of limitations, because the cause of action arose on November 18, 2011, when Filley filed its complaint asserting that it was accelerating the amount due on the note. The court also determined that Filley mitigated its damages and had exhausted all administrative remedies

available to it. The court determined that a money judgment would be entered in favor of Filley and against appellants jointly and severally on their note and guaranty, but that the amount appellants owed Filley was a genuine issue of material fact left to be determined. Trial was scheduled for October 18, 2012, at which time the court would make a final determination on the merits of the case.

Subsequently, the parties submitted a joint stipulation of facts in lieu of having a trial, which joint stipulation was received into evidence. HeatSource's payment history was attached to the joint stipulation, showing the date and amount of each payment HeatSource made on the promissory note. The draw history was also attached to the joint stipulation, reflecting the date and amount of each draw HeatSource made under the loan agreement. The joint stipulation stated that HeatSource made the final draw on March 26, 2004, and that under the terms of the note and loan agreement, HeatSource agreed that the first monthly installment was due and payable within 30 days of the draw.

Based on the joint stipulation, the court entered an order finding that appellants were jointly and severally liable to Filley in the amount of $116,469.67.

The trial court subsequently ruled on Thomas' cross-claim, finding that Mark and Kathy are jointly and severally liable to Thomas for any and all amounts that Thomas pays on the judgment entered in favor of Filley.

ASSIGNMENTS OF ERROR

Mark and Kathy assign, restated, that the trial court erred in (1) granting partial summary judgment in favor of Filley, concluding that Filley's claim was not barred by the statute of limitations, and (2) finding that Filley had mitigated its damages and exhausted its administrative remedies.

On cross-appeal, Thomas assigns that the trial court erred in (1) finding that Filley's claim was not barred by the statute of limitations, (2) finding that Filley had mitigated its damages and exhausted its administrative remedies, (3) finding that the only genuine issue of material fact remaining was the amount owed under the promissory note, and (4) granting a

monetary judgment in favor of Filley. Thomas, however, does not set forth any arguments in support of the errors assigned in his brief. Rather, he relies solely on "the reasons stated in Appellant's brief" to support his stated errors. Accordingly, we do not address Thomas' assignments of error that were not also assigned by Mark and Kathy. See *Dowd Grain Co. v. County of Sarpy*, 19 Neb. App. 550, 810 N.W.2d 182 (2012) (in order to be considered by appellate court, alleged errors must be both specifically assigned and specifically argued in brief of party asserting error).

STANDARD OF REVIEW

[1] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts 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. *Harris v. O'Connor*, 287 Neb. 182, 842 N.W.2d 50 (2014).

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3] A judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record. Neb. Rev. Stat. § 25-1911 (Reissue 2008).

ANALYSIS

[4] Appellants first assign that the trial court erred in granting partial summary judgment in favor of Filley, finding that Filley's cause of action was not barred by the statute of limitations. Pursuant to Neb. Rev. Stat. § 25-205 (Reissue 2008), the applicable statute of limitations is 5 years: "[A]n action upon a specialty, or any agreement, contract, or promise in writing, or foreign judgment, can only be brought within five years." Appellants contend that Filley's cause of action accrued in November 2003, when Thomas transferred his ownership interest in HeatSource to Mark and Kathy and/or HeatSource. If appellants' contention is correct, the 5-year

statute of limitations for a cause of action against appellants would have expired in November 2008 for the note and guaranty. See *Production Credit Assn. of the Midlands v. Schmer*, 233 Neb. 749, 448 N.W.2d 123 (1989) (statute of limitations begins to run against contract of guaranty the moment cause of action first accrues and guarantor's liability arises when principal debtor defaults).

In regard to Thomas' transfer of ownership, the promissory note provides: "[I]n the event of the sale or transfer of any ownership interest in the Borrower, then this note shall become immediately due and payable." Appellants contend that the language in the note is self-operative. That is, at the moment Thomas transferred his ownership, the note's acceleration clause was invoked and the remaining loan balance became immediately due and payable. Appellants argue that because HeatSource did not immediately satisfy the outstanding loan balance, HeatSource has been in default under the terms of the promissory note since 2003.

However, Nebraska case law is contrary to appellants' argument. In *National Bank of Commerce v. Ham*, 256 Neb. 679, 592 N.W.2d 477 (1999), the Nebraska Supreme Court held that an acceleration provision, although absolute in its terms, is not self-operative. In *Ham*, a borrower entered into a personal money reserve plan agreement with National Bank of Commerce (NBC). The agreement required the borrower to repay, in monthly installments, any money lent to him. The agreement in *Ham* also contained an acceleration clause which provided that if any payment was not made when due, all sums due and owing to NBC "'shall immediately become due and payable, without demand or notice.'" 256 Neb. at 682, 592 N.W.2d at 480. Payments were missed in January, March, and May 1990, and a representative of NBC sent a letter to the borrower on August 15, 1990, informing him that NBC was exercising its option to accelerate. On July 14, 1995, NBC sued the borrower to recover the amount due under the agreement.

[5] On appeal, the Supreme Court in *Ham* held:

> In the absence of a contractual provision allowing acceleration, where an obligation is payable by installments,

> the statute of limitations runs against each installment individually from the time it becomes due. . . . Where a contract contains an option to accelerate, the statute of limitations for an action on the whole indebtedness due begins to run from the time the creditor takes positive action indicating that [the creditor] has elected to exercise the option.

256 Neb. at 682, 592 N.W.2d at 479-80. The court concluded that NBC's claim against the borrower was not barred by the 5-year statute of limitations because the statute of limitations began to run in August 1990, when NBC gave written notice of its election to accelerate the unpaid balance due.

Appellants argue that *National Bank of Commerce v. Ham, supra*, can be distinguished because it involved an action by a creditor against a borrower, rather than an action on a guaranty as in the present case. However, in *City of Lincoln v. Hershberger*, 272 Neb. 839, 725 N.W.2d 787 (2007), the Nebraska Supreme Court held that although that case involved guarantors asserting a statute of limitations defense, as opposed to the original debtor, the principles relied on in *National Bank of Commerce v. Ham, supra*, apply equally to the original debtor and the guarantor of the same debt. *City of Lincoln v. Hershberger, supra*, involved an installment contract with an optional acceleration clause. The court noted that the statute of limitations for an action on the whole indebtedness due begins to run from the time the creditor takes positive action indicating that it has elected to exercise the acceleration option. The court concluded that the statute of limitations began to run on the city's claim against the debtor on the date the city sent a letter to the guarantors indicating the city's intent to exercise its right to accelerate. The court further explained that because the day the letter was sent was the date of the debtor's default for purposes of the city's action against the debtor, it was also the date upon which the statute of limitations began to run on each guaranty.

The present case is similar to *National Bank of Commerce v. Ham*, 256 Neb. 679, 592 N.W.2d 477 (1999), and *City of Lincoln v. Hershberger, supra*, in that it involves an

installment contract with an optional acceleration clause. It is also similar to *Hershberger* in that it is the guarantors' asserting a statute of limitations defense. Although the acceleration clause upon which appellants rely for their statute of limitations defense is based on a transfer of ownership rather than a default in payment as in *Ham* and *Hershberger*, the same principles set forth in *Ham* and *Hershberger* apply. That is, where a contract contains an option to accelerate, the statute of limitations for an action on the whole indebtedness due begins to run from the time the creditor takes positive action indicating that the creditor has elected to exercise the option. *National Bank of Commerce v. Ham, supra*.

Accordingly, the acceleration clause at issue was not self-operative and Filley's cause of action did not accrue in November 2003, when Thomas transferred his ownership interest in HeatSource to Mark and Kathy and/or HeatSource. Filley's cause of action would not accrue until it took some action to indicate it intended to exercise the option to accelerate the note. Filley has never given notice of its election to accelerate due to Thomas' transferring his ownership. The only action Filley has taken to indicate it was accelerating the note was its filing of the complaint against appellants on November 18, 2011, and the complaint is not based on the transfer of ownership. Rather, the complaint is based on HeatSource's being in default of its obligations owed to Filley for failing to make scheduled payments on the note, which stems from a different acceleration clause within the promissory note as previously set forth. Regardless of which acceleration clause the complaint was based on, the filing of the complaint was the first action taken by Filley to indicate it was accelerating the note. That being so, Filley's cause of action based on Thomas' transfer of ownership did not accrue in November 2003 and the statute of limitations did not expire in November 2008.

Appellants further argue that even if the acceleration clause for transfer of ownership was not self-operative, the statute of limitations precluded Filley from recovering installment payments that were due and owing for more than 5 years prior to the commencement of the case. Appellants argue that the

monthly payments were all separate payments that accrued at different times and that therefore, the statute of limitations would have expired on some of the payments before Filley commenced its suit.

[6] Based on *Ham* and *Hershberger*, this argument has no merit. Both cases involved installment contracts, and in both cases, the court held that "'[*i*]*n the absence of a contractual provision allowing acceleration*, where an obligation is payable by installments, the statute of limitations runs against each installment individually from the time it becomes due.'" *City of Lincoln v. Hershberger*, 272 Neb. 839, 844, 725 N.W.2d 787, 791 (2007) (emphasis supplied), quoting *National Bank of Commerce v. Ham*, 256 Neb. 679, 592 N.W.2d 477 (1999). As discussed, the promissory note in this case is an installment contract with an acceleration provision. Therefore, the statute of limitations does not run against each installment individually.

The trial court correctly determined that Filley's cause of action on the whole indebtedness due under the note began to run on November 18, 2011, when Filley took positive action to accelerate the debt. Therefore, the trial court did not err in granting partial summary judgment in favor of Filley, finding that Filley's cause of action was not barred by the statute of limitations.

Appellants next assign that the trial court erred in finding that Filley had mitigated its damages and exhausted its administrative remedies. These findings were made as part of the partial summary judgment granted in Filley's favor. The trial court found that Filley presented sufficient evidence to establish that it had mitigated its damages and exhausted its administrative remedies. It further found that the burden shifted to appellants and that they failed to present evidence that Filley failed to exhaust its administrative remedies or mitigate its damages.

In regard to administrative remedies, Filley presented an affidavit of Doty, the housing program manager for the Department, who is a custodian of the Department's documents

and has personal knowledge of the interaction between the Department, Filley, and appellants. Doty stated:

> Prior to this lawsuit, [Filley] exhausted administrative procedures or remedies, if any, it had available to it through the Department. The Department has no objection to the filing of the Complaint in this action by [Filley] or to any effort by [Filley] under state law to see a judgment against [appellants].

Filley also presented an affidavit of Norton, the village clerk of Filley, who stated that there were not any administrative requirements of the Department that must be satisfied or completed as a precondition to Filley's filing a complaint against appellants.

Appellants did not present any evidence to counter that presented in Doty's or Norton's affidavits and failed to present any evidence that Filley had administrative remedies that it failed to pursue. Accordingly, the trial court did not err in finding that Filley had exhausted its administrative remedies.

In regard to Filley's mitigation of damages, Doty's affidavit states that before the lawsuit was filed by Filley "there were no steps to [his] knowledge that [Filley] was required to or recommended to take with the Department to somehow mitigate the unpaid balance of the Note and the Guaranty or reduce damages to [Filley] from the failure of [appellants] to pay." Norton's affidavit states that "[Filley] took all steps necessary to diminish or reduce its damages through the Department."

Appellants contend, however, that Filley could have retained the note proceeds, thereby mitigating its damages, if it had submitted additional documents to the Department. The affidavits of Mark and Kathy both state that the community development block grant contract between the Department and Filley provided Filley the opportunity to retain HeatSource's payments made on the note by submitting notice and a plan for the reuse of the program income for economic development activities and by obtaining approval of the plan from the Department by certain deadlines. If the deadlines were not met,

then the payments that were received from HeatSource were to be returned to the Department.

[7] Appellants contend that Filley failed to take the steps necessary to retain the program income. Specifically, Mark and Kathy's affidavits state that

> upon information and belief, [Filley] failed to obtain the Department's approval for a reuse program and was forced to return the program proceeds to the Department. Had [Filley] acted reasonably and prudently, it would have obtained approval of a reuse program, kept the program proceeds, and reduced its claim for damages.

Appellants' claim that Filley could have taken steps to retain appellants' payments on the note and did not do so is based "upon information and belief" of Mark and Kathy and not upon personal knowledge. Appellants do not present actual knowledge or other evidence to support their conclusion that Filley did not obtain the Department's approval for a reuse program. See Neb. Rev. Stat. § 25-1334 (Reissue 2008) (supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that affiant is competent to testify to matters stated therein). As such, appellants failed to produce any competent evidence to contradict Filley's evidence that it mitigated its damages. The record supports the trial court's determination that Filley mitigated its damages.

CONCLUSION

We conclude the district court did not err in granting partial summary judgment in favor of Filley, finding that Filley's cause of action was not barred by the statute of limitations and that Filley had mitigated its damages and exhausted its administrative remedies. Accordingly, the district court's $116,469.67 judgment in favor of Filley and against appellants is affirmed.

AFFIRMED.

Gerald Ficke, appellee, v. Gilbert Wolken, appellant.

858 N.W.2d 249

Filed December 9, 2014. No. A-13-906.

1. **Specific Performance: Equity.** An action for specific performance sounds in equity.
2. **Equity: Appeal and Error.** When an equity case is appealed from the district court, the appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court.
3. **Equity: Evidence: Appeal and Error.** When evidence conflicts in an equity action, an appellate court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
4. **Contracts: Real Estate.** An oral agreement for the transfer of title to real estate is voidable under the statute of frauds.
5. **Contracts: Specific Performance: Real Estate.** Specific performance of an oral agreement to convey real estate will be enforced by a court of equity where one party has wholly performed his part thereof and the other party has not performed his part, and its nonperformance on the one hand would amount to a fraud on the party who has fully performed it.
6. **Contracts: Specific Performance: Real Estate: Proof.** A party seeking specific performance of an oral contract for the sale of real estate upon the basis of part performance must prove an oral contract, the terms of which are clear, satisfactory, and unequivocal, and that the acts done in part performance were referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract, and further that nonperformance by the other party would amount to a fraud upon the party seeking specific performance.
7. **Contracts: Specific Performance: Real Estate: Evidence.** In an action for specific performance of an oral contract to convey real estate where partial performance is relied upon to avoid the defense of the statute of frauds, the evidence of the alleged contract and its terms must be clear, satisfactory, and unequivocal.
8. **Contracts.** A mutual understanding sufficient to establish the terms of a contract may be implied from the conduct of the parties and the surrounding circumstances.
9. **Contracts: Evidence: Proof.** When the existence and terms of an oral contract have been established by clear, satisfactory, and unequivocal evidence, the contract is nonetheless unenforceable unless it is also proved by clear, satisfactory, and unequivocal evidence that there has been such performance as the law requires.
10. **Contracts: Specific Performance: Real Estate.** In an action for specific performance of an oral contract to convey real estate where partial performance is relied upon to avoid the defense of the statute of frauds, the acts constituting performance must be such as are referable solely to the contract sought to be

enforced, and not such as might be referable to some other and different contract or relation.

11. **Contracts.** The unconscionability of a contract provision presents a question of law.
12. **Contracts: Words and Phrases.** When considering whether an agreement is unconscionable, the term "unconscionable" means manifestly unfair or inequitable.
13. **Contracts.** A contract can be either procedurally or substantively unconscionable.
14. **Contracts: Words and Phrases.** Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh, while procedural unconscionability relates to impropriety during the process of forming a contract.
15. **Contracts.** A contract is not substantively unconscionable unless the terms are grossly unfair under the circumstances that existed when the parties entered into the contract.

Appeal from the District Court for Gage County: PAUL W. KORSLUND, Judge. Affirmed.

Lyle J. Koenig, of Koenig Law Firm, for appellant.

Bradley A. Sipp for appellee.

INBODY, RIEDMANN, and BISHOP, Judges.

RIEDMANN, Judge.

INTRODUCTION

Gilbert Wolken appeals from the order of the district court for Gage County which ordered specific performance of an oral contract for the transfer of land from Wolken to Gerald Ficke. Because we find that the evidence establishes that the oral contract falls within an exception to the statute of frauds, we affirm.

BACKGROUND

This case arises out of an alleged oral promise by Wolken to give Ficke 80 acres of farmland after Ficke had worked for Wolken for 10 years. A bench trial was held in the district court, during which the following evidence was adduced:

Ficke began working for Wolken as a farmhand on January 10, 2000. His duties included tending to cattle, maintenance, mechanical work, and other activities associated with farming. Ficke typically worked between 40 and 60 hours per week,

depending on the season, and was "on-call" at all times. He was often called in to work on weekends, after midnight, and during his vacations, but was compensated for his overtime hours. Although his starting wage was only $7.50 per hour, his rate of pay increased to $14.75 per hour by September 2010. He also received bonuses at Christmastime that totaled anywhere from $500 to $2,000.

During the early spring of 2003, Wolken told Ficke that he would give him a specific 80 acres of farmland after Ficke had worked for him for 10 years. Although the agreement was not reduced to writing, they talked about it many times over the years. Wolken would often remind Ficke in January how many years were remaining until he would get the land. For example, in January 2008, Wolken told Ficke, "[T]wo more years and [that 80 acres is] yours."

According to Ficke, on January 10, 2010, Wolken told him that he had completed his 10 years and that the 80 acres was his. Although Wolken did not sign over the land to Ficke, he started treating it like it belonged to Ficke. For example, after harvest that year, Wolken directed the cooperative where Wolken stored his grain to pay Ficke 40 percent of the wheat proceeds from that 80 acres as rent. Ficke received a check from the cooperative dated July 14, 2010, for over $5,000. Wolken admitted that he directed the cooperative to issue the check to Ficke, but stated the following reason for doing so: "I thought he could perform better on his job, that he'd settle down and make a man of himself. . . . You do things sometimes to get a guy on the right track." According to Wolken, the check was a bonus payment.

Ficke also testified that Wolken told him in 2010 that he would need to start paying the taxes on the land. Although Ficke never paid any of the taxes, he testified that he offered to do so many times but that Wolken was unsure of the amount. Wolken repeatedly told him not to worry about it and that they would get it straightened out later.

Ficke testified that he had considered quitting his job with Wolken because he worked constantly, had no family life, and had no health insurance for 5 or 6 years. He further testified that he thought he "could do better," but that "80 acres after

ten years isn't a bad deal either." When asked why he stayed working for Wolken, Ficke stated: "Well, 80 acres, and farming, that's what I loved. I loved to farm. And after the ten years, a bonus like that is something that a person works for." However, Ficke also admitted that he needed to earn a living and that he was working to support his family.

Ficke testified that he received one offer of employment during the time he worked for Wolken, but that it offered a lower wage than he was earning at that time. Ficke acknowledged that he worked substantially the same hours the entire period of time he worked for Wolken and that his wages increased over that time.

Wolken terminated Ficke's employment on September 28, 2010. According to Wolken, Ficke's employment was terminated due to his temper and the fact that he got "tangled up with [Wolken's] wife." Ficke testified that Wolken called him a couple of days later and apologized for letting him go. Wolken told Ficke that Wolken could not believe Wolken would let a woman come "between a working relationship like" theirs.

A couple of weeks later, Ficke stopped by Wolken's place to pick up his property. According to Ficke, Wolken told him at that time that he was trying to figure out how he could purchase the 80 acres from Ficke without either of them having to pay too much in taxes. Their conversation was interrupted by Wolken's wife, and they never spoke about it again.

Wolken admitted that in 2003, he promised Ficke the 80 acres "if he fulfilled his job" of providing "good decent help" for 10 years. According to Wolken, he made the promise in order to give Ficke "a better attitude on the job" but Ficke did not work for him for 10 years after that promise was made. Wolken's sister and neighbor testified, however, regarding conversations that took place in 2010 in which Wolken stated that he had given the 80 acres to Ficke for working for him for 10 years.

The district court ruled in favor of Ficke, finding that Ficke's testimony was "completely credible." It found that Ficke had established an oral contract by clear and unequivocal evidence and that an equitable exception to the statute of

frauds applied because Ficke had performed his part of the contract and such performance was solely referable to the contract sought to be enforced. It determined that Ficke was entitled to specific performance of the oral contract, but ordered further hearing to obtain an adequate legal description of the tract of land in question. After the parties stipulated to the land's legal description, the court awarded the land to Ficke. Wolken timely appeals.

ASSIGNMENTS OF ERROR

Wolken assigns that the district court erred in (1) finding that Ficke established the terms of an oral contract by clear, satisfactory, and unequivocal evidence; (2) finding that Ficke proved by clear, satisfactory, and unequivocal evidence that his performance of the alleged oral contract was referable solely to the alleged oral contract and not to some other contract or relation; and (3) failing to find that the alleged oral contract was unenforceable as against public policy.

STANDARD OF REVIEW

[1-3] An action for specific performance sounds in equity. *Sayer v. Bowley*, 243 Neb. 801, 503 N.W.2d 166 (1993). When an equity case is appealed from the district court, the appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court. *Id*. When the evidence conflicts, however, the appellate court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Id*.

ANALYSIS

[4,5] It is the general rule that an oral agreement for the transfer of title to real estate is voidable under the statute of frauds. *Hackbarth v. Hackbarth*, 146 Neb. 919, 22 N.W.2d 184 (1946); Neb. Rev. Stat. §§ 36-103 and 36-105 (Reissue 2008). A well-known exception to that rule, however, is that specific performance of an oral agreement to convey real estate will be enforced by a court of equity where one party has wholly performed his part thereof and the other party has not performed his part, and its nonperformance on the one

hand would amount to a fraud on the party who has fully performed it. *Hackbarth v. Hackbarth, supra*. Because the agreement before us was not reduced to writing, it is subject to the statute of frauds and therefore unenforceable, unless it falls within the exception for part performance.

[6] A party seeking specific performance of an oral contract for the sale of real estate upon the basis of part performance must prove an oral contract, the terms of which are clear, satisfactory, and unequivocal, and that the acts done in part performance were referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract, and further that nonperformance by the other party would amount to a fraud upon the party seeking specific performance. *American Central City v. Joint Antelope Valley Auth.*, 281 Neb. 742, 807 N.W.2d 170 (2011).

Existence and Terms of Oral Contract.

[7] In an action for specific performance of an oral contract to convey real estate where partial performance is relied upon to avoid the defense of the statute of frauds, the evidence of the alleged contract and its terms must be clear, satisfactory, and unequivocal. *Theobald v. Agee*, 202 Neb. 524, 276 N.W.2d 191 (1979).

[8] Upon our review of the evidence, Ficke has met his burden of proving the existence of an oral agreement and its terms by clear, satisfactory, and unequivocal evidence. Ficke testified that Wolken agreed to give him a certain 80 acres of land after he had worked for him for 10 years. Although their initial agreement did not specify when the 10-year period began, Ficke assumed that it began when he started working for Wolken in January 2000, which was confirmed by Wolken's subsequent conduct. See *Hoeft v. Five Points Bank*, 248 Neb. 772, 780, 539 N.W.2d 637, 644 (1995) ("'"mutual understanding . . . sufficient to establish [the terms of] a contract . . . may be implied from conduct [of the parties] and the surrounding circumstances"'").

Wolken and Ficke spoke about the agreement many times over the years, and Wolken would often remind Ficke in January regarding the number of years remaining until he

would get the land. Ficke testified that on January 10, 2010, Wolken told him he had completed his 10 years and the 80 acres was his. Ficke testified that although Wolken did not deliver the deed to the land to Ficke, Wolken shared the proceeds of the harvest with him as rent and told him that he needed to pay taxes on the land. Wolken acknowledged that he made this agreement with Ficke, but denied that the cooperative check was for rent. Two uninterested witnesses, however, testified that Wolken told them in 2010 that he had given the land to Ficke for working for him for 10 years. Thus, we conclude that Ficke met his burden of establishing both the existence of the oral contract and its terms by clear, satisfactory, and unequivocal evidence.

"Solely Referable" to Oral Contract.

[9,10] Even when the existence and terms of an oral contract have been established by clear, satisfactory, and unequivocal evidence, the contract is nonetheless unenforceable unless it is also proved by clear, satisfactory, and unequivocal evidence that there has been such performance as the law requires. See *Theobald v. Agee, supra*. The acts constituting performance must be such as are referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract or relation. *Id*. The performance must be something that the claimant would not have done "unless and on account of the contract and with the direct view to its performance so that nonperformance by the other party would amount to fraud upon him." *Id*. at 531, 276 N.W.2d at 195.

Wolken relies primarily on two Nebraska Supreme Court cases to support his argument that Ficke did not prove that his continued employment was referable solely to the oral promise. See *In re Estate of Layton*, 212 Neb. 518, 323 N.W.2d 817 (1982), and *Theobald v. Agee, supra*.

In *In re Estate of Layton*, an employee of the decedent's hardware store filed a claim against the decedent's estate, alleging that during the last 10 years of the decedent's life, he had promised the employee on numerous occasions that he would execute a will leaving the hardware store to the

employee in return for the employee's "long and faithful service" at that store. 212 Neb. at 519, 323 N.W.2d at 818. The evidence at trial showed that the employee had worked at the hardware store for 50 years and that in response to the employee's having been offered two other job opportunities which he declined, the decedent promised the employee that the store and inventory would be his when the decedent reached the age of 65. The employee testified that he remained working at the store 6 days a week for 10 hours per day, at what he felt were low wages, because of the decedent's promise. However, the evidence showed that the promise was altered several times prior to the decedent's death.

A jury returned a verdict in favor of the employee. The Nebraska Supreme Court reversed the jury's verdict, basing the reversal in part on its finding that the employee failed to show that his continued service was referable solely to the alleged oral promise. The court relied heavily on the employee's admission that he did nothing more after the promise was made than he had been doing prior to the promise. It further reasoned:

> We must note that the [employee] continued to be compensated for his services following the making of the purported agreement and received annual raises in that compensation. There is not evidence in the record, other than the [employee's] bare assertions, to indicate that the [employee] was being undercompensated for the work he was doing. Consequently, the [employee] has by his own admission made it impossible to distinguish between his performance rendered under his employment contract and his performance rendered under the alleged agreement at issue herein. We are unable to draw such a distinction and therefore must conclude that the [employee] has failed to prove that his performance following the making of the alleged agreement was "'not such as might have been referable to some other or different contract.'"

In re Estate of Layton, 212 Neb. at 530, 323 N.W.2d at 823.

In *Theobald v. Agee*, 202 Neb. 524, 276 N.W.2d 191 (1979), the owner of a farm equipment company allegedly promised

two of his employees that he would leave them an interest in a farm he owned if they would remain in his employ. The plaintiff continued working for the company until it was sold approximately 6 years later. The owner subsequently died and left nothing to the two employees in his will. The plaintiff sought specific enforcement of the oral promise based on his continued employment and the fact that his wages had decreased after the contract was made.

The Nebraska Supreme Court affirmed the trial court's ruling that the plaintiff failed to show that his continued employment was solely referable to the promise of land. It noted, contrary to the plaintiff's argument, that the plaintiff's total income actually increased after the contract was made due to the payment of bonuses. Further, the court found no evidence indicating that the plaintiff's performance was any different after the alleged agreement than it was prior thereto and no evidence that the plaintiff had ever threatened to resign either prior to or at the time of the alleged agreement. Therefore, the court found that the plaintiff's continued employment was equally referable to his employment contract with the company and that the alleged agreement therefore did not fall within an exception to the statute of frauds.

What we glean from these two cases is that it is incumbent upon the plaintiff to prove the sole reason he continued in his employment was to attain what was promised and that it is insufficient if the evidence fails to prove the promise was the enticement for the continued employment. Like the employees in *In re Estate of Layton*, 212 Neb. 518, 323 N.W.2d 817 (1982), and *Theobald v. Agee, supra*, Ficke was employed in a manner substantially the same both before and after the oral promise was made, he continued to receive compensation for his work with annual raises and bonuses, and he never rejected other job opportunities because of the promise. However, unlike the testimony of the employees in those two cases, Ficke's testimony supports a conclusion that the sole reason he continued his employment was to attain the land that was promised. During trial, the following testimony was adduced from Ficke:

> [Ficke's counsel:] During this ten-year, nine-month span of time that you worked for . . . Wolken, did you ever think about quitting?
>
> [Ficke:] Oh, yes.
>
> Q. Why?
>
> A. Well, I worked constantly. I had no family life, insurance. I had no health insurance for, I don't know, five, six years. I just, you know, I always thought, you know, that I could do better, but then in the back of me [sic] mind, yeah, 80 acres after ten years isn't a bad deal either.
>
> Q. Did you ever decide to stay working for . . . Wolken because of his promise?
>
> [Wolken's counsel]: We will object on the ground that it's leading and suggestive, Your Honor.
>
> THE COURT: Sustained.
>
> [Ficke's counsel:] Well, you testified that you thought about quitting before. Why did you stay with him?
>
> [Ficke:] Well, 80 acres, and farming, that's what I loved. I loved to farm. And after the ten years, a bonus like that is something that a person works for.

Although the court prevented Ficke from testifying to the ultimate question of whether he continued working for Wolken because of the promise, Ficke's testimony proves that obtaining the 80 acres was the reason he did not quit. We further note that although our review is de novo, we are not precluded from giving weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying. *In re Estate of Layton, supra*. The trial judge indicated in his order that he found Ficke to be "completely credible," and this further supports our conclusion that the trial court did not err in finding that Ficke's continued employment was solely referable to the promise of receiving the 80 acres.

Public Policy.

Wolken argues that the alleged oral argument was unenforceable as against public policy because the value of the land was $640,000. He claims it would be unconscionable for Ficke to receive this much, since his only "'consideration'" was his

continued employment, for which he was compensated by salary and bonus. Brief for appellant at 19. We disagree.

[11-14] The unconscionability of a contract provision presents a question of law. *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006). When considering whether an agreement is unconscionable, the term "unconscionable" means manifestly unfair or inequitable. *Id*. A contract can be either procedurally or substantively unconscionable. *Adams v. American Cyanamid Co*., 1 Neb. App. 337, 498 N.W.2d 577 (1992). "'Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh, while procedural unconscionability relates to impropriety during the process of forming a contract.'" *Id*. at 356, 498 N.W.2d at 590, quoting *Schroeder v. Fageol Motors*, 86 Wash. 2d 256, 544 P.2d 20 (1975).

[15] Based upon Wolken's argument that the agreement provides a "windfall" to Ficke, brief for appellant at 19, we construe his position as that of substantive unconscionability. A contract is not substantively unconscionable unless the terms are grossly unfair under the circumstances that existed when the parties entered into the contract. *Adams v. American Cyanamid Co., supra*.

According to the evidence, the spring of 2003 is when Wolken made the promise to convey the land. To determine if a contract is substantively unconscionable, we view the contract at the time it was made. There is no evidence as to the value of the land promised as of the spring of 2003, and the present value of the land, to which the parties stipulated, does not provide any insight into its value in 2003. Moreover, the evidence reveals that the promise was for 80 acres; Wolken owns 700 acres and rents another 200. He also owns 875 head of cattle and has a substantial farming operation. The relationship between Wolken and Ficke was not only that of employer and employee, but also that of "[v]ery good friends." Ficke testified that his family and Wolken would go together to concerts and family activities and dine and fish together. Therefore, while the promise of 80 acres may appear generous, given the facts and circumstances of this case, it does not rise to the level of unconscionable. The

trial court did not err in refusing to invalidate the agreement as unconscionable.

CONCLUSION

Upon our de novo review of the record, we find that Ficke met his burden of proving both the existence of the oral contract and its terms by clear, satisfactory, and unequivocal evidence. We also conclude that he sufficiently proved that his performance was solely referable to the oral contract. We determine that the contract was not unconscionable, and we affirm the district court's order.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. AARON P. BROOKS, APPELLANT.

858 N.W.2d 267

Filed December 9, 2014. No. A-14-246.

1. **Sentences: Prior Convictions: 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.
2. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
3. **Sentences: Probation and Parole.** It is within the discretion of the trial court whether to impose probation or incarceration.
4. **Prior Convictions: Proof.** In a proceeding to enhance a punishment because of prior convictions, the State has the burden of proving such prior convictions by a preponderance of the evidence.
5. **Sentences: Prior Convictions: Evidence: Proof.** On an appeal of a sentence enhancement hearing, an appellate court views and construes the evidence most favorably to the State.
6. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
7. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.

8. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
9. **Appeal and Error.** An appellate court may, at its option, notice plain error.
10. ____. Plain error must be not only plainly evident from the record but also of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, or fairness of the judicial process.
11. **Sentences.** A sentence is illegal when it is not authorized by the judgment of conviction or when it is greater or less than the permissible statutory penalty for the crime.
12. **Sentences: Appeal and Error.** An appellate court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one is pronounced.

Appeal from the District Court for Buffalo County: WILLIAM T. WRIGHT, Judge. Affirmed in part, and in part vacated and remanded for resentencing.

Brandon J. Dugan, Deputy Buffalo County Public Defender, for appellant.

Jon Bruning, Attorney General, George R. Love, and Mary C. Byrd, Senior Certified Law Student, for appellee.

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

INBODY, Chief Judge.

INTRODUCTION

Aaron P. Brooks appeals his plea-based conviction for refusal to submit to a chemical test enhanced by two prior convictions and the sentence imposed thereon. We reject Brooks' argument that mitigating facts brought to the attention of the district court by a defendant pursuant to Neb. Rev. Stat. § 60-6,197.02(3) (Cum. Supp. 2014) are used by the court in determining whether an otherwise valid prior offense should be used for the purpose of enhancement. However, because the sentence imposed by the court failed to impose a mandatory fine, we vacate Brooks' sentence and remand the matter for resentencing.

STATEMENT OF FACTS

Pursuant to a plea agreement, Brooks, who was represented by counsel, pled no contest to an amended information

charging him with refusal to submit to a chemical test with two prior convictions, a Class IIIA felony. Brooks pled to the underlying charge of refusal to submit, but reserved the right to contest his prior convictions to be used for the purpose of enhancement. Pursuant to the plea agreement, the State also agreed to dismiss a county court case charging Brooks with driving during revocation and no proof of insurance. The State provided a factual basis setting forth that on May 31, 2013, at 1 a.m., a Kearney police officer conducted a traffic stop of Brooks' vehicle. Upon making contact with Brooks, who was driving, the officer noticed a strong odor of an alcoholic beverage coming from Brooks, who also showed impairment on field sobriety tests. Brooks' breath alcohol content was determined to be .17 grams of alcohol per 210 liters of breath on a preliminary breath test. Following the postarrest chemical test advisement, Brooks refused to submit to a chemical test. The court found that a factual basis existed for Brooks' plea, accepted Brooks' plea, and found him guilty of the underlying refusal to submit to a chemical test charge.

At the enhancement hearing, the State introduced into evidence certified copies of Brooks' 2001 and 2003 convictions for second-offense driving under the influence, which certified copies also established that Brooks was represented by counsel at the time of both his pleas and his sentencings. Brooks' counsel then sought to submit mitigating circumstances as part of the enhancement hearing, which he was allowed to do, requesting that the court take judicial notice of the current version of § 60-6,197.02, as well as the driving under the influence statutes that were in effect at the time of Brooks' two prior driving under the influence convictions. The court agreed to take judicial notice of the requested statutes. The district court found that there had been two prior convictions that should be counted for the purposes of enhancement and proceeded to the sentencing hearing. The court stated that it was considering as mitigation of Brooks' sentence the fact that his previous convictions were approximately 12 and 14 years prior to the current offense. The court further stated that

he would generally send someone with Brooks' history and background to prison for 2 to 6 years; however, the court was going against its usual policy due to the probation officer's recommendation of probation and the State's indication that it was willing to accept a sentence of probation. The court then sentenced Brooks to 4 years' probation with various conditions, including 90 days' incarceration commencing immediately with work release allowed. Brooks was ordered to abstain from alcohol and complete 120 days of continuous alcohol monitoring. Brooks was also ordered to serve an additional 90 days' incarceration incrementally, on the recommendation of probation and the order of the court. Additionally, following Brooks' release from jail, he was to serve a 45-day no-driving period, after which he could obtain an ignition interlock permit and installation of an ignition interlock device. Brooks' license was revoked for a period of 5 years. The court did not order Brooks to pay a fine.

ASSIGNMENTS OF ERROR

On appeal, Brooks' assignments of error, consolidated and restated, are that the trial court erred in failing to consider mitigating facts before finding that an otherwise valid prior conviction would be used for enhancement and failing to find that his prior convictions should not have been used to enhance his sentence. He also contends that the sentence imposed upon him was excessive.

Brooks also assigns as error that the district court erred in failing to articulate its general findings regarding the imposition of his sentence and the enhancement of his sentence with specificity and consistency and in making factual findings that were clearly erroneous. However, Brooks' brief does not argue these assignments of error; rather, he merely restates the assignment of error and refers the court to previous sections in his brief. An argument that does little more than to restate an assignment of error does not support the assignment, and an appellate court will not address it. *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014). Thus, we decline to address these two assignments of error.

STANDARD OF REVIEW

[1] 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. Mitchell*, 285 Neb. 88, 825 N.W.2d 429 (2013); *State v. Garcia*, 281 Neb. 1, 792 N.W.2d 882 (2011).

[2,3] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Rieger*, 286 Neb. 788, 839 N.W.2d 282 (2013); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013). It is within the discretion of the trial court whether to impose probation or incarceration. *State v. Rieger, supra*; *State v. Wills*, 285 Neb. 260, 826 N.W.2d 581 (2013).

ANALYSIS

Enhancement of Sentence.

Brooks contends that the district court erred in determining that there were valid prior convictions that enhanced his sentence. We note that Brooks does not argue that his prior convictions were invalid; instead, Brooks argued to the district court, and argues on appeal, that under § 60-6,197.02(3), the district court was allowed to consider mitigating facts before finding that a particular prior conviction would be used for enhancement, and that there were sufficient mitigating facts in his case, e.g., the length of time between the prior convictions and his current offense, such that his prior convictions should not have been used to enhance his sentence.

[4,5] In a proceeding to enhance a punishment because of prior convictions, the State has the burden of proving such prior convictions by a preponderance of the evidence. *State v. Taylor*, 286 Neb. 966, 840 N.W.2d 526 (2013). On an appeal of a sentence enhancement hearing, we view and construe the evidence most favorably to the State. *Id*.

In the instant case, the State introduced into evidence certified copies of Brooks' 2001 and 2003 convictions for second-offense driving under the influence, which certified copies also established that Brooks was represented by counsel at the time of both his pleas and his sentencings. Brooks does not dispute that these convictions were within the 15-year period prior to the offense for which the sentence was being imposed as required by § 60-6,197.02(1)(a) and (c). Further, although the Nebraska Supreme Court has construed the language of § 60-6,197.02(3) as permitting within limits a challenge based upon denial of the Sixth Amendment right to counsel, Brooks has not challenged the validity of his previous convictions on this basis and the records clearly show he was represented by counsel at the time of previous convictions and the sentencings thereon. See, *State v. Scheffert*, 279 Neb. 479, 778 N.W.2d 733 (2010); *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999). Thus, the State made a prima facie showing that Brooks' 2001 and 2003 convictions were valid for the purposes of enhancement.

Once the State makes a prima facie showing that a defendant's convictions are valid for purposes of enhancement, "[t]he convicted person shall be given the opportunity to review the record of his or her prior convictions, bring mitigating facts to the attention of the court prior to sentencing, and make objections on the record regarding the validity of such prior convictions." § 60-6,197.02(3). Brooks claims that this statutory language supports his position that a court can use mitigating facts to determine that an otherwise valid prior conviction should not be used for enhancement.

[6-8] Statutory language is to be given its plain and ordinary meaning, and this court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *State v. Taylor, supra*. It is not within the province of this court to read a meaning into a statute that is not warranted by the legislative language. *Id*. Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by

the court below. *Id.*; *State v. Abdulkadir*, 286 Neb. 417, 837 N.W.2d 510 (2013).

Pursuant to the statutory language contained in § 60-6,197.02(3), the defendant may "bring mitigating facts to the attention of the court prior to sentencing." However, the statute does not provide that the mitigating facts presented by the defendant would be considered by the court in determining whether otherwise valid prior convictions would be used to enhance a defendant's sentence. Since the statute specifically provides that the defendant may "bring mitigating facts to the attention of the court prior to sentencing," when this language is given its plain and ordinary meaning, the language is properly interpreted that the mitigating facts offered by the defendant may be considered by the court in determining the imposition of a sentence appropriate for that particular defendant. Because we reject Brooks' argument that mitigating facts are considered by the district court in determining whether an otherwise valid prior conviction should be used for the purposes of enhancement, we likewise reject his claim that the district court erred in failing to find that there were sufficient mitigating facts such that his prior convictions should not have been used to enhance his sentence.

Excessive Sentence.

Brooks contends that the length of his sentence of 4 years' probation is excessive as applied to him because of mitigating factors including (1) the length of time between his previous offenses and the current offense, (2) his age, and (3) his long-term employment as a foreman/superintendent with a construction company that requires extensive travel throughout the United States, which employment he contends he will be forced to change during the time he is on probation. We do not reach the merits of Brooks' claims regarding the excessiveness of his sentence, because we find plain error with his sentence in that the court failed to impose a mandatory fine.

[9,10] An appellate court may, at its option, notice plain error. *Wayne G. v. Jacqueline W.*, 288 Neb. 262, 847 N.W.2d 85 (2014). Plain error must be not only plainly evident from

the record but also of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, or fairness of the judicial process. *Id*.

Brooks was convicted of refusal to submit to a chemical test enhanced by two prior convictions, and the district court sentenced him to 4 years' probation. Brooks' probation term is within the statutory sentencing range. See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014) (Class IIIA felonies punishable by up to 5 years' imprisonment and/or $10,000 fine). However, since the court sentenced Brooks to probation, the statutory requirements of Neb. Rev. Stat. § 60-6,197.03(6) (Cum. Supp. 2012) are also applicable.

Section 60-6,197.03(6) provides that if a person has two prior convictions and the court places the person on probation,

> the court shall, as one of the conditions of probation or sentence suspension, order that the operator's license of such person be revoked for a period of at least five years but not more than fifteen years from the date ordered by the court. The revocation order shall require that the person not drive for a period of forty-five days, after which the court may order that during the period of revocation the person apply for an ignition interlock permit and installation of an ignition interlock device . . . . Such order of probation or sentence suspension shall also include, as conditions, the payment of a one-thousand-dollar fine, confinement in the city or county jail for sixty days, and, upon release from such confinement, the use of a continuous alcohol monitoring device and abstention from alcohol use at all times for no less than sixty days.

In the instant case, the court revoked Brooks' license for 5 years; required that he not drive for a period of 45 days, after which he could apply for an ignition interlock permit and installation of an ignition interlock device; ordered confinement for 90 days with an additional 90 days' confinement ordered to be served incrementally, on the recommendation of probation and the order of the court; and ordered him to abstain from alcohol and complete 120 days of continuous alcohol

monitoring. However, when the court sentenced Brooks to probation, it was also required by § 60-6,197.03(6) to impose a $1,000 fine, and it failed to do so.

[11] A sentence is illegal when it is not authorized by the judgment of conviction or when it is greater or less than the permissible statutory penalty for the crime. *State v. Alba*, 13 Neb. App. 519, 697 N.W.2d 295 (2005).

[12] Inasmuch as this court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one is pronounced, see *State v. Conover*, 270 Neb. 446, 703 N.W.2d 898 (2005), we vacate the sentence imposed for third-offense refusal to submit to a chemical test and remand the matter for imposition of the sentence required by law.

CONCLUSION

We reject Brooks' claim that mitigating facts brought to the attention of the court by a defendant pursuant to § 60-6,197.02(3) are used by the district court in determining whether an otherwise valid prior offense should be used for the purpose of enhancement. Therefore, we affirm his conviction. However, because we find that the court imposed an illegal sentence by failing to impose a statutorily required fine, we vacate Brooks' sentence and remand the matter for imposition of the sentence required by law.

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

AARON E. ROMMERS, APPELLANT, V. ELIZABETH S. ROMMERS, APPELLEE.

858 N.W.2d 607

Filed December 16, 2014. No. A-14-119.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these

determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.

2. **Visitation: Appeal and Error.** Parenting time determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
3. **Child Support: Taxation: Appeal and Error.** An award of a dependency exemption is reviewed de novo to determine whether the trial court abused its discretion.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
5. **Evidence: Appeal and Error.** When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
6. **Child Custody.** The standard for determining custody is parental fitness and the child's best interests.
7. ____. In determining the best interests of the child in a custody determination, a court must consider, at a minimum, (1) the relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing; (2) the desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning; (3) the general health, welfare, and social behavior of the minor child; and (4) credible evidence of abuse inflicted on any family or household member. Other pertinent factors include the moral fitness of the child's parents, including sexual conduct; respective environments offered by each parent; the age, sex, and health of the child and parents; the effect on the child as a result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; and the parental capacity to provide physical care and satisfy educational needs of the child.
8. **Evidence: Appeal and Error.** When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
9. **Child Custody.** The custodial parent must satisfy the court that there is a legitimate reason for leaving the state and that it is in the minor child's best interests to continue to live with that parent.
10. **Child Custody: Visitation.** There are three broad considerations to consider whether removal from the state is in the children's best interests: (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the children and the custodial parent; and (3) the impact such a move will have on the contact between the children and the noncustodial parent, when viewed in the light of reasonable visitation.
11. ____: ____. The purpose of requiring a legitimate reason for removing children from the state is to prevent the custodial parent from relocating because of an ulterior motive, such as frustrating the noncustodial parent's visitation rights.

12. ____: ____. A reasonable visitation arrangement should provide a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent.

Appeal from the District Court for Holt County: MARK D. KOZISEK, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Joel E. Carlson, of Stratton, DeLay, Doele, Carlson & Buettner, P.C., L.L.O., for appellant.

Lori McClain Lee, of Legal Aid of Nebraska, for appellee.

INBODY, RIEDMANN, and BISHOP, Judges.

INBODY, Judge.

INTRODUCTION

Aaron E. Rommers appeals the order of the Holt County District Court dissolving his marriage to Elizabeth S. Rommers and awarding her custody of the parties' minor child in Arizona. For the reasons that follow, we affirm in part, and in part reverse and remand the matter back to the district court for further proceedings.

STATEMENT OF FACTS

Aaron and Elizabeth were married in February 2010. Of that marriage, one minor child, Samantha Rommers, was born in June 2012. On January 2, 2013, Aaron filed a complaint for dissolution asserting that the marriage between himself and Elizabeth was over and that both parties were fit and proper to have custody of Samantha. The complaint further asserted that Elizabeth and Samantha had been living in Arizona since December 4, 2012. The complaint requested that the court dissolve the parties' marriage, divide the property and debts, and award the parties joint physical and legal custody of Samantha.

Elizabeth filed an answer and counterclaim alleging that an ongoing custody case had been filed on December 7, 2012, in the Superior Court of Pinal County, Arizona, in which Elizabeth had been granted temporary emergency custody of Samantha. Elizabeth's counterclaim requested that the court

dissolve the parties' marriage, divide the property and debts, and award Elizabeth custody and child support. The proceedings initiated in Arizona were later dismissed, and all further proceedings were held in Nebraska.

At trial in December 2013, various family members for both parties testified. Aaron testified that he married Elizabeth in 2010 and that he, Elizabeth, and Samantha lived in the same home where he still resides in Ewing, Nebraska. Aaron testified that he has lived in Ewing his entire life and that he has a large family which also lives in the area. Aaron testified that he had family and community support and wanted to have Samantha in his life.

Aaron testified that during the marriage, he shared parental responsibilities with Elizabeth and would help out whenever he could with both Samantha and household duties such as cooking and cleaning. Aaron was employed full time and has continued to maintain that employment throughout the proceedings, earning $17.84 per hour.

Aaron testified that Elizabeth left the family home with Samantha on December 3, 2012. Aaron explained that Elizabeth did not return any of his text messages that day and that when he arrived home from work, she and Samantha were gone. Aaron learned that Elizabeth was in Arizona when he saw that she had used a debit card from his checking account in that area. Sometime thereafter, Aaron spoke with Elizabeth, who indicated that she and Samantha would not be returning to Nebraska. Aaron testified that the distance from his home to where Elizabeth and Samantha reside in Arizona is 1,400 miles one way. Aaron testified that he attempted to make arrangements with Elizabeth to see Samantha, but that Elizabeth refused until June 2013, when she gave him permission to make a trip to Arizona before Samantha's first birthday. On June 17, Aaron made the 24-hour car trip to Arizona, where he spent four nights. Elizabeth did not allow Aaron to see Samantha on the first day he was in Arizona, but did allow about 3 hours per day thereafter, broken into two times per day. Aaron testified that either Elizabeth, her brother, or her sister-in-law was present at all of the visits. Aaron testified that the total expenses for the trip equated to $1,200 and

that making that trip again would be very financially difficult for him. Aaron testified that he has not made any further trips to Arizona, but had recently begun to have "Skype visit[s]" with Samantha over the Internet.

Aaron testified that initially, when Elizabeth left him, he attempted to support her by putting money in his checking account for her to access, but was unable to continually provide that type of support because he had been sued on several debts and had his wages garnished.

Aaron testified that he believed Elizabeth left him because she was upset by a picture and e-mail he received of another woman, but that he did not have any Internet communications with other women. Aaron testified that he had been frustrated at times when Samantha was an infant because she was colicky and it was difficult for both him and Elizabeth to soothe Samantha, but that he had not lost his patience with her. He refuted Elizabeth's accusations that he had lashed out against property in moments of frustration.

Aaron's aunt testified that she had observed Aaron with Samantha in the months after her birth and that he positively interacted with Samantha and was a proud father. Aaron's aunt had not seen Samantha since September 2012.

Aaron's mother, Laura Rommers, testified that Aaron owns his own home, which was approximately four blocks from her home, and that it is a two-bedroom, one-bathroom home where he had lived with Elizabeth and Samantha during the marriage. Laura testified that Aaron took care of Samantha and shared parental and household responsibilities with Elizabeth. Laura testified that Elizabeth breastfed Samantha and that there were not many occasions when Aaron could feed Samantha. Laura also observed him changing diapers and bathing Samantha. Laura testified that after Samantha was born, Aaron worked full time and Elizabeth became a stay-at-home mother. Laura testified that in December 2012, Elizabeth took Samantha with her to Arizona and did not return to Nebraska, and that since that time, Aaron has been sad and more quiet than normal. Laura testified that Aaron has a large family and support in the area and that Aaron should have custody of Samantha

because he loves Samantha and would do everything he could for her.

Elizabeth testified that she grew up in an Amish community and met Aaron on a "Farmers Only" Web site "chat room." Elizabeth testified that she has 10 siblings, none of whom live in Nebraska. In September 2009, Elizabeth moved to Nebraska to live with Aaron and worked full time as a manager at a grocery store, earning $8 per hour, until shortly before giving birth to Samantha. Elizabeth did not return to any type of employment until moving to Arizona.

After Samantha's birth, Elizabeth stayed at home as the primary caregiver and Aaron worked a full-time job. Elizabeth testified that Aaron did not assist her with Samantha and became easily frustrated because of Samantha's colic, often yelling at Samantha to shut up. Elizabeth testified that on one occasion, Aaron became so frustrated he punched a dent into a wall and said he was done being a father. Elizabeth described Aaron as often aggressive and destructive of property in frustration. Elizabeth testified that Aaron spent "quite a bit of time" at home on the computer and that she was worried about leaving him alone with Samantha.

Elizabeth testified that she observed conversations that Aaron had with other women through e-mail and pictures on social media Web sites. Elizabeth believed that the conversations were inappropriate because she believed they were with younger women, but she did not know the ages of any of the women he had engaged with during online conversations. Elizabeth submitted evidence of one such conversation with Aaron's ex-girlfriend's sister, who Elizabeth testified was 12 or 13 years old, which involved an inappropriate picture of the girl. Elizabeth explained that she asked Aaron to stop communicating with other women, but that when he did not, she decided to leave.

Elizabeth left for Arizona on December 3, 2012, and she testified that she left Aaron a note and her wedding ring, but did not actually speak with him until the following day. Elizabeth testified that since moving to Arizona, she has lived with her brother and his wife, along with their six children,

who range in age from 7 to 15. The home has four bedrooms and three bathrooms, and Elizabeth and Samantha share a bedroom and bathroom. Elizabeth pays her brother $100 per month for both rent and childcare. Elizabeth testified that this residential situation is only temporary and that she hopes to be able to get her own place in the future. Elizabeth is employed as a cashier at a truckstop, earning $8.50 per hour and working approximately 30 hours a week. While Elizabeth works, her sister-in-law cares for Samantha, who gets along very well with her cousins.

Elizabeth testified that she has never refused Aaron visitation with Samantha if he was willing to travel to Arizona, but explained that she could not travel because she does not have a vehicle. Elizabeth testified that she has had frequent contact with Aaron and had also allowed Aaron visitation with Samantha during the time she and Samantha were in Nebraska for the trial proceedings. Elizabeth explained that she wanted supervised visitations between Aaron and Samantha because she was concerned with his temper and outbursts.

On December 30, 2013, the district court entered an order dissolving the parties' marriage. The court divided the parties' assets and debts, ordered no alimony, and ordered each party to pay his or her own costs and attorney fees. The court found that Elizabeth had moved to Arizona with Samantha before any proceedings were initiated in Nebraska, but determined that since there had been no previous custody determination, the court was not required to engage in a removal analysis under *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), insomuch as Elizabeth was not required to prove that she had a legitimate reason for leaving the state. However, the court found that although *Farnsworth* was not the requisite analysis, the factors of the *Farnsworth* analysis should be taken into account within the framework of a best interests analysis, and the court was still required to take into consideration the parents' reasons for seeking or opposing the move, the potential that the move holds for enhancing the quality of life for the child and custodial parent, and the impact the move will have on the child and noncustodial parent.

As to the motives of the parties, the trial court found that Elizabeth moved to Arizona with Samantha to live with her brother because she had reported Aaron to law enforcement after finding a picture of what she believed to be a young naked girl on his cell phone and due to his temper and aggressiveness. The court found that Aaron opposed the move because it would curtail his time with Samantha, but that the parties' motives favored the move to Arizona. The court further determined that the move to Arizona was not for better employment opportunities and that over the past year, Elizabeth had been working as a cashier for minimum wage without evidence of improvement, which factor weighed against the move. The court also found that both parties had large families and that while Samantha had a close relationship with Elizabeth's large family in Arizona, Samantha had little contact with Aaron's family, which weighed slightly against the move.

The court also engaged in a review of several other factors and found that the parties had both testified as to their family relationship and had given considerably different accounts. The court found that Elizabeth was the primary caregiver and provided for the majority of Samantha's needs and that Aaron helped, but was not the primary provider. The court found that Elizabeth had been taking care of Samantha with the help of family, but without much financial help from Aaron. The court found that because Samantha was very young, there was no evidence regarding her desires and wishes or of her general health, welfare, and social behavior. The court found that there was no credible evidence of child abuse, neglect, or domestic intimate partner abuse, but that Aaron had a temper and had acted out in a physical and aggressive manner which justified Elizabeth's concerns about leaving Aaron alone with Samantha.

The district court found that while there was no evidence concerning Elizabeth's moral fitness, there was evidence which called into question Aaron's moral fitness and did not reflect favorably thereon—such as pictures of a naked young girl and communications with young girls with sexual

innuendos—but that "[o]ther than Aaron's relationships with young girls, the evidence did not disclose any deficits in the attitude or stability of [either party's] character." The court found that Aaron lived alone and that Elizabeth and Samantha lived with her brother's family of eight in a four-bedroom home. The court further found that Samantha had not formed relationships because of her young age, and as such, the court was unable to conclude that any less-frequent contacts would be detrimental.

The court concluded that custody of Samantha with Elizabeth in Arizona, subject to visitation with Aaron, was in Samantha's best interests. The court ordered that due to Samantha's young age, if Aaron were to exercise any visitation with Samantha, it must be done in Arizona at Aaron's expense, citing evidence which rebutted the presumption of the application of the Nebraska Child Support Guidelines; it ordered a deviation of $75 per month for Aaron's travel expenses. The court ordered Aaron to pay $424 per month in child support. The court ordered Aaron to maintain health insurance for Samantha and ordered that after the first $480 of any calendar year's unreimbursed health care expenses for Samantha, for which Elizabeth was to be responsible, Aaron was to be responsible for 70 percent of any further such expenses and Elizabeth for 30 percent.

Specifically, as to Aaron's visitation, Aaron was awarded parenting time until Samantha was 5 years old on Christmas and during spring break in even-numbered years, on New Year's Day and during fall break in odd-numbered years, and for 1 continuous week of summer visitation. Once Samantha reached the age of 5, Aaron was awarded holiday parenting time in odd-numbered years during Easter, the Fourth of July, Thanksgiving, and New Year's Day and in even-numbered years during the Memorial Day weekend, the Labor Day weekend, Christmas, and Samantha's birthday. Furthermore, once Samantha reached the age of 5, Aaron was awarded visitation on Father's Day and Aaron's birthday and his summer visitation was extended to 6 continuous weeks. Aaron was also allowed to call and video chat with Samantha on

Sunday, Wednesday, and Friday of each week, for not less than 15 minutes.

Aaron filed a motion for new trial or, in the alternative, to alter and amend, which was denied by the district court. Aaron has timely appealed to this court.

ASSIGNMENTS OF ERROR

Aaron assigns that the district court erred by awarding custody of Samantha to Elizabeth, by ordering a parenting plan that restricts his parenting time with Samantha, in failing to find that Elizabeth's flight to another state was a factor in determining custody and parenting time, in failing to find that Elizabeth intentionally alienated Samantha from Aaron, in not providing a sufficient deviation in the child support calculation for transportation costs, and in failing to allocate the income tax exemption for Samantha.

STANDARD OF REVIEW

[1] In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion. *Mamot v. Mamot*, 283 Neb. 659, 813 N.W.2d 440 (2012).

[2] Parenting time determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. See *Rosloniec v. Rosloniec*, 18 Neb. App. 1, 773 N.W.2d 174 (2009).

[3] An award of a dependency exemption is reviewed de novo to determine whether the trial court abused its discretion. *Emery v. Moffett*, 269 Neb. 867, 697 N.W.2d 249 (2005).

[4] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Fitzgerald v. Fitzgerald*, 286 Neb. 96, 835 N.W.2d 44 (2013).

[5] When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Freeman v. Groskopf*, 286 Neb. 713, 838 N.W.2d 300 (2013).

ANALYSIS

Application of Coleman v. Kahler.

Both parties in this case focus on *Coleman v. Kahler*, 17 Neb. App. 518, 766 N.W.2d 142 (2009), which the district court relied upon in its order on the dissolution of the parties' marriage. The district court determined that the traditional removal analysis under *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), was not necessary in the custody determination at hand because there had been no prior custody order. Instead, the district court engaged in an analysis of the best interests of Samantha regarding placing custody with Elizabeth in line with the findings made in *Coleman*.

In *Coleman v. Kahler, supra*, a father and mother were in a relationship from which two children were born, but they were never married. Various orders regarding paternity and child support were entered, but no custody determinations were made, and the mother eventually moved with the children out of the state. *Id*. The trial court awarded custody of the parties' minor children to the mother, finding that it was in the best interests of the children to award the mother custody and to allow her to remove the children out of the state. *Id*. On appeal, the father asserted that the trial court erred in allowing the mother to remove the children and in denying his request for custody. *Id*. This court held that Nebraska's removal jurisprudence does not apply to a child born out of wedlock where there has been no prior adjudication addressing child custody or parenting time. *Id*.

Clearly, the facts of the present case differ from those of *Coleman v. Kahler, supra*, insofar as this case involves an original action for dissolution, as Aaron and Elizabeth had been married, and insofar as this was not a paternity action.

Therefore, the parties' focus and the district court's reliance on the findings of *Coleman* are misplaced. If the Nebraska court system were to allow litigants to mesh original custody determinations and removal determinations in such a way as has occurred in this case, it would allow parents to leave the state with children before any filing occurred and without any repercussions and would allow parents to avoid any scrutiny under a removal analysis. The trial court should have first entered an order regarding custody and then conducted a proper *Farnsworth* removal analysis, which would take into account an appropriate parenting plan in accordance with the custody determination and decision regarding removal and would also include a determination regarding child support and an award of the tax exemption. Cf. *Clinton M. v. Paula M.*, 21 Neb. App. 856, 844 N.W.2d 814 (2014), and *State on behalf of Savannah E. & Catilyn E. v. Kyle E.*, 21 Neb. App. 409, 838 N.W.2d 351 (2013) (in cases where noncustodial parent is seeking sole custody of minor child while simultaneously seeking to remove that child from jurisdiction, court should first consider whether material change in circumstances has occurred and, if so, whether change in custody is in child's best interests; if this burden is met, then court must make determination of whether removal from jurisdiction is appropriate).

Therefore, upon our de novo review of the record, the district court's and the parties' reliance upon *Coleman v. Kahler, supra*, was in error. We shall address the effect of this determination upon the district court's specific findings in turn.

Custody.

Aaron argues that the district court erred by awarding Elizabeth custody of Samantha subject to his rights of reasonable parenting time.

[6-8] The standard for determining custody is parental fitness and the child's best interests. See *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). Nebraska's Parenting Act states that it is in the best interests of the child to have a "safe, stable, and nurturing environment." Neb. Rev. Stat. § 43-2921 (Reissue 2008). In determining the best interests of the child

in a custody determination, a court must consider, at a minimum, (1) the relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing; (2) the desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning; (3) the general health, welfare, and social behavior of the minor child; and (4) credible evidence of abuse inflicted on any family or household member. Other pertinent factors include the moral fitness of the child's parents, including sexual conduct; respective environments offered by each parent; the age, sex, and health of the child and parents; the effect on the child as a result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; and the parental capacity to provide physical care and satisfy educational needs of the child. *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004). When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W.2d 528 (1999).

The record in this case indicates that Samantha was very young when Elizabeth left the home and that thus, there was not much evidence regarding the relationship of Samantha with each parent prior to the commencement of the action, other than testimony given that Elizabeth was the primary caregiver and that Aaron was involved with Samantha's care. This also affects consideration of the desires and wishes of the child, as Samantha is too young to speak, much less communicate her preference. The record indicates that Samantha was generally healthy, with the exception of being colicky as a newborn, and was progressing as expected. The record does not contain any credible evidence of abuse inflicted on any family or household member.

The record indicates that both parents could provide Samantha with a place to live and that both parents were fit and had the capacity to provide physical care and satisfy the educational needs of Samantha. However, the record indicates that Aaron had a temper and was easily frustrated in dealing

with Samantha's fussiness associated with her colicky condition. The record also indicates that Elizabeth was concerned with Aaron's moral fitness after finding a picture of a naked female on his cell phone and social media Web site conversations with other women on his computer.

Based upon our de novo review of the evidence, we find that the district court did not abuse its discretion by awarding custody of Samantha to Elizabeth. Both parents are fit to parent Samantha, but because Elizabeth is the primary caregiver of Samantha, custody with Elizabeth is not an abuse of discretion. Therefore, we affirm that portion of the district court's order awarding custody of Samantha to Elizabeth.

Removal.

Aaron assigns that the district court erred by allowing Elizabeth to leave the state with Samantha. Aaron agrees with the district court that while the analysis set forth in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), does not "'technically'" apply, the factors of the *Farnsworth* analysis should be taken into consideration. Brief for appellant at 20.

[9] Once the district court has made the initial custody determination, it should not skip over the majority of the removal analysis if the parent has requested or, as in this case, has already left the state with the child. There is a two-step process before a custodial parent is allowed to remove a child from the State of Nebraska. The custodial parent must satisfy the court that there is a legitimate reason for leaving the state and that it is in the minor child's best interests to continue to live with that parent. See *id*.

[10] *Farnsworth* sets forth three broad considerations to consider whether removal is in the children's best interests: (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the children and the custodial parent; and (3) the impact such a move will have on the contact between the children and the noncustodial parent, when viewed in the light of reasonable visitation. See *Wild v. Wild*, 15 Neb. App. 717, 737 N.W.2d 882 (2007).

[11] The purpose of requiring a legitimate reason is to prevent the custodial parent from relocating because of an ulterior motive, such as frustrating the noncustodial parent's visitation rights. See *Farnsworth v. Farnsworth, supra*.

In this case, there was ample evidence presented which would have allowed the district court first to analyze whether or not Elizabeth had a legitimate reason to leave the state and then, if necessary, to engage in an analysis of whether Elizabeth then demonstrated that removing Samantha from Nebraska was in her best interests. See *id*. However, the court did not properly do so in line with Nebraska Supreme Court precedent on removal. As such, we reverse the order of the district court allowing Elizabeth to remove Samantha from the State of Nebraska and remand the matter for a determination by the district court, on the record as it now exists, to determine whether Elizabeth has a legitimate reason to leave the state and then, if necessary, whether said removal is in Samantha's best interests.

Parenting Plan and Child Support.

Aaron argues that the district court abused its discretion in the parenting plan entered by failing to consider if the plan would foster a relationship between himself and Samantha, by entering a plan that is more accommodating to Elizabeth, and by awarding him inequitable parenting time with Samantha.

[12] Having reversed the district court's determination regarding removal and remanded that matter for a proper determination based upon the requirements set forth in *Farnsworth v. Farnsworth, supra*, we also reverse the district court's determinations on the parenting plan and child support order. We also remand those matters back to the district court for redetermination, mindful that a reasonable visitation arrangement should provide a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent. See *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002).

Tax Exemption.

Aaron argues that the district court failed to award either party the tax exemption. However, upon our review of the

record, we find that the issue was not properly raised before the district court, either in the pleadings or at trial. Had the issue been raised at the trial court level, this court could address the issue on appeal, but it is well established that an issue not properly presented to and passed upon by the trial court may not be raised on appeal. See *Gebhardt v. Gebhardt*, 16 Neb. App. 565, 746 N.W.2d 707 (2008).

CONCLUSION

In conclusion, based upon our de novo review of the record, we find that the district court's award of custody of Samantha to Elizabeth is in Samantha's best interests. We decline to address Aaron's assignment of error regarding the tax exemption because that matter was not properly presented to and passed upon by the trial court. However, we reverse the order of the district court allowing Elizabeth to leave the State of Nebraska with Samantha and remand the matter back to the district court for an appropriate retrial on the matter of removal based upon the record as it exists before this court. The district court's order regarding the parenting plan and child support is also reversed and the matter remanded to the district court for redetermination on the current record.

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

STATE OF NEBRASKA, APPELLEE, V. JEFFREY D. GLAZEBROOK, APPELLANT.

859 N.W.2d 341

Filed January 6, 2015. No. A-13-781.

1. **Trial: Evidence: Appeal and Error.** A ruling on a motion in limine is not a final ruling on the admissibility of evidence and therefore does not present a question for appellate review.
2. **Criminal Law: Convictions: Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: 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. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable

to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

3. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
4. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
5. **Administrative Law: Statutes.** The authority to delegate discretionary and quasi-judicial powers to agency subordinates is implied where the powers bestowed upon an agency head are impossible of personal execution.
6. **Trial: Evidence: Appeal and Error.** Because overruling a motion in limine is not a final ruling on admissibility of evidence and therefore does not present a question for appellate review, a question concerning admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection to the evidence during trial.
7. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
8. **Criminal Law: Directed Verdict.** In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed.
9. **Effectiveness of Counsel: Proof: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.
10. **Effectiveness of Counsel: Proof.** To show prejudice on a claim of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
11. ____: ____. To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.
12. **Effectiveness of Counsel: Presumptions: Appeal and Error.** The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.
13. **Trial: Attorneys at Law.** The decision about whether to make an objection during a trial has long been considered an aspect of trial strategy.

14. ____: ____. A decision not to object could be explained by trial counsel's calculated strategy not to highlight the objectionable material.
15. **Trial: Attorneys at Law: Effectiveness of Counsel: Presumptions.** Trial counsel is afforded due deference to formulate trial strategy and tactics, and there is a strong presumption that counsel acted reasonably.
16. **Postconviction: Effectiveness of Counsel: Appeal and Error.** In the context of direct appeal, like the requirement in postconviction proceedings, mere conclusions of fact or law are not sufficient to allege ineffective assistance of counsel.
17. **Sentences: Words and Phrases: Appeal and Error.** An appellate court reviews criminal sentences for abuse of discretion, which occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
18. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

Gregory A. Pivovar for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

PIRTLE, Judge.

INTRODUCTION

A jury found Jeffrey D. Glazebrook guilty of tampering with a witness and of terroristic threats. He was sentenced for the offenses, both felonies, and his sentences were enhanced by a finding that he was a habitual criminal. For the reasons that follow, we affirm.

BACKGROUND

On November 16, 2011, Glazebrook was charged by information with two crimes: tampering with a witness, a Class IV felony, and terroristic threats, a Class IV felony. The information also alleged Glazebrook was a habitual criminal, as defined by Neb. Rev. Stat. § 29-2221 (Reissue 2008).

After a jury trial on August 30 and 31, 2012, Glazebrook was convicted of both tampering with a witness and terroristic threats. The district court held an enhancement hearing and found Glazebrook had been convicted of at least two prior felony convictions that satisfied the criteria for habitual criminal sentencing.

The charges in this case were derived from Glazebrook's alleged behavior during a prior criminal trial, with Glazebrook as the defendant. During the testimony of Charles Goodwin, an inmate witness, Glazebrook allegedly threatened Goodwin's life. At the trial on this matter, several witnesses, including four of the jurors and the county sheriff in attendance at the prior trial, testified. They stated that they saw Glazebrook mouth a threat toward Goodwin immediately after Goodwin had testified that Glazebrook had uttered an inflammatory statement; Goodwin had testified that Glazebrook had previously told him, "[T]here ain't no pussy like old pussy." This statement was the subject of a motion in limine filed by Glazebrook prior to the start of the trial. Glazebrook's motion was denied, and the statement attributed to Glazebrook was allowed to become a part of the record in this case.

David Herroon, one of the jurors in the prior trial, testified in this case that Glazebrook mouthed the words "I will kill you" to Goodwin. Herroon testified to his ability to read lips because of his hearing loss, and he stated that he was certain that Glazebrook had mouthed those words to Goodwin. Herroon testified that he was shocked and stunned because he "had never thought something like that would happen and that [he] would witness it."

Saunders County Sheriff Kevin Stukenholtz testified that he was present at the prior trial and that the inmate witness testifying at the time of the alleged threat was Goodwin. Stukenholtz testified that he was approximately 22 feet from Glazebrook during Goodwin's testimony, during which he saw Glazebrook lean forward and "mouth something." He stated he was not in a position to see what was mouthed, but he noticed that Goodwin was visibly shaken and that his voice was cracking after he concluded his testimony and left the witness stand.

Danny Sabatka, another juror, testified that he observed Glazebrook mouthing the words "I'll kill you" to an inmate witness who was testifying. Sabatka testified Glazebrook's demeanor had changed and become "much more profound and directed towards that individual." Sabatka said this was the only time he noticed a change in Glazebrook's demeanor during the trial.

Two other jurors, John Brabec and Daniel O'Connor, testified that they witnessed a change in Glazebrook's demeanor during the testimony of an inmate witness. Brabec testified that Glazebrook's mouthed words, "I will kill you," toward the inmate witness were "obvious." Brabec stated that he was 100 percent certain of the statement Glazebrook had mouthed.

Prior to the trial, the jurors who testified were shown a video reenactment of Glazebrook making various statements, without sound. Herroon and Sabatka were not able to identify the words spoken in the video. Brabec testified that the statements he observed in the video did not resemble the statement mouthed in court. He said the way Glazebrook mouthed the statement in court was different from the way a person would move his or her mouth in normal conversation. Brabec described the mouthed statement in court as more enunciated, or exaggerated, than the statements on the video.

Herroon also testified that the statements on the video were different from what he witnessed as a juror. Herroon stated Glazebrook's mouthed statement in court was "very articulated . . . almost over the top enunciation, trying to get a point across." Herroon testified that Glazebrook was very agitated and was sitting "up in his seat with elbows puffed out, almost like attempting to try and look bigger, more threatening." In contrast, Glazebrook's demeanor in the video was very calm and the movements of his mouth were "almost conversational."

One of Glazebrook's attorneys from the previous case testified that the judge was concerned about eye contact between Goodwin and Glazebrook. He stated that the judge asked him to address that issue with Glazebrook, and he said that he did. He testified that the statement "[T]here ain't no pussy like old pussy" was not a surprise at trial, because it

was in the pretrial reports and was brought up at the pretrial hearing.

After the defense rested, the matter was entrusted to the jury, which returned guilty verdicts on both charges. On September 21, 2012, Glazebrook filed a motion to dismiss alleging the district court for Sarpy County lacked subject matter jurisdiction. Glazebrook asserted the information was null and void because it was prepared, signed, filed, and verified by an assistant attorney general, not the Attorney General himself. A hearing on the matter was held on September 26. The State presented an affidavit executed by Nebraska's Attorney General indicating that the assistant attorney general was given the express, implied, and specific authority to submit the information on behalf of the State of Nebraska against Glazebrook. The district court's order, filed November 1, 2012, denied Glazebrook's motion to dismiss.

Glazebrook was sentenced on December 31, 2012, for the crimes of tampering with a witness and terroristic threats. The district court found Glazebrook to be a habitual criminal as there were at least two valid prior offenses which could be used for enhancement of the sentences. Glazebrook was sentenced to serve a term of 30 to 60 years' imprisonment on each count. The sentences were ordered to be served concurrently.

ASSIGNMENTS OF ERROR

Glazebrook asserts the trial court erred in denying his motion to dismiss, his motion for directed verdict, and his motion in limine. He asserts the trial court abused its discretion in imposing excessive sentences. He also asserts that he received ineffective assistance of counsel and that the jury erred in finding there was sufficient evidence to return a guilty verdict.

STANDARD OF REVIEW

[1] A ruling on a motion in limine is not a final ruling on the admissibility of evidence and therefore does not present a question for appellate review. See *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008).

[2] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: 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. *State v. Ely*, 287 Neb. 147, 841 N.W.2d 216 (2014). The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id*.

[3] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014). When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. *Id*. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. Filholm, supra*.

[4] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

ANALYSIS

Motion to Dismiss.

Glazebrook asserts the trial court did not have subject matter jurisdiction to proceed in this case under an information filed by an assistant attorney general, rather than the Attorney General, for the State of Nebraska. After the trial concluded, the jury returned guilty verdicts on August 31, 2012. This issue was raised for the first time in Glazebrook's motion to dismiss on September 21, 2012. A hearing was held on the motion to dismiss, and the court took judicial notice of the file, and the fact that Glazebrook did not file a motion to quash prior to entering his not guilty pleas.

The district court also received an affidavit from Nebraska's Attorney General. The affidavit stated that the assistant attorney general, in his official capacity within the Nebraska Department of Justice, had the Attorney General's "express and implied authority . . . to sign criminal pleadings, including Complaints and Informations, on behalf of the State of Nebraska." The affidavit also stated that the assistant attorney general had the Attorney General's specific authority to "sign and file the Information in the Saunders County District Court in Case Number CR11-76; and all other pleadings necessary to prosecute the related criminal matters against . . . Glazebrook."

The court found that Glazebrook could have filed a motion to quash, to address the alleged defects in the information. However, Glazebrook did not do so at any time prior to entering his "not guilty" pleas or following the entry of his pleas. He did not seek to withdraw his pleas or raise the issue of any alleged defect prior to this appeal. The district court ultimately found that Glazebrook had waived the alleged defects in the information, and it denied his motion to dismiss. The district court also found that the assistant attorney general had the authority to file the information, because Neb. Rev. Stat. § 84-204 (Reissue 2014) gives an assistant attorney general and the Department of Justice the same authority in each county as the county attorney.

[5] The court in *Fulmer v. Jensen*, 221 Neb. 582, 585, 379 N.W.2d 736, 739 (1986), applied the general principle of law that the "authority to delegate discretionary and quasi-judicial powers to agency subordinates is implied where the powers bestowed upon an agency head 'are impossible of personal execution.'" The evidence shows that the Attorney General delegated his authority to file the information against Glazebrook to the assistant attorney general. The Attorney General is authorized to appear for the State and prosecute and defend, in any court, any cause or matter, civil or criminal, in which the State may be a party or interested. Neb. Rev. Stat. § 84-203 (Reissue 2014). The statutes also state the Attorney General "shall appoint a deputy attorney general" who "may do and perform, in the absence of the Attorney General, all

the acts and duties that may be authorized and required to be performed by the Attorney General." Neb. Rev. Stat. § 84-206 (Reissue 2014). Thus, the Attorney General had the authority under the Nebraska statutes to delegate tasks to an assistant attorney general, and the record shows the assistant attorney general had specific authority from the Attorney General to file the information charging Glazebrook for the crimes of which he was convicted.

Motion in Limine.

Glazebrook asserts the trial court erred in denying his motion in limine, specifically regarding Stukenholtz' recollection of an inmate witness' statement in the previous criminal trial when Glazebrook was the defendant. The inmate witness, Goodwin, had testified at the previous trial that Glazebrook had told him, "[T]here ain't no pussy like old pussy," which allegedly implicated Glazebrook in the crime in the previous criminal trial.

In this case, following a hearing on the motions in limine, the court determined that the parties could not mention the crime Glazebrook was tried for in the previous case. However, the court found that Glazebrook's statement was not excluded, insofar as the State argued it was important that it be introduced for identity purposes and to show what caused Glazebrook's alleged reaction to Goodwin's testimony.

[6] A ruling on a motion in limine is not a final ruling on the admissibility of evidence and therefore does not present a question for appellate review. *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008). Because overruling a motion in limine is not a final ruling on admissibility of evidence and therefore does not present a question for appellate review, a question concerning admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection to the evidence during trial. *State v. Almasaudi*, 282 Neb. 162, 802 N.W.2d 110 (2011).

During the trial in this case, Stukenholtz, the sheriff present at the prior criminal trial, was asked to repeat what Goodwin said that allegedly caused Glazebrook to react. Glazebrook's counsel objected, stating, "Not the best evidence. Lacking

sufficient foundation. Prejudicial." The trial court overruled the objection, and Stukenholtz stated, "Goodwin was quoting . . . Glazebrook and he said, there's no pussy like old pussy." Herroon also testified that he had heard the statement in the prior case which Glazebrook allegedly reacted to in court. When asked specifically what the statement was, Herroon said, "[H]e said, there's no pussy like old pussy." The defense did not object to this utterance. Similarly, Glazebrook's counsel did not object when the State used the statement in questions posed to the witnesses.

[7] Glazebrook acknowledges that there was one objection to the statement and no objection to the other occasions the statement was repeated at trial. Though Glazebrook's counsel objected once, he did not make a continuing objection or move to strike that statement from the rest of the record. Failure to make a timely objection waives the right to assert prejudicial error on appeal. *State v. Cox*, 21 Neb. App. 757, 842 N.W.2d 822 (2014). Thus, we find Glazebrook has waived the right to argue the merits of the court's decision with regard to his motion in limine on appeal.

Sufficiency of Evidence.

Glazebrook asserts the evidence was insufficient to support a jury verdict as to the charge of tampering with a witness.

In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence; such matters are for the finder of fact. *State v. Matit*, 288 Neb. 163, 846 N.W.2d 232 (2014). The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

The crime of tampering with a witness is defined by Neb. Rev. Stat. § 28-919(1) (Reissue 2008), which states:

> A person commits the offense of tampering with a witness or informant if, believing that an official proceeding

> or investigation of a criminal or civil matter is pending or about to be instituted, he or she attempts to induce or otherwise cause a witness or informant to:
>
> (a) Testify or inform falsely;
>
> (b) Withhold any testimony, information, document, or thing;
>
> (c) Elude legal process summoning him or her to testify or supply evidence; or
>
> (d) Absent himself or herself from any proceeding or investigation to which he or she has been legally summoned.

The jury instructions required the State to prove the material elements beyond a reasonable doubt, namely to show that on or about September 25, 2009, Glazebrook did intend to induce or otherwise cause a witness, Goodwin, to testify or inform falsely or to withhold testimony, information, documents, or things.

The evidence shows that Goodwin testified at a prior trial, in which Glazebrook was the defendant, on or about September 25, 2009, in Saunders County, Nebraska. Goodwin's testimony was not a flattering description of Glazebrook's character or behavior. Multiple witnesses testified that during Goodwin's testimony, they observed a change in Glazebrook's demeanor. Stukenholtz was present at the prior trial, during which Goodwin testified that Glazebrook had previously told him, "[T]here ain't no pussy like old pussy." Stukenholtz testified that he observed Glazebrook lean forward and mouth something to Goodwin. Stukenholtz further testified that he was not in a position to see what was mouthed, but he noticed that Goodwin was visibly shaken and that Goodwin's voice was cracking after he testified.

Sabatka, Brabec, and O'Connor, jurors from the prior trial, testified that they observed a change in Glazebrook's demeanor after Goodwin testified to Glazebrook's prior statement. They testified that Glazebrook focused intently on Goodwin, leaned forward, and mouthed words that were perceived to be a threat. Herroon, another juror from the prior trial, testified that he has hearing aids and that he looks at someone speaking to make sure that he understands what that person is saying.

Herroon testified that he was looking at Glazebrook during Goodwin's testimony and that Herroon, Sabatka, and Brabec all testified that the mouthed threat was "I will kill you" or "I'll kill you." Brabec testified that he had an unobstructed view of Glazebrook and was 100 percent certain that is what Glazebrook had communicated to Goodwin.

Brabec was asked to identify the statement mouthed by Glazebrook by viewing a video of Glazebrook saying other statements aloud, without sound. Brabec was not able to identify the statement he witnessed in court when it was shown on the video. However, Brabec testified that the statements he observed in the video did not resemble the statement mouthed in court. He said the way Glazebrook mouthed the statement in court was different from the way a person would move his or her mouth in normal conversation. Brabec described the statement mouthed in court as more enunciated, or exaggerated, than the statements on the video.

Herroon was also asked to view the video. He was unable to identify the alleged statement among the video-recorded statements, but testified that the statements were different from what he witnessed as a juror. Herroon stated Glazebrook's mouthed statement in court was "very articulated . . . almost over the top enunciation, trying to get a point across." Herroon testified that Glazebrook was very agitated and was sitting "up in his seat with elbows puffed out, almost like attempting to try and look bigger, more threatening." In contrast, Glazebrook's demeanor in the video was very calm and the movements of his mouth were "almost conversational."

Glazebrook emphasizes the fact that the jurors were not looking at Goodwin in the prior trial, but were looking at Glazebrook. He argues that none of the witnesses saw whether Goodwin reacted to Glazebrook's alleged mouthed threat. Glazebrook asserts "it is impossible to tamper with a witness with a statement that is never delivered to him." Brief for appellant at 41. However, the material elements of the crime do not require delivery of any statement to a witness. Rather, the statute requires only that a person attempt to induce or cause a witness to testify falsely, or to withhold his or her testimony or information. After viewing the evidence in the

light most favorable to the prosecution, we find any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. We find this argument is without merit.

Glazebrook also asserts the trial court erred when it denied his motion for directed verdict.

[8] In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Elseman*, 287 Neb. 134, 841 N.W.2d 225 (2014). If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed. *Id*.

Having found that there was sufficient evidence to support the jury's finding of guilt, we find there was also sufficient evidence for the trial court to deny Glazebrook's motion for directed verdict. Thus, the trial court did not err.

Ineffective Assistance of Counsel.

Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014). When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. *Id*. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. Filholm, supra*.

[9-12] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *State v. Filholm, supra*. To show prejudice, the defendant must demonstrate a reasonable probability

that but for counsel's deficient performance, the result of the proceeding would have been different. *Id*. To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. *State v. Morgan*, 286 Neb. 556, 837 N.W.2d 543 (2013). The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice. *Id*.

Glazebrook asserts trial counsel was ineffective because he failed to request a limiting instruction or object on each occasion the "no pussy like old pussy" statement was repeated at trial. Prior to trial, Glazebrook's counsel filed a motion in limine requesting that the State be precluded from presenting any evidence or comments to the jury regarding the specific testimony of the inmate witnesses, or the nature of the charges against Glazebrook, in the prior criminal trial. The State asserted the statement was relevant to show the identity of the speaker who made the statement at the prior trial and to show the intent of and motive for Glazebrook's reaction to the statement's being repeated in court. The trial court denied Glazebrook's motion to exclude the statement.

At trial, the statement was repeated multiple times: in the State's opening, by the State in questioning witnesses, and by Herroon and Stukenholtz, who were present at the prior trial when the statement was made. Glazebrook's counsel objected to the line of questioning in which Stukenholtz was asked to repeat what he heard Goodwin say in the prior trial, and the court overruled the objection. Trial counsel did not object to the other instances of the statement or ask for a limiting instruction. Glazebrook asserts on appeal that this "inflammatory statement" was highly prejudicial, brief for appellant at 49, and that counsel was ineffective for not making further efforts to prevent the repetition of the statement.

[13-15] The decision about whether to make an objection during a trial has long been considered an aspect of trial strategy. *State v. Ruegge*, 21 Neb. App. 249, 837 N.W.2d 593

(2013). The Nebraska Supreme Court has previously discussed the notion that a decision not to object could be explained by trial counsel's calculated strategy not to highlight the objectionable material. *Id*. See *State v. Huston*, 285 Neb. 11, 824 N.W.2d 724 (2013). Trial counsel is afforded due deference to formulate trial strategy and tactics, and as stated above, there is a strong presumption that counsel acted reasonably. *State v. Ruegge, supra*, citing *State v. Nesbitt*, 279 Neb. 355, 777 N.W.2d 821 (2010). Trial counsel in this case objected only once during trial to the statement, and it is not apparent from the record whether this was part of trial counsel's strategy. We find the record is insufficient for this court to determine whether counsel's failure to continue objecting to the statement constituted ineffective assistance of counsel.

Glazebrook asserts he received ineffective assistance of trial counsel for several additional reasons, all related to the speculative issue of whether additional witnesses could or would have provided favorable testimony to support his defense. Specifically, Glazebrook asserts trial counsel was deficient in (1) failing to hire an expert witness lipreader; (2) failing to take the deposition of the alleged victim, Goodwin; (3) failing to interview the remaining jurors from the prior criminal trial during which the alleged crimes were committed; and (4) failing to withdraw so he could testify as a witness about the events which took place during the prior trial.

[16] The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014). The determining factor is whether the record is sufficient to adequately review the question. *Id*. This is because the trial record reviewed on appeal is "'devoted to issues of guilt or innocence'" and does not usually address issues of counsel's performance. *Id*. at 769, 848 N.W.2d at 578. In the context of direct appeal, like the requirement in postconviction proceedings, mere conclusions of fact or law are not sufficient to allege ineffective assistance of counsel. *Id*.

The potential testimony of these witnesses is not part of the record on direct appeal, and Glazebrook recognizes that these

issues were likely not ripe for review by this court. We find the record is not sufficient to adequately review these remaining issues.

Appropriateness of Sentences Imposed.

[17] Glazebrook asserts the sentences imposed by the trial court were excessive. An appellate court reviews criminal sentences for abuse of discretion, which occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *State v. Rieger*, 286 Neb. 788, 839 N.W.2d 282 (2013). An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.

The jury found Glazebrook was guilty of tampering with a witness, a Class IV felony, and terroristic threats, a Class IV felony. Under the Nebraska Revised Statutes, the sentences for both crimes are eligible to be enhanced by a determination that the individual is a habitual criminal. Section 29-2221(1) provides:

> Whoever has been twice convicted of a crime, sentenced, and committed to prison, in this or any other state or by the United States or once in this state and once at least in any other state or by the United States, for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be a habitual criminal and shall be punished by imprisonment in a Department of Correctional Services adult correctional facility for a mandatory minimum term of ten years and a maximum of not more than sixty years[.]

The trial court reviewed the evidence of at least six felonies for which Glazebrook was charged, convicted, and sentenced to serve at least 1 year. Glazebrook does not dispute that he has six prior felony convictions, and there is little doubt that Glazebrook fits the definition of a habitual criminal. Instead, Glazebrook challenges the length of the term to which he was sentenced. He was sentenced to 30 to 60 years' imprisonment for each crime in this case, and his sentences were ordered to run concurrently.

Glazebrook asserts the trial court in this case has punished him not for the crimes of terroristic threats and tampering with a witness "but[,] instead, for the crimes he is alleged to have committed in the prior case which was reversed." Brief for appellant at 57. However, the trial court's remarks at the sentencing hearing do not suggest a focus on the prior reversal; rather, the trial court focused on Glazebrook's criminal record.

[18] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. *State v. Bol*, 288 Neb. 144, 846 N.W.2d 241 (2014).

The record shows the trial court considered Glazebrook's age, mentality, and criminal history; the instances of escape and attempted escape; and the violent offenses of burglary and sexual assault. The court acknowledged that some of Glazebrook's prior offenses were committed when he was a youth and perhaps were the product of an "undeveloped mind," but that Glazebrook was approximately 50 years old at the time he was convicted of these crimes. The court noted Glazebrook's record was one of the worst the court had seen and that the sentences imposed were necessary to "protect the integrity of the court." There is no evidence to support the argument that the trial court's sentences were intended to punish Glazebrook for the charges in the prior trial.

Glazebrook's sentences of 30 to 60 years' imprisonment, to run concurrently, are within the statutory limits. In light of his multiple previous felony convictions, the seriousness of these crimes, and the disrespect Glazebrook has demonstrated for legal process by committing these offenses in court, we find the trial court did not abuse its discretion.

CONCLUSION

We find the trial court did not err in denying Glazebrook's motion in limine, motion for directed verdict, and motion to

dismiss. We find there was sufficient evidence to support the jury's verdict, and the trial court did not abuse its discretion in imposing sentences within the statutory limits. We find the record is insufficient to determine whether counsel's failure to maintain a continuing objection to the inflammatory statement constituted ineffective assistance of counsel. We find the record is also insufficient to determine whether Glazebrook received ineffective assistance of counsel with regard to the witnesses called to testify at trial.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
BETTY KELLOGG, APPELLANT.

859 N.W.2d 355

Filed January 6, 2015. No. A-14-038.

1. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of the vehicle.
2. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. This investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. Also, the officer may run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are outstanding warrants for any of its occupants.
3. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** To expand the scope of a traffic stop and continue to detain the motorist, an officer must have reasonable, articulable suspicion that a person in the vehicle is involved in criminal activity beyond that which initially justified the interference.
4. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause.
5. **Police Officers and Sheriffs: Probable Cause.** Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances.
6. **Probable Cause.** Reasonable suspicion must be determined on a case-by-case basis.

7. **Constitutional Law: Search and Seizure: Arrests: Probable Cause.** The Fourth Amendment mandates that an arrest be justified by probable cause to believe that a person has committed or is committing a crime.
8. **Probable Cause: Words and Phrases.** Probable cause is a flexible, common-sense standard that depends on the totality of the circumstances.
9. **Probable Cause: Appeal and Error.** An appellate court determines whether probable cause existed under an objective standard of reasonableness, given the known facts and circumstances.

Appeal from the District Court for Burt County: JOHN E. SAMSON, Judge. Affirmed.

Nicholas E. Wurth, of Law Offices of Nicholas E. Wurth, P.C., for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

MOORE, Chief Judge, and IRWIN and PIRTLE, Judges.

PER CURIAM.

I. INTRODUCTION

Betty Kellogg appeals her conviction for possession of methamphetamine, which charge arose out of a traffic stop. On appeal, she challenges the finding of the district court for Burt County, Nebraska, that the law enforcement officer who stopped her vehicle for speeding had reasonable suspicion to expand the stop beyond the purposes of the initial traffic stop and that there was probable cause to arrest her. We find no merit to these assertions, and we affirm.

II. BACKGROUND

The events giving rise to this incident occurred on or about June 12, 2012. On that date, Nebraska State Patrol Trooper Jason Morris observed a vehicle driven by Kellogg passing another vehicle and traveling at 73 miles per hour in an area where the posted speed limit was 60 miles per hour. Trooper Morris conducted a traffic stop. He testified that the only basis for the traffic stop was that Kellogg was speeding.

Trooper Morris testified that when he asked Kellogg to produce her operator's license and registration, Kellogg was unable to produce her license. He testified that she went "past

her driver's license several times while she was looking for it" in her wallet. He testified that he observed her operator's license several times as she looked through items in her wallet, but did not point it out to her; Kellogg indicated to Trooper Morris that she "must have left it at home" and never did produce the license. Trooper Morris obtained Kellogg's license from her wallet after subsequently placing her under arrest.

Trooper Morris described Kellogg's demeanor at the time of the traffic stop as "appear[ing] to be confused, overactive, and unable to concentrate on the task [of providing her license and registration]," and he said that she "couldn't concentrate [and] couldn't sit still, she had gone past her driver's license several times while she was looking for it." He testified that her demeanor gave rise to suspicions that she was under the influence of a chemical substance. He testified that he did not detect the odor of alcohol or drugs and that Kellogg's speech was not slurred.

Trooper Morris asked Kellogg if she had been drinking or taking any drugs, and she indicated "that she was not currently drinking any alcohol and that she had taken some prescription medication . . . and she was following the recommended usage of that prescription."

Trooper Morris testified about his training and experience in relation to both alcohol and drugs and in discerning people that are under the influence of either. He testified that, by the time of this stop, he "had arrested approximately 230 [people for] driving under the influence" and had attended a "basic [driving under the influence] course at the academy." He testified that, in addition to his training related to alcohol usage, he had completed a separate training course and been certified as a drug recognition expert and had conducted more than 20 drug recognition expert evaluations.

Based on his observations of Kellogg and on his suspicion that she was under the influence of alcohol or drugs, he asked Kellogg to perform field sobriety tests. He administered the horizontal gaze nystagmus test, the walk-and-turn test, and the one-leg stand. In addition, he administered the "Romberg Balance" test and the finger-to-nose test.

Trooper Morris testified that Kellogg "showed lack of smooth pursuit" in the horizontal gaze nystagmus test. He testified that Kellogg had suffered an injury in one eye and that that eye was "deadened," which prevented him from assessing whether the pupils in both eyes were equal. He testified that he "did not see nystagmus at maximum deviation or onset of nystagmus prior to 45 degrees." He "did, however, see bloodshot glassy eyes in both eyes." He testified that Kellogg "did not display impairment on the horizontal gaze nystagmus test."

Trooper Morris testified that Kellogg "displayed impairment on the walk and turn" test. He indicated that "[i]n the first nine steps she missed the heel to toe four times and stepped off the line and raised her arms." He acknowledged that "national training guidelines" suggest that the walk-and-turn test may be inaccurate for "elderly individuals," acknowledged that the test becomes "nonconclusive" at age 65, and acknowledged that Kellogg was 61 years of age at the time of this traffic stop.

Trooper Morris testified that Kellogg "displayed impairment on the one leg stand by swaying while balancing, using her arms to balance and she put her foot down."

Trooper Morris testified that Kellogg displayed impairment on the "Romberg Balance" test. He testified that "she displayed eye tremors and had a one-inch sway from front to back and side to side."

Trooper Morris also testified that Kellogg "displayed impairment on the finger to nose test." He testified that she "missed the finger to nose and touched her nose with the pad of her finger" on several steps of the test and that "she did not wait for [Trooper Morris] to tell her to raise her arm."

At the conclusion of the field test, Trooper Morris had the opinion that Kellogg was impaired. He then asked her to perform a preliminary breath test, which result was ".000." Trooper Morris opined that as a result, the impairment he had observed was not due to alcohol.

Trooper Morris then requested Kellogg to provide a urine sample, but Kellogg refused. He then placed her under arrest.

Trooper Morris conducted an inventory search of the vehicle. During the search, he discovered "a little baggie of meth directly behind her driver's license in her wallet." The material in the baggie was sent to a laboratory for testing, and it tested positive for methamphetamine.

Kellogg was initially charged by information with possession of methamphetamine, driving under the influence of drugs, and refusal of a chemical test. She entered not guilty pleas to all charges. The State ultimately dismissed the latter two charges, leaving Kellogg charged only with possession of methamphetamine.

Kellogg moved to suppress "any and all evidence gained by means of a stop and search of [her] vehicle." In her motion, Kellogg challenged the initial stop and the subsequent search.

After a hearing on the motion to suppress, at which hearing the above testimony was adduced, the district court overruled Kellogg's motion. The court first found that the initial stop of Kellogg's vehicle was lawful, because Trooper Morris observed a traffic violation: speeding. The court found that Trooper Morris' observations were sufficient to give rise to a reasonable suspicion warranting the performance of field tests. The court held that Trooper Morris' observations, Kellogg's performance on the field tests, and Kellogg's refusal to submit to a chemical test were sufficient to provide probable cause to arrest Kellogg on suspicion of driving under the influence of drugs. The court held that the search performed by Trooper Morris was a lawful inventory search.

In analyzing Kellogg's motion to suppress, the district court noted that Neb. Rev. Stat. § 60-6,197 (Cum. Supp. 2014) required a person to be arrested prior to being required to submit to a chemical test such that refusal to submit to a test is a violation of the statute. As noted, the State subsequently dismissed the refusal charge.

Subsequent to the court's ruling on Kellogg's motion to suppress, the parties submitted the merits of the possession charge to the court in a stipulated bench trial. The court received a transcription of the motion to suppress hearing, the laboratory report indicating that the substance located during the inventory search was methamphetamine, and a stipulation of the

parties to submit the matter on the evidence adduced at the motion to suppress hearing and subject to Kellogg's objections therein.

The district court found Kellogg guilty of possession of methamphetamine. The court sentenced Kellogg to 2 years' probation. This appeal followed.

III. ASSIGNMENTS OF ERROR

Kellogg has assigned two errors on appeal. First, she asserts that "[t]he district court erred in finding that Trooper Morris had reasonable articulable suspicion to expand the purpose of the traffic stop to a driving under the influence investigation." Second, she asserts that "[t]he district court erred in finding that Trooper Morris had probable cause to arrest [Kellogg] for driving under the influence . . . ."

IV. STANDARD OF REVIEW

In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review. Regarding historical facts, we review the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination. *State v. Bol*, 288 Neb. 144, 846 N.W.2d 241 (2014).

V. ANALYSIS

1. Expansion of Traffic Stop

Kellogg first asserts that "[t]he district court erred in finding that Trooper Morris had reasonable articulable suspicion to expand the purpose of the traffic stop to a driving under the influence investigation." She argues that Trooper Morris lacked reasonable suspicion to expand the stop, to continue to detain her, or to administer field sobriety tests. We find no merit to this assertion.

[1] Kellogg does not contest the propriety of the initial traffic stop. Nor could she reasonably do so, because the record shows that she was stopped for speeding. And a traffic violation, no matter how minor, creates probable cause to stop

the driver of the vehicle. *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011).

[2] Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. *Id*. This investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. *Id*. Also, the officer may run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are outstanding warrants for any of its occupants. *Id*.

[3-6] To expand the scope of a traffic stop and continue to detain the motorist, an officer must have reasonable, articulable suspicion that a person in the vehicle is involved in criminal activity beyond that which initially justified the interference. See *id*. Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause. *Id*. Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances. *Id*. Reasonable suspicion must be determined on a case-by-case basis. *Id*.

In this case, the district court found that Trooper Morris had reasonable suspicion to detain Kellogg and administer field sobriety tests based on testimony that she was nervous, talkative, and confused; could not sit still; repeated herself; passed over her operator's license while looking for it; and had bloodshot eyes. We examine these factors mindful of the rule that when a determination is made to detain a person during a traffic stop, even where each factor considered independently is consistent with innocent activities, those same factors may amount to reasonable suspicion when considered collectively. See *State v. Howard, supra*.

As noted above, Trooper Morris testified that he had completed a "basic" driving under the influence course as part of his training and that he had also completed "a drug recognition expert course and [is] certified as a drug recognition

expert." He testified that at the time of his stop of Kellogg, he "had arrested approximately 230 [people for] driving under the influence" and had "done . . . approximately 21 or 22 [drug recognition expert] evaluations."

Trooper Morris testified that after he stopped Kellogg for speeding and made contact with her, he asked her to produce her operator's license, registration, and proof of insurance. He testified that she was not able to produce the documents. He testified that "[s]he appeared to be confused, overactive, and unable to concentrate on the task" of providing her operator's license and registration. Trooper Morris testified that he suspected that "there might be a possibility of some influence from a chemical substance."

Trooper Morris testified that he asked Kellogg if she had been drinking or had taken any drugs, and Kellogg indicated that she had taken some prescription medication "following the recommended usage of that prescription."

Trooper Morris testified that he believed Kellogg was under the influence of some substance based on "[t]he fact that she couldn't concentrate on any of the tasks, she couldn't sit still, [and] she had gone past her driver's license several times while she was looking for it." He explained that as Kellogg went through her wallet trying to locate her operator's license, he was able to visibly see the license but that Kellogg had "gone past it" and had not seen it and "stated that she must have left it at home." He also testified that he had to ask Kellogg for her registration and insurance card "a second time" before she was able to produce those items.

Trooper Morris testified that in his experience and training, that kind of behavior was indicative of someone's being under the influence.

Although some of these factors, when examined in isolation, do not weigh heavily in favor of a finding of reasonable suspicion that Kellogg was engaged in criminal activity, when viewed in their totality, they indicate that Trooper Morris had reasonable suspicion to detain her to determine whether she was under the influence of drugs or alcohol. Although Trooper Morris' observations could, to some extent, be characterized as indicia of nervousness, Kellogg's confusion,

hyperactivity, inability to concentrate, and inability to locate her operator's license and registration can be reasonably construed as more than typical nervousness at being stopped by law enforcement. Kellogg's assertion that there was not sufficient reasonable suspicion to expand the traffic stop is without merit.

We note that Trooper Morris testified that while he was administering the horizontal gaze nystagmus test, he observed "bloodshot glassy eyes in both eyes." He was not asked if he had observed Kellogg's eyes to be bloodshot prior to his administration of this field test. The district court included the fact that Kellogg had bloodshot eyes in its recitation of the factors that supported reasonable suspicion to continue detaining Kellogg and investigate the suspicion of driving under the influence. Because there is no evidence to indicate that Trooper Morris observed Kellogg's eyes to be bloodshot prior to his administering the field tests, we do not include it in our consideration of the evidence supporting Trooper Morris' reasonable suspicion.

2. Probable Cause for Arrest

Kellogg also asserts that there was no probable cause for her arrest. We find no merit to this assertion.

[7] The Fourth Amendment mandates that an arrest be justified by probable cause to believe that a person has committed or is committing a crime. *State v. Scheffert*, 279 Neb. 479, 778 N.W.2d 733 (2010). Therefore, in order to arrest Kellogg for driving under the influence, Trooper Morris needed probable cause to believe Kellogg had been driving under the influence of drugs or alcohol. See *id*.

[8,9] Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances. *State v. Matit*, 288 Neb. 163, 846 N.W.2d 232 (2014). We determine whether probable cause existed under an objective standard of reasonableness, given the known facts and circumstances. *Id*.

In this case, the district court concluded that the State had demonstrated that Trooper Morris had probable cause to arrest Kellogg for driving under the influence. The court noted that "Trooper Morris testified that after performing a

series of field sobriety tests that, in his opinion, [Kellogg] was impaired by either drugs or alcohol." The court noted that a preliminary breath test registered negative to alcohol and that "Trooper Morris testified that, after considering the negative result of the [preliminary breath test], the impairment he was observing was not due to alcohol." The court also noted that Trooper Morris requested Kellogg to provide a urine sample, but she refused to do so. Based on the totality of the circumstances, including Trooper Morris' observations of Kellogg prior to the field sobriety tests and during performance of the field tests, the observation of bloodshot eyes, and her refusal to provide a urine sample, the district court found probable cause to support the arrest for driving under the influence.

On appeal, Kellogg again argues that her behavior prior to the field sobriety tests was merely indicative of nervousness and alone cannot be enough to support a finding of probable cause. She argues that evidence that her eyes appeared bloodshot is not significant because there was no "evidence that would indicate how [her] eye normally looks to be able to determine whether it was significant that her eye was bloodshot or glassy." Brief for appellant at 26. She argues that various portions of her performance on the field sobriety tests were not consistent with impairment, even if other portions were. She argues that some of the observations Trooper Morris testified about in court were not contained in his written report. She argues that her age, 61 at the time of the stop, should be considered a factor in assessing her performance on some of the field tests.

Despite Kellogg's assertions regarding individual aspects of Trooper Morris' observations and Kellogg's performance on the field sobriety tests, the totality of the circumstances demonstrates that Trooper Morris had sufficient probable cause to make an arrest for driving under the influence. As noted above, although some of her behaviors could be considered consistent with nervousness, it is reasonable to conclude that they went beyond mere nervousness. Although the observation of bloodshot eyes alone would not be sufficient to constitute probable cause, it is a relevant factor to the totality of the circumstances

evaluation. Similarly, regardless of whether certain specific aspects of various field tests were inconsistent with impairment, the overall opinion of impairment based on the tests is a part of the totality consideration.

Trooper Morris testified that every field sobriety test besides the horizontal gaze nystagmus test indicated impairment. With respect to the horizontal gaze nystagmus test, Trooper Morris testified that an injury Kellogg had suffered to one eye limited the usefulness of the test, but also testified that he did not observe nystagmus. He did, however, observe Kellogg's eyes to be bloodshot and glassy. With respect to the walk-and-turn test, he testified that Kellogg's performance indicated impairment, even though there was not a "real" line for Kellogg to use and even though she was 61 years of age at the time. With respect to the one-leg stand, he testified that Kellogg's performance indicated impairment. With respect to the "Romberg Balance" test, he testified that Kellogg's performance indicated impairment. With respect to the finger-to-nose test, he testified that Kellogg's performance indicated impairment.

Trooper Morris testified that Kellogg did not provide him with any reason that she would be unable to adequately perform any of the field sobriety tests. He testified that she indicated that she understood what was being asked of her for each of the field tests. And he testified that his conclusion based on her performance on the field tests was that she was impaired.

Trooper Morris testified that the fact that Kellogg's preliminary breath test showed a negative result for alcohol suggested to him that the impairment he was observing was related to drugs and not alcohol. And he testified about his specific training with respect to drug recognition.

Based on the totality of the circumstances, we conclude that a reasonably cautious person would believe that Kellogg was under the influence of some substance. Under an objective standard of reasonableness, we find that Trooper Morris had probable cause to arrest Kellogg for driving under the influence and that the district court did not err in so concluding. This assignment of error is without merit.

VI. CONCLUSION

We find no merit to Kellogg's assertions that Trooper Morris lacked reasonable suspicion to expand the detention beyond a traffic stop for speeding and to investigate suspicion that she was under the influence of drugs or alcohol. We find no merit to Kellogg's assertions that Trooper Morris lacked probable cause to arrest her for driving under the influence. We affirm the decision of the district court.

AFFIRMED.

IRWIN, Judge, dissenting.

I respectfully disagree with the majority's conclusion that the evidence in this case supports a finding, despite this being a de novo review of questions of law, that the law enforcement officer had reasonable, articulable suspicion to expand the scope of the initial stop beyond its original purpose. The evidence indicates that his observations amounted to observations merely of nervousness, which is not sufficient to support a finding of reasonable, articulable suspicion. I would reverse.

Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011). The investigation permitted by the traffic stop itself may include gathering information related to the traffic stop and determining whether the vehicle is stolen or the driver is the subject of outstanding warrants. See *id*.

To expand the scope of the stop and continue to detain the motorist to pursue investigating other possibilities, such as driving under the influence, an officer must have reasonable, articulable suspicion that a person in the vehicle is involved in criminal activity beyond that which initially justified the interference. See *id*.

To demonstrate reasonable, articulable suspicion, there must be some objective justification for detention, something more than an inchoate and unparticularized hunch. *Id*. Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances. *Id*. Reasonable suspicion must be determined

on a case-by-case basis. *Id*. Determinations of reasonable suspicion are reviewed de novo. *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003).

Although a motorist's nervousness is an appropriate factor for consideration within the totality of the circumstances of a prolonged traffic stop, *its presence is of limited significance generally*. *State v. Louthan*, 275 Neb. 101, 744 N.W.2d 454 (2008). The Nebraska Supreme Court has specifically held that standing alone, a description of a motorist's nervousness would not support a determination of reasonable suspicion. See *id*. In this case, Trooper Morris' basis for reasonable suspicion was just that—a description of Kellogg's nervousness, standing alone.

In this case, the factors upon which the district court based its conclusion that there was reasonable suspicion to detain Kellogg and administer field sobriety tests were testimony that she was nervous, talkative, and confused; could not sit still; repeated herself; passed over her operator's license while looking for it; and had bloodshot eyes.

Trooper Morris testified that he believed Kellogg was under the influence of some substance based on "[t]he fact that she couldn't concentrate on any of the tasks, she couldn't sit still, [and] she had gone past her driver's license several times while she was looking for it." He explained that as Kellogg went through her wallet trying to locate her operator's license, he was able to visibly see the license but that Kellogg had "gone past it" and had not seen it and "stated that she must have left it at home." He also testified that he had to ask Kellogg for her registration and insurance card "a second time" before she was able to produce those items.

According to Trooper Morris, based upon this demeanor, he had suspicions that she was under the influence of a chemical substance. He testified that he did not detect the odor of alcohol or drugs and that Kellogg's speech was not slurred, and he did not testify to any other objective indications that would have suggested that Kellogg was under the influence.

Trooper Morris testified that in his experience and training, that kind of behavior was indicative of someone's being under the influence. He did not, however, testify about why these

actions—which are all consistent with mere nervousness—suggest someone's being under the influence. Morris' testimony about his training and background did not include any explanation of why or how any of these observations about Kellogg's demeanor suggested that she was under the influence of some substance, rather than merely nervous at being stopped by law enforcement.

I would conclude that these factors, when viewed in their totality, are insufficient to indicate that Trooper Morris had reasonable suspicion to detain Kellogg to determine whether she was under the influence of drugs or alcohol. Trooper Morris' observations amount only to observing indicia of nervousness. Kellogg's inability to locate her operator's license and registration or concentrate on the task of doing so is reasonably construed as nervousness at being stopped by law enforcement. Trooper Morris testified that he observed no odor of alcohol or drugs and that he observed nothing about her driving besides speeding that would warrant stopping her. Kellogg's assertion that there was not sufficient reasonable suspicion to expand the traffic stop is with merit.

Although Trooper Morris testified that he is a drug recognition expert and that he had performed approximately 21 or 22 drug recognition expert evaluations, he did not testify to any nexus between Kellogg's nervousness and a reasonable suspicion of her being under the influence of drugs. When asked why he had reason to believe that Kellogg was under the influence, he merely pointed to her inability to concentrate, sit still, and locate her driver's license without going past it in her wallet.

As noted by the majority, the evidence did not support the district court's inclusion of Trooper Morris' observation of bloodshot eyes, because the testimony does not indicate that Trooper Morris made that observation prior to administering the field tests.

I would find that the district court erred in concluding that Trooper Morris had reasonable, articulable suspicion to expand the initial stop beyond its purposes as a traffic stop for speeding. I would reverse the district court's conclusion to the contrary.

Curtis Acres Association, a Nebraska nonprofit corporation, appellee, v. Stephen Hosman, appellant.

859 N.W.2d 365

Filed January 13, 2015. No. A-13-946.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts 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. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Restrictive Covenants: Intent.** Restrictive covenants are to be construed so as to give effect to the intentions of the parties at the time they agreed to the covenants.
4. **Restrictive Covenants.** If the language of a restrictive covenant is unambiguous, the covenant shall be enforced according to its plain language, and the covenant shall not be subject to rules of interpretation or construction; however, restrictive covenants are not favored in the law and, if ambiguous, should be construed in a manner which allows the maximum unrestricted use of the property.
5. ____. Restrictive covenants that permit a homeowners association to approve or disapprove improvements based on a standard of whether such improvements conform to the harmony of external design and location in relation to surrounding structures are not per se ambiguous; rather, such covenants are enforceable, provided that the authority is exercised reasonably within the framework of the covenants' stated purposes.
6. ____. If a restrictive covenant agreement contains a provision which provides for future alteration or amendment, the language employed within the agreement determines the extent of that provision.
7. **Equity: Words and Phrases.** Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue.
8. ____: ____. Generally, conduct which forms a basis for a finding of unclean hands must be willful in nature and be considered fraudulent, illegal, or unconscionable.

Appeal from the District Court for Douglas County: J Russell Derr, Judge. Affirmed.

Michael F. Coyle and Alexander D. Boyd, of Fraser Stryker, P.C., L.L.O., for appellant.

David D. Ernst and Kellie Chesire Olson, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellee.

IRWIN, INBODY, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Stephen Hosman commenced construction on a boathouse on his lakefront property located in Douglas County, Nebraska. Shortly after construction began, the Curtis Acres Association (Association), the corporation which operates and manages the Curtis Acres subdivision, where Hosman's property is located, filed suit against Hosman. The Association alleged that the construction on Hosman's property violated various restrictive covenants applicable to the land and asked that the court enter an injunction requiring Hosman to permanently remove the boathouse from his property.

Ultimately, the district court found that the construction of the boathouse violated several restrictive covenants and ordered the removal of the structure from Hosman's property. Hosman appeals. Upon our review, we affirm the decision of the lower court.

II. BACKGROUND

In 1990, Hosman purchased a lot in the Curtis Acres subdivision. Prior to Hosman's purchase of the property, the Association filed a "Declaration of Covenants, Conditions, Restrictions, and Easements" (declaration) for the subdivision with the Douglas County register of deeds. Included in the declaration was a requirement that residents obtain preapproval of any improvements built on their lots. That provision provided, in relevant part:

> No improvements of any nature shall be constructed, erected, placed, altered, maintained or permitted on any Lot until detailed plans and specifications with respect thereto in a form reasonably satisfactory to the Association showing the proposed improvement, including a site plan, exterior elevations, exterior lighting, materials, colors,

> landscaping, grading, and such other information as the Association may require has been submitted to and approved in writing by the Association. The Association may designate an Architectural Committee to perform this function.

After Hosman purchased his lot, he submitted building plans to the Association, seeking approval of the construction of a residence on the lot. During his deposition, Hosman testified about the approval process as follows:

> There was a committee that I went through, I believe three sets of plans to get to something that they would allow me to build. It was a rather expensive way to go. My first set of plans were turned down. My second set of plans were turned down because they told me it was a three-story — it was a two-story walkout towards the lake. They told me nothing was allowed to have three stories towards the lake. I finally got a third set of plans, which finally were approved.

Subsequent to Hosman's obtaining approval of the construction of his residence, the declaration was amended on four separate occasions. The first three amendments did not alter the requirement that residents obtain preapproval of any improvements built on their lots. However, the fourth and most recent amendment did alter this provision. In the "Fifth Amendment and Amended and Restated Declaration of Covenants, Conditions[,] Restrictions and Easements" (Fifth Amended Declaration), which was filed with the register of deeds on September 28, 2007, the Association added the following pertinent language to its previous instructions regarding the approval of any new construction:

> An owner desiring to erect an improvement shall deliver two sets of construction plans, landscaping plans, plot plans and grading plans to Association (herein collectively referred to as the "Plans"). Such plans shall include a description type, quality, color (including any color change) and use of materials proposed for the exterior of such Improvement and the proposed grading plan of each lot. Concurrent with submission of the plans,

> Owner shall notify the Association of the Owner's mailing address.
>
> . . . The Association shall review such Plans in relation to the type and exterior of improvements constructed, or approved for construction, on neighboring Lots and in the surrounding area, and any general scheme or plans formulated by Association. In this regard, Association intends that the Lots shall form a residential community with homes constructed of high quality materials. The decision to approve or refuse approval of a proposed improvement shall be exercised by Association to promote development of the Lots and to protect the valued [sic], character and residential quality of all Lots. If Association determines that the proposed improvement will not protect and enhance the integrity and character of all the Lots and neighboring Lots as a quality residential community, Association may refuse approval of the proposed improvement.
>
> . . . Written notice of any approval of a proposed improvement shall be mailed (or faxed) to the owner at the address specified by the owner upon submission of the Plans. Such notice shall be mailed (or faxed), with a copy to the Secretary of the Association, within thirty (30) days after the date of submission of the plans. If notice of approval is not mailed (or faxed) within such period, the proposed improvement shall be deemed disapproved by Association. Construction of any improvement cannot begin until the Plans have been approved by Association.

The president of the Association at the time the Fifth Amended Declaration was adopted and filed explained the rationale behind this amendment as follows:

> The Association determined that new restrictive covenants were necessary in order to bring the existing covenants in compliance with Nebraska law and to articulate a clear standard for approval of new improvements. Additionally, the Association determined that new covenants were needed to reflect the growth of the Curtis

> Acres Subdivision; to articulate the pre-existing master plan of the Curtis Acres Subdivision, which was to ensure any future improvements were in conformity with the existing improvements and upscale design of the Curtis Acres Subdivision; to ensure that any future improvements would be consistent with the master plan; and to preserve and maintain the high character and quality of the Curtis Acres Subdivision.

Approximately 3 years after the Fifth Amended Declaration was filed, Hosman began constructing a boathouse on his lot. The boathouse was located approximately 15 feet from the edge of the lake. Prior to beginning construction, Hosman did not seek approval of his construction plans. When the Association learned of the new construction on Hosman's lot, it sent him a letter reminding him of the requirement delineated in the Fifth Amended Declaration that he submit building plans prior to beginning construction on any improvement on his property. The letter also stated, "You have not made such a submittal, and until submittal and approval by the Association, you are hereby immediately required to cease and discontinue construction of the improvement. If the improvement is not approved, you will be required to remove the improvement from your property."

After receiving the letter from the Association, Hosman submitted a one-page, handwritten drawing of his boathouse for approval. The drawing noted various dimensions for the boathouse and attached deck. Also included on the drawing was a note that the siding on the boathouse was to be the same as on the existing residence and that the roof of the boathouse was to be blue in color.

Hosman subsequently received a letter from the Association's architectural committee which informed him that the drawing he submitted for approval was not sufficient pursuant to the requirements of the Fifth Amended Declaration. The letter also informed him, "A blue standing seam roof is not acceptable." In addition, the letter noted, "Structures will be set back from the shore line so as not to impede one's neighbor's views. We suggest 100′. Lake front is not acceptable."

Essentially, this letter denied Hosman approval to continue building the boathouse.

Despite not receiving approval from the Association, Hosman did not relocate the boathouse; nor did he attempt to comply with any of the Association's building requirements. As a result, on October 6, 2010, the Association filed a complaint against Hosman in the district court. In the complaint, the Association alleged that Hosman's boathouse was in violation of the Fifth Amended Declaration in that Hosman did not obtain or receive approval to construct the boathouse and the boathouse violated the aesthetic integrity of the subdivision and lessened the value of all nearby properties. More specifically, the Association alleged that the boathouse was not appropriately set back from the shoreline; the boathouse was an enclosed lakefront structure, which was not acceptable; and the color and type of roof on the boathouse were not acceptable. The Association requested that the court enter an order requiring Hosman to take down and remove the boathouse.

Hosman timely filed an answer and counterclaim. Therein, he denied a majority of the Association's assertions regarding his boathouse and affirmatively alleged that the covenants contained in the Fifth Amended Declaration were ambiguous, that his boathouse was in conformity with any relevant covenants, and that the covenants were unenforceable because the Association had not reasonably exercised its authority. Hosman requested that the court enter an order declaring that the boathouse constructed on his property is permissible and not in violation of the Fifth Amended Declaration.

Subsequent to the filings of the complaint and answer, both the Association and Hosman filed motions for summary judgment. After multiple hearings, the district court granted the Association's motion for summary judgment, denied Hosman's similar motion, and ordered Hosman to permanently remove the boathouse from his property. Specifically, the court found that Hosman had breached the covenants contained in the Fifth Amended Declaration, that those covenants were enforceable by the Association, and that the Association

had not in any way waived its right to enforce the covenants against Hosman.

Hosman appeals from the district court's decision.

III. ASSIGNMENTS OF ERROR

On appeal, Hosman generally alleges that the district court erred in granting the Association's motion for summary judgment. Hosman specifically alleges that the district court erred in finding (1) that the covenants provide a clear, articulable standard for approval of building projects; (2) that the enforcement of the covenants against Hosman was reasonable; and (3) that the Association did not have unclean hands in its administration of the covenants.

IV. STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts 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. *Farmington Woods Homeowners Assn. v. Wolf*, 284 Neb. 280, 817 N.W.2d 758 (2012). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

V. ANALYSIS

On appeal, Hosman challenges the district court's decision to grant the Association's motion for summary judgment and to require him to remove the boathouse from his property. However, before we address Hosman's specific allegations concerning the court's granting of the Association's motion for summary judgment, we note that Hosman does not dispute the district court's finding that he breached the covenants contained in the Fifth Amended Declaration when he failed to submit detailed, complete building plans for the boathouse to the Association prior to beginning construction. In fact, Hosman

does not dispute that he continues to be in breach of this requirement because he has never submitted appropriate building plans and has never received approval from the Association for the construction of his boathouse.

Instead, Hosman focuses his arguments on appeal on his contention that the building covenants contained in the Fifth Amended Declaration are not enforceable by the Association. We read his arguments to suggest that despite his failure to comply with the requirement to submit appropriate building plans, the Association did not have the authority to deny his plan to build a boathouse with a blue roof at the lakeshore.

First, Hosman argues that the Association should not have disapproved of his boathouse plans, because the covenants contained in the Fifth Amended Declaration are not enforceable insofar as they "do not provide a clear, articulable standard for approval" of construction requests made by residents. Brief for appellant at 16. Hosman asserts that under the facts of this case, the Association's decision to approve or deny building plans has been left to the subjective opinions of members of the Association. We conclude that Hosman's assertion lacks merit. We find that the relevant covenants contained in the Fifth Amended Declaration contain a sufficient standard for approval and are not ambiguous.

[3,4] Restrictive covenants are to be construed so as to give effect to the intentions of the parties at the time they agreed to the covenants. *Southwind Homeowners Assn. v. Burden*, 283 Neb. 522, 810 N.W.2d 714 (2012). If the language is unambiguous, the covenant shall be enforced according to its plain language, and the covenant shall not be subject to rules of interpretation or construction. However, restrictive covenants are not favored in the law and, if ambiguous, should be construed in a manner which allows the maximum unrestricted use of the property. *Id*.

The Nebraska Supreme Court has previously addressed the specificity required by covenants which control residents' requests to build new construction or to make improvements on their property in *Normandy Square Assn. v. Ells*, 213 Neb. 60, 327 N.W.2d 101 (1982). In that case, a homeowner's

association filed suit against a resident after the resident built a fence on her property without receiving the approval of the association. The association had apparently denied the resident's submitted building plans because the fence was not appropriately set back from the street. *Id*. The relevant covenants at issue included a requirement that residents obtain approval of any construction projects, but did not include any specific standards upon which that approval would be based. *Id*. Instead, the covenants included the following broad standard for the association's approval of building plans: "'[T]he harmony of external design and location in relation to the surrounding structures and topography . . . .'" *Id*. at 63, 327 N.W.2d at 104. In addition, the covenants indicated that their purpose was "'enhancing and protecting the value, desirability and attractiveness of said property . . . .'" *Id*. Ultimately, the trial court required the homeowner to relocate the fence so as to comply with the policy of the association.

[5] On appeal, the Supreme Court affirmed the decision of the trial court. *Ells, supra*. The court held that restrictive covenants that permit a homeowners association to approve or disapprove improvements based on a standard of whether such improvements conform to the harmony of external design and location in relation to surrounding structures are not per se ambiguous; rather, such covenants are enforceable, provided that the authority is exercised reasonably within the framework of the covenants' stated purposes. *Id*.

When we apply the rule set forth in *Ells, supra*, to the applicable restrictive covenant contained in the Fifth Amended Declaration, we conclude that it contains a sufficient standard for approval and is not ambiguous. Like the building covenant in *Ells*, the building covenant in the Fifth Amended Declaration contains a general and broad standard for approval, rather than specific building standards:

> The Association shall review such Plans in relation to the type and exterior of improvements constructed, or approved for construction, on neighboring Lots and in the surrounding area, and any general scheme or plans formulated by Association.

However, also similarly to the covenant in *Ells*, this building covenant clearly conforms to the purposes of the declaration for the benefit of all owners:

> The decision to approve or refuse approval of a proposed improvement shall be exercised by Association to promote development of the Lots and to protect the valued [sic], character and residential quality of all Lots. If Association determines that the proposed improvement will not protect and enhance the integrity and character of all the Lots and neighboring Lots as a quality residential community, Association may refuse approval of the proposed improvement.

Essentially, it is clear that the intent of the building covenants within the Fifth Amended Declaration is to review residents' building plans in order to determine whether such plans conform to the standards of the neighborhood. We conclude that, pursuant to the holding in *Normandy Square Assn. v. Ells*, 213 Neb. 60, 327 N.W.2d 101 (1982), this intent is clearly stated within the covenants and, as a result, does not create ambiguity or an unclear standard of approval as Hosman suggests. Accordingly, we find, as did the district court, that the Association had the power and authority to disapprove of Hosman's boathouse.

We now turn to the question of whether that authority was exercised reasonably. The Association informed Hosman that it could not approve the boathouse because the blue roof was not in conformity with other, existing structures and because the boathouse was located too close to the shoreline of the lake. The Association indicated that the structure needed to be located at least 100 feet away from the lake. On appeal, Hosman argues that the Association's failure to approve the boathouse was unreasonable for three reasons: (1) There are other boathouses in Curtis Acres subdivision that are located within 100 feet of the shoreline of the lake, (2) the Association does not consistently enforce all of the covenants contained in the Fifth Amended Declaration, and (3) the Association treats Hosman differently from other residents because members of the Association dislike him.

1. Other Boathouses Within 100 Feet of Lake

Hosman asserts that the Association exercised its authority under the covenants unreasonably because there are multiple boathouses in Curtis Acres subdivision that are located within 100 feet of the shoreline and the Association has not asked that those boathouses be removed or moved back. Essentially, Hosman asserts that the Association waived its ability to enforce the setback rule. The Association concedes that there are boathouses in the subdivision that are located within 100 feet of the shoreline, but it asserts that those boathouses were built prior to the filing of the Fifth Amended Declaration wherein the Association amended its building covenants and reexamined its standards for approval. The Association also asserts that since the filing of the Fifth Amended Declaration in 2007, it has consistently required a 100-foot setback from the shoreline for covered structures.

[6] The Nebraska Supreme Court has previously recognized that if a restrictive covenant agreement contains a provision which provides for future alteration or amendment, the language employed within the agreement determines the extent of that provision. *Regency Homes Assn. v. Schrier*, 277 Neb. 5, 759 N.W.2d 484 (2009); *Boyles v. Hausmann*, 246 Neb. 181, 517 N.W.2d 610 (1994). The court indicated, "Although we will enforce those restrictions of which a landowner has notice, we will not hold that a property owner is bound to that of which he does not have notice." *Boyles*, 246 Neb. at 191, 517 N.W.2d at 617.

Our review of the original declaration and its various amendments reveals that in each version of the document, there has been a clear provision which indicates that the declaration and the restrictive covenants contained therein are subject to amendment. That provision provides that the Association may extend, modify, or terminate any part of the declaration with a two-thirds vote of the members of the Association. Therefore, the question before us is whether the policy requiring structures to be set back from the lake by at least 100 feet can be considered an "extension" or "modification" of the original declaration such that a homeowner in

the Association would be on notice that his or her property could be subject to such a policy.

The original declaration indicated a clear intention by the Association to maintain control over the general appearance of all structures constructed within the subdivision, including materials, colors, landscaping, and exterior lighting. In addition, the Association required each homeowner to submit a "site plan" prior to beginning any construction. Presumably, such a site plan would include the location of a structure within the relevant lot. Accordingly, we conclude that the original declaration contemplated control over the general appearance and location of all structures built within the subdivision. As such, homeowners, including Hosman, would have reasonably contemplated that an extension or modification of the declaration could later include more specific building and location requirements.

And, such an extension or modification occurred when the Association adopted the Fifth Amended Declaration and decided to make its building policies more exacting, including deciding to require structures to be set back from the lake by at least 100 feet. Evidence presented by the Association revealed that since the adoption of the Fifth Amended Declaration in 2007, the Association has uniformly required such a setback for every new structure. Because the Association properly amended the covenants in 2007 and because it has uniformly enforced those amended covenants since 2007, we do not find that it acted unreasonably in denying Hosman approval of his boathouse, as the structure clearly did not comply with the setback requirement.

We must also note that the Association's failure to approve Hosman's boathouse was not based entirely on its location on his property or on its proximity to the shoreline. The Association also indicated that the structure was not permissible because of the color of the roof. Hosman did not present any evidence to demonstrate that there are other boathouses or structures within the subdivision that have a blue roof. As such, even if the Association unreasonably denied the boathouse based on its location, there is no evidence that the denial based on the roof color was also unreasonable.

2. Inconsistent Enforcement of All Covenants

Hosman asserts that the Association exercised its authority under the covenants unreasonably because the Association has failed to consistently enforce all of the restrictive covenants applicable to homeowners within the Curtis Acres subdivision. Specifically, Hosman points to evidence that the Association has permitted two homeowners to violate a covenant which requires the construction of a residence to commence within 1 year of purchasing a lot. The Association does not dispute that two homeowners have technically violated this covenant. However, it offered evidence of extenuating circumstances in each homeowner's situation. The Association apparently did not enforce the covenant against the two homeowners because of those extenuating circumstances.

Our review of the Fifth Amended Declaration reveals that the Association is permitted to waive the application of covenants to certain homeowners: "The Association will have the right . . . for the purpose of avoiding undue hardship to waive partly or wholly the application to any Lot of any covenant or easement granted to the Association." Given this language and the Association's explanation regarding why it has not enforced the building covenant against these two homeowners, we conclude that Hosman's assertion lacks merit. There is no evidence that the Association has acted unreasonably by failing to require these two homeowners to commence building a residence while at the same time requiring Hosman to comply with the covenant concerning approval of the construction of new structures.

Hosman also asserts that the Association cannot enforce the covenants against him because it has unclean hands in its enforcement of those covenants. As the basis of this argument, Hosman again points to the Association's permitting the two homeowners to violate the covenant which requires the construction of a residence to commence within 1 year of purchasing a property. Hosman contends that the Association's failure to act is particularly egregious because these two homeowners were, at least at one time, on the decisionmaking board of the Association.

[7,8] Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue. *Farmington Woods Homeowners Assn. v. Wolf*, 284 Neb. 280, 817 N.W.2d 758 (2012). Generally, conduct which forms a basis for a finding of unclean hands must be willful in nature and be considered fraudulent, illegal, or unconscionable. *Id.*

As we discussed above, the Association did not act unreasonably by failing to enforce the covenant requiring building to commence on each lot within 1 year of its purchase against these two board members, because each had an extenuating circumstance and because the Fifth Amended Declaration permitted such a deviation from enforcement. Accordingly, there is also no evidence that the Association acted inequitably, unfairly, or dishonestly, and Hosman's assertions to the contrary lack merit.

3. Inconsistent Treatment of Residents

Hosman also asserts that the Association exercised its authority under the covenants unreasonably because members of the Association dislike him and, as a result of this dislike, treat him differently from the other residents. There was evidence presented at the summary judgment hearing that Hosman does not have a good relationship with certain members of the Association. There was also evidence that during the pendency of the lower court proceedings, one member of the Association participated in sending to Hosman's home a package which contained derogatory comments and insinuations about Hosman's character. However, Hosman did not present any evidence which would link any animosity held by individual Association members to the Association as a whole or to its decisionmaking process. Stated another way, Hosman did not demonstrate that any one member's dislike of him contributed in any fashion to the Association's decision to deny approval of the boathouse.

We note that Hosman did offer evidence about a previous instance between himself and the Association which, he

asserts, is evidence of ongoing inconsistent treatment by the Association. Apparently, sometime in 2008, Hosman attempted to build a seawall on his property which he believed to be similar in nature to other residents' seawalls. Hosman was sent a letter by the Association that his seawall was not permitted. Hosman argues that he was not permitted to build the seawall simply because of the Association's animosity toward him. However, the Association presented evidence that Hosman's seawall was not similar to other residents' seawalls because Hosman had attempted to excavate the shoreline in order to construct the seawall, whereas other residents had finished construction without engaging in any excavation. Excavation of the shoreline is clearly not permitted by the Fifth Amended Declaration, as that document states: "The shoreline of the Lake will not be permitted to be excavated." Thus, Hosman's evidence does not demonstrate a pattern of inconsistent treatment as he suggests. Rather, the evidence demonstrates that Hosman has failed to comply with the restrictive covenants contained in the Fifth Amended Declaration on more than one occasion.

Based on the evidence presented at the summary judgment hearing, we conclude that the district court did nor err in finding that the covenants in the Fifth Amended Declaration were enforceable by the Association, that the Association exercised its authority to enforce those covenants reasonably, and that Hosman breached the covenants in his construction of the boathouse. Accordingly, we affirm the decision of the district court to grant the Association's motion for summary judgment and order Hosman to permanently remove the boathouse from his property in the Curtis Acres subdivision.

VI. CONCLUSION

We affirm the district court's order granting the Association's motion for summary judgment, denying Hosman's motion, and ordering Hosman to permanently remove the boathouse from his property.

AFFIRMED.

Lori Jean Logan, appellee, v. Terry Lee Logan, appellant.

859 N.W.2d 886

Filed January 20, 2015. No. A-13-1038.

1. **Divorce: Property Division: Alimony: Appeal and Error.** An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property and support.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Divorce: Appeal and Error.** While in a divorce action the case is reviewed on appeal de novo, the appellate court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite.
4. ____: ____. Obviously, a trial court weighs the credibility of the witnesses and the evidence and determines what evidence should be given the greater weight in arriving at a factual determination on the merits. The testimony need not be accepted in its entirety and the trier of fact must use a commonsense approach and apply that common knowledge which is understood in the community.
5. **Property Division.** Under Neb. Rev. Stat. § 42-365 (Reissue 2008), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
6. ____. The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
7. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.
8. **Rules of the Supreme Court: Appeal and Error.** The Nebraska Supreme Court has repeatedly emphasized that Neb. Ct. R. App. P. § 2-109(D)(1) (rev. 2014) requires a party to set forth assignments of error in a separate section of the brief, with an appropriate heading, following the statement of the case and preceding the propositions of law, and to include in the assignments of error section a separate and concise statement of each error the party contends was made by the trial court.
9. ____: ____. Headings in the argument section of a brief do not satisfy the requirements of Neb. Ct. R. App. P. § 2-109(D)(1) (rev. 2014).
10. ____: ____. When a party on appeal fails to comply with the clear requirements of the court rules mandating that assignments of error be set forth in a separate section of the brief, an appellate court may proceed as though the party failed to file a brief or, alternatively, may examine the proceedings for plain error.

11. **Appeal and Error.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

Appeal from the District Court for Dakota County: PAUL J. VAUGHAN, Judge. Affirmed.

Craig H. Lane, P.C., for appellant.

Michele M. Lewon, of Kollars & Lewon, P.L.C., for appellee.

MOORE, Chief Judge, and IRWIN and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Terry Lee Logan appeals an order of the district court for Dakota County, Nebraska, in which order the court dissolved Terry's marriage to Lori Jean Logan, divided marital assets, and ordered each party to pay his or her respective attorney fees. On appeal, Terry challenges the court's valuation of the marital home and a family business, the court's division of other property and debt, and the court's allowance of temporary alimony to the date of the decree. We find no merit to the appeal, and we affirm.

II. BACKGROUND

The parties were married in 1973. During the course of their marriage, they had three children, all of whom are now adults. At the time of trial, Terry was 61 years of age and Lori was 57 years of age.

In August 2012, Lori filed a complaint seeking dissolution of the parties' marriage. In her complaint, Lori requested an award of temporary and permanent spousal support, an equitable division of marital assets and debts, and attorney fees. In October 2013, the district court entered a decree dissolving the parties' marriage and dividing the parties' assets and debts. Terry has appealed from the decree, and Lori has purported to bring a cross-appeal.

The primary issues raised by Terry in his appeal concern the valuation of the parties' marital home, the valuation of a

business operated by Terry, the division of other property and debt, and an award of temporary alimony during the proceedings below.

1. Marital Residence

Terry and Lori purchased the marital residence in 1998. Lori moved out of the residence in August 2012, and Terry was still residing there at the time of trial. Both parties testified that they wanted to be awarded the marital residence.

Terry testified that he believed that the marital residence was worth $185,000. Lori testified that she believed that the marital residence was worth $198,000. In addition, a real estate broker opined that the marital residence was worth between $193,000 and $203,000.

The primary issue on appeal concerning the valuation of the marital residence relates to indebtedness of two of the parties' sons and how that indebtedness relates to the marital residence. The evidence adduced at trial indicated that the remaining amount of the primary mortgage on the marital residence was approximately $3,353.

In Lori's motion for temporary allowances, she alleged that both sons had loans secured with the parties' home as collateral. Similarly, in his affidavit objecting to temporary allowances, Terry averred that the marital residence was "subject to second mortgages representing additional collateral for two (2) of the parties' sons who could not otherwise purchase homes." In that affidavit, Terry further opined that "to his recollection, one (1) mortgage was $75,000 and the other mortgage was $80,000."

At trial, Lori provided exhibits reflecting the two sons' indebtedness to a credit union. She testified that the parties had allowed the two sons to use the marital residence as collateral for loans. At trial, Lori did not want the valuation of the marital residence reduced by the value of the sons' loans, although she agreed that the loans created liens on the residence.

At trial, Terry presented a proposed distribution of assets and liabilities, in which he proposed that the court reduce the value of the marital residence by the primary mortgage

amount and also by the amount of each of the two sons' loans for which the residence was serving as collateral.

In the decree, the district court valued the marital residence at $185,000, which was Terry's proposed value, and awarded the residence to Lori, subject to indebtedness. The court reduced the value of the residence by the amount of the primary mortgage and also by the amount of each of the two sons' loans. The court specifically noted in the decree that both Terry and Lori "argued at trial that these are legitimate deductions to the equity value of the home notwithstanding the fact that the sons have, and likely will, continue to pay their respective mortgages. Since both parties have argued this position, the Court has adopted their positions."

2. Terry's Business

Terry was employed at a meatpacking company for 22 years, and then at a computer company for 15 years. He operated an individual tax preparation service on a part-time basis while employed at the computer company. When he lost his job at the computer company in 2008, he began operating his tax service on a full-time basis. Terry testified that his tax service primarily involves completion of individual tax returns, earning him approximately $50 per return.

The tax service had been operated as a limited liability company prior to the parties' separation. After the parties' separation, Terry dissolved the limited liability company. Terry testified that he dissolved the limited liability company because Lori had sought and received a protection order which made it impossible for him to continue operating the business in a business relationship with Lori. Terry testified that the dissolution resulted in his having to move the location of the business and incur costs.

Terry estimated that he services between 900 and 1,000 clients through the business. He testified that he has "20 to 25" bookkeeping clients. He testified that he receives between $150 and $200 per month per bookkeeping client and that he averages approximately $50 per return for tax preparation services.

Terry testified that during the first 5 months of 2013, the business had generated over $73,000 in income; this amount was also presented in an exhibit offered by Terry. Terry estimated that bookkeeping revenue for the remainder of 2013 would be between $20,000 and $24,000.

Terry presented expert testimony concerning the valuation of the business from a partner in a certified public accounting firm. Terry's expert indicated that he had provided approximately a dozen business valuations in the past 20 years, and he provided a report which was offered and received by the court. Terry's expert based his opinion of the business' value on a valuation report prepared by another accountant, who had opined that the value of the business was between $52,000 and $70,000. Terry's expert testified that he felt the range was reasonable, and he opined that the business was worth between $0 and $70,000. Terry's expert based his opinion, in part, on the fact that the business was one providing tax and bookkeeping services, not accounting, and the fact that the business' customers were those looking for cheap services from year to year, rather than reliable repeat customers. Terry's expert also testified, however, that if Terry sold the business and did not "stick around and assist with the transition to . . . new owners," then the value of the business was potentially "very possibly zero up to, perhaps, the value of the furniture and equipment," and that it was possible someone would offer Terry only between "$500 or $1,000" for his client list. Terry's expert also testified that he "assumed that [Terry] would try to minimize the value of his business if he were going through a divorce."

Lori also presented expert testimony concerning the valuation of the business from a certified public accountant. Lori's expert testified that he was in the process of becoming accredited in business valuations and that he had valued nine businesses as a certified public accountant in the previous year. Lori's expert opined that the business was worth approximately $66,000 as of December 31, 2011. Lori's expert testified that his valuation was hampered because his access to information concerning the business was "very, very, very

much restricted to the revenues . . . of the company." As a result, he reduced his opinion to a "calculation report" instead of a "valuation report." He testified that his calculation was also consistent with his opinion of the business' value based on his familiarity with small tax and bookkeeping practices in the area.

In the decree, the court awarded the business to Terry and set its value at "a value of $25,000." The court noted that the value was "substantially lower than the value of [Lori's] expert at $66,000, but more than [Terry's] expert at $19,000." The court indicated that it had determined the value of the business "by a full consideration of all factors considered by both parties' expert witnesses."

3. Other Property and Debt

In the decree, the district court divided other property and debt of the parties. In particular, the court made specific findings about "certain disputed items."

The court valued an "Ameriprise account" and made a division of it. The court concluded that the account had a value of $44,832.04 at the time of separation, that it had been reduced to $22,521.59 by the time of trial, and that Terry had been in control of the account during that time and had spent the $22,310.45 from the account for living expenses. The court awarded each party $11,260.80, reflecting half of the remaining balance of the account, but assessed Terry $33,571.24 in the marital estate to reflect both his half of the account and the amount by which he had diminished the account's balance prior to trial.

The court ordered Lori to pay $13,782.94 on a debt owed to "GM Mastercard." The court included this amount as a marital debt for which Lori was responsible. The court also ordered Lori to pay a $10,060.05 debt to Pioneer Bank. The court included this debt as a marital debt for which Lori was responsible. Similarly, the court also ordered Lori to pay debts of $877.23 to "Everett's Furniture," $885.29 to "Younker's Credit Card," $740.20 to "Siouxland Paramedics Bill," and $1,772.31 to "Mercy Medical Center Bill," and concluded each were marital debts for which Lori was responsible.

4. Temporary Alimony

In March 2013, Lori filed a motion for temporary allowances, in which, among other requests, she requested the court order temporary alimony to commence then "and continue each and every month thereafter until final disposition of the case." Terry filed an affidavit, in which he averred that the request for temporary allowances should be denied. In April, the court entered an order awarding Lori temporary alimony commencing March 1, 2013, and continuing "until conclusion of this matter."

In the decree, the court noted that Terry had been ordered to pay temporary spousal support "commencing March 1, 2013, until conclusion of this matter." The court held that "[t]emporary support shall terminate upon entry of this Decree" and that "[n]o further spousal support shall be ordered."

III. ASSIGNMENTS OF ERROR

On appeal, Terry has assigned four errors: First, he asserts that the district court erred in reducing the value of the marital home by the two sons' loans, which were secured by the marital home. Second, he asserts that the court erred in its valuation of the business. Third, he asserts that the court erred in its division of other property and debts. Fourth, he asserts that the court erred in granting Lori temporary alimony from July 2013 through the date of the filing of the dissolution decree.

On her purported cross-appeal, Lori has not assigned any errors, but has presented arguments concerning the district court's valuation of the business and failure to award Lori attorney fees.

IV. ANALYSIS

1. Terry's Appeal

[1,2] An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Pohlmann v. Pohlmann*, 20 Neb. App. 290, 824 N.W.2d 63 (2012). This standard of review applies to the trial court's determinations regarding division of property and support. See

id. An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id*.

(a) Valuation of Marital Residence

Terry first challenges the district court's valuation of the marital residence. Specifically, Terry assigns as error the court's determination to reduce the value of the marital residence by the outstanding balances on the two loans taken out by the parties' sons and secured through the use of the marital residence as collateral. We find no abuse of discretion.

Terry's arguments on appeal do not challenge the court's determination as to the valuation of the marital residence or the court's inclusion of the remaining balance of the primary mortgage on the residence. Terry also does not challenge the specific amounts the court determined to be the outstanding balances on the two sons' loans for which the marital residence was serving as collateral. Terry's argument is limited to challenging the court's determination that the value of the marital residence be reduced by the balances on the two loans, because the sons were paying their loans and because the end result is "inequitabl[e]." Brief for appellant at 23.

Terry acknowledges in his brief that "[t]here seemed to be some confusion and conflicting testimony regarding whether" the two sons' loans reflected indebtedness on the marital residence. Brief for appellant at 21. The record indicates that both parties asserted at trial that the two sons' loans were indebtedness against the value of the marital residence. As noted above in the "Background" section, Lori first noted that the residence was serving as collateral for the two sons' loans in her motion for temporary allowances, and in his response thereto, Terry specifically indicated that the residence was "subject to second mortgages representing" collateral for the two sons' loans. Both parties testified at trial that the marital residence was used as collateral for the two loans.

By the conclusion of the trial, Lori did not want the valuation of the marital residence reduced by the value of the loans, but agreed that the loans created liens against the residence.

The proposed distribution of assets and liabilities that Terry presented to the court specifically proposed that the court reduce the value of the marital residence by the primary mortgage amount and the amounts of the two sons' loans. Terry wanted the court to award him the residence and wanted the value attributed to him in the distribution of the marital estate to reflect the reality that the two loans were secured by the residence and that they reduced the equity value in the residence.

The court specifically noted that it was including the loans in the valuation of the residence because both parties had argued to the court that such should be done. Now that Terry was not awarded the residence, he attempts to assert that the court erred in valuing the residence and considering the two loans precisely as he asked the court to do at trial. There is no abuse of discretion in the court's determination, and this assignment of error is meritless.

(b) Valuation of Business

Terry next asserts that the court erred in its valuation of his tax preparation business. He argues on appeal that the court erred in finding that the business could be valued at $25,000 or in finding any value at all, beyond the value of equipment. We find no abuse of discretion.

[3,4] In reviewing challenges to the valuation in dissolution proceedings of the interest in a business, the Nebraska Supreme Court has recognized that while in a divorce action the case is reviewed on appeal de novo, the appellate court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. See *Lockwood v. Lockwood*, 205 Neb. 818, 290 N.W.2d 636 (1980). Obviously, a trial court weighs the credibility of the witnesses and the evidence and determines what evidence should be given the greater weight in arriving at a factual determination on the merits. *Lockwood v. Lockwood, supra*. The testimony need not be accepted in its entirety and the trier of fact must use a commonsense approach and apply that common knowledge which is understood in the community. *Id*.

In this case, Terry argues on appeal that the court erred in finding that the business had any value beyond the small value of equipment, including outdated computers and old desks. However, our review of the record indicates that both parties presented evidence that would support a finding that the business had value beyond just this equipment. Terry's own expert opined that a valuation prepared by another accountant and placing the value of the business as being between $52,000 and $70,000 was reasonable. Terry's expert opined that the business was worth between $0 and $70,000, although he testified that the business' client list was potentially worth as little as $500 to $1,000. Lori presented expert testimony suggesting the value of the business was approximately $66,000.

Terry makes arguments on appeal concerning the qualifications of Lori's expert. Lori counters by making arguments on appeal concerning the qualifications of Terry's expert. Such arguments are challenges to the credibility of the witnesses, and we do not second-guess the trial court's determinations about the credibility of witnesses.

Although we recognize that the district court's decision to value the business at $25,000 does not reflect adoption of a specific value testified to by any of the witnesses, the evidence at trial would have supported a valuation of $0 to $70,000. The parties also presented testimony about a variety of factors that might affect the valuation, positively or negatively, including the data available to make a valuation, whether the customers would be likely to continue patronizing the business if it was run by someone other than Terry, the nature of the customers, et cetera. The parties also presented evidence about a variety of valuation methods. All of these factors taken into account, we do not find the valuation of the trial court to be an abuse of discretion. This assigned error is without merit.

(c) Other Property and Debts

Terry also asserts that the court erred in various other specific determinations of property and debt distribution. We find no abuse of discretion.

[5,6] Under Neb. Rev. Stat. § 42-365 (Reissue 2008), the equitable division of property is a three-step process. *Plog v.*

Plog, 20 Neb. App. 383, 824 N.W.2d 749 (2012). The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Plog v. Plog, supra*. The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Id*.

In this case, the division of marital assets and liabilities ended up such that Lori received a net marital estate value of $83,547.91 and Terry received a net marital estate value of $82,725. Terry has indicated that several specific items were erroneously considered by the district court in its division of the marital estate. We consider each in turn.

(i) Pioneer Bank Debt

First, Terry asserts that the district court erred in finding that a $10,060.05 debt to Pioneer Bank, which the court ordered Lori to pay, should be considered a marital debt. Terry argues that the debt was incurred to pay Lori's attorney fees.

Terry points to Lori's testimony at trial to support his assertion that this loan was used for Lori's attorney fees. Lori testified that she took out the note at Pioneer Bank for $10,000 because she "had attorney bills to pay and [she] put it on [her] credit card and [she] went over the limit, so [she] went to the bank." She testified that "once you go over the limit, then you have to pay that over the limit amount" and that "it was $5,300 and some-odd dollars, so [she] borrowed that money from Pioneer Bank to pay part of it and to the credit card for the attorney fees and car repair."

[7] This testimony does suggest that Lori used some portion of this loan to pay attorney fees. However, it is not clear how much of it was used for attorney fees and how much was used for other expenses that would properly be considered marital debt. Lori's testimony indicates that she took out this loan because when she used a credit card to pay attorney fees, she ended up going over the limit on the credit card. She testified that she used this loan to pay "part" of the overage and to pay

the credit card "for the attorney fees and car repair." On this record, there is no way for us to determine how much of this was used to pay attorney fees and how much was used to pay other unidentified charges on the credit card. It is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors. *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009). In this case, Terry has not presented a record indicating how we can ascertain that the court abused its discretion in treating this loan as a marital debt simply because some unknown amount of it may have been used to pay a credit card bill that included payments for attorney fees.

(ii) GM Mastercard

Terry next asserts that the court erred in treating debt associated with a GM Mastercard as marital without properly considering testimony that Lori used the credit card to purchase some items of furniture during the parties' separation. He points out that Lori testified that "part of this credit card debt was her purchase of various pieces of furniture including a bedroom set in the sum of $4,800 as well as two (2) other purchases at Everett's Furniture." Brief for appellant at 35.

In the decree, the court noted that Lori had valued the GM Mastercard debt at $20,809.88 and had requested the entire amount be considered a marital debt, and that Terry had valued the GM Mastercard debt at $13,776.94 and had requested the entire amount be considered a nonmarital debt. The court ordered Lori to pay the debt, but placed the marital debt value at $13,782.94. In reducing the value to this amount, the court specifically held that it was not allowing amounts attributed to "excess charges for OnStar and internet purchases of $1,137.22, concert and lodging purchases of $935.62 and furniture purchases of $4,954.10 for items [Lori] did not list as marital assets."

Terry argues that "this debt should either be viewed as non-marital or that the value of the furniture Lori purchased with this credit card should be added . . . as an asset." Brief for appellant at 35. Inasmuch as the court specifically reduced

the amount of the debt considered as marital to account for the furniture Terry is complaining about, we find no abuse of discretion.

Terry also argues that the debt should be considered nonmarital because he paid temporary spousal support of $1,500 per month and that the debt could be considered an "unnecessary dissipation of assets." Brief for appellant at 36. Again, Terry has not established how or why the amount of the debt actually considered marital by the district court reflects an improper dissipation of assets or constitutes nonmarital expenses. We find no abuse of discretion in the court's treatment of this debt.

(iii) Ameriprise Account

Terry next asserts that the district court erred in its treatment of an Ameriprise account. He argues the court erred in crediting against his interest in the account money he used for living expenses and for paying temporary spousal support and in crediting against his interest an amount that was transferred from the Ameriprise account to a Bank of the West individual retirement account.

With respect to the Ameriprise account, the district court made specific findings. The court noted that the account had a value at the time of separation of $44,832.04 and, by the time of trial, had been reduced to $22,521.59. The court noted that Terry had control of this account throughout and that he had testified he spent the amount by which the account was reduced to pay for his living expenses. As such, the court awarded each party half of the remaining balance ($11,260.80 each), but assessed $33,571.24 against Terry in the marital estate calculations.

Terry testified that he withdrew "about half" of the money in the Ameriprise account "for living expenses" after being served with Lori's complaint for dissolution. He testified that he calculated his budget "for the next four or five months and determined that [he] needed to take out about $22,000 to meet [his] home bills." He testified that he "figured [he'd] give [Lori] half and [he'd] get half. So [he] took [his] half out to live on . . . ." He also testified that money in a Bank

of the West account "came from the IRA" and that it represented an amount out of the $22,000 withdrawn from the Ameriprise account that he "didn't quite need all" and "put it back into the IRA." Terry testified that he then took the money back out of the Bank of the West account to pay Lori temporary alimony.

We do not find an abuse of discretion in the court's treatment of the amounts from the Ameriprise account. Terry's testimony supports the court's determination that Terry withdrew half of the value of the account after the separation and used it to pay living expenses and temporary alimony payments to Lori.

(iv) Various Other Debts

Finally, Terry asserts that the district court erred in its treatment of several other debts, including a furniture bill, a Younker's credit card, and medical bills. With respect to these debts, he simply argues that it is his position that they should have been considered Lori's individual debt and not included in the marital estate, and he points out that the medical bills were incurred after the parties had separated. Terry has not demonstrated an abuse of discretion by the court with respect to any of these debts.

(v) Conclusion

We find that Terry has not demonstrated an abuse of discretion with respect to the district court's treatment of any of these challenged debts. We find no merit to this assignment of error.

(d) Temporary Alimony

Finally, Terry asserts that the district court erred in granting Lori temporary alimony after the time of her deposition or the trial. He argues that Lori had consistently testified since the time of a deposition in December 2012 that she was not requesting alimony, and he argues that the court should have terminated the temporary alimony award effective either at the time of her deposition or at the time of trial, rather than at the time of entry of the decree. We find this assertion to be meritless.

In his brief on appeal, Terry points this court to only three pages of the record to support his assertion on appeal. On those pages, Lori was asked, "Are you making a request to the Court today to have [Terry] pay alimony to you after this divorce is final?" Lori replied, "No." In addition, the court specifically asked Lori's counsel if she was "agreeing there's not going to be an alimony request as part of these proceedings," and Lori's counsel indicated, "Right, constantly and consistently that's been her testimony, she testified to it at her deposition in December, as well as today, and I've made several comments that have said we're not pursuing alimony." Lori's counsel indicated, "So she's making no long-term request for alimony."

Lori requested temporary and permanent spousal support in her complaint, filed in August 2012. In March 2013, Lori filed a motion for temporary allowances, including spousal support. The court entered an order directing Terry to pay temporary spousal support "until conclusion of this matter." The record presented to us does not include any indication that, after the temporary order was entered, Terry took any action in the district court to challenge or modify this temporary order.

The portions of the record that Terry has pointed us to on appeal do not, in any way, support his argument that Lori did not want temporary spousal support until the entry of the decree and that the court abused its discretion in not, sua sponte, altering its temporary order to terminate temporary spousal support earlier than the entry of the decree. Lori's testimony at trial, Lori's counsel's assertions to the court, and even the portions of Lori's deposition that Terry attached to his affidavit contesting the motion for temporary allowances, all clearly indicate that Lori was not seeking a permanent alimony award. They do not, in any way, suggest that Lori did not want the temporary spousal support that she had filed a motion specifically asking the court to award. Terry's assignment of error in this regard is meritless.

2. Lori's Cross-Appeal

Lori has purported to file a cross-appeal. In so doing, however, she has failed to present any assignments of error. Lori's

brief on cross-appeal does not contain any separate section setting forth assignments of error. Rather, her brief includes in headings within the "Argument" section of the brief assertions that the district court committed error concerning the valuation of the business and denial of her request for attorney fees.

[8,9] The Nebraska Supreme Court has repeatedly emphasized that Neb. Ct. R. App. P. § 2-109(D)(1) (rev. 2014) requires a party to set forth assignments of error in a separate section of the brief, with an appropriate heading, following the statement of the case and preceding the propositions of law, and to include in the assignments of error section a separate and concise statement of each error the party contends was made by the trial court. See, *In re Interest of Samantha L. & Jasmine L.*, 286 Neb. 778, 839 N.W.2d 265 (2013); *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011). The court has also emphasized that "headings in the argument section of a brief do not satisfy the requirements of Neb. Ct. R. App. P. § 2-109(D)(1)." *In re Interest of Samantha L. & Jasmine L.*, 286 Neb. at 783, 839 N.W.2d at 269-70. See, also, *In re Interest of Jamyia M., supra*.

[10,11] When a party on appeal fails to comply with the clear requirements of the court rules mandating that assignments of error be set forth in a separate section of the brief, we may proceed as though the party failed to file a brief or, alternatively, may examine the proceedings for plain error. *In re Interest of Samantha L. & Jasmine L., supra*; *In re Interest of Jamyia M., supra*. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *Id*. After reviewing the relevant parts of the record, we find no plain error.

V. CONCLUSION

We find no merit to Terry's assertions of error. We find that Lori failed to assign any errors on cross-appeal, and we find no plain error. We affirm.

AFFIRMED.

State of Nebraska, appellee, v. Aaron L. Determan, appellant.

859 N.W.2d 899

Filed January 27, 2015. No. A-13-756.

1. **Appeal and Error.** In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
2. **Postconviction: Appeal and Error.** In appeals from postconviction proceedings, an appellate court independently resolves questions of law.
3. **Postconviction: Constitutional Law.** A trial court's ruling that the petitioner's allegations are refuted by the record or are too conclusory to demonstrate a violation of the petitioner's constitutional rights is not a finding of fact—it is a determination, as a matter of law, that the petitioner has failed to state a claim for postconviction relief.
4. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
5. **Effectiveness of Counsel: Appeal and Error.** Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that an appellate court reviews independently of the lower court's decision.
6. **Postconviction: Final Orders.** Within a postconviction proceeding, an order granting an evidentiary hearing on some issues and denying a hearing on others is a final order as to the claims denied without a hearing. In other words, an order denying an evidentiary hearing on a postconviction claim is a final judgment as to that claim.
7. **Postconviction: Effectiveness of Counsel: Appeal and Error.** Where a defendant alleges multiple postconviction claims of ineffective assistance of counsel including a claim that counsel was deficient in failing to timely file, or otherwise timely perfect, a direct appeal, the district court shall make its determination regarding the claim regarding the direct appeal, including holding an evidentiary hearing if the court determines that an evidentiary hearing is necessary, prior to addressing the defendant's other postconviction claims.

Appeal from the District Court for Saline County: Vicky L. Johnson, Judge. Judgment vacated, and cause remanded for further proceedings.

Jeffrey A. Gaertig, of Carlson, Schafer & Davis, P.C., L.L.O., for appellant, and Aaron L. Determan, pro se.

Jon Bruning, Attorney General, and Melissa R. Vincent for appellee.

INBODY, RIEDMANN, and BISHOP, Judges.

INBODY, Judge.

INTRODUCTION

Aaron L. Determan appeals the portion of the decision of the Saline County District Court denying his motion for post-conviction relief without an evidentiary hearing on his claims that trial counsel failed to object to the State's breach of a plea agreement, failed to properly effectuate a continuance of the sentencing hearing, failed to advise him of the requirement of corroboration for a plea-based drug conviction, and stipulated to corroboration. The court determined that an evidentiary hearing was required regarding Determan's remaining claim, that his trial counsel was ineffective for failing to timely perfect his direct appeal.

STATEMENT OF FACTS

Previous Case.

Determan was charged with unlawful manufacture or distribution of a controlled substance, a Class III felony. A jury trial was set for February 27 and 28, 2013; however, on February 26, Determan appeared with counsel and waived his right to a jury trial. The following day, Determan entered a plea of guilty to the charged offense. The only plea agreement in this case was that the State would not make a sentencing recommendation other than to submit the matter based on the information contained in the presentence investigation report (PSR). The State provided the following factual basis: On June 14, 2011, Determan made contact with an informant who had been cooperating with the Nebraska State Patrol regarding drug investigative matters. Determan and the informant had been texting back and forth during the afternoon hours of June 14, and an agreement was reached for Determan to deliver 2 grams of hashish to the informant. The informant, in cooperation with the Nebraska State Patrol, was transported by a State Patrol investigator to a location

in Wilber, Saline County, Nebraska, at which point he proceeded to the door of a residence and had a brief discussion with Determan. At that point, there was an exchange where Determan provided to the informant a plastic baggie containing a brown substance which looked like hashish. Hashish is a derivative of a Schedule I drug that also has tetrahydrocannabinol (THC) in it. The informant provided $60 to Determan for the transaction. The informant then got back into the State Patrol vehicle and delivered the substance to the State Patrol investigator. The substance was analyzed by the Nebraska State Patrol laboratory, which showed the substance to be THC, a Schedule I drug, which is a controlled substance under Nebraska law.

Upon the reading of the factual basis, the following colloquy occurred among the district court, defense counsel, and Determan:

> THE COURT: Anything to add as far as the facts are concerned, [defense counsel]?
>
> [Defense counsel]: No, Your Honor.
>
> THE COURT: Do you stipulate there was sufficient corroboration?
>
> [Defense counsel]: Yes.
>
> THE COURT: . . . Determan, have you heard what the county attorney believes his evidence would be in this case?
>
> [Determan]: Yes, ma'am.
>
> THE COURT: Do you have any disagreement with anything that he has said?
>
> [Determan]: No, ma'am.
>
> THE COURT: Did you do the things that he says that you did?
>
> [Determan]: Yes, ma'am.

The district court accepted Determan's plea and found him guilty of the charged offense. The court ordered a presentence investigation and instructed Determan to contact the probation office by no later than 3 p.m. the following Friday to schedule an appointment. The court also advised Determan that if he failed to show up for his appointment, it was possible the

probation office would not be able to complete the PSR in time for his sentencing hearing, and that that "[would not] help" Determan.

On February 27, 2013, Determan called the probation office and left a voice mail indicating that he needed to schedule an appointment. Support staff attempted to contact Determan at the number provided, but were unable to make contact with Determan. The following day, the probation officer assigned to conduct Determan's presentence interview sent a letter to Determan advising him that his appointment was scheduled for March 11 at 12:30 p.m. Determan failed to appear for his appointment and did not call to reschedule it. On March 12, the probation officer contacted Determan by telephone to discuss his missed appointment. Determan explained that he had been in the emergency room with a toothache and was unable to attend his appointment. The probation officer scheduled a second appointment, for March 19 at 2 p.m., and reminded Determan that he needed to complete his paperwork and bring it with him. On March 18, Determan called the probation officer and advised her that he was having car problems and was attempting to find a ride. The probation officer reminded Determan that his appointment was not until 2 p.m. the following day. On the day of his appointment, Determan arrived at the probation office 40 minutes late and did not have his paperwork with him. The probation officer advised Determan that she could not meet with him, due to her other scheduled appointments. She further advised Determan to contact his attorney, because she would not have time to interview him prior to the PSR's being due. She also provided him with another copy of the paperwork that he needed to complete. The probation officer completed the PSR without interviewing Determan. The PSR included an older PSR prepared in March 2011 in connection with a different case.

At the sentencing hearing held on April 15, 2013, the court noted that it had received and reviewed the PSR prepared by the probation department. Although Determan's counsel stated that he had reviewed the PSR, he noted that Determan had been unable to complete his portion of the presentence investigation. Determan's counsel made an oral motion to continue

the sentencing hearing to allow Determan to complete the presentence investigation interview. The prosecutor opposed the continuance, noting that Determan had substantial opportunities to complete his portion of the presentence investigation, that this was not the first time Determan had been required to submit to a presentence investigation, and that Determan "knows the routine." The prosecutor further suggested that Determan's request for a continuance was "just another delay tactic." The court denied the motion to continue the sentencing hearing, noting:

> It is routinely my practice when I take a plea to advise defendants that it is their obligation to contact probation as soon as possible, that if they don't appear when they're supposed to, that it can delay the [PSR] preparation. I don't have any specific recollection of doing so with . . . Determan, but I am certain that I did.

After his request for a continuance was denied, Determan sought and received permission to supplement the PSR through testimony. Determan testified that he had attempted to check himself into a drug rehabilitation program 3 weeks earlier but was denied admission because he had not yet obtained an evaluation. He further testified that he had been employed by a roofing company since being released from incarceration in October 2012, but that he was currently unemployed because his boss had passed away the previous week. Determan testified that his father had a job for him "starting in May and ending in November" and that he was prepared to obtain a substance abuse evaluation and to seek necessary treatment.

Following Determan's testimony, the district court sought remarks from the State, which offered the following: "Your Honor, the State reviewed the [PSR]. It does set forth sufficient information to allow the Court to make an adequate and appropriate decision on [Determan], and I will submit it based upon that information." Prior to imposing sentence, the district court stated that it had considered the following factors in determining Determan's sentence: (1) the nature and circumstances of the current offense; (2) Determan's criminal history, which included 15 infractions, 28 misdemeanors, and

three felonies—two of which resulted in incarceration and one of which resulted in placement on probation, from which he received an unsatisfactory release; (3) his unemployed status; and (4) his failure to obtain a substance abuse evaluation when given the opportunity. The court then sentenced Determan to 8 to 10 years' imprisonment with credit for 7 days served.

Following his sentencing, Determan, assisted by the same counsel that represented him during his plea and sentencing, timely filed a notice of appeal. However, because Determan's poverty affidavit was not filed under 32 days after his sentencing, we dismissed his direct appeal for lack of jurisdiction on June 28, 2013, in case No. A-13-441.

Current Case.

In August 2013, Determan filed a verified motion for postconviction relief alleging, inter alia, that trial counsel was ineffective for (1) failing to timely file his direct appeal; (2) failing to object when the prosecutor violated the terms of the plea agreement; (3) failing to file a written motion to continue the sentencing hearing, failing to object when his oral request to continue the sentencing hearing was denied, and failing to properly present to the court mitigating factors supporting probation or a more lenient sentence; and (4) failing to advise him of the deficiencies in the State's required corroborating evidence, stipulating to an inadequate factual basis, and advising him to do the same. He contends that absent the acts and omissions of his trial counsel, he would have chosen to go to trial rather than plead guilty to the State's factual basis premised upon inadmissible evidence.

On August 22, 2013, the district court filed an order denying in part, and granting in part, Determan's request for postconviction relief. The court granted Determan's request for an evidentiary hearing with regard to the untimely filing of his appeal. However, the court dismissed the remaining claims contained in Determan's motion for postconviction relief.

Regarding the second allegation, failing to object when the prosecutor violated the terms of the plea agreement, the court found:

> The record reflects that the prosecutor made an objection when [Determan] moved to continue. He submitted the case for sentencing based on the [PSR]. This is in exact accord with his agreement. This portion of the Motion [for postconviction relief] is dismissed as [Determan] cannot show that the attorney's performance was deficient.

Regarding the third allegation, failing to file a written motion to continue the sentencing hearing, failing to object when his oral request to continue the sentencing hearing was denied, and failing to properly present to the court mitigating factors supporting probation or a more lenient sentence, the court found:

> The record is clear that [Determan's] counsel moved to continue the sentencing hearing. The State objected. [That] motion was overruled. This portion of the Motion [for postconviction relief] is dismissed as [Determan] cannot show that the attorney's performance was deficient.
>
> . . . .
>
> The record reflects that [Determan's] counsel did argue mitigating facts. [Determan] testified. This portion of the Motion [for postconviction relief] is dismissed as [Determan] cannot show that the attorney's performance was deficient.

Regarding the fourth allegation, failing to advise him of the deficiencies in the State's required corroborating evidence and stipulating to an inadequate factual basis and advising him to do the same, the court found:

> In colloquy with the Court, [Determan] stated that he understood all of the written information provided to him from his counsel. He also stated that he had told his attorney everything that he knew about the case, that his counsel had discussed trial strategies and defense, that he was satisfied with the advice of his attorney. His counsel stipulated that there was sufficient corroboration when the factual basis was related by the prosecutor. [Determan] then indicated that he had no disagreement with anything stated by the prosecutor and admitted that he had engaged in the acts stated by the prosecutor.

> This portion of the Motion [for postconviction relief] is dismissed as [Determan] cannot show that the attorney's performance was deficient.

ASSIGNMENTS OF ERROR

Determan contends the district court erred in denying him an evidentiary hearing on his postconviction claims of ineffective assistance of trial counsel regarding counsel's failure to object to the State's breach of the plea agreement, failure to properly effectuate a continuance of the sentencing hearing, failure to advise him of the requirement of corroboration for a plea-based drug conviction, and stipulation to corroboration.

[1] We note that in his brief, Determan argues that trial counsel was ineffective for failing to object to the district court's reliance on a 2010 PSR; however, he did not assign this as error. In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *State v. Green*, 287 Neb. 212, 842 N.W.2d 74 (2014).

STANDARD OF REVIEW

[2-4] In appeals from postconviction proceedings, we independently resolve questions of law. *State v. Dragon*, 287 Neb. 519, 843 N.W.2d 618 (2014); *State v. Baker*, 286 Neb. 524, 837 N.W.2d 91 (2013). A trial court's ruling that the petitioner's allegations are refuted by the record or are too conclusory to demonstrate a violation of the petitioner's constitutional rights is not a finding of fact—it is a determination, as a matter of law, that the petitioner has failed to state a claim for postconviction relief. *State v. Dragon, supra*; *State v. Baker, supra*. Thus, in appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief. *State v. Dragon, supra*; *State v. Baker, supra*.

[5] Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that we review independently of the lower court's decision.

State v. Dunkin, 283 Neb. 30, 807 N.W.2d 744 (2012); *State v. Hernandez, ante* p. 62, 847 N.W.2d 111 (2014).

ANALYSIS

[6] Within a postconviction proceeding, an order granting an evidentiary hearing on some issues and denying a hearing on others is a final order as to the claims denied without a hearing. *State v. Alfredson*, 287 Neb. 477, 842 N.W.2d 815 (2014). In other words, an order denying an evidentiary hearing on a postconviction claim is a final judgment as to that claim. *Id*. Thus, Determan's postconviction claims which were denied by the district court are properly before this court for review.

[7] However, before addressing Determan's assigned errors, we are compelled to note that we have addressed the issue of the preferred procedural practice when a defendant's motion for postconviction relief raises multiple issues regarding ineffective assistance of counsel, one of which is counsel's failure to timely file, or otherwise timely perfect, his direct appeal. We previously held in *State v. Seeger*, 20 Neb. App. 225, 822 N.W.2d 436 (2012), that where a defendant combines all of his claims of ineffective assistance of counsel in a postconviction action including a claim that counsel was ineffective in failing to timely file a direct appeal, judicial economy may be served by deferring ruling on the balance of postconviction claims until after an evidentiary hearing on the entitlement to a new direct appeal has been held.

> If a new direct appeal is granted, the remaining postconviction claims could be dismissed as premature and thereafter raised in the direct appeal. If a new direct appeal is not granted, then the court could issue a final order addressing all of the claims and the appellant would be required to file only one appeal.

Id. at 230-31, 822 N.W.2d at 442. Despite our previous pronouncement on this issue, the piecemeal determination of postconviction claims where there is a claim of the ineffectiveness of counsel for failing to timely perfect a direct appeal is obviously a continuing issue. Therefore, we are now setting forth that where a defendant alleges multiple postconviction

claims of ineffective assistance of counsel including a claim that counsel was deficient in failing to timely file, or otherwise timely perfect, a direct appeal, the district court shall make its determination regarding the claim regarding the direct appeal, including holding an evidentiary hearing if the court determines that an evidentiary hearing is necessary, prior to addressing the defendant's other postconviction claims. We also note that although the issue is not directly presented to us, judicial economy would be best served by following this same procedure in all postconviction cases where the district court determines that an evidentiary hearing is needed on one or more of the defendant's claims but not on other claims.

CONCLUSION

Based on our ruling, we find that the district court erred in ruling on the balance of Determan's postconviction claims prior to holding an evidentiary hearing on his entitlement to a new direct appeal, and therefore, the decision of the district court denying Determan's motion for postconviction relief without an evidentiary hearing on his second, third, and fourth claims is vacated and this cause is remanded for further proceedings.

JUDGMENT VACATED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

IN RE ESTATE OF MARY ANN CLINGER, DECEASED. ORIN M. CLINGER ET AL., APPELLANTS, V. SHAUN CLINGER, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY ANN CLINGER, DECEASED, ET AL., APPELLEES.

860 N.W.2d 198

Filed January 27, 2015. No. A-13-769.

1. **Rules of the Supreme Court: Appeal and Error.** A party filing a cross-appeal must set forth a separate division of the brief prepared in the same manner and under the same rules as the brief of appellant.

2. ____: ____. The cross-appeal section must set forth a separate title page, a table of contents, a statement of the case, assigned errors, propositions of law, and a statement of facts.
3. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
4. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
5. **Wills: Proof.** In a contested case, the proponents of a will have the burden of establishing prima facie proof of testamentary capacity.
6. **Wills: Words and Phrases.** One possesses testamentary capacity if she understands the nature of her act in making a will or a codicil thereto, knows the extent and character of her property, knows and understands the proposed disposition of her property, and knows the natural objects of her bounty.
7. **Wills: Proof.** Prima facie proof of a testator's testamentary capacity is established by the introduction of a self-proved will.
8. ____: ____. Prima facie proof of a testator's testamentary capacity is rebuttable with competent evidence to the contrary.
9. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
10. **Rules of Evidence: Appeal and Error.** When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
11. **Trial: Evidence: Appeal and Error.** A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of abuse of discretion.
12. **Rules of Evidence: Hearsay: Proof.** 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.
13. **Rules of Evidence: Hearsay: Words and Phrases.** A "statement," for purposes of the Nebraska Evidence Rules, is an oral or written assertion or nonverbal conduct of a person, if it is intended by him as an assertion.
14. **Rules of Evidence: Hearsay.** A statement of the declarant's then existing state of mind is excluded from the hearsay rule.
15. **Trial: Evidence: Jury Instructions.** Where evidence is admissible for some purposes, but not for others, a limiting instruction directing the jury for

which purpose the evidence can be considered does not constitute an abuse of discretion.

16. **Trial: Witnesses.** While the right to cross-examine a witness is an essential and fundamental requirement of a fair trial, it is not absolute.
17. **Trial: Juries: Evidence.** The jury should not have unrestricted review of a testimonial exhibit.
18. ____: ____: ____. Courts have broad discretion in allowing the jury unlimited access to properly received exhibits that constitute substantive evidence.
19. **Trial: Testimony: Evidence.** Neb. Rev. Stat. § 25-1240 (Reissue 2008) provides four modes by which testimony of witnesses can be taken, including by affidavit, deposition, oral examination, and video recording of an examination conducted prior to the time of trial for use at trial in accordance with procedures provided by law.
20. **Wills: Undue Influence: Proof.** In a will contest case in which undue influence is claimed, the contestant must prove the following elements by a preponderance of the evidence: (1) The testator was subject to undue influence; (2) there was an opportunity to exercise such influence; (3) there was a disposition to exercise such influence; and (4) the result was clearly the effect of such influence.
21. **Wills: Undue Influence: Presumptions.** A presumption of undue influence exists if the contestant's evidence shows a confidential or fiduciary relationship, coupled with other suspicious circumstances.
22. **Wills: Undue Influence: Presumptions: Evidence: Proof.** Once the contestant meets its burden of proving the presumption of undue influence, the proponents of the will must rebut the presumption that arises by producing evidence that there was no undue influence, and once they do so, the presumption disappears.
23. **Wills: Undue Influence: Presumptions: Evidence.** The presumption of undue influence in a will contest case is not an evidentiary presumption.
24. **Presumptions: Proof.** Under the "bursting bubble" theory of presumptions, when evidence is introduced to rebut the presumption, the presumption disappears and the burden of proof or persuasion does not shift.
25. **Courts: Juries.** The decision whether to reply to questions from the jury regarding the applicable law is entrusted to the discretion of the trial court.
26. ____: ____. The court can, in the exercise of its discretion, refuse to reply to a question from the jury regarding the applicable law.

Appeal from the District Court for Custer County: MARK D. KOZISEK, Judge. Affirmed.

Bradley D. Holbrook and Nicholas R. Norton, of Jacobsen, Orr, Lindstrom & Holbrook, P.C., L.L.O., for appellants.

Steven P. Vinton, of Bacon & Vinton, L.L.C., for appellee Shaun Clinger.

George G. Vinton for appellees Calvin Clinger and Patricia Clinger.

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

RIEDMANN, Judge.

INTRODUCTION

Orin M. Clinger, Mary E. Chalupa, Melvina D. Bundy, and Sandra A. Goodwater (collectively the contestants) appeal and Shaun Clinger, Calvin Clinger, and Patricia Clinger (collectively the proponents) attempt to cross-appeal from the order of the district court for Custer County which found that the will of Mary Ann Clinger dated February 18, 2011, was valid. On appeal, the contestants argue that the district court erred in directing a verdict on the issue of testamentary capacity, playing a video for the jury and allowing it into the jury room, refusing their proposed jury instructions, and responding to a question from the jury. We conclude that the court did not err in its decisions and therefore affirm.

BACKGROUND

Mary Ann and her husband, Melvin Clinger, were the parents of six children: Mary Chalupa, Sandra Goodwater, LeRoy Clinger, Orin Clinger, Calvin Clinger, and Melvina Bundy. Mary Ann and Melvin owned a 320-acre farm near Ansley, Nebraska, and all of the children worked on the farm while growing up. In November 1997, Melvin and Mary Ann entered into a written lease agreement to rent the farm to their son Calvin for annual rent of $24,000. At the time, the rent was the farm's only source of income. Melvin died on January 1, 1998, and in February, Mary Ann and Calvin entered into a new lease agreement which decreased the annual rent to $19,580.

In 2000, the contestants became concerned about Mary Ann's financial situation. Mary Ann complained to her doctor that she was under a lot of stress and unable to pay her bills because Calvin was not making his rent payments. She received a foreclosure notice from one of her creditors and feared she would lose the farm. The contestants then initiated a conservatorship action because of their concerns about Mary Ann's ability to control her own finances.

A guardian ad litem was appointed temporarily, and according to him, Mary Ann's finances were "a mess" because Calvin

was not paying any farm or machinery rent to her. Not only was there no income coming in, but Mary Ann was also paying all of the farming expenses that should have been paid by Calvin. In addition to the financial concerns, there were concerns raised about Calvin's influence over Mary Ann. The guardian ad litem felt that Calvin was living off of Mary Ann's existence at that time. In January 2001, a permanent conservator was appointed. Mary Ann was very upset with the contestants because she did not think the conservatorship was necessary.

On August 24, 2001, Mary Ann executed a will, in which she left the entire farm to Calvin. The execution of the will was recorded. In the video, the attorney who drafted the 2001 will asked Mary Ann questions about herself, her family, the property she owned, and the will. He specifically asked her whether Calvin or anyone else influenced the making of the will, and she said no.

Over the next 10 years after the will was executed, Mary Ann's physical health deteriorated. In January 2011, she was diagnosed with lung cancer, and the medical plan from that point was to keep her comfortable. She was prescribed numerous medications, including at least five narcotics with possible side effects of sedation, confusion, dizziness, and disorientation. Mary Ann's doctor, however, did not detect in Mary Ann any of the potential side effects of the medications. He observed that Mary Ann was able to communicate and participate in her care at the time and that despite being limited by her body, she was still mentally "sharp." Mary Ann's physician never saw any signs of dementia in her, and she retained the ability to understand what property she owned, who her children were, and what she was doing.

Also in January 2011, Mary Ann asked Calvin to draft a new will for her. She made changes in the percentages each child received, as well as in the disposition of some Bibles and her wedding ring. But the disposition of property was similar to that of the August 2001 will in that Mary Ann left the entire farm to Calvin and divided her home and personal property among her other five children. Mary Ann's attorney at the time, Steve Herman, was concerned that

the January 2011 will was drafted by a layperson and that he knew nothing about its execution; therefore, he recommended that Mary Ann execute a new will. Because of Mary Ann's failing health, Herman went to Mary Ann's house on February 17, 2011, to discuss the new will he was drafting for her. According to Herman, Mary Ann clearly knew that she wanted to make a will and understood the making of the will. Mary Ann discussed her relationship with her children and assured Herman that the proposed distribution of her assets was what she wanted.

On February 18, 2011, Herman's law partner and two of his staff members went to see Mary Ann to execute the will. When they arrived, Mary Ann recognized them, called them by name, and knew why they were there. According to Herman's law partner, Mary Ann's physical condition was weaker than it had been previously, but she was still thinking clearly and displayed her usual good sense of humor. He asked Mary Ann about every provision in the will, and she provided commentary on why she wanted her assets disposed of the way she did. He said that Mary Ann's medications did not seem to affect her ability to think clearly, and he "absolutely" believed that Mary Ann understood the nature of her acts at the time. Thus, the will was executed that day.

The February 2011 will left the entire 320 acres of farmland to Calvin. The proceeds from the sale of her house and its contents were to be divided among her other five children, and the remainder of the estate was also to go to Calvin. The will specified that Mary Ann was aware the devise to Calvin was substantially more valuable than the devise to the other children, but that she was intentionally making those devises to reflect Calvin's dedication and service to her throughout the years. The will was signed and dated February 18, 2011.

Mary Ann died on March 5, 2011. On March 7, a petition was filed to admit the February 18 will to probate and appoint a personal representative. The contestants filed an answer and objection to the petition, claiming that the will was invalid because Mary Ann lacked testamentary capacity and the devises were the result of undue influence. An amended petition was filed on May 10, 2012.

A jury trial on the issues of testamentary capacity and undue influence was held in July and August 2013. The testimony generally established that although Mary Ann's physical health declined, she always retained her mental clarity, understanding, and ability to recognize and converse with various people. There was contradicting evidence presented as to whether Calvin improperly influenced Mary Ann or whether she simply favored him because of his assistance with the farm and support of her with respect to the conservatorship. The video of the will execution of August 2001 was received into evidence at trial as evidence solely on the issue of testamentary capacity, and the jury was given a limiting instruction not to consider the video on the issue of undue influence. The video was played for the jury and sent into the jury room during deliberation.

After the contestants rested, the proponents moved for a directed verdict on testamentary capacity and undue influence. The court denied the motion on the issue of undue influence, but granted the motion for directed verdict on testamentary capacity.

During the jury instruction conference, the contestants offered proposed instructions regarding a presumption of undue influence, which instructions the court declined to give. While the jury was deliberating, it posed a question to the court regarding the burden of proof. The court's response referred the jury back to its prior jury instruction on the burden of proof. Ultimately, the jury found that the will was not the result of undue influence and that therefore it was valid. This timely appeal followed.

ASSIGNMENTS OF ERROR

On appeal, the contestants assign that the district court erred in (1) sustaining the motion for directed verdict on the issue of testamentary capacity, (2) allowing the video of Mary Ann to be played for the jury, (3) allowing the video to be taken back to the jury room, (4) refusing to instruct the jury as to the presumption of undue influence, and (5) its response to the question from the jury.

The proponents also attempted to cross-appeal on the court's refusal to grant a directed verdict on the issue of undue influence.

ANALYSIS

Cross-Appeal.

[1,2] We first dispose of the proponents' attempted cross-appeal on the court's refusal to grant a directed verdict on the issue of undue influence. We do not reach the merits of their assertion because they failed to follow the requirements for asserting a cross-appeal. A party filing a cross-appeal must set forth a separate division of the brief prepared in the same manner and under the same rules as the brief of appellant. *Vokel v. Nebraska Acct. & Disclosure Comm.*, 276 Neb. 988, 759 N.W.2d 75 (2009). Thus, the cross-appeal section must set forth a separate title page, a table of contents, a statement of the case, assigned errors, propositions of law, and a statement of facts. *Id.* The proponents' separate section entitled "Brief on Cross Appeal" contains nothing more than a one-paragraph argument. Parties wishing to secure appellate review of their claims for relief must be aware of, and abide by, the rules of the Nebraska appellate courts in presenting such claims. See *id.* Therefore, we do not consider the merits of the purported cross-appeal.

Directed Verdict on Testamentary Capacity.

[3,4] The contestants claim that the district court erred in directing a verdict on the issue of testamentary capacity. In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. *Wulf v. Kunnath*, 285 Neb. 472, 827 N.W.2d 248 (2013). The party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Id.* A directed verdict is proper at the close of all the

evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law. *Id*.

[5,6] In a contested case, the proponents of a will have the burden of establishing prima facie proof of testamentary capacity. See, Neb. Rev. Stat. § 30-2431 (Reissue 2008); *In re Estate of Mecello*, 262 Neb. 493, 633 N.W.2d 892 (2001). One possesses testamentary capacity if she understands the nature of her act in making a will or a codicil thereto, knows the extent and character of her property, knows and understands the proposed disposition of her property, and knows the natural objects of her bounty. *In re Estate of Wagner*, 246 Neb. 625, 522 N.W.2d 159 (1994).

[7,8] Prima facie proof of a testator's testamentary capacity is established by the introduction of a self-proved will. *In re Estate of Stephens*, 9 Neb. App. 68, 608 N.W.2d 201 (2000). Such prima facie proof is rebuttable with competent evidence to the contrary. *Id*.

In the present case, the contestants admit that the February 2011 will qualifies as a self-proved will and that therefore the proponents satisfied their initial burden of proof. They argue, however, that the evidence that, at the time the will was executed, Mary Ann was taking so many medications with numerous side effects supports a reasonable inference she lacked testamentary capacity.

The evidence presented at trial did, in fact, establish that Mary Ann was taking numerous potent medications with potential side effects. Contrary to the contestants' claim, however, there was no evidence that Mary Ann actually suffered from any of those side effects. Mary Ann's treating physician specifically testified that he did not observe any of the potential side effects of the medications in Mary Ann. The last time he saw her, in late January 2011, she still had the ability to understand what property she owned, who her children were, and what she was doing. Similarly, according to the witnesses present at the execution of the will, Mary Ann was able to think clearly, knew what she was doing, recognized everyone and called them by name, provided commentary on the contents of her will, and gave reasoning for the disposition of

her property. There was no evidence presented that Mary Ann lacked the requisite awareness or understanding at the time the will was executed. Accordingly, the district court did not err in granting the proponents' motion for directed verdict on the issue of testamentary capacity.

Video.

The contestants claim that the district court committed reversible error when it admitted into evidence the video of Mary Ann's executing the 2001 will and allowed it to be played for the jury. They claim that the video was cumulative, its probative value was substantially outweighed by its prejudicial effect, and its admission violated their rights to cross-examine witnesses against them. They claim that it was hearsay to which no exception applies. We disagree.

[9-11] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009). When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion. *Erickson v. U-Haul Internat.*, 278 Neb. 18, 767 N.W.2d 765 (2009). A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of abuse of discretion. *Id*.

[12,13] 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 2008). A statement is defined as an oral or written assertion or nonverbal conduct of a person, if it is intended by him as an assertion. § 27-801(1).

[14] The attorney who drafted the 2001 will and recorded its execution testified that he was "fairly certain" there was going to be a will contest so he went through the preliminary questioning of Mary Ann as to intent before she executed the will and had it video recorded. The video therefore contained assertions made by Mary Ann that would constitute hearsay if

no exception applies. However, Neb. Rev. Stat. § 27-803(2) (Reissue 2008) excludes the following from the hearsay rule:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

We conclude that the video of Mary Ann's executing her will and containing responses to questions posed at that time regarding her state of mind is an exception to the hearsay rule and that the video was therefore properly admitted as evidence. However, toward the end of the video, Mary Ann responded to questions regarding undue influence. These statements, if offered for the truth of the matter asserted, would be hearsay. The district court addressed this issue by instructing the jury that it was not to consider the video to show influence or lack thereof, but only state of mind and testamentary capacity.

[15] The contestants claim that this limiting instruction was ineffective because the probative value of the video was substantially outweighed by the likelihood of unfair prejudice under Neb. Rev. Stat. § 27-403 (Reissue 2008). They claim that because Mary Ann denied in the video that she was unduly influenced by anyone, even a limiting instruction could not "'unring the bell.'" Brief for appellants at 42. The Nebraska Supreme Court has held, however, that where evidence is admissible for some purposes, but not for others, a limiting instruction directing the jury for which purpose the evidence can be considered does not constitute an abuse of discretion. See, e.g., S*hipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006) (approving admission of evidence of similar incidents for purpose of considering defective design and knowledge of manufacturer, but for no other purpose); *Ford v. Estate of Clinton*, 265 Neb. 285, 656 N.W.2d 606 (2003) (approving of admission of evidence with limiting instruction).

Our review of the record leads us to conclude that it was not an abuse of discretion for the district court to admit the video as evidence of Mary Ann's state of mind and play it for the jury, with the limiting instruction given.

The contestants also argue that the video is cumulative of other evidence proffered by the proponents. However, the jury had not observed nor heard, firsthand, from Mary Ann. The video was evidence of her state of mind and testamentary capacity on the date the 2001 will was signed. We therefore reject this assertion.

[16] Finally, the contestants claim that the admission of the video violated their right to cross-examine a witness. While the right to cross-examine a witness is an essential and fundamental requirement of a fair trial, see *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007), it is not absolute, see *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993) (holding criminal defendant was not denied right to cross-examination when hearsay statement made by woman later murdered was offered into evidence because statement fell within exception to hearsay rule). Section 27-803 and Neb. Rev. Stat. § 27-804(2) (Reissue 2008) provide various situations in which out-of-court statements are admitted as evidence without the declarant being available to testify at trial. As evidenced by § 27-804(2)(e), the touchstone for admission of an out-of-court statement from an unavailable witness is the guarantee of trustworthiness. Therefore, where guarantees of trustworthiness exist, cross-examination of a declarant in a civil case may not be required if the statement sought to be introduced falls within a statutory exception. As stated above, because the present state-of-mind exception allowed admission of the video, and the court properly gave a limiting instruction as to the purpose for which it could be considered, the contestants were not denied their right to cross-examination. We conclude that the district court did not abuse its discretion when it allowed the video into evidence and played it for the jury.

The contestants further claim that the district court erred in allowing the video into the jury room during deliberations. The record does not affirmatively show that the video was taken

into the jury room, but both parties concede that it was. We have no indication, however, that the jury had the necessary equipment to replay the video. See *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000), *disapproved on other grounds, State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012) (in which jury requested playback equipment). Furthermore, we find nowhere in the record where contestants objected to the video's being taken into the jury room. Notwithstanding the absence of any indication that the jury replayed the video, we proceed to address the assigned error.

[17-19] The Nebraska Supreme Court has stated that the jury should not have unrestricted review of a testimonial exhibit. *State v. Dixon, supra*. As to nontestimonial evidence, however, the courts have broad discretion in allowing the jury unlimited access to properly received exhibits that constitute substantive evidence. *State v. Vandever*, 287 Neb. 807, 844 N.W.2d 783 (2014). In *Vandever*, the Supreme Court noted that Neb. Rev. Stat. § 25-1116 (Reissue 2008) provides a procedure for a deliberating jury to request the court to assist it when a disagreement arises among the jurors as to the testimony presented. The court distinguished between a determination of "whether evidence is 'testimony' for purposes of § 25-1116 [and a] determination of whether a statement is 'testimonial' for purposes of Confrontation Clause analysis." *State v. Vandever*, 287 Neb. at 815-16, 844 N.W.2d at 790. In doing so, it noted that Neb. Rev. Stat. § 25-1240 (Reissue 2008) provides four modes by which testimony of witnesses can be taken, including by affidavit, deposition, oral examination, and video recording of an examination conducted prior to the time of trial for use at trial in accordance with procedures provided by law. The court concluded that

> "testimony" for purposes of § 25-1116 encompasses evidence authorized as "testimony" under § 25-1240, that is, as live testimony at trial by oral examination or by some substitute for live testimony, including but not limited to, affidavit, deposition, or video recording of an examination conducted prior to the time of trial for use at trial. For completeness, we note that videotaped depositions

> are statutorily included in the definition of "deposition" in § 25-1242.

State v. Vandever, 287 Neb. at 816-17, 844 N.W.2d at 790.

The *Vandever* court concluded that the proposed evidence, an audio recording of an investigator's interview of the defendant, was not testimonial because it was not prepared as or admitted into evidence as a substitute for live testimony at trial. According to the *Vandever* court, the audio recording "was not 'an examination conducted prior to the time of trial for use at trial in accordance with procedures provided by law.'" *Id*. at 817, 844 N.W.2d at 791.

Likewise, we determine that the video of Mary Ann executing her will was not "an examination conducted prior to the time of trial for use at trial in accordance with procedures provided by law." See § 25-1240. Rather, the video shows Mary Ann responding to preliminary questions from her attorney to establish testamentary capacity before executing her will. And while her attorney testified that he video recorded the execution because he anticipated a will contest, the questions he posed to her did not constitute an examination for use at trial "in accordance with procedures provided by law." See *id*. Therefore, the video was nontestimentary evidence and the trial court had broad discretion in allowing the jury unlimited access to it during deliberations.

In light of the limiting instruction given to the jury that it was not to consider the video for any purpose other than testamentary capacity, an issue on which the trial court ultimately directed a verdict in favor of the proponents, we find no abuse of discretion in allowing the jury access to the video during its deliberations.

Jury Instructions.

The contestants argue that the district court erred in failing to give their proposed jury instructions regarding undue influence. In a proposed instruction regarding the statement of the case, the contestants sought to instruct the jury that a presumption of undue influence existed because Calvin and/or his wife, Patricia, had a confidential relationship with

Mary Ann, which was coupled with suspicious circumstances. In a later proposed instruction, the contestants sought to have the jury instructed as follows:

> In connection with this claim of undue influence, the burden is on contestants to establish facts which show that a confidential relationship existed between Mary Ann . . . and her son, Calvin . . . , and/or his wife, Patricia . . . , and the existence of suspicious circumstances. If such facts are established, a presumption of undue influence arises and the burden of going forward with the evidence to rebut the presumption then shifts to the proponent[s].
>
> The proponent[s] may rebut this presumption by evidence which shows that there was no undue influence or by evidence which shows that Mary Ann . . . had competent independent advice and that [the will] was her own voluntary act.

The district court rejected the proposed jury instructions and instead instructed the jury that the burden of proving undue influence was on the contestants, without any reference to the presumption of undue influence that may arise. The district court stated that the proposed instructions would impermissibly shift the burden of proof from the contestants to the proponents. The contestants argue that the refusal to give their requested instructions was error. We disagree.

[20,21] In a will contest case in which undue influence is claimed, the contestant must prove the following elements by a preponderance of the evidence: (1) The testator was subject to undue influence; (2) there was an opportunity to exercise such influence; (3) there was a disposition to exercise such influence; and (4) the result was clearly the effect of such influence. *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009). The Nebraska Supreme Court has recognized a presumption of undue influence if the contestant's evidence shows a confidential or fiduciary relationship, coupled with other suspicious circumstances. *Id*. Those circumstances include: (1) a vigorous campaign by a principal beneficiary's family to maintain intimate relations with the testator, (2) a lack of advice to the testator from an independent attorney,

(3) an elderly testator in weakened physical or mental condition, (4) lack of consideration for the bequest, (5) a disposition that is unnatural or unjust, (6) the beneficiary's participation in procuring the will, and (7) domination of the testator by the beneficiary. *Id*.

[22] Once the contestant meets this burden of proof, the proponents of the will must rebut the presumption that arises by producing evidence that there was no undue influence. Once they do so, the presumption disappears. See *id*.

[23,24] While the Nebraska Supreme Court has recognized a "presumption" of undue influence in a will contest case, it has also recognized that it is not an evidentiary presumption. See *McGowan v. McGowan*, 197 Neb. 596, 250 N.W.2d 234 (1977). Rather, the presumption of undue influence falls under the ambit of the "bursting bubble" theory of presumptions which holds that when evidence is introduced to rebut the presumption, the presumption disappears and the burden of proof or persuasion does not shift. *Id*. In dealing with this type of presumption, the trial court need only determine that the evidence introduced in rebuttal is sufficient to support a finding contrary to the presumed fact. If that determination is made, there is no need to instruct the jury on the presumption. 2 McCormick on Evidence § 344 (Kenneth S. Broun et al. eds., 7th ed. 2013).

In the present action, the contestants presented evidence that could support a finding of a confidential relationship coupled with suspicious circumstances. For example, Mary Ann moved in with Calvin and Patricia in January 2009 because of her declining health and lived with them until her death. Some of Mary Ann's other children felt as though they were not welcome in Calvin's home to visit Mary Ann. In addition, there was testimony that Mary Ann was adamant she did not want to pay someone to care for her because it was too expensive. However, the contestants admitted into evidence checks written on Mary Ann's account in 2009 and 2010 to Calvin and Patricia, separately, totaling more than $15,000.

The proponents then offered evidence to rebut this presumption. Orin, Goodwater, and Bundy admitted that they did, in fact, visit Mary Ann when she was living with Calvin.

Patricia testified that she is a licensed practical nurse and that Mary Ann would write her checks to reimburse her for the care she was providing because it was less expensive than paying for a nursing home. Further, during the time that Mary Ann lived with Calvin and Patricia, she had her own attorney, with whom she would meet and speak alone, without Calvin or anyone else present. The undisputed evidence established that Mary Ann maintained her mental health until the time of her death, and the proponents offered evidence indicating that Mary Ann repeatedly explained her displeasure with the contestants over the conservatorship and her desire to leave the farm to Calvin because of his assistance to her during her lifetime.

Once the proponents offered their rebuttal evidence, the presumption disappeared and there was no basis upon which the district court should have instructed the jury on the presumption because the presumption no longer existed. See *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009) (stating that where evidence appears to rebut presumption, presumption disappears, and burden of proof remains on party asserting issue). See, also, *Cappuccio v. Prime Capital Funding LLC*, 649 F.3d 180 (3d Cir. 2011) (holding that as matter of good practice, where party has produced sufficient facts to rebut presumption in civil case, and it drops out of case, trial court should avoid references to such presumption in its instructions).

To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Hike v. State*, 288 Neb. 60, 846 N.W.2d 205 (2014). While the contestants' tendered instructions contained correct statements of the law, they were not warranted by the evidence because once the proponents offered rebuttal evidence, the presumption disappeared. Since the burden of proof remained on the contestants to prove undue influence, and because the jury instructions given properly placed this burden on the contestants, they

were not prejudiced by the court's failure to give the tendered instructions.

Jury Question.

The contestants contend that the district court erred in its response to the question from the jury. The proponents argue that this claim is waived because the contestants failed to object to the court's response at the time.

During deliberation, the jury asked a question about the burden of proof in the case. When discussing the question with the parties' counsel, the court proposed simply referring the jury back to the jury instructions. The contestants requested that the court provide further explanation. After a suggestion from the proponents, the court proposed referring the jury to the specific instruction that defined the burden of proof, to which counsel for the contestants replied, "I don't have any problem with that part, Your Honor."

The proponents contend that because the contestants acquiesced to the proposed response, they are prohibited from now challenging it on appeal. We do not find that the contestants agreed to the court's proposed response. In discussing the court's response, counsel for the contestants argued that the jurors' question indicated that they were confused on the proper burden of proof. The court replied that although they might be confused, the court was going to tell them to refer back to the instructions because the burden of proof is defined. Counsel for the contestants then replied, "Well, I mean, that's my input, Your Honor. I think that it needs to be defined further, but I understand that that's your instruction." The court then offered to specifically refer the jury back to the instruction on the burden of proof and asked whether counsel had "[a]ny problem with that?" Counsel for the contestants then responded that he did not have any problem with "that part." We interpret this exchange as the contestants' making their argument for further explanation, but when the court indicated that it was not willing to do so, the contestants essentially took what they could get by agreeing to the more detailed response. Therefore, because the waiver was not clear and unequivocal, we will address the merits of this assignment of error.

See *Katskee v. Nevada Bob's Golf of Neb.*, 238 Neb. 654, 472 N.W.2d 372 (1991) (to establish waiver of legal right, there must be clear, unequivocal, and decisive action by party which demonstrates such purpose).

The contestants claim that the district court erred in its response to the jury's question, because the jury was clearly confused on the proper burden of proof and because simply referring them back to the very instruction from which their confusion stemmed substantially impaired the contestants' right to a fair trial. We disagree and find no abuse of discretion in the district court's response.

[25,26] The decision whether to reply to questions from the jury regarding the applicable law is entrusted to the discretion of the trial court. *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010). The court can, in the exercise of its discretion, refuse to reply to a question from the jury regarding the applicable law. See *State v. Neujahr*, 248 Neb. 965, 540 N.W.2d 566 (1995) (trial court did not abuse its discretion by referring jury to instructions given when jury raised question adequately covered by those instructions).

In the present case, the jury asked the court, "Please explain the difference between Burden of Proof: Greater weight of the Evidence is not the same as having shadow of doubt?" The court responded that the jury should refer back to instruction No. 7, which provided:

> A. GREATER WEIGHT OF THE EVIDENCE: Any party who has the burden of proving a claim must do so by the greater weight of the evidence.
>
> (1) The greater weight of the evidence means evidence sufficient to make a claim more likely true than not true. It does not necessarily mean the greater number of witnesses or exhibits.
>
> (2) Any party is entitled to the benefit of any evidence tending to establish a claim, even though such evidence was introduced by another.
>
> (3) If the evidence upon a claim is evenly balanced, or if it weighs in favor of the other party, then the burden of proof has not been met.

B. Where two inferences may be drawn from the facts proved, which inferences are opposed to each other but are equally consistent with the facts proved, a party having the burden of proof on an issue may not meet that burden by relying solely on the inference favoring that party.

Instruction No. 7 is a correct statement of the law. See, NJI2d Civ. 2.12A; NJI2d Civ. 16.06. Because the question raised by the jury was adequately covered by the instruction given, the district court did not abuse its discretion by referring the jury to the instructions and declining further explanation.

CONCLUSION

We find no error in the district court's decisions and therefore affirm the judgment.

AFFIRMED.

ALAN FYFE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BILLIE FYFE, AND DAVID WINGENBACH, APPELLEES, V. TABOR TURNPOST, L.L.C., A NEBRASKA LIMITED LIABILITY COMPANY, ET AL., APPELLANTS.

860 N.W.2d 415

Filed February 3, 2015. No. A-13-907.

1. **Easements: Adverse Possession: Equity: Jurisdiction: Appeal and Error.** A suit to confirm a prescriptive easement is one grounded in the equitable jurisdiction of the district court. An appellate court's review is de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, an appellate court will consider that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
3. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, which an appellate court independently decides.
4. **Easements: Proof: Time.** A party claiming a prescriptive easement must show that its use was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period.

5. **Easements: Adverse Possession.** The use and enjoyment which will give title by prescription to an easement are substantially the same in quality and characteristics as the adverse possession which will give title to real estate.
6. ____: ____. The law treats a claim of a prescriptive right with disfavor, and, accordingly, such a claim requires that all the elements of such adverse use be clearly, convincingly, and satisfactorily established.
7. **Easements: Presumptions: Proof: Time.** Generally, once a claimant has shown open and notorious use over the 10-year prescriptive period, adverseness is presumed. At that point, the landowner must present evidence showing that the use was permissive.
8. **Easements: Proof.** The party asserting a prescriptive right must also clearly establish the nature and scope of the easement.
9. **Easements.** The extent and nature of an easement are determined from the use made of the property during the prescriptive period.
10. ____. The law requires that an easement must be clearly definable and precisely measured.
11. **Easements: Adverse Possession: Words and Phrases.** A use is continuous and uninterrupted if it is established that the easement was used whenever there was any necessity to do so and with such frequency that the owner of the servient estate would have been apprised of the right being claimed.
12. **Easements.** A permissive use is not adverse and cannot ripen into a prescriptive easement.
13. **Easements: Adverse Possession: Notice.** If a use begins as a permissive one, it retains that character until notice that the use is claimed as a matter of right is communicated to the owner of the servient estate.
14. **Easements.** An easement carries with it, by implication, the right of doing whatever is reasonably necessary for the full enjoyment of the easement itself.
15. **Injunction: Equity.** A mandatory injunction is an equitable remedy that commands the subject of the order to perform an affirmative act to undo a wrongful act or injury.
16. **Injunction.** An injunction, in general, is an extraordinary remedy that a court should ordinarily not grant except in a clear case where there is actual and substantial injury.
17. **Injunction: Damages.** A court should not grant an injunction unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
18. **Injunction: Equity.** Where an injury committed by one against another is continuous or is being constantly repeated, so that complainant's remedy at law requires the bringing of successive actions, that remedy is inadequate and the injury will be prevented by injunction.
19. **Equity: Words and Phrases.** An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.
20. **Trial: Evidence: Appeal and Error.** Error may not be predicated upon a ruling admitting or excluding evidence unless a substantial right of the party is affected and, in cases where the ruling is one excluding evidence, the substance of the

evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

21. **Trial: Witnesses: Records.** In order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited.
22. **Easements: Equity.** An adjudication of rights with respect to an easement is an equitable action.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed.

Bell Island, of Island, Huff & Nichols, P.C., L.L.O., for appellants.

Jerald L. Ostdiek, of Douglas, Kelly, Ostdiek & Ossian, P.C., and Howard P. Olsen, Jr., and John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellees.

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

MOORE, Chief Judge.

In this appeal, we review a prescriptive easement for an irrigation lateral granted by the district court to Alan Fyfe and Billie Fyfe over a part of real estate owned by Tabor Turnpost, L.L.C., an entity composed of Thomas W. Baker and Juanita Baker and their two daughters. The Fyfes were also awarded damages following a jury trial. The Bakers assign a number of errors which relate to the court's grant of the prescriptive easement and an injunction, the exclusion of certain testimony at trial, and the court's jury instructions. We find no merit to the Bakers' arguments and affirm the trial court's judgment.

I. FACTUAL BACKGROUND

In 1896, the Minatare Mutual Canal and Irrigation Company (Minatare Mutual) was incorporated as a nonprofit corporation under Nebraska law. Minatare Mutual's stated purpose is to deliver water to the stockholders of the company. The company's canal begins just east of Scottsbluff, Nebraska, behind the city's lagoon, and flows in a general southerly direction through Minatare, Nebraska, before eventually emptying into

the North Platte River. Minatare Mutual delivers water to its stockholders through a series of headgates located at various points along the canal. If more than one landowner receives water through a particular headgate, Minatare Mutual delivers water to the headgate, but the landowners are responsible to work out how each would receive the water.

The disputing parties in this action are neighboring landowners and stockholders in Minatare Mutual. Since 1953, the Fyfe family has owned real property which is legally described as "[t]he Northeast Quarter and the North Twenty acres of the Southeast Quarter of Section 21, Township 21 North, Range 53 West of the 6th P.M., Scotts Bluff County, Nebraska . . . ." At the time this action was instituted, Alan Fyfe and his father, Billie Fyfe, were co-owners of this property. Billie Fyfe died during the pendency of the action, and Alan Fyfe, as personal representative of his father's estate, maintained the action. Although Billie Fyfe originally farmed the land, the Fyfes have leased their property for approximately the past 15 years. Since approximately 2008, the Fyfes have been leasing their property to David Wingenbach, who was also a named plaintiff. For the convenience of the reader, the plaintiffs in this action will be collectively referred to hereafter as "the Fyfes."

The Bakers have owned and farmed property to the northwest of the Fyfes since 1974. Their property is legally described as "[t]he West Half (W½) of Section Sixteen (16), Township Twenty-one (21) North, Range Fifty-three (53) West of the 6th P.M., Scotts Bluff County, Nebraska." In 1998, the Bakers transferred the ownership of their land to Tabor Turnpost, an entity which is composed of the Bakers and their two daughters. For the remainder of the opinion, we collectively refer to Tabor Turnpost and the Bakers as "the Bakers."

The focus of the Fyfes and the Bakers' dispute is a lateral that begins at headgate 39 on the Minatare Mutual canal which is located on the western edge of the Baker property and runs across the Baker property. Specifically, the lateral runs west to east from headgate 39 until it reaches an elbow. At the elbow, the lateral continues southeast until it reaches the northwest corner of the Fyfe property. Included with this

opinion as appendix A is a portion of exhibit 166—a drawing of the lateral and the surrounding area—which was received into evidence at trial. Although neither party was aware when the lateral was originally constructed, Alan Fyfe testified that his family had used the lateral to bring water from Minatare Mutual's canal to irrigate the Fyfe property since 1953. The Bakers acknowledged that the lateral was in existence when they purchased the property in 1974. There was also testimony that four landowners utilized the lateral for irrigation until approximately 2000. Since 2000, only the Fyfes and the Bakers have used the lateral to receive water from Minatare Mutual.

Maintenance of this lateral has been a contentious issue between the parties. The Bakers have maintained the lateral from headgate 39 to a cement "check" that was located just beyond the elbow, while the Fyfes have maintained the lateral from that check to the point where the lateral reached their property. A check is a structure, often built of cement, which is used to impede the flow of water so it will rise up and flow in a different direction. The parties generally agree on the various methods that can be employed to clean the lateral, which include burning the dried weeds in the lateral in the early spring before water enters the lateral, spraying weedkiller on the sides of the lateral, and using mechanical means to scrape all the weeds from the lateral. The Bakers contend that the Fyfes have not adequately performed the required maintenance, causing the lateral to overflow onto the Baker property on various occasions. Over the years, the Bakers complained to the Minatare Mutual board a number of times regarding the Fyfes' maintenance of the lateral.

The Fyfes deny that their maintenance of the lateral has been inadequate. Their maintenance has included a yearly burning of the dried weeds in the lateral as well as using mechanical means in certain years to scrape weed growth from the lateral. The Fyfes also claim that they have always been able to receive water through the lateral despite any weed issues. Past and present representatives from Minatare Mutual testified that the Fyfes have never been denied water because of weeds.

In 2007, the Bakers installed four culverts on the lateral. These culverts are located just past the elbow and were installed in place of an old cement check. The Bakers utilize two of these culverts to divert water from the lateral to irrigate their fields on either side of the lateral. The other two culverts allow water to flow through the lateral. The Fyfes asserted at trial that the culverts restrict the flow of water through the lateral to the point where they no longer receive enough water to irrigate their fields.

The parties' dispute reached its boiling point in July 2010, when the Bakers shut down the headgate after the Fyfes had called Minatare Mutual for water. Thomas Baker claimed that water was running over onto his property and that he had received permission from Minatare Mutual to lower the headgate whenever overflowing occurred. The Fyfes did not become aware of the existence of this purported agreement between the Bakers and Minatare Mutual until they filed suit against the Bakers. The Fyfes did not receive any water from Minatare Mutual for the rest of 2010.

To prevent the previous year's problems from repeating, the Fyfes obtained permission from Minatare Mutual in 2011 to utilize a more northern headgate on the canal as their diversion point, and they now receive water through a different series of laterals. The Fyfes installed a center pivot on their property and have been able to irrigate the majority of their property through this new system. However, even with this new system, the Fyfes could not supply water to all of their property, and they filed suit against the Bakers in the district court.

The Fyfes filed their operative complaint on March 1, 2012. They sought relief in the form of a prescriptive easement over the Baker property to obtain irrigation water, an injunction to prevent the Bakers from interfering with their easement, and damages resulting from crop losses. The Bakers denied the Fyfes' allegations and counterclaimed, seeking to eject the Fyfes from their property and to be compensated for damages to their property. On July 23 and 24, the district court held a trial on the equitable issues.

On October 3, 2012, the district court entered a memorandum order in which it granted the Fyfes a perpetual prescriptive easement. After including the legal descriptions of the parties' property, the court described the prescriptive easement as follows:

> This easement shall start at Minatare Mutual . . . headgate #39 located on [Minatare Mutual's] main canal and end at the southeast corner of [the Baker property]/northwest corner of [the Fyfe property]. The easement shall follow a well defined irrigation lateral across [the Baker property] that has been in existence for more than fifty years. This irrigation lateral runs generally from west to east from headgate #39 to a well defined check box or "elbow" and then generally southeastwardly to the southeast corner of [the Baker property]. The extent of the easement is 10 feet on each side of the center line of the irrigation lateral between headgate #39 and the "elbow;" and 20 feet on each side of the center line of the irrigation lateral between the [elbow] and the southeast corner of [the Baker property].

In addition to granting the Fyfes a prescriptive easement, the district court also granted the Fyfes' requested injunctive relief and enjoined the Bakers from interfering with the Fyfes' reasonable operation, use, and maintenance of the prescriptive easement. The court found that the culverts the Bakers installed in 2007 unreasonably interfered with the Fyfes' prescriptive easement and ordered their removal. The order permitted the Bakers, at their option, to reinstall a cement check at that point on the lateral. Finally, the court denied the Bakers' counterclaim for ejectment.

On September 23 through 25, 2013, the district court held a jury trial on the issue of damages. The jury found in favor of the Fyfes and awarded $19,200 in damages. The jury also found against the Bakers on their counterclaim. The Bakers have appealed.

II. ASSIGNMENTS OF ERROR

The Bakers assert that the district court erred when it (1) granted the Fyfes a prescriptive easement, (2) granted the

Fyfes injunctive relief which required the Bakers to remove certain culverts, (3) excluded certain statements made by Billie Fyfe as hearsay, and (4) instructed the jury that the installation of culverts had unreasonably interfered with the Fyfes' water.

III. STANDARD OF REVIEW

[1] A suit to confirm a prescriptive easement is one grounded in the equitable jurisdiction of the district court. An appellate court's review is de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, an appellate court will consider that the trial court observed the witnesses and accepted one version of the facts over another. See *Teadtke v. Havranek*, 279 Neb. 284, 777 N.W.2d 810 (2010).

[2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *Hike v. State*, 288 Neb. 60, 846 N.W.2d 205 (2014).

[3] Whether a jury instruction is correct is a question of law, which an appellate court independently decides. *Kuhnel v. BNSF Railway Co.*, 287 Neb. 541, 844 N.W.2d 251 (2014).

IV. ANALYSIS

1. Prescriptive Easement

[4-6] A party claiming a prescriptive easement must show that its use was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period. *Feloney v. Baye*, 283 Neb. 972, 815 N.W.2d 160 (2012). Although there are some differences between the two doctrines, the use and enjoyment which will give title by prescription to an easement are substantially the same in quality and characteristics as the adverse possession which will give title to real estate. See *Teadtke v. Havranek, supra*. The law treats a claim of a prescriptive right with disfavor, and, accordingly, such a claim requires that all the elements of such adverse use be clearly, convincingly, and

satisfactorily established. *Lake Arrowhead, Inc. v. Jolliffe*, 263 Neb. 354, 639 N.W.2d 905 (2002).

[7] Generally, once a claimant has shown open and notorious use over the 10-year prescriptive period, adverseness is presumed. *Feloney v. Baye, supra*. At that point, the landowner must present evidence showing that the use was permissive. *Id*.

[8-10] In addition to satisfying the necessary requirements to establish a prescriptive easement, the party asserting a prescriptive right must also clearly establish the nature and scope of the easement. See *Werner v. Schardt*, 222 Neb. 186, 382 N.W.2d 357 (1986). The extent and nature of an easement are determined from the use made of the property during the prescriptive period. *Teadtke v. Havranek, supra*. The law requires that the easement must be clearly definable and precisely measured. *Grint v. Hart*, 216 Neb. 406, 343 N.W.2d 921 (1984).

The Bakers assert that the district court erred when it granted the Fyfes a prescriptive easement. They contend that the Fyfes' use was not continuous and that the Fyfes' entry onto the Baker property was obtained by permission. The Bakers also argue that the prescriptive easement granted by the district court was not precisely described and was in excess of the Fyfes' actual use. We separately address each of these arguments.

(a) Continuous

The Bakers assert that the Fyfes' claim for a prescriptive easement must fail because the Fyfes have submitted to limitations on their use of the lateral. The Bakers assert that Minatare Mutual's limitations, as well as their own, have interrupted the Fyfes' use of the easement. We disagree.

[11] A use is continuous and uninterrupted if it is established that the easement was used whenever there was any necessity to do so and with such frequency that the owner of the servient estate would have been apprised of the right being claimed. *Svoboda v. Johnson*, 204 Neb. 57, 281 N.W.2d 892 (1979); *Breiner v. Holt Cty.*, 7 Neb. App. 132, 581 N.W.2d 89 (1998).

There is no dispute that the Fyfes have utilized the lateral to obtain water to irrigate their property for far longer than the necessary 10-year prescriptive period. The fact that Minatare Mutual has the ability to deny water to any stockholder if a lateral is not properly cleared of weeds is not significant. Although there was evidence that the Fyfes received notices from Minatare Mutual that their water would be shut off if the lateral was not cleaned, there was no evidence that anyone associated with Minatare Mutual had ever shut off the Fyfes' water. Further, even though Minatare Mutual had the right to deny the Fyfes water, this had no effect on the Fyfes' claim to use the lateral across the Baker property.

There is evidence in the record that the Bakers at various times restricted the Fyfes' access to the lateral, which has frustrated the Fyfes' ability to perform maintenance. The Bakers would not allow the Fyfes onto their land if crops had been planted, or the Fyfes were forced to access the lateral in between alfalfa cuttings. Even with these restrictions, however, the Fyfes' use of the lateral was continuous. The Bakers never asserted that the Fyfes could not utilize the lateral to obtain water; rather, the Bakers' restrictions related to the Fyfes' accessing the lateral via the Bakers' surrounding land. Finally, the fact that the Bakers interrupted the Fyfes' receipt of water through the lateral in June 2010 does not defeat their continuous use of the lateral, particularly since their use of the lateral began in 1953 and continued uninterrupted until at least 2010.

While the Fyfes' receipt of water and maintenance of the lateral varied and was not a daily occurrence, such is not necessary to establish their continuous use of the lateral. The Fyfes established that their use of the lateral was continuous throughout the prescriptive period.

(b) Permissive

At trial, the Bakers asserted that the Fyfes' use of the lateral was established by an agreement with the previous landowners. The Bakers did not produce direct evidence of the agreement, but they testified that they were informed of the existence of the agreement prior to their purchase of the

property. The Bakers also highlighted the Minatare Mutual rules to further their claim that the Fyfes' use of the lateral was permissive.

[12,13] It is well established that a permissive use is not adverse and cannot ripen into a prescriptive easement. See *Simacek v. York County Rural P.P. Dist.*, 220 Neb. 484, 370 N.W.2d 709 (1985). The general rule is that if a use begins as a permissive one, it retains that character until notice that the use is claimed as a matter of right is communicated to the owner of the servient estate. *Id.*

Although the Bakers claim that the Fyfes' use of the lateral was permissive, there is little evidence in the record to support that claim. First, there was no evidence, other than the Bakers' testimony, of any agreement between the Bakers' predecessors that permitted the Fyfes to use the lateral. Based on our reading of the record, we agree with the district court's characterization of the Bakers' testimony regarding the agreement as having been for the "convenience of litigation."

The Bakers also contended that the Minatare Mutual bylaws lend support to their claim that the Fyfes' use of the lateral was permissive. Specifically, the Bakers highlight the following provisions: "Any turnouts used by one or more shareholders shall share the cost of headgate and installation as per share basis and be used by each of them. . . . No headgate will be allowed until a permit has been issued by Minatare Mutual." Because joint shareholders used headgate 39, the Bakers contend, it logically follows that the Fyfes' use of the lateral had to be permissive. However, these provisions in the bylaws do not have the force that the Bakers assert. The above provisions in the bylaws state that in order to establish a joint headgate, the shareholders must share the cost and obtain Minatare Mutual's permission. Nonetheless, these provisions do not establish that the Fyfes' use of this particular lateral over the Baker property was by permission. The record is silent as to whether the headgate was originally a joint headgate or whether it was used first by a single landowner and later by multiple landowners.

Additionally, we note that the evidence at trial established that the Fyfes have used this lateral to irrigate their land since

at least 1959, as recited by the trial court. Thus, based on this record, we agree with the trial court's conclusion that the prescriptive period began in 1959 at the latest. That being the case, and there being no evidence to refute the Fyfes' claim, the Fyfes' prescriptive right to use the lateral existed before the Bakers purchased their property.

Finally, we observe that the Bakers' actions throughout their ownership of the property establish that they did not believe the Fyfes' use was permissive. If use of the lateral was by permission, the Bakers could have required the Fyfes to obtain their irrigation water through another route many years earlier. However, the Bakers never objected to the Fyfes' ability to obtain water through the lateral. In fact, the Fyfes' entitlement to receive the water that was delivered to the headgate and through the lateral derived from Minatare Mutual, not the Bakers or their predecessors. Further, if access to the lateral for maintenance was by permission of the Bakers, they would not have prohibited the Fyfes from entering the Baker property at various times to maintain the lateral. Instead, the Bakers submitted numerous complaints to the Minatare Mutual board regarding the Fyfes' maintenance, or lack of maintenance, of the lateral and eventually lowered the headgate to prevent the Bakers from receiving water. Only when this litigation was initiated did the Bakers seek to eject the Fyfes from the land.

We conclude the record clearly shows that the Fyfes' use of the lateral to obtain water was not permissive.

(c) Description and Scope of Easement

The Bakers assert that the Fyfes' claim for a prescriptive easement must also fail for lack of an exact description. They claim that the district court's description of the easement is speculative because there are no measurements, locations, or other fixed landmarks from which to establish the boundary line. The Bakers assert that there must be a metes and bounds description of the easement.

As noted above, the district court granted the Fyfes a prescriptive easement over the irrigation lateral. The court

determined there was sufficient evidence to show the location of the lateral and noted that its location had not been a contested issue. The court also determined that the scope of the easement extended 10 feet on each side of the irrigation lateral between headgate 39 and the elbow and 20 feet on each side of the irrigation lateral between the elbow and the southeast corner of the Baker property.

We reject the Bakers' argument that the Fyfes' claim must fail for lack of a precise description of the easement. There was no dispute at trial as to the location of the lateral over which the Fyfes asserted a prescriptive right. In fact, the parties agreed that the lateral had been in existence for many years. Further, each party submitted its own depiction of the area into evidence and each party's exhibit showed the lateral in the same location. A photograph submitted in evidence shows that headgate 39 is identifiable as such on the Minatare Mutual canal. Upon review of the record, it is clear that the disputed lateral is the only lateral on the Baker property which runs in a general southeastwardly direction until it reaches the Fyfe property.

We find the Nebraska Supreme Court's decision in *Fischer v. Grinsbergs*, 198 Neb. 329, 252 N.W.2d 619 (1977), to be instructive in this case. In *Fischer*, the Supreme Court reversed the district court's finding that the plaintiffs had not sufficiently described a prescriptive easement over a driveway. In reaching that conclusion, the court acknowledged that a claim for an easement could not be "too indefinite for a determinate description." *Id.* at 343, 252 N.W.2d at 627. However, the court concluded that the evidence presented at trial, which included the deeds of the lots in question, undisputed testimony that the driveway extended 6 feet on the defendants' land and 3 feet on the plaintiff's land, and photographs showing the location of the driveway, was sufficient to describe the easement. In so deciding, the court emphasized that the driveway had existed for years and that the easement would be limited to the width of the driveway as was reasonably necessary for access to the plaintiff's garage. *Id.*

As did the Supreme Court in *Fischer*, we acknowledge the requirement that a prescriptive easement must have a

determinate description. Based on the evidence in this case, we conclude this requirement was met. Evidence to describe the easement over the lateral consisted of maps of the area, photographs of the lateral and headgate in question, the deeds to both the Fyfe property and the Baker property, and similar testimony from both parties regarding the location and course of the lateral. This evidence was sufficient for the court to enter judgment in favor of the Fyfes.

[14] Finally, the evidence at trial supported the scope of the easement granted. The Fyfes' documentary evidence and testimony at trial, which the district court accepted over the Bakers' conflicting testimony, demonstrated that an area 20 feet to each side of the lateral's centerline was necessary to bring in the appropriate equipment to properly clean the lateral. See *Homestead Estates Homeowners Assn. v. Jones*, 278 Neb. 149, 768 N.W.2d 436 (2009) (easement carries with it, by implication, right of doing whatever is reasonably necessary for full enjoyment of easement itself). We find no error in that determination.

2. Removal of Culverts

The district court concluded that the evidence at trial established that the Bakers' culverts on the lateral impaired the Fyfes' ability to bring water to their property and ordered the culverts to be removed. The Bakers contend that this order to remove the culverts was beyond the scope of injunctive relief. We conclude the injunctive relief was appropriate.

[15-17] The order compelling the Bakers to remove the culverts is a mandatory injunction. A mandatory injunction is an equitable remedy that commands the subject of the order to perform an affirmative act to undo a wrongful act or injury. *Bock v. Dalbey*, 283 Neb. 994, 815 N.W.2d 530 (2012). Further, an injunction, in general, is an extraordinary remedy that a court should ordinarily not grant except in a clear case where there is actual and substantial injury. *Id*. And a court should not grant an injunction unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. *Id*.

[18,19] Where an injury committed by one against another is continuous or is being constantly repeated, so that complainant's remedy at law requires the bringing of successive actions, that remedy is inadequate and the injury will be prevented by injunction. *Lambert v. Holmberg*, 271 Neb. 443, 712 N.W.2d 268 (2006). In such cases, equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief. *Id*. An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Id*.

The Fyfes presented evidence at trial to show that the culverts unreasonably restricted the flow of water through the lateral. Alan Fyfe, who holds a professional engineer's license, testified that the cross section of the lateral is much larger than the cross section of the culverts, causing a weak link in the lateral system. Wingenbach, Fyfes' lessee, also testified that the culverts restricted the amount of water he received. The Fyfes also presented evidence that silt had settled into the culverts, further restricting the flow of water. The Bakers countered the Fyfes' claims with their own testimony. The Bakers' testimony demonstrated that they believed the decreased waterflow was solely the result of weeds in the portion of the lateral the Fyfes maintained.

Having considered this conflicting evidence, the district court concluded that the culverts were installed after the prescriptive period had run and that they unreasonably interfered with the flow of water in the lateral. Giving weight to the fact that the trial judge heard and observed the witnesses, we agree with this conclusion. See *Prime Home Care v. Pathways to Compassion*, 283 Neb. 77, 809 N.W.2d 751 (2012) (in appeal of equity action, where credible evidence is in conflict on material issue of fact, appellate court considers and may give weight to fact that trial judge heard and observed witnesses and accepted one version rather than another). This assigned error is without merit.

3. Billie Fyfe's Statements

The Bakers also contend that the district court erred when it did not allow Thomas Baker to testify regarding Billie Fyfe's response to the Bakers' decision to install culverts in place of the cement check. Thomas Baker attempted to testify to the substance of a discussion he allegedly had with Billie Fyfe. The discussion centered on how to replace the old cement check that had been damaged:

> [Bakers' counsel:] Did that discussion talk about installing the culverts that are there?
>
> [Thomas Baker:] Yes.
>
> [Bakers' counsel:] And did . . . Billie Fyfe agree or tell you he thought that would be a good idea to install some culverts in there?
>
> [Fyfes' counsel]: Objection, hearsay.
>
> [Bakers' counsel]: Party opponent, Your Honor.
>
> THE COURT: He's deceased, isn't he?
>
> [Bakers' counsel]: Well, it's his estate still involved in the case.
>
> THE COURT: I'm not sure, I think it's the [personal representative who] can waive that so I'm going to sustain that.
>
> [Bakers' counsel]: Okay. Well, it goes to his state of mind as to why he put it in as well, Your Honor.
>
> THE COURT: Okay. But I'm still — my ruling stands. Let's just move on.

The Bakers argue that Thomas Baker should have been allowed to answer the question because Billie Fyfe's estate remained a party in the litigation. Therefore, the Bakers contend that Billie Fyfe's statements were those of a party opponent and not hearsay. See, Neb. Rev. Stat. § 27-801(4)(b) (Reissue 2008); *In re Estate of Krueger*, 235 Neb. 518, 455 N.W.2d 809 (1990) (in action against estate, statement made by decedent constitutes party admission). They assert that the exclusion of this answer was prejudicial error and led the court to improperly order the removal of the culverts.

[20,21] The Fyfes contend that the Bakers have waived this argument, because no offer of proof was made at trial

to establish what Thomas Baker's answer would have been had he been allowed to answer the question. Neb. Rev. Stat. § 27-103 (Reissue 2008) provides that error may not be predicated upon a ruling admitting or excluding evidence unless a substantial right of the party is affected and, in cases where the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked. The Nebraska Supreme Court has stated that in order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited. *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008).

Although we may be able to conclude from the context of the question asked that Thomas Baker's answer would have been that Billie Fyfe consented to the installation of culverts, that answer alone does not entitle the Bakers to relief. The problem with the culverts, as adduced by the Fyfes, was the size and maintenance of the culverts, which impeded the water flowing to their property. Thus, Billie Fyfe's purported agreement to the installation of the culverts does not end the inquiry. The pertinent questions would be whether he was informed of or involved in the details regarding the design, installation, and maintenance of the culverts. Because there was no offer of proof made, there is no evidence in the record to establish that Billie Fyfe specifically approved of the design, size, or maintenance of the culverts. We cannot say the district court's decision to sustain the Fyfes' hearsay objection constituted prejudicial error.

4. Jury Instruction

In their final assignment of error, the Bakers contend that the district court erroneously instructed the jury. Specifically, the Bakers take issue with the following jury instruction:

> II. Court's Findings
>
> In an earlier proceeding the Court determined as a matter of law that [the Fyfes] owned an easement

> to convey irrigation water from the [Minatare Mutual] canal across [the Bakers'] land to [the Fyfes'] land; and that this easement followed a well defined irrigation lateral across [the Bakers'] land that had been in existence for more than fifty years. The Court further determined as a matter of law that the width of the easement was 10 feet on either side of the centerline of the irrigation lateral from the [Minatare Mutual] canal eastward to the "elbow", and 20 feet on either side of the irrigation lateral centerline from the "elbow" on to [the Fyfes'] land. The Court further found that in 2007 [the Bakers] installed culverts in the irrigation lateral a short distance southeast of the "elbow" which, in part, unreasonably interfered with [the Fyfes'] easement to use the irrigation lateral. The Court ordered Baker to remove the culverts and restore the irrigation lateral to its prior condition. The Court further determined as a matter of law that [the Fyfes] had the right to access [the Bakers'] land as was reasonably necessary to maintain and repair the irrigation lateral.

The Bakers objected at the jury trial when the Fyfes offered a portion of the prior ruling into evidence, which included a statement similar to the instruction above, and the Bakers also objected to the above instruction during the instruction conference. The Bakers contend that the issue of whether they had interfered with the Fyfes' easement was a matter that should have been submitted to the jury.

[22] We reject the Bakers' arguments. As noted in the factual background above, the district court bifurcated the equitable and legal issues. An adjudication of rights with respect to an easement is an equitable action. See *Homestead Estates Homeowners Assn. v. Jones*, 278 Neb. 149, 768 N.W.2d 436 (2009). Thus, we conclude the district court properly considered the issue of interference with the easement as an equitable issue.

Further, after the district court decided the Fyfes' claim of interference with the easement as an equitable issue, it did not err when it informed the jury of this finding. Contrary to the

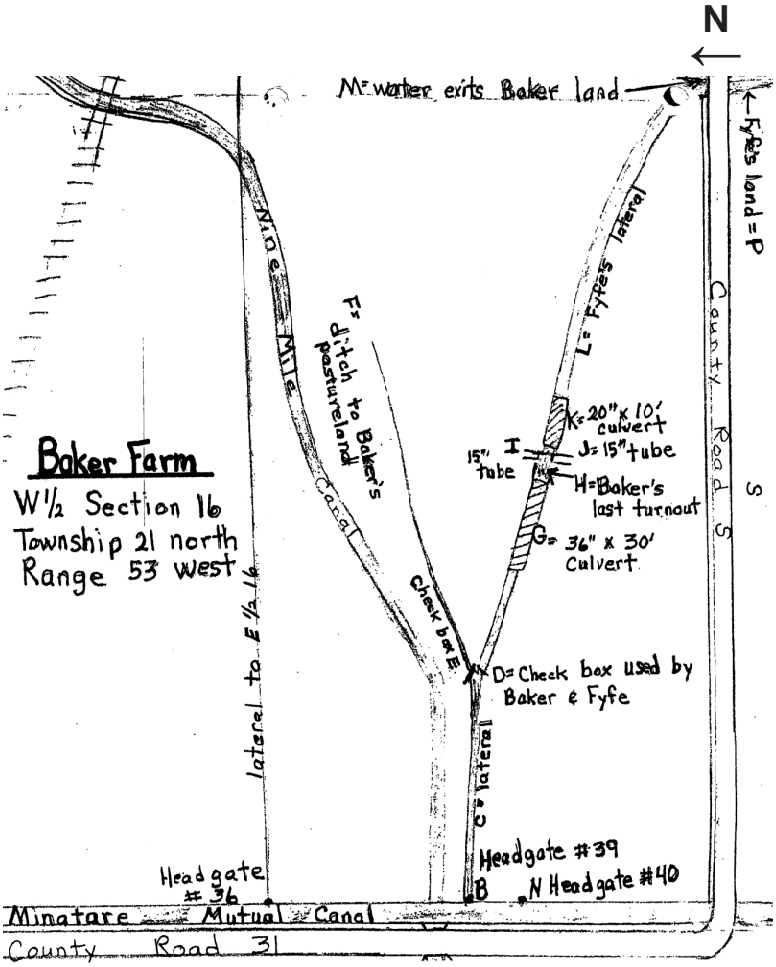
Bakers' assertions that this instruction left the jury with nothing to decide, the jury was required to determine what damages, if any, were proximately caused by the interference with the Fyfes' easement. After deliberation, the jury concluded that the Fyfes had established their damages in the amount of $19,200. We find no merit to this assigned error.

V. CONCLUSION

The district court did not err when it granted the prescriptive easement or when it ordered the culverts to be removed. Further, we conclude there was no prejudicial error committed when the court sustained the Fyfes' hearsay objection, and we do not find error with the jury instructions.

AFFIRMED.

(*See page 730 for appendix A.*)



APPENDIX A
(Directional information supplied.)

Bernard Michie and Dianna Lee Estes, appellants, v. Anderson Builders, Inc., appellee.

859 N.W.2d 906

Filed February 3, 2015. No. A-14-200.

1. **Workers' Compensation: Appeal and Error.** On appellate review, the findings of fact made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
2. **Workers' Compensation: Evidence: Appeal and Error.** If the record contains evidence to substantiate the factual conclusions reached by the trial judge in workers' compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court.
3. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Foreign Judgments: Jurisdiction: States.** A judgment rendered in a sister state court which had jurisdiction is to be given full faith and credit and has the same validity and effect in Nebraska as in the state rendering judgment.
5. **Workers' Compensation: Expert Witnesses.** In order for expert testimony to be admissible in a workers' compensation case, the witness must qualify as an expert, the testimony must assist the trier of fact to understand the evidence or determine a fact in issue, the witness must have a factual basis for the opinion, and the testimony must be relevant.
6. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.
7. **Workers' Compensation: Expert Witnesses.** The trial judge in a workers' compensation case is entitled to accept the opinion of one expert over another.

Appeal from the Workers' Compensation Court: Michael K. High, Judge. Affirmed.

Michael W. Meister for appellants.

Ryan C. Holsten, of Atwood, Holsten, Brown, Deaver & Spier Law Firm, P.C., L.L.O., for appellee.

Moore, Chief Judge, and Riedmann and Bishop, Judges.

RIEDMANN, Judge.

INTRODUCTION

Dianna Lee Estes appeals the decision of the Nebraska Workers' Compensation Court, which found that although her husband, Bernard Michie, sustained a workplace injury, his subsequent death was not causally related to his injury. The court awarded indemnity payments, along with medical and hospital expenses incurred to the time of his death, but denied spousal benefits under the Nebraska Workers' Compensation Act. For the reasons set forth below, we affirm.

BACKGROUND

Michie sustained an injury to his lower back in April 2010 while pouring and leveling wet concrete in the course and scope of his employment with Anderson Builders, Inc. Michie underwent various treatments for the pain associated with his injury from April 2010 until he died unexpectedly in April 2012. At the time of his death, Michie was taking two prescription medications related to his workplace injury: oxycodone for pain and cyclobenzaprine as a muscle relaxant. Prior to his death, Michie initiated this action, seeking indemnity and medical benefits under the Nebraska Workers' Compensation Act. Following his death, Michie's widow, Estes, filed an amended petition, seeking spousal benefits as well as funeral and burial expenses. She alleged that Michie died as a result of an accidental overdose of the medications he was prescribed for his workplace injury and that she was therefore entitled to death benefits.

A trial was held in the compensation court. Estes offered various exhibits, including Michie's post mortem toxicology test results, an autopsy report, and the verdict of the coroner from Laramie County, Wyoming, which is the location where Michie died. The toxicology test results showed the presence of both prescription drugs in Michie's blood at the time of his death. The concentration of oxycodone was 27 nanograms per milliliter, and the concentration of cyclobenzaprine was 60 nanograms per milliliter.

The autopsy report was prepared by Dr. James A. Wilkerson IV, a forensic pathologist. Dr. Wilkerson's conclusion as to

the cause of Michie's death is stated in the autopsy report as follows:

> Based upon the history and autopsy findings, it is my opinion that . . . Michie, a 49-year-old White male, had no definitive cause of death. History, scene findings, pulmonary edema and a full bladder, along with the toxicology findings, suggest multiple drug intoxication as the most likely cause of death. Prolonged metabolism while in a comatose but ultimately fatal state resulted in reduced levels of the drugs. The manner of death is undetermined.

The Laramie County coroner conducted an investigation and determined the cause of Michie's death to be "mixed drug toxicity due to an overdose of his prescribed medications." He determined the manner of death to be "accidental."

Anderson Builders presented expert testimony of Dr. John Vasiliades, a board-certified clinical chemist, toxicologist, and forensic toxicologist. Dr. Vasiliades is currently employed as a laboratory director and toxicologist at a toxicology laboratory in Omaha, Nebraska. He holds both a bachelor's degree and a doctorate degree in chemistry, and he has completed fellowships in chemistry and toxicology. He has qualified hundreds of times in state and federal court as a toxicology and forensic toxicology expert. However, Dr. Vasiliades is not a licensed physician or medical care provider.

Before rendering an opinion in this matter, Dr. Vasiliades reviewed Michie's medical records, the autopsy report, the toxicology test results, and the death investigation report and verdict of the Laramie County coroner. Dr. Vasiliades was aware, based on his review of the records, that Michie had a history of back pain and had been taking 30 milligrams each of oxycodone and cyclobenzaprine daily for a long period of time.

Dr. Vasiliades testified that he is familiar with both of these prescription drugs and their effects on the human body. He testified that the concentrations of the two drugs found in Michie's blood at the time of his death were in the therapeutic, or even "subtherapeutic," range. The level of oxycodone in Michie's blood was only 27 nanograms per millileter,

which is consistent with what Dr. Vasiliades would expect for someone who was taking 30 milligrams of the drug per day. He explained that in order for oxycodone to become toxic, it must be in excess of 600 nanograms per milliliter. Regarding cyclobenzaprine, Dr. Vasiliades testified that it becomes toxic at levels in excess of 300 nanograms per milliliter, and Michie's blood sample contained only 60 nanograms per milliliter.

Given that the concentrations of the drugs in Michie's blood were so low, Dr. Vasiliades opined that the drugs "certainly" did not cause Michie's death. He explained that neither drug concentration was high enough to cause death individually or in combination with one another, especially given that Michie was a chronic user and could likely withstand much higher concentrations of the drugs.

When questioned about the possibility that Michie had an adverse or allergic reaction to the drugs, Dr. Vasiliades explained that such reactions would have occurred within the first few times of taking the drugs. Because Michie had been taking the drugs over a long period of time, Dr. Vasiliades opined that Michie's death was not caused by an adverse or allergic reaction to either medication.

The compensation court awarded indemnity and medical benefits for the back injury, but denied spousal benefits to Estes based on its finding that she failed to meet her burden of proving a causal link between Michie's death and his workplace injury. It found that Dr. Wilkerson's report as to the cause of death was conclusory in nature and not based upon toxicological science. It accepted the opinion of Dr. Vasiliades that the concentrations of oxycodone and cyclobenzaprine were well within the therapeutic range at the time of Michie's death and did not cause his death.

Both Estes and Michie are named in the timely filed notice of appeal, but for ease of discussion, we will refer to Estes as the sole appellant.

ASSIGNMENTS OF ERROR

Estes assigns three errors on appeal: (1) The compensation court erred in failing to give full faith and credit to the verdict

of the Laramie County coroner, as required by U.S. Const. art. IV, § 1; (2) the compensation court erred when it allowed Dr. Vasiliades, a forensic toxicologist with no medical training, to testify on matters of causation over Estes' objection, contrary to Nebraska law requiring medical testimony on causation in workers' compensation cases; and (3) the compensation court erred in failing to find that the medication prescribed to Michie caused or contributed to his death and that Estes was entitled to workers' compensation benefits.

STANDARD OF REVIEW

[1-3] On appellate review, the findings of fact made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Clark v. Alegent Health Neb.*, 285 Neb. 60, 825 N.W.2d 195 (2013). If the record contains evidence to substantiate the factual conclusions reached by the trial judge in workers' compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court. *Id.* An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Id.*

ANALYSIS

Full Faith and Credit to Coroner's Verdict

Estes first assigns that the compensation court erred in failing to give full faith and credit to the verdict of the Laramie County coroner, as required by U.S. Const. art. IV, § 1. We disagree.

[4] A judgment rendered in a sister state court which had jurisdiction is to be given full faith and credit and has the same validity and effect in Nebraska as in the state rendering judgment. *In re Trust Created by Nixon*, 277 Neb. 546, 763 N.W.2d 404 (2009). We do not believe the verdict issued by the Laramie County coroner is a "judgment" entitled to full faith and credit. But even if it were, the Full Faith and Credit Clause would require our courts to give it the same validity and effect that it would have in Wyoming. See *In re*

Trust Created by Nixon, supra. Estes has not pointed to any Wyoming law indicating what validity and effect a coroner's verdict is given in Wyoming. According to our research, a coroner's verdict is merely advisory and has no probative effect under Wyoming law. See *Raigosa v. State*, 562 P.2d 1009 (Wyo. 1977).

Because the coroner's verdict would not have been conclusive evidence in Wyoming courts as to Michie's cause of death, the Full Faith and Credit Clause does not require that it be given such effect in our courts. Thus, the compensation court was entitled to consider and weigh the credibility of the coroner's verdict, just as any other piece of evidence received at trial. This assignment of error has no merit.

Testimony on Cause of Death

For her second assignment of error, Estes asserts that the compensation court erred by allowing Dr. Vasiliades, a forensic toxicologist with no medical training, to testify on matters of causation, contrary to Nebraska law requiring medical testimony to prove causation. She argues, therefore, that the compensation court should have sustained her objections to Dr. Vasiliades' testimony on the basis of foundation and relevance.

In support of her argument, Estes relies upon *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 780, 408 N.W.2d 280, 286 (1987), which states:

> "'"Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries." The employee must show by *competent medical testimony* a causal connection between the alleged injury, the employment, and the disability.' . . ."

(Emphasis supplied.)

[5] We do not believe this case supports Estes' argument. The fact that a plaintiff is required to show causation through

competent medical testimony does not mean that nonmedical expert testimony is inadmissible. In order for expert testimony to be admissible in a workers' compensation case, the witness must qualify as an expert, the testimony must assist the trier of fact to understand the evidence or determine a fact in issue, the witness must have a factual basis for the opinion, and the testimony must be relevant. See *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996). We note that scientific testimony, rather than medical testimony, has been considered in a prior workers' compensation case for purposes of determining causation. See *Ward v. City of Mitchell*, 224 Neb. 711, 400 N.W.2d 862 (1987).

Here, although Dr. Vasiliades is not a medical expert, he is certainly qualified as an expert in the science of toxicology. He has a bachelor's degree and doctorate degree in chemistry, and he completed fellowships in chemistry and toxicology. He is board certified in clinical chemistry, toxicology, and forensic toxicology, and is currently employed as a toxicologist at a toxicology laboratory. He has qualified hundreds of times in state and federal courts as a toxicology and forensic toxicology expert.

Dr. Vasiliades reviewed Michie's medical records, the autopsy report, and the post mortem blood test results, which provided the proper factual foundation for his opinion. His testimony was certainly helpful to the trier of fact in understanding the toxicology reports and whether the concentration of prescription drugs found in Michie's blood could have caused his death. Dr. Vasiliades' opinion that the concentration of those drugs was therapeutic, rather than toxic, was relevant to the issue before the court: whether the prescription drugs contributed to or caused Michie's death.

Because Dr. Vasiliades' testimony was both relevant and supported by proper foundation, the compensation court did not err in admitting it as expert testimony. This assignment of error is without merit.

Denial of Spousal Benefits

Finally, Estes asserts the compensation court erred in failing to find that the medications prescribed for Michie's workplace

injury contributed to his death and that therefore, Estes was entitled to workers' compensation benefits.

[6] A factual determination by the Nebraska Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous. *Aken v. Nebraska Methodist Hosp.*, 245 Neb. 161, 511 N.W.2d 762 (1994). In testing the sufficiency of the evidence to support the findings of fact by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence. *Rader v. Speer Auto*, 287 Neb. 116, 841 N.W.2d 383 (2013).

Here, the compensation court found that Estes failed to meet her burden of proving a causal link between Michie's workplace injury and his subsequent death. In reaching this conclusion, the court rejected Dr. Wilkerson's opinion as to the cause of death and instead accepted the opinion of Dr. Vasiliades that the concentrations of oxycodone and cyclobenzaprine were well within the therapeutic range and did not cause Michie's death. We conclude that the record contains sufficient evidence to support these findings.

Estes argues on appeal that a causal link was established because the only medications found in Michie's body at the time of his death were the medications prescribed to treat his workplace injury. However, the presence of the medications alone is not enough to establish a causal link between the injury and the death. Although Dr. Wilkerson believed that "multiple drug intoxication" was the "most likely cause of death," Dr. Vasiliades testified that the concentration of those drugs was therapeutic, rather than toxic, and could not have caused Michie's death.

[7] The trial judge in a workers' compensation case is entitled to accept the opinion of one expert over another. See *Lowe v. Drivers Mgmt., Inc.*, 274 Neb. 732, 743 N.W.2d 82 (2007). We will not substitute our findings of fact for those of the compensation court when its findings are substantiated

by the record. See *Clark v. Alegent Health Neb.*, 285 Neb. 60, 825 N.W.2d 195 (2013). This assignment of error has no merit.

CONCLUSION

For the reasons set forth above, we affirm the decision of the compensation court.

AFFIRMED.

GRAYLIN GRAY, APPELLANT, V. MICHAEL KENNEY, DIRECTOR OF NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLEE.

860 N.W.2d 214

Filed February 3, 2015. No. A-14-378.

1. **Affidavits: Appeal and Error.** An appellate court reviews a district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) de novo on the record based on the transcript of the hearing or the written statement of the court.
2. **Constitutional Law: Judgments.** Except in those cases where the denial of in forma pauperis status would deny a defendant his or her constitutional right to appeal in a felony case, Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2008) allows the court on its own motion, or upon objection by any interested party, to deny in forma pauperis status on the basis that the legal positions asserted by the applicant are frivolous or malicious.
3. **Actions: Words and Phrases.** A frivolous legal position pursuant to Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) is one wholly without merit, that is, without rational argument based on the law or on the evidence.
4. **Habeas Corpus: Judgments: Collateral Attack.** Under Nebraska law, an action for habeas corpus is a collateral attack on a judgment of conviction.
5. **Judgments: Collateral Attack.** Only a void judgment may be collaterally attacked.
6. **Judgments: Jurisdiction: Collateral Attack.** Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack.
7. **Habeas Corpus: Jurisdiction: Sentences.** A writ of habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose.
8. **Habeas Corpus.** A writ of habeas corpus is not a writ for correction of errors, and its use will not be permitted for that purpose.

9. **Habeas Corpus: Sentences.** The regularity of the proceedings leading up to the sentence in a criminal case cannot be inquired into on an application for writ of habeas corpus, for that matter is available only in a direct proceeding.
10. **Jurisdiction: Judgments: Appeal and Error.** Where jurisdiction has attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void.
11. **Res Judicata.** The doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
12. ____. The doctrine of res judicata bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action.
13. **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.
14. **Actions: Res Judicata.** Unlike the doctrine of res judicata, which involves successive suits, the law-of-the-case doctrine involves successive stages of one continuing lawsuit.
15. **Habeas Corpus: Appeal and Error.** The law-of-the-case doctrine applies to issues raised in a petition for a writ of habeas corpus if that same issue was raised in the appellate court on direct appeal.
16. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Graylin Gray, pro se.

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

IRWIN, RIEDMANN, and BISHOP, Judges.

RIEDMANN, Judge.

INTRODUCTION

Graylin Gray appeals from the order of the district court for Lancaster County which denied his application to proceed

in forma pauperis on his petition for writ of habeas corpus. We affirm.

BACKGROUND

Gray was convicted by a jury of unlawful possession of four or more financial transaction devices and unlawful circulation of financial transaction devices in the first degree. The district court determined that Gray was a habitual criminal and sentenced him to 10 to 20 years' imprisonment on each count. On direct appeal, Gray challenged, among other things, the district court's determination that he was a habitual criminal. In a memorandum opinion filed on March 12, 2009, in case No. A-08-336, we found that the evidence was sufficient to support the district court's habitual criminal finding and affirmed Gray's convictions and sentences in all respects.

On March 14, 2014, Gray filed a petition for writ of habeas corpus, alleging that his sentences are void because the district court applied the wrong burden of proof in determining that he was a habitual criminal. Along with his habeas petition, Gray filed a motion to proceed in forma pauperis and a poverty affidavit. The State timely filed an objection to Gray's motion to proceed in forma pauperis on the basis that his habeas petition was frivolous. A hearing was held on the State's objection, during which the State offered into evidence a copy of our opinion affirming Gray's convictions and sentences on direct appeal.

Following a hearing, the district court sustained the State's objection and denied Gray's motion to proceed in forma pauperis. It found that the petition appeared to be frivolous on its face, in that the issues raised in the petition had been previously litigated and that none of the issues raised in the petition establish that the commitment was void.

Gray timely appeals from that decision.

ASSIGNMENT OF ERROR

Gray assigns that the district court erred in denying his application to proceed in forma pauperis on his petition for writ of habeas corpus.

STANDARD OF REVIEW

[1] A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court. *Peterson v. Houston*, 284 Neb. 861, 824 N.W.2d 26 (2012).

ANALYSIS

Denial of In Forma Pauperis Status.

[2,3] Applications to proceed in forma pauperis are governed by § 25-2301.02. *Peterson v. Houston, supra*. Except in those cases where the denial of in forma pauperis status would deny a defendant his or her constitutional right to appeal in a felony case, § 25-2301.02(1) allows the court on its own motion, or upon objection by any interested party, to deny in forma pauperis status on the basis that the legal positions asserted by the applicant are frivolous or malicious. See *Peterson v. Houston, supra*. A frivolous legal position pursuant to § 25-2301.02 is one wholly without merit, that is, without rational argument based on the law or on the evidence. *Peterson v. Houston, supra*. We agree with the district court's conclusion that Gray's habeas petition is frivolous because the judgment Gray seeks to attack is not void and because the issues Gray seeks to challenge have been previously litigated.

[4-7] Under Nebraska law, an action for habeas corpus is a collateral attack on a judgment of conviction. *Id*. Only a void judgment may be collaterally attacked. *Id*. Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack. *Id*. Thus, a writ of habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose. *Id*.

[8-10] A writ of habeas corpus is not a writ for correction of errors, and its use will not be permitted for that purpose. *Id*. "'[T]he regularity of the proceedings leading up to the sentence in a criminal case cannot be inquired into on an application for writ of habeas corpus, for that matter is available only in

a direct proceeding.'" *Id.* at 867, 824 N.W.2d at 33. "'Where jurisdiction has attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void.'" *Id.* at 869, 824 N.W.2d at 34.

Gray's habeas petition asserts that his sentences are void because the district court determined that he was a habitual criminal beyond a reasonable doubt, rather than by a preponderance of the evidence. We disagree. The fact that the district court applied a higher burden of proof in determining Gray's habitual criminal status does not make his sentences void. Because the district court had proper jurisdiction and Gray's sentences were within its power to impose, his petition for habeas corpus is frivolous.

The State also argues that any claims regarding Gray's status as a habitual criminal are precluded under the doctrines of res judicata and the law of the case. While we agree that the law-of-the-case doctrine precludes relitigation of the habitual criminal issue, we disagree that res judicata is applicable. Because these are independent doctrines which are sometimes closely related, we address each separately.

Res Judicata.

[11,12] The doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions. *Kiplinger v. Nebraska Dept. of Nat. Resources*, 282 Neb. 237, 803 N.W.2d 28 (2011). The doctrine bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action. *Id.*

The determination that Gray was a habitual criminal was made by a court of competent jurisdiction and was a final judgment on the merits. However, the same parties or their privies were not involved in both actions. The habitual criminal

finding arose out of a case filed by the State of Nebraska against Gray in case No. A-08-336, and the postconviction cases involved those same parties in cases Nos. A-10-147 and A-13-254. The present action for a writ of habeas corpus, however, was filed by Gray against Michael Kenney, the director of the Nebraska Department of Correctional Services. There is no showing that Kenney is in privity with the State of Nebraska. Privity requires, at a minimum, a showing that the parties in the two actions are really and substantially in interest the same. *R.W. v. Schrein*, 263 Neb. 708, 642 N.W.2d 505 (2002). Because Kenney and the State of Nebraska are not in privity, the fourth element for an application of res judicata fails.

Law-of-the-Case Doctrine.

[13,14] 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. *State v. Merchant*, 288 Neb. 439, 848 N.W.2d 630 (2014). Unlike the doctrine of res judicata, which involves successive suits, the law-of-the-case doctrine involves successive stages of one continuing lawsuit. See *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008).

While we are not aware of any precedent applying the law-of-the-case doctrine to claims raised in a petition for writ of habeas corpus that were previously rejected on direct appeal, the Nebraska Supreme Court has applied the doctrine when that issue was addressed on direct appeal. See, *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005) (applying doctrine to subsequent postconviction); *Thomas v. State*, 268 Neb. 594, 685 N.W.2d 66 (2004) (applying doctrine to subsequent petition to perpetuate juror's testimony).

Both *State v. Marshall, supra*, and *Thomas v. State, supra*, involved subsequent actions derived from the original convictions. In *State v. Marshall*, the defendant filed a motion for postconviction relief after his convictions were affirmed by the Supreme Court on direct appeal. The district court denied the

motion without an evidentiary hearing. *Id*. At issue in the direct appeal was whether a plea in bar was properly overruled. The Supreme Court held that because the defendant did not timely appeal from the order denying his plea in bar, it lacked jurisdiction to address the alleged error. When the defendant raised the issue in his postconviction motion, the Supreme Court held that its decision in the direct appeal that the order on the plea in bar was final constituted the law of the case which applied in the postconviction proceeding. *Id*.

In *Thomas v. State, supra*, the defendant in the trial court had been convicted and his convictions were affirmed on direct appeal. He subsequently filed a petition seeking to perpetuate the testimony of three jurors who participated in his trial, citing what is now codified as Neb. Ct. R. Disc. § 6-327(a). He alleged that one of the jurors failed to disclose during voir dire that he had a relative who had been the victim of a murder. The district court sustained the State's motion to dismiss. On appeal, the Nebraska Supreme Court stated that it had previously rejected this juror issue on direct appeal. The Supreme Court concluded that its opinion in the direct appeal became the law of the case and precluded further consideration of the issue in the appeal of the subsequent action.

The law-of-the-case doctrine generally applies to successive stages of the same lawsuit. *In re Estate of Stull*, 261 Neb. 319, 622 N.W.2d 886 (2001). However, as evidenced by *State v. Marshall, supra*, and *Thomas v. State, supra*, the doctrine may also be applied to an issue raised in a subsequent action when that action is derived from a direct appeal. For example, postconviction relief is sought by a convicted, imprisoned person "on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable." Neb. Rev. Stat. § 29-3001 (Cum. Supp. 2014). Therefore, a postconviction action, although separate from the criminal action in which the defendant was convicted, necessarily requires an analysis of the underlying conviction.

[15] In the present action, Gray filed a petition for a writ of habeas corpus. An action for habeas corpus is a collateral attack on a judgment of conviction. *Peterson v. Houston*,

284 Neb. 861, 824 N.W.2d 26 (2012). See Neb. Rev. Stat. § 29-2801 (Reissue 2008). Similar to a motion for postconviction relief, a petition for a writ of habeas corpus is dependent upon the underlying conviction. We therefore hold that the law-of-the-case doctrine applies to issues raised in a petition for a writ of habeas corpus if that same issue was raised in the appellate court on direct appeal.

We conclude that the law-of-the-case doctrine is applicable here. On direct appeal, Gray challenged the district court's determination that he was a habitual criminal, and in case No. A-08-336, we affirmed the district court's finding after analyzing the sufficiency of the evidence to prove two of Gray's prior convictions. Because Gray's status as a habitual criminal has already been challenged and affirmed by this court, his attempt to raise the issue again in his petition for writ of habeas corpus is frivolous.

Challenge to Bill of Exceptions.

[16] Finally, Gray argues in his brief that certain statements he made during the hearing on the State's objection to his motion to proceed in forma pauperis were incorrectly transcribed. However, Gray did not assign this issue as error. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court. *State v. Turner*, 288 Neb. 249, 847 N.W.2d 69 (2014). Because Gray did not assign this issue as error, we will not address it on appeal.

CONCLUSION

The district court did not err in denying Gray's application to proceed in forma pauperis on his petition for writ of habeas corpus. Upon the spreading of our mandate affirming the district court's denial of in forma pauperis status, Gray shall have 30 days to pay the fees necessary to file his petition. See § 25-2301.02(1).

AFFIRMED.

State of Nebraska, appellee, v. Scott A. Johnson, appellant.

860 N.W.2d 222

Filed February 10, 2015. No. A-14-085.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Speedy Trial.** Neb. Rev. Stat. § 29-1207 (Cum. Supp. 2014) requires discharge of a defendant whose case has not been tried within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial.
3. **Speedy Trial: Pretrial Procedure.** Neb. Rev. Stat. § 29-1207(4)(a) (Cum. Supp. 2014) specifically excludes from the speedy trial calculation the time from filing until final disposition of pretrial motions of the defendant.
4. **Courts: Speedy Trial: Pretrial Procedure.** A court cannot table a motion and thereby suspend a defendant's rights where judicial delay without a showing of good cause under Neb. Rev. Stat. § 29-1207(4)(f) (Cum. Supp. 2014) would otherwise warrant discharge.
5. **Speedy Trial: Good Cause.** Where the excludable period properly falls under Neb. Rev. Stat. § 29-1207(4)(a) (Cum. Supp. 2014) rather than the catchall provision of § 29-1207(4)(f), no showing of reasonableness or good cause is necessary to exclude the delay.
6. **Speedy Trial: Pretrial Procedure: Good Cause.** Unlike the requirement in Neb. Rev. Stat. § 29-1207(4)(f) (Cum. Supp. 2014) that any delay be for good cause, conspicuously absent from § 29-1207(4)(a) is any limitation, restriction, or qualification of the time which may be charged to the defendant as a result of the defendant's motions.
7. **Speedy Trial: Pretrial Procedure.** The plain terms of Neb. Rev. Stat. § 29-1207(4)(a) (Cum. Supp. 2014) exclude all time between the time of the filing of the defendant's pretrial motions and their final disposition, regardless of the promptness or reasonableness of the delay.
8. **Courts: Constitutional Law: Speedy Trial: Appeal and Error.** The Nebraska Supreme Court has never recognized a right to interlocutory appeal solely concerning the constitutional right to speedy trial.
9. **Final Orders: Speedy Trial: Appeal and Error.** An appeal from a final order—as an order denying a nonfrivolous statutory speedy trial claim is—may raise every issue presented by the order that is the subject of the appeal.
10. **Constitutional Law: Judgments: Speedy Trial: Appeal and Error.** The overruling of a motion alleging the denial of a speedy trial based upon constitutional grounds pendent to a nonfrivolous statutory claim may be reviewed upon appeal from that order.
11. **Constitutional Law: Speedy Trial.** The constitutional right to a speedy trial is guaranteed by U.S. Const. amend. VI and Neb. Const. art. I, § 11.

12. **Constitutional Law: Statutes: Speedy Trial.** The constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other.
13. **Constitutional Law: Speedy Trial.** It is an unusual case in which the Sixth Amendment has been violated when the time limits under the speedy trial act have been met.
14. **Speedy Trial: Words and Phrases.** A speedy trial, generally, is one conducted according to prevailing rules and proceedings of law, free from arbitrary, vexatious, and oppressive delay.
15. **Constitutional Law: Speedy Trial.** The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused, because it implicates both the rights of the accused to be treated decently and fairly and societal interests in providing a speedy trial that exist separately from, and sometimes in opposition to, the interests of the accused.
16. **Speedy Trial: Judgments: Pretrial Procedure.** The right to a speedy trial is a more vague concept than other procedural rights, and there is no fixed point at which it can be determined how long is too long in a system where justice is to be swift but deliberate.
17. **Constitutional Law: Courts: Speedy Trial.** The U.S. Supreme Court has developed a balancing test to determine whether a defendant's constitutional right to a speedy trial has been violated. This balancing test involves four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant.
18. **Constitutional Law: Speedy Trial.** None of the four factors for determining whether a defendant's constitutional right to a speedy trial has been violated, standing alone, is a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial; rather, the factors are related and must be considered together with such other circumstances as may be relevant.
19. **Constitutional Law: Criminal Law: Pretrial Procedure: Time.** The Fifth Amendment has only a limited role to play in protecting against oppressive delay in the criminal context.
20. **Speedy Trial: Due Process: Proof.** The due process claimant's burden is a heavy one, requiring a showing of both substantial actual prejudice resulting from the trial delay and bad faith on the part of the government.

Appeal from the District Court for Lancaster County: STEPHANIE F. STACY, Judge. Affirmed in part, and in part remanded with directions.

Matthew K. Kosmicki for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

MOORE, Chief Judge, and IRWIN and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Scott A. Johnson appeals an order of the district court for Lancaster County, Nebraska, denying his motion for absolute discharge on speedy trial grounds. On appeal, Johnson argues that the court erred in not granting relief on the basis of statutory speedy trial rights and constitutional speedy trial rights. We find no merit to Johnson's assertion concerning his statutory speedy trial claim. With respect to Johnson's constitutional speedy trial claim, we remand the matter with directions for further consideration.

II. BACKGROUND

We initially note that there is no dispute in this case about the number of days to be attributed to the various time periods since the information was filed against Johnson. Rather, Johnson's arguments are based entirely on assertions that the time it took the district court to rule on a motion to suppress constituted an inordinate and unreasonable delay and that sometime during that delay, he was denied a speedy trial.

On June 7, 2012, Johnson was charged by information with possession of a controlled substance.

On June 15, 2012, Johnson filed pretrial discovery motions. The district court ruled on Johnson's motions on June 19. The court concluded that as a result of these pretrial motions, 4 days were properly excluded from the speedy trial calculation. Johnson has not challenged this calculation.

On September 13, 2012, Johnson requested the case be continued from the October 2012 jury term to the December 2012 jury term. The court granted Johnson's request and accepted his waiver of speedy trial for that period. The district court concluded that as a result of this request, 81 days were properly excluded from the speedy trial calculation. Johnson has not challenged that calculation.

On November 1, 2012, Johnson moved to continue the case to the February 2013 jury term. The court granted this request.

The district court concluded that as a result of this request, 95 additional days would be properly excluded from the speedy trial calculation, but that 32 of those days overlapped the time properly excluded because of the prior continuance; as a result, the court concluded that 63 additional days were properly excluded from the speedy trial calculation. Johnson has not challenged that calculation.

On January 17, 2013, Johnson filed a motion to suppress. The motion was heard on March 20, and the court took the motion under advisement. The court entered an order overruling the motion to suppress on December 2.

On December 20, 2013, Johnson filed a motion for absolute discharge. In the motion, Johnson specifically asserted that his motion for discharge was based on his allegations that he had been denied both his statutory and his constitutional rights to speedy trial.

At the hearing on Johnson's motion for discharge, the parties presented argument and the State offered an exhibit demonstrating the State's calculation of excludable time periods. There was no testimony presented, and there was no discussion on the record concerning the reasons for the court's delay in ruling on Johnson's motion to suppress from March until December 2013. Johnson argued the court should find that the court's delay in ruling on the motion to suppress was an inordinate and unreasonable delay and, based on the Nebraska Supreme Court's ruling in *State v. Wilcox*, 224 Neb. 138, 395 N.W.2d 772 (1986), that he was entitled to discharge.

On January 15, 2014, the district court entered an order overruling Johnson's motion for discharge. The court specifically distinguished the present case from *State v. Wilcox, supra*, found that the entire time from Johnson's filing of the motion to suppress until the court's ruling on the motion was properly excludable as being attributed to a pretrial motion filed by the defendant, and concluded that the statutory time for speedy trial would not expire until March 2014. The court did not mention Johnson's assertion regarding his constitutional right to speedy trial.

This appeal followed.

III. ASSIGNMENT OF ERROR

On appeal, Johnson has assigned one error. He asserts that the district court erred in overruling his motion for absolute discharge.

IV. ANALYSIS

We initially note that there are no issues raised in this case concerning the "counting" of particular days attributed to the various pretrial filings and rulings. Rather, the primary argument in this appeal concerns whether the length of time it took the court to rule on Johnson's motion to suppress constituted an inordinate or unreasonable delay such that, at some point during that time, Johnson's speedy trial rights were violated.

[1] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Hettle*, 288 Neb. 288, 848 N.W.2d 582 (2014).

1. Statutory Speedy Trial Right

Johnson first asserts that his statutory right to speedy trial under Neb. Rev. Stat. § 29-1207 (Cum. Supp. 2014) was violated, because the more than 8 months that his motion to suppress was under advisement resulted in his not being brought to trial within 6 months. His argument is premised upon, and depends upon, a conclusion that the time that his motion was pending is not entirely excluded from the speedy trial calculation because there was inordinate or unreasonable judicial delay without good cause. We find no merit to Johnson's assertion and conclude that this time period was entirely excludable as attributed to his pretrial motion to suppress.

[2,3] Section 29-1207 requires discharge of a defendant whose case has not been tried within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial. *State v. Hettle, supra*; *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997). Section 29-1207(4)(a) specifically excludes from the speedy trial calculation "the time from filing until final disposition of pretrial motions of the defendant."

In this case, Johnson relies heavily on the outcome in *State v. Wilcox*, 224 Neb. 138, 395 N.W.2d 772 (1986), as support for his assertion that even though the period of time at issue here involved the period of time it took the court to rule on his pretrial motion to suppress, it was an unreasonable period of time for such a ruling and constituted judicial delay without a showing of good cause. In *State v. Wilcox, supra*, the Nebraska Supreme Court held that a defendant was denied his right to a speedy trial where a motion to suppress filed by the defendant was not heard until 1 year 7 months 24 days after it was filed. The motion was set for hearing a little over 1 month after it was filed. However, the motion was not heard at that time because the judge recused himself. Thereafter, the record indicated no action in the case for 1 year 4 months 26 days, until finally the substituted judge received the transcript and 16 days later ruled on the motion.

[4] In *State v. Wilcox, supra*, the Nebraska Supreme Court concluded that the defendant's rights under § 29-1207 had been violated. In addressing the time period after the substituted judge had been assigned to the case, the court stated that a court cannot table a motion and thereby suspend a defendant's rights where judicial delay without a showing of good cause under § 29-1207(4)(f) would otherwise warrant discharge.

[5] Since its ruling in *State v. Wilcox, supra*, the Nebraska Supreme Court has clarified its ruling and consistently rejected the argument that Johnson makes in this case, by drawing a distinction between cases where the period of delay properly falls under § 29-1207(4)(a) and cases where the period of delay properly falls under the catchall provision of § 29-1207(4)(f). See, *State v. Covey*, 267 Neb. 210, 673 N.W.2d 208 (2004); *State v. Turner, supra*; *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987), *abrogated on other grounds, State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990). In *State v. Lafler, supra*, the court clarified that where the excludable period properly falls under § 29-1207(4)(a) rather than the catchall provision of § 29-1207(4)(f), no showing of reasonableness or good cause is necessary to exclude the delay.

The court explained that the delay in *State v. Wilcox*, 224 Neb. 138, 395 N.W.2d 772 (1986), was *not* based on one of the specifically enumerated or described periods of delay under § 29-1207(4)(a). *State v. Lafler, supra*. Rather, the delay in *State v. Wilcox, supra*, in the court's actually assigning and hearing the defendant's motion was attributable to judicial neglect and fell under § 29-1207(4)(f), wherein other periods of delay not specifically enumerated are excludable, but only if the court finds that they are for good cause. *State v. Lafler, supra*.

[6,7] Unlike the requirement in § 29-1207(4)(f) that any delay be for good cause, conspicuously absent from § 29-1207(4)(a) is any limitation, restriction, or qualification of the time which may be charged to the defendant as a result of the defendant's motions. *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997); *State v. Lafler, supra*. Rather, the plain terms of § 29-1207(4)(a) exclude all time between the time of the filing of the defendant's pretrial motions and their final disposition, regardless of the promptness or reasonableness of the delay. *State v. Turner, supra*; *State v. Lafler, supra*. Nebraska's statute is similar to the federal Speedy Trial Act of 1974, 18 U.S.C. § 3161 et seq. (2012), and the U.S. Supreme Court in *Henderson v. United States*, 476 U.S. 321, 106 S. Ct. 1871, 90 L. Ed. 2d 299 (1986), stated that the plain terms of the act excluded all time between the filing and the hearing on a motion whether or not the hearing had been promptly held and that the period of delay was not required to be reasonable. See, *State v. Turner, supra*; *State v. Lafler, supra*. The Nebraska Legislature could have drafted Nebraska's statutes to apply a reasonable time requirement to § 29-1207(4)(a), but did not.

The defendants in *State v. Turner, supra*, and in *State v. Lafler, supra*, made arguments similar to the one set forth by Johnson in this case, asserting that periods of time attributed to their pretrial motions should be considered inordinate or unreasonable delay and require a showing of good cause to satisfy speedy trial rights. The Nebraska Supreme Court rejected that argument in both cases, and we similarly reject it here. The record demonstrates that Johnson's motion was heard and

taken under advisement, and there is nothing to suggest any kind of judicial neglect comparable to that in *State v. Wilcox, supra*. As such, the district court correctly concluded that the entire time attributed to the motion to suppress was properly excluded, and the court was not clearly erroneous in so holding. This assigned error is without merit.

2. Constitutional Speedy Trial Right

Johnson next asserts that the district court erred in not finding that his constitutional right to a speedy trial was violated. The court did not make any findings on this issue or resolve the issue, and we conclude that the matter must be remanded for further consideration.

We initially note that the State asserts on appeal that a defendant is not entitled to appeal from a pretrial ruling denying relief based on constitutional speedy trial rights. The State argues: "The U.S. Supreme Court has expressly held that no interlocutory appeal lies from a denial of relief based upon the constitutional rights to speedy trial." Brief for appellee at 3, citing *United States v. MacDonald*, 435 U.S. 850, 98 S. Ct. 1547, 56 L. Ed. 2d 18 (1978). The State asserts that the Nebraska Supreme Court has never recognized a right to interlocutory appeal solely concerning the constitutional right to speedy trial. We find the authority upon which the State bases its argument in this case to be distinguishable, because the factual scenario at hand does not involve an interlocutory appeal based *solely* on an alleged constitutional violation of a right to speedy trial.

In *United States v. MacDonald, supra*, the U.S. Supreme Court did reverse a lower court decision and remand the matter on the basis of concluding that a defendant was not entitled to a pretrial appeal on speedy trial grounds. In that case, however, the defendant had sought relief solely on the basis of his Sixth Amendment right to a speedy trial and there was no statutory claim also at issue.

[8] In *State v. Wilson*, 15 Neb. App. 212, 724 N.W.2d 99 (2006), this court was faced with an appeal from the denial of a motion to discharge on the basis of both statutory and constitutional speedy trial rights. We found the defendant's

statutory claim to be frivolous, and we declined to address the constitutional claim on the basis that the constitutional claim, in the absence of a nonfrivolous statutory claim, was not a final, appealable order. *Id*. In so finding, we recognized the U.S. Supreme Court's holding in *United States v. MacDonald, supra*. As the State notes in its brief in this case, we stated in *State v. Wilson*, 15 Neb. App. at 221, 724 N.W.2d at 107, that "the Nebraska Supreme Court has never recognized a right to interlocutory appeal solely concerning the constitutional right to speedy trial."

[9,10] The State's reliance on this authority, however, is unpersuasive in this case because the appeal herein is clearly not *solely* concerning the constitutional right to speedy trial. As discussed significantly above, this case involves both a nonfrivolous statutory claim and a constitutional claim. In *State v. Wilson, supra*, we also noted that an appeal from a final order—as an order denying a nonfrivolous statutory speedy trial claim is—may raise every issue presented by the order that is the subject of the appeal. Thus, the overruling of a motion alleging the denial of a speedy trial based upon constitutional grounds pendent to a nonfrivolous statutory claim may be reviewed upon appeal from that order. *Id*. See, *State v. Hettle*, 288 Neb. 288, 848 N.W.2d 582 (2014); *State v. Brooks*, 285 Neb. 640, 828 N.W.2d 496 (2013).

[11-13] The constitutional right to a speedy trial is guaranteed by U.S. Const. amend. VI and Neb. Const. art. I, § 11. *State v. Hettle, supra*. The constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other. *Id*. Nevertheless, § 29-1207 provides a useful standard for assessing whether the length of a trial delay is unreasonable under the U.S. and Nebraska Constitutions. *State v. Hettle, supra*. It is an unusual case in which the Sixth Amendment has been violated when the time limits under the speedy trial act have been met. *State v. Hettle, supra*.

[14-16] A speedy trial, generally, is one conducted according to prevailing rules and proceedings of law, free from arbitrary, vexatious, and oppressive delay. *Id*. But the right is generically different from any of the other rights enshrined in the Constitution for the protection of the accused, because it

implicates both the rights of the accused to be treated decently and fairly and societal interests in providing a speedy trial that exist separately from, and sometimes in opposition to, the interests of the accused. See *id*. In addition, deprivation of the right may sometimes work to the benefit of the accused. *Id*. The right is a more vague concept than other procedural rights, and there is no fixed point at which it can be determined how long is too long in a system where justice is to be swift but deliberate. *Id*.

[17,18] The U.S. Supreme Court has developed a balancing test to determine whether a defendant's constitutional right to a speedy trial has been violated. See *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). This balancing test involves four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. *State v. Hettle, supra*. None of these four factors, standing alone, is a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial; rather, the factors are related and must be considered together with such other circumstances as may be relevant. *State v. Tucker*, 259 Neb. 225, 609 N.W.2d 306 (2000).

In this case, Johnson clearly raised his constitutional speedy trial right as a basis for his motion for absolute discharge. Nonetheless, the order of the district court denying the motion for discharge does not include any mention of the constitutional right, does not include any consideration of the four factors that must be balanced, and does not include any kind of factual findings about such considerations as the reason for the delay or the potential prejudice to Johnson as the defendant. Without any findings to review, it is impossible for this court to determine whether the district court was clearly erroneous.

During oral argument in this case, both counsel for Johnson and counsel for the State agreed that without any findings from the district court on this issue, there is no way for this court to properly perform its appellate function of review, and both agreed that if we concluded that the constitutional claim is properly before us in this appeal, then the matter would

need to be remanded for the district court to make findings concerning the factors set forth above. See *State v. Vasquez*, 16 Neb. App. 406, 744 N.W.2d 500 (2008) (when trial court's findings are incomplete, appellate court must remand for further consideration).

Because Johnson properly raised his claim asserting violation of his constitutional right to speedy trial and because the district court failed to address the issue and make appropriate findings concerning the factors set forth above, we must remand the matter to the district court for further consideration and findings.

3. Due Process Assertions

Finally, Johnson argues that the court erred in not finding a violation of his due process rights. It is not apparent what due process rights Johnson was asserting in this case, beyond his rights to speedy trial already discussed above.

[19,20] The Nebraska Supreme Court has noted that the Fifth Amendment has only a limited role to play in protecting against oppressive delay in the criminal context. *State v. Hettle*, 288 Neb. 288, 848 N.W.2d 582 (2014). It is the measure against which prearrest or preindictment delay is scrutinized. *Id*. In *State v. Hettle, supra*, the court noted that it was aware of no case in which the Fifth Amendment was applied to a claim for delay in bringing an accused to trial after arrest or indictment. Moreover, the due process claimant's burden is a heavy one, requiring a showing of both substantial actual prejudice resulting from the delay and bad faith on the part of the government. *State v. Hettle, supra*.

In this case, Johnson has not demonstrated any violation of due process rights. This assertion on appeal is without merit.

V. CONCLUSION

We find no merit to Johnson's assertion concerning his statutory speedy trial claim. With respect to his constitutional speedy trial claim, we remand the matter with directions for further consideration.

Affirmed in part, and in part
remanded with directions.

Herman Trust, appellee, v. Brashear 711 Trust, appellant.

Herman Trust, appellee, v. Brashear LLP, appellant.

Herman Trust, appellee, v. Kermit A. Brashear, appellant.

860 N.W.2d 431

Filed February 17, 2015. Nos. A-13-895 through A-13-897.

1. **Judgments: Jurisdiction.** When a jurisdictional question does not involve a factual dispute, the issue is a matter of law.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
4. **Final Orders: Appeal and Error.** An order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
5. **Final Orders: Motions to Dismiss.** A denial of a motion to dismiss is not a final order.
6. **Summary Judgment: Final Orders: Appeal and Error.** A denial of a motion for summary judgment is not a final order and therefore is not appealable.
7. **Final Orders: Appeal and Error.** To fall within the collateral order doctrine, an order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.
8. ____: ____. The collateral order doctrine is a narrow exception that should never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered.
9. **Courts: Final Orders: Appeal and Error.** Because the collateral order doctrine has its source in decisions of the U.S. Supreme Court, Nebraska courts review cases decided by the federal courts for guidance.
10. **Final Orders: Appeal and Error.** The mere identification of some interest that would be irretrievably lost has never sufficed to meet the third requirement of the collateral order doctrine—that an order be effectively unreviewable on appeal from a final judgment.
11. **Immunity: Final Orders: Appeal and Error.** The right to avoid litigation pursuant to a claim for governmental immunity from suit is reviewable under the collateral order doctrine on an interlocutory appeal when the facts are not disputed.

12. **Immunity: Liability.** A claim for governmental immunity is based in immunity from suit and is not simply a defense against liability, which immunity is effectively lost if a case is erroneously permitted to go to trial.
13. **Immunity: Public Officers and Employees.** Governmental immunity is the entitlement not to stand trial or face the other burdens of litigation; requiring an official with a colorable immunity claim to defend a suit for damages would be disruptive of effective government and would cause harm that the immunity was meant to avoid.
14. **Judgments: Final Orders.** Whether a right is adequately vindicable or effectively reviewable cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement.
15. **Constitutional Law: Statutes: Immunity: Final Orders.** A policy embodied in a constitutional or statutory provision entitling a party to immunity from suit is of such importance that it justifies a departure from the operation of ordinary final judgment principles.
16. **Final Orders: Compromise and Settlement: Appeal and Error.** Rights under private settlement agreements can be adequately vindicated on appeal from final judgment.
17. **Compromise and Settlement: Appeal and Error.** A refusal to enforce a settlement agreement claimed to shelter a party from suit altogether does not supply the basis for immediate appeal.
18. **Courts: Appeal and Error.** The U.S. Supreme Court has instructed courts of appeals to view claims of a right not to be tried with skepticism, if not a jaundiced eye.
19. **Limitations of Actions: Words and Phrases.** A tolling agreement is an agreement between a potential plaintiff and a potential defendant by which the defendant agrees to extend the statutory limitations period on the plaintiff's claim, usually so that both parties will have more time to resolve their dispute without litigation.
20. **Trial: Judgments: Appeal and Error.** It is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is effectively unreviewable if review is to be left until later.

Appeals from the District Court for Douglas County: TIMOTHY P. BURNS, Judge. Appeals dismissed.

Steven D. Davidson, of Baird Holm, L.L.P., for appellants.

James P. Waldron and Christopher J. Tjaden, of Gross & Welch, P.C., L.L.O., for appellee.

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

BISHOP, Judge.

The present interlocutory appeals arise out of three separate but related actions filed by the Herman Trust against Kermit A. Brashear; Brashear LLP, his law practice; and the Brashear 711 Trust (the 711 Trust), a nominee trust for the benefit of Brashear and his wife (collectively the Brashears), to recover on a promissory note and personal guaranties executed by the Brashears. The Brashears filed separate motions to dismiss in each case, claiming that the lawsuits were filed prior to the expiration or termination of a tolling agreement executed by the Brashears. The district court overruled the motions to dismiss, finding that the tolling agreement applied to professional negligence claims only and not the claims at issue. The Brashears now appeal from the district court's order denying their motions to dismiss, claiming this court has appellate jurisdiction to review the district court's order under the collateral order doctrine. We disagree and dismiss all three appeals for lack of jurisdiction.

BACKGROUND

Brashear is a licensed Nebraska attorney and the sole equity partner of Brashear LLP. Brashear provided legal services to R.L. Herman, his family, and his business interests for more than 30 years. Herman served as trustee of the Herman Trust.

On January 17, 2011, the 711 Trust executed and delivered to the Herman Trust a promissory note (the Note) in the principal amount of $764,000, with an interest rate of 5 percent per annum. The Note provided that the commercial building owned by the 711 Trust, and occupied by Brashear LLP, would be used as collateral for the loan. Pursuant to the Note, it was to be repaid in equal monthly interest-only payments commencing on February 17. The principal was not required to be repaid until the sale of the building, until the death of Brashear, or until October 12, 2012, whichever occurred first. The Note provided that upon the happening of one of those events, the repayment of the full principal amount plus all accrued interest was due within 30 days.

In connection with the Note, on January 17, 2011, Brashear LLP and Brashear, individually, each executed a personal guaranty of the Note, agreeing to unconditionally and irrevocably guarantee the full and timely payment of the Note by the 711 Trust.

Brashear prepared the loan documents utilized in connection with this transaction.

Sometime in August 2012, the Herman Trust retained new legal counsel, which provided the Herman Trust with advice regarding the representation provided to the Herman Trust by Brashear. The Herman Trust's new counsel opined that Brashear failed to meet the applicable standard of care for a transactional attorney with respect to the loan transaction and the documents prepared by Brashear in connection with the transaction.

On January 16, 2013, a tolling agreement was entered into between Herman (as trustee of the Herman Trust), Brashear, and Brashear LLP. The 711 Trust was not a party to the tolling agreement. The tolling agreement provided that the parties

> desire[d] to defer immediate commencement of any litigation by Herman against . . . Brashear or Brashear LLP arising out of the alleged professional negligence of . . . Brashear in providing legal services and counsel to Herman, in order to give the parties hereto time to conduct additional and further discussion and negotiations, outside of direct litigation.

Pursuant to the agreement, Brashear and Brashear LLP waived and agreed not to assert the defense of the statute of limitations, and the parties agreed that the running of any statute of limitations or statute of repose would be tolled for 1 year or until the agreement was terminated by 30 days' written notice.

Less than 2 months later, on March 7, 2013, the Herman Trust filed three separate complaints against the 711 Trust, Brashear LLP, and Brashear. In its complaint against the 711 Trust, the Herman Trust alleged that the 711 Trust defaulted on the Note for failure to make payments, that the Herman

Trust was owed the principal sum of $764,000 plus accrued interest in the amount of $15,278.90, and that the Herman Trust had made a demand for payment, but that the amount owed remained unpaid. The Herman Trust's separate complaints against Brashear and Brashear LLP sought to recover the unpaid amount pursuant to their personal guaranties executed in connection with the Note.

On April 17, 2013, the 711 Trust, Brashear LLP, and Brashear each filed a motion to dismiss, alleging that the district court lacked subject matter jurisdiction, that the complaint failed to state a claim, and that the Herman Trust failed to join necessary parties. The basis for each motion was that the tolling agreement prohibited the filing of the lawsuits.

A hearing on the motions was held on October 1, 2013. The court received into evidence affidavits and exhibits from the parties and treated the motions to dismiss as motions for summary judgment. The court entered an order on October 11, overruling the motions filed in each case. The court concluded that the Herman Trust's complaints sought to recover on breach of contract claims and that the tolling agreement applied only to professional negligence claims. The court also found that although the evidence in the three separate actions overlapped, each of the Herman Trust's complaints advanced separate theories of recovery, and that therefore dismissal for failure to join a necessary party was not proper. The court granted a motion to consolidate the three cases with respect to discovery only.

The 711 Trust, Brashear LLP, and Brashear each now appeal from the order denying their motions to dismiss, which we consolidated for purposes of appeal.

ASSIGNMENTS OF ERROR

The Brashears assign as error on appeal that (1) the district court erred in denying the motions to dismiss, (2) the district court erred in failing to conclude that the tolling agreement barred the filing of the Herman Trust's contract claims on the Note and guaranty, and (3) the district court erred in finding that the Herman Trust's claim on the Note and guaranty did

not constitute litigation arising out of the alleged professional negligence of Brashear.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, the issue is a matter of law. *Kelliher v. Soundy*, 288 Neb. 898, 852 N.W.2d 718 (2014).

ANALYSIS

[2-4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007). For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Kelliher, supra*. An order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered. *StoreVisions v. Omaha Tribe of Neb.*, 281 Neb. 238, 795 N.W.2d 271 (2011), *modified on denial of rehearing* 281 Neb. 978, 802 N.W.2d 420.

[5-7] The present appeals were taken from the district court's order overruling three motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim, which were converted to motions for summary judgment. A denial of a motion to dismiss is not a final order. See *id*. See, also, *Qwest Bus. Resources v. Headliners–1299 Farnam*, 15 Neb. App. 405, 727 N.W.2d 724 (2007). Similarly, a denial of a motion for summary judgment is not a final order and therefore is not appealable. *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003). The Brashears concede that they are not appealing from a final order or one made in a special proceeding, but contend that we have jurisdiction to review the present appeals under the collateral order doctrine, an exception to the final order rule. To fall within the collateral order doctrine, an order must (1) conclusively determine the disputed question,

(2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment. *StoreVisions, supra*.

[8,9] Our Supreme Court and the U.S. Supreme Court have emphasized the modest scope of the collateral order doctrine, explaining that it is a "'"narrow exception"'" that should "'never be allowed to swallow the general rule . . . that a party is entitled to a single appeal, to be deferred until final judgment has been entered . . . .'" *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 86, 718 N.W.2d 531, 535 (2006) (quoting *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994)). In Nebraska, the collateral order doctrine has been applied in limited circumstances. The Nebraska Supreme Court has only utilized the doctrine to review interlocutory appeals from: a district court order canceling a notice of lis pendens against property in which the appellant claimed title, *Kelliher v. Soundy*, 288 Neb. 898, 852 N.W.2d 718 (2014); a district court's denial of a motion to dismiss based upon a finding that an Indian tribe waived its claim for sovereign immunity, *StoreVisions, supra*; an order granting disqualification of counsel on the basis of prior representation of an adverse party, *Jacob North Printing Co. v. Mosley*, 279 Neb. 585, 779 N.W.2d 596 (2010); and a denial of a claim for qualified immunity, *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007). Because the collateral order doctrine has its source in decisions of the U.S. Supreme Court, Nebraska courts review cases decided by the federal courts for guidance. See *Kelliher, supra*.

[10] In considering the three requirements for an order to fall within the collateral order doctrine as set forth in *StoreVisions, supra*, we find that the first two conditions are met in this case: (1) The trial court did conclusively determine the disputed question of whether the tolling agreement should prevent all litigation, and (2) by doing so, the trial court did resolve an important issue completely separate from the merits of the action (default on loan). Accordingly, our analysis focuses on the third requirement of the collateral order doctrine, which is whether the district court's order denying the Brashears' motions to dismiss pursuant to the tolling

agreement would be effectively unreviewable on appeal from a final judgment. In *Hallie Mgmt. Co., supra*, the Nebraska Supreme Court concluded that a discovery order compelling disclosure of documents claimed to be protected by the attorney-client privilege and work product doctrine did not meet the third condition of the collateral order doctrine. In making this determination, the court explained that although harm may occur in delaying review of an erroneous discovery order to disclose privileged information (because delayed appellate review would not eliminate breach of confidentiality), such harm was outweighed by the delay and disruption that would occur in the litigation process if the court were to allow appeals from every discovery order claimed to implicate privilege. The court explained that almost every pretrial or trial order might be called "'"effectively unreviewable"'" in the sense that relief from error cannot rewrite history, and that appellate reversal upon a final judgment might only "'imperfectly'" repair the burden to litigants. *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 87, 718 N.W.2d 531, 535 (2006) (quoting *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994)). However, the mere identification of some interest that would be "'"irretrievably lost"'" has "'never sufficed to meet the third [requirement of the collateral order doctrine].'" *Id.* at 87, 718 N.W.2d at 536. In the case of a discovery order to disclose privileged information, on appeal from a final judgment, the appellate court could determine whether the disclosure was erroneously compelled, and reverse the judgment and order a new trial prohibiting the use of the privileged documents or evidence obtained as a result of their disclosure, as an adequate remedy. See *Hallie Mgmt. Co., supra*.

[11-13] The Brashears equate their purported right to avoid litigation to a claim for governmental immunity from suit, the latter of which courts have determined is reviewable under the collateral order doctrine on an interlocutory appeal when the facts are not disputed, because immunity from suit is an important right that would be effectively lost on appeal from a final judgment. See, e.g., *StoreVisions v. Omaha Tribe of Neb.*, 281 Neb. 238, 795 N.W.2d 271 (2011), *modified on*

denial of rehearing 281 Neb. 978, 802 N.W.2d 420 (jurisdiction to review district court's order overruling Indian tribe's motion to dismiss based on finding that tribe had waived its sovereign immunity); *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007) (jurisdiction to review district court's order overruling Department of Health and Human Services employee's motion for summary judgment on employee's claimed qualified immunity defense). The stated rationale behind granting interlocutory review to those types of orders is because a claim for governmental immunity "is based in immunity from suit and is not simply a defense against liability," *StoreVisions*, 281 Neb. at 243-44, 795 N.W.2d at 277, which immunity "'is effectively lost if a case is erroneously permitted to go to trial,'" *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144, 113 S. Ct. 684, 121 L. Ed. 2d 605 (1993). Governmental immunity is the "'entitlement not to stand trial or face the other burdens of litigation'"; requiring an official with a colorable immunity claim to defend a suit for damages would be disruptive of effective government and would cause harm that the immunity was meant to avoid. *Digital Equipment Corp.*, 511 U.S. at 870. See, also, *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S. Ct. 2690, 73 L. Ed. 2d 349 (1982) (denial of presidential immunity is immediately appealable because of unique position of President's office, rooted in separation of powers and supported by our history).

Constitutional or statutory immunity from suit, however, has been viewed differently than agreements not to be sued when considered under the collateral order doctrine. The U.S. Supreme Court has previously declined to extend the rationale for granting interlocutory review of immunity claims to a private settlement agreement under which one party claimed it was provided with a right not to be sued. In *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 866, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994), the defendant unsuccessfully attempted to equate its claimed "'right not to go to trial'" under a settlement agreement to governmental immunity from suit, in order to obtain interlocutory appellate review under the collateral order doctrine. In *Digital*

Equipment Corp., the parties entered into a settlement agreement wherein the defendant agreed to pay the plaintiff a sum of money for the right to use a trade name and corresponding trademark, in exchange for a waiver of all damages and dismissal of the suit. Several months later, the trial court granted the plaintiff's motion to vacate the dismissal and rescind the settlement agreement for alleged misrepresentation of material facts during settlement negotiations. The defendant appealed from the order permitting the case to proceed, claiming that it had a "'right not to stand trial altogether'" pursuant to the settlement agreement and that such a right per se satisfied the third requirement of the collateral order doctrine. *Id.*, 511 U.S. at 869.

[14-16] The U.S. Supreme Court rejected the defendant's argument and concluded the third requirement of the collateral order doctrine (that decision would be effectively unreviewable on appeal from final judgment) was not met by the defendant's assertion of a "'right not to stand trial'" under the settlement agreement. *Id.* With respect to the third requirement, the Supreme Court stated, "[W]hether a right is 'adequately vindicable' or 'effectively reviewable,' simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." *Id.*, 511 U.S. at 878-79. The Supreme Court differentiated the *privately* conferred right claimed by the defendant from a "*policy . . . embodied in a constitutional or statutory provision* entitling a party to immunity from suit (a rare form of protection)," concluding the latter was of such importance that it justified a departure from the operation of ordinary final judgment principles, while the former did not. *Id.*, 511 U.S. at 879 (emphasis supplied). Although the defendant argued that settlement agreement "immunities" should be reviewed on collateral order appeal due to the public policy favoring voluntary resolution of disputes, the Supreme Court disagreed, stating:

> It defies common sense to maintain that parties' readiness to settle will be significantly dampened (or the corresponding public interest impaired) by a rule that a district court's decision to let allegedly barred litigation

> go forward may be challenged as a matter of right only on appeal from a judgment for the plaintiff's favor.

Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 881, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994). The Court accordingly concluded that the privately claimed right to avoid trial under the settlement agreement was not an important enough right to justify an immediate appeal and that "rights under private settlement agreements can be adequately vindicated on appeal from final judgment." *Id.*, 511 U.S. at 869.

[17] The Supreme Court in *Digital Equipment Corp.* discussed that the defendant asserting its right to avoid trial under the settlement agreement had the "unenviable task" of explaining why other rights that might fairly be said to include an implicit "'right to avoid trial'" aspect are less in need of protection by immediate review, or more readily vindicated on appeal from final judgment, than the claimed privately negotiated right to be free from suit. *Id.*, 511 U.S. at 875. The Supreme Court cited other examples of unreviewable interlocutory appeals by parties who also could fairly be considered to have a right to avoid trial: a party that once prevailed at trial and then pleads res judicata, a party who seeks shelter under the statute of limitations, or a party not subject to a claim on which relief could be granted. See *Digital Equipment Corp., supra*. The Court continued that to ground a ruling "on whether this settlement agreement in terms confers the prized 'right not to stand trial' (a point [the plaintiff] by no means concedes) would flout our own frequent admonitions . . . that availability of collateral order appeal must be determined at a higher level of generality." *Id.*, 511 U.S. at 876-77. The Court explained that if it granted review of the order denying enforcement of the settlement agreement in *Digital Equipment Corp.*, then "any district court order denying effect to a settlement agreement could be appealed immediately." 511 U.S. at 877. The Court therefore held that "a refusal to enforce a settlement agreement claimed to shelter a party from suit altogether does not supply the basis for immediate appeal." *Id.*, 511 U.S. at 884.

[18] In the instant case, similar to the argument advanced by the defendant in *Digital Equipment Corp., supra*, the Brashears contend that the district court's order permitting the Herman Trust's lawsuits to proceed would be effectively unreviewable on appeal from a final judgment because the tolling agreement provided them with a "right to avoid litigation during the tolling period" which will be "irretrievably lost" without an immediate appeal "to protect the benefit of the bargain under the contract." Brief for appellants at 3. The U.S. Supreme Court has instructed courts of appeals to view claims of a "'right not to be tried' with skepticism, if not a jaundiced eye." *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994). And the mere identification of some interest that would be "'irretrievably lost'" has never sufficed to meet the third requirement of the collateral order doctrine. *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 87, 718 N.W.2d 531, 535 (2006). Pursuant to *Hallie Mgmt. Co.*, we must balance the potential harm of delaying until final judgment appeals from orders denying enforcement of a tolling agreement, against the harm caused by the delay certain to result if interlocutory review of such orders is permitted.

[19] Unlike governmental immunity which "is based in immunity from suit and is not simply a defense against liability," *StoreVisions v. Omaha Tribe of Neb.*, 281 Neb. 238, 243-44, 795 N.W.2d 271, 277 (2011), *modified on denial of rehearing* 281 Neb. 978, 802 N.W.2d 420, a tolling agreement does not provide a party with *immunity* from suit. Tolling agreements do not extinguish a cause of action of a potential plaintiff against a potential defendant, or relieve a defendant from potential liability altogether; rather, the potential plaintiff agrees to defer litigation, typically in exchange for the defendant's agreement to extend the statutory limitations period on the plaintiff's claim. Black's Law Dictionary defines "tolling agreement" as "[a]n agreement between a potential plaintiff and a potential defendant by which the defendant agrees to extend the statutory limitations period on the plaintiff's claim, usu[ally] so that both parties will have

more time to resolve their dispute without litigation." Black's Law Dictionary 1716 (10th ed. 2014). The Brashears' argument further *presumes* that the remedy for an alleged breach of a tolling agreement is dismissal of the lawsuits. However, we note that our courts have not addressed whether dismissal would be the proper remedy for such a breach, and there is case law from other jurisdictions that have concluded dismissal is not a proper remedy. See, e.g., *Kunza v. St. Mary's Regional Health Center*, 747 N.W.2d 586 (Minn. App. 2008) (dismissal is not proper remedy for breach of agreement not to sue for limited time); *Saint Louis University v. Medtronic Nav., Inc.*, No. 4:12CV01128, 2012 WL 4049018 (E.D. Mo. Sept. 13, 2012) (memorandum opinion) (concluding that under Missouri law, appropriate remedy for breach of covenant not to sue for limited time is damages, because dismissal does not accord with rationale behind such covenants). However, we need not determine at this time what the proper remedy would be for the breach of a tolling agreement, since we conclude the collateral order doctrine does not give us jurisdiction over the present appeals.

[20] Even if we accepted the Brashears' assertion that the agreement provided them with a private right not to be sued on any cause for a limited time and that the remedy is dismissal of the prematurely filed suits, we find the private right at issue here to be similar to the settlement agreement at issue in *Digital Equipment Corp.*, 511 U.S. at 879, wherein the U.S. Supreme Court distinguished such a *privately* conferred right from a "*policy embodied in a constitutional or statutory provision* entitling a party to immunity from suit," only the latter of which is of such importance that it justifies departing from the operation of ordinary final judgment principles. (Emphasis supplied.) Further, "it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." *Will v. Hallock*, 546 U.S. 345, 353, 126 S. Ct. 952, 163 L. Ed. 2d 836 (2006). The Brashears' situation has greater similarity to, than difference from, the claims of a party that once

prevailed at trial and then pleads res judicata, a party who seeks shelter under the statute of limitations, or a party not subject to a claim on which relief could be granted, none of which are reviewable on interlocutory appeal. See *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994). Additionally, the Brashears' situation is much like the settlement agreement in *Digital Equipment Corp.*, and the U.S. Supreme Court held in that case that "a refusal to enforce a settlement agreement claimed to shelter a party from suit altogether does not supply the basis for immediate appeal." 511 U.S. at 884. The tolling agreement in this case seeks to avoid or delay trial against the Brashears; however, the mere avoidance of a trial in this instance does not imperil a substantial public interest that would be unreviewable later. See *Will, supra* (it is not mere avoidance of trial, but avoidance of trial that would imperil substantial public interest, that counts when asking whether order is effectively unreviewable if review is to be left until later). And although the district court's order might be called "'"effectively unreviewable"'" in the sense that relief from error cannot rewrite history, and that appellate reversal upon a final judgment might only "'imperfectly'" repair the burden to litigants, *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 87, 718 N.W.2d 531, 535 (2006), we must nevertheless conclude that the third requirement of the collateral order doctrine has not been satisfied and that the appeals must be dismissed for lack of jurisdiction.

CONCLUSION

The district court's order overruling the Brashears' motions to dismiss does not fall within the collateral order doctrine; accordingly, this court does not have jurisdiction over these appeals.

APPEALS DISMISSED.

Lola M. Mohr, appellant, v. Mark L. Mohr, appellee.

859 N.W.2d 377

Filed February 17, 2015. No. A-14-416.

1. **Appeal and Error.** Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. ____: ____. An appellate court has a duty to determine whether it has jurisdiction over the matter before it irrespective of whether the issue of jurisdiction was raised or considered by the district court.
4. **Limitations of Actions: Dismissal and Nonsuit.** An action is commenced on the date the complaint is filed with the court. The action shall stand dismissed without prejudice as to any defendant not served within 6 months from the date the complaint was filed.
5. **Statutes: Pleadings: Dismissal and Nonsuit: Words and Phrases.** The language of Neb. Rev. Stat. § 25-217 (Reissue 2008) providing for dismissal of unserved petitions is self-executing and mandatory.
6. **Dismissal and Nonsuit.** The only way to ensure that an unserved action stands dismissed, as required by statute, is to hold that such dismissal occurs by operation of law, without predicate action by the trial court.
7. ____. Once an action is dismissed by operation of law, any further orders by the district court, except to formalize the dismissal, are a nullity.
8. **Divorce: Jurisdiction.** The district court in which an original divorce decree was entered has continuing jurisdiction until all of the children of the marriage are of legal age or emancipated.
9. **Modification of Decree: Child Custody.** A proceeding to modify custody is commenced by filing a complaint to modify.
10. **Modification of Decree: Service of Process.** Service of process of a modification complaint is to comply with the requirements for a dissolution action.

Appeal from the District Court for Gage County: Paul W. Korslund, Judge. Reversed and remanded with directions.

Lola M. Mohr, pro se.

F. Matthew Aerni, of Berry Law Firm, for appellee.

Irwin, Riedmann, and Bishop, Judges.

RIEDMANN, Judge.

INTRODUCTION

The district court for Gage County modified the original dissolution decree and awarded Mark L. Mohr custody of the parties' minor children. Lola M. Mohr now appeals. Because we determine that Lola was not served with a copy of the modification complaint within 6 months from the date it was filed, we reverse the judgment and remand the cause to the district court with directions to vacate the modification order and to enter an order that Mark's complaint for modification stands dismissed pursuant to Neb. Rev. Stat. § 25-217 (Reissue 2008).

BACKGROUND

Lola and Mark's marriage was dissolved in 2004. The decree awarded custody of the minor child involved herein, a daughter born in 1997, to Lola, subject to Mark's parenting time.

On April 17, 2013, Mark filed a complaint to modify custody. After several attempts, Lola was served with the complaint for modification in person on October 30. Because she never filed an answer or otherwise responded, Mark moved for default judgment on February 12, 2014. A hearing was held on March 10, at which Mark testified and Lola did not appear.

Subsequent to the hearing, the district court entered an order of modification. It found that a material change in circumstances existed and that it was in the minor child's best interests that her custody be awarded to Mark. The district court also ordered Lola to pay $442 per month in child support to Mark.

Lola filed a document that the court construed as a motion for new trial. After hearing, the court denied the motion. Lola timely appealed to this court.

ASSIGNMENTS OF ERROR

Lola failed to specifically assign errors in accordance with the Supreme Court's rules of appellate practice. See Neb. Ct. R. App. P. § 2-109(D)(1)(e) (rev. 2014).

STANDARD OF REVIEW

[1] Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012).

ANALYSIS

[2-4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Dillion v. Mabbutt*, 265 Neb. 814, 660 N.W.2d 477 (2003). This is true irrespective of whether the issue of jurisdiction was raised or considered by the district court. *Sarpy Cty. Bd. of Comrs. v. Sarpy Cty. Land Reutil.*, 9 Neb. App. 552, 615 N.W.2d 490 (2000). To determine whether we have jurisdiction, we must examine § 25-217. This statute states that an "action is commenced on the date the complaint is filed with the court. The action shall stand dismissed without prejudice as to any defendant not served within six months from the date the complaint was filed."

[5-7] The language of § 25-217 providing for dismissal of unserved petitions is self-executing and mandatory. *Dillion v. Mabbutt, supra*. The only way to ensure that an unserved action stands dismissed, as required by statute, is to hold that such dismissal occurs by operation of law, without predicate action by the trial court. See *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000). Once an action is dismissed by operation of law, any further orders by the district court, except to formalize the dismissal, are a nullity. See *id*.

In this case, Mark filed his complaint to modify the dissolution decree on April 17, 2013, and Lola was not served until October 30. More than 6 months elapsed between the filing and the service of the complaint; therefore, any orders entered after October 17 are a nullity.

[8-10] We recognize that this was an action for modification and not an original dissolution action. We are also cognizant that the district court in which the original divorce decree was entered has continuing jurisdiction until all of the children of the marriage are of legal age or emancipated. See

Nemec v. Nemec, 219 Neb. 891, 367 N.W.2d 705 (1985). We also are aware that the Nebraska Supreme Court has stated that an application to modify the terms of a divorce decree is not an independent proceeding. *Id*. However, in 2004, Neb. Rev. Stat. § 42-364 (Reissue 1998) was amended to include a provision requiring that a proceeding to modify custody be commenced by filing a complaint to modify. See 2004 Neb. Laws, L.B. 1207 (now codified at Neb. Rev. Stat. § 42-364 (Cum. Supp. 2014)). By that amendment, service of process of a modification complaint is to comply with the requirements for a dissolution action. *Id*. We have refused to allow modification of a divorce decree where modification was sought without the proper filing of a complaint. See *Wilson v. Wilson*, 19 Neb. App. 103, 803 N.W.2d 520 (2011). We find no authority to except dissolution actions from the requirement of § 25-217, and we therefore determine that the requirement of service within 6 months is applicable to modification actions. Because Lola was not served within 6 months from the date the complaint to modify was filed, the district court's orders modifying custody and denying Lola's motion for new trial were a nullity.

CONCLUSION

Mark's failure to perfect service upon Lola within 6 months of the date on which he filed his modification complaint resulted in the dismissal of the case by operation of law. Therefore, the district court's subsequent orders were a nullity. Accordingly, we reverse the judgment and remand the cause to the district court with directions to vacate the modification order and to enter an order that Mark's complaint stands dismissed pursuant to § 25-217.

REVERSED AND REMANDED WITH DIRECTIONS.

Ronald G. Vlach, appellant, v. Rhonda K. Vlach, appellee.

860 N.W.2d 231

Filed February 24, 2015. No. A-14-076.

1. **Jurisdiction: Appeal and Error.** An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law.
2. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
3. **Jurisdiction: Appeal and Error.** When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.

Appeal from the District Court for Dodge County: Geoffrey C. Hall, Judge. Appeal dismissed.

Donald D. Schneider, of Don Schneider Law Office, for appellant.

Susan A. Anderson and Philip J. Kosloske, of Anderson & Bressman Law Firm, P.C., L.L.O., for appellee.

Moore, Chief Judge, and Inbody and Pirtle, Judges.

Pirtle, Judge.

INTRODUCTION

Ronald G. Vlach appeals the order of the district court for Dodge County wherein the court denied his motion for leave to file an amended complaint seeking to amend his original declaratory judgment action into a dissolution of marriage action. The court found that all of the issues in the declaratory judgment action had been fully litigated and that the case was concluded. Thus, the court found it did not have jurisdiction over the dissolution of the parties' marriage. Having found the district court properly concluded it did not have jurisdiction in that matter, we consequently find we do not have jurisdiction to consider this appeal on the merits. For the reasons that follow, we dismiss Ronald's appeal.

BACKGROUND

On April 6, 2012, Ronald filed a declaratory judgment action in the district court for Dodge County pursuant to Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 2008). Ronald sought a declaration that no marriage existed between himself and the appellee, Rhonda K. Vlach. He asserted the parties' certificate of marriage was not filed as required by statute after their marriage ceremony in October 1985.

Ronald filed a motion for summary judgment on May 18, 2012. A hearing on the motion was held on June 4, and on August 3, the district court for Dodge County overruled Ronald's motion for summary judgment. Ronald appealed that order of the district court to the Nebraska Supreme Court.

While Ronald's motion for summary judgment was pending, on June 14, 2012, Rhonda filed a complaint for dissolution of marriage in the district court for Saunders County. Rhonda stated that there was an action pending in Dodge County wherein Ronald sought a declaration that the marriage of the parties was void.

On June 21, 2013, the Supreme Court rendered its opinion regarding the declaratory judgment action in *Vlach v. Vlach*, 286 Neb. 141, 835 N.W.2d 72 (2013). The Supreme Court held that the declaratory judgment action was filed for the determination of the marital status of the parties and that the parties were legally married. *Id*.

The judgment on the Supreme Court's mandate was entered by the district court for Dodge County on September 20, 2013, and on the same day, Ronald filed a motion for leave to file an amended complaint. The motion stated that the Supreme Court answered the preliminary question as to whether the parties were legally married. The proposed amended complaint set forth the elements for a dissolution of the marriage and requested that a division of the property and debts of the parties be resolved.

On January 24, 2014, the district court for Dodge County denied Ronald's motion for leave to file the amended complaint, and Ronald timely appealed.

ASSIGNMENTS OF ERROR

Ronald's assignments of error, consolidated and restated, are as follows: (1) The district court erred in denying his motion for leave to file an amended complaint for dissolution of marriage, (2) the district court erred in finding the action was a declaratory judgment action solely to determine whether or not the marriage was valid, and (3) the district court for Dodge County erred in finding it did not have jurisdiction over the dissolution of the parties' marriage and in finding the district court for Saunders County properly had jurisdiction over the matter. He also asserts the district court erred in receiving an exhibit over his objection.

STANDARD OF REVIEW

[1] An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law. *Carney v. Miller*, 287 Neb. 400, 842 N.W.2d 782 (2014).

ANALYSIS

Ronald's original complaint, filed in the district court for Dodge County, contained only one cause of action for a declaratory judgment. A declaratory judgment action seeks to declare the rights, status, or other legal relations between the parties. § 25-21,149. Ronald sought a determination whether the parties were legally married, and the district court found Ronald and Rhonda were legally married. Ronald appealed the district court's order to the Nebraska Supreme Court.

[2] In *Vlach v. Vlach*, 286 Neb. 141, 835 N.W.2d 72 (2013), the Nebraska Supreme Court stated that in this particular case, the nature of the declaratory judgment action was the determination of the marital status of the parties. The Supreme Court stated, "An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute." *Id*. at 149, 835 N.W.2d at 78. Accord *American Amusements Co. v. Nebraska Dept. of Rev.*, 282 Neb. 908, 807 N.W.2d 492 (2011). The Supreme Court, applying principles of law, determined the district court correctly decided the merits of the declaratory judgment action.

After the Supreme Court's decision, Ronald filed a motion seeking to amend his complaint from a declaratory judgment action, to instead seek a dissolution of the marriage. He asserts that the issue considered by the Supreme Court was "the preliminary issue in this case."

The district court denied Ronald's motion for leave to file an amended complaint, finding that "all issues related to [his] declaratory action have been fully litigated, decided, and are concluded." The district court for Dodge County found it had no jurisdiction over the dissolution of marriage action, because Rhonda had filed a dissolution action in the district court for Saunders County and that matter was still pending. On appeal, Ronald asserts the district court for Dodge County erred in denying his motion to amend.

The appeal in this case is from the order denying Ronald's motion to file an amended complaint. The action he is attempting to amend has already been adjudicated on the merits, the order was affirmed on appeal, and there has been a judgment entered on the mandate in the trial court. As a result, there was, and is, nothing pending before the district court for Dodge County in that case. We find the declaratory judgment action determining the marital status of the parties was a separate and distinct action from any action for the dissolution of the parties' marriage. As there was no pending action in the district court which could be a proper subject of an amended complaint, the district court properly concluded that it lacked jurisdiction to allow Ronald to amend his complaint.

[3] When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *McClellan v. Board of Equal. of Douglas Cty.*, 275 Neb. 581, 748 N.W.2d 66 (2008). Having found that the district court lacked jurisdiction to allow a complaint to be amended in a case that had been fully litigated, we find we also lack jurisdiction to consider the merits of Ronald's claim on appeal.

CONCLUSION

We find that after the Nebraska Supreme Court issued its mandate on the declaratory judgment action, there was no pending action in the district court which could be amended. The district court correctly concluded that it lacked jurisdiction, and it follows that this court also lacks jurisdiction on appeal.

APPEAL DISMISSED.

IN RE INTEREST OF ETHAN M., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. DANIEL M., APPELLANT.

860 N.W.2d 442

Filed February 24, 2015. No. A-14-358.

1. **Juvenile Courts: Judgments: Appeal and Error.** Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. However, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Juvenile Courts: Jurisdiction.** Neb. Rev. Stat. § 43-247 (Supp. 2013) provides that the juvenile court's jurisdiction over any individual adjudged to be within the provisions of the juvenile code shall continue until the individual reaches the age of majority or the court otherwise discharges the individual from its jurisdiction.
3. **Juvenile Courts: Minors.** The purpose of the juvenile code is to assure the rights of all juveniles to care and protection and a safe and stable living environment and to development of their capacities for a healthy personality, physical well-being, and useful citizenship to protect the public interest.
4. ____: ____. The Nebraska Juvenile Code must be liberally construed to accomplish its purpose of serving the best interests of juveniles who fall within it.
5. ____: ____. The juvenile court has broad discretion as to the disposition of those who fall within its jurisdiction.
6. **Courts: Juvenile Courts: Jurisdiction: Minors.** Both a civil court and a juvenile court may be concerned on a primary basis with the welfare of the child, but, while their functions overlap, the basis of their jurisdiction and the scope of their powers differ.
7. **Juvenile Courts: Jurisdiction: Interventions: Parent and Child.** The juvenile court can appropriately intervene between the parents and the child only if the

child's condition requires the state to use its power to protect the welfare of the child.

Appeal from the Separate Juvenile Court of Lancaster County: Toni G. Thorson, Judge. Affirmed.

Joy Shiffermiller, of Shiffermiller Law Office, P.C., L.L.O., for appellant.

Ashley Bohnet, Deputy Lancaster County Attorney, and Jordan Talsma, Senior Certified Law Student, for appellee.

Irwin, Inbody, and Pirtle, Judges.

Irwin, Judge.

I. INTRODUCTION

Daniel M. appeals an order of the separate juvenile court of Lancaster County, Nebraska, terminating its jurisdiction over Daniel's son, Ethan M. This case has previously been on appeal to this court on a number of occasions. See, *In re Interest of Ethan M.*, 15 Neb. App. 148, 723 N.W.2d 363 (2006) (*Ethan M. I*); *In re Interest of Ethan M.*, 18 Neb. App. 63, 774 N.W.2d 766 (2009) (*Ethan M. II*); *In re Interest of Ethan M.*, 19 Neb. App. 259, 809 N.W.2d 804 (2011) (*Ethan M. III*); *In re Interest of Ethan M.*, No. A-13-058, 2013 WL 4036465 (Neb. App. Aug. 6, 2013) (selected for posting to court Web site) (*Ethan M. IV*).

In the present appeal, Daniel has assigned numerous errors, including the juvenile court's finding that jurisdiction should be terminated. Because we find no error with the court's termination of its jurisdiction, we affirm.

II. BACKGROUND

This case has appeared before this court on at least six prior occasions, resulting in three prior published opinions, as noted above. In *Ethan M. III*, 19 Neb. App. at 260-61, 809 N.W.2d at 806-07, this court recounted the prior history, including the results of the first two published opinions:

> Ethan . . . , born in January 2000, is the child of Daniel and Theresa S. Following the dissolution of Daniel and

Theresa's marriage in 2002, a California court awarded Daniel custody of Ethan. In January 2005, [the Department of Health and Human Services (DHHS)] removed Ethan from Daniel's home in Nebraska and placed him into foster care. The county court for Sherman County, Nebraska, subsequently adjudicated Ethan as a result of allegations that other children residing within the home had suffered injuries. In January 2006, the court approved an immediate change of Ethan's placement from the home of his paternal grandparents to the home of [his biological mother] Theresa in California. Daniel appealed, and in [*Ethan M. I*], we found that the State must make reasonable efforts to reunify Ethan and Daniel. We recognized that under the California divorce decree, Daniel was Ethan's custodial parent. We concluded that Ethan should not be placed in California with Theresa and that he should be placed in a situation in Nebraska that was conducive to reunification with Daniel. We observed that Daniel had complied with all tasks required by the case plan.

DHHS did not return Ethan's custody to Daniel. Rather, Ethan's physical custody remained with Theresa, who moved to Nebraska. In June 2007, Daniel began having weekly supervised visitation with Ethan. But in August, the visitation was changed to therapeutic visitation supervised by a mental health professional. In September, visitation ceased due to the unavailability of a mental health professional to supervise the visitation. DHHS arranged for telephone calls between Ethan and Daniel on Tuesdays and Thursdays, but Ethan often ended the calls quickly or refused to speak [to Daniel]. In February 2009, the county court for Sherman County adopted DHHS' case plan which continued telephonic visitation only, found that reasonable efforts to reunify Ethan and Daniel were not necessary, placed custody of Ethan with Theresa, and dismissed the juvenile case. Upon Daniel's appeal, we found plain error in the court's order. In [*Ethan M. II*, 18 Neb. App. at 72, 774 N.W.2d at 773], we held that "where the only issue placed in front of the

county court is whether a case plan is in the child's best interests, permanent child custody cannot be modified merely through the adoption of the case plan." We stated, however, that "a case plan could be used to place a child with a noncustodial parent as a dispositional order under the continuing supervision of the juvenile court." *Id*. We reversed the county court's order and remanded the cause for further proceedings.

In *Ethan M. IV*, we recounted the history of the case following *Ethan M. II*. We noted that a series of review hearings were held in 2010 and that the court had entered an order of review which approved a Department of Health and Human Services (DHHS) case plan containing no rehabilitative goals or tasks for Daniel. We noted that the court had continued legal custody with DHHS and physical custody with Theresa S., had found that reasonable efforts had been made to prevent or eliminate the need for removal of Ethan from his home, and had ordered that the primary permanency plan was family preservation with an alternative plan of reunification.

In *Ethan M. III*, we observed that the order at issue was no longer one finding that reasonable efforts were excused, but was one finding that reasonable efforts had been made to prevent or eliminate the need for Ethan's removal from his home. We noted, however, that Ethan had been removed from *Daniel's* home and not *Theresa's* home and that the adopted case plan had no goals or services related to correcting, eliminating, or ameliorating the situation that led to *that* removal and, instead, had essentially attempted to redefine Ethan's home as Theresa's home, even though he had been removed from Daniel's home. We concluded that DHHS needed to immediately obtain updated assessments and devise rehabilitative goals to facilitate a future reunification between Ethan and Daniel.

Subsequent to our opinion in *Ethan M. III*, the court ordered evaluations to assess Ethan's best interests and the possibility of reunification with Daniel. See *Ethan M. IV*. The court also ordered DHHS to devise rehabilitative goals to facilitate a future reunification, bearing in mind Ethan's best interests. *Id*.

In December 2012, the juvenile court entered an order finding that legal custody should remain with DHHS, that Ethan's needs were being met, that services were being provided in compliance with a case plan, and that reasonable efforts had been made to prevent or eliminate the need for removing Ethan from his home. *Ethan M. IV*. The court noted that, at that time, there was evidence that beginning visitation between Ethan and Daniel would be harmful to Ethan and that Ethan did not desire a relationship with Daniel and was anxious and fearful of him. *Id*.

On appeal in *Ethan M. IV*, we ultimately concluded that we lacked jurisdiction because Daniel was not appealing from a final order. The denial of Daniel's motions for visitation and for immediate placement did not affect substantial rights and were not final and appealable, and there had not been such changes in the permanency plans to create a final and appealable order. As such, we dismissed for lack of jurisdiction. *Id*.

Since our decision in August 2013 in *Ethan M. IV*, additional review hearings were held and additional services were provided to Ethan and Daniel.

In September 2013, the juvenile court conducted a review hearing, during which it also heard a motion filed by the guardian ad litem requesting a court order permitting therapeutic visitation between Ethan and Daniel. The licensed social worker and mental health practitioner who had been working with Ethan testified that he had seen Ethan every 2 to 3 weeks since September 2012 and that he had met with Daniel in October 2012 and again in February 2013.

He testified that he would recommend starting therapeutic visitation between Ethan and Daniel. He testified that Ethan had sometimes expressed an interest in seeing Daniel, but that Ethan had vacillated between wanting to see Daniel and not wanting to see Daniel. He testified that he believed Ethan was using his expressions of wanting to see Daniel as a form of manipulation of Theresa, who was guarded about potential negative impacts that might arise from therapeutic visitation between Ethan and Daniel. He also testified that it would be unwise to force Ethan to attend visitation with Daniel and

that the focus for Ethan's well-being needed to be on establishing permanence.

On cross-examination, the social worker acknowledged that Ethan had been given numerous opportunities to engage with Daniel and had not wanted to, that Ethan wanted to "move on," and that Ethan really only wanted to express his anger to Daniel and that doing so "may mean that is the last time [Ethan] ever sees [Daniel]." He also testified that Ethan was in a safe and stable environment with Theresa. During questioning from the court, the social worker testified that Ethan has no desire to have a relationship with Daniel and that the social worker had pushed Ethan to have a conversation with Daniel to express his feelings.

At the conclusion of that hearing, the court adopted the DHHS plan and authorized therapeutic visitation, to be established consistent with Ethan's best interests. The adopted plan provided for Ethan to remain placed in Theresa's home, and the plan indicated that such placement was the least restrictive alternative and was in Ethan's best interests. The plan provided a primary permanency plan of family preservation by February 2014. The court ordered DHHS to assist Daniel with any necessary transportation to participate in such visitation.

In late December 2013, another review hearing was held. The record indicates that, in addition to reviewing the progress of the juvenile case, the juvenile court was simultaneously hearing a custody case concerning the parties. The court noted that in a separate civil case, temporary custody of Ethan had been placed with Theresa, apparently modifying the custody previously awarded to Daniel in the parties' divorce.

During the review hearing, the DHHS caseworker testified that DHHS was recommending case closure, was not continuing to try to force Ethan to have contact with Daniel, and was allowing Ethan to achieve permanency in the safe and stable home environment in which he was then living, with Theresa. The caseworker testified that continued contact between Ethan and Daniel was not in Ethan's best interests.

Daniel testified that three different therapeutic visits had been scheduled and that he had traveled to Lincoln, Nebraska,

each time to attempt to participate. He testified that when he arrived at the social worker's office for the first scheduled therapeutic visit, the social worker had been informed "just prior to the visit, that Ethan would not be attending." Telephone contact was attempted, and "the phone was just hung up" twice before Ethan briefly spoke with Daniel.

Daniel testified that when he arrived at the social worker's office for the second visit, he was informed that Ethan would again not be attending. Ethan was called again and told Daniel that "he didn't feel like talking." According to Daniel, that was the end of that call.

Daniel testified that when he arrived at the social worker's office for the third visit, Ethan was again not going to be physically present. Another short telephone conversation occurred.

Daniel also testified that he had sent three letters to Ethan, but that he received "[n]othing at all" back from Ethan in response to any of the letters.

In April 2014, the juvenile court entered an order terminating its jurisdiction over Ethan. The court noted that Ethan was then 13 years old and that he had been living in Theresa's care since January 2006. The court noted that a permanency plan of family preservation with Theresa had been approved at least since 2009.

The court noted the efforts DHHS had made to establish a relationship between Ethan and Daniel. DHHS had changed Ethan's therapist to provide "'fresh eyes'" on the situation and had provided Ethan with individual therapy with a therapist to work on the relationship with Daniel. Ethan and Theresa had cooperated with the therapy. The therapist had attempted to facilitate telephone contact and therapeutic visitations between Ethan and Daniel. DHHS had also provided team meetings to facilitate case goals. DHHS had also assisted Daniel with transportation and had provided him an opportunity to write letters to Ethan.

Despite those efforts, Ethan, now a teenager, has refused to cooperate and has refused to attend visitation with Daniel. According to the court, Ethan has "clearly indicated he will not participate in visits and does not intend to talk with his father[, Daniel]." As noted, Ethan did not agree to attend any

of the scheduled therapeutic visits and was willing to speak only briefly with Daniel on the telephone. The court also noted that Ethan has held this position concerning Daniel for years.

The court held that forcing Ethan to have contact with Daniel was not in Ethan's best interests. The court noted that Ethan is in a safe and stable placement with his biological mother, Theresa, and is doing well in that placement. The court also recognized the pending custody case, in which temporary custody of Ethan had been placed with Theresa. As such, the court concluded that the juvenile court jurisdiction should terminate and that there are no other reasonable efforts that can be made to justify continuing the juvenile case. Daniel now appeals.

III. ASSIGNMENTS OF ERROR

Daniel has assigned a number of errors on appeal, including that the juvenile court erred in terminating jurisdiction. Because we conclude below that the court did not err in terminating jurisdiction, we need not more fully discuss Daniel's other assignments of error.

IV. ANALYSIS

This case presents the court with a situation where the juvenile court has exercised jurisdiction for approximately 9 years; has approved various case plans that have provided therapy and stability for Ethan, who is now a teenager; and has attempted to incorporate attempts to restore a relationship between Daniel and Ethan. Throughout that time, Ethan has largely expressed a refusal to develop such a relationship with Daniel and has refused to attend offered visitation. A separate custody proceeding has been instituted involving Ethan, Daniel, and Theresa. The evidence adduced supports the juvenile court's conclusion that there are no further reasonable efforts available to the juvenile court justifying continuing jurisdiction, and we affirm.

[1] Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's

findings. However, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Zoey S., ante* p. 371, 853 N.W.2d 225 (2014).

[2-5] Neb. Rev. Stat. § 43-247 (Supp. 2013) provides that the juvenile court's jurisdiction over any individual adjudged to be within the provisions of the juvenile code shall continue until the individual reaches the age of majority or the court otherwise discharges the individual from its jurisdiction. The purpose of the juvenile code is to assure the rights of all juveniles to care and protection and a safe and stable living environment and to development of their capacities for a healthy personality, physical well-being, and useful citizenship to protect the public interest. Neb. Rev. Stat. § 43-246(1) (Cum. Supp. 2014); *In re Interest of Vincent P.*, 15 Neb. App. 437, 730 N.W.2d 403 (2007). The Nebraska Juvenile Code must be liberally construed to accomplish its purpose of serving the best interests of juveniles who fall within it. *In re Interest of Vincent P., supra*. The juvenile court has broad discretion as to the disposition of those who fall within its jurisdiction. *Id*.

[6,7] The Nebraska Supreme Court has recognized that both a civil court and a juvenile court may be concerned on a primary basis with the welfare of the child, but, while their functions overlap, the basis of their jurisdiction and the scope of their powers differ. See *In re Interest of Goldfaden*, 208 Neb. 93, 302 N.W.2d 368 (1981). The Supreme Court has held that the juvenile court can appropriately intervene between the parents and the child only if the child's condition requires the state to use its power to protect the welfare of the child. See *id*.

The chronology of this case, our prior opinions in this case, and evidence adduced at the latest review hearing demonstrate that Ethan's condition no longer requires the intervention of the juvenile court and, conversely, do not demonstrate that there are additional efforts available to the juvenile court which will reasonably serve Ethan's best interests or that Ethan's best interests require continued intervention of the juvenile court.

We found in *Ethan M. I* that the State needed to make reasonable efforts to reunify Ethan and Daniel and that Ethan should not be placed with his biological mother, Theresa, in California, because a placement in Nebraska would be more conducive to fostering a relationship between Ethan and Daniel. Following our decision, Theresa moved to Nebraska and Ethan continued to be placed with her. Weekly supervised visitation was commenced, and eventually, DHHS arranged for regular telephone visitation between Ethan and Daniel. Ethan often ended these calls quickly or refused to speak to Daniel.

We found in *Ethan M. II* that it was inappropriate for the juvenile court to permanently modify child custody through the adoption of a case plan, and we found in *Ethan M. III* that DHHS needed to obtain updated assessments and devise rehabilitative goals to facilitate a potential reunification between Ethan and Daniel. This was done, and we recognized in *Ethan M. IV* that the juvenile court ordered updated evaluations and ordered DHHS to devise rehabilitative goals to facilitate reunification, bearing in mind Ethan's best interests.

Evidence presented to the juvenile court in the trial proceedings of *Ethan M. IV* demonstrated that Ethan's needs were being met in his placement with Theresa and that beginning visitation between Ethan and Daniel would be harmful to Ethan. Evidence also demonstrated that Ethan, then 12 years of age, did not desire a relationship with Daniel and was anxious and fearful of him.

Now, subsequent to our decision in *Ethan M. IV*, additional review hearings have been held and additional evidence has been adduced to the juvenile court. Based on the recommendation of a licensed social worker and mental health practitioner who had been seeing Ethan on a regular basis, the juvenile court adopted a case plan that included authorization of therapeutic visitation between Ethan and Daniel. Three such visits were scheduled, but none of them were successfully completed. On each occasion, Ethan refused to attend. Telephone contact was attempted, with limited success. In addition, Daniel's attempts to engage Ethan in a relationship through written correspondence resulted in Ethan's not responding "at all."

Evidence was adduced to the juvenile court supporting a conclusion that forcing Ethan to attend visitation or have a relationship with Daniel would be contrary to Ethan's best interests. Ethan has been given numerous opportunities throughout the history of this case to engage with Daniel, has repeatedly expressed that he does not desire to do so, and has refused to engage in a relationship with Daniel.

The record presented to us demonstrates that a separate civil case is pending in which custody of Ethan is being litigated between Daniel and Theresa. The record suggests that, in the civil case, temporary custody of Ethan has been placed with Theresa, apparently modifying a prior dissolution decree's award of custody to Daniel. The evidence adduced to the juvenile court has consistently demonstrated that Ethan is in a safe and stable placement with Theresa and is doing well in that placement.

We find that the record fully supports the juvenile court's conclusion that further attempting to force Ethan to have contact with Daniel is not in Ethan's best interests. The record also supports the court's conclusion that there has not been a showing that any additional reasonable efforts are available to justify continuing the juvenile case. The record supports the court's conclusion that the pending custody case is an appropriate forum for resolving any custody issues between the parties. As such, we affirm the juvenile court's termination of jurisdiction in this case.

V. CONCLUSION

We find no error in the juvenile court's termination of jurisdiction. We affirm.

AFFIRMED.

State of Nebraska, appellee, v. Frederick E. McSwine, also known as Frederick E. Johnson, appellant.

860 N.W.2d 776

Filed March 10, 2015. No. A-13-887.

1. **Trial: Prosecuting Attorneys.** Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case.
2. **Motions for New Trial: Prosecuting Attorneys: Appeal and Error.** An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion of the trial court.
3. **Trial: Appeal and Error.** In order to preserve, as a ground of appeal, an opponent's misconduct during closing argument, the aggrieved party must have objected to improper remarks no later than at the conclusion of the argument.
4. **Appeal and Error.** Plain error may be found on appeal when an error, unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
5. **Trial: Prosecuting Attorneys.** Prosecutors are charged with the duty to conduct criminal trials in a manner that provides the accused with a fair and impartial trial.
6. **Trial: Prosecuting Attorneys: Words and Phrases.** Generally, prosecutorial misconduct encompasses conduct that violates legal or ethical standards for various contexts because the conduct will or may undermine a defendant's right to a fair trial.
7. **Trial: Prosecuting Attorneys.** Generally, in assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper; it is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial.
8. **Trial: Prosecuting Attorneys: Due Process.** Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infected the trial that the resulting conviction violates due process.
9. **Trial: Prosecuting Attorneys: Appeal and Error.** In determining whether a prosecutor's improper conduct prejudiced the defendant's right to a fair trial, an appellate court considers the following factors: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury; (2) whether the conduct or remarks were extensive or isolated; (3) whether defense counsel invited the remarks; (4) whether the court provided a curative instruction; and (5) the strength of evidence supporting the conviction.
10. **Constitutional Law: Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution, and thereby obtain reversal of a conviction, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, demonstrate a reasonable probability

that but for counsel's deficient performance, the result of the proceeding would have been different.

11. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it.
12. **Criminal Law: Evidence: New Trial: Double Jeopardy: Appeal and Error.** Upon finding reversible error in a criminal trial, an appellate court must determine whether the total evidence admitted by the district court, erroneously or not, was sufficient to sustain a guilty verdict; if it was not, then double jeopardy forbids a remand for a new trial.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed and remanded for a new trial.

Mark E. Rappl for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

IRWIN, INBODY, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Frederick E. McSwine, also known as Frederick E. Johnson, was convicted by a jury of terroristic threats, kidnapping, first degree sexual assault, and use of a deadly weapon to commit a felony. The district court subsequently sentenced McSwine to a total of approximately 57 to 85 years' imprisonment. McSwine here appeals from his convictions. On appeal, McSwine assigns several errors, including that the district court erred in overruling his motion for new trial, which motion was based on allegations of prosecutorial misconduct during closing arguments. McSwine also alleges that he received ineffective assistance of trial counsel in a variety of respects. Most notably, McSwine alleges that his trial counsel was ineffective in failing to object to improper statements made by the prosecutor during closing arguments.

Upon our review, we conclude that the prosecutor committed misconduct in knowingly providing false information to the jury during closing arguments. Such misconduct amounts to plain error which requires a reversal of McSwine's

convictions. In addition, we conclude that McSwine received ineffective assistance of counsel when defense counsel failed to timely object to the prosecutor's false statements. Such ineffective assistance would also require reversal of McSwine's convictions. Because the evidence presented by the State was sufficient to sustain McSwine's convictions, we reverse the convictions and remand for a new trial.

II. BACKGROUND

The State filed a criminal complaint charging McSwine with terroristic threats, kidnapping, first degree sexual assault, and use of a weapon to commit a felony. The charges against McSwine stem from an incident which occurred between McSwine and C.S. in October 2012. McSwine and C.S. knew each other prior to October 2012 because McSwine had been employed at a gas station that C.S. had frequented. However, the extent of the relationship was disputed at trial.

Evidence adduced by the State established that on the morning of October 13, 2012, McSwine knocked on the door to C.S.' apartment and asked if he could come in the apartment and use the bathroom. This was not the first occasion that McSwine had come to C.S.' apartment and asked to use the bathroom. A few weeks prior to the day in question, McSwine had appeared on C.S.' doorstep with a similar request. On that day, C.S., who was entertaining friends, let him in the apartment. McSwine then left C.S.' apartment immediately after going into the bathroom.

On October 13, 2012, when McSwine again appeared on C.S.' doorstep requesting to use her bathroom, the only other person in her apartment was her boyfriend, who was asleep in her bedroom. She let McSwine into the apartment, and after he went into the bathroom, he returned to the doorway, threatened C.S. with a "sharp instrument," and forced her from the apartment and into his car. McSwine then drove to three separate, isolated areas where he forced C.S. to engage in various sexual acts. After keeping C.S. with him for approximately 5 hours, McSwine permitted C.S. to flee his car. She then ran to a nearby home where the residents called law enforcement.

McSwine disputed the evidence presented by the State. During his trial testimony, he testified that on the morning of October 13, 2012, C.S. accompanied him to his car willingly and consented to engaging in various sexual acts with him. He also testified that at some point during their encounter, C.S. became upset with him after she discovered that he had lied to her about having a charger for his cellular telephone in the car. After she became upset, she began to accuse McSwine of "using [her] for sex." She then asked to get out of his car, and McSwine stopped the car on the side of a road in order to permit her to leave. During closing arguments, McSwine's counsel argued that C.S. concocted the story about being kidnapped and sexually assaulted because she was angry with McSwine and because she did not want to get in trouble with her boyfriend or with her parents.

After hearing all of the evidence, the jury convicted McSwine of all four charges: terroristic threats, kidnapping, first degree sexual assault, and use of a weapon to commit a felony. The district court subsequently sentenced McSwine to a total of 56 years 8 months to 85 years in prison.

McSwine appeals his convictions here.

III. ASSIGNMENTS OF ERROR

On appeal, McSwine assigns five errors. First, McSwine argues that the district court erred in overruling his motion for a new trial, which motion was based on his assertion that the prosecutor committed misconduct during closing arguments. Second, McSwine alleges that the district court erred in failing to admit evidence of a specific instance of C.S.' sexual behavior prior to the day of the assault. Third, McSwine alleges that the district court erred in overruling his motion for a mistrial which was based on allegations of juror misconduct. Fourth, McSwine alleges that the totality of all the errors committed during the proceedings below prohibited him from receiving a fair trial. Finally, McSwine alleges that he received ineffective assistance of trial counsel for a variety of reasons, including that his trial counsel failed to timely object to inappropriate statements made by the prosecutor during closing arguments.

IV. ANALYSIS

1. Prosecutorial Misconduct During Closing Arguments

We first address McSwine's assertions regarding prosecutorial misconduct during closing arguments, as these assertions are dispositive of this appeal. McSwine argues both that the district court erred in overruling his motion for new trial, which motion was based on the prosecutorial misconduct, and that his defense counsel provided ineffective assistance for failing to timely object to the prosecutorial misconduct.

(a) Standard of Review

[1,2] Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case. *State v. Faust*, 269 Neb. 749, 696 N.W.2d 420 (2005). An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion of the trial court. *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999).

(b) Factual Background

At trial, the State introduced into evidence the substance of multiple text messages transmitted from McSwine to his wife and from McSwine to a friend. These text messages were sent on October 13, 2012, after C.S. left McSwine's car and ran to a nearby residence. Because these text messages are central to McSwine's assertions regarding prosecutorial misconduct, we briefly recount the substance of the messages here.

The first collection of text messages was sent from McSwine to his wife. In those messages, he tells her that he "messed up bad" and that "[c]ops are probably going to be looking for me [and] if they are I'm going to run." McSwine apologizes to his wife and indicates that he "[doesn't] deserve [her and wished he] didn't f*** everything up." In a later text message from McSwine to his wife, he asks her if she "would give [him] up even if [he] was dead wrong and did some foul s***." McSwine then discusses running away to Mexico or to a "reservation."

The second collection of text messages was sent from McSwine to a friend. In these messages, McSwine indicates

that he got himself into trouble, that he "might be taking a trip," and that he doesn't know "what [he] was thinking." McSwine then states that he "f*** this all up."

During the trial, the State suggested that these text messages demonstrated McSwine's feelings of guilt and remorse about kidnapping and sexually assaulting C.S. The State's contentions can be summarized as follows: McSwine knew that C.S. had run to a residence and assumed that she would report everything that had happened to her that day to law enforcement. In addition, McSwine knew that C.S. could identify him, because of their prior interactions at the gas station where he worked. Accordingly, McSwine knew that it was only a matter of time before the police started to look for him and he was arrested.

Contrary to the State's suggestions about the text messages, during McSwine's testimony, he testified that the content of the text messages did not have to do with kidnapping or sexually assaulting C.S. Rather, he testified that his guilt, remorse, and concern about being arrested stemmed from an incident that occurred earlier in the day on October 13, 2012, and had nothing to do with C.S. McSwine testified that in the early morning hours of October 13, he was selling drugs to a friend of a friend when he became concerned that the buyer was going to rob him. McSwine hit the buyer and ran to a nearby house. An elderly woman confronted him when he entered the house, and he apologized and ran back outside. McSwine testified that at the time of this incident, he was high on methamphetamines. He testified that he assumed he would be facing multiple charges for this encounter and that, because he was on parole, the charges would probably be significant.

During the State's closing argument, the prosecutor specifically disputed McSwine's testimony about the motivation for the text messages. In fact, the prosecutor informed the jury that McSwine's testimony that he trespassed by walking into someone's house was "unsupported by any evidence at all. It's just him saying that that happened." Later, in the prosecutor's rebuttal, he again indicates to the jury, "There is nothing that supports [McSwine's] statement or his testimony that

he ran through some house . . . nothing. It's just his word." McSwine's counsel did not object to either of these comments by the prosecutor.

During deliberations, the jurors asked a question of the court regarding the prosecutor's statements during closing arguments. Specifically, the jury asked, "Did [the prosecutor] say that there was no evidence . . . including a police report . . . of . . . McSwine's presence in a local house . . . ?" The court responded to the jury's question by informing the jury that it had all of the evidence it was going to receive in the case. Both the State and defense counsel agreed with the court's handling of the question.

After the jury returned its guilty verdict, McSwine filed a motion for new trial. The crux of McSwine's argument in the motion was the prosecutor's misleading statements during closing arguments that there was no evidence to support McSwine's testimony that he had trespassed through a house in the early morning hours of October 13, 2012. McSwine alleged that, although no such evidence was offered or admitted at trial, the prosecutor knew that there was, in fact, evidence of the trespass, including multiple police reports. These police reports were provided to defense counsel by the prosecutor as part of the discovery process.

In support of McSwine's motion for new trial, he offered numerous exhibits into evidence. Two of these exhibits are police reports regarding a trespass which occurred on October 13, 2012. These reports indicate that McSwine was identified by the homeowner as the person who came into her home and that, as a result, McSwine was a suspect in that incident. A third exhibit is the affidavit of defense counsel. In that affidavit, counsel states that he did not object to the prosecutor's statement that there was no evidence of the trespass, because he thought that the prosecutor was arguing that there was no such evidence "'presented at trial.'" Counsel states that the failure to object was a mistake and not a matter of trial strategy.

After a hearing, the district court overruled McSwine's motion for a new trial. Ultimately, the court found that McSwine did not object to the prosecutor's statements during

closing arguments and that, as a result, the claims raised in the motion for new trial were not timely raised.

(c) Analysis

On appeal, McSwine alleges that the district court erred in failing to grant him a new trial in light of the prosecutor's false and misleading statements during closing arguments. While he acknowledges that defense counsel did not timely object to the prosecutor's comments prior to submission of the case to the jury, he asserts that the prosecutor's closing remarks deprived him of his right to a fair trial and that reversal under the plain error standard is proper. We find that McSwine's assertion has merit.

[3,4] Because McSwine did not timely object to the challenged comments, we review this issue only for plain error. See, *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013) (in order to preserve, as ground of appeal, opponent's misconduct during closing argument, aggrieved party must have objected to improper remarks no later than at conclusion of argument); *State v. Godinez*, 190 Neb. 1, 205 N.W.2d 644 (1973) (objection to prosecutorial misconduct made during closing argument is not timely made if it is raised for first time in affidavit in support of motion for new trial). Plain error may be found on appeal when an error, unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. *State v. Alarcon-Chavez*, 284 Neb. 322, 821 N.W.2d 359 (2012). But, as the Nebraska Supreme Court has noted, "'the plain-error exception to the contemporaneous-objection rule is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result."'" *Id.* at 336, 821 N.W.2d at 369 (quoting *United States v. Young*, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)). See, also, *State v. Barfield*, 272 Neb. 502, 723 N.W.2d 303 (2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[5,6] Prosecutors are charged with the duty to conduct criminal trials in a manner that provides the accused with a fair

and impartial trial. *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014). Because prosecutors are held to a high standard for a wide range of duties, the term "prosecutorial misconduct" cannot be neatly defined. Generally, prosecutorial misconduct encompasses conduct that violates legal or ethical standards for various contexts because the conduct will or may undermine a defendant's right to a fair trial. *Id*.

[7] Generally, in assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper; it is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial. *State v. Watt, supra*. The first step in our analysis, then, is to determine whether the prosecutor's statements to the jury that there was no evidence to support McSwine's testimony regarding his trespass and other illegal activities in the early morning hours of October 13, 2012, were improper.

Evidence offered by McSwine at the hearing on his motion for new trial revealed that the prosecutor's statements about the lack of evidence supporting McSwine's testimony were misleading. On two separate occasions, the prosecutor told the jury that there was no evidence which supported McSwine's testimony that on October 13, 2012, prior to his interaction with C.S., he had committed various criminal offenses, including trespassing through a residence. The prosecutor's comments were not qualified in a way so as to suggest that there was simply no evidence presented at the trial. Instead, the prosecutor unambiguously stated that the only evidence of the trespass was McSwine's testimony: "There is nothing that supports [McSwine's] statement or his testimony that he ran through some house . . . nothing. It's just his word." These comments were misleading in that they made it appear to the jury as though McSwine's explanation about why he sent the incriminating text messages lacked any credibility, when, in fact, there was evidence that McSwine had committed other criminal acts on October 13 which in no way involved C.S.

Even more concerning than the effect these false statements had on the jurors is the evidence that the prosecutor knew the statements to be false or misleading when making them.

The prosecutor knew that there was, in fact, evidence about the trespass, because he forwarded to defense counsel police reports about that trespass and about McSwine's being the one who committed the trespass. In addition, defense counsel stated in his affidavit that he and the prosecutor had a discussion about the trespass prior to trial. At that time, the prosecutor specifically indicated that he was not going to offer any evidence about that act at trial.

Because the prosecutor's comments were misleading and were made with knowledge of their inaccuracy and untruthfulness, we conclude that the comments were improper in nature.

[8,9] We now turn to a discussion about whether the improper comments prejudiced McSwine's right to a fair trial. Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infected the trial that the resulting conviction violates due process. *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014). Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole. *Id*. In determining whether a prosecutor's improper conduct prejudiced the defendant's right to a fair trial, we consider the following factors: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury; (2) whether the conduct or remarks were extensive or isolated; (3) whether defense counsel invited the remarks; (4) whether the court provided a curative instruction; and (5) the strength of evidence supporting the conviction.

As we discussed above, the prosecutor's statements misled the jury about the credibility of McSwine's testimony regarding the trespass and, thus, regarding the rationale behind his incriminating text messages. The effect these comments had on the jury is especially concerning in a case like this, where the credibility of the witnesses was a key factor. There was conflicting evidence presented as to whether the sexual encounter between McSwine and C.S. was forced or consensual. The case ultimately came down to a question of whether the jury believed C.S.' version of events or McSwine's version, and the incriminating text messages authored by McSwine were

a key piece of evidence in evaluating McSwine's version of events.

Given the prosecutor's misleading comments during closing arguments, the jury could have reasonably discounted McSwine's testimony about the rationale for the text messages and, perhaps more significantly, could have discounted McSwine's credibility altogether. While the false comments were isolated in that they occurred only during the prosecutor's closing argument and his rebuttal argument, the limited number of times the false information was provided to the jury is tempered by the timing of the false information. The comments were repeated on at least two separate occasions at the very end of the trial proceedings, directly before the jury began its deliberations. And it is clear that the prosecutor's false comments were at the forefront of the jurors' minds during their deliberations as the group specifically asked the court whether there was any evidence, including a police report, about the trespass. Such a question suggests that the jury was specifically contemplating the credibility of McSwine's testimony and relying on the prosecutor's comments during closing arguments to assist in its determination.

In addition, because McSwine's defense counsel did not timely object to the prosecutor's false statements, the district court did not specifically instruct the jury not to consider such comments, nor did the court provide any sort of curative instruction to the jury.

Considering the context of the prosecutor's deliberate and misleading comments and the trial as a whole, we conclude that this is an instance in which unobjected-to prosecutorial misconduct constitutes plain error demanding a reversal of McSwine's convictions.

In his appeal, McSwine also argues that his convictions require reversal because defense counsel provided ineffective assistance when he failed to timely object to the prosecutor's false and misleading statements about the existence of evidence to support his explanation about the text messages. For the sake of completeness, we are compelled to find that this assertion also has merit. Defense counsel provided

deficient performance and such deficient performance prejudiced McSwine's ability to receive a fair trial.

[10] The Nebraska Supreme Court has previously adopted the two-part test for proving a claim of ineffective assistance of counsel set forth by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution, and thereby obtain reversal of a conviction, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. See, e.g., *State v. Clausen*, 247 Neb. 309, 527 N.W.2d 609 (1995). Essentially, the defendant must establish that his attorney failed to perform at least as well as a lawyer with ordinary training and experience in criminal law and must demonstrate how he was prejudiced in the defense of the case as a result of the attorney's actions or inactions. *Id*.

Defense counsel's performance was deficient when he failed to timely object to the prosecutor's misleading statements during closing arguments about the lack of any evidence to support McSwine's testimony about the trespass. As we concluded above, the prosecutor's statements amounted to misconduct and, had defense counsel objected to those statements, such objection would have been successful. Based on the affidavit submitted by defense counsel in support of McSwine's motion for new trial, defense counsel knew or should have known that the prosecutor's statements were false and should have recognized the detrimental effect such statements would have had on McSwine's defense. In fact, in that same affidavit, defense counsel admitted that he had simply "misheard" the prosecutor's statements and that had he heard the statements correctly, he would have objected and made a motion for a mistrial. We read defense counsel's comments as an admission that his performance was deficient.

Defense counsel's deficient performance in failing to object to the prosecutor's statements prejudiced McSwine's defense.

The prosecutor's statements were misleading and, at the very least, implied that McSwine had fabricated his story about the events of the early morning hours of October 13, 2012, prior to his encounter with C.S. and, thus, had fabricated his explanation for the incriminating text messages. In a case such as this where the credibility of the witnesses, and in particular the credibility of McSwine and C.S., was the crux of the evidence, defense counsel's failure to challenge the prosecutor's false and misleading statements was clearly prejudicial to McSwine's defense.

Ultimately, we find that McSwine has demonstrated that there is a reasonable probability that but for his defense counsel's deficient performance, the result of the proceeding would have been different. Therefore, we conclude that McSwine received ineffective assistance of counsel and that this ineffective assistance would also necessitate reversal of his convictions.

2. Remaining Assignments of Error

Because we reverse McSwine's convictions, and because we conclude that two of the remaining assignments of error are unlikely to reoccur, and a third may reoccur but must be decided contextually in the nuanced environment of the new trial, we need not address the remaining assignments of error.

[11] An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it. *State v. Draper*, 289 Neb. 777, 857 N.W.2d 334 (2015).

It does not seem likely that the circumstances which form McSwine's argument regarding juror misconduct would reoccur in a new trial. Similarly, we cannot assume that the exact same circumstances which form McSwine's numerous claims of ineffective assistance of counsel would reoccur on remand.

McSwine's argument regarding the admissibility of certain evidence having to do with the victim's sexual history is, arguably, distinguishable from the other two assigned, but unaddressed, errors. While the sexual history issue is somewhat

likely to reappear in some shape or form during a new trial, the law in this area (e.g., the rape shield law) is very well established. And while the issue may reappear during a second trial, how it arises exactly will dictate how the trial court applies the rules of evidence to determine the admissibility of any such evidence. We find it in the interest of judicial economy and the realities of trial practice that a meaningful and guiding discussion of this issue in our opinion is not really possible, nor would it be beneficial to the parties or the trial court.

Thus, we do not address any of McSwine's remaining assignments of error.

3. Double Jeopardy

[12] Having found reversible error, we must determine whether the totality of the evidence admitted by the trial court was sufficient to sustain McSwine's convictions. Upon finding reversible error in a criminal trial, an appellate court must determine whether the total evidence admitted by the district court, erroneously or not, was sufficient to sustain a guilty verdict; if it was not, then double jeopardy forbids a remand for a new trial. See *State v. Draper, supra*. Upon our review of all of the evidence presented, we conclude that the evidence was sufficient to sustain a guilty verdict, and thus, double jeopardy does not bar a new trial.

V. CONCLUSION

We conclude that the prosecutor's misleading statements to the jury during closing arguments regarding the existence of evidence to support McSwine's testimony constituted plain error which requires a reversal of McSwine's convictions. In addition, we conclude that McSwine received ineffective assistance of counsel when defense counsel failed to timely object to the prosecutor's statements. Such ineffective assistance would also require reversal of McSwine's convictions. Because the evidence presented by the State was sufficient to sustain McSwine's convictions, we reverse the convictions and remand for a new trial.

Reversed and remanded for a new trial.

State of Nebraska, appellee, v. Ryan E. Kozisek, appellant.

861 N.W.2d 465

Filed March 24, 2015. No. A-14-022.

1. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
2. **Trial: Evidence: Appeal and Error.** The admission of demonstrative evidence is within the discretion of the trial court, and a judgment will not be reversed on account of the admission or rejection of such evidence unless there has been a clear abuse of discretion.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Trial: Testimony.** Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
5. **Trial: Testimony: Witnesses.** Opinion testimony by a lay witness is permitted only where it is rationally based on the perception of the witness and it is helpful to a clear understanding of his testimony or the determination of a fact in issue.
6. ____: ____: ____. Opinion testimony by a lay witness is generally admissible where it is necessary and advisable as an aid to the jury, but it should be excluded whenever the point is reached at which the trier of fact is being told that which it is itself entirely equipped to determine.
7. ____: ____: ____. A lay witness' function is to describe what he has observed, and the trier of fact will draw a conclusion from the facts observed and reproduced by the witness.
8. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
9. **Trial: Evidence: Verdicts: Juries: Appeal and Error.** Evidentiary error is harmless when improper admission of evidence did not materially influence the jury to reach a verdict adverse to substantial rights of the defendant. Harmless error review looks to the basis on which the trier of fact 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, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
10. **Jurisdiction: Prosecuting Attorneys: Indictments and Informations.** A prosecutor is required to file an information listing the offense in the county with jurisdiction over that offense.

11. **Prosecuting Attorneys: Witnesses: Indictments and Informations.** A prosecutor must endorse the names of witnesses known to the prosecutor at the time the information is filed.
12. **Witnesses: Indictments and Informations.** The purpose of Neb. Rev. Stat. § 29-1602 (Reissue 2008) is to notify the defendant as to witnesses who may testify against the defendant and give the defendant an opportunity to investigate them.
13. **Rebuttal Evidence: Witnesses: Indictments and Informations.** The requirement of endorsement of the State's witnesses on the information has no application to rebuttal witnesses.
14. **Trial: Rebuttal Evidence.** Rebuttal evidence is confined to new matters first introduced by the opposing party and is not an opportunity to bolster, corroborate, reiterate, or repeat a case in chief.
15. ____: ____. Rebuttal evidence is limited to that which explains, disproves, or counteracts evidence introduced by the adverse party.
16. **Trial: Rebuttal Evidence: Appeal and Error.** The abuse of discretion standard is applied to an appellate court's review of a trial court's ruling on the admissibility of rebuttal testimony.
17. **Trial: Juries: Evidence.** Demonstrative exhibits are defined by the purpose for which they are offered at trial—to aid or assist the jury in understanding the evidence or issues in a case.
18. **Trial: Evidence: Testimony: Proof.** Demonstrative exhibits are admissible if they supplement the witness' spoken description of the transpired event, clarify some issue in the case, and are more probative than prejudicial.
19. ____: ____: ____: ____. Demonstrative exhibits are inadmissible when they do not illustrate or make clearer some issue in the case; that is, when they are irrelevant, or when the exhibit's character is such that its probative value is substantially outweighed by the danger of unfair prejudice.
20. **Trial: Evidence: Testimony.** Demonstrative exhibits are relevant only because of the assistance they give to the trier of fact in understanding other real, testimonial, and documentary evidence.
21. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for York County: ALAN G. GLESS, Judge, and J. PATRICK MULLEN, Judge, Retired. Reversed and remanded for a new trial.

Mark E. Rappl for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

IRWIN, RIEDMANN, and BISHOP, Judges.

RIEDMANN, Judge.

INTRODUCTION

Ryan E. Kozisek was convicted in the district court for York County of intentional child abuse resulting in death. He appeals, arguing that his motion for new trial should have been granted because of the erroneous admission of opinion testimony and improper rebuttal evidence. He also claims that the district court erred in overruling his objection to a demonstrative video. We agree that the district court abused its discretion in overruling the motion for new trial, because the admission of the opinion testimony constituted prejudicial error. We therefore reverse, and remand for a new trial.

BACKGROUND

Kozisek was charged with intentional child abuse resulting in death following the death of his 4-month-old daughter, Kaley Kozisek (Kaley). Kozisek married Kassandra Roper (Kassandra) in 2008. Their first daughter was born in January 2009, and their second daughter, Kaley, was born in September 2010. Kozisek was disappointed when he and Kassandra found out their second child would be a girl, and he became "[m]ore stressed [and d]epressed" after Kaley was born. He did not understand why Kaley cried so much, and Kassandra recalled him saying that he "hated" Kaley. He also told a coworker that he "hated" Kaley and told another coworker that Kaley cried so much that he felt like "shaking [her] to the point where [she] would stop crying."

Kaley had "milk and soy protein intolerance [and] spit up a lot" during feedings. Kassandra described her as a "[f]ussy" eater, but otherwise, as generally healthy. Kaley contracted the stomach flu in early January 2011, however, so Kassandra called the pediatrician because Kaley was vomiting. Around that same time, Kassandra noticed an indentation on the back of Kaley's head and mentioned it to the pediatrician when Kaley was in her office on January 17. Kaley also saw her pediatrician on January 21 for her 4-month checkup. At that visit, she was bright-eyed, very alert, developing appropriately, and breathing comfortably. According to Kassandra, Kaley was also "fine" on January 22 and 23 and played with toys,

giggled, and smiled. Kaley was still fussy during feedings, but according to Kassandra, that was normal for her.

Kozisek quit his job in January 2011, forcing Kassandra to find employment while Kozisek stayed home with his daughters. On Kassandra's first day of work, January 24, she got up around 3 a.m., and before leaving for work, she checked on Kaley, who was sleeping "perfectly fine." When she called home around 10 a.m., Kozisek said Kaley was "breathing kind of funny" and put the telephone up to Kaley so Kassandra could hear her breathing. Kassandra thought Kaley sounded "a little bit different," but she was not too concerned and said she would look at Kaley when she got home around 1 p.m. At 12:18 p.m., Kozisek called the 911 emergency dispatch service and reported that Kaley was barely breathing, limp, and starting to turn blue.

When emergency medical services initially arrived, Kaley was unresponsive and did not have a pulse. She was initially taken to a hospital in York, Nebraska, and then shortly thereafter, she was "life-flighted" to a hospital in Omaha, Nebraska. Kaley died the following day.

At trial, the State called several expert witnesses who testified that Kaley's injuries were not caused accidentally. An ophthalmologist who examined Kaley at the hospital in Omaha observed extensive hemorrhaging in the back of her eyes. He opined that the cause of Kaley's injuries was nonaccidental trauma and could think of no other causes that would explain Kaley's retinal hemorrhaging.

A child abuse pediatrician also examined Kaley at the hospital in Omaha. She noticed that Kaley's eyes were fixed and widely dilated, which is an indication of severe brain injury. Because Kaley's eyes were so widely dilated, the child abuse pediatrician could look through the pupils and see the back of Kaley's eyes, where she "very clearly" observed blood. A CT scan showed evidence of severe brain injury. The back of Kaley's skull was depressed, an injury that is referred to as a "ping pong skull fracture" (ping pong fracture), because it looks like the indentation that occurs when "a ping pong ball [is] pushed in." Kaley also had bleeding between her brain and skull all around, including fresh blood, and severe swelling to

the brain. According to the child abuse pediatrician, it was not the blood or blood pressure in Kaley's brain that caused her to be ill, but her brain had been damaged by the same force that caused the bleeding. In the child abuse pediatrician's opinion, Kaley suffered from abusive head trauma and the injury occurred after the night of January 23, 2011.

Finally, the coroner's physician who performed the autopsy on Kaley on January 26, 2011, testified during the State's case in chief. He observed a cluster of bruises on the top of Kaley's head, as well as fresh blood, which is a manifestation of blunt force trauma. He also observed a subdural hemorrhage and subarachnoid hemorrhage, meaning she had bleeding in the connective tissues between the scalp and the brain. He further found bleeding around the optic nerves in both of her eyes extending into the retinas. The coroner's physician concluded that parts of the subdural hematoma were at least 3 days old; however, the subarachnoid hemorrhage, retinal hemorrhages, and bruising on the top of the head were no more than 1 day old. The coroner's physician opined that Kaley's cause of death was blunt force trauma to the head and brain.

Kassandra was called as a witness for the State. During her direct examination, the following exchange occurred:

> Q Now during the interview with the state patrol . . . you continually denied that - - 100 percent that . . . Kozisek would have anything to do with the injuries to Kaley; is that correct?
>
> A I remember saying that, yes.
>
> Q Again, I don't know how many times that you denied it but it was numerous times?
>
> A Correct.
>
> Q And this was during your interview on the 24th of January, 2011?
>
> A Correct.
>
> Q Have you come to change your opinion?
>
> [Defense counsel]: Your Honor, objection. Two reasons. One, it calls for an improper opinion. Two, it's an ultimate issue for the jury to decide.
>
> THE COURT: Overruled.

> Q . . . Have you changed your opinion on whether or not the injuries were caused by [Kozisek]?
>
> A Yes, I have.
>
> Q And why was it that you continued to say that he didn't - - or look - - reflecting back on the 24th?
>
> A I was in shock. I honestly did not know what happened. I thought being with somebody for 10 years, how would they be able to hurt their own child. I never thought that he would do anything like that.

Kassandra said that she and her older daughter moved out of the family home in March 2011 and that she ultimately dissolved her marriage with Kozisek and moved to a different city.

Kozisek did not testify at trial, but his prior statements were introduced through several witnesses. He denied injuring Kaley and asserted that her death was caused by a series of tragic accidents, beginning with the ping pong fracture on the back of her head. He repeatedly claimed that while he was at home with his daughters on January 24, the older daughter fell or jumped off of a chair onto Kaley, which caused Kaley's breathing to change.

At trial, Dr. Janice Ophoven testified in Kozisek's defense. She is a medical doctor specializing in forensics and pediatric forensics. In Dr. Ophoven's opinion, there was insufficient evidence to conclude that Kaley's injuries and death were the result of abuse. Dr. Ophoven believed that the ping pong fracture put pressure on the veins in the back of Kaley's head, which increased intercranial pressure. Increased intercranial pressure is also associated with bleeding in the eyes. Dr. Ophoven believed that Kaley's vomiting and fussiness in the days leading up to her death were evidence of complications from increased intercranial pressure and that the older daughter's falling onto Kaley potentially caused a spike in pressure that shut down circulation to her brain and caused cardiac arrest.

Dr. Ophoven also testified that in the last 10 years, there has been a shift in the literature and science involving what is known as shaken baby syndrome. She claimed that it has been discovered that no matter how hard or how long you shake a

baby, the amount of force that can be generated is insufficient to cause the brain injury and retinal hemorrhaging that is so commonly seen in abused children. As a result, according to Dr. Ophoven, "the scientific basis for the original theory has now become controversial."

After the conclusion of Dr. Ophoven's testimony, the State indicated its intention to call a rebuttal witness. Kozisek objected, but his objection was overruled. The State then called Dr. Daniel Davis, a forensic pathologist and deputy medical examiner in Oregon, to testify on rebuttal. Dr. Davis testified that he disagreed with Dr. Ophoven's opinion. He believed that the ping pong fracture was unrelated to Kaley's death and that her vomiting was associated with her continued feeding issues. If the fracture were crimping the central vein in the back of Kaley's head as Dr. Ophoven claimed, Dr. Davis said he would expect to see symptoms immediately after the fracture occurred, but the fracture was nearly healed.

Dr. Davis testified that what is present in this case are the classic signs of a shaken baby. First, he disagreed with the notion that Kaley experienced cardiac arrest, and instead, he asserted that because she was unresponsive and not breathing but her heart was still beating, she was in respiratory arrest, which occurs as a result of interference with the brainstem. In addition, when a baby is shaken, the brain rotates inside of the head, which causes the veins on both sides of the central vein to tear and bleed over the surface of the brain and into the subdural space, which is exactly what was seen in Kaley. Moreover, what is seen in virtually all shaken baby cases is significant hemorrhage into the eyes, as was seen in Kaley's eyes.

Dr. Davis explained that when a baby is shaken, the brain is "basically stirred," and as a result, millions of nerve fibers throughout the brain are torn at a microscopic level. That causes the signals in the brainstem controlling alertness, breathing, and heart rate to be lost, which causes sudden unresponsiveness, changes to breathing for a few minutes, and then the cessation of breathing. He said that "it happens identically every time" because the effect on the brainstem is so profound in shaking due to shearing at the microscopic level.

To help illustrate Dr. Davis' explanation of the effects of shaking a baby, the State played a demonstrative video that Dr. Davis helped create approximately 10 years ago. Kozisek objected to the video, but his objections were overruled. Dr. Davis said that he was very heavily involved in the production of the video because he was the source of the accuracy of the medical information contained in it. He said that he has used the video about a dozen previous times in court and that it has also been used by other medical professionals in a variety of courtrooms throughout the country. The video is a graphic animation of the injuries that occur in a baby's brainstem when the baby is shaken. Dr. Davis described the video as "a demonstrative aid to help [him] explain the mechanism of injury in shaking."

Dr. Davis testified that the difference between his opinion on intercranial pressure and Dr. Ophoven's was "cause and effect." He believes that the increase in Kaley's intercranial pressure was an effect of the injuries she sustained, but Dr. Ophoven believed the pressure increase caused Kaley's injuries. According to Dr. Davis, shaking a baby injures the brain, and the brain's major reaction to injury is swelling. When the brain swells, intercranial pressure increases. Dr. Davis stated that Dr. Ophoven's opinion that increased pressure somehow caused everything else to happen was "backwards." He also stated that he could not "buy in" to the theory that the older daughter's falling on Kaley, which he noted was not even a substantiated fact, caused Kaley's death.

Dr. Davis was also asked to respond to Dr. Ophoven's claim that shaken baby syndrome is now a controversial diagnosis. He explained that "rather than just calling everything shaken baby," the suggestion now, when it is unclear whether there was also trauma, is to call it "abusive head trauma," which encompasses shaking, shaking with impact, and impact. The goal of this new position by physicians was not to detract from shaking as a mechanism of abusive head trauma but to broaden the terminology to account for the multitude of injuries that result from abusive head trauma. Thus, physicians are using the term "abusive head trauma" instead of "shaken baby" because

it is more inclusive of all of the mechanisms that can happen to children.

After the conclusion of evidence and deliberation, the jury found Kozisek guilty of intentional child abuse resulting in death. Kozisek filed a motion for new trial challenging Kassandra's opinion testimony, the State's rebuttal expert, and use of the demonstrative video. The district court found that the jury could infer Kassandra's opinion of Kozisek's guilt from her testimony and allowing this testimony was error. However, because there was abundant evidence adduced by the State to show Kozisek's guilt, the court found the error harmless. It also found no error in admitting the State's rebuttal expert or the demonstrative video. Accordingly, the district court denied Kozisek's motion for new trial. Kozisek was sentenced to 35 to 50 years' incarceration. He has now appealed to this court.

ASSIGNMENTS OF ERROR

Kozisek assigns that the district court erred in (1) denying his motion for new trial after concluding that the admission of Kassandra's opinion testimony was improper but harmless error, (2) denying his motion for new trial because the State's rebuttal evidence did not respond to new matters introduced by him, and (3) overruling his objection to the demonstrative video.

STANDARD OF REVIEW

[1] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Ramirez*, 287 Neb. 356, 842 N.W.2d 694 (2014).

[2] The admission of demonstrative evidence is within the discretion of the trial court, and a judgment will not be reversed on account of the admission or rejection of such evidence unless there has been a clear abuse of discretion. *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

[3] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *State v. Ramirez, supra*.

ANALYSIS

Opinion Testimony.

Kozisek asserts that the district court erred in denying his motion for new trial after concluding that Kassandra's opinion testimony was improper but harmless error. He claims allowing Kassandra to infer her opinion of Kozisek's guilt was not only erroneous, but materially influenced the jury's decision.

The district court concluded that although Kassandra did not specifically give her opinion, the implication that she now believes Kozisek caused Kaley's injuries is clear from her testimony. Kozisek asserts that allowing Kassandra to state her opinion of his guilt was error. We agree.

[4-7] Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. Neb. Rev. Stat. § 27-704 (Reissue 2008). Opinion testimony by a lay witness is permitted only where it is rationally based on the perception of the witness and it is helpful to a clear understanding of his testimony or the determination of a fact in issue. See Neb. Rev. Stat. § 27-701 (Reissue 2008). It is generally admissible where it is necessary and advisable as an aid to the jury, but it should be excluded whenever the point is reached at which the trier of fact is being told that which it is itself entirely equipped to determine. *State v. William*, 231 Neb. 84, 435 N.W.2d 174 (1989). A lay witness' function is to describe what he has observed, and the trier of fact will draw a conclusion from the facts observed and reproduced by the witness. See *id*.

In the present case, Kassandra's testimony was not objectionable for the reason that it embraced the ultimate issue in the case, that is, Kozisek's guilt. However, her opinion failed to meet the § 27-704 requirement that it be "otherwise admissible" because it lacked sufficient foundation to show that her testimony was rationally based on her perception. The only

information elicited from Kassandra was that she initially did not think Kozisek had anything to do with Kaley's injuries, but that she has since changed her opinion. We do not know, however, the basis for her change in opinion. This leaves the record in doubt as to whether her belief of Kozisek's guilt is an expression of her actual knowledge or merely an expression of her opinion, which is impermissible. See *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993). Moreover, Kassandra's opinion would not be helpful to the fact finder because she was merely drawing a conclusion based on the same evidence that was being presented to the jury. We therefore agree with the district court that allowing Kassandra to testify that she has changed her opinion regarding Kozisek's guilt was error.

[8,9] Having concluded that the district court erred in allowing Kassandra's testimony as to her opinion of Kozisek's guilt, we must now determine whether such error was harmless. In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989). Evidentiary error is harmless when improper admission of evidence did not materially influence the jury to reach a verdict adverse to substantial rights of the defendant. *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012). Harmless error review looks to the basis on which the trier of fact 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, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *Id.*

Here, the implication from Kassandra's testimony that she changed her opinion is that she now, at a minimum, questions whether Kozisek had something to do with Kaley's injuries or, worse, now believes that he intentionally caused them. Who better than Kozisek's then-wife and mother of his children would know whether Kozisek was capable of the crime with which he was charged? Given the spousal relationship

between Kassandra and Kozisek, we cannot say that the verdict rendered against Kozisek was surely unattributable to her testimony. Although Kassandra was not an expert, the weight of her opinion differed because of her relationship with Kozisek. See *Simon v. Drake*, 285 Neb. 784, 829 N.W.2d 686 (2013).

In *Simon v. Drake*, the Nebraska Supreme Court recognized the differing weight a witness' testimony may have depending upon his relationship with the party against whom he is testifying. In *Simon v. Drake*, a medical malpractice action, the defendant was allowed to elicit testimony from one of the plaintiff's treating physicians that the needle size used by the defendant was within the range of the proper needle size for the procedure at issue. He had not been designated as an expert. The trial court found this to be harmless error, and on appeal, we agreed. Upon further review, the Nebraska Supreme Court reversed. It reasoned that the treating physician's testimony was not substantially similar to the testimony of the parties' designated experts because "[c]ompared to the testimony of a hired expert, a juror was likely to give great weight to [the treating physician's] opinion because he was [the plaintiff's] treating physician and testifying as an expert against his own patient." *Id.* at 794, 829 N.W.2d at 693. The court went on to explain that the relationship between a patient and a treating physician was one of confidence and trust and that therefore, the jury would have given significant weight to that testimony. The court stated that it could not conclude that the weight the jury likely would have given to the treating physician's opinions was not the "tipping point" for finding in favor of the defendant, especially since the defendant's only expert conceded he would have used a different needle size. *Id.* at 796, 829 N.W.2d at 694.

Here, we determine that the jury would have given significant weight to Kassandra's testimony, given the spousal relationship between her and Kozisek. And we cannot conclude that the weight given to this testimony was not the "tipping point" for finding against Kozisek, especially when the medical evidence was conflicting and complex. See *id.* We therefore conclude that the State failed to prove beyond a reasonable

doubt that the admission of Kassandra's opinion of Kozisek's involvement in Kaley's death was harmless error. Accordingly, we reverse the conviction.

Rebuttal Evidence.

Although the foregoing determination resolves this appeal, we nonetheless consider the remaining assignment of error, because it presents issues which are likely to reoccur in the new trial we must order, as further explained below.

Kozisek argues that the district court erred in denying his motion for new trial because the State's rebuttal evidence was improper. He asserts that it was unfair for the State to call an unendorsed rebuttal expert and that doing so denied him an opportunity to depose and effectively confront the witness. Kozisek also claims that the State's rebuttal expert did not respond to new matters introduced by his expert; rather, the State used its rebuttal expert to improperly bolster and reiterate its case in chief. We disagree.

[10-12] Neb. Rev. Stat. § 29-1602 (Reissue 2008) requires a prosecutor to file an information listing the offense in the county with jurisdiction over that offense. The prosecutor must also endorse the names of witnesses known to the prosecutor at the time of the filing. See *id*. The purpose of § 29-1602 is to notify the defendant as to witnesses who may testify against the defendant and give the defendant an opportunity to investigate them. *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

[13] But it has long been the rule in this state that the requirement of endorsement of the State's witnesses on the information has no application to rebuttal witnesses. *Id*. See, also, *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000); *State v. Pratt*, 197 Neb. 382, 249 N.W.2d 495 (1977); *Griffith v. State*, 157 Neb. 448, 59 N.W.2d 701 (1953). Thus, the State was not required to provide Kozisek with Dr. Davis' name prior to trial.

[14-16] Kozisek also claims that Dr. Davis' testimony did not respond to new matters raised by Dr. Ophoven. Rebuttal evidence is confined to new matters first introduced by the opposing party and is not an opportunity to bolster, corroborate,

reiterate, or repeat a case in chief. *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010). It is limited to that which explains, disproves, or counteracts evidence introduced by the adverse party. *Id*. The abuse of discretion standard is applied to an appellate court's review of a trial court's ruling on the admissibility of rebuttal testimony. *Id*.

An argument similar to Kozisek's was proffered and rejected by the Nebraska Supreme Court in *State v. Swillie*, 218 Neb. 551, 357 N.W.2d 212 (1984). There, the defendant contended that the rebuttal testimony should have been presented in the State's case in chief because it only corroborated the State's other witnesses. The Supreme Court iterated its prior holding that in a criminal prosecution, any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony. See *id*. Thus, the court concluded that because the testimony tended to dispute testimony offered on behalf of the defendant as to a material fact, it was properly offered in rebuttal. *Id*.

Similarly, in the present case, Dr. Davis disputed Dr. Ophoven's testimony as to a number of material facts, including Kaley's cause of death and whether shaken baby syndrome is now a controversial diagnosis. Further, Dr. Ophoven claimed that the cause of death in cases such as this should be determined by a forensic pathologist, and Dr. Davis was the only one of the State's expert witnesses who was a forensic pathologist. Accordingly, we cannot find that the district court abused its discretion in allowing Dr. Davis to testify as a rebuttal witness. Therefore, Kozisek's motion for new trial was properly denied.

Demonstrative Video.

Finally, Kozisek argues that the district court erred in overruling his objection to the demonstrative video played during Dr. Davis' testimony. We find no merit to this argument.

[17-20] Demonstrative exhibits are defined by the purpose for which they are offered at trial—to aid or assist the jury in understanding the evidence or issues in a case.

State v. Pangborn, 286 Neb. 363, 836 N.W.2d 790 (2013). Demonstrative exhibits are admissible if they supplement the witness' spoken description of the transpired event, clarify some issue in the case, and are more probative than prejudicial. *Id*. Conversely, they are inadmissible when they do not illustrate or make clearer some issue in the case; that is, when they are irrelevant, or when the exhibit's character is such that its probative value is substantially outweighed by the danger of unfair prejudice. *Id*. They are relevant only because of the assistance they give to the trier of fact in understanding other real, testimonial, and documentary evidence. *Id*.

In the present case, the video was used to assist Dr. Davis in explaining what happens when a baby is shaken. Dr. Davis disagreed with Dr. Ophoven's theory that the ping pong fracture was crimping the central vein in Kaley's head and that the older daughter's falling on Kaley threw off her equilibrium and caused her to suffer cardiac arrest. First, Dr. Davis opined that Kaley suffered respiratory arrest, not cardiac arrest, because although she was unresponsive and not breathing, her heart was still beating. He believed that this occurred as a result of interference with her brainstem from abusive head trauma. He explained that shaking a baby causes the brain to move around in the head which results in the tearing of nerve fibers at a microscopic level. The signals in the brainstem that control alertness, breathing, and heart rate are lost, which is why the child suddenly becomes unresponsive and stops breathing. The video visually depicted the above-described testimony and assisted with Dr. Davis' explanation of his opinion on Kaley's cause of death and why he disagreed with Dr. Ophoven.

With respect to creation of the video, Dr. Davis testified that for the last 15 or more years, he has operated a company that makes graphics and demonstrative animation aids to help people understand difficult medical concepts. He commissioned the video to be made approximately 10 years prior and was heavily involved in its creation as the source of the accuracy of the medical evidence contained in it. It was repeatedly made clear to the jury during Dr. Davis' testimony that the

animation in the video was not intended to represent Kaley, but, rather, the video simply depicted what generally happens in a baby's brain when it is shaken.

Based on the foregoing, we find no abuse of discretion in the district court's conclusion that the video could assist the jury in understanding Dr. Davis' testimony and clarifying an issue in the case. This assignment of error is without merit.

Double Jeopardy.

[21] Having found reversible error in the admission of Kassandra's opinion testimony, we must determine whether the totality of the evidence admitted by the district court was sufficient to sustain Kozisek's conviction. If it was not, then the concepts of double jeopardy would not allow a remand for a new trial. See *State v. Borst*, 281 Neb. 217, 795 N.W.2d 262 (2011). The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *State v. Borst, supra*.

After reviewing the record, we conclude that the evidence presented at trial, including the evidence that should have been excluded, was sufficient to support Kozisek's conviction. As such, we conclude that double jeopardy does not preclude a remand for a new trial on the charge of intentional child abuse resulting in death. We therefore remand the cause to the district court for a new trial.

CONCLUSION

We conclude that the district court erred when it denied Kozisek's motion for new trial because the admission of Kassandra's opinion regarding Kozisek's involvement in Kaley's death was prejudicial error. We reverse the decision of the district court and remand the cause to the district court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

State of Nebraska, appellee, v. Gregory M. Mucia, appellant.

862 N.W.2d 89

Filed March 31, 2015. No. A-14-070.

1. **Criminal Law.** Neb. Rev. Stat. § 28-813.01 (Cum. Supp. 2014) provides that it shall be unlawful for a person to knowingly possess any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers.
2. **Criminal Law: Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: 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.
3. ____: ____: ____. The relevant question for an appellate court reviewing a sufficiency of the evidence claim is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
4. **Convictions: Evidence: Appeal and Error.** A conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
5. **Criminal Law: Statutes: Legislature: Intent: Appeal and Error.** On appeal, appellate courts give penal statutes a sensible construction, considering the Legislature's objective and the evils and mischiefs it sought to remedy.
6. **Criminal Law: Statutes: Words and Phrases: Appeal and Error.** Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning; but an appellate court strictly construes penal statutes and does not supply missing words or sentences to make clear that which is indefinite or not there.
7. **Criminal Law: Statutes.** Ambiguities in a penal statute are resolved in the defendant's favor.
8. **Criminal Law: Intent.** Knowingly possessing child pornography, as prohibited by Neb. Rev. Stat. § 28-813.01 (Cum. Supp. 2014), requires a specific intention to possess child pornography.
9. **Criminal Law: Trial: Judges.** A trial judge sitting without a jury is not required to articulate findings of fact or conclusions of law in criminal cases.
10. **Criminal Law: Trial: Judges: Presumptions.** In a jury-waived criminal trial, the trial judge is presumed to be familiar with and to have applied the proper rules of law, unless it clearly appears otherwise.
11. **Convictions: Evidence: Appeal and Error.** A conviction will be affirmed if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
12. ____: ____: ____. When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is

> whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge. Affirmed.

Sean J. Brennan for appellant.

Jon Bruning, Attorney General, and Melissa R. Vincent for appellee.

IRWIN, INBODY, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Gregory M. Mucia appeals his conviction for possession of child pornography. On appeal, Mucia asserts that the State failed to adduce sufficient evidence to show that he knowingly possessed the child pornography and challenges the court's admission of four video files into evidence. We find no merit to Mucia's assertions on appeal, and we affirm.

II. BACKGROUND

Mucia was charged by information with violating Neb. Rev. Stat. § 28-813.01 (Cum. Supp. 2014), which makes it "unlawful for a person to knowingly possess any visual depiction" of child pornography. The charge was based on the identification of child pornography files on Mucia's computer, discovered by a Lincoln Police Department investigator, Corey Weinmaster.

At trial, Mucia did not dispute that evidence of child pornography was found on two of his computers. His defense was that he had not knowingly possessed child pornography; that he had not intended to access child pornography; and that if he located child pornography while searching for adult pornography, he deleted it. Mucia argued at trial that he had not knowingly possessed child pornography, because to do so would require him to have done so in a way that was not accidental or involuntary.

Weinmaster testified at trial that he investigates child pornography cases for the Lincoln Police Department, including conducting forensic examinations of computers. He testified that he uses a software program that, through the Internet, searches "IP" addresses of computers using file-sharing software and locates files that have previously been identified as potentially depicting child pornography. He testified that when the program identifies a file, the file is, at that time, actually on the hard drive of the identified computer and available for sharing through a file-sharing software program. He testified that when the software program identifies such a file, the file-sharing program being used by the identified computer also has a unique identification that can also be tracked.

According to evidence adduced at trial, Weinmaster's investigation was based on identifying persons using peer-to-peer (P2P) software, wherein users install publicly available software that facilitates the trading of digital files. Through such programs, users are able to search for digital files available on other computers and are able to select specific files to be downloaded to the user's computer. The P2P software uses an algorithm to create a "hash" value, which is a digital signature that allows an investigator to determine "with a precision that exceeds 99.9999 percent certainty" that two files are identical. The hash value of files identified as being available for sharing through P2P software can then be compared with files in a database of known child pornography to determine whether files available for sharing are child pornography.

In October 2011, Weinmaster ran the software program "and identified an IP address that had listed 10 files available for sharing" that had hash values and titles consistent with files in a law enforcement database of known child pornography files. Weinmaster then completed an affidavit for search warrant. According to his affidavit, he reviewed the information associated with four of the hash values and identified files named "r@ygold_boyandgirl 11 yo FUCK!3.26(PTHC KIDSEX}.mpg," "Best Vicky BJ & Handjob with sound (r@ygold pedo reelkiddymov underage illegal lolita daughter incest xxx ora.mpg," "! NEW ! (pthc) Veronika Nuevo 2

Nenas_all.mpg," and "(((KINGPASS))) (pthc) (dark studio) Dark Robbery.mpg."

Weinmaster reviewed the files in the law enforcement database that had the unique hash values identified with the four files. Each was a video file depicting children engaged in sexual conduct. One video involved a prepubescent female and a prepubescent male and depicted masturbation and sexual penetration; Weinmaster estimated that the children were approximately 9 to 11 years of age. One video involved a prepubescent female, approximately 9 to 11 years of age, performing oral sex on an adult male. One video involved two prepubescent females, approximately 7 to 9 years of age, and depicted penetration of one's vagina with a foreign object, as well as a female approximately 10 to 11 years of age performing oral sex on an adult male. One video involved three females, approximately 12 to 14 years of age, exposing their breasts and vaginas and rubbing their vaginas.

Copies of these four videos were offered and received, over objection, at trial. Weinmaster testified that his software program indicated that the video files had been present on Mucia's computers, but that they were no longer present on the computers after they were seized and forensically examined.

Through identification of the IP address associated with the identified files, Weinmaster was able to identify that the Internet account holder was Mucia's brother. When executing a search warrant, Weinmaster seized two computers, both from Mucia's room at the residence. Weinmaster then ran forensic examinations on both computers.

Weinmaster testified that he found evidence of a variety of files, both in and out of the "recycle bin," on one of the computers that merited further investigation. He testified that four of the files that were not in the recycle bin were video files that had been downloaded through a P2P software program and placed in a specific user account that had to be specified as the download location. He testified that he viewed the four videos and that they constituted child pornography. Portions of the four videos were played for the court. As the portions were played for the court, there was no description or indication of what was being seen by the court.

In addition to the 4 files found out of the computer's recycle bin, Weinmaster located 14 other files in the recycle bin. He testified that files in the recycle bin were still accessible and can be restored and that the recycle bin can be used as "another storage container" on the computer.

Weinmaster testified that the location of files located on the computer required a series of steps to download the P2P software program, to install it, and to set it up and specify the download location to be somewhere other than a default location. He also testified that other P2P software programs on the computers included data files that tracked activity and showed a history of files consistent with child pornography. He also testified about Internet history located on the computers showing files that had been accessed and including terms consistent with child pornography, as well as thumbnail images on the computers that fit the criteria for child pornography.

Weinmaster testified he found evidence of files being accessed on the computers that were associated with "LS models" (which Weinmaster testified was a term prevalent in child pornography) and "p-t-h-c" (another term prevalent in child pornography) and that included phrases such as "rubbing eight y-o to orgasm" and "PTHC, five-year-old Kate, dad, ecstasy, hyphen, Katie . . . getting a mouthful of my cum, dot, link." He testified that he could tell that the files were accessed and downloaded, but could not determine whether video files were watched.

On cross-examination, Weinmaster testified that Mucia had indicated that he used the P2P programs to search for pornography, but indicated that he had not been looking for child pornography. Weinmaster testified that Mucia indicated that if he saw child pornography, he deleted it. He also testified that a P2P user can conduct a batch download, highlighting a long block of items and downloading them without reading filenames first.

On cross-examination, Weinmaster testified that the four files he located which had been saved on either of the computers were the four videos of which a portion was played for the court and that everything else either was located in the recycle

bin or was indicated only through residual evidence of having been accessed at some point in time. He testified that the four videos he initially identified through hash values, leading to the search warrant and seizure of the computers, were not on the computers after he seized them. When asked to confirm that he found "no evidence of them anywhere" after seizing the computers, he acknowledged there was "[n]one."

Mucia testified in his own defense. He acknowledged installing and using P2P software on his computers to obtain music, movies, and pornography. He testified that he never intentionally obtained child pornography and never searched for child pornography. He acknowledged that he had, on occasion, obtained images or videos that he suspected were child pornography, but he testified that when this happened, he had deleted the files because he "didn't want anything to do with child pornography." He testified that he had searched for "'teen porn'" in an attempt to locate pornography involving girls that were ages 19 to 24.

Mucia testified that he had engaged in "'batch downloading'" of files, during which he downloaded a large number of files and then returned later to "see what it was."

Mucia testified that he was unaware that there was any child pornography on his computers.

On cross-examination, Mucia testified that downloaded files had to be opened to be able to see their content. He acknowledged seeing content in 2011 that he believed was child pornography. He agreed that the titles of files discovered by Weinmaster were consistent with child pornography.

On cross-examination, Mucia acknowledged that it was "possible" that he had visited a Web site related to "Preteen Models and Young Models" in September 2011, but testified that he was not "aware of" it. He testified that it was possible he had "click[ed] on a link of a link, but when — if [he] did go there, [he] would immediately get out, but [he] wasn't intending to go there."

Mucia also presented evidence from another computer forensics expert who had conducted a forensic examination of the computers in this case. The expert testified that he was often called upon to search for evidence of a user's intent. He

testified that in doing so, he looked for the overall context in which data resides, including how organized any child pornography might be, whether it is relabeled or put into subfolders and subdirectories, and whether it is saved on external drives or encrypted into hidden areas. He testified that in this case he found no signs of any organization, no encryption, and no external copies or storage.

Mucia's expert testified that "'teen porn'" is a common search term for pornography that would be age appropriate for someone Mucia's age.

Mucia's expert testified that his analysis of the computers and the evidence was consistent with Mucia's denial of having knowingly possessed child pornography. He testified that "searches for adult pornography were conducted, and in casting this large net across a body of water of unknown material . . . the unintended consequences of child pornography existed and . . . most of it had been deleted."

On cross-examination, Mucia's expert acknowledged that there was evidence of child pornography on the computers. In fact, he testified that he located two videos consistent with child pornography on one of the computers that Weinmaster had not found.

After the bench trial, the court found that the State had met its burden of proof and found Mucia guilty of knowingly possessing child pornography. The court sentenced Mucia to 3 years' probation. This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Mucia has assigned two errors. First, he asserts that the State failed to adduce sufficient evidence to demonstrate that he "knowingly" possessed child pornography. Second, he asserts that the district court erred in receiving into evidence the four videos identified by Weinmaster but not actually found on his computers.

IV. ANALYSIS

1. Knowing Possession

[1] Mucia was charged with possession of child pornography under § 28-813.01. That statute provides that "[i]t shall be

unlawful for a person to *knowingly* possess any visual depiction of sexually explicit conduct . . . which has a child . . . as one of its participants or portrayed observers." (Emphasis supplied.)

On appeal, as at trial, Mucia does not argue that there was insufficient evidence to establish that he had possessed child pornography or that child pornography was found on his computers. Rather, he focuses his argument on asserting that the State failed to sufficiently demonstrate that his possession was knowing. He argues that "[t]he State failed to present evidence to refute Mucia's and [his expert's] testimony that Mucia received the child pornography unintentionally while conducting batch downloads of legal adult pornography and that he was not in knowing possession of it." Brief for appellant at 7.

[2-4] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: 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. *State v. Hansen*, 289 Neb. 478, 855 N.W.2d 777 (2014). See, also, *State v. Schuller*, 287 Neb. 500, 843 N.W.2d 626 (2014). The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id*. A conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011).

[5-7] On appeal, appellate courts give penal statutes a sensible construction, considering the Legislature's objective and the evils and mischiefs it sought to remedy. See *State v. Knutson*, 288 Neb. 823, 852 N.W.2d 307 (2014). Absent a statutory indication to the contrary, we give words in a statute their ordinary meaning; but we strictly construe penal statutes and do not supply missing words or sentences to make clear that which is indefinite or not there. See *id*.

Ambiguities in a penal statute are resolved in the defendant's favor. *Id*.

We have been unable to locate any prior cases in Nebraska where either the Nebraska Supreme Court or this court have had occasion to make a determination about whether the term "knowingly" as used in § 28-813.01 requires a showing that the defendant had the specific intention of possessing child pornography or merely the general intention of possessing material that is, in fact, child pornography, and the parties have cited us to no authority on point. Nonetheless, we find that the Nebraska Supreme Court's discussion in *State v. Schuller, supra*, sheds some light on the subject.

In *State v. Schuller, supra*, a defendant was convicted in a bench trial of possession of child pornography under § 28-813.01. The Supreme Court addressed whether the term "possess" in § 28-813.01 included constructive possession, as well as actual possession, and concluded that constructive possession was included in the statute's prohibition. The evidence in that case did not create an appealable issue concerning whether the defendant had knowingly possessed the child pornography at issue, as the uncontested evidence demonstrated that the defendant had searched the Internet for child pornography, had downloaded child pornography, had watched child pornography, and had then deleted the child pornography; the defendant had engaged in this behavior several times. Thus, the Supreme Court noted that the evidence was sufficient to support finding that the defendant had knowingly possessed child pornography.

The Supreme Court addressed the defendant's argument that he had not possessed the child pornography files at issue because he had merely viewed them. In rejecting this argument, the Supreme Court distinguished the factual context of the case from a hypothetical scenario in which an office worker intentionally seeks out child pornography and views and manipulates child pornography images, and then an innocent coworker who happens to go into the office sees the images on the computer screen. The Supreme Court noted that in the hypothetical scenario, the innocent coworker would not have affirmatively sought out the images and had not had the

ability to control or manipulate them, and that therefore, the coworker would not have knowingly possessed them.

The Supreme Court concluded that the defendant in *State v. Schuller*, 287 Neb. 500, 843 N.W.2d 626 (2014), had not merely viewed the child pornography files at issue. "Instead, he repeatedly searched for, downloaded, viewed, and then deleted child pornography. He did this intentionally and with the specific purpose to do so, and he used file-sharing software to achieve his ends. This constitutes knowing possession—not mere viewing." *Id*. at 514, 843 N.W.2d at 636.

The Supreme Court also noted that if a person legally browses adult pornography and mistakenly clicks on a link leading him to a child pornography site, which he immediately closes, the person would not be guilty of knowingly possessing child pornography. *State v. Schuller, supra*. The Supreme Court noted that, even though in such a situation child pornography would be downloaded to a computer's "'cache'" folder as a temporary Internet file, the person would not have downloaded the files knowingly or constructively possessed them. *Id*. at 514, 843 N.W.2d at 636.

[8] The Supreme Court's discussion in *State v. Schuller, supra*, is illustrative and suggests that knowingly possessing child pornography, as prohibited by § 28-813.01, requires a specific intention to possess child pornography. The Supreme Court's emphasis on the defendant in that case having acted "intentionally and with the specific purpose" to locate and view child pornography is more consistent with a specific intent requirement than a general intent to possess files that, unbeknownst to the defendant, turn out to be child pornography.

We thus agree with Mucia that § 28-813.01 requires sufficient proof that he had the specific intent to possess child pornography, and not merely a general intent to download files that, unbeknownst to him, turned out to be child pornography.

In this case, the trial court did not make any specific findings about whether it was applying a specific or general intent requirement to the term "knowingly." After counsel made closing arguments, the court inquired whether Mucia's engaging in batch downloads knowing that batch downloads could

result in illegal content being retrieved would be sufficient to demonstrate knowing possession, and Mucia's counsel argued to the court that a specific intent would be required. The court then took the matter under advisement, and when the court announced its verdict, the court did not make a specific finding on the relative intent required, but it did note that it had considered the arguments of counsel and had concluded that the State met its burden of proof. The record on appeal does not include the written verdict of the court.

[9,10] A trial judge sitting without a jury is not required to articulate findings of fact or conclusions of law in criminal cases. *State v. Franklin*, 241 Neb. 579, 489 N.W.2d 552 (1992). Further, it has long been the law in Nebraska that in a jury-waived criminal trial, the trial judge is presumed to be familiar with and to have applied the proper rules of law, unless it clearly appears otherwise. See *State v. Tucker*, 278 Neb. 935, 774 N.W.2d 753 (2009); *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003); *State v. Franklin, supra*; *State v. Cowan*, 204 Neb. 708, 285 N.W.2d 113 (1979).

[11,12] In such a case, the conviction will be affirmed if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. See *State v. Keup, supra*. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id*. Thus, the question we must resolve, in determining whether there was sufficient evidence to support the court's conviction in this bench trial, is whether the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support a conclusion that Mucia intentionally possessed child pornography.

Although we acknowledge that the amount of child pornography found on Mucia's computers was slight, we nonetheless conclude that the conviction must be affirmed. Viewed in a light most favorable to the State, the evidence adduced at trial indicated that the four videos initially identified by Weinmaster as being on Mucia's computer and available for downloading by other P2P users had been present on Mucia's

computer at one point in time, even though they were no longer present when the computers were seized. Those four videos had file names including terms such as "11 yo FUCK!," "pedo," "reelkiddymov underage illegal lolita daughter incest," and "pthc." Weinmaster testified that each was a video file depicting children engaged in sexual conduct, including prepubescent females and males engaged in masturbation and sexual penetration.

The evidence, viewed and construed most favorably to the State, indicated that four other video files were located in a specific user account, which had to be specified as a download location and would not have automatically been created through the P2P program's setup, and that the location of files found on the computers required a series of steps to download the P2P program, install it, and set it up and specify the download location.

The evidence, viewed and construed most favorably to the State, indicated that P2P software programs on the computers included data files and tracked activity showing a history of files consistent with child pornography, including temporary files and thumbnail images. The files included terms consistent with child pornography, such as "LS models" and "p-t-h-c," and included phrases such as "rubbing eight y-o to orgasm" and "PTHC, five-year-old Kate, dad, ecstasy, hyphen, Katie . . . getting a mouthful of my cum." The evidence indicated that these files were accessed and downloaded.

Although the State was unable to adduce direct evidence that Mucia intentionally sought out child pornography files and although Mucia presented evidence that he had engaged in batch downloads that might have inadvertently returned child pornography files, the evidence circumstantially supports a conclusion that Mucia knowingly possessed child pornography. The question presented on appeal is not whether it would have been reasonable for the finder of fact to have reached a different conclusion, but whether any rational finder of fact could have reached the conclusion that was reached by the trial court. Viewed in a light most favorable to the State, the circumstantial evidence supports a conclusion that child pornography files had to be selected from P2P searches to be

downloaded and some of the files were downloaded to a specific location that required specific steps by the user that a fact finder could find inconsistent with Mucia's claim of inadvertence or accidental possession.

On appeal, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. *State v. Hansen*, 289 Neb. 478, 855 N.W.2d 777 (2014). See, also, *State v. Schuller*, 287 Neb. 500, 843 N.W.2d 626 (2014). The relevant question for us is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id*. Even though the evidence adduced in this case was such that a rational trier of fact could have accepted Mucia's assertion that his possession was only inadvertent or reckless, it was also such that a rational trier of fact could have concluded that it was knowing. Because we do not reweigh the evidence or resolve such conflicts, we find the evidence sufficient to support the conviction, and we find no merit to Mucia's assignment of error.

2. Admission of Videos

Mucia also asserts that the district court erred in admitting into evidence four videos. The videos were the four files initially identified by Weinmaster through the presence of hash values consistent with child pornography and which Weinmaster testified were not located on the computer after it was seized and searched.

Mucia argues on appeal that the State failed to demonstrate that the videos were true and accurate copies of any file that had actually ever been on his computers, because the only connection between the videos and his computers was the testimony regarding hash values.

The State argues on appeal that Mucia failed to preserve any objection to the admission of the video files, because although he did object to their admission into evidence, he failed to specify any grounds for the objection. See *State v. Muse*, 15 Neb. App. 13, 721 N.W.2d 661 (2006) (to preserve claimed error in admission of evidence, litigant must make timely

objection which specifies ground of objection and may not assert different ground on appeal).

In this case, Mucia's objection at trial did not specify any ground for the objection. It is not apparent from the record that his objection was based on the reliability of hash value evidence or based on asserting that the videos were not true and accurate copies of videos that have ever appeared on the computer.

Indeed, as noted above, Mucia's defense at trial—specifically indicated to the trial court before any testimony was received—was unrelated to any challenge to whether child pornography or any particular child pornography had been on Mucia's computer or possessed by him. Mucia's defense was entirely premised on challenging whether his possession was "knowing." To the extent that Mucia did not challenge the State's assertion that he actually possessed child pornography, it is hard to discern how admission of these video files could have prejudiced Mucia. Moreover, there was other evidence presenting graphic depictions of the videos that was admitted without objection; and there was substantial evidence of other child pornography on Mucia's computers that was admitted without objection.

We find no merit to Mucia's assertion that the court erred in admitting the video files. Mucia did not specify a basis for objecting to the files' admission and thus waived the right to assert the basis for objecting which was being asserted on appeal. Moreover, any error in admission would have been harmless in the context of this prosecution.

V. CONCLUSION

We find no merit to Mucia's assignments of error, and we affirm.

AFFIRMED.

State of Nebraska on behalf of Dawn M., a minor child, appellee, v. Jerrod M., appellee, and Amber M., appellant.

861 N.W.2d 755

Filed April 7, 2015. No. A-14-607.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Child Custody.** In addition to the statutory factors relating to the best interests of the child, a court making a child custody determination may consider matters such as the moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension, regardless of chronological age, and when such child's preference is based on sound reasons; and the general health, welfare, and social behavior of the child.
3. **Modification of Decree: Child Custody: Evidence: Time.** Evidence of a custodial parent's behavior during the year or so before the hearing on the motion to modify is of more significance than the behavior prior to that time. The focus is on the best interests of the child now and in the immediate future, and how the custodial parent is behaving at the time of the modification hearing and shortly prior to the hearing is therefore of greater significance than past behavior when attempting to determine the best interests of the child.
4. **Judgments: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
5. **Evidence: Appeal and Error.** Where 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 court heard and observed the witnesses and accepted one version of the facts rather than another.
6. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Howard County: Karin L. Noakes, Judge. Affirmed.

James A. Wagoner for appellant.

Charles R. Maser for appellee Jerrod M.

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

PIRTLE, Judge.

INTRODUCTION

Amber M. appeals the custody determination, made by the district court for Howard County, which awarded primary physical custody of the minor child, Dawn M., to Jerrod M., subject to parenting time as provided in the parenting plan. The court also ordered Amber to pay child support to Jerrod and denied Amber's application to move out of the State of Nebraska with Dawn. For the reasons that follow, we affirm.

BACKGROUND

Dawn was born in November 2006 and shares a last name with her mother, Amber. Dawn's father, Jerrod, was not aware of Dawn's birth until a year or two later, when he was served with notice that he was named as her father in a paternity case. Jerrod has a criminal history and has been incarcerated for most of Dawn's life. Amber also has a criminal history, but has been incarcerated only for short periods of time.

Janet S., Amber's mother, provided a home and daily care for Dawn for most of Dawn's life. Amber resided with Dawn and Janet for periods of time, but not continuously. In the summer of 2012, Amber contacted Lori P., Jerrod's mother, to see if she would take care of Dawn, and Dawn was removed from Janet's home. Dawn spent the summer of 2012 and the 2012-13 school year with Lori at her home in Smith Center, Kansas. In September 2012, Amber signed a consent form giving Lori and her husband "physical care" of Dawn and the authority to consent to "any medical, dental, surgical, emergency treatment and / or [the] release of medical information" related to Dawn. Dawn returned to Janet's home with Amber after the end of the 2012-13 school year in Smith Center. Dawn's school records indicate she struggled in some areas in school in Smith Center and noted areas where she needed to improve.

In August 2013, Dawn began living with Jerrod, and on August 20, a temporary order was entered granting Jerrod temporary custody. Dawn has resided with Jerrod since that

time. Jerrod filed a motion to modify custody, parenting time, and child support on August 21. During the 2013-14 school year, Dawn attended Banner County School. She demonstrated some improvement, but had some trouble in certain areas, and Jerrod decided to hold her back to repeat the first grade.

In January 2014, Amber moved to Riverdale, Utah, to live with her boyfriend, who is now her fiance. Amber filed a complaint to modify on January 13, and she filed a request to move out of the state with Dawn on February 3. She had visits with Dawn 5 to 10 times at Janet's home between September and December 2013, and she has not seen Dawn in person since December 2013. Amber has missed scheduled visits, but she has spoken with Dawn on the telephone.

The parties' complaints regarding custody, child support, and parenting time, and Amber's request to move out of the state, were addressed at trial on June 2, 2014. The parties stipulated that there had never been a permanent order establishing custody or parenting time and that the trial was held for that purpose. The court was also tasked with deciding whether to modify the child support order and, if Amber was awarded custody, whether she would be allowed to move out of the state with Dawn.

The court found that neither parent had been consistently present in Dawn's life, but that Jerrod has had day-to-day contact with her and has provided consistent care for her for the 10 months preceding the hearing. The court was "greatly concerned" with Jerrod's past criminal history, especially his convictions for assaultive behavior. However, the court found there was no evidence that indicated Dawn had been abused or placed in a dangerous situation since she was placed with Jerrod. The court found that Jerrod was taking the appropriate steps toward stability and providing for Dawn, including maintaining steady employment and providing for her physical care and educational needs. Ultimately, the court found it was in Dawn's best interests that Jerrod be awarded custody, subject to Amber's parenting time as set forth in the parenting plan. The court also ordered Amber to pay child support in the amount of $71 per month starting July 1, 2014. The

court denied Amber's motion to move Dawn out of the State of Nebraska.

ASSIGNMENTS OF ERROR

Amber asserts the court abused its discretion in awarding custody to Jerrod. Amber also asserts the district court erred in failing to make any specific findings that Dawn can be adequately protected from harm and in failing to impose any limits reasonably calculated to protect Dawn, because Jerrod was previously convicted of a charge of domestic assault. Amber asserts the court erred in denying her request to move out of the State of Nebraska with Dawn and in devising a parenting plan that she deems unworkable.

STANDARD OF REVIEW

[1] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Collins v. Collins*, 21 Neb. App. 161, 837 N.W.2d 573 (2013).

ANALYSIS

Jerrod's Assault Conviction.

Amber asserts the trial court erred by granting custody to Jerrod without making specific findings pursuant to Neb. Rev. Stat. § 43-2932 (Reissue 2008), as he had been previously convicted of domestic assault. She asserts the court's implicit findings that granting custody to Jerrod was appropriate does not satisfy the statute's requirement of explicit findings. She referred to Jerrod's previous charge for domestic assault against his estranged wife and asserted that the trial court failed to make written findings that Dawn would be adequately protected in Jerrod's care.

Neb. Rev. Stat. § 43-2929 (Cum. Supp. 2014) states that a parenting plan shall serve the best interests of the child pursuant to Neb. Rev. Stat. §§ 42-364, 43-2923, and 43-2929.01 (Cum. Supp. 2014). Section 43-2929(1)(a) and (b)(ix) provides that the parenting plan should assist in developing a restructured family that serves the best interests of the child by accomplishing the parenting functions and should include

"[p]rovisions for safety when a preponderance of the evidence establishes child abuse or neglect, domestic intimate partner abuse, unresolved parental conflict, or criminal activity which is directly harmful to a child."

Section 43-2932 provides guidance for when limitations should be included in the parenting plan for the protection of the child or the child's parent. Section 43-2932(1)(b) states that if a parent is found to have engaged in any activity specified in subsection (1)(a), such as domestic intimate partner abuse, then "limits shall be imposed that are reasonably calculated to protect the child or child's parent from harm." Section 43-2932(3) states that if a parent is found to have engaged in any activity specified in subsection (1), the court "shall not order legal or physical custody to be given to that parent without making special written findings that the child and other parent can be adequately protected from harm by such limits as it may impose under such subsection."

Section 43-2923(2) states that when a preponderance of the evidence indicates domestic intimate partner abuse, the best interests of the child require a parenting and visitation arrangement that provides for the safety of the "victim parent."

In the present case, the domestic abuse was between Jerrod and a third party. While it is true that Jerrod was convicted of domestic assault, the conviction was the result of an incident with Jerrod's estranged wife. There is no evidence that the incident involved Amber. Section 43-2932(3) refers to protection of "the child and other parent" when a parent has engaged in domestic abuse. Accordingly, we conclude that § 43-2932 applies to instances where domestic abuse occurred between the parents of the child or children at issue, where it is necessary to ensure that there is no future domestic abuse to the "other parent."

If there has been no domestic intimate partner abuse between the parents, there is no reason to include provisions to protect the child or the other parent. There is no allegation that Amber was abused or that there was any violence involved when transferring the child for visits. Accordingly, § 43-2932 is inapplicable, and it was not necessary for the court to make specific written findings pursuant to the statute

before awarding Jerrod custody. This assignment of error is without merit.

Award of Custody to Jerrod.

Amber asserts the trial court erred in awarding custody of Dawn to Jerrod. According to § 43-2923(1), the best interests of the child require a parenting arrangement which provides for a child's safety, emotional growth, health, stability, and physical care and regular and continuous school attendance and progress. In determining custody and parenting arrangements, the court shall consider the best interests of the minor child, which shall include, but not be limited to, consideration of the foregoing factors listed in § 43-2923(6):

> (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
>
> (b) The desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desire and wishes are based on sound reasoning;
>
> (c) The general health, welfare, and social behavior of the minor child;
>
> (d) Credible evidence of abuse inflicted on any family or household member . . . and
>
> (e) Credible evidence of child abuse or neglect or domestic intimate partner abuse.

[2] In addition to the statutory factors relating to the best interests of the child, a court making a child custody determination may consider matters such as the moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension, regardless of chronological age, and when such child's preference is based

on sound reasons; and the general health, welfare, and social behavior of the child. *Collins v. Collins*, 21 Neb. App. 161, 837 N.W.2d 573 (2013).

Amber asserts that in light of Jerrod's history of criminal activity and his lack of involvement in Dawn's life prior to 2013, Jerrod is not the proper party to have custody of Dawn. She asserts additional facts in support of her position, including the following: Jerrod did not acknowledge paternity until a case was filed against him in 2007, and Dawn does not share his last name. Jerrod did not regularly pay child support after it was ordered in November 2008. While Dawn was in Amber's custody, three attempts to facilitate visitation with Jerrod were unsuccessful. At the time of trial, Jerrod did not have a driver's license as a result of a driving under the influence conviction in 2011. Amber asserts the trial court disregarded these facts and other "disabilities" which would inhibit Jerrod's ability to provide for Dawn in the future.

[3] In *Schrag v. Spear, ante* p. 139, 849 N.W.2d 551 (2014), *reversed on other grounds* 290 Neb. 98, 858 N.W.2d 865 (2015), this court considered the behavior of a parent in a case where modification of child custody was at issue. We noted that Nebraska courts have held that evidence of a custodial parent's behavior during the year or so before the hearing on the motion to modify is of more significance than the behavior prior to that time. *Id*. The focus is on the best interests of the child now and in the immediate future, and how the custodial parent is behaving at the time of the modification hearing and shortly prior to the hearing is therefore of greater significance than past behavior when attempting to determine the best interests of the child. *Id*. See, also, *Hoins v. Hoins*, 7 Neb. App. 564, 584 N.W.2d 480 (1998). Although this case is not a modification, as permanent custody had not been previously decided, the standard for determining a child's best interests remains the same in an initial custody determination. § 43-2923. See, also, *Schrag v. Spear, supra*; *Collins v. Collins, supra*.

Amber's recitation of the above facts is supported by the record. However, the record also shows that Jerrod had made significant changes in his life and demonstrated a willingness

to provide for Dawn in the months preceding the custody hearing. It is true that he was incarcerated off and on throughout Dawn's life and that he was not involved in her day-to-day care until he gained temporary custody in 2013. However, the record shows he was not made aware of his paternity until he was served in prison with notice of a paternity case filed against him. Jerrod testified that his driver's license had been revoked, but that he was eligible at the time of the hearing to get it reinstated. The record shows that since August 2013, he has provided a safe and stable home and cared for Dawn's educational, emotional, and physical needs. He moved from St. Paul to Harrisburg, Nebraska, to pursue a job opportunity and is the head foreman at a mill. Through this job, Jerrod was given housing for his family free of charge in a five-bedroom home and was scheduled to become eligible for insurance benefits after 6 months of employment.

Prior to this case, Dawn was in Amber's custody, but a significant portion of her life was spent with her maternal and paternal grandmothers. The record shows that Amber resided with Dawn at times, but that at other times, she was left in the care of Janet, Amber's mother, or Lori, Jerrod's mother. Amber asked Lori to care for Dawn in Smith Center from September 2012 to June 2013, because Amber was having problems with the father of her youngest two children. During that time, Amber provided Lori and her husband a power of attorney to make decisions on Dawn's behalf. Jerrod testified that he had some contact with Dawn while she resided with his mother. Dawn was nervous at first, but then warmed up to him. Jerrod testified that he was told numerous times by Amber and her family that he was not welcome in Dawn's life. Janet testified that Jerrod was, in fact, welcome, but that he had not taken advantage of opportunities to see Dawn. However, Janet's credibility was brought into question when she denied making a "Facebook" entry stating that she had "raised that girl [Dawn] from birth," and a copy of the alleged entry was entered into the record.

After Jerrod gained temporary custody of Dawn in August 2013, Amber did not attend all of the scheduled visitation times. Both Amber and Jerrod testified that there were times

Amber was scheduled to pick up Dawn for visits, but that she failed to do so. Amber's last visit with Dawn was in December 2013, and since that time, she had only had telephonic contact with her. Amber asserts that Jerrod caused the visitation lapses between November and December 2013, because he moved from St. Paul to Harrisburg. However, the record shows that in January 2014, Amber moved with her two youngest children, Dawn's half siblings, to Utah to live with her fiance, a distance far more likely to significantly affect visitation than a move within the State of Nebraska.

Jerrod testified that Dawn got behind in her schoolwork while she resided in St. Paul and that she had made marked improvement while attending Banner County School after moving to Harrisburg. Notwithstanding that improvement, Dawn was to be held back in first grade for the 2014-15 academic year. The trial court found that Jerrod had made a "difficult and mature decision" which demonstrated a commitment to Dawn's education and showed that he was acting in her best interests.

[4,5] A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Collins v. Collins*, 21 Neb. App. 161, 837 N.W.2d 573 (2013). Where 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 court heard and observed the witnesses and accepted one version of the facts rather than another. *Id*. It is clear that the court considered the factors involved in determining parental fitness and the child's best interests when deciding the issue of permanent custody. We find the trial court did not abuse its discretion in granting custody to Jerrod.

Removal From State of Nebraska.

[6] Amber asserts the trial court abused its discretion in denying her motion to remove Dawn from the State of Nebraska to live with her, her fiance, and Dawn's younger half siblings in Utah. Having found that the trial court did not err in finding Jerrod was the appropriate parent to have custody of Dawn, we need not address this assignment of error.

An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Carey v. City of Hastings*, 287 Neb. 1, 840 N.W.2d 868 (2013).

Parenting Plan.

Amber asserts the parenting plan created by the court is "unworkable" and punishes her for moving out of the state. She states the court gave her "use-it-or-lose, alternating weekend visits when the court knows the distance barriers and lack of license to transport by [Jerrod]." Brief for appellant at 14. She also states that the plan is contrary to the Parenting Act, but does not provide any legal authority or reasoning to support her conclusion.

The parenting plan Amber proposed at the custody hearing allowed for extended summer visitation each year from June 1 to August 1, with extended time over the holidays. Jerrod testified that the proposed plan was reasonable and that he would be open to Amber's receiving the same proposed visitation time if he were granted custody. He also testified that he was willing to meet Amber halfway between Harrisburg and Amber's residence in Utah to transfer Dawn. Jerrod testified that Dawn would like to play softball and that he would like her to be able to do so during the summer holidays, if it does not interfere too much with summer parenting time.

In the parenting plan, the trial court ordered a visitation schedule which consists of alternating weekends, alternating holidays, and an extended time period over the summer, which is typical of many parenting plans. The court's plan provides that Christmas is defined as the time after the child is excused from school until December 27. The New Year's holiday begins on December 27 and ends the evening before Dawn is scheduled to return to school. This allows both parents to have an extended period with the child during the holiday season. The court-ordered plan granted Amber 6 weeks of parenting time during the summer, which does not greatly differ from the approximately 8 weeks of parenting time she provided for in the proposed plan.

Presumably, Amber's assessment that the plan is "unworkable" stems from her inability to see Dawn on alternating weekends, because Amber resides in Utah. The court acknowledged that Amber's residence in Utah would make it unlikely that she would exercise her weekend parenting time on a regular basis, yet it still provided the possibility for her to use that time if she were so inclined. The record shows that Amber's mother and stepfather reside in St. Paul and that the father of her two youngest children presumably still resides in or around Kearney, Nebraska. These factors, in addition to Dawn's continued presence in Nebraska, may make Amber more likely to return to Nebraska occasionally on weekends. The ordered schedule actually allows Amber the potential for more time with Dawn during the school year than her own proposed plan, which did not allow for weekend visitation during the school year, except on holidays.

A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Collins v. Collins*, 21 Neb. App. 161, 837 N.W.2d 573 (2013). Upon our review of the record, we find the trial court did not abuse its discretion in creating the ordered parenting plan.

CONCLUSION

After our de novo review of the record, we conclude that the trial court did not abuse its discretion in granting custody to Jerrod and that the court was not obligated to make specific written findings that Dawn and Amber would be adequately protected from harm. Having found that granting custody in favor of Jerrod was appropriate, we need not address Amber's assignment of error regarding the removal of Dawn from the State of Nebraska. We find the trial court did not abuse its discretion in the creation of the ordered parenting plan.

AFFIRMED.

Evan L. Bohnet, appellee, v. Katherine A. Bohnet, now known as Katherine A. Balerud, appellant.

862 N.W.2d 99

Filed April 14, 2015. No. A-14-492.

1. **Child Custody: Visitation: Appeal and Error.** Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial judge, and although reviewed de novo on the record, the trial judge's determination will normally be affirmed absent an abuse of discretion.
2. **Judgments: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result.
3. **Modification of Decree: Appeal and Error.** Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion.
4. **Child Custody.** Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.
5. **Modification of Decree: Child Custody: Proof.** The party seeking modification of a decree of dissolution bears the burden of showing a material change of circumstances affecting the best interests of a child.
6. **Modification of Decree: Child Custody.** Whether considering a modification of custody or a proposed removal from the state, the best interests of the children are the paramount considerations.

Appeal from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Affirmed.

Terrance A. Poppe and Andrew K. Joyce, Senior Certified Law Student, of Morrow, Poppe, Watermeier & Lonowski, P.C., L.L.O., for appellant.

Peter C. Wegman and Jesse S. Krause, of Rembolt Ludtke, L.L.P., for appellee.

Irwin, Riedmann, and Bishop, Judges.

Bishop, Judge.

The only issue raised in this modification of custody appeal is whether the analysis required when a parent seeks to relocate with a minor child from Nebraska to another state also applies to intrastate moves. Specifically, does *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), apply

when a move within Nebraska creates a distance of 148 miles between parental households and therefore requires modification to an existing parenting plan. We conclude that while some of the longer distance moves within the state might benefit from a more thorough removal analysis as set forth in *Farnsworth*, we decline to require it until such time as the Legislature or our Supreme Court directs us to do so. Further, finding no abuse of discretion in the district court's modification order, we affirm.

BACKGROUND

Katherine A. Bohnet, now known as Katherine A. Balerud (Katie), and Evan L. Bohnet are the parents of Madelynn Bohnet (Maddie), born in 2008. Katie became pregnant with Maddie at age 16 while a junior in high school in Columbus, Nebraska. After graduating from high school in 2009, Katie commenced her college education at the University of Nebraska-Lincoln. Evan had graduated from Columbus High School in 2008, and he also attended the University of Nebraska-Lincoln. Katie and Evan were married on July 24, 2010; Evan filed for divorce in June 2011. The parties both signed a property settlement agreement and parenting plan, and on September 15, the Lancaster County District Court entered an order dissolving their marriage. Legal custody of Maddie was awarded jointly to the parties, and physical custody was awarded to Evan subject to Katie's reasonable parenting time. The parenting plan agreed upon at that time provided for a "9/5 parenting time" schedule, which gave Katie parenting time with Maddie every other Thursday afternoon to the following Monday morning, and during the "off" weeks, parenting time from Thursday afternoon until Friday morning. The parties also agreed to alternate weeks during the summer.

Upon Evan's graduation in May 2013 with a degree in "[s]econdary math" (grades 7 through 12), he accepted a teaching position in South Sioux City, Nebraska, about 148 miles away from Lincoln, Nebraska, where Katie still resided. On May 13, Katie filed a "Complaint for Modification of Decree and Praecipe," wherein she alleged a material and substantial change of circumstances had occurred since the entry

of the decree in that Evan had accepted a job in South Sioux City, that he was planning to move there, and that this would make it impossible for her to exercise her parenting time as set forth in the decree. Katie requested custody of Maddie, and she asked for orders pertaining to parenting time, child support, and attorney fees. Trial was held September 16, 17, and 20.

At trial, Evan testified that he looked for work in Lincoln but that nothing was available, so he gradually expanded his search radius and received the job offer from South Sioux City Community Schools. Evan claimed that he was offered the job in mid-April 2013 and that he talked with Katie about it the first week of May before signing a contract. At the time of trial, he was an "8th grade math teacher" earning $33,500 per year. Evan purchased a home in South Sioux City with help from his parents on the downpayment, and Maddie started kindergarten at Cardinal Elementary School (Cardinal) in South Sioux City, which school is located four to six blocks from Evan's home. Katie testified that Maddie's teacher at Cardinal is "wonderful" and that she did not have "any major concerns about the school in particular."

Katie testified that she hoped to graduate in December 2013 with a major in "special education mild/moderate secondary[, grades] 7 through 12." At the time of trial in September 2013, she was working as a paraeducator with students "who have severe and profound disabilities" at a Lincoln high school. Her hours were 8 a.m. to 3 p.m., Monday through Friday, and she was earning $12.95 per hour. Her hope was to secure a teaching position at the same high school in the next school year following the completion of her degree. Katie also worked part time at a golf course in North Bend, Nebraska, managed by her father. Her regular hours there were Thursdays from 4:30 to 8:30 p.m. and then occasionally on weekends. Maddie would accompany her to Columbus where Katie's mother would watch Maddie until Katie was done with work in North Bend.

Both parties and the witnesses who testified about their observations of Maddie all agreed in various complimentary words that Maddie is "[a]ctive, fun, funny, a ball of energy,"

"athletic," "bright," "easy to get along with," "popular," "outgoing," and "you can't help but love her" (Evan's testimony); is an "excited, happy, five-and-a-half-year-old [who] loves to be a helper," "loves to spend time outside," and is "very well behaved" (Katie's testimony); is "very happy" and loves Katie "[v]ery much" (testimony of a friend of Katie's family since 1990); "loves to spend time with [Katie,] depends on [Katie]," and is "healthy," "happy," and "well adjusted" (testimony of a friend of Katie's family for 16 years); is "very happy" and has a "[v]ery loving, very positive" relationship with Katie (testimony of a relative of Katie's by a former marriage who is a fourth grade teacher at Pyrtle Elementary School (Pyrtle) in Lincoln); is "happy, healthy and well adjusted most of the time" (testimony of Katie's mother); and is "a happy, healthy, well-adjusted girl," and that Maddie and Evan have a "very loving relationship," and that "Maddie loves [Evan]" (testimony of Evan's sister). The sum of the testimony reflects a happy, well-adjusted child with a healthy relationship with both parents.

A witness from the Nebraska Department of Education, Dean Folkers, was called by Katie to testify about data collected from Nebraska's public schools and to engage in comparisons between Pyrtle in Lincoln (where Katie wished to enroll Maddie due to proximity to her home) and Cardinal in South Sioux City. In one example, Folkers explained that 86.49 percent of the students who took the Nebraska State Accountability third grade mathematics test at Pyrtle met or exceeded the expectation as compared to 60.34 percent at Cardinal. The poverty percentage at Cardinal was 67.60 percent, and at Pyrtle it was 23.68 percent. Folkers explained that the poverty percentage is based upon a student's eligibility for free or reduced lunch. Folkers also discussed "adequate yearly progress," which he explained is a designation stemming from the "No Child Left Behind" requirements. As part of those requirements, schools must meet certain criteria to receive funds for extra support in reading and other learning areas. Schools must meet a benchmark established by the state, and Folkers testified that both schools met this benchmark, except that Cardinal's special education students did not meet the

benchmark established for such students. Folkers stated that with regard to reading and mathematics improvement scores, Cardinal had improved in every category from 2010-11 to 2011-12; whereas, Pyrtle had declined in 5 of the 10 categories in that same year.

A licensed psychologist employed by the university began counseling Katie in February 2011. She largely discussed Katie's need to develop "her internal sense of who she is . . . raising her self-confidence . . . and her self-esteem." The psychologist testified that Katie's "trajectory has been upward and strong . . . [h]er self-reflection and growth . . . has been very solid and I feel good about her progress and maturity." She did not have any concerns about Katie having custody of Maddie.

Dr. Lisa Blankenau, a licensed psychologist with a specialty in families, couples, and court evaluations for families, testified about the impact of moves on a parent's relationship with a child. Dr. Blankenau met with Katie only twice in July 2013 and once in August; she never met either Evan or Maddie. She was not asked to render an expert opinion with respect to custody in the pending case; rather, Katie's counsel elicited testimony about parenting schedules generally and the impact of decreased parenting time. Dr. Blankenau stated that she advocates for 10 days with one parent and 4 days with the other parent (10/4 schedule) or 9 days with one parent and 5 days with the other parent (9/5 schedule). She explained that it takes an adjustment period of 2 days before "real parenting occurs." Dr. Blankenau testified that if a parent had

> four or five days in a row, you'd have the first couple days of just adjustment and then after that, you'd be able to do real parenting: getting them on a schedule, doing some caretaking activities, doing other things besides just entertainment and fun things. And so that would make the parenting bond with both parents stronger and a less disruption to a child's life.

Dr. Blankenau testified that time with the child is important to develop a close bond and that if the distance "gets too far away," then it is hard to find that needed time. She did not

consider "Skype . . . an appropriate substitute for one-on-one parenting time," in particular with children of Maddie's age, because they do not have "the attention span to spend . . . much time on Skype." Also, "[Skype is] not a physical presence," and "[p]art of being a parent is being able to kiss and hug and love them and hold hands and just that physical touch that parents have . . . ." And based on studies, "without a strong bond with both parents, children . . . go one of two ways. They can be more aggressive and [act] out, or they can be more passive and develop more depressive like symptoms." Further, "[c]hildren with a strong bond with both parents tend to be more successful in their life overall. They . . . do better in school . . . have more educational goals . . . are more stable . . . are less likely to break . . . important rules like the law[, and are] less likely to have mental health issues." Dr. Blankenau stated that "[t]here is a definite difference between the two populations." Dr. Blankenau also testified generally about "alienation of affections," but did not address anything specific to the case at hand. On cross-examination, Dr. Blankenau was asked whether she had any other recommendations on how to make weekend parenting work besides Friday evening to Sunday evening, given that Evan lived in South Sioux City and Katie lived in Lincoln. Her response was, "Not with that distance. I don't know how else it would work."

Katie and Evan both testified about their relationship with Maddie, their activities, and why one location was better than the other. The evidence reveals two good parents, each with good intentions for themselves and for Maddie. Evan agreed in several instances that he could improve on his communication with Katie and expressed his intention to do so. And understandably, Katie was concerned about the reduced parenting time having a negative impact on her relationship with Maddie.

The district court entered its "Findings" on February 24, 2014, concluding that "a material and substantial change in circumstances requiring the modification of the previous decree" existed and that legal custody shall be awarded jointly, with physical custody awarded to Evan. Parenting time for Katie was modified to every other weekend from

Friday at 6 p.m. until Sunday at 6 p.m. Katie was to pick Maddie up in South Sioux City at the commencement of her parenting time; Evan was to pick her up in Lincoln at the conclusion of that parenting time. Katie was ordered to pay child support of $145 per month; this reflected a downward deviation from the $189 per month child support calculation in consideration of transportation expenses necessary for Katie to exercise her parenting time. Health insurance and medical costs were also addressed. An "Order" was entered the same day, and following a motion for new trial filed February 25, an amended order was filed April 30, which changed the transportation requirement to the parties meeting at a mutually agreed-upon location in Blair, Nebraska, at the commencement of Katie's parenting time, with Evan picking Maddie up from Katie's home at the conclusion of that parenting time. Katie timely appealed.

ASSIGNMENT OF ERROR

Katie's sole assignment of error is that the district court abused its discretion by awarding physical custody to Evan without applying the factors set forth in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), to determine if the move was in Maddie's best interests.

STANDARD OF REVIEW

[1,2] Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial judge, and although reviewed de novo on the record, the trial judge's determination will normally be affirmed absent an abuse of discretion. *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result. *Id*.

[3] Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion. *Garza v. Garza*, 288 Neb. 213, 846 N.W.2d 626 (2014).

ANALYSIS

The parties' September 15, 2011, divorce decree provided for joint legal custody, with physical custody of Maddie awarded to Evan. Katie's parenting time was based on the 9/5 schedule described earlier. Following the modification trial, the district court's February 24, 2014, order found that a material and substantial change in circumstances existed that required modification of the original decree. Although the district court did not change the legal and physical custody as previously ordered, it did modify Katie's parenting time from the 9/5 schedule to every other weekend from Friday at 6 p.m. until Sunday at 6 p.m. As a result, Katie's parenting time went from five overnights to two overnights in each 14-day period.

Referring to *Farnsworth, supra*, Katie argues that "Nebraska Courts have applied the *Farnsworth* removal factors in several cases where the distance moved by the removing parent was comparable or significantly less than [Evan's] 148 mile move currently before this Court." Brief for appellant at 17. Katie directs us to the following:

> *Keiser v. Hohenthaner*, A-11-590, 2012 WL 1869269 (Neb. Ct. App. May 22, 2012) ([r]emoval analysis applied to 5-10 mile move from Crofton[, Nebraska,] to Yankton, South Dakota); *Curtis v. Curtis*, 17 Neb. App. 230, 759 N.W.2d 269 (2008) ([r]emoval applied to 17.6 mile move from Falls City[, Nebraska,] to Big Lake, Missouri); *Ginter v. Ginter*, A-07-752, 2008 WL 373165 (Neb. Ct. App. Feb. 12, 2008) ([r]emoval analysis applied to 142 mile move from Nebraska to Iowa); and *State ex rel. Bach v. Keiper*, A-04-439, 2005 WL 41547 (Neb. Ct. App. Jan. 11, 2005) ([r]emoval analysis applied to 280 mile move from Chadron[, Nebraska,] to Denver[, Colorado]).

Brief for appellant at 17.

Katie argues that the underlying concern should be "the impact that the relocation has on the child, not whether arbitrary state lines are crossed," brief for appellant at 20-21, and that applying *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), to a 17-mile move as in *Curtis v. Curtis*, 17 Neb. App. 230, 759 N.W.2d 269 (2008), but not to a

220-mile move as in *McLean v. McLean*, No. A-08-879, 2009 WL 1270492 (Neb. App. May 5, 2009) (selected for posting to court Web site) (move from Ponca, Nebraska, to rural Brewster, Nebraska), produces "arbitrary and illogical results," brief for appellant at 21. We do not disagree that it may seem illogical to require the more extensive *Farnsworth* removal analysis in situations involving some of the short distances noted above simply because a state line has been crossed, but not require such an analysis when a greater intrastate distance is involved, such as in the present case. However, as Katie acknowledges, this court, in unpublished opinions, has declined to apply the *Farnsworth* removal analysis to significant moves within this state's border. Katie cites to *Houchin v. Houchin*, No. A-11-483, 2012 WL 882450 (Neb. App. Mar. 13, 2012) (selected for posting to court Web site), and *McLean, supra*. Katie nevertheless argues that the removal analysis in *Farnsworth, supra*, was "borrowed" from other states, such as New York, Massachusetts, and New Jersey, and that since "the Nebraska Supreme Court has not indicated whether its removal analysis should be applied to in-state moves, this Court should look to those states from which" *Farnsworth* was modeled. Brief for appellant at 18,19. As indicated previously, while some long-distance intrastate moves might benefit from a thorough *Farnsworth* analysis when considering custody and parenting time issues within the state, neither our Supreme Court nor the Legislature has made that the current state of the law, and therefore, we continue to decline to require the application of the *Farnsworth* analysis to intrastate moves and cannot say that the district court abused its discretion in failing to do so.

We would also note that in *McLaughlin v. McLaughlin*, 264 Neb. 232, 248-49, 647 N.W.2d 577, 592 (2002), the dissent touched on this issue of intrastate moves being handled differently than interstate moves, stating, "It is also true that the distance between Omaha and Huron, South Dakota, is not so great that it would absolutely preclude regular visitation; as the majority correctly notes, this distance is no greater than some intrastate relocations which would not require court approval."

[4-6] Until directed otherwise, the current law applicable to requests for modification of custody and/or parenting time that arise due to an intrastate move of a custodial parent would fall under the propositions of law generally found in custody modification cases, that being that ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000). Further, the party seeking modification of a decree of dissolution bears the burden of showing a material change of circumstances affecting the best interests of a child. *Id*. Whether considering a modification of custody or a proposed removal from the state, the best interests of the children are the paramount considerations in our determination. *Id*.

When considering Maddie's best interests, based upon the record before us as discussed in relevant part earlier, we cannot say that the district court abused its discretion in leaving custody as previously ordered and in modifying the parenting plan to accommodate the distance created by Evan's new teaching job in South Sioux City. Certainly, the decreased weekly parenting time for Katie is unfortunate given what appears to be a very healthy mother-child relationship. We are also mindful of Dr. Blankenau's compelling testimony regarding the impact of decreased parenting time on a parent's relationship with a child. However, even Dr. Blankenau had to admit that given the distance between the residences, other than the Friday to Sunday night parenting schedule, "I don't know how else it would work." Accordingly, the district court did not abuse its discretion in modifying the parenting plan to accommodate the distance between the parties' households.

CONCLUSION

The district court's February 24, 2014, modification order, as amended April 30, is affirmed.

AFFIRMED.

Clayton B. Schroeder, appellant, v. Maria A. Schroeder, now known as Maria A. Michaelis, appellee.

863 N.W.2d 491

Filed April 28, 2015. No. A-14-057.

1. **Contempt: Words and Phrases.** When a party to an action fails to comply with a court order made for the benefit of the opposing party, such act is ordinarily a civil contempt, which requires willful disobedience as an essential element. "Willful" means the violation was committed intentionally, with knowledge that the act violated the court order.
2. **Modification of Decree: Notice: Contempt: Pleadings.** Absent application and notice requesting modification, a trial court does not have the power to modify a divorce decree during the course of a contempt proceeding.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Reversed and remanded with directions.

Brandie M. Fowler and Matthew Stuart Higgins, of Higgins Law, for appellant.

C.G. "Dooley" Jolly, of Adams & Sullivan, P.C., L.L.O., for appellee.

Irwin, Riedmann, and Bishop, Judges.

Irwin, Judge.

This appeal involves a contempt action initiated by Maria A. Schroeder, now known as Maria A. Michaelis, resulting from her belief that her ex-husband, Clayton B. Schroeder, failed to abide strictly by the terms of a custody order entered by the district court. Below is a summary of the procedural and factual background of the case.

In 2006, the district court entered a decree of dissolution, dissolving the marriage between Maria and Clayton. The decree contained a custody order and parenting plan which was to govern the parties' actions as to their daughter, Alexis Schroeder, born in May 2004. Since the entry of the decree, there have been multiple modifications made to the original custody order and parenting plan. It is clear, simply from the number of times these parties have appeared in court requesting such modifications, that they do not communicate well

with each other and that they have a contentious relationship which hinders their ability to make decisions together regarding their daughter.

The current custody order and parenting plan contains the following provision:

> Both parties have further agreed that the minor child should have access to telephone contact with the non-possessory parent, and each parent should have the same degree of telephone access with the child. The parent with whom the child is staying at any one time shall assist the child in initiating calls to or receiving calls from the other parent, and shall not unreasonably interfere with such access. Telephone access shall be exercised by the non-possessory parent at reasonable times, and for reasonable durations, to take into account the child's school and extracurricular activity schedule, bedtime, and meals.

Clayton's compliance with this telephone schedule provision forms the basis of the current appeal.

In June 2013, Maria filed a motion for an order to show cause. In this motion, she alleged that Clayton had willfully failed to comply with the tenets of the telephone schedule provision and that he should be found by the court to be in contempt. Specifically, Maria alleged in her affidavit accompanying the motion:

> Despite the clear and unambiguous language of the [telephone schedule provision], [Clayton] steadfastly, arbitrarily and baselessly refuses to assist Alexis in the initiation and/or receipt of telephone calls with me. In fact, when [Clayton] is exercising his parenting time with Alexis, I rarely, if ever, am afforded the opportunity to speak with Alexis. As such, I often go multiple days without any communication whatsoever with Alexis.

A hearing was held on Maria's motion for an order to show cause. At this hearing, Maria testified that she regularly attempts to telephone Alexis at least two or three times when Alexis is with Clayton, that she often does not make contact with Alexis, and that if she does make contact, the telephone calls are very short in duration. Maria testified that

she believes her desire to speak with Alexis on the telephone every day that Alexis is with Clayton is "reasonable." To the contrary, Clayton testified that he believes Maria's telephone calls to Alexis are excessive, unreasonable, and place unnecessary stress on Alexis. In addition, he testified that he does not hinder Alexis' ability to speak with Maria, but, rather, leaves it up to Alexis to decide when she does and does not want to speak with Maria on the telephone.

After the hearing, the district court entered an order finding that Clayton is guilty of contempt of court for his failure to abide by the terms of the telephone schedule provision. The court indicated that it read the provision to provide each parent the right to reasonable contact with Alexis when she was in the care of the other parent. The court went on to find, "Reasonable contact . . . could be a daily contact. There's nothing wrong with a parent contacting their child on a daily basis when they don't have the child." In addition, the court's order finding Clayton in contempt also required the parties to have breakfast with each other and Alexis one time per month. The court indicated:

> During this breakfast, the parties are to act respectful [sic] to each other, each party is to tell one age appropriate joke, and have one age appropriate human interest story to discuss. The purpose of this is to demonstrate to the minor child that the two people the minor child loves the most can get along.

Clayton appealed from the district court's order. However, we dismissed this initial appeal as prematurely filed because Clayton had not been sentenced for his contempt conviction.

Upon our remand, the district court held a sentencing hearing where it sentenced Clayton to an "admonish[ment]" for his failure to comply with the telephone schedule provision. The court indicated that "[i]f there are no further violations of the Decree by [Clayton] within the next six months, the Contempt findings of this court shall be vacated." At this hearing, the court also indicated that it was going to continue to require the parties to participate in a monthly breakfast with each other and Alexis for "a period of three to four months."

Clayton has now filed a second appeal. In this appeal, he alleges that the district court erred in finding him in contempt of court for failing to abide by the terms of the telephone schedule provision and in ordering him to participate in monthly breakfasts with Maria and Alexis.

Clayton first alleges that the district court erred in finding him to be in contempt of court for his failure to abide by the tenets of the telephone schedule provision. Specifically, Clayton alleges that there was insufficient evidence to establish that he willfully disobeyed the tenets of the telephone schedule provision because such tenets were not "clear and unambiguous enough to put [him] on notice that his conduct would be in violation of [the court's order]." Brief for appellant at 17. Clayton's argument clearly has merit.

[1] When a party to an action fails to comply with a court order made for the benefit of the opposing party, such act is ordinarily a civil contempt, which requires willful disobedience as an essential element. *Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012). "Willful" means the violation was committed intentionally, with knowledge that the act violated the court order. *Id*. In her motion for a show cause order, Maria alleged that Clayton willfully violated the telephone schedule provision. However, this provision is not specific enough to provide either party with knowledge about exactly what was required of them. As a result, any violation of the provision on Clayton's part could not be intentional or willful.

A careful review of the language of the provision indicates that each parent was merely required to "assist the child in initiating calls to or receiving calls from the [nonpossessory] parent" and that each parent "shall not unreasonably interfere with such access." The provision does not contain a definition of what constitutes reasonable access, nor does it provide any indication of how often a nonpossessory parent should be permitted to speak with Alexis. Although the district court specifically found that daily contact with Alexis by the nonpossessory parent "could" be reasonable, this is not a specific requirement of the telephone schedule provision as it existed prior to the contempt hearing.

The evidence presented at the hearing revealed that Maria was able to speak with Alexis during her time with Clayton, just not as often as Maria would have liked. The evidence also revealed that the parties have very different ideas about what constitutes reasonable telephone access under the tenets of this provision. Given this evidence, and given the ambiguous language contained in the telephone schedule provision, we reverse the district court's order finding Clayton to be in contempt.

Clayton also alleges that the district court erred in requiring him and Maria to participate together in a monthly breakfast with Alexis. Specifically, he alleges that neither party requested any sort of modification to the custody order and parenting plan and that, as a result, he did not have notice the court was going to order such a modification and was unable to refute the propriety of the modification. Again, Clayton's assertion has merit.

[2] In her initial motion to the court, Maria requested the court to determine only whether Clayton was in contempt of court for violating the telephone schedule provision. She stated:

> [Maria] moves the Court for an Order finding [Clayton] in contempt for willful disobedience and resistance of lawful orders of this Court, issued and directed to the parties on February 11, 2009, and on November 6, 2009, for [Maria's] attorneys fees and costs incurred in bringing this application, and all other relief as this Court deems fair, just, and equitable.

There was no request for any sort of modification to the previously entered custody order and parenting plan. The Supreme Court has previously held that absent application and notice requesting modification, a trial court does not have the power to modify a divorce decree during the course of a contempt proceeding. See *Mays v. Mays*, 229 Neb. 674, 428 N.W.2d 618 (1988). This rule would seem to be equally applicable to the modification of a custody order contained within a divorce decree.

Neither party requested a modification to the previously entered custody order and parenting plan. We therefore reverse

the district court's decision to require the parties to participate in monthly breakfasts with each other.

In conclusion, we reverse the district court's contempt order for a failure of proof. See *Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012) (explaining that finding of civil contempt requires willful disobedience). As to the "breakfast order," we reverse the district court's decision to require the parties to participate in monthly breakfasts with each other because neither party requested such a modification to the custody order and neither party had notice that such a modification was being considered by the court. For the reasons set forth herein, we reverse, and remand with directions.

REVERSED AND REMANDED WITH DIRECTIONS.

BISHOP, Judge, concurring in part, and in part dissenting.

I dissent from the majority's opinion reversing the contempt order, and in part dissent to its reversal of the modifications ordered by the district court. Although for different reasons, I concur with the majority that the breakfast meeting modification should be reversed.

CONTEMPT

Clayton's first assigned error is that the trial court erred in finding him to be in civil contempt. The majority agreed and reversed the district court's contempt order "for a failure of proof." I dissent from that conclusion because the district court made specific factual findings that the telephone schedule provision was "reasonable to understand," that Clayton had an obligation to facilitate the communication between Alexis and Maria, and that "[f]acilitating the communication is not letting a nine-year-old kid make a determination as to whether she's talking to her mom." There was no clear error in this finding. Notably, Clayton testified:

> When there is a phone call placed and [Alexis] is not engaged in an activity, she's offered the telephone. She knows how to answer the telephone. She knows there's . . . a big green button if she wants to answer, and she will look at it and put it down or give it back to me if she chooses not to speak.

This response was explored further on cross-examination:

> [Counsel for Maria:] Didn't you testify earlier that you would hand the phone to [Alexis] and say if you want to answer it you can but if you don't you don't have to?
>
> [Clayton:] Yes. There's a large red or green button that she would have to push.
>
> [Counsel for Maria:] Okay.
>
> [Clayton:] She's nine. She knows how to read and follow pretty simple directions.
>
> [Counsel for Maria:] So basically your testimony . . . is that when Maria calls you give [Alexis] the phone and you give [Alexis] the choice of answering; is that correct?
>
> [Clayton:] Yes.
>
> [Counsel for Maria:] Okay. Do you think that's reasonable.
>
> [Clayton:] Yes.
>
> . . . .
>
> [Counsel for Maria:] So is it your testimony that it's adverse to [Alexis'] health to speak with her mother on the phone?
>
> [Clayton:] If that phone call is causing stress, then I'm not going to force the phone call. She's given the option to answer or not. There's no stress put on it on my side.
>
> [Counsel for Maria:] You're an educated man, [Clayton]. You don't read within paragraph 5 any duty on your part to help facilitate these phone calls?
>
> [Clayton:] I guess if you're asking me if I push a button. Is that your question? Do you want me to push a button in order to have her talk to her?
>
> [Counsel for Maria:] Yes. Yes.
>
> [Clayton:] Okay.
>
> . . . .
>
> [Counsel for Maria:] So are you saying — are you — do you read in there where you do not have a responsibility to assist in these phone calls being made?
>
> [Clayton:] I believe I am assisting in how those phone calls are being made.

> [Counsel for Maria:] By handing a nine-year-old child a phone and allowing her to make a decision on whether to answer?
>
> [Clayton:] Yes.
>
> [Counsel for Maria:] And you don't think it's possible that [Alexis'] stress level is caused by the ramifications she knows is going to occur if she talks to Maria?
>
> [Clayton:] There's no ramification in my house. It's when she goes back to the other house and gets yelled at for not answering the phone.
>
> [Counsel for Maria:] But you admit that when Maria calls you don't always take them?
>
> [Clayton:] I would agree to that.

The district court asked further questions on this matter and confirmed that when Maria calls Clayton's cell phone, Clayton knows it is her because "[t]he caller ID pops up." The court further inquired as follows:

> [The court:] And then you give your phone to your daughter, [Alexis], and say, you know, it's your mother, do you want to talk to her or not, and if she wants to talk to her then she pushes some button on the phone. If she doesn't, then she just walks away, right?
>
> [Clayton:] Correct.
>
> [The court:] Okay. And you don't answer the phone and give it to her?
>
> [Clayton:] No.

Clayton testified that he was "assisting" by handing the phone to Alexis and allowing her to decide whether to answer the call. Clayton testified that "reasonableness" means a telephone call here and there with Alexis when she is in his care and that "[e]xcessive contact is what causes the stress on the child." Clayton testified that the telephone plan had been in place "over the last few years" and "we've discussed with these counselors about the stress that it puts on the child and what we observe and I've chosen not to inflict that upon her," and that his decision was based on "feedback from the counselors that we've spoken to." At the conclusion of the evidence, the court made its findings on the record and stated in relevant part:

> The way I read that [November 9, 2009, order] is, is that each parent has a right to reasonable contact with the minor child, that being [Alexis], when the other party has possession of that child. Reasonable contact this Court finds could be a daily contact. There's nothing wrong with a parent contacting their child on a daily basis when they don't have the child.
>
> I mean, and it has to be for a reasonable time. It can't be for, you know, 15, 20 minutes, and then it just keeps going on and on, but just for a reasonable time just — and I think that comforts the child when the child knows that the other parent does not object to that phone call.
>
> And I think, [Clayton], one of the reasons your daughter may not be accepting the calls is because she knows that you don't get along with [Maria], her mom. She knows her dad doesn't get along with her mom, and she knows that — and when she's with you she wants to please you, and that may be one way that she is pleasing you or doesn't want to upset you is by talking to her mom. That's a guess on my part.
>
> Under the order, [Clayton], you have an obligation to facilitate the communication. Facilitating the communication is not letting a nine-year-old kid make a determination as to whether she's talking to her mom.
>
> Facilitating means you say, hello, um, good evening, just a minute I'll get your daughter for you, and you give the phone to your daughter. You don't let the daughter make decisions. . . .
>
> . . . [T]he Court finds by clear and convincing evidence that, [Clayton], you are in contempt of court. I think it's reasonable to understand what the order says and you have failed to comply with that order.

There was no clear error in the district court's finding that Clayton failed to comply with that part of the telephone provision which requires each parent to assist Alexis in initiating calls to or receiving calls from the other parent. There is sufficient evidence in the record to support the district court's

conclusion that Clayton understood the order and failed to comply with it.

The majority concludes that "the parties have very different ideas about what constitutes reasonable telephone access under the tenets of this provision" and that "[t]he provision does not contain a definition of what constitutes reasonable access, nor does it provide any indication of how often a nonpossessory parent should be permitted to speak with Alexis." I do not disagree on this point. However, I do not see this frequency aspect of the telephone provision as the basis for the district court's finding that Clayton violated the telephone provision. Rather, the district court was troubled by Clayton's handing the telephone over to Alexis and letting her make the choice of whether to push the "green button" and answer the call. As the district court noted, letting a 9-year-old child make that decision was not compliant with the requirement that the parent facilitate the telephone contact.

In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed is reviewed for abuse of discretion. *Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012).

I conclude that the district court's factual findings were not clearly erroneous and that based upon those findings, it did not abuse its discretion in determining that Clayton was in contempt of the telephone provision, specifically, that he failed to assist Alexis in initiating calls to or in receiving calls from Maria. I would affirm the district court's contempt order.

MODIFICATION OF DECREE

Clayton's second assigned error is that the district court erred by unilaterally modifying the parenting plan of the parties without providing either party notice or an opportunity to

be heard. In the district court's order filed September 3, 2013, wherein the court found Clayton in contempt for failing to comply with the telephone provision, the court also went on to state in its order:

> This Court on its own Motion, which is in the best interest of the minor child, hereby modifies the Decree and Parenting Plan as follows:
>
> 1. That neither party shall make any derogatory remarks of the other party to that party, or in the presence of the minor child.
>
> 2. That the parties are to have breakfast once per month on the first Saturday morning of the month that [Maria] has possession of the minor child. [Clayton] will choose the breakfast site in odd numbered months and [Maria] will choose the breakfast site in even numbered months. If the parties cannot agree on a time, then the breakfast will commence at 9:30 a.m. This breakfast shall include the two parties and the minor child. During this breakfast, the parties are to act respectful [sic] to each other, each party is to tell one age appropriate joke, and have one age appropriate human interest story to discuss. The purpose of this is to demonstrate to the minor child that the two people the minor child loves the most can get along.
>
> 3. The Court also finds that reasonable phone conversation can include daily phone conversation at reasonable times and duration.

The majority concludes that there was no request for modification and that absent application and notice requesting modification, a trial court does not have the power to modify a divorce decree during the course of a contempt proceeding, citing to *Mays v. Mays*, 229 Neb. 674, 428 N.W.2d 618 (1988). The majority then goes on to state, "This rule would seem to be equally applicable to the modification of a custody order contained within a divorce decree."

In *Mays, supra*, one party was awarded a coin collection and in a contempt order, the other party was ordered to deliver the coin collection or pay the face value of the coins. The party entitled to the coin collection argued that by permitting

the payment in lieu of delivery of the coins, the court "unauthorizedly modified its original decree of dissolution and, in the alternative, that the value of the coins should be the actual value, rather than the face value." *Id.* at 675, 428 N.W.2d at 619. Our Supreme Court stated that "absent an application and notice requesting modification, a trial court has no power to modify, during the course of contempt proceedings, the terms of an earlier order for support or division of property," and reversed that portion of the district court's order. *Id.* I agree that this legal proposition prohibits modification of "support or division of property" during a contempt proceeding. However, it does not speak to a court's ability, in enforcement proceedings, to modify parenting time, visitation, or other access with a minor child as set forth in Neb. Rev. Stat. § 42-364.15 (Reissue 2008):

> In any proceeding when a court has ordered a parent to pay, temporarily or permanently, any amount for the support of a minor child and in the same proceeding has ordered parenting time, visitation, or other access with any minor child on behalf of such parent, the court shall enforce its orders as follows:
>
> (1) Upon the filing of a motion which is accompanied by an affidavit stating that either parent has unreasonably withheld or interfered with the exercise of the court order after notice to the parent and hearing, *the court shall enter such orders as are reasonably necessary to enforce rights of either parent including the modification of previous court orders relating to parenting time, visitation, or other access*. The court may use contempt powers to enforce its court orders relating to parenting time, visitation, or other access. The court may require either parent to file a bond or otherwise give security to insure his or her compliance with court order provisions; and
>
> (2) Costs, including reasonable attorney's fees, may be taxed against a party found to be in contempt pursuant to this section.

(Emphasis supplied.)

In this case, Maria filed a motion requesting an order finding that Clayton was in contempt for willful disobedience

and resistance to the orders of the court, and included an affidavit stating, among other things, that on November 6, 2009, a modification order provided the telephone provision (as previously set forth), and that despite its clear and unambiguous language, Clayton "steadfastly, arbitrarily and baselessly refuses to assist Alexis in the initiation and/or receipt of telephone calls" with Maria. A hearing was held on August 29, 2013. Based upon the language of § 42-364.15(1), there was an allegation of interference with the exercise of a court order relating to access to the child and there was a hearing on the same. Section 42-364.15(1) provides that after such notice and hearing, the court shall enter orders as are reasonably necessary to enforce the rights of either parent "including the modification of previous court orders relating to parenting time, visitation, or other access." Additionally, the court may use its contempt powers to enforce its orders relating to these matters. Notably, the authority granted to the court pursuant to this statute does not extend to modifications relating to custody, child or spousal support, or property division matters. It does, however, give the court authority to enforce the rights of the parents pursuant to existing court orders and to modify parenting time, visitation, or other access to the child as are "reasonably necessary" to enforce such rights. As to the district court's three modification provisions noted earlier, I conclude that the facts support two of the three modification provisions as being reasonably necessary to enforce the telephone access that was placed at issue by Maria's motion and affidavit. However, the facts do not support the breakfast meeting modification as being reasonably necessary; I address that first.

Breakfast Meeting Modification

I agree with the majority that the breakfast meeting provision should be reversed; however, I do not agree with the majority's basis for doing so, namely, that "absent application and notice requesting modification, a trial court does not have the power to modify a divorce decree during the course of a contempt proceeding." Such a holding cannot be reconciled with the plain language of § 42-364.15(1), which does

provide the court with authority to modify its previous orders under certain circumstances, as discussed above. Instead, I would reverse this portion of the court's order based on the breakfast provision not being reasonably necessary to enforce the rights at issue, as set forth in § 42-364.15(1), specifically in this case, to enforce Maria's rights of access to Alexis via the telephone contact previously ordered by the court. I applaud the district court's efforts to try to get these two contentious parents to demonstrate, in the presence of Alexis, a polite and more familial relationship. The inability of these parents to get past their own attitudes toward the other parent or their own personal needs, and to instead focus on creating an emotionally safe and thriving environment for Alexis, certainly presented a challenge to the district court. At the hearing, the court told the parties it was ordering the breakfast meetings because Alexis needed to see her parents "get along." The court further stated:

> [H]ere's this person that you love the most in the world along with your other children and the way that you show your love to her is to get along with the other person that she loves the most. And what you do, rather than show love, is you show hate to the other person, which directly injures your daughter emotionally. If you love your daughter, you'd figure out a way to get along.

There is no question the court was seeking a solution as to how to get these parents to consider their daughter's best interests before their own interests or frustrations, and perhaps under its contempt powers, the district court could have ordered the breakfast meetings on a temporary basis. See *In re Interest of Samantha L. & Jasmine L.*, 284 Neb. 856, 824 N.W.2d 691 (2012) (Nebraska courts, through their inherent judicial power, have authority to do all things necessary for proper administration of justice, including power to punish for contempt), and *In re Contempt of Liles*, 216 Neb. 531, 344 N.W.2d 626 (1984), *overruled on other grounds, Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010) (contempt sanctions which aim to compel future obedience are coercive and are conditioned upon continued noncompliance and are subject to modification by contemnor's

conduct). Whether such a coercive sanction would be supported by the facts in this record and survive an abuse of discretion standard of review by an appellate court, however, is not decided here because in this case, rather than impose the breakfast meeting as a temporary coercive sanction, the court instead elected to modify the decree. To do that, the modification must be reasonably necessary to enforce the rights of either parent to their parenting time or other access, and while the court's good intentions are noted, the record does not support that it was reasonably necessary for the parties to have monthly breakfast meetings with their daughter in order to enforce the telephone access at issue. Accordingly, I would reverse the breakfast meeting modification.

Other Modifications

The majority's opinion is silent as to the other two modification provisions which ordered that (1) neither party shall make any derogatory remarks of the other party to that party, or in the presence of the minor child, and (2) reasonable telephone conversation can include daily telephone conversation at "reasonable times and duration." Presumably, these provisions are likewise reversed based on the majority's conclusion that modification of a decree was not authorized in the present action. I would affirm these two modification provisions as being reasonably necessary to enforce each parent's parenting time and/or telephone access, since the issue of frequency of telephone contact and derogatory remarks allegedly made by both parties in the course of dealing with telephone contact were at issue in this action.

The record reflects that Clayton's position was that Maria's efforts to contact Alexis were excessive, whereas Maria testified that she tried to reach Alexis on 2 out of the 7 days (per 14-day period) that Alexis was with her father, but that she called more often or on other days because her calls were not returned. Maria also testified that she was not permitted to call Clayton's home telephone, just his cell phone. Maria also testified that she had tried many times to resolve their communication issues and that Clayton was rude multiple times, such as ignoring her or her e-mails, and that when he is angry, "he

sends texts that say don't call me again, don't text me again, don't do this again, just kind of talking down to me." Maria testified that the longest period of time that she had gone without speaking to Alexis was 9 to 10 days and that during that time, she did not know where Alexis was, even though she had asked Clayton for his travel plans for that 10-day vacation period. Maria testified that Alexis does not feel like she is allowed to use the home telephone and that she does not feel comfortable asking Clayton for it. Clayton testified that Maria contacted his family and his wife "and said extremely derogatory things that have really kind of demolished our communication" and that this generally was the basis for denying her contact through the home telephone.

Since the parental interference or noncompliance at issue stemmed from telephone contact, including disagreements on what constituted reasonable telephone contact and allegations of derogatory remarks being made by each party with regard to telephone contact matters, I conclude that the district court did not abuse its discretion in modifying the decree to include these provisions, since they are reasonably necessary to enforce each parent's rights as to the matters related to telephone access.

CONCLUSION

In summary, when a civil contempt determination is made by a district court, an appellate court should reverse only if the trial court's factual findings are clearly erroneous, and if they are not, then the trial court's determinations of whether a party is in contempt and of the sanction to be imposed should be reversed only if there has been an abuse of discretion. See *Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012). There is no question that trial courts need that discretion to be able to deal firmly, and at times creatively, when trying to protect the best interests of a minor child in the face of evidence that the child's parents have created an uncomfortable and stressful environment for the child because the parents cannot figure out a way to get along and coparent in a reasonable manner for the sake of the child. The district court did not abuse its discretion in finding that Clayton willfully

failed to comply with assisting Alexis in initiating calls to or receiving calls from Maria.

Further, § 42-364.15(1) authorizes a trial court to enter orders as are reasonably necessary to enforce rights of either parent, and this includes the modification of previous court orders relating to parenting time, visitation, or other access. As discussed above, I would reverse the breakfast meeting modification, but I would affirm the other two modification provisions as being reasonably necessary to enforce matters pertaining to telephone contact.

6224 Fontenelle Boulevard, L.L.C., appellant, v. Metropolitan Utilities District, appellee.

863 N.W.2d 823

Filed May 5, 2015. No. A-13-704.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts 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 the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Constitutional Law: Appeal and Error.** Constitutional interpretation is a question of law on which an appellate court is obligated to reach a conclusion independent of the decision by the trial court.
4. **Summary Judgment.** Summary judgment proceedings do not resolve factual issues, but, instead, determine whether there is a material issue of fact in dispute.
5. ____. If a genuine issue of fact exists, summary judgment may not properly be entered.
6. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
7. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

8. **Summary Judgment: Words and Phrases.** In the summary judgment context, a fact is material only if it would affect the outcome of the case.
9. **Eminent Domain: Words and Phrases.** Inverse condemnation is 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.
10. **Eminent Domain: Property: Intent.** Inverse condemnation has been characterized as an action or eminent domain proceeding initiated by the property owner rather than the public entity and has been deemed to be available where private property has actually been taken for public use without formal condemnation proceedings and where it appears that there is no intention or willingness of the taker to bring such proceedings.
11. **Constitutional Law: Eminent Domain: Damages.** Because the governmental entity has the power of eminent domain, the property owner in an inverse condemnation cannot compel the return of property taken; however, as a substitute, the property owner has a constitutional right to just compensation for what was taken.
12. **Judgments: Eminent Domain.** The ultimate determination of whether government conduct constitutes a taking or damaging is a question of law for the court.
13. **Eminent Domain.** In an action for inverse condemnation due to a governmental taking or damaging of a landowner's property without the benefit of condemnation proceedings, actual physical construction or physical damaging is not necessary for compensation.
14. **Judgments: Eminent Domain.** A determination of what constitutes a burden on property that is direct, substantial, and peculiar to the property itself requires a case-by-case analysis and cannot be defined by one specific set of circumstances.
15. **Eminent Domain: Property: Proof.** In order to meet the initial threshold in an inverse condemnation case that the property has been taken or damaged for public use, it must be shown that there was an invasion of property rights that was intended or was the foreseeable result of authorized governmental action.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Affirmed.

Jason M. Bruno and Robert S. Sherrets, of Sherrets, Bruno & Vogt, L.L.C., for appellant.

Ronald E. Bucher and Mark Mendenhall for appellee.

Inbody, Chief Judge, and Irwin and Bishop, Judges.

Inbody, Chief Judge.

INTRODUCTION

6224 Fontenelle Boulevard, L.L.C. (6224 Fontenelle), appeals the order of the Douglas County District Court granting

summary judgment in favor of Metropolitan Utilities District (MUD), denying 6224 Fontenelle's motion for summary judgment, and dismissing 6224 Fontenelle's inverse condemnation action. For the reasons that follow, albeit for reasons different from those of the district court, we affirm the order dismissing 6224 Fontenelle's motion for summary judgment and granting MUD's motion for summary judgment.

STATEMENT OF FACTS

On March 7, 2012, MUD installed a gas regulator station in the public right-of-way near 6224 Fontenelle's property located at 6224 Fontenelle Boulevard, Omaha, Douglas County, Nebraska. A gas regulator station is a utility facility that controls the pressure and flow of natural gas to the natural gas distribution system, consisting of aboveground pipes, valves, regulators, and other equipment which allows for the continuous monitoring of gas pressure.

On March 1, 2013, 6224 Fontenelle brought an inverse condemnation proceeding in Douglas County Court to have damages ascertained and determined and to request an appointment of appraisers. The petition alleged that MUD engaged in a taking which caused damage to 6224 Fontenelle's property through the installation of a "dangerous, obnoxious, and unsightly" gas regulator station. The petition further alleged that MUD had taken the property for public use without condemnation proceedings and that the gasline regulator station is not functional and serves no purpose.

In accordance with procedures set forth in the eminent domain statutes, Neb. Rev. Stat. §§ 76-701 through 76-726 (Reissue 2009), the county court appointed three disinterested freeholders to serve as appraisers, which appraisers inspected the property and held a meeting to hear arguments from any interested party. The appraisers submitted a report concluding that no damages were incurred at the property located at 6224 Fontenelle Boulevard.

6224 Fontenelle appealed that determination to the district court. In the petition on appeal, 6224 Fontenelle alleged several causes of action, including inaccurate valuation,

excessive taking, improper purpose, and failure to negotiate in good faith.

MUD filed a motion to strike and for summary judgment which alleged that there was no genuine issue of material fact and that MUD was entitled to judgment as a matter of law. In response, 6224 Fontenelle filed a partial motion for summary judgment as to its allegations of inaccurate valuation and failure to negotiate in good faith. 6224 Fontenelle alleged that it suffered $68,000 in damages and requested that the court enter judgment in its favor.

Hearings were held on the pending motions, and evidence was received by the court. A member of 6224 Fontenelle submitted an affidavit indicating that in his opinion as a licensed real estate broker, in accordance with a 2012 appraisal, the fair market property value was $70,500 prior to the erection of the gas regulator station. He opined that after the erection of the gas regulator station, the fair market value of the home was $2,500. He also included a March 9, 2012, appraisal valuing the property using the sales comparison approach at $40,300. The appraisal further provides:

> In addition to the above adjustments, a further adjustment was made for the presence of the gas line regulator station that is located in the right-of-way right east and in front of the subject property. The view to the street is obstructed and considered unsitely [sic]. Along with this, is the perception of a safety hazard and the warnings of open flames and such in the vicinity of the station. With the stated regulations, the unsitely [sic] view and the perceived safety concerns, even though the regulator station in [sic] not on the subject property, it still has an affect [sic] on the market value of the home. Because of this, an adjustment of 25% of the market value of the property before the station construction (first appraisal) was made for external obsolescence under the feature "view".
>
> Justification of the adjustment for the gas line regulator station was derived from information concerning other external detractors of value, including overhead

> high power transmission lines, natural gas transmission lines, etc. Articles concerning examples of the affect [sic] on market values are attached in this appraisal. However, the appraiser was unable to find local sales data that supports the reduction of market value by the existence of the station. The adjustment made herein is derived from articles, along with years of experience in the real estate sales and appraisal industry.

(Emphasis omitted.)

A senior design engineer for MUD submitted an affidavit indicating that she was involved in the final approval for the design of the gas regulator station involved in this case. She indicated that originally, the gas regulator station was to be constructed farther east, closer to Fontenelle Boulevard, but that the site was moved because of a reported concern related to potential damage to existing mature trees. She indicated that MUD and the city of Omaha had previous disputes regarding tree damage and that MUD now makes efforts to avoid any tree damage if possible. She indicated that the gas regulator station was constructed within the public roadway right-of-way; that the gas regulator was currently functioning and had been in operation since October 16, 2012; and that MUD has 63 aboveground gasline regulator stations in its service territory and has had no incidents or accidents resulting in safety concerns.

Also received into evidence was an affidavit submitted by the current tenant at the property located at 6224 Fontenelle Boulevard which indicated that the tenant had given notice to vacate the premises as a result of the installation of the gas regulator station, because the station was "ugly and unattractive," prevented her children from playing in the front yard because of her fear for their safety, and bore a label stating, "'CAUTION GAS PIPELINE. NO SMOKING, MATCHES OR OPEN FLAMES . . .'" that prevented her family from having barbecues in the front yard.

The affidavit of a licensed Realtor in Omaha further indicated that the gas regulator station near 6224 Fontenelle Boulevard "radically diminishes" the value of the property and

"presents a significant impediment to marketing and selling the property."

The district court found that 6224 Fontenelle had appealed the determination in its inverse condemnation action where the appraisers had determined that no damages were sustained as a result of the construction of the gas regulator station on a public roadway. The district court found that while 6224 Fontenelle's property may have diminished in value as a result of the construction of the regulator station, the construction alone did not constitute a taking or a physical invasion of the property, and thereby that 6224 Fontenelle's petition did not state a cause of action. As such, the district court found that there was no genuine issue of material fact, sustained MUD's motion for summary judgment, and dismissed 6224 Fontenelle's petition with prejudice. The district court overruled MUD's motion to strike and denied 6224 Fontenelle's motion for summary judgment.

It is from that order that 6224 Fontenelle has timely appealed to this court.

ASSIGNMENTS OF ERROR

6224 Fontenelle assigns, rephrased and consolidated, that the district court erred by granting MUD's motion for summary judgment and by denying its motion for summary judgment and dismissing its petition with prejudice.

STANDARD OF REVIEW

[1,2] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts 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. *Harris v. O'Connor*, 287 Neb. 182, 842 N.W.2d 50 (2014). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3] Constitutional interpretation is a question of law on which an appellate court is obligated to reach a conclusion

independent of the decision by the trial court. See *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006).

ANALYSIS

On appeal, 6224 Fontenelle argues that the district court erred by dismissing its motion for summary judgment and granting MUD's motion for summary judgment.

[4,5] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts 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. *Harris v. O'Connor, supra*. Summary judgment proceedings do not resolve factual issues, but, instead, determine whether there is a material issue of fact in dispute. *Peterson v. Homesite Indemnity Co.*, 287 Neb. 48, 840 N.W.2d 885 (2013). If a genuine issue of fact exists, summary judgment may not properly be entered. *Id.*

[6-8] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Id.* After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id.* In the summary judgment context, a fact is material only if it would affect the outcome of the case. *Id.*

[9] Neb. Const. art. I, § 21, provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." Inverse condemnation is 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. *Village of Memphis v. Frahm*, 287 Neb. 427, 843 N.W.2d 608 (2014);

Henderson v. City of Columbus, 285 Neb. 482, 827 N.W.2d 486 (2013).

[10,11] Inverse condemnation has been characterized as an action or eminent domain proceeding initiated by the property owner rather than the public entity and has been deemed to be available where private property has actually been taken for public use without formal condemnation proceedings and where it appears that there is no intention or willingness of the taker to bring such proceedings. See *Henderson v. City of Columbus, supra*. Because the governmental entity has the power of eminent domain, the property owner cannot compel the return of property taken; however, as a substitute, the property owner has a constitutional right to just compensation for what was taken. *Id*.

[12] The ultimate determination of whether government conduct constitutes a taking or damaging is a question of law for the court. See, *Rupert v. City of Rapid City*, 827 N.W.2d 55 (S.D. 2013); *E-L Enters. v. Milwaukee Metro. Sewerage*, 326 Wis. 2d 82, 785 N.W.2d 409 (2010) (ultimate determination of whether government conduct constitutes taking is question of law that is not properly placed before jury); *G & A Land, LLC v. City of Brighton*, 233 P.3d 701 (Colo. App. 2010) (whether taking has occurred such that action can be brought under taken or damaged clause of state constitution is issue of law to be decided by court); *State v. Heal*, 917 S.W.2d 6 (Tex. 1996) (determinations of whether property has been damaged under constitution generally; determination of whether there is material and substantial impairment to property as result of taking is question of law); *Yegen v. City of Bismarck*, 291 N.W.2d 422 (N.D. 1980) (determination of whether or not there has been taking or damaging of private property for public use is question of law).

This case presents this court with a unique set of factual circumstances, one of which has not been addressed by Nebraska courts, such that 6224 Fontenelle has alleged an inverse condemnation action where there has been no physical intrusion or taking of its property, but only a damaging of the property by virtue of a loss of value to the property. Thus, we ask, In an

inverse condemnation action, must there be an actual physical taking or invasion of the landowner's property?

In this case, the property had not been physically invaded in a tangible manner, no physical invasion had occurred, and the property had not been physically damaged. The district court concluded that 6224 Fontenelle failed to state a cause of action based on inverse condemnation, based upon the court's determination that "while [6224 Fontenelle's] property may have diminished in value as a result of the construction of the regulator station it does not constitute a taking or a physical invasion of the property."

In the case of *Quest v. East Omaha Drainage Dist.*, 155 Neb. 538, 52 N.W.2d 417 (1952), the plaintiff filed an action for damages allegedly caused to the plaintiff's real estate as a result of an excavation made by the defendant on its land adjoining the plaintiff's land. In *Quest v. East Omaha Drainage Dist., supra*, there was no actual physical taking by the defendant of the plaintiff's property. Instead, evidence was adduced that the excavation resulted in a cliff on the defendant's property which destroyed the use of the plaintiff's property for residential purposes. *Id*. The evidence showed that children could and did get under the fence built along the cliff; fires were started in the area; dirt, dust, and litter blew into the plaintiff's property; wind coming from the face of the cliff blew roofing and shingles from the plaintiff's home; pools of stagnant water gathered in the excavated area, which brought mosquitoes; hundreds of cliff swallows nested in the cliff, which resulted in excessive noise and filth in the plaintiff's yard; and annoying noise and vibrations from nearby trains which were not experienced prior to the excavation now caused cracks in the walls and ceilings. *Id*. The Nebraska Supreme Court found that there had been a taking by a public entity, because the excavation and the resulting cliff "materially depreciated the market value of plaintiff's property and restricted its use." *Id*. at 542-43, 52 N.W.2d at 420.

In the case of *City of Omaha v. Matthews*, 197 Neb. 323, 248 N.W.2d 761 (1977), landowners instituted an inverse condemnation action for damage suffered when the sanitary sewer connection from their buildings to a sewer on the street

was disrupted and destroyed by actions of the public building commission. The Nebraska Supreme Court held that sanitary sewer connections running from private property to the city or district sewer main were privately owned and could not be appropriated or destroyed by the city without compensation to the owner. *Id*. The court found that "the commission had the power of condemnation and it may be exercised whenever property is damaged for public use. An actual taking of property is not required." *Id*. at 327, 248 N.W.2d at 763. See, also, *Kula v. Prososki*, 219 Neb. 626, 365 N.W.2d 441 (1985) (when private property has been damaged for public use, owner is entitled to seek compensation in direct action under state constitutional provision); *Maloley v. City of Lexington*, 3 Neb. App. 976, 536 N.W.2d 916 (1995) (takings clause of Nebraska Constitution prohibits both taking and damaging of property without just compensation and allows recovery for damages caused by temporary takings, as well as by permanent takings).

[13] It is clear then that the answer to our initial question is no—in an action for inverse condemnation due to a governmental taking or damaging of a landowner's property without the benefit of condemnation proceedings, actual physical construction or physical damaging is not necessary for compensation. As such, the district court erred, as a matter of law, in determining that 6224 Fontenelle was not entitled to the benefit of inverse condemnation proceedings based on there being no actual taking or physical invasion of the property of 6224 Fontenelle. Clearly, an actual physical taking or physical invasion of a landowner's property is not necessary for a claimant to successfully bring an inverse condemnation action.

Having determined that an actual physical invasion of property is not required, we now consider whether the property of 6224 Fontenelle was taken or damaged within the meaning of Neb. Const. art. I, § 21, as a result of MUD's installation of a gas regulator station in the public right-of-way near 6224 Fontenelle's property. As mentioned, there is little precedent in Nebraska regarding this issue, and so we look to other states for guidance in our review of the matter.

California courts have held that property is "'taken or damaged'" within the meaning of the California Constitution (whose article I, § 19, is similar to Nebraska's constitutional provision) when (1) the property has been physically invaded in a tangible manner; (2) no physical invasion has occurred, but the property has been physically damaged; or (3) an intangible intrusion onto the property has occurred which has caused no damage to the property but places a burden on the property that is direct, substantial, and peculiar to the property itself. *Oliver v. AT&T Wireless Services*, 76 Cal. App. 4th 521, 530, 90 Cal. Rptr. 2d 491, 497 (1999). Accord *San Diego Gas & Elec. Co. v. Superior Ct.*, 13 Cal. 4th 893, 920 P.2d 669, 55 Cal. Rptr. 2d 724 (1996).

The first two circumstances that would justify a claim of inverse condemnation are clearly not present in this case, which leaves the issue of whether there has been an intangible intrusion onto the property which has caused no damage to the property but places a burden on the property that is direct, substantial, and peculiar to the property itself.

[14] A determination of what constitutes a burden on property that is "direct, substantial, and peculiar to the property itself" requires a case-by-case analysis and cannot be defined by one specific set of circumstances. See *Arkansas Game and Fish Com'n v. U.S.*, ___ U.S. ___, 133 S. Ct. 511, 518, 184 L. Ed. 2d 417 (2012) (there is "no magic formula [that] enables a court to judge, in every case, whether a given government interference with property is a taking").

The California Supreme Court has illustrated what types of intrusions would establish a burden that is "direct, substantial, and peculiar to the property itself" by explaining that the landowner must establish that the consequences of the intangible intrusion are not far removed from a direct physical intrusion. *Oliver v. AT&T Wireless Services*, 76 Cal. App. 4th at 530, 90 Cal. Rptr. 2d at 497. See, e.g., *Varjabedian v. City of Madera*, 20 Cal. 3d 285, 572 P.2d 43, 142 Cal. Rptr. 429 (1977) (recurring violation of property by gaseous effluent from sewage treatment facility and claim that land was made untenable for residential purposes); *Bauer v. County of Ventura*, 45 Cal. 2d 276, 289 P.2d 1 (1955) (invasions of water

or other liquid effluents provide basis for inverse liability); *Harding v. Department of Transp.*, 159 Cal. App. 3d 359, 205 Cal. Rptr. 561 (1984) (noise, dust, and debris from nearby freeway and loss of light from 23-foot embankment resulting in loss of vegetable garden made neighboring property virtually untenable).

Other states have likewise addressed the issue, on a case-by-case analysis, using similar determinations of whether or not an intangible intrusion is a taking or damaging for purposes of inverse condemnation actions. The South Dakota Supreme Court requires that a plaintiff prove that the consequential injury is peculiar to the land and not of a kind suffered by the public as a whole. *Krier v. Dell Rapids Tp.*, 709 N.W.2d 841 (S.D. 2006). See, also, *Rupert v. City of Rapid City*, 827 N.W.2d 55 (S.D. 2013) (city's use of deicer on streets adjacent to owner's property was direct and substantial action that caused peculiar injury).

The Minnesota Supreme Court has held that the test is that the owner show "a direct and substantial invasion of his property rights of such a magnitude [that] he is deprived of the practical enjoyment of the property and that such invasion results in a definite and measurable diminution of the market value of the property." *Alevizos v. Metropolitan Airports Comm.*, 298 Minn. 471, 487, 216 N.W.2d 651, 662 (1974). The court went on to also require that the invasion of property rights be repeated and aggravated with a reasonable probability that it will continue into the future. *Alevizos v. Metropolitan Airports Comm., supra*.

[15] In Nebraska, in order to meet the initial threshold in an inverse condemnation case that the property has been taken or damaged "'for public use,'" it must be shown that there was an invasion of property rights that was intended or was the foreseeable result of authorized governmental action. *Henderson v. City of Columbus*, 285 Neb. 482, 493, 827 N.W.2d 486, 495 (2013).

6224 Fontenelle argues that *Henderson v. City of Columbus, supra*, broadens the notion of a taking beyond property that is actually taken, to include compensation for property that is damaged through a diminishment of the market value of the

property, while MUD and the district court through its determinations interpret that case to narrow the requirement for compensation to the finding of a physical taking only.

In *Henderson v. City of Columbus, supra*, the plaintiffs sued the defendant after raw sewage flooded into their home after a heavy rainstorm. The plaintiffs claimed that the flooding damaged their home and was the result of a malfunction of the city-run sanitary sewage system. The complaint alleged theories of recovery based upon negligence, inverse condemnation under the Nebraska Constitution, nuisance, and trespass. After a bench trial on liability, the trial court found in favor of the defendant and dismissed the plaintiffs' complaint. The plaintiffs appealed to this court, which affirmed the trial court's order with respect to negligence but reversed the portion of the trial court's order which found in favor of the defendant with regard to inverse condemnation. Although for reasons different from those of the trial court, the Nebraska Supreme Court held that the plaintiffs failed to establish an inverse condemnation claim and affirmed the trial court's judgment in favor of the defendant. *Id*.

In the opinion, the Nebraska Supreme Court set forth that

> [t]he initial question in an inverse condemnation case is not whether the actions of the governmental entity were the proximate cause of the plaintiff's damages. Instead, the initial question is whether the governmental entity's actions constituted the taking or damaging of property for public use. That is, it must first be determined whether the taking or damaging was occasioned by the governmental entity's exercise of its power of eminent domain. Only after it has been established that a compensable taking or damage has occurred should consideration be given to what damages were proximately caused by the taking or damaging for public use.

Id. at 489, 827 N.W.2d at 492.

The Nebraska Supreme Court concluded that the plaintiffs failed to establish the threshold element that their property was "'taken or damaged for public use'" by the defendant in the exercise of its power of eminent domain and, therefore,

failed to establish that they were entitled to compensation under the Nebraska Constitution. *Henderson v. City of Columbus*, 285 Neb. at 489, 827 N.W.2d at 492 The court found that the flooding, which occurred in the plaintiffs' basement, was not a case where the defendant exercised its right of eminent domain, insofar as the defendant had taken immediate action, there had not been a recurring sewage backup, and it was not foreseeable that the defendant's action would take or damage private property. *Id*.

We find that contrary to both 6224 Fontenelle's and MUD's arguments, *Henderson v. City of Columbus*, 285 Neb. 482, 827 N.W.2d 486 (2013), is consistent with inverse condemnation precedent and does not broaden or narrow the requirements set forth pursuant to the Nebraska Constitution. *Henderson v. City of Columbus, supra*, involved a single event in which sewage flooded and which the defendant did not know or could not foresee would result in a taking or damaging of property.

In this case, the alleged taking or damaging is permanent. MUD built a permanent gas regulator station to control the pressure and flow of natural gas to the natural gas distribution system, consisting of aboveground pipes, valves, regulators, and other equipment which allows for the continuous monitoring of gas pressure near the property of 6224 Fontenelle. Thus, *Henderson v. City of Columbus, supra*, is distinguishable from these circumstances.

Nonetheless, we are still left with the question of whether or not the installation of the MUD gas regulator station near the property of 6224 Fontenelle constituted a taking or damaging. 6224 Fontenelle argues that there has been a taking or damaging because the value of its property has been significantly reduced as a result of the construction of the gas regulator station, due to the perception of a safety hazard and the unsightly view. 6224 Fontenelle alleged that it can no longer rent the property, insofar as the current tenant feels that the regulator station is "ugly and unattractive" and presents a safety hazard. On the other hand, MUD contends that there are no safety concerns presented by the gas regulator station and that there had been no incidents or accidents at this gas regulator station or any other.

Other state courts have addressed similar circumstances wherein the taking or damaging was the reduction in market value of a property and found that a diminution in property value alone is not a taking or damaging of the property, but, instead, is a measure of just compensation when such taking or damaging is otherwise proved. In the case of *Oliver v. AT&T Wireless Services*, 76 Cal. App. 4th 521, 90 Cal. Rptr. 2d 491 (1999), property owners brought an action against neighbors and a cellular telephone company after the construction of a cellular telephone transmission tower on property adjoining the owners' property; the court held that the mere displeasing appearance in size and shape of the structure otherwise permitted by law, the only admitted effect of which is an alleged diminution in value, cannot give rise to an inverse condemnation claim. See, also, *San Diego Gas & Elec. Co. v. Superior Ct.*, 13 Cal. 4th 893, 920 P.2d 669, 55 Cal. Rptr. 2d 724 (1996) (homeowners brought action against public utility, claiming that powerlines on property adjoining theirs ran electric currents which emitted high and unreasonably dangerous levels of radiation onto their property; court held that intangible intrusion must result in direct, substantial, and peculiar burden on property); *M.T.A. v. Continental Develop. Corp.*, 16 Cal. 4th 694, 941 P.2d 809, 66 Cal. Rptr. 2d 630 (1997) (recovery of neighboring landowners in inverse condemnation or nuisance action requires more than showing that value of property has diminished as result of project).

The only evidence 6224 Fontenelle presented in this case was that there was a perception of a safety hazard and that the gas regulator station was unsightly. This is not a direct, substantial, and peculiar burden on the property. We likewise find that a diminution in property value alone is not a taking or damaging of the property, but, instead, is a measure of just compensation when such taking or damaging is otherwise proved. A claimed loss of value in property, in and of itself, cannot establish a taking or damaging for purposes of inverse condemnation, but, instead, is an element of a measure of damages for just compensation when a taking or damaging is

otherwise proved. Thus, while the district court erred in concluding that inverse condemnation required an actual physical taking, it did not err in finding that there were no genuine issues of material fact, dismissing 6224 Fontenelle's motion for summary judgment, and granting MUD's motion for summary judgment.

CONCLUSION

In conclusion, we find that summary judgment in this case is proper, although for reasons different from those of the district court. We find that contrary to the district court's findings, an actual physical taking or physical damage is not required in order to receive just compensation in an inverse condemnation action. However, we find that a diminution in property value alone is not a taking or damaging of the property, but, instead, is a measure of just compensation when such taking or damaging is otherwise proved. 6224 Fontenelle has failed to show that MUD engaged in a taking or damaging as a matter of law, and there exist no genuine issues of material fact. As such, we affirm the order of the district court dismissing 6224 Fontenelle's motion for summary judgment and granting MUD's motion for summary judgment.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
RICHARD R. COBOS, JR., APPELLANT.

863 N.W.2d 833

Filed May 5, 2015. No. A-14-505.

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. **Criminal Law: Evidence: Proof.** In order to justify an alibi instruction, there must be evidence that the defendant was at some other place during the commission of the crime for a length of time that it was impossible for him to have been

at the place where the crime was committed, either before or after the time he was at such other place.

3. **Jury Instructions: Convictions: Appeal and Error.** Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, the error must be considered prejudicial to the rights of the defendant.
4. **Jury Instructions: Appeal and Error.** In reviewing a claim of prejudice from jury instructions given or refused, an appellate court must read the instructions 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 evidence, there is no prejudicial error.
5. **Jury Instructions.** In construing an individual jury instruction, the instruction may not be judged in artificial isolation but must be viewed in the context of the overall charge to the jury considered as a whole.
6. **Sentences: Evidence.** A sentencing court has broad discretion as to the source and type of evidence or information that it may use in determining the kind and extent of the punishment imposed within the limits fixed by statute.
7. **Sentences: Probation and Parole.** When attempting to determine whether the defendant is a proper candidate for probation and rehabilitation, the court, of necessity, must consider whether the defendant acknowledges his or her guilt.
8. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
9. **Records: Appeal and Error.** Where allegedly prejudicial remarks of counsel do not appear in the bill of exceptions, an appellate court is precluded from considering an assigned error concerning such remarks.
10. **Criminal Law: Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: 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. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Appeal from the District Court for Scotts Bluff County: LEO DOBROVOLNY, Judge. Affirmed.

Bell Island, of Island & Huff, P.C., L.L.O., for appellant.

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

IRWIN, RIEDMANN, and BISHOP, Judges.

RIEDMANN, Judge.

INTRODUCTION

Richard R. Cobos, Jr., appeals from his conviction and sentence in the district court for Scotts Bluff County of third degree sexual assault of a child. Finding no merit to Cobos' assigned errors, we affirm.

BACKGROUND

Cobos was charged with third degree sexual assault of a child based on reports that he had subjected his sister-in-law, M.M., to sexual contact. At trial, M.M. testified that the assault occurred while she and her twin sister were staying with their older sister, Valerie Cobos (Valerie), and her husband, Cobos, in Gering, Nebraska, during August 2012. M.M. was approximately 12 years old at that time, while Cobos was approximately 36 years old.

At the time of the assault, Cobos had recently become employed as a teacher and football coach in Mitchell, Nebraska, which was approximately 12 miles from his home in Gering. Although school had not yet started, Cobos had football practice at 7 a.m. each day, and he had to be there at least an hour early to get things ready. In addition, since this was Cobos' first year at a new school, he had been going even earlier to prepare his classroom for the beginning of the school year. Valerie testified that it was not unusual for Cobos to get up in the middle of the night to go to work and that once he left the house, he would not come home until the end of the school day.

On the morning of the assault, Cobos left the house at approximately 2 a.m. M.M. and her twin sister were still up talking in the living room when he left. Cobos told them to let Valerie know that he was going to school to work in his classroom. The girls fell asleep on the couch in the living room around 4 a.m.

M.M. testified that she woke up later that morning to Cobos' touching her breasts underneath her bra. She knew it was early morning because she looked out the window above the couch and saw the sun starting to rise. According

to M.M., she tried to go back to sleep, but Cobos continued to touch her and tried to put his hand underneath her underwear. M.M. turned away and Cobos stopped, but then he put his hands back underneath her bra. After touching her breasts for a little while longer, Cobos kissed M.M. "directly on the lips and said good morning," then left the house. M.M. testified that she looked at the person touching her and saw that it was Cobos.

A jury instruction conference was held in the district court, during which defense counsel requested an alibi instruction. The court overruled the request, finding that the evidence did not support such instruction. After the jury was instructed, the case was submitted for deliberation. The jury found Cobos guilty beyond a reasonable doubt of third degree sexual assault of a child.

Cobos subsequently filed a motion for new trial alleging, in part, that the prosecutor engaged in misconduct by referring to Cobos as a "predator" during closing arguments. Because the closing arguments were not recorded, defense counsel offered an affidavit stating that during closing arguments, the prosecutor referred to Cobos as a predator and preying on those weaker than him; that such statement was objected to by defense counsel on grounds of relevance and facts not in evidence; and that such objection was overruled. The State objected to the exhibit on the basis that it was not the best evidence, and challenged the accuracy of statements contained in the affidavit. The district court received the affidavit into evidence but ultimately overruled the motion for new trial.

The case then proceeded to sentencing. During the sentencing hearing, defense counsel objected to the court's considering statements in the presentence investigation report indicating that Cobos declined to comment on the allegations. The district court overruled the objection. Before imposing Cobos' sentence, the district court indicated that it had reviewed the presentence investigation report and considered the evidence presented at trial, as well as Cobos' age, his lack of a prior criminal history, his education, the nature of the offense, the

lack of physical violence involved in the commission of the offense, the harm caused to the victim, the lack of justification for the offense, Cobos' attitude, and the unlikelihood of recurrence. Regarding Cobos' attitude, the court stated:

> I don't have [Cobos'] written . . . version; however, there is an interview of [Cobos] that comes through in the pre-sentence investigation. I think [his] attitude . . . overall is good, but it doesn't show, that I can see, an acceptance of responsibility for what the jury found were his acts and some sort of moving forward on what to do about that.

Finally, the court noted that although Cobos would likely be successful in completing probation, it found that he was in need of treatment, which could best be provided in a correctional setting, and that a sentence other than imprisonment would depreciate the seriousness of the crime and promote disrespect for the law. It then imposed a sentence of 24 to 60 months' imprisonment. This timely appeal followed.

ASSIGNMENTS OF ERROR

Cobos assigns that the district court erred in (1) failing to instruct the jury on Cobos' alibi defense, (2) enhancing Cobos' sentence based on his assertion of his constitutional right to remain silent, (3) overruling Cobos' motion for new trial based on prosecutorial misconduct, and (4) finding sufficient evidence to support the jury's guilty verdict.

ANALYSIS

Refusal to Give Alibi Instruction.

Cobos first assigns that the district court erred in failing to instruct the jury on his alibi defense. Cobos argues that his requested alibi instruction should have been given because there was evidence showing that he was at work in another town 12 miles away at the time of the assault.

[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. Planck*, 289 Neb. 510, 856 N.W.2d 112 (2014). We find that although Cobos' proposed instruction was a correct statement of the law and was warranted by the evidence, Cobos was not prejudiced by the court's refusal to give the requested instruction because the jury was instructed that the State had the burden of proving each and every element of the crime charged, which necessarily required proof of Cobos' presence at the time and place of the crime charged.

[2] In order to justify an alibi instruction, there must be evidence that the defendant was at some other place during the commission of the crime. See *State v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1987). In addition, the evidence must show that the defendant was at such other place a length of time that it was impossible for him to have been at the place where the crime was committed, either before or after the time he was at such other place. See *id*.

In *State v. El-Tabech, supra*, the trial court refused to give an alibi instruction as requested by the defendant. On appeal, the Nebraska Supreme Court affirmed, citing two reasons: (1) In Nebraska, alibi is not an affirmative defense, and (2) the evidence did not warrant such an instruction.

As to the first reason, the *El-Tabech* court stated that an alibi negates every fact necessary to prove a given crime because a defendant could not commit the offense if he was elsewhere at the time. The court noted the jury was instructed that the State had the burden of proving each and every element of the crime, including the fact that the accused committed the act as charged. The court therefore held that the failure to instruct the jury on the alibi did not relieve the State of its full burden.

In the present case, the jury was instructed that Cobos was charged with unlawfully subjecting M.M. to sexual contact in August 2012 in Scotts Bluff County and was provided with the respective ages of Cobos and M.M. The court further instructed that the State had the burden of proving him guilty beyond a reasonable doubt and that each of the following elements had to be proved beyond a reasonable doubt:

1. That [Cobos] subjected [M.M] to sexual contact; and
2. That [Cobos] was nineteen years of age or older at the time; and
3. That [M.M] was fourteen years of age or younger at the time; and
4. That [Cobos] did so on or about the date or dates charged in Scotts Bluff County, Nebraska.

Cobos' proposed instruction stated: "An issue in this case is whether [Cobos] was present at [a specific address in Gering] between the hours of 4:00 a.m. and 6:00 a.m. on August 17, 2012 and/or August 18, 2012. The state must prove that he was." As such, the proposed instruction told the jury that the State had to prove Cobos was present at the specific location at the given time. But the instructions actually given advised the jury that these were elements of the crime which the State must prove beyond a reasonable doubt; therefore, we find no prejudicial error in the court's refusal to give the alibi instruction.

[3-5] Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, the error must be considered prejudicial to the rights of the defendant. *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006). In reviewing a claim of prejudice from jury instructions given or refused, an appellate court must read the instructions 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 evidence, there is no prejudicial error. *State v. Fox*, 286 Neb. 956, 840 N.W.2d 479 (2013). In construing an individual jury instruction, the instruction may not be judged in artificial isolation but must be viewed in the context of the overall charge to the jury considered as a whole. *State v. Putz*, 266 Neb. 37, 662 N.W.2d 606 (2003).

The instructions given, as a whole, properly instructed the jury as to the elements the State was required to prove beyond a reasonable doubt. We therefore find no error in the court's refusal to give the tendered instruction.

The second reason the Nebraska Supreme Court found no error in failing to give the requested alibi instruction in *State*

v. El-Tabech, 225 Neb. 395, 405 N.W.2d 585 (1987), was because the evidence did not warrant the instruction. This is the basis upon which the district court refused to give the instruction in the present case. We disagree that the evidence was insufficient.

In *State v. El-Tabech, supra*, the defendant's alibi covered only a portion of the time during which the crime could have been committed. Cobos, however, claimed that he left Gering at 2 a.m. and was in Mitchell until late afternoon and that therefore he could not have been in Gering at sunrise to commit the crime charged. We find this evidence sufficient to support an alibi instruction, but because of our conclusion above that the jury was adequately instructed, we find no prejudicial error in the trial court's refusal to give a separate alibi instruction.

We recognize that the Nebraska pattern jury instructions contain a pattern instruction on alibi, and our opinion should not be construed to stand for the proposition that the failure to give a requested alibi instruction can never be prejudicial error. As stated by the Ninth Circuit Court of Appeals, failure to give an alibi instruction in a state action can be a denial of federal due process depending upon the evidence in the case and the overall instructions given to the jury. See *Duckett v. Godinez*, 67 F.3d 734 (9th Cir. 1995). But where, as here, the jury is instructed on every element of the crime, and further instructed that the defendant is presumed to be innocent until the contrary is proved, which properly places the burden of proving beyond a reasonable doubt every material element of the crime charged upon the State, we find no error in the failure to give a separate alibi instruction.

Enhancement of Sentence Based on Cobos' Silence.

Cobos next assigns that the district court erred by imposing a more severe sentence due to Cobos' assertion of his constitutional right to remain silent by refusing to provide a statement to the probation office in conjunction with the presentence investigation. We disagree.

There is no evidence that the district court increased the severity of Cobos' sentence based on his assertion of his right to remain silent; rather, the court noted the absence of a written statement from Cobos in conjunction with its discussion of Cobos' failure to accept responsibility for his actions. A defendant's failure to take responsibility for his actions is a proper factor to consider in imposing a sentence. See *State v. Carngbe*, 288 Neb. 347, 352, 847 N.W.2d 302, 307 (2014) (noting that defendant's actions postconviction were "not signs of responsibility"). Before imposing Cobos' sentence, the district court stated various factors that it had considered, including the information contained in the presentence investigation report, Cobos' age, his lack of a prior criminal history, his education, the nature of the offense, the lack of physical violence in the commission of the offense, the harm caused to the victim, the lack of justification for the offense, Cobos' attitude, and the unlikelihood of recidivism.

[6,7] A sentencing court has broad discretion as to the source and type of evidence or information that it may use in determining the kind and extent of the punishment imposed within the limits fixed by statute. *State v. Alford*, 6 Neb. App. 969, 578 N.W.2d 885 (1998). When attempting to determine whether the defendant is a proper candidate for probation and rehabilitation, the court, of necessity, must consider whether the defendant acknowledges his or her guilt. *State v. Winsley*, 223 Neb. 788, 393 N.W.2d 723 (1986). Based on the record, it appears that the district court considered Cobos' failure to accept responsibility as merely one of many factors in determining the appropriate sentence to impose. We find no abuse of discretion in its having done so.

Motion for New Trial.

[8] Cobos assigns that the district court erred in overruling his motion for new trial on the basis of prosecutorial misconduct. In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Tolbert*, 288 Neb. 732, 851 N.W.2d 74 (2014).

[9] Cobos' motion for new trial was based upon alleged improper statements by the prosecutor during closing arguments; however, the closing arguments were not transcribed and thus are not part of the record before this court. It is the law in Nebraska that, where allegedly prejudicial remarks of counsel do not appear in the bill of exceptions, an appellate court is precluded from considering an assigned error concerning such remarks. *State v. Harris*, 205 Neb. 844, 290 N.W.2d 645 (1980). Although Cobos' assignment of error does not directly challenge the remarks of the prosecutor, it challenges the court's ruling on his motion for new trial, which was based upon the remarks of the prosecutor. Absent a record of the alleged prosecutorial misconduct, we cannot reach this assigned error.

Sufficiency of Evidence.

[10] Finally, Cobos assigns that the evidence was insufficient to convict him. Specifically, he argues that the State failed to present evidence identifying Cobos; therefore, it failed to prove an essential element of the crime. In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: 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. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Tolbert, supra*.

Because Cobos challenges only the sufficiency of the in-court identification, we focus our discussion on that essential element as well.

Despite Cobos' assertion that M.M. never made an in-court identification of the person who touched her, M.M. testified that she saw the person that touched her and that it was her sister Valerie's husband, Cobos. Valerie made an in-court identification of Cobos by pointing at him. Cobos challenges the court reporter's authority to make a notation in the record

that Valerie pointed at Cobos. We determine that under the facts of this case, such identification was proper for two reasons. First, it was sufficient identification for the State to ask Valerie whether Cobos was in the courtroom and request that she point him out. See *State v. Kaba*, 217 Neb. 81, 349 N.W.2d 627 (1984). Second, the identification of Cobos was not litigated, and was only an implicit issue in this case. See *id*.

In *State v. Kaba, supra*, the court distinguished between cases in which the defendant's identity is an implicit issue and cases in which identification is a hotly contested issue, such as where a witness' opportunity to observe the perpetrator is challenged. The *Kaba* court determined that identification of a defendant was an implicit issue because numerous witnesses testified regarding their encounters with the defendant and none of those witnesses noted that the person in the courtroom was not the same person with whom they had had their encounters. As the *Kaba* court noted, it is inconceivable that the State's witnesses would sit silently by, knowing the wrong man had been brought to trial. Likewise, we find it inconceivable that neither M.M. nor Valerie would alert the court if someone other than Cobos were brought to trial. Therefore, we reject this assignment of error.

CONCLUSION

For the foregoing reasons, we affirm Cobos' conviction and sentence.

AFFIRMED.

Echo Financial, appellee, v. Peachtree Properties, L.L.C., et al., appellees, and County of Sarpy, Nebraska, appellant.

864 N.W.2d 695

Filed May 19, 2015. No. A-14-261.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts 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 the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Jurisdiction: Appeal and Error.** It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.
5. **Final Orders: Foreclosure: Appeal and Error.** A decree of foreclosure is a final order for purposes of appeal.
6. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to as a matter of law.
7. ____. Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.
8. ____. If a genuine issue of fact exists, summary judgment may not properly be entered.
9. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
10. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
11. **Summary Judgment.** In the summary judgment context, a fact is material only if it would affect the outcome of the case.
12. **Property: Liens: Taxes.** Special assessments are secondary to the general lien represented by the tax certificate.
13. **Tax Sale: Title.** The title conveyed under a tax sale is not derivative, but is a new title in the nature of an independent grant by the sovereign authority, and

the purchaser takes free from any encumbrances, claims, or equities connected with the prior title.

14. **Judicial Sales: Property: Liens: Foreclosure: Taxes.** Tax liens arising subsequent to the sale of a tax certificate, but prior to the commencement of the foreclosure proceeding, are included in the foreclosure decree and satisfied by the proceeds of the sheriff's sale.
15. **Liens: Taxes.** Taxes levied subsequent to the date of the certificate constitute a lien superior to the lien of the certificate.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Affirmed in part, vacated in part, and in part reversed and remanded with directions.

L. Kenneth Polikov, Sarpy County Attorney, and Bonnie N. Moore for appellant.

Deana K. Walocha for appellee Echo Financial.

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

INBODY, Judge.

INTRODUCTION

The County of Sarpy (Sarpy County) appeals the order of the Sarpy County District Court granting Echo Financial's motion for summary judgment and entering a decree of foreclosure on Echo Financial's tax certificate.

STATEMENT OF FACTS

This appeal relates to a parcel of real property in Sarpy County, Nebraska, legally described as "Lot 62, Villas at Creekside, a Subdivision in Sarpy County, Nebraska," hereinafter referred to as the "subject property." Echo Financial is the holder of tax sale certificate No. 10281 for the subject property. This tax certificate was issued by the Sarpy County treasurer to Echo Financial and evidences the purchase of unpaid property taxes on March 3, 2010, for the 2008 taxes on the subject property. Echo Financial also is the holder of a lien for the subsequent general taxes assessed on the subject property in 2009, 2010, and the first half of 2011.

In June 2013, Echo Financial filed a complaint for foreclosure of the subject property. All parties with interests in the property were named as defendants, including Sarpy County

and Sanitary and Improvement District (SID) No. 268. Echo Financial alleged that SID No. 268 held special assessments on the subject property and that Sarpy County had unpaid weed control assessments or "weed liens" on the subject property. Sarpy County was the only defendant to file an answer or otherwise make an appearance. In its answer, Sarpy County admitted that it held weed liens on the subject property and also affirmatively alleged that it levied taxes on the subject property for tax years 2011 and 2012 and that pursuant to Neb. Rev. Stat. § 77-203 (Reissue 2009), those taxes are considered a first lien on the property taxed, superior to all other liens.

Echo Financial moved for summary judgment. A hearing was held on October 28, 2013, with one exhibit, the affidavit of the owner of Echo Financial, received into evidence. Sarpy County did not oppose the motion for summary judgment as long as Sarpy County's liens, including general taxes, were first liens superior to all other liens in accordance with § 77-203. When asked by the court if there was "any disagreement on the issues here," the attorney for Echo Financial stated, "I don't believe there is." Although Echo Financial had a proposed order, the attorney for Echo Financial stated that both attorneys were going to need to consult to amend the order. The court stated that it was letting Echo Financial and Sarpy County "work out an order that protects everybody's interests on the motion for summary judgment, but . . . would assume [it] can enter that order once you get those details worked out." The court further sustained a motion for default judgment against the remaining defendants except Sarpy County.

After Sarpy County and Echo Financial reached an impasse regarding the priority that the parties' liens should have in the foreclosure decree, Sarpy County filed a motion for rehearing and a hearing was held thereon on January 13, 2014. After each side's oral argument before the court, the court provided Sarpy County with 10 days to respond to Echo Financial's draft foreclosure decree and brief which had been previously filed and to submit an alternative decree of foreclosure. Echo Financial was given 7 days thereafter to respond.

On February 14, 2014, the district court filed an opinion and order setting forth that Echo Financial's motion for summary judgment should be granted and that a decree of foreclosure should be entered whereby Sarpy County's lien against the property for unpaid weed assessments shall be deemed second to Echo Financial's lien for general taxes. Thereafter, on February 25, the court filed the decree of foreclosure. In the decree of foreclosure, the district court found, in relevant part, that Echo Financial's motion for summary judgment should be granted; Echo Financial holds a valid first lien against the subject property; Sarpy County holds a lien for unpaid special assessments (weed liens), which are junior only to the interests of Echo Financial and SID No. 268; and the subject property is to be sold subject to Sarpy County's unpaid real property taxes for the second half of 2011 and 2012. Sarpy County filed its notice of appeal on March 24, 2014.

ASSIGNMENTS OF ERROR

Sarpy County's assignments of error, restated and consolidated, are that the district court erred in (1) granting Echo Financial's motion for summary judgment, (2) ordering that Sarpy County's weed liens were junior to the interests of Echo Financial and SID No. 268, and (3) failing to find that Sarpy County has general tax liens for the second half of 2011 and 2012 and ordering the subject property to be sold subject to Sarpy County's lien for unpaid real property taxes instead of ordering that these general tax liens were to be paid from the proceeds of the sheriff's sale.

STANDARD OF REVIEW

[1,2] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts 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. *Harris v. O'Connor*, 287 Neb. 182, 842 N.W.2d 50 (2014). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against

whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id*.

ANALYSIS

Jurisdiction.

Before addressing the merits of Sarpy County's appeal, we address Echo Financial's argument that Sarpy County's notice of appeal was not timely filed and, consequently, that we lack jurisdiction over this appeal.

[3,4] It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Huskey v. Huskey*, 289 Neb. 439, 855 N.W.2d 377 (2014). For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. *Kelliher v. Soundy*, 288 Neb. 898, 852 N.W.2d 718 (2014).

[5] A decree of foreclosure is a final order for purposes of appeal. See *Schuyler Building & Loan Ass'n v. Fulmer*, 61 Neb. 68, 84 N.W. 609 (1900). See, also, *Leseberg v. Meints*, 224 Neb. 533, 399 N.W.2d 784 (1987). The decree of foreclosure in the instant case was filed on February 25, 2014. Sarpy County timely filed its notice of appeal on March 24. Pursuant to Neb. Rev. Stat. § 25-1912 (Reissue 2008), in order to vest an appellate court with jurisdiction, a party must file an appeal within 30 days of the entry of a judgment, decree, or final order. Because Sarpy County's appeal was filed within 30 days of the decree of foreclosure, this court has jurisdiction over this appeal.

Summary Judgment.

Sarpy County's first assignment of error is that the district court erred in granting Echo Financial's motion for summary judgment.

[6-8] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to as a matter of law. *Harris v. O'Connor, supra*. Summary judgment proceedings do not

resolve factual issues, but instead determine whether there is a material issue of fact in dispute. *Peterson v. Homesite Indemnity Co.*, 287 Neb. 48, 840 N.W.2d 885 (2013). If a genuine issue of fact exists, summary judgment may not properly be entered. *Id.*

[9-11] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Id.* After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id.* In the summary judgment context, a fact is material only if it would affect the outcome of the case. *Id.*

Pursuant to Neb. Rev. Stat. § 77-1908 (Reissue 2009), the tax sale certificate in foreclosure proceedings under Neb. Rev. Stat. § 77-1902 (Cum. Supp. 2012) shall be presumptive evidence of all the facts necessary to entitle the plaintiff to be paid for redemption from the tax sale. A copy of tax certificate No. 10281 was attached to the complaint filed in this case. Section 77-203 provides that property taxes are a first lien on the property taxed.

Since Echo Financial adduced presumptive and uncontradicted evidence that it owned tax sale certificate No. 10281 and was presumptively entitled to be paid for redemption from the tax sale, the district court properly granted Echo Financial's motion for summary judgment. Although we have determined that the district court properly granted summary judgment in favor of Echo Financial, we also address Sarpy County's assignments of error regarding specific portions of the district court's order.

Priority of Sarpy County's Tax Liens.

Sarpy County contends that the court erred in finding that Sarpy County's weed lien was junior to the interests of Echo Financial and SID No. 268. Sarpy County argues that pursuant

to Neb. Rev. Stat. § 77-209 (Reissue 2009), its special assessments are junior only to the first lien of general taxes.

[12] Weed liens are a type of special assessment. See Neb. Rev. Stat. § 77-1701 (Reissue 2009) ("[i]n any county in which a city of the metropolitan class is located, all statements of taxes shall also include notice that special assessments for cutting weeds, removing litter, and demolishing buildings are due"). Section 77-209 provides that "[a]ll special assessments, regularly assessed and levied as provided by law, shall be a lien on the real estate on which assessed, and shall take priority over all other encumbrances and liens thereon except the first lien of general taxes under section 77-203." Pursuant to § 77-203, property tax liens are first liens "until paid or extinguished as provided by law." Special assessments are secondary to the general lien represented by the tax certificate. *INA Group v. Young*, 271 Neb. 956, 716 N.W.2d 733 (2006). Thus, the district court did not err in finding that Sarpy County's weed liens were junior to Echo Financial's general lien represented by its tax certificate.

Further, Sarpy County's weed liens are also junior to the interests of SID No. 268. Pursuant to § 77-1902 (Reissue 2009):

> When land has been sold for delinquent taxes and a tax sale certificate or tax deed has been issued, the holder of such tax sale certificate or tax deed may, instead of demanding a deed or, if a deed has been issued, by surrendering the same in court, proceed in the district court of the county in which the land is situated to foreclose the lien for taxes represented by the tax sale certificate or tax deed and all subsequent tax liens thereon, excluding any lien on real estate for special assessments levied by any sanitary and improvement district which real estate has not been previously offered for sale by the county treasurer, in the same manner and with like effect as in the foreclosure of a real estate mortgage, except as otherwise specifically provided by sections 77-1903 to 77-1917. Such action shall only be brought within six months after the expiration of three

> years from the date of sale of any real estate for taxes or special assessments.

"[T]he portion of § 77-1902 added in 1996 . . . which effectively excludes special assessments levied by sanitary improvement districts from the free and clear effects of judicial foreclosure, is an exception to the common law. See 1996 Neb. Laws, L.B. 1321." *SID No. 424 v. Tristar Mgmt.*, 288 Neb. 425, 437, 850 N.W.2d 745, 753 (2014). For completeness, we note that in 2011, the Legislature made a statutory amendment to provide that the sheriff's deed which results from the judicial foreclosure proceeding passes title to the purchaser free and clear of all liens and interests of all persons who were parties to the proceedings, "excluding any lien on real estate for special assessments levied by any sanitary and improvement district which special assessments have not been previously offered for sale by the county treasurer." See Neb. Rev. Stat. § 77-1914 (Cum. Supp. 2014); however, this substantive change is not applicable to the tax deed issued in this case. See Neb. Rev. Stat. § 77-1837.01(2) (Cum. Supp. 2014) ("[t]ax sale certificates sold and issued between January 1, 2010, and December 31, 2014, shall be governed by the laws and statutes that were in effect on December 31, 2009, with regard to all matters relating to tax deed proceedings, including noticing and application, and foreclosure proceedings"). Thus, for the foregoing reasons, the district court properly found that Sarpy County's weed liens were junior to both the interests of Echo Financial and SID No. 268.

Ordering Sale Subject to Sarpy County's General Tax Liens.

Sarpy County also assigns as error that the district court erred when it ordered that the subject property was to be sold subject to the lien of Sarpy County for the general taxes for the second half of 2011 and 2012. We note that at oral arguments, Echo Financial stated that it was relying upon Neb. Rev. Stat. §§ 77-1806 and 77-1818 (Reissue 2009) in support of its claim that Sarpy County's liens could not be foreclosed upon in this action. However, these statutes relate to actions

where the county is foreclosing upon its tax lien by the sale of real property. Echo Financial also referenced Neb. Rev. Stat. § 77-1901 (Cum. Supp. 2012) in its arguments. This section relates to actions where the county board enters an order directing the county attorney to foreclose liens. Of course, in the instant case, Echo Financial, not Sarpy County, has brought the foreclosure action. Thus, these statutes are not relevant to our analysis.

[13] The title conveyed under a tax sale is not derivative, but is a new title in the nature of an independent grant by the sovereign authority, and the purchaser takes free from any encumbrances, claims, or equities connected with the prior title. *INA Group v. Young*, 271 Neb. 956, 716 N.W.2d 733 (2006). See *Polenz v. City of Ravenna*, 145 Neb. 845, 18 N.W.2d 510 (1945). Echo Financial argues that Sarpy County must apply for a tax sale certificate pursuant to Neb. Rev. Stat. § 77-1913 (Reissue 2009) in order to collect any liens that remain unpaid after the sheriff's sale. Section 77-1913 provides a procedure for what to do with "subsequent taxes levied and assessed against the property under foreclosure." However, "'Subsequent taxes' within the meaning of § 77-1913 do not include taxes, whether general taxes or special assessments, that were assessed and levied prior to the commencement of the foreclosure proceeding." *INA Group v. Young*, 271 Neb. at 968, 716 N.W.2d at 742.

[14] Since Sarpy County's tax liens arose subsequent to the sale of the tax certificate to Echo Financial in March 2010 and prior to the commencement of the foreclosure proceedings in June 2013, § 77-1913 is not applicable to the instant case. "Tax liens arising subsequent to the sale of a tax certificate, but prior to the commencement of the foreclosure proceeding, are included in the foreclosure decree and satisfied by the proceeds of the sheriff's sale. See § 77-1902." *INA Group v. Young*, 271 Neb. at 967, 716 N.W.2d at 742. Thus, Sarpy County's liens for the general taxes for the second half of 2011 and 2012 are to be satisfied by the proceeds of the sheriff's sale.

[15] Additionally, taxes levied subsequent to the date of the certificate constitute a lien superior to the lien of the

certificate. *Medland v. Van Etten*, 75 Neb. 794, 106 N.W. 1022 (1906). See, also, *Coffin v. Old Line Life Ins. Co.*, 138 Neb. 857, 295 N.W. 884 (1941). Tax liens

> "'take priority in the reverse order of other liens. As to all other liens the first in order of time is prima facie superior to those of a later date. In the case of tax liens, however, the "last shall be first and the first last." The general and universal rule is that in proceedings in rem to enforce the payment of taxes the last tax levied and sought to be enforced is superior and paramount to the lien of all other taxes, claims, or titles.' . . ." 3 Cooley, Taxation (4th Ed.) sec. 1242.

Coffin v. Old Line Life Ins. Co., 138 Neb. at 861, 295 N.W. at 887 (emphasis omitted). Consequently, not only are Sarpy County's general tax liens for the second half of 2011 and 2012 to be paid from the proceeds of the foreclosure sale, but Sarpy County's liens also take priority over Echo Financial's liens.

CONCLUSION

We find that the district court properly granted summary judgment in favor of Echo Financial; however, we reverse the decision of the district court on errors contained in the foreclosure decree, vacate the foreclosure decree, and remand the cause for issuance of a new foreclosure decree consistent with this opinion.

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

STATE OF NEBRASKA, APPELLEE, V.
DAVID H. MINNICK, APPELLANT.

865 N.W.2d 117

Filed May 19, 2015. No. A-14-650.

1. **Criminal Law: Sentences: Time.** In the absence of statute, when a valid sentence has been put into execution by commitment of a prisoner, the court has no authority to set aside, modify, amend, or revise the sentence, either during or after the term or session of court at which the sentence was imposed. Any attempt

to do so is of no effect and the original sentence remains in force. However, where a portion of the sentence is valid and a portion is invalid or erroneous, the court has authority to modify or revise the sentence by removing the invalid or erroneous portion of the sentence if the remaining portion of the sentence constitutes a complete valid sentence.

2. **Sentences: Judges: Records.** Where a sentence is validly imposed, a judge may correct an inadvertent mispronouncement of a sentence only in those instances in which it is clear that the defendant has not yet left the courtroom; it is obvious that the judge, in correcting his or her language, did not change in any manner the sentence originally intended; and no written notation of the inadvertently mispronounced sentence was made in the records of the court.
3. **Sentences.** Sentences of less than 1 year shall be served in the county jail, whereas sentences of 1 year or more for Class IIIA felonies shall be served in institutions under the jurisdiction of the Department of Correctional Services.
4. ____. A void sentence is no sentence.
5. ____. If the original sentence is invalid, it is of no effect and the court may impose any sentence which could have been validly imposed in the first place.

Appeal from the District Court for Madison County: JAMES G. KUBE, Judge. Affirmed.

Christopher P. Bellmore, Chief Deputy Madison County Public Defender, for appellant.

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

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

RIEDMANN, Judge.

INTRODUCTION

David H. Minnick appeals his plea-based conviction and sentence for fourth-offense driving under the influence (DUI). On appeal, he argues that the district court improperly imposed a subsequent sentence because his original sentence was only partially invalid. We find no merit to his argument and therefore affirm.

BACKGROUND

Minnick was initially charged with aggravated fourth-offense DUI. Pursuant to a plea agreement, the information was amended to remove the enhancement and Minnick pleaded guilty to fourth-offense DUI, a Class IIIA felony. The factual basis for the charge provided by the State indicated that

Norfolk police officers found Minnick in a running vehicle on a public street or highway in Madison County, Nebraska, and that when a blood test was taken, Minnick's blood alcohol content was found to be in excess of the legal limit. The district court accepted the plea and found Minnick guilty.

Minnick was initially sentenced "to a term of not less than, nor more than, 180 days' incarceration [in an institution] under the jurisdiction of the Nebraska Department of Corrections." He was given credit for 10 days previously served. The district court further ordered that Minnick be allowed to participate in any alcohol and drug treatment program made available through the Department of Correctional Services.

A few hours after he was originally sentenced, Minnick was brought back before the court. The district court informed him that

> evidently the sentence that I gave was 180 days down at the Department of Corrections with treatment. I can't sentence you to 180 days down at the Department of Corrections, at least it's questionable whether I can or not. Regardless, they're not going to accept you.
>
> So my options would then be to probably send you down there for a minimum of one year and allow you to get some treatment down there or sentence you to—keep your sentence at 180 days, but just put you in the Madison County Jail here, but you wouldn't get any treatment.

Minnick said that he understood and conferred with his attorney. His attorney then told the court that Minnick would prefer to be resentenced to 1 year's incarceration at the Department of Correctional Services so that he could possibly get treatment for his alcohol issues. The district court then vacated the prior sentence and sentenced Minnick "to a term of not less than, nor more than, one year in the Department of Corrections." Minnick now appeals to this court.

ASSIGNMENT OF ERROR

Minnick assigns that the district court erred in imposing a subsequent sentence, because the original sentence was

validly imposed in part and could only be modified to correct the invalid portion of the original sentencing order.

STANDARD OF REVIEW

This appeal presents a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Gass*, 269 Neb. 834, 697 N.W.2d 245 (2005).

ANALYSIS

Minnick argues that the district court erred in imposing a subsequent sentence. He asserts that once a valid sentence is imposed, it cannot be modified, amended, or revised in any way.

[1,2] In *State v. McDermott*, 200 Neb. 337, 263 N.W.2d 482 (1978), the Nebraska Supreme Court stated that in the absence of statute, when a valid sentence has been put into execution by commitment of a prisoner, the court has no authority to set aside, modify, amend, or revise the sentence, either during or after the term or session of court at which the sentence was imposed. Any attempt to do so is of no effect and the original sentence remains in force. However, where a portion of the sentence is valid and a portion is invalid or erroneous, the court has authority to modify or revise the sentence by removing the invalid or erroneous portion of the sentence if the remaining portion of the sentence constitutes a complete valid sentence. *Id*. Additionally, where a sentence is validly imposed, a judge may correct an inadvertent mispronouncement of a sentence only in those instances in which it is clear that the defendant has not yet left the courtroom; it is obvious that the judge, in correcting his or her language, did not change in any manner the sentence originally intended; and no written notation of the inadvertently mispronounced sentence was made in the records of the court. See *State v. Foster*, 239 Neb. 598, 476 N.W.2d 923 (1991). The question therefore becomes whether the original sentence imposed was a valid sentence. We determine that it was not.

[3] In the present case, Minnick was convicted of fourth-offense DUI, a Class IIIA felony. See Neb. Rev. Stat. § 60-6,197.03(7) (Cum. Supp. 2014). The court was required to sentence Minnick to serve at least 180 days' imprisonment. See *id*. Sentences of less than 1 year shall be served in the county jail, whereas sentences of 1 year or more for Class IIIA felonies shall be served in institutions under the jurisdiction of the Department of Correctional Services. See Neb. Rev. Stat. § 28-105(2) (Cum. Supp. 2014). Consequently, the district court lacked statutory authority to impose its original sentence of 180 days under the jurisdiction of the Department of Correctional Services. See *State v. Wren*, 234 Neb. 291, 450 N.W.2d 684 (1990), *overruled on other grounds, State v. Hense*, 276 Neb. 313, 753 N.W.2d 832 (2008).

In *State v. Wren, supra*, the defendant was sentenced to 1 year's imprisonment in the county jail for his conviction of burglary, a Class III felony. The defendant filed a motion for reduction of sentence which was sustained "'to the extent that the statute provides that a sentence of one year be served in the Nebraska Correctional Complex it is ordered served in the . . . County Jail.'" *State v. Wren*, 234 Neb. at 292, 450 N.W.2d at 686 (emphasis omitted). The Supreme Court granted leave for the State to docket error proceedings in that court.

[4] Citing § 28-105(2) for the requirement that all sentences of imprisonment for a Class III felony be served in an institution under the jurisdiction of the Department of Correctional Services, the Supreme Court held that the district court was without statutory authority to sentence the defendant to the county jail. The Supreme Court stated that the "trial court's sentence was certainly unauthorized as being beyond its power to pronounce. A void sentence is no sentence . . . and therefore the defendant is legally without sentence." *State v. Wren*, 234 Neb. at 294, 450 N.W.2d at 687. It remanded the cause with directions to resentence the defendant.

In *State v. Wilcox*, 239 Neb. 882, 479 N.W.2d 134 (1992), the trial court sentenced the defendant to 6 months' imprisonment in the county detention center on a conviction of first degree assault, a Class III felony. The minimum sentence of

incarceration for that crime was 1 year. On appeal, the State argued that the sentence was invalid because it was for a term less than the statutory minimum. The Nebraska Supreme Court agreed, stating the district court lacked statutory authority to sentence the defendant to a term of imprisonment of less than 1 year.

More applicable to the present case, however, the court in *State v. Wilcox* went on to find plain error because the district court sentenced the defendant to serve his imprisonment in the county detention center. Citing § 28-105(2), the Supreme Court observed that all sentences of imprisonment for Class III felonies shall be served in an institution under the jurisdiction of the Department of Correctional Services. The Supreme Court concluded that because the county detention center was not an institution under the jurisdiction of the Department of Correctional Services, the district court's sentence was "unauthorized" and therefore void. *State v. Wilcox*, 239 Neb. at 887, 479 N.W.2d at 137. The Supreme Court stated that a void sentence is no sentence and remanded the cause to the district court for an authorized and appropriate sentencing.

In the present action, the initial sentence was unauthorized because it did not comply with § 28-105(2) in that the trial judge sentenced Minnick to a term of 180 days in an institution under the direction of the Department of Correctional Services. As a result, the sentence was void because Minnick could have been sentenced to a period of either 180 days in the county jail or a minimum of 1 year and a maximum of 5 years under the Department of Correctional Services, but not a combination of the two options. Minnick was, therefore, without sentence until he was brought back into court and was sentenced to 1 year under the supervision of the Department of Correctional Services. As a result, the district court did not err in vacating the original sentence and imposing a new term of incarceration.

We recognize that Minnick's sentence was partially valid, in that the court was authorized to sentence him to a period of 180 days or authorized to commit him to the Department of Correctional Services; however, the 180 days were required to be served in the county jail, whereas commitment to the

Department of Correctional Services required a sentence of 1 year or more. Although *State v. McDermott*, 200 Neb. 337, 263 N.W.2d 482 (1978), provides that a partially invalid sentence can be modified or revised by removing the invalid portion, that procedure is only permissible when the remaining portion of the sentence constitutes a complete valid sentence.

In *State v. McDermott*, the original sentence was for "6 months in jail, subject to review in 30 days by the Court." 200 Neb. at 339, 263 N.W.2d at 484. The phrase "subject to review in 30 days by the Court" was unauthorized and invalid. Because the removal of this phrase left a complete valid sentence, the district court was authorized to modify the invalid part by removing it. Here, either portion of the sentence (duration or location) is valid; however, it is the combination that makes the sentence invalid. Therefore, the district court was not limited to correction of either portion of the sentence and could, instead, sentence Minnick anew.

As to the court's authority to call Minnick back into the courtroom and resentence him, a similar situation arose in *State v. Blankenship*, 195 Neb. 329, 237 N.W.2d 868 (1976). In *State v. Blankenship*, the court sentenced the defendant on a Friday to an indeterminate period of not less than 25 nor more than 30 years' imprisonment on a conviction of second degree murder. The following Monday, the court, on its own motion, determined that the indeterminate sentence was invalid. The court therefore vacated the sentence and resentenced the defendant to life imprisonment.

[5] On appeal, the defendant in *State v. Blankenship, supra*, argued that the second sentence was invalid. The court rejected that argument, citing the general rule that if the original sentence is invalid, it is of no effect and the court may impose any sentence which could have been validly imposed in the first place. Because a conviction for second degree murder required the imposition of a sentence of a definite term of years, not less than the minimum authorized by law, or a sentence of life imprisonment, the original sentence was invalid and the district court had the authority to impose a new, valid sentence, even when that new sentence increased the term of imprisonment. Therefore, the new life sentence was affirmed on appeal.

See, also, *State v. Shelby*, 194 Neb. 445, 232 N.W.2d 23 (1975) (affirming resentencing where defendant was invalidly sentenced to treatment or confinement in Lincoln Regional Center under discretion of director).

Because no valid sentence was initially imposed upon Minnick, the court had the authority to bring Minnick back into the courtroom and impose a valid complete sentence, even if it increased the term of imprisonment.

CONCLUSION

Because the original sentence was unauthorized and therefore void, the district court did not err in imposing a new sentence on Minnick. Accordingly, we affirm the conviction and sentence.

AFFIRMED.

STATE OF NEBRASKA ON BEHALF OF ANDREW D.,
A CHILD UNDER 18 YEARS OF AGE, APPELLEE,
V. BRYAN B., DEFENDANT AND THIRD-PARTY
PLAINTIFF, APPELLANT, AND MONICA D.,
THIRD-PARTY DEFENDANT, APPELLEE.

864 N.W.2d 249

Filed May 26, 2015. No. A-14-225.

1. **Actions: Paternity: Child Support: Equity.** While a paternity action is one at law, the award of child support in such an action is equitable in nature.
2. **Paternity: Child Support: Appeal and Error.** A trial court's award of child support in a paternity case will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.
3. **Child Support: Rules of the Supreme Court: Insurance: Proof.** The Nebraska Child Support Guidelines provide that the increased cost to the parent for health insurance for the children shall be prorated between the parents. The parent paying the premium receives a credit against his or her share of the monthly support, provided that the parent requesting the credit submits proof of the cost of health insurance coverage for the children.
4. **Child Support.** As a general matter, parties' current earnings are to be used in calculating child support.
5. ____. If there is substantial fluctuation in income from year to year, the trial court may use income averaging to calculate income for child support purposes.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed in part as modified, and in part reversed and remanded with directions.

Grant A. Forsberg, of Forsberg Law, P.C., L.L.O., for appellant.

Julie Fowler, of Child Support Enforcement Office, for appellee State of Nebraska.

Michael B. Lustgarten, Britt H. Dudzinski, and A. Jill Stigge, Senior Certified Law Student, of Lustgarten & Roberts, P.C., L.L.O., for appellee Monica D.

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

PIRTLE, Judge.

INTRODUCTION

Bryan B. appeals from an order of the district court for Douglas County determining custody and child support for his minor child, Andrew D. Bryan challenges the court's child support calculation, taking issue with the health insurance deduction given to the child's mother, Monica D., and the income figures used for both parties. He also challenges a provision in the order requiring him to submit to random drug tests at Monica's request. Based on the reasons that follow, we affirm in part as modified, and in part reverse and remand with directions.

BACKGROUND

Bryan and Monica are the biological parents of Andrew, born in 2011. In November 2012, the State on behalf of Andrew filed a complaint to establish paternity and support. Both Bryan and Monica filed an answer and cross-claim.

In May 2013, Monica filed a motion asking the court to enter an order requiring Bryan to submit to hair follicle drug testing. Monica alleged that Bryan had initially voluntarily agreed to comply with such testing, but later refused after such testing was set up and paid for. The motion also requested temporary orders regarding physical and legal custody, visitation,

child support, daycare expenses, health insurance coverage for Andrew, and attorney fees.

The court entered a temporary order in June 2013, awarding Monica temporary sole legal and physical custody, ordering Bryan to pay child support and 50 percent of daycare expenses, ordering Monica to provide health insurance for Andrew if available through her employer, and ordering Bryan to submit to a hair follicle drug test or a urinalysis within 24 hours of Monica's request at a facility of her choice.

Bryan submitted to a drug test in June 2013, the results of which were negative for drugs, and another test in October 2013, the results of which were positive for marijuana.

Trial was held on the complaint to establish paternity and support in December 2013. The evidence showed that Bryan is a self-employed mechanic and owns an automobile repair business. Bryan admitted that he has failed to file personal and business income tax returns since he started his business in 2008, stating that he is a "poor paper manager." Accordingly, there were no income tax returns presented to the court to use in determining Bryan's income for child support purposes.

Bryan testified that after paying the bills of his business, he makes about $2,000 per month in income. He also presented exhibit 7, an estimated income statement for his business for the years 2012 and 2013. The exhibit showed a net income of $14,727.60 for 2012, a net income of $18,333.60 for 2013, and monthly net income of $1,527.80. Brian presented a second exhibit, exhibit 8, which showed his monthly deposits and withdrawals from December 2011 through November 2013 for his business checking account. Between December 2011 and December 2012, his monthly deposit average was $17,856.89 and his monthly withdrawal average was $17,399.37. Between January 2013 and November 2013, his monthly deposit average was $20,572.30 and his monthly withdrawal average was $20,698.67. Bryan further presented exhibit 6, an estimated income statement for the building where his business is located, which building he owns. It showed a net loss of $34,989.88 for 2013, as well

as a monthly net loss of $2,915.82. Monica objected to the admission of all three exhibits, and the court overruled the objection, stating it would give the exhibits the value the court believed they deserved.

Bryan testified that he leases part of the building where his business is located. He also has some storage units on the property that he rents out. Bryan also owns a two-unit building with his parents that they rent out. Bryan testified that he nets about $100 per month from the building. Bryan testified that he also owns a "double-wide modular, or trailer house," that he was in the process of renovating at the time of trial. He hoped to rent it out after the construction was done. He also owns a piece of unimproved real estate with his brother.

Bryan testified that between his business and his rental property, $2,500 was a reasonable amount of monthly income to use for him in the child support calculation.

Bryan testified that he uses a computer program named "QuickBooks" for his business. Prior to trial, Bryan provided Monica's counsel with a copy of the QuickBooks records for his business. On cross-examination, Monica's counsel presented Bryan with exhibit 3, a balance sheet dated December 3, 2013, for Bryan's business, printed from the QuickBooks records Bryan provided Monica. It showed $602,995.75 in total assets, $20,080.94 in total liabilities, and $582,914.81 in total equity. Bryan contended that the balance sheet was not accurate because it did not reflect the expenses and liabilities of the business, only income. Bryan testified that he does not record expenses in QuickBooks and that he only uses it for estimates and receipts. Bryan's counsel objected to the admission of the exhibit into evidence, and the trial court overruled the objection.

Monica testified about her work history for the past several years before trial. She testified that in 2010, she worked for a company where she made $171,682. She left her employment with that company and was unemployed for a time, then worked for another company, where her salary was $50,000 per year. Monica testified that she left that company to work as an independent contractor for a business where she was

earning $6,200 per month, or $74,000 per year. The day before trial, Monica began working as an independent contractor for a different business and was going to make $6,000 per month, or $72,000 per year. Her contract was for 3 months, and after that time, her position and salary were to be reevaluated. Monica's tax returns for the years 2010, 2011, and 2012 were entered into evidence. The tax returns showed that in 2010, she earned $171,682; in 2011, she earned $124,856; and in 2012, she earned $39,553.

Monica also testified that Andrew was not covered by health insurance at the time of trial, but that she intended to seek private health insurance coverage for him. She testified that she had investigated the cost of a "catastrophic-only health insurance policy" and that the cost would be about $250 per month.

There was also testimony from both parties regarding Bryan's past marijuana use. Monica testified that in the 4 years that she and Bryan were together, Bryan would smoke marijuana daily. She testified that after their relationship ended in 2012, Bryan told her he was trying to quit smoking marijuana, but he admitted that during their relationship, he bought marijuana on a weekly basis and had been spending $400 per month. Monica testified that she was asking the court to include in the paternity order a similar drug test provision to that included in the temporary order. She indicated that Bryan had agreed to the provision in the temporary order requiring him to submit to a hair follicle drug test or a urinalysis at her instruction. She testified that her request to have a similar provision included in the paternity order was based on the fact that Bryan tested positive for marijuana in October 2013. She further testified that the provision she was requesting was modified somewhat from that in the temporary order. Monica stated that the provision could limit the number of tests to no more than four per year and that it could state if the drug tests are clean for 1 year, the testing requirement would end.

Bryan testified that he had not smoked marijuana at all since June 2013 and that the positive test in October must have been

due to marijuana use from June or earlier. He testified that prior to June 2013, he smoked marijuana every few weeks. He denied smoking marijuana daily and denied spending $400 per month as Monica claimed. He also testified that he has never smoked marijuana around Andrew.

When asked whether he agreed to the drug testing provision in the temporary order, Bryan indicated that he did, but only because his attorney told him that he did not have a choice. Bryan testified that he did not want the drug testing provision in the paternity order because he objects to the hair follicle drug test being a method of testing. Bryan testified that he told Monica he would take a urinalysis.

A certified professional collector for a drug testing company testified that she performed the collection of Bryan's hair specimen for the October 2013 drug test and sent it to a laboratory where the hair sample was tested to determine if Bryan had used drugs. After the testing was conducted, the laboratory notified the collector of the results, which were positive for "THC metabolite," or marijuana. She further explained the positive test results indicated that Bryan had smoked marijuana at some point in the past 90 days before the sample was taken, but the results do not indicate how often Bryan had smoked marijuana in the past 90 days.

The trial court entered an order on February 11, 2014, finding that Bryan and Monica were the biological parents of Andrew, awarding Bryan and Monica joint legal custody, and awarding Monica sole physical custody of Andrew subject to Bryan's parenting time. Bryan was ordered to pay child support in the amount of $470 per month, which the court determined by using $3,500 per month for Bryan's income and $6,000 per month for Monica's income. Bryan was ordered to pay 34 percent of Andrew's daycare expenses, and Monica was ordered to obtain and maintain private health insurance for Andrew. The trial court determined that Monica was paying $205 per month for health insurance coverage and included that amount in the child support calculation. The court's order states that the cost of health insurance was determined by documentation attached to the order, and marked as exhibit C,

which indicates that Monica pays $205 per month for health insurance for Andrew.

The court's order also required Bryan to submit to a hair follicle drug test or a urinalysis at Monica's request and expense, no more than four times annually. The order provided that if the test results are negative for a period of 12 months, the drug testing requirement will terminate.

ASSIGNMENTS OF ERROR

Bryan assigns that the trial court erred in (1) granting Monica a health insurance deduction without any evidence of the cost of such insurance, (2) basing Bryan's income for child support purposes on speculation, (3) failing to apply a 3-year average of Monica's income in calculating child support, and (4) requiring Bryan to submit to a hair follicle drug test.

STANDARD OF REVIEW

[1,2] While a paternity action is one at law, the award of child support in such an action is equitable in nature. *Citta v. Facka*, 19 Neb. App. 736, 812 N.W.2d 917 (2012). A trial court's award of child support in a paternity case will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *Id*.

ANALYSIS

Health Insurance Deduction.

Bryan first assigns that the trial court erred in granting Monica a health insurance deduction for child support purposes without any evidence of the cost of such insurance. Monica testified that Andrew was not covered by health insurance at the time of trial, but that she intended to seek private health insurance coverage for him. She testified that she had investigated the cost of a "catastrophic-only" policy and the cost would be approximately $250 per month. Monica did not present any evidence other than her own testimony to show what the cost of health insurance would be.

[3] The Nebraska Child Support Guidelines provide that the increased cost to the parent for health insurance for the children shall be prorated between the parents. The parent paying the premium receives a credit against his or her share of the

monthly support, provided that the parent requesting the credit submits proof of the cost of health insurance coverage for the children. See, Neb. Ct. R. § 4-215(A) (rev. 2011); *Patton v. Patton*, 20 Neb. App. 51, 818 N.W.2d 624 (2012).

Monica failed to submit proof of the cost of health insurance for Andrew. She presented no documentation to the court at the time of trial regarding the expense of health insurance. The only evidence presented was her own testimony that insurance would cost approximately $250 per month.

The trial court, however, relied on a document that it attached to its order and concluded that Monica was paying $205 per month for health insurance. There is nothing in the record to indicate where this document came from, and it was not entered into evidence at trial. Further, there is nothing in the record to indicate that the trial court left the record open to give Monica time to present documentation regarding insurance costs. As such, there is no evidence in the record to support the figure used by the trial court.

We conclude that Monica failed to prove the cost of health insurance for Andrew and that the trial court erred in relying on a document that was not in evidence. The trial court erred in granting Monica a health insurance deduction without any evidence of the cost of such insurance. On remand, the court is directed to recalculate child support without allowing Monica a health insurance deduction for Andrew.

Bryan's Income.

Bryan next assigns that the trial court erred in basing his income for child support purposes on speculation. Specifically, he argues that the court erred in accepting and relying on exhibit 3, a balance sheet dated December 3, 2013, for Bryan's business, printed from the QuickBooks records Bryan provided Monica, in determining his income. He contends that the exhibit did not accurately depict his true earnings or income and that the court arbitrarily determined his income was $3,500 per month.

The admission of exhibit 3 was within the trial court's discretion. It was produced from the copy of the QuickBooks records Bryan provided to Monica prior to trial, which were

the only financial business records Bryan kept. Although the use of the balance sheet was not ideal, there were no income tax returns to rely on, because Bryan had not filed personal or business tax returns since 2008.

Further, the court did not rely solely on exhibit 3. In addition to accepting exhibit 3 into evidence, the trial court also accepted three exhibits presented by Bryan: an estimated income statement for his business for the years 2012 and 2013 (exhibit 7); monthly deposits and withdrawals from December 2011 through November 2013 for his business checking account (exhibit 8); and an estimated income statement for the building where his business is located, which building he owns (exhibit 6). The court also heard testimony from Bryan in regard to how these exhibits were prepared, the business records he kept or did not keep, and his rental properties. Although the court specifically referred to exhibit 3 in its oral pronouncement of its decision that Bryan's income was $3,500 per month, the court also stated that "based on the evidence and lack thereof because of [Bryan's] refusal to file a tax return as required by law for the past four years, he should have a total monthly income from all sources attributed to him." Therefore, the court took into consideration all the evidence presented in regard to Bryan's income and considered his income from all sources.

Bryan put himself in the position in which he now claims error. There was no clear evidence of his income because he voluntarily failed to file tax returns since 2008 and does not keep reliable or complete business records. Accordingly, the court had to piece together the evidence it had the best it could to determine Bryan's income. We do not conclude that the trial court abused its discretion in determining that Bryan's income is $3,500 per month for child support purposes.

Monica's Income.

Bryan also assigns that the trial court erred in failing to use a 3-year average of Monica's income for purposes of the child support calculation. Monica testified that in the last 3 years, she has had several different jobs, most of them involving sales, and her tax returns show that her income has varied in

the 3 years before trial. At the time of trial, Monica was earning $6,000 per month, which is the income amount that the trial court used in the child support calculation. Bryan contends that the court should have considered Monica's fluctuation in income and should have averaged her income for 2010, 2011, and 2012, resulting in income of $9,335 per month, rather than $6,000 per month.

[4,5] As a general matter, parties' current earnings are to be used in calculating child support. *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002). However, if there is substantial fluctuation in income from year to year, the trial court may use income averaging to calculate income for child support purposes. *Gress v. Gress*, 274 Neb. 686, 743 N.W.2d 67 (2007). The Nebraska Child Support Guidelines specifically allow for income averaging in certain circumstances. Worksheet 1 states: "In the event of substantial fluctuations of annual earnings of either party during the immediate past 3 years, the income may be averaged to determine the percent contribution of each parent as shown in item 6. The calculation of the average income shall be attached to this worksheet."

Although the trial court in the present case could have found that a 3-year average of Monica's earnings was appropriate, it was not required to. Worksheet 1 states that "the income *may* be averaged" when there have been substantial fluctuations in annual earnings.

Further, Monica's earnings during the past 3 years have decreased each year. This court has held that a steady decline in a parent's income is not "substantial fluctuations" in income. In *State on behalf of Hannon v. Rosenberg*, 11 Neb. App. 518, 654 N.W.2d 752 (2002), the father's income had shown a steady decrease since 1997, as opposed to the "substantial fluctuations" required by Worksheet 1. The father had received a cut in pay in 1999 that had continued for approximately 16 months, and there was no indication that his pay would increase in the future. This court stated that "[w]hile using income averaging to increase support is generally beneficial to minor children, this method should only be used when the facts support it." *State on behalf of Hannon v. Rosenberg*, 11 Neb. App. at 524, 654 N.W.2d at 758. We concluded that

the facts of the case did not support the use of income averaging and that the district court had erred in using the father's average income for the 3 years prior to trial in calculating child support.

We conclude that the trial court in this case did not abuse its discretion in using Monica's monthly earnings at the time of trial for child support purposes, rather than a 3-year average of her earnings.

Random Drug Testing Requirement.

Finally, Bryan argues that the trial court erred in requiring him to submit to random hair follicle drug testing. The requirement specifically provides as follows:

> With notice from [Monica] to [Bryan], which notice shall be sent via email, [Bryan] shall, within 24 hours of that notice being provided, submit to a hair follicle drug test or a urinalysis screen to test for drugs. In the notice, [Monica] shall dictate whether the test is to be a hair follicle test or a UA screen and will also set forth the specific facility at which [Bryan] shall have the test performed. [Monica] shall be responsible for drug testing costs. [Monica] shall be entitled to require [Bryan] to submit to drug testing no more than four times per year. If [Bryan] does not test positive for illegal drugs for one year consecutive period, the requirements of this drug testing provision shall terminate and this provision shall no longer be in effect.

This court recently addressed a similar issue in *Barth v. Barth, ante* p. 241, 851 N.W.2d 104 (2014). In that case, the trial court's order gave the custodial parent the discretion to withhold overnight visitation with the noncustodial parent if the noncustodial parent cohabits with someone of the opposite sex. We held that a custodial parent cannot be granted the authority to determine the visitation privileges of the noncustodial parent, because setting the time, manner, and extent of visitation is solely the duty of the court. We found that the trial court abused its discretion in allowing the custodial parent to determine whether the noncustodial parent is entitled to

overnight visits, as such provision was an unlawful delegation of the trial court's duty.

The present case is similar to *Barth v. Barth, supra*, in that the drug testing provision gives Monica, the custodial parent, the power to dictate when, where, and how the provision will be carried out. However, we determine that the *Barth* case is distinguishable from the present case because in *Barth*, the provision at issue involved visitation, which is solely the court's duty to determine. The random drug testing provision in the present case is not tied to visitation privileges. In addition, the present case is different from *Barth* in that Bryan agreed to the provision in the temporary order and was not opposed to a drug testing provision at trial. Monica testified that Bryan had agreed to the drug testing provision in the temporary order. Bryan also indicated that he agreed based on his attorney's recommendation to do so. Bryan also testified that he did not object to the drug testing provision in and of itself, but was opposed to the hair follicle method of drug testing. Bryan testified that he told Monica he would take a urinalysis. Similarly, on appeal, Bryan's assignment of error only raises issue with the court's requiring him to submit to hair follicle drug testing. In his brief, he states that "Bryan at no point in this matter had an issue with random drug testing, it was simply the method of the same." Brief for appellant at 26.

We conclude that the trial court did not abuse its discretion in requiring Bryan to submit to random drug testing at Monica's request. However, we modify the provision to provide that when Monica requests a drug test, it should be Bryan's choice whether to submit to a hair follicle drug test or a urinalysis.

CONCLUSION

We conclude that the trial court erred in granting Monica a health insurance deduction in the child support calculation without any evidence of the cost of such insurance. We also conclude that the trial court did not err in determining the incomes of Bryan and Monica for child support purposes.

Accordingly, the matter of child support is reversed and remanded to the trial court with directions to recalculate child support without granting Monica a health insurance deduction for Andrew. Further, we determine that the trial court did not err in requiring Bryan to submit to random drug testing at Monica's request, but we modify the provision to provide that it should be Bryan's choice whether to submit to a hair follicle drug test or a urinalysis.

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

STATE OF NEBRASKA, APPELLEE, V.
JOSHUA D. ROHDE, APPELLANT.

864 N.W.2d 704

Filed May 26, 2015. No. A-14-379.

1. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion.
2. **Courts: Appeal and Error.** Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.
3. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Criminal Law: Courts: Appeal and Error.** When deciding appeals from criminal convictions in county court, an appellate court applies the same standards of review that it applies to decide appeals from criminal convictions in district court.
5. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
6. **Constitutional Law: Investigative Stops: Appeal and Error.** An appellate court reviews de novo the determination that the community caretaking exception to the Fourth Amendment applied.

7. **Constitutional Law: Search and Seizure: Investigative Stops: Arrests: Probable Cause.** The Fourth Amendment guarantees the right to be free of unreasonable search and seizure. This guarantee requires that an arrest be based on probable cause and limits investigatory stops to those made upon an articulable suspicion of criminal activity.
8. **Criminal Law: Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** A traffic stop requires only that the stopping officer have specific and articulable facts sufficient to give rise to a reasonable suspicion that a person has committed or is committing a crime.
9. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** In determining whether there is reasonable suspicion for an officer to make an investigatory stop, the totality of the circumstances must be taken into account.
10. **Constitutional Law: Police Officers and Sheriffs: Investigative Stops.** The community caretaking exception to the Fourth Amendment recognizes that local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.
11. **Constitutional Law: Investigative Stops.** The community caretaking exception to the Fourth Amendment should be narrowly and carefully applied in order to prevent its abuse.
12. **Constitutional Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** In determining whether the community caretaking exception to the Fourth Amendment applies, a court should assess the totality of the circumstances surrounding the stop, including all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction.
13. **Constitutional Law: Investigative Stops: Motor Vehicles.** The community caretaking exception to the Fourth Amendment is equally applicable to drivers and passengers or occupants of a vehicle.

Appeal from the District Court for Buffalo County, WILLIAM T. WRIGHT, Judge, on appeal thereto from the County Court for Buffalo County, GERALD R. JORGENSEN, JR., Judge. Judgment of District Court affirmed.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Jon Bruning, Attorney General, and Melissa R. Vincent for appellee.

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

INBODY, Judge.

I. INTRODUCTION

Joshua D. Rohde appeals the Buffalo County District Court's affirmance of his conviction for driving under the influence of alcohol, first offense. He contends that the district court erred in affirming the county court's denial of his motion to suppress, because the initial stop of his vehicle violated his constitutional rights, and that there was no reason to believe an emergency situation existed or exigent circumstances justified stopping his vehicle pursuant to the community caretaking exception to the Fourth Amendment.

II. STATEMENT OF FACTS

At approximately 1:45 a.m. on March 16, 2013, Kearney police officer Brad Butler observed a dark-colored Ford Explorer with a female passenger with her head and part of her torso "sticking out of the moonroof of the vehicle." The female passenger was waving her arms, but Butler could not tell what she was waving at or what she was intending to wave at. Butler did not know if she was trying to wave him down, but there was no other traffic in the area. Butler turned his police cruiser around, activated its emergency lights, and conducted a stop of the vehicle for the reason that he felt that the conduct of the female passenger was both unsafe and illegal. Prior to the stop of the vehicle, there was no indication that it was exceeding the speed limit, and the vehicle had its headlights on. Butler made contact with both Rohde, who was driving the vehicle, and the female passenger of the vehicle, neither of whom indicated that they were in need of assistance. Upon further investigation, Butler arrested Rohde for driving under the influence of alcohol. Rohde was charged in Buffalo County Court with driving under the influence, first offense.

On April 5, 2013, Rohde filed a motion to suppress all of the evidence obtained for the reason that the initial stop was not based upon probable cause. He further moved to suppress any statements made by him while in custody and before *Miranda* warnings were given, in violation of his Fifth

Amendment right against self-incrimination. Finally, he moved to suppress the results of the chemical test of his blood for the reason that there was no probable cause to request such test, in violation of his constitutional rights and Neb. Rev. Stat. § 60-6,107 (Reissue 2010).

A suppression hearing was held on July 10, 2013. Butler testified to the facts as previously set forth. Rohde testified in his defense that he was driving a Ford Explorer at around 1:45 a.m. on March 16, 2013, at which point in time a female passenger stood up and extended part of her body through the "sunroof" for about 2 seconds. Rohde testified that the female passenger was standing on the floor of the vehicle and that he could feel her slightly lean against his arm. Rohde testified that at the time, he was driving about 35 to 40 miles per hour.

The county court denied Rohde's motion to suppress, finding that the stop was justified based upon the "general nature of checking welfare" and that "the officer would be remiss in not stopping and finding out what's going on." The county court also reasoned that it is "reasonable to assume that somebody could have been trying to signal [the officer] and then got pulled back into the car by their abductor."

A stipulated trial was held on August 13, 2013, with Rohde preserving the issues raised in his motion to suppress. The parties stipulated that Rohde's blood was tested on March 22 for alcohol content, which test showed an alcohol content of .15 grams of alcohol per 100 milliliters of his blood, and also that the blood sample was sent to a forensic laboratory in Omaha, Nebraska, on May 20 to be tested for alcohol content and that said test showed an alcohol content of .15 grams of alcohol per 100 milliliters of his blood.

The county court found Rohde guilty of the charged offense and, thereafter, sentenced Rohde to 9 months' probation, a driver's license suspension of 60 days, a $500 fine, and other conditions. Rohde timely appealed his conviction and sentence to the Buffalo County District Court. The district court affirmed Rohde's conviction and sentence, finding that the community caretaking exception applied to justify the stop of

Rohde's vehicle in that the circumstances of a female passenger "protrud[ing] the upper half of her body through a moonroof or sunroof [of a vehicle] and wav[ing] momentarily" as an officer passed were at least sufficient to suggest an effort by an occupant of the vehicle to wave down a police officer, which effort was thwarted when she was almost immediately pulled back into the vehicle. These circumstances are sufficient to create a concern for the welfare of the female passenger. Further, the district court noted that "the simple fact that an occupant of the vehicle is protruding, even momentarily, half of her body through the roof of a vehicle traveling at 35 to 40 miles per hour creates a significant enough safety concern that an inquiry as to the welfare [of the occupant] is appropriate." Rohde has timely appealed to this court.

III. ASSIGNMENTS OF ERROR

On appeal, Rohde's assignments of error, consolidated and restated, are that the district court erred in affirming the county court's denial of his motion to suppress because the initial stop of his vehicle violated his constitutional rights and because there was no reason to believe that an emergency situation existed or that exigent circumstances justified stopping his vehicle pursuant to the community caretaking exception.

IV. STANDARD OF REVIEW

[1-3] In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion. *State v. Piper*, 289 Neb. 364, 855 N.W.2d 1 (2014); *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011). Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. *State v. Piper, supra*; *State v. McCave, supra*. When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *State v. Piper, supra*; *State v. McCave, supra*.

[4-6] When deciding appeals from criminal convictions in county court, we apply the same standards of review that we apply to decide appeals from criminal convictions in district court. *State v. Avey*, 288 Neb. 233, 846 N.W.2d 662 (2014); *State v. McCave, supra*. In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. *State v. Piper, supra*; *State v. Matit*, 288 Neb. 163, 846 N.W.2d 232 (2014). Regarding historical facts, we review the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination. *State v. Piper, supra*; *State v. Matit, supra*. Likewise, we review de novo the determination that the community caretaking exception applied. See *State v. Bakewell*, 273 Neb. 372, 730 N.W.2d 335 (2007).

V. ANALYSIS

1. Reasonable Suspicion

Rohde claims that prior to the stop of his vehicle, Butler lacked reasonable suspicion to believe that Rohde was involved in criminal activity.

[7-9] The Fourth Amendment guarantees the right to be free of unreasonable search and seizure. *State v. Bol*, 288 Neb. 144, 846 N.W.2d 241 (2014). This guarantee requires that an arrest be based on probable cause and limits investigatory stops to those made upon an articulable suspicion of criminal activity. *Id*. A traffic stop requires only that the stopping officer have specific and articulable facts sufficient to give rise to a reasonable suspicion that a person has committed or is committing a crime. *Id*. In determining whether there is reasonable suspicion for an officer to make an investigatory stop, the totality of the circumstances must be taken into account. *Id*.

In the instant case, there was no evidence of speeding, weaving, or other traffic infraction justifying a stop of Rohde's vehicle; nor was there any evidence that Rohde or his passenger had committed or was committing a crime other than

the possible commission of a seatbelt offense, for which enforcement can only be accomplished as a secondary action and is not justification for the stop of Rohde's vehicle. See Neb. Rev. Stat. §§ 60-6,270 and 60-6,271 (Reissue 2010). Thus, we must consider whether the community caretaking exception was applicable to this case.

2. Community Caretaking Exception

We next address Rohde's claim that the district court erred in affirming the county court's finding that the community caretaking exception applied in this case. He contends that the community caretaking exception has not been applied in Nebraska to justify the stop of a vehicle where the person in need of the "care" is a passenger, not the driver. Further, he contends that even if this court does find that the community caretaking exception is applicable to passengers, the circumstances in the instant case did not justify its use, because the evidence did not show that the passenger in this case demonstrated a need for any kind of assistance or care.

[10,11] The Nebraska Supreme Court adopted the community caretaking exception to the Fourth Amendment in *State v. Bakewell*, 273 Neb. 372, 730 N.W.2d 335 (2007). The exception recognizes that

> "[l]ocal police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."

Id. at 376, 730 N.W.2d at 338, quoting *Cady v. Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973). The exception should be narrowly and carefully applied in order to prevent its abuse. *State v. Bakewell, supra*.

[12] In determining whether the community caretaking exception to the Fourth Amendment applies, a court should assess the totality of the circumstances surrounding the stop, including all of the objective observations and considerations,

as well as the suspicion drawn by a trained and experienced police officer by inference and deduction. *State v. Bakewell, supra*; *State v. Smith*, 4 Neb. App. 219, 540 N.W.2d 374 (1995).

(a) Application of Community Caretaking Exception in Nebraska

The community caretaking exception has been considered in a limited number of reported appellate cases in Nebraska. The community caretaking exception was found to apply in two cases, one case in which the vehicle was being driven in an erratic manner, *State v. Bakewell, supra*, and one in which the vehicle was stopped in traffic, *State v. Smith, supra*. The community caretaking exception was considered, and found not to apply, in two other cases: *State v. Moser*, 20 Neb. App. 209, 822 N.W.2d 424 (2012) (in postconviction proceeding alleging ineffective assistance of counsel for failing to file motion to suppress, where vehicle was stopped because of shattered windshield, community caretaking exception did not apply, there having been no evidence that vehicle had recently been involved in accident and no sense of urgency to check on welfare of driver), and *State v. Scovill*, 9 Neb. App. 118, 608 N.W.2d 623 (2000) (officer's search of glove box of car following one-vehicle accident was not justified by community caretaking exception).

In *State v. Bakewell, supra*, the officer observed a vehicle traveling on a highway at 3:15 a.m. where there was little or no other traffic present. The vehicle stopped or slowed considerably five times within approximately 90 seconds, with the vehicle eventually pulling off onto the shoulder of the road. The Nebraska Supreme Court found that considering the totality of the circumstances, it was reasonable for the officer to conclude that the driver was lost or that something was wrong with the driver, with his vehicle, or inside the vehicle, and because of the early hour of the morning, it was reasonable for the officer to assume that his assistance might be welcomed. Thus, under the court's de novo review of the

record, the Supreme Court concluded that the officer's actions in approaching the vehicle fell within the community caretaking exception.

In *State v. Smith, supra*, an officer observed a pickup in an intersection, which pickup had not moved for several minutes. The officer pulled up behind the pickup and observed that the brake lights were on and that there was no activity in the pickup. The officer was justified in believing that an exigent circumstance might exist and had good reason to make contact with the driver and to provide the driver aid, if necessary. Thus, the community caretaking exception was applicable.

In both of these cases where the community caretaking exception was applied, the individual potentially requiring assistance was the driver. Nebraska case law has not addressed a situation like that presented in the instant case, where the individual potentially requiring assistance is a passenger or occupant in the vehicle.

Rohde argues that since Nebraska has applied the community caretaking exception only when the individual requiring assistance was the driver of the vehicle, there is a question as to whether the community caretaking exception applies to a passenger in a vehicle. This question is an issue of first impression in Nebraska. Thus, we turn to other jurisdictions for guidance.

(b) Community Caretaking Exception
Applied to Occupants in
Other Jurisdictions

Several states have had the opportunity to consider whether the community caretaking exception applies to passengers, or occupants, in a vehicle. We review two cases where courts have determined that the community caretaking exception applied to justify a stop where the individual potentially requiring assistance was a passenger or occupant in the vehicle, *State v. Crawford*, 659 N.W.2d 537 (Iowa 2003), and *State v. Moore*, 129 Wash. App. 870, 120 P.3d 635 (2005).

(i) Cases Where Community Caretaking Exception Applied to Justify Stop

a. *State v. Crawford*

For example, in *State v. Crawford*, 659 N.W.2d at 543, the Iowa Supreme Court held that the stop of the defendant's flatbed truck was reasonable under the community caretaking exception to the warrant requirement where, at the time the officer stopped the defendant's truck, the officer had received a report that a male subject had taken "'some pills,'" was agitated and physically aggressive to a woman in her apartment, then had abruptly left in a flatbed truck; the officer did not know if the male subject was driving the truck; and the officer did no more than was necessary to determine whether the male subject, who was the defendant's passenger, was in need of assistance.

The Iowa Supreme Court noted that in determining the applicability of the community caretaking exception, "a court determines reasonableness by balancing the public need and interest furthered by the police conduct against the degree and nature of the intrusion upon the privacy of the citizen." *Id*. at 542. "This balancing requirement to determine reasonableness requires an objective analysis of the circumstances confronting the police officer: Under the circumstances, would a reasonable person have thought an emergency existed?" *Id*. In order to establish "'reasonableness,'" the burden falls on the state to show "'specific and articulable facts'" indicating that the officer's actions were proper. *Id*. Additionally, "'the scope of the entry and search "must be limited to the justification thereof, and the officer may not do more than is reasonably necessary to determine whether a person is in need of assistance, and to provide that assistance."'" *Id*., quoting *State v. Carlson*, 548 N.W.2d 138 (Iowa 1996).

b. *State v. Moore*

In another case finding that the community caretaking exception applied to justify a stop, the Washington Court of

Appeals found that a police officer's initial stop of an automobile that was registered to an owner who was reported as "'missing/endangered'" was justified under the community caretaking exception to determine if the person reported as missing/endangered was in the car. *State v. Moore*, 129 Wash. App. 870, 874, 120 P.3d 635, 637 (2005). The missing/endangered listing did not provide a physical description of the owner of the vehicle. During the officer's brief detention of the vehicle's driver and passengers, the officer was unable to fully dispel her concern whether any passenger was the person reported as missing/endangered. In order to do so, the officer asked each of the occupants of the vehicle for identification. The officer's interaction with the defendant, who was one of the passengers, indicated that he was the subject of an outstanding felony warrant. The court determined that the brief detention and police interaction with the defendant were also valid based upon the community caretaking exception.

The Washington Court of Appeals noted that in determining the reasonableness of the police intrusion, the court considers the totality of the circumstances. *State v. Moore, supra*. The court further stated that

> [w]hether a stop [made pursuant to the] "community caretaking" [exception] is "reasonable" requires balancing "the competing interests involved in light of all the surrounding facts and circumstances," particularly the "individual's interest in freedom from police interference against the public's interest in having the police perform a 'community caretaking function.'"

Id. at 880, 120 P.3d at 640, quoting *State v. Acrey*, 148 Wash. 2d 738, 64 P.3d 594 (2003). The court noted that when "'an officer believes in good faith that someone's health or safety may be endangered . . . public policy does not demand that the officer delay any attempt to determine if assistance is needed and offer assistance while a warrant is obtained.'" *State v. Moore*, 129 Wash. App. at 881, 120 P.3d at 640, quoting *State v. Gocken*, 71 Wash. App. 267, 857 P.2d 1074 (1993). Further, "'the officer could be considered derelict by *not* acting promptly to ascertain if someone needed help.'" *State v. Moore*, 129 Wash. App. at 881, 120 P.3d at 640 (emphasis

in original), quoting *State v. Gocken, supra*. However, a stop initiated pursuant to the community caretaking exception must end when the reasons for initiating the encounter are fully dispelled. *State v. Moore, supra*.

(ii) Cases Where Community Caretaking Exception Did Not Apply to Justify Stop

In other cases, courts have recognized the community caretaking exception and analyzed the exception in reference to a passenger or occupant in a vehicle, but have found that the particular facts of the case did not support application of the community caretaking exception.

a. *Wright v. State*

In *Wright v. State*, 7 S.W.3d 148, 151 (Tex. Crim. App. 1999), the Texas Court of Criminal Appeals recognized the community caretaking exception and noted that the exception allows police officers, as part of their duty to "'serve and protect,'" to stop or temporarily detain an individual whom a reasonable person—given the totality of the circumstances—would believe is in need of help. In determining whether an officer acted reasonably in stopping an individual to render assistance, Texas courts consider these nonexclusive factors, in light of the facts available to the officer when he conducts the stop of the defendant: (1) the nature and level of the distress exhibited by the individual; (2) the location of the individual; (3) whether or not the individual was alone, had access to assistance independent of that offered by the officer, or both; and (4) to what extent the individual—if not assisted—presented a danger to himself or others. *Id*. On remand, the intermediate appellate court applied these four factors and found that the exception did not apply where a deputy stopped a car on a highway at 4 a.m. in order to make sure that a passenger was all right after he saw the rear passenger lean out an open window and vomit. The appellate court found that the deputy did not act reasonably in stopping the vehicle, because the passenger was

> in the rear seat of a car that was being driven in a lawful manner on a public highway. [The passenger] appeared

> to be having some gastric distress, but in addition to the driver, the other passenger in the car could have aided and assisted [him]. Nothing indicated that [the passenger's] condition was any more serious than an upset stomach.

Wright v. State, 18 S.W.3d 245, 247 (Tex. App. 2000).

b. *Andrews v. State*

Similarly, in *Andrews v. State*, 79 S.W.3d 649 (Tex. App. 2002), the Texas Court of Appeals found that a stop was not justified by the community caretaking exception where a trooper saw the defendant's car pull off to the shoulder of the interstate at 1 a.m. and saw a passenger lean through an open passenger door and appear to vomit. After the passenger shut her door, the defendant began to drive away. The trooper stopped the defendant's car "'to make sure everything was okay.'" *Id*. at 650. The Texas court noted that although the stop occurred in a location that was on a somewhat isolated section of interstate and the passenger appeared to be having some gastric distress, the driver could have aided the passenger, neither of the car's occupants indicated that they needed assistance, and nothing supported a reasonable belief that the passenger was a danger to herself or others.

c. *Gibson v. State*

Another Texas case which considered the applicability of the community caretaking exception and applied the four non-exclusive factors set forth in the successive opinions in *Wright v. State, supra*, for courts to consider in determining whether an officer acted reasonably in stopping an individual to render assistance is *Gibson v. State*, 253 S.W.3d 709 (Tex. App. 2007). Therein, a mother who was concerned that her 15-year-old daughter, C.W., had not returned home by 11:15 p.m. from a football game contacted police, told them that C.W. had left the game at 10:20 p.m. with the defendant and might be in a blue 1989 "'Pontiac Oldsmobile [sic],'" and gave officers the license plate number. *Id*. at 712. At approximately 11:45 p.m., an officer spotted a vehicle matching the description given by C.W.'s mother. Although the officer could not identify the

vehicle's occupants or tell how many occupants were in the vehicle, he conducted a stop of the vehicle and located C.W. as a passenger.

In applying the four factors, the *Gibson* court noted that the first and most important factor to be considered is the nature and level of the distress exhibited by the individual. Although this first factor is entitled to the greatest weight, it is not always dispositive. *Id*. The three remaining factors—the location of the individual in distress, whether the individual was alone or had access to assistance other than that offered by the officer, and the extent to which the individual, if not assisted, posed a danger to himself or others—help to give more definition to the first factor and may reveal a particular level of distress is more or less serious depending on the presence or absence of these factors. *Id*.

In applying the first factor, the court determined that the evidence was insufficient to establish that C.W. exhibited a nature and level of distress sufficient to independently justify the stop of the defendant's vehicle as an objectively reasonable exercise of the community caretaking function, because the only evidence of the nature and level of C.W.'s distress at the time the defendant's vehicle was stopped was that C.W. was no more than 1½ hours late and that for some unstated reason, C.W.'s mother did not want her in a vehicle with the defendant. Further, the second factor, location of the individual in distress, mitigated against C.W.'s being in sufficient distress to justify the stop, because the officer stopped the defendant's vehicle a couple of houses away from C.W.'s home, the proximity of which reasonably implies that the defendant was in the process of taking C.W. home at the time of the stop. The third factor, whether the individual in distress was alone or had access to assistance other than that offered by the officer, did not support the stop because the officer could not identify any of the individuals in the defendant's vehicle or the number of individuals in the vehicle. The fourth factor, the extent to which the individual in distress, if not assisted, posed a danger to himself or others, also weighed against the stop, because there was no evidence that C.W. was placed in danger by getting a ride home from the defendant.

Thus, the court found, after considering all of the factors in light of the totality of the circumstances, that the evidence failed to establish that the stop of the defendant's vehicle was objectively reasonable under the community caretaking exception. *Id*.

d. *People v. Madrid*

The California Court of Appeal held that the community caretaking exception did not apply to a situation where an officer conducted a stop of a vehicle because he believed a passenger might be ill. *People v. Madrid*, 168 Cal. App. 4th 1050, 85 Cal. Rptr. 3d 900 (2008). The only facts articulated by the officer as grounds for the vehicle stop were that the passenger had walked to the vehicle with an unsteady gait, at one point using a nearby shopping cart to steady himself to avoid falling, and appeared to be sweating. However, the passenger was able to walk 50 feet to the appellant's vehicle and get into the passenger seat without assistance; if the passenger needed assistance, the appellant could have provided that assistance; and neither the passenger nor the driver indicated that they were in need of additional help. Nothing about the position and location of the passenger, i.e., sitting in the passenger seat of a vehicle being driven lawfully through a shopping center parking lot, suggested that the passenger was in need of additional assistance, and the facts did not support a reasonable conclusion that the passenger presented a danger to himself or others.

The court articulated that the appropriate standard under the community caretaking exception is one of reasonableness: "'Given the known facts, would a prudent and reasonable officer have perceived a need to act in the proper discharge of his or her community caretaking functions?'" *People v. Madrid*, 168 Cal. App. 4th at 1056, 85 Cal. Rptr. 3d at 905, quoting *People v. Ray*, 21 Cal. 4th 464, 981 P.2d 928, 88 Cal. Rptr. 2d 1 (1999). In a determination whether an officer acted reasonably, the officer must be able to point to specific and articulable facts from which he concluded that his action was necessary. *People v. Madrid, supra*. Stated another way, the community caretaking exception applies when police officers

"'acted reasonably to protect the safety and security of persons and property[,]' . . . that is, when 'a prudent and reasonable officer [would] have perceived a need to act in the proper discharge of his or her community caretaking functions.'" *People v. Madrid*, 168 Cal. App. 4th at 1058, 85 Cal. Rptr. 3d at 906, quoting *People v. Ray, supra*.

e. *Lewis v. State*

In *Lewis v. State*, 398 Md. 349, 353, 920 A.2d 1080, 1082 (2007), while out looking for a rape suspect described in a "'flyer,'" officers stopped a sport utility vehicle after they observed the vehicle parked on the side of the road with a male driver and a woman passenger who started "acting nervously, abruptly pushing their hands down under the vehicle's console." Although the State argued that the stop was justified under the community caretaking exception to protect the general public because police were looking for a suspect wanted in connection with a rape and to protect the female passenger because the officer thought a rape could be in progress, the appellate court agreed with the suppression hearing judge's assessment that "'there was utterly no evidence whatsoever or no reason to think there was any possible attempted rape going on.'" *Id*. at 373, 920 A.2d at 1094. The appellate court noted that the parties disagreed on whether Maryland had recognized the community caretaking exception, but regardless of whether the exception had been recognized or not, the exception was not applicable under the facts of the case.

f. Other Cases

In *State v. Lackey*, 137 N.M. 296, 110 P.3d 512 (N.M. App. 2005), the New Mexico Court of Appeals found that an officer's stop of a vehicle in which the defendant was a passenger was not justified by the community caretaking exception where the vehicle slowly drove past the scene of an accident two times, because there was no specific articulable safety concern about the defendant or the vehicle in which he was riding.

In *Majors v. State*, 70 So. 3d 655 (Fla. App. 2011), a bank manager notified police that a customer was acting strangely,

attempting to withdraw a large amount of money, and wanted the check made payable to the driver of a vehicle parked outside the bank and that the customer kept going back and forth between the vehicle and the bank. The Florida District Court of Appeal held that the community caretaking exception did not apply to justify the stop because, if the officers intended to stop the vehicle to check on the safety of its occupants or any person its occupants may have been threatening, the stop would have been based on sheer speculation, rather than articulable facts related to public safety.

(c) Application to Instant Case

[13] As the aforementioned cases establish, it is accepted in other jurisdictions that the community caretaking exception is equally applicable to drivers and passengers or occupants of a vehicle. We now hold that in Nebraska, the community caretaking exception is likewise equally applicable to drivers and passengers or occupants of a vehicle. Having found that the community caretaking exception applies to passengers, we now proceed to consider whether the exception is applicable to the facts of the instant case.

In the instant case, Butler observed a female passenger lift "the upper half of her body through [the] moon-roof" of Rohde's vehicle and briefly wave both of her arms before disappearing back into the vehicle. It was approximately 1:45 a.m., and there was no other traffic in the area. Butler could reasonably have concluded that there was a high level of distress being displayed by the female passenger, that she was attempting to flag him down to obtain his assistance, and that she was pulled back into the vehicle by the driver. Under these circumstances, the nature and level of distress exhibited here by the female passenger were such as to, and high enough to, necessitate an investigation. Other factors—location, access to assistance, and the extent to which she would, without assistance, present a danger to others—also support the reasonableness of Butler's actions. The passenger's action of waving, which a reasonable person could interpret as an attempt to flag Butler down for assistance, indicated a high level of distress signifying that the passenger may have been

in danger. Butler had no way of determining whether or not the passenger was in need of assistance without conducting a stop of Rohde's vehicle, and he was not required to delay an attempt to determine if assistance was needed in order to obtain a warrant and, in fact, could have been considered derelict had he failed to act promptly to ascertain if the passenger was in need of assistance. See *State v. Moore*, 129 Wash. App. 870, 120 P.3d 635 (2005). Thus, considering the totality of the circumstances surrounding the stop, it was reasonable for Butler to stop Rohde's vehicle to determine if his female passenger was in need of assistance and the community caretaking exception justified the stop of Rohde's vehicle.

VI. CONCLUSION

In sum, having determined that the community caretaking exception also applies to passengers or occupants in a vehicle and that it applied in the instant case to justify the stop of Rohde's vehicle to check on the welfare of the female passenger, we affirm Rohde's conviction and sentence.

AFFIRMED.

BURDETTE FLODMAN AND PHYLLIS FLODMAN, APPELLEES, v. CORKY ROBINSON, DOING BUSINESS AS THE VACUUM COMPANY, APPELLANT.

864 N.W.2d 716

Filed June 9, 2015. No. A-14-510.

1. **Small Claims Court: Appeal and Error.** The district court and higher appellate courts generally review judgments from a small claims court for error appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. ____: ____. In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
4. **Sales: Notice: Time.** Neb. Rev. Stat. § 69-1603(1) (Reissue 2009) provides the buyer with a right to cancel a home solicitation sale until midnight of the third business day after the seller has given notice of the buyer's right to cancel.

5. **Sales: Notice.** Neb. Rev. Stat. § 69-1603(2) (Reissue 2009) requires the buyer's notice of cancellation to be sent by mail and addressed to the seller. The buyer's notice of cancellation is considered given at the time it is mailed.
6. ____: ____. Neb. Rev. Stat. § 69-1604(1) (Reissue 2009) contains the language a seller is required to include in the notice of cancellation.
7. ____: ____. As an alternative to the language provided in Neb. Rev. Stat. § 69-1604(1) (Reissue 2009), § 69-1604(2) permits a seller to use the language provided by the Federal Trade Commission in a notice of cancellation.
8. **Time: Words and Phrases.** For purposes of Neb. Rev. Stat. § 69-1603(1) (Reissue 2009), "business day" is defined as any calendar day except Sunday or any federal holiday.
9. **Sales: Notice.** Neb. Rev. Stat. § 69-1604(5) (Reissue 2009) permits a buyer to cancel a home solicitation sale in any manner and by any means if the seller has not complied with the requirements in § 69-1604(1).
10. **Sales: Notice: Time.** The seller's inclusion of an incorrect date for the buyer's right to cancel in a home solicitation sale is more than a technical violation of the statute and does not comply with Nebraska law.
11. **Rules of Evidence: Proof: Words and Phrases.** The best evidence rule, also known as the original document rule, as expressed in Neb. Rev. Stat. § 27-1002 (Reissue 2008), states that the original writing, recording, or photograph is required to prove the content of that writing, recording, or photograph.
12. **Rules of Evidence: Proof.** When a duplicate writing or document is offered as evidence, the burden of raising an issue concerning the authenticity of the original writing or document, or showing circumstances of unfairness to prevent admissibility of a duplicate, is on the party opposing the duplicate's admission into evidence.
13. **Small Claims Court: Rules of Evidence.** Pursuant to Neb. Rev. Stat. § 25-2806 (Reissue 2008), the formal rules of evidence do not apply in small claims court.
14. **Small Claims Court.** The setting in small claims court affords the parties the opportunity to obtain a prompt and just determination in an action involving small amounts while expending a minimum amount of resources.
15. ____. The small claims setting is vastly different from the relatively more complex and time-consuming litigation that occurs in county or district courts.
16. **Courts: Appeal and Error.** A court cannot err with respect to a matter not submitted to it for disposition.

Appeal from the District Court for Polk County, PATRICIA A. LAMBERTY, Judge, on appeal thereto from the County Court for Polk County, STEPHEN R.W. TWISS, Judge. Judgment of District Court affirmed in part and in part reversed, and cause remanded with directions.

Kelly M. Thomas, of Svehla Law Offices, P.C., for appellant.

No appearance for appellees.

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

MOORE, Chief Judge.

Corky Robinson, doing business as The Vacuum Company, appeals from an order of the district court for Polk County, which found in favor of Burdette Flodman and Phyllis Flodman in connection with their claim arising out of a purchase of a vacuum cleaner from Robinson. Sitting as an appellate court, the district court affirmed an order of the small claims division of the Polk County Court. In this appeal, Robinson asserts that the county court erred when it determined that the cancellation notice contained in the purchase agreement violated the statutes regulating home solicitation sales. Robinson also argues that the county court should not have accepted a copy of the purchase agreement into evidence and that the court erred in requiring him to return the Flodmans' two previously owned vacuum cleaners. For the reasons that follow, we affirm in part, and in part reverse and remand with directions.

FACTUAL BACKGROUND

On December 19, 2013, Robinson visited the Flodmans at their home with the objective of selling them a vacuum cleaner. The Flodmans eventually purchased one of Robinson's vacuum cleaners for $510. As part of this transaction, the Flodmans gave Robinson two of their old vacuum cleaners, a "Dyson Ball" and a "Rainbow." Robinson accepted $500 in full satisfaction of the price of the vacuum cleaner.

To memorialize the sale, Robinson prepared and delivered to the Flodmans two copies of his standard purchase agreement. Robinson retained a third copy for his records. Robinson's purchase agreement contains a description of the sale as well as an advisement regarding a buyer's right to cancel. The advisement, in all capital letters, informs the buyer that he or she "'MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.'" Phyllis signed

the agreement, certifying that she was given notice of her rights as a buyer and that she had received two copies of the agreement.

The separate notice of cancellation is printed to the side of the purchase agreement. The notice, reproduced in its entirety below, advises the purchaser:

> BUYER'S RIGHT TO CANCEL
>
> NOTICE OF CANCELLATION
>
> Date of Transaction __ /__ /__
>
> You may CANCEL this transaction, without any Penalty or Obligation, within THREE BUSINESS DAYS from the above date. If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within TEN BUSINESS DAYS following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be canceled.
>
> If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale, or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.
>
> If you do make the goods available to the seller and the seller does not pick them up within 20 days of the date of your Notice of Cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.
>
> To cancel this transaction, mail or deliver a signed and dated copy of this Cancellation Notice or any other written notice, or send a telegram, to. The Vacuum Company, 1805 S 9th St. Lincoln Ne. 68502
>
> NO LATER THAN MIDNIGHT OF __ /__ /__
>
> I HEREBY CANCEL THIS TRANSACTION.
>
> (Date) _____
>
> (Buyer's Signature) _____

In addition to the above, Robinson's standard purchase agreement also specifies that he does not accept any other form of communication in place of the requirement for written cancellation. Finally, the form explains that all sales are final after the 3-day cancellation period elapses.

On the notice of cancellation given to the Flodmans, Robinson noted that the date of the transaction was "12/19/13." Robinson also indicated that the Flodmans had to exercise their right to cancel no later than midnight of "12/22/13." A review of the calendar shows that December 22, 2013, was a Sunday.

On the morning of Saturday, December 21, 2013, Phyllis contacted Robinson by telephone to advise him that she did not like the vacuum cleaner she and her husband had purchased. Robinson acknowledged that this telephone call occurred. In response, Robinson told Phyllis that she needed to "put [her] letter in the mailbox." During this telephone conversation, Robinson also agreed to return to the Flodmans' home after Christmas to look at the vacuum cleaner he had sold them.

Robinson returned to the Flodmans' home 12 days after the sale had been completed. During this visit, Phyllis informed Robinson of her desire to cancel the sale. Relying on the notice of cancellation in the purchase agreement, and the Flodmans' failure to mail in the completed notice of cancellation, Robinson declined to permit the Flodmans to return the vacuum cleaner.

The Flodmans filed a small claims action against Robinson in the Polk County Court seeking to return the vacuum cleaner they had purchased from Robinson and to recover the money they had paid Robinson for that vacuum. The Flodmans also sought to have Robinson return the vacuum cleaners they had traded to him at the same time they purchased the new vacuum cleaner. In their filed claim, the Flodmans alleged that the two vacuum cleaners they had given Robinson were valued at $800. On February 13, 2014, the county court held a hearing on the Flodmans' claim.

At the hearing, the Flodmans contended that Phyllis' telephone call to Robinson on December 21, 2013, was sufficient

to cancel the sale. The Flodmans also asserted they had given Robinson a Dyson vacuum cleaner and another vacuum cleaner as part of the sale. During their testimony, the Flodmans could not agree whether the second vacuum cleaner was a "Kirby" or a "Rainbow." They asked the court to order Robinson to return those two vacuum cleaners.

Robinson explained to the court that his purchase agreement form complied with all applicable law pertaining to home solicitations. He testified that he had conversations with the Attorney General's office in both Nebraska and Kansas and received their approval for his form. Robinson maintained that he had the right to refuse the Flodmans' attempted cancellation of the sale because they had not complied with the terms of the purchase agreement. Finally, Robinson disagreed with the Flodmans' claim that they had traded two vacuum cleaners as part of the sale. Rather, Robinson testified that "the bearings were out of" the two old vacuums, that "[he] can't get much for that old of a model," and that the vacuums were given to him to dispose of.

On February 25, 2014, the county court entered an order in which it found in favor of the Flodmans. The court determined that the transaction between the Flodmans and Robinson was controlled by Neb. Rev. Stat. §§ 69-1601 to 69-1607 (Reissue 2009). Further, the court concluded that the language in Robinson's standard purchase agreement and accompanying notice of cancellation complied with Nebraska law pertaining to home solicitation sales. However, the county court found that Robinson incorrectly completed his form because of his indication that December 22, 2013, was the last day for the Flodmans to exercise their right to cancel the sale. Because December 22 was a Sunday, and, therefore, not a business day, the court found that Robinson's notice of cancellation did not comply with Nebraska or federal law.

Due to the fact that Robinson's notice of cancellation did not comply with the applicable statutes, the county court concluded that the law permitted the Flodmans to exercise their right to cancel in any manner and by any means they chose. Thus, the Flodmans' telephone call to Robinson on December 21, 2013, canceled the sale. The county court ordered that the Flodmans

were entitled to the return of any money paid to Robinson in addition to the return of the two vacuum cleaners they had tendered to him as part of the sale. The Flodmans were ordered to return to Robinson the vacuum cleaner they had purchased upon Robinson's compliance with the court's order.

Robinson appealed the county court's order to the district court. At oral arguments before the district court, Robinson maintained that his purchase agreement and attached notice of cancellation complied with all applicable law. Robinson also claimed that his copy of the purchase agreement relating to the sale to the Flodmans contained December 23, 2013, as the final date for the Flodmans to exercise their right to cancel. Robinson believed that the tripartite paper did not allow the entire date to copy through. He informed the court that he attempted to adduce his copy of the purchase agreement into evidence at the small claims court, but was prevented from doing so by the clerk magistrate. Finally, Robinson argued to the district court that the Flodmans had requested he recycle their two old vacuum cleaners and that he did so as a free service to them. He asserted that a trade-in would have been reflected on the purchase agreement.

On May 7, 2014, the district court entered an order affirming the judgment of the county court. The district court did not find any errors on the record. Robinson now appeals to this court.

ASSIGNMENTS OF ERROR

Robinson assigns three errors. He asserts, restated, that the county court erred by (1) concluding the notice of cancellation did not comply with Nebraska law, (2) allowing the Flodmans to introduce a carbon copy of the purchase agreement when the original was available, and (3) finding that the Flodmans had traded their two vacuum cleaners as part of the sale with Robinson.

STANDARD OF REVIEW

[1] The district court and higher appellate courts generally review judgments from a small claims court for error appearing on the record. See, Neb. Rev. Stat. §§ 25-2733 and 25-2807

(Reissue 2008); *Hara v. Reichert*, 287 Neb. 577, 843 N.W.2d 812 (2014).

[2,3] When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *First Nat. Bank of Unadilla v. Betts*, 275 Neb. 665, 748 N.W.2d 76 (2008). However, in instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record. *Id.*

ANALYSIS

Contents of Purchase Agreement and Cancellation Notice.

[4,5] As the county court accurately stated in its order, this case comes within the Nebraska statutes governing home solicitation sales, §§ 69-1601 to 69-1607. In this case, the provisions within §§ 69-1603 and 69-1604 determine the outcome. Section 69-1603(1) provides the buyer with a right to cancel a home solicitation sale until midnight of the third business day after the seller has given notice of the buyer's right to cancel. Section 69-1603(2) requires the buyer's notice of cancellation to be sent by mail and addressed to the seller. The buyer's notice of cancellation is considered given at the time it is mailed.

[6,7] Section 69-1604(1) contains the language a seller is required to include in the notice of cancellation. Subsection (1) specifically states:

> Whenever a buyer has the right to cancel a home solicitation sale, the seller's contract shall contain a notice to be printed in capital and lowercase letters of not less than ten-point boldface type and appear under the conspicuous caption: BUYER'S RIGHT TO CANCEL; which shall read as follows: You may cancel this agreement by mailing a written notice to (Insert name and mailing address of seller) before midnight of the third business day after you signed this agreement. If you wish, you may use this

page as that notice by writing "I hereby cancel" and adding your name and address.

§ 69-1604(1). As an alternative, § 69-1604(2) permits a seller to use the language provided by the Federal Trade Commission in its trade regulation rule as long as that language provides at least equal information as that required by § 69-1604(1). The Federal Trade Commission requires the following language in a notice of cancellation:

NOTICE OF CANCELLATION

[enter date of transaction]

_____

(Date)

You may CANCEL this transaction, without any Penalty or Obligation, within THREE BUSINESS DAYS from the above date.

If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within TEN BUSINESS DAYS following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be cancelled.

If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale, or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.

If you do make the goods available to the seller and the seller does not pick them up within 20 days of the date of your Notice of Cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed and dated copy of this Cancellation Notice or any other written notice, or send a telegram, to [*Name of seller*],

> at [*address of seller's place of business*] NOT LATER THAN MIDNIGHT OF [*date*].
>
> I HEREBY CANCEL THIS TRANSACTION.
>
> (Date) _____
>
> (Buyer's signature) _____

16 C.F.R. § 429.1 (2013) (emphasis in original).

The notice of cancellation on Robinson's form adopts the language from the Federal Trade Commission's rule. As is evident from above, the language from the Federal Trade Commission's rule provides information that is at least equal to Nebraska's required language in § 69-1604(1). Thus, the language in Robinson's standard notice of cancellation complies with Nebraska law.

[8,9] The difficulty in this case arises because Robinson's cancellation notice for the particular transaction with the Flodmans contains an incorrect date. The purchase agreement displays December 22, 2013, as the final day for the Flodmans to have exercised their right to cancel the sale. The question is whether December 22 was a business day. The Nebraska statutes governing home solicitation sales do not define "business day." Based on the Legislature's reference in § 69-1604(2) to the Federal Trade Commission's rule, we believe it is appropriate to adopt the Federal Trade Commission's definition of "business day" for Nebraska home solicitation sales. The Federal Trade Commission defines "business day" as "[a]ny calendar day except Sunday or any federal holiday (e.g., New Year's Day, Presidents' Day, Martin Luther King's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.)" 16 C.F.R. § 429.0(f) (2013). Applying this definition of "business day" to the present case, we observe that although December 22 was the third day after Robinson's sale to the Flodmans, it was a Sunday, not a business day. Therefore, Monday, December 23, should have been the last day for the Flodmans to exercise their right to cancel. Under § 69-1604, subsection (5) specifies that a buyer may cancel a home solicitation sale in any manner and by any means if the seller has not complied with the requirements in subsection (1).

Thus, the next question in this case is whether Robinson's failure to fill in the blank with the correct date causes the cancellation notice to run afoul of § 69-1604. If it did, then the Flodmans' telephone call to Robinson would suffice to cancel the sale. See § 69-1604(5). Robinson contends the cancellation notice in question was effective because there is nothing in the Nebraska statutes or case law which requires any type of "fill-in-the-blank" date on a cancellation notice. He correctly observes that § 69-1603(1) requires only a statement that the buyer has 3 business days to cancel a sale.

Despite Robinson's contentions, we agree with the county court's conclusion. Our review of the legislative history of this statutory section regarding home solicitation sales reveals that the purpose of the section was to "provide the consumers of the State of Nebraska some protection in the field of home solicitation sales." Committee Statement, L.B. 212, Committee on Miscellaneous Subjects, 83d Leg., 1st Sess. (Apr. 2, 1973). Keeping that purpose in mind, the protection provided to the buyer by the cancellation period of 3 business days required in § 69-1603(1) would be frustrated if a seller were permitted to advise the buyer of an incorrect expiration date for the buyer's right of cancellation. We recognize that Nebraska law does not require Robinson to include a specific date for the expiration of the buyer's right to cancel on the notice of cancellation. However, in order to comply with Nebraska law once a buyer elects to include a specific date, it is axiomatic that the correct date should be used in order to require the buyer to strictly comply with the provisions in the cancellation notice.

Our research has revealed that there is no authority construing the home solicitation statutes in Nebraska. Similarly, there is very little guidance from other states with respect to the inclusion of a specific date for cancellation of a home solicitation sale. While Robinson cites to various cases decided under the Federal Truth in Lending Act for the proposition that technical violations of cancellation notices may be overlooked, this authority does not address the particular situation with which we are presented—namely, the inclusion of

an incorrect cancellation date. Our independent research has not revealed any cases in the realm of state home solicitation statutes or under federal regulations in which the inclusion of an incorrect date in a cancellation notice was addressed, let alone excused.

Nonetheless, we find some guidance from the Connecticut Supreme Court's decision in *Wright Bros. Builders, Inc. v. Dowling*, 247 Conn. 218, 720 A.2d 235 (1998). In that case, the Connecticut court was called upon to determine whether the failure to include the date of the transaction or the date by which the transaction could be canceled on the notice of cancellation precluded enforcement of the contract. We pause to note that this case involved Connecticut's Home Improvement Act which incorporated provisions from that state's Home Solicitation Sales Act. Among the adopted provisions was the requirement for a notice of cancellation which is similar to the notice Robinson uses on his form. Connecticut law requires the notice of cancellation to include the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation. See Conn. Gen. Stat. Ann. § 42-135a (West 2012). The Connecticut Supreme Court further noted that although compliance with the Home Improvement Act was mandatory, such compliance did not have to be "technically perfect." *Wright Bros. Builders, Inc. v. Dowling*, 247 Conn. at 231, 720 A.2d at 241. Turning to the specific contract, the Connecticut Supreme Court concluded that the seller's failure to fill in the blanks with the date of the transaction and the date by which the buyer could cancel the sale was not fatal. The court concluded that the missing information could have been gleaned from even "the most cursory review of the contract." *Id.* at 233, 720 A.2d at 242. The failure to include the dates on the notice of cancellation did not rise to the level of noncompliance with the law.

[10] The reasoning in *Wright Bros. Builders, Inc.* leads us to the opposite conclusion in this case. While failure to

include a date for cancellation may be a technical violation overcome by inclusion of the 3-day cancellation language, including an incorrect date on the notice of cancellation is clearly more than a technical violation of the statute. Inclusion of an incorrect date may lead a buyer to conclude that his or her right to cancel an unwanted sale had expired, when in reality it had not. Such a practice by a seller would infringe on the buyer's protection under § 69-1603(1).

To summarize, because Robinson's cancellation notice for this particular transaction contained an incorrect date for the expiration of the Flodmans' right to cancel, it did not comply with Nebraska law. That being the case, the Flodmans were permitted to cancel the sale by any means they chose. We determine that Phyllis' telephone call to Robinson on December 21, 2013, canceled the sale.

Copy of Purchase Agreement.

During the small claims hearing, the Flodmans offered into evidence exhibit 3, one of the two copies of the purchase agreement they received from Robinson. The trial court concluded that this purchase agreement displayed December 22, 2013, as the final day for the Flodmans to exercise their right to cancel the sale. Robinson did not object to the introduction of this exhibit at trial or notify the court of a possible discrepancy regarding the date on the copy. However, on appeal to the district court, Robinson contended that the clerk magistrate did not allow him to introduce the original purchase agreement into evidence at the small claims hearing. Robinson asserted that the original purchase agreement correctly displayed December 23 as the final day for the Flodmans' right of cancellation. The district court rejected this argument.

Now, Robinson argues that the county court erred when it permitted the Flodmans to introduce a copy of the purchase agreement into evidence when the original was available. He contends that the admission of the copy of the purchase agreement into evidence prejudiced him because it was not the best evidence of the contents of the purchase agreement.

[11,12] The best evidence rule, also known as the original document rule, as expressed in Neb. Rev. Stat. § 27-1002 (Reissue 2008), states that the original writing, recording, or photograph is required to prove the content of that writing, recording, or photograph. See *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000), *overruled on other grounds, State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014). The purpose of this rule is to prevent fraud, inaccuracy, mistake, or mistransmission of critical facts contained in a writing, recording, or photograph when its contents are an issue in a proceeding. See *Equitable Life v. Starr*, 241 Neb. 609, 489 N.W.2d 857 (1992). When a duplicate writing or document is offered as evidence, the burden of raising an issue concerning the authenticity of the original writing or document, or showing circumstances of unfairness to prevent admissibility of a duplicate, is on the party opposing the duplicate's admission into evidence. *Id*.

[13-15] We reject Robinson's arguments for a number of reasons. First, Robinson's reliance on the best evidence rule is misplaced because the formal rules of evidence do not apply in small claims court. See Neb. Rev. Stat. § 25-2806 (Reissue 2008). The setting in small claims court affords the parties the opportunity to obtain a prompt and just determination in an action involving small amounts while expending a minimum amount of resources. *Henriksen v. Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002). The small claims setting is vastly different from the relatively more complex and time-consuming litigation that occurs in county or district courts. See *id*.

Additionally, even if the best evidence rule were to apply to small claims court, Robinson still had the burden to raise the issue to the court. Because he failed to raise any objection at the small claims hearing regarding the authenticity or contents of the Flodmans' copy of the purchase agreement, his arguments must also fail. See *Equitable Life v. Starr, supra*.

[16] Finally, Robinson's argument regarding his inability to introduce his copy of the purchase agreement at the small claims hearing is without merit. Robinson states that he attempted to introduce the original into evidence during his case in chief at the small claims hearing, but was prevented by the clerk magistrate. We have not discovered any such

attempt in the bill of exceptions from the small claims hearing or any objection on the record to the clerk's refusal to mark such an exhibit. Further, Robinson does not cite to any such example in his brief. A court cannot err with respect to a matter not submitted to it for disposition. *Huber v. Rohrig*, 280 Neb. 868, 791 N.W.2d 590 (2010).

Therefore, based on the above reasons, we find Robinson's claim as to the best evidence rule to be without merit.

County Court's Finding That Vacuum Cleaners Were Trade-ins.

Finally, Robinson assigns error to the county court's conclusion that the Flodmans had traded two vacuum cleaners as part of the transaction with Robinson. He contends that he made no promise that the Flodmans' vacuum cleaners would be treated as trade-ins. Robinson argues that he simply provided a free disposal service for the Flodmans.

At the small claims hearing, there was little evidence presented to establish how the parties intended to handle these two vacuum cleaners in the sale. The Flodmans introduced evidence in the form of an instruction manual to demonstrate that they gave Robinson a Dyson vacuum cleaner. Phyllis testified that this Dyson vacuum cleaner was 3 years old. The record is less clear as to the specifications of the second vacuum cleaner; Burdette testified that it was a "Rainbow," while Phyllis maintained that it was a "Kirby." Neither Burdette nor Phyllis testified to the value of either of these vacuum cleaners, and they did not specifically testify that the two vacuum cleaners were to be treated as trade-ins for the vacuum cleaner purchased from Robinson. Robinson testified that both of the Flodmans' vacuum cleaners were old, had worn-out bearings, and were given to him for disposal.

In addition to the parties' testimony, the purchase agreement sheds some light on this issue. The purchase agreement contains a typed notation on line 10 which states, "Customer Requests FREE Disposal-recycle of old Vacuum." Above that line, Robinson appeared to write "Dyson" and "R.B." Robinson's initials are in a box next to these handwritten notes.

The county court found that the Flodmans were entitled to the return of their two vacuum cleaners. We conclude this determination was clearly erroneous. The record from the small claims hearing does not contain any testimony from the Flodmans to support their contention that they believed they were giving these vacuum cleaners as trade-ins. In fact, the Flodmans' evidence at the small claims hearing related only to the identification of the two vacuum cleaners. As noted above, their evidence as to this issue was not clear.

Because of the Flodmans' failure to introduce evidence to support their contention that their two vacuum cleaners should be considered trade-ins, Robinson's testimony as to these vacuum cleaners was not contradicted. He testified that the two vacuum cleaners were given to him for disposal. He described each of these vacuums as "old" and stated that "the bearings were out" on each. The contents of the purchase agreement, while not the best example of clarity, also provided additional support for Robinson's claims that these vacuums were given to him for disposal.

Based on this record from the small claims hearing, we conclude that there was not competent evidence to support the order requiring Robinson to return the two vacuums to the Flodmans and that the district court erred by affirming that portion of the county court's order.

CONCLUSION

We find no error on the record in the county court's receipt of exhibit 3, one of three copies of the purchase agreement. We also find no error in the county and district courts' conclusion that the cancellation notice in the purchase agreement, with the handwritten cancellation deadline, did not conform to Nebraska law such that Flodmans' oral cancellation was sufficient. We therefore affirm the judgment of the county court to the extent that it ordered Robinson to return the $500 paid to him by the Flodmans and ordered the Flodmans to return to Robinson the vacuum cleaner that they purchased from him. However, we conclude the county court's finding that the two vacuum cleaners previously owned by the Flodmans were trade-ins and that they were entitled to return of the vacuums

is not supported by competent evidence. We therefore reverse that portion of the district court's order affirming this finding, with directions to the district court to remand the cause to the county court with directions to reverse and vacate that portion of the order.

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

IN RE INTEREST OF NERY V. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MARIO V., SR., AND IDA V., APPELLEES, AND ROSEBUD SIOUX TRIBE, INTERVENOR-APPELLANT.

864 N.W.2d 728

Filed June 9, 2015. No. A-14-654.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. ____: ____. An appellate court reviews questions of law independently of the juvenile court's conclusions.
3. **Indian Child Welfare Act.** The substantive portions of the Indian Child Welfare Act and the corresponding portions of the Nebraska Indian Child Welfare Act provide heightened protection to the rights of Indian parents, tribes, and children in proceedings involving custody, termination, and adoption.
4. **Juvenile Courts: Evidence: Proof.** In adjudication cases, the standard of proof for the active efforts element in Neb. Rev. Stat. § 43-1505(4) (Reissue 2008) is proof by a preponderance of the evidence.

Appeal from the County Court for Hall County: PHILIP M. MARTIN, JR., Judge. Affirmed.

Lloyd E. Guy III for intervenor-appellant.

Megan Alexander, Deputy Hall County Attorney, for appellee State of Nebraska.

Susan M. Koenig, of Mayer, Burns, Koenig & Janulewicz, guardian ad litem.

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

INBODY, Judge.

INTRODUCTION

The Rosebud Sioux Tribe (Tribe), an intervenor in this case, appeals the order of the county court for Hall County, sitting as a separate juvenile court, denying the Tribe's motion for a change of placement of three minor children, Mario V. (Mario Jr.), Esperanza V., and Nery V. For the reasons that follow, we affirm the order of the trial court finding that the State met its burden of proof in showing that there was good cause to deviate from the placement requirements of the Nebraska Indian Child Welfare Act (NICWA).

STATEMENT OF FACTS

Background Information.

Mario Jr., Esperanza, and Nery were removed from their parents' care in November 2010. At the time of the children's removal, their biological mother, Ida V., requested that the children be placed with Tara L. and Terry L., which request was granted without objection from any party. Ida has ties to the Rosebud Sioux Tribe and requested placement with Tara and Terry even though they are not Native American. The Tribe intervened in this case in January 2011, and the Tribe has been aware during the pendency of the case that the children are placed in a non-Native American foster home.

In October 2013, the Tribe filed a motion to change the placement of all three children, asserting that Ida no longer consented to a non-Native American placement and requesting that the children be placed with their maternal aunt, Brianna C., who is an enrolled member of the Tribe. Thereafter, Ida filed with the trial court a "Withdrawal of Consent to Placement in Non-Indian Home." The Nebraska Department of Health and Human Services (DHHS) filed an objection to the change of placement for the reasons that the children had been placed with Tara and Terry for 3 years; that Brianna had been previously suggested for placement, but that on three separate occasions, home studies were completed, none of which recommended placement with her; that the Tribe had been involved

in the case since 2010 and had failed to inquire about placement; and that a new placement would traumatize the children and was not in their best interests.

Hearing on Motion to Change Placement.

The hearing on the motion to change placement was held over several days from January through May 2014. The Tribe adduced testimony from several witnesses. Brianna testified that she was the children's aunt and also an enrolled member of the Tribe. At that time, Brianna was 27 years old; lived in Kearney, Nebraska, with her 5-year-old daughter; and was employed by a sports medicine clinic as a "CNA, med aide." Brianna also has a pharmacy technician's license and has received her certification to volunteer as a court-appointed special advocate. Brianna testified about the importance of being such an advocate and her involvement with that work, but later testified that she had worked on only one case and did not know if she had been terminated from the advocate program, since she had moved from Grand Island, Nebraska, to Kearney without giving notice. Brianna testified that she had been employed at seven different places in the last 7 years. Brianna's current home has three bedrooms and two bathrooms.

Brianna explained that on three separate occasions, DHHS had completed home studies at her residence, and that she had been denied authorization as a placement each time. Brianna has not seen any of Ida's children since they were first taken from Ida's home and had only recently attempted to have visitation with them in November 2013. Brianna testified that her involvement with the Tribe included having her federal identification card from the Lakota Sioux Tribe and taking her daughter to a Tribe powwow in 2013. Other than those two instances, Brianna testified she had very little involvement with the Tribe, limited to talking to her daughter about her ancestors and buying a compact disc of "Indian music" to listen to.

The Tribe adduced testimony from Lorna Turgeon. Turgeon testified that she is an enrolled member of the Rosebud

Sioux Tribe; she obtained her undergraduate degree from Metropolitan State University in St. Paul, Minnesota; and she obtained master of social work and master of public administration degrees from the University of Nebraska at Omaha. Turgeon testified that she had more than 20 years of experience in working with children and was certified as an expert in Indian child welfare. Turgeon testified about the importance of the extended family in the Indian culture.

Turgeon became involved in this particular case in September 2013. A home study commissioned by the Tribe was completed in October 2013 and is based upon interviews with Brianna. Turgeon testified that the recommendation of that home study was for placement of the three children with Brianna. The recommendation was based on aspects of the home study including child safety, nurturance, Brianna's being able to provide for the children financially and being able to create a safe and loving home for them, and the fact that the children "would retain their cultural identity and sense of belonging within their culture and their family." However, Turgeon testified that in compiling the home study, she did not meet with the children's foster parents, did not know how much contact with Native American culture the children had been exposed to in their lives, and did not know what, if anything, the foster parents have done to help the children retain any Native American culture. Turgeon had also not reviewed any of the DHHS case files for the family, including the home studies DHHS completed.

The Tribe's home study explains that in the Lakota family structure, a biological mother's sister is considered the children's "other mother." The home study indicates that prior to the children's being removed, Brianna was involved in the children's lives. The home study indicates that Brianna was aware of the trauma continued moving causes the children and that she could be "therapeutic" for the children by making the children feel secure. The home study indicates that Brianna supports contact with the children's parents and that she feels that she can control Ida when she gets mad or upset. The Tribe's home study indicates that Brianna is very involved in her Native American culture and mentions several times

that Brianna is also very involved as a court-appointed special advocate volunteer.

The Tribe's home study included a home safety checklist indicating the process involved in the study. The checklist includes whether the worker involved in the study contacted a minimum of three references, completed "[g]enograms" and "[e]co [m]aps," investigated Brianna's transportation, and verified her driver's license and whether Brianna met housing requirements. The checklist indicates that Brianna had no automobile insurance and that no screening for abuse and neglect or criminal background check had been completed. Turgeon acknowledged that the minor children were happy in their current foster placement and admitted that it was possible that the children could live in a home that was neither Hispanic nor Native American but still retain the culture of one or both of those cultural identities.

Sherri Eveleth, a DHHS Indian child welfare program specialist, testified as an expert witness for the State and explained that she had been involved with this family and case since 2008. Eveleth testified that several attempts had been made with the family to place the children with family members, but that many of the family members lost contact or interest. Eveleth testified that the Tribe intervened in the case in January 2011, upon her request after finding out about the children's eligibility as enrolled members of the Tribe. Eveleth contacted the Tribe's caseworker, Shirley Bad Wound, about the children via telephone and in person. Eveleth testified that she specifically talked with Bad Wound about placement of the children with Native American families but was told that there were no families available for placement in the area or on the Rosebud Sioux reservation. Eveleth testified that placement of the children with Brianna would result in serious emotional harm to the children. Eveleth testified that Brianna did not act to protect the children despite knowing the children were in the care of Ida, who was actively using methamphetamine, and that Brianna's courtroom testimony indicated she was capable of being very hostile.

Christina Ledesma, the ongoing DHHS case manager, was assigned to the case from November 2010 to September 2012.

During that time, the children remained in the same placement with Tara and Terry. Ledesma testified that several home studies were completed for family members who expressed an interest in placement of the children with them, including Brianna. Ledesma testified that several of the interested family members lost touch with DHHS or did not complete the placement information. Ledesma testified that in 2008, Brianna had a home study which did not recommend placement of the children with her. A second home study was completed in 2011, which also did not recommend placement of the children with Brianna. Ledesma explained that all of the children were high-needs children with mental health diagnoses and trust issues. DHHS was concerned with Brianna's employment stability and her ability to be a single parent to not only her own daughter, but also to the three minor children at issue. There was also concern that Brianna would not be able to stand up to Ida and set healthy boundaries for the children. Ledesma testified that the Tribe was aware that the children were placed in a non-Native American home and did not make any objection to said placement for several years. Ledesma further testified that the caseworker for the Tribe, Bad Wound, did not have any placement options for the children.

The current DHHS caseworker, Marjorie L. Creason, testified that she was assigned to this case in 2012. Creason testified that Mario Jr., prior to his current placement, had been placed in six or seven homes and that Esperanza had been in three different foster home placements. Creason testified that she meets with the children during her monthly visits and team meetings and that they are all excelling in school and involved in several activities. Creason testified that the children are very social and have bonded with Tara and Terry. Creason testified that based on the home studies, she would not feel comfortable about placing the children with Brianna, and that due to the amount of time they have been placed with Tara and Terry, a change in placement was not in the children's best interests.

In 2011, Joan Ramsey, a licensed professional counselor, was hired by DHHS to conduct a home study of Brianna.

Ramsey testified that in completing home studies, she looks at the individuals' family of origin, relationships with their own parents and siblings, mental health history, substance abuse issues, contacts with the law, social problems, financial and employment history, relationship with their biological children, and parenting style and the effect on foster children in the home.

In 2011, Brianna was living with her daughter in a small one-bedroom apartment, in a neighborhood where there were safety concerns. Brianna was employed as a "CNA" working from 2 to 10 p.m. and planned on placing the children in daycare during those hours. Ramsey was concerned because Brianna believed she could adequately parent all four children on her own while working full time and also considering attending school. Ramsey was also concerned because of Brianna's instability with frequently changing jobs, which also raised financial concerns. Ramsey testified that Brianna was not financially self-sufficient and had no health insurance. Ramsey was also concerned with Brianna's ability to set boundaries with Ida. On the positive side, Ramsey testified that all of Brianna's references indicated that Brianna loved children, was a good parent to her own daughter, and loved Ida's children as well. Ramsey did not recommend that the children be placed with Brianna based upon the home study.

In 2013, Ramsey completed the third home study for Brianna. At that time, Brianna had moved to Kearney and was living in a larger trailer home, with three bedrooms, two bathrooms, and a small yard. Brianna indicated that at her new employment, she worked three 12-hour shifts over each weekend and would place the children in daycare during that time. Ramsey testified that Brianna's financial position had improved but that she was still concerned Brianna was unrealistic about parenting the children. Ramsey testified that two of the three children are high needs with diagnoses of dysthymic disorder and reactive attachment disorder, the latter of which requires routine, structure, and very little change for a child. Ramsey also testified that any deviation could result in stress and emotional issues for the children. Ramsey testified that Brianna had not done any research or planning

and did not have any support for the transition of the children. Further, Ramsey had difficulty keeping in contact with Brianna, which raised concern in that Brianna would need to keep in constant contact with schools, therapists, doctors, and caseworkers.

Ramsey testified that similarly to her conclusions in 2011, she did not recommend placement of the children with Brianna. Ramsey emphasized that the children had been in placement with Tara and Terry for a significant amount of time and were very bonded with that family. Ramsey, after speaking with caseworkers and therapists, was concerned that any movement of the children would cause significant harm and set the children back in their development.

The children's foster mother, Tara, testified that she first had contact with the children's biological family in 2008, when Mario Jr. and Esperanza were placed with her and her husband, Terry, for approximately 9 months. Tara lost track of the children until 2010, when she saw them at a local restaurant. At that time, Tara kept in touch with the family and had many conversations with Ida. Tara testified that in November 2010, Ida called her and was very upset because the State had taken the children into custody. Ida asked Tara if she would go to DHHS and get the children. Tara testified she and Terry decided to take placement of the children and have had them since that time.

Tara testified that when the children first came to live with them, the children were exhibiting behavioral issues and started therapy. Tara testified that therapy had addressed those issues and that the issues no longer existed. All three children are attending school and doing very well. Tara explained that she has continually taken steps with the children to expose them to Native American culture by taking them to powwows, to visit the Rosebud Indian reservation, and to the Crazy Horse monument in South Dakota and by frequently checking out books on the subject from the library. Tara testified that the children are settled in their home and are all bonded with her and Terry.

Trial Court's Order.

On June 18, 2014, the trial court overruled the Tribe's motion to change placement, finding the State had met its burden of proof in showing that there was good cause to deviate from the placement requirements of the federal Indian Child Welfare Act (ICWA) and that the best interests of the children indicate that a change of placement was not appropriate. The court noted that the children had been placed in their current foster placement for more than 3 years and that the placement initially was made at Ida's request. Further, the court noted that DHHS initiated multiple home studies on Brianna, none of which led to her being approved as a placement, and that the evidence indicated that some of the concerns raised over Brianna's ability to be a proper placement for the children had not been alleviated over time; and, more importantly, that the best interests of the children would be adversely affected by their being moved. The court also noted the evidence indicated that DHHS exercised due diligence in trying to find alternative family placements, but that these placements were rejected by the family members who were contacted and that DHHS was advised by the Tribe there were no tribal placements available. It is from this order that the Tribe has appealed.

ASSIGNMENTS OF ERROR

The Tribe contends that the trial court erred (1) in holding that the State had met its burden of proof that good cause existed to deviate from the placement preferences and (2) in finding that DHHS had exercised due diligence in trying to accomplish compliance with the ICWA.

STANDARD OF REVIEW

[1,2] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Elizabeth S.*, 282 Neb. 1015, 809 N.W.2d 495 (2012). An appellate court reviews questions of law independently of the juvenile court's conclusions. *Id.*

ANALYSIS

Denial of Tribe's Motion to Change Placement.

The Tribe contends that the trial court abused its discretion when it determined that a change of placement of the three minor children would not be in the best interests of the children because they had been in the same placement for 3 years and when it relied upon testimony from DHHS' qualified expert witness, Eveleth, in holding that such a change would be likely to cause serious emotional damage to the children. The Tribe also argues that the trial court erred when it ignored the testimony of Turgeon and the Tribe's home study, which found that placement with Brianna would be appropriate.

The NICWA's Neb. Rev. Stat. § 43-1508(2) (Reissue 2008), which is the equivalent to the ICWA's 25 U.S.C. § 1915(b) (2012), provides:

> Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his or her special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, *in the absence of good cause to the contrary*, to a placement with:
>
> (a) A member of the Indian child's extended family;
>
> (b) A foster home licensed, approved, or specified by the Indian child's tribe;
>
> (c) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
>
> (d) An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(Emphasis supplied.)

In the case of *In re Interest of Bird Head*, 213 Neb. 741, 331 N.W.2d 785 (1983), the Nebraska Supreme Court considered whether good cause had been shown to deviate from the placement preferences specified in the ICWA. In that case, the Indian child's mother was deceased and the father was

unknown. The trial court terminated the parental rights of any potential father, ordered that the child's custody remain with DHHS and that the child be placed for adoption, and continued temporary custody with the child's foster parents pending further disposition by DHHS. The child's maternal aunt appealed, alleging, among other things, that the court erred in failing to follow the placement preferences outlined in the ICWA or to make any findings of good cause for not doing so. The record in that case showed that there were several possible placements for the child which had statutory preference over placement with the current foster parents, who had no statutory claim of preference. Although the evidence showed that the foster parents were fit and proper persons to have custody, the lower court made no finding to that effect; nor did it make a finding about the fitness of the foster parents as compared to that of the statutorily preferred individuals.

On appeal, the Nebraska Supreme Court noted that the ICWA did not strictly require placement with a statutorily preferred person or agency, but, rather, required only that the statutory preferences be followed in the absence of good cause to the contrary. The court observed that the only direct finding made by the lower court was that the child's aunt was unfit to have custody of the child, a finding that was supported by the evidence. However, the court observed that the evidence was uncertain and that no finding had been made below as to good cause for failing to follow the statutory preferences with respect to the other preferred individuals or agencies. The court observed that the ICWA "does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus." *In re Interest of Bird Head*, 213 Neb. at 750, 331 N.W.2d at 791. The court further stated that the legislative history of the ICWA showed that its "good cause" provision was intended to provide state courts with flexibility in determining the placement of Indian children. The court held that under the ICWA, factual support must exist in the trial record for the purpose of appropriate appellate review as to good cause for failure to comply with statutory child placement preference directives. See *In re Interest of Bird Head, supra*. Because the record lacked any findings by the lower

court as to what good cause was shown for deviation from the placement preferences with respect to persons other than the child's aunt, the court remanded the cause for consideration of whether good cause existed not to place the child with other family or tribal members. *Id.*

Neither the ICWA nor the NICWA defines what constitutes good cause for deviating from the statutory placement preferences; however, the Bureau of Indian Affairs has published nonbinding guidelines for determining whether good cause exists. We have previously looked to such guidelines for reference in NICWA cases concerning issues other than those present in this case. See, generally, *In re Interest of Enrique P. et al.*, 19 Neb. App. 778, 813 N.W.2d 513 (2012); *In re Interest of Melaya F. & Melysse F.*, 19 Neb. App. 235, 810 N.W.2d 429 (2011); *In re Interest of Ramon N.*, 18 Neb. App. 574, 789 N.W.2d 272 (2010). The Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,594 (Nov. 26, 1979) (not codified), state, under subdivision (a) of paragraph F.3, "Good Cause To Modify Preferences," that for purposes of foster care or preadoptive or adoptive placement, a determination of good cause not to follow the order of preference in the ICWA shall be based on one or more of the following considerations:

> (i) The request of the biological parents or the child when the child is of sufficient age.
>
> (ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.
>
> (iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.

Those guidelines further state that the burden of establishing the existence of good cause not to follow the statutory preferences is on the party urging that the preferences not be followed. The commentary section following the above guidelines states that paragraph (iii) of the guidelines quoted above recommends that a diligent attempt to find a suitable family meeting the preference criteria be made before consideration of a nonpreference placement is considered. A diligent

attempt to find a suitable family includes, at a minimum, contact with the child's tribal social service program, a search of all county or state listings of available Indian homes, and contact with nationally known Indian programs with available placement resources. *Id.* at 67,595.

In this case, the trial court's order found that the State had met its burden of proof by showing good cause to deviate from the placement requirements of the ICWA. The court found that even though Brianna met the requirements of being a member of the child's extended family and of her home's being a foster home approved by the Tribe, the best interests of the children indicated that a change of placement was not appropriate and would adversely affect the children. The court found that the children had been placed in their current foster home for more than 3 years, which placement was made at Ida's request. The court further found that while Brianna had made some steps toward being an appropriate placement, there still remained concerns about her ability which had not been alleviated. Clearly, the trial court's determination as to good cause was based on the appropriate determinations.

Upon our de novo review of the record, we conclude that the record supports the finding that the State has shown good cause to deviate from the statutory preferences of the ICWA. The record indicates that at the inception of this case, Ida requested that the children be placed with Tara and Terry. Over the next 3 years, DHHS made attempts to find a suitable family by maintaining contact with the Tribe and contacting family members. The record indicates that DHHS was continually informed by the Tribe that there were no Native American homes available for placement in the area or on the reservation. Throughout the proceedings, family members indicated that they might be interested in placement, but most lost interest and contact with DHHS. Brianna was the only family member who maintained an interest in placement, but was continually found by DHHS to be unsuitable for placement. Furthermore, the testimony from the experts for both the State and the Tribe, the caseworkers, and various other witnesses clearly indicates that a change in placement at this time would be emotionally detrimental and would adversely affect the

children, who are flourishing in their current placement, where they have been for over 3 years. The children are thriving at school and are active and social, and the need for any therapy to address behavioral issues had completely ceased.

The ICWA does not require strict placement, only that statutory preferences be allowed in the absence of good cause to the contrary. Further, the ICWA does not change the long-standing precedent that the best interests of the children are paramount. Good cause has been shown, and the denial of placement with Brianna at this time is in the best interests of the children.

Due Diligence in Finding Placement.

The Tribe next assigns that the trial court erred in finding that DHHS had exercised due diligence in compliance with the ICWA, because it did nothing more than complete three home studies of Brianna and was hostile in denying visitation between the children and relatives. The Tribe argues that DHHS did not make active efforts to prevent the breakup of the Native American family.

[3,4] Generally stated, the substantive portions of the ICWA and the corresponding portions of the NICWA provide heightened protection to the rights of Indian parents, tribes, and children in proceedings involving custody, termination, and adoption. *In re Adoption of Kenten H.*, 272 Neb. 846, 725 N.W.2d 548 (2007). Included in this heightened protection is the active efforts reunification standard found in Neb. Rev. Stat. § 43-1505(4) (Reissue 2008):

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

Referring to the Nebraska Administrative Code, the Nebraska Supreme Court has stated: "[T]he 'active efforts' standard requires more than the 'reasonable efforts' standard that applies in non-ICWA cases. And at least some efforts should

be 'culturally relevant.' Even with these guidelines, there is no precise formula for 'active efforts.' Instead, the standard requires a case-by-case analysis." *In re Interest of Walter W.*, 274 Neb. 859, 865, 744 N.W.2d 55, 61 (2008). In adjudication cases, the standard of proof for the active efforts element in § 43-1505(4) is proof by a preponderance of the evidence. *In re Interest of Mischa S., ante* p. 105, 847 N.W.2d 749 (2014).

Based upon the record before this court, the procedural posture of this case is unique. The case was previously before the court on appeal regarding the voluntary relinquishment and termination of both parents' rights. See *In re Interest of Nery V. et al.*, 20 Neb. App. 798, 832 N.W.2d 909 (2013). In that case, we affirmed Ida's voluntary relinquishment of her rights to Mario Jr. and Esperanza, remanded the cause for further proceedings to be conducted after proper notice was given to the Tribe, and vacated the order terminating the rights of the biological father, Mario V., Sr., to all three children. *Id.*

The present case on appeal deals not with termination of any parental rights, but with a change in placement. Initial placement of the children was done in 2010, with the consent of Ida and with no objection from the Tribe until 2013. Thus, the case is still in the adjudication stages and the State must prove active efforts not by the clear and convincing standard of termination cases, but by a preponderance of the evidence. See *In re Interest of Mischa S., supra.*

The Tribe asserts that this case is akin to *In re Interest of Bird Head*, 213 Neb. 741, 331 N.W.2d 785 (1983). We disagree and find the current circumstances distinguishable. We have addressed *In re Interest of Bird Head* in great detail in the previous section of our analysis and will not set out that information as duplicative. It is clear that the record in *In re Interest of Bird Head* completely lacked any findings by the juvenile court, including as to what efforts had been made by DHHS and whether the children's current placement met any of the statutory claims of preference. The decision was reversed and the cause remanded for further proceedings because the placement was not supported by good cause, not because DHHS had not exercised due diligence.

In the present case, the trial court found that DHHS had exercised due diligence in trying to find alternative family placements but, until recently, was rejected by family members and had been continually advised by the Tribe that no tribal placements were available. It was not until October 2013 that the Tribe indicated it had appropriate placement options for the children and that Ida indicated she no longer wished to have the children placed with Tara and Terry after initially requesting that they be placed there in 2010.

The NICWA expert for DHHS, Eveleth, testified that in this case, family was first considered for placement of the children. At one point, the children were placed with a family member, and also, several family members such as a maternal great aunt and a grandmother had been considered for placement but eventually indicated to DHHS that they were not interested or lost contact with DHHS completely. The first caseworker on the case, Ledesma, contacted several family members regarding placement, including one who did not complete a home study, one who was denied after a home study, and one who declined to be considered for placement of the children. Ledesma and Eveleth also maintained contact with Bad Wound, the Tribe's ICWA expert, about the children via telephone and in-person contacts. Eveleth testified that she specifically talked with Bad Wound about placement with Native American families but was informed that there were no families available for placement in the area or on the Rosebud Sioux reservation. Eveleth also testified that she was told that the Tribe had no family or tribal services available for the family. DHHS sought out a therapist who had experience with Native American heritage and had actually provided services on the Rosebud Sioux reservation. DHHS also attempted to form a cultural plan, but was informed by the Tribe that it was too early for the formation of a cultural plan.

Eveleth testified that there had been repeated contact with Bad Wound which had been documented and that the appropriate notices had been sent to the Tribe. Eveleth explained that initially, the children were not eligible for membership in the Tribe during the children's first contact with DHHS, but DHHS continued to contact the Tribe thereafter and the

children were eventually eligible. The record shows that Tara and Terry are fostering the children's Native American culture by taking them to powwows, visiting the Rosebud Indian reservation, taking a trip to the Crazy Horse monument in South Dakota, and frequently checking out books on the subject from the library. These, based upon Brianna's testimony, are significantly more efforts than she provides her biological daughter. Brianna testified that she has her federal identification card from the Lakota Sioux Tribe and that she took her daughter to a Tribe powwow in 2013. Other than those two instances, Brianna testified she had very little involvement with the Tribe, limited to talking to her daughter about her ancestors and buying a compact disc of "Indian music" to listen to. Therefore, the record supports by a preponderance of the evidence that DHHS made active efforts in this case.

However, we shall not go without mentioning that the record has presented concern that these active efforts may not survive a test under the clear and convincing standard in possible future proceedings, given that the record indicates that Brianna and other family members have requested visitation with the children and had been denied and given that there is no evidence of services offered by DHHS in light of those relationships. As the case continues to proceed, DHHS should be mindful of its heightened obligation to foster Native American relationships.

CONCLUSION

In conclusion, we find that good cause exists for a deviation from statutory placement preferences under the ICWA and that the trial court did not err by denying the Tribe's motion to change placement. Further, the record supports a showing by a preponderance of the evidence that active efforts were made by DHHS to prevent the breakup of the Native American family. Therefore, we affirm the order of the trial court.

AFFIRMED.

In re Interest of Trenton W. et al., children under 18 years of age. State of Nebraska, appellee, v. Richard W., appellant, and Susan W., appellee.

865 N.W.2d 804

Filed June 16, 2015. Nos. A-14-841 through A-14-845.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with due process is a question of law.
3. **Juvenile Courts: Parental Rights: Notice.** The factual allegations of a petition seeking to adjudicate a child must give a parent notice of the bases for seeking to prove that the child is within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2013).
4. **Juvenile Courts: Constitutional Law: Due Process.** In the context of both adjudication and termination hearings, procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker.
5. **Parental Rights.** Adjudication is a crucial step in proceedings possibly leading to the termination of parental rights.
6. **Parental Rights: Constitutional Law: Due Process.** Parents have a fundamental liberty interest at stake, and the State cannot adjudicate a child except by procedures which meet the requisites of the Due Process Clause.
7. **Statutes: Appeal and Error.** Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.
8. **Juvenile Courts: Jurisdiction: Proof.** At the adjudication stage, in order for a juvenile court to assume jurisdiction of a minor child under Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2013), the State must prove the allegations of the petition by a preponderance of the evidence, and the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsections of § 43-247.
9. ____: ____: ____. While the State need not prove that the juvenile has actually suffered physical harm, at a minimum, the State must establish that without intervention, there is a definite risk of future harm.
10. **Juvenile Courts: Judgments: Jurisdiction.** Once a child is adjudicated under Neb. Rev. Stat. § 43-247 (Supp. 2013), both custodial parents are within the jurisdiction of the court, even if the adjudication is based upon the acts of only one parent.

Appeals from the County Court for Boone County: STEPHEN R.W. TWISS, Judge. Reversed and remanded for further proceedings.

Ted M. Lohrberg for appellant.

Jeffrey C. Jarecki, of Jarecki Law, P.C., L.L.O., for appellee Susan W.

Jeffrey M. Doerr, of Law Offices of Jeffrey M. Doerr, guardian ad litem.

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

RIEDMANN, Judge.

INTRODUCTION

Richard W. appeals, and Susan W. attempts to cross-appeal, from the order of the county court, sitting as a juvenile court, which adjudicated their five minor children within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2013). Because we find that there was insufficient evidence to support the adjudications based upon the actions of Richard, we reverse the judgment of the juvenile court adjudicating the children on that basis and remand the cause for further proceedings.

BACKGROUND

Richard and Susan are the natural parents of five minor children: Jasmine W., born in 2001; Emily W., born in 2003; Ashlee W., born in 2004; Trenton W., born in 2007; and Bella W., born in 2012. On May 8, 2014, the State filed petitions to adjudicate each of the minor children under § 43-247(3)(a). The petitions alleged that Richard and Susan neglected or refused to provide proper subsistence, education, or other care necessary for the health, morals, or well-being of the children; that the children were in a situation dangerous to life or limb or injurious to their health and morals; and that the children lacked proper parental care by reason of the fault or habits of Richard and Susan. The petitions did not contain any specific factual allegations to support the general allegations stated above and were not accompanied by an affidavit.

The same day the petitions for adjudication were filed, however, the State filed motions for temporary custody which were accompanied by an affidavit. It alleged that three of the minor children were left in a motel room without adult supervision on May 7, 2014; that there was concern Richard and Susan were abusing prescription drugs and alcohol and failing to provide appropriate care for the children; and that the family had been involved with Child Protective Services in Tennessee before moving to Nebraska. Both parents entered a denial to the allegations. An adjudication hearing was held, during which the following evidence was adduced:

Richard and Susan moved with their children from the State of Tennessee to Albion, Nebraska, in early April 2014. Susan enrolled the children in school immediately. The family moved in with Susan's sister, Sheryl B., where they planned to live temporarily until they could obtain their own housing. On May 5, however, they were asked to leave Sheryl's home due to conflict between Susan and Sheryl. Richard and Susan had no other relatives in Albion, so they arranged to stay three nights—May 5 through 7—at a local motel where Richard was working.

On May 7, 2014, Ginger Buhl-Jorgensen, an investigator with Child Protective Services in Nebraska, traveled to Albion to investigate a report she had received expressing concern for the children due to prescription drug and alcohol abuse by Richard and Susan. Buhl-Jorgensen began her investigation by researching the history of the family, which included contacting the State of Tennessee. She was advised that Child Protective Services in Tennessee had two open investigations concerning the family and had attempted to open a case before the family left the state.

Buhl-Jorgensen was accompanied by Albion police officer Joe Predmore to the children's school, where they made contact with Trenton and Emily. After learning that Jasmine and Ashlee were absent from school that day, Buhl-Jorgensen and Officer Predmore proceeded to the motel where the family was staying. They located 12-year-old Jasmine, 9-year-old Ashlee, and 18-month-old Bella in the family's motel room,

but no adults were present. The children advised them that their parents had gone to court.

While Buhl-Jorgensen and Officer Predmore were there interviewing the children, Richard called the motel room to check on them. Richard spoke to Buhl-Jorgensen on the telephone at that time. He explained that he had accompanied Susan to her court appearance that morning in the Antelope County Courthouse in Neligh, Nebraska, and that he was currently walking back to Albion. When asked why Jasmine and Emily were not in school that day, Richard advised that he and Susan could not take Bella to court with them, so they decided to keep Jasmine and Ashlee home from school to take care of Bella. Buhl-Jorgensen asked Richard about his ability to pay for additional nights at the motel or any other plans for living accommodations for the family, to which Richard stated that he would "figure it out." He did not indicate whether he had any financial resources to obtain housing past May 7, 2014. However, Susan testified that they had already made arrangements for Richard and the children to stay with a friend in Norfolk who was going to pick them up that afternoon when Richard got back from Neligh.

Buhl-Jorgensen testified regarding her observations of the motel room. She stated that it had two beds, one bathroom, and a small refrigerator with "an opened gallon of milk, four to five slices of cheese, a can of peaches, two small cans of Vienna sausages, and some pop." There were extra "comforter type blankets" on the floor next to the beds. She did not observe any alcohol or alcohol containers in the room, but she did locate two prescription medication bottles sitting on a table. Buhl-Jorgensen read the labels and noted that both medications, Valium and oxycodone, were prescribed to Susan. The Valium prescription was filled on April 24, 2014, for 60 pills, but there was only 1 pill left in the bottle. The oxycodone prescription was filled on April 23 for 150 pills, and that bottle was empty. Based on this information, Buhl-Jorgensen believed that there were too many pills missing from the bottles and that the prescriptions were not being followed as prescribed, although she acknowledged at the

hearing that she did not know what happened to the "missing" pills. Buhl-Jorgensen and Officer Predmore felt that the children were in an unsafe, unstable situation; they were removed from the motel and placed temporarily with Susan's sister, Sheryl.

Richard and Susan both testified at the hearing regarding the events that occurred on May 7, 2014. They left Albion that day at approximately 7 a.m. to walk to Susan's court appearance in the Antelope County Courthouse in Neligh. Before leaving, they ate continental breakfast with the children at the motel and then walked Trenton and Emily to school. Susan testified that it was important for her to appear in court, as she was scheduled to begin serving a 45-day jail sentence on a 4-year-old assault conviction, and that there would be a warrant issued for her arrest if she failed to appear. Richard accompanied Susan to court in order to retrieve her bond money, which was needed to help support the family. Richard and Susan agreed that it was more important for Richard to obtain the bond money than it was for Jasmine and Ashlee to go to school that day.

The Antelope County Courthouse is located in Neligh, which is approximately 26 miles from Albion. Richard and Susan had to walk, because although they had a vehicle, neither had a valid driver's license. Susan testified that she had recently been arrested for driving under suspension, so she did not want to risk getting arrested again for driving. They were not planning on walking the whole way, but instead hoped to find a ride along the way. They walked approximately 7 miles before a farmer agreed to take them the rest of the way to Neligh. Richard obtained the bond money and arrived back in Albion at approximately 3:30 p.m.

The evidence at the hearing established that Jasmine was less than a month away from her 13th birthday at the time of this incident. She had watched Bella previously and knew how to take care of her. Buhl-Jorgensen testified that some 13-year-old children are not capable of supervising younger children, but acknowledged that "plenty of them are." Susan testified that Jasmine was "a responsible young lady" and that she and Richard felt "[v]ery confident" leaving Jasmine

and Ashlee to care for Bella. Richard and Susan made sure there was sufficient food for lunch in the refrigerator, as well as milk for Bella. Both girls had access to a telephone in the room and knew to call the 911 emergency dispatch service if there were an emergency. In addition, the children were told that Richard's boss, whom they had met, would be available at the front desk if they needed anything, or that they could call Richard's cell phone. Richard testified that he called the motel room every 30 to 40 minutes to check on them and make sure everything was "okay."

Susan's sister, Sheryl, testified regarding Richard's and Susan's abuse of alcohol and prescription drugs while they were living with her. She described one occasion during the first week in May when she came home from work to find Richard and Susan drinking alcohol while all of the children were home. She found an empty 24-pack of beer and an empty 12-pack of beer by the trash, and empty beer cans were scattered all over the living room.

Sheryl further testified that she had concerns about Richard's and Susan's abusing prescription drugs. She observed Susan in an "altered state of mind" or exhibiting strange behavior on a daily basis. On one occasion, she and Susan took the children to the park, but Susan was "out of it" and spent the entire time "staring at the sky." About a week before they were asked to leave, Sheryl observed Susan give Richard four of her prescription oxycodone pills and then saw Richard immediately ingest at least one of them.

Both Richard and Susan denied having abused prescription drugs or alcohol since moving to Nebraska. Regarding the "missing" pills, Susan testified that she had transferred them to a single container, along with her other prescription medications, so that they would be easier to transport and she would have them while serving her jail sentence. Susan further testified that she never took more medication than she was prescribed and that she never gave any of her medication to Richard.

In addition to the above evidence, the State presented evidence concerning Jasmine's school attendance, a video Susan recorded of Jasmine, testimony that the children had lice, and

testimony that Richard and Susan inquired about purchasing drugs from Sheryl's former boyfriend. Richard objected to the evidence on the basis of relevance and due process, arguing that there were no allegations in the petition concerning those issues and that he had not received notice the State was seeking adjudication on those bases. The objections were overruled.

Following the hearing, the juvenile court issued a written order adjudicating the children as within the meaning of § 43-247(3)(a). Richard timely appeals, and Susan attempts to cross-appeal.

ASSIGNMENTS OF ERROR

On appeal, Richard assigns that the juvenile court erred in (1) overruling his objections to the admission of certain evidence concerning issues not raised in the petition for adjudication and (2) finding sufficient evidence to support adjudication when the State failed to prove that the allegations posed a definite risk of future harm to the minor children.

In her attempted cross-appeal, Susan, as appellee, assigned that the juvenile court erred in finding sufficient evidence to support the adjudications. Because Susan filed a notice of appeal after Richard's appeals were perfected, Susan is considered an appellee. See Neb. Ct. R. App. P. § 2-101(C) (rev. 2014). As an appellee attempting to file a cross-appeal, Susan was required to follow the procedures outlined in the Supreme Court rules, which she failed to do. See Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2014). Therefore, we will not consider Susan's assigned error except as in support of the arguments raised by Richard.

STANDARD OF REVIEW

[1,2] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Chloe P.*, 21 Neb. App. 456, 840 N.W.2d 549 (2013). The determination of whether the procedures afforded an individual comport with due process is a question of law. *Id.*

ANALYSIS

Admissibility of Evidence.

Richard first assigns that the district court erred in overruling his objections to the admissibility of evidence related to the children's school attendance, a video Susan recorded of Jasmine, testimony that the children had lice, and testimony that Richard and Susan inquired about purchasing drugs from Sheryl's former boyfriend. Richard argues that neither the petition for adjudication nor the affidavit accompanying the motion for temporary custody contained any allegations concerning those matters and that therefore, he was not provided notice that the State was seeking to adjudicate the children on those bases. We agree.

[3-6] The factual allegations of a petition seeking to adjudicate a child must give a parent notice of the bases for seeking to prove that the child is within the meaning of § 43-247(3)(a). *In re Interest of Taeven Z.*, 19 Neb. App. 831, 812 N.W.2d 313 (2012). In the context of both adjudication and termination hearings, procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker. *In re Interest of Christian L.*, 18 Neb. App. 276, 780 N.W.2d 39 (2010). Adjudication is a crucial step in proceedings possibly leading to the termination of parental rights. *Id.* Parents have a fundamental liberty interest at stake, and the State cannot adjudicate a child except by procedures which meet the requisites of the Due Process Clause. *In re Interest of Christian L., supra.*

In *In re Interest of Taeven Z., supra*, we analyzed the pleading requirements of a juvenile petition and determined that due process requirements apply to petitions filed under § 43-247(3). We determined that pursuant to Neb. Rev. Stat. § 43-274(1) (Reissue 2008), in effect at the time *In re Interest of Taeven Z., supra*, was decided and at the time the present petition was filed, required that a § 43-247(3) petition "'set[]

forth the facts verified by affidavit.'" 19 Neb. App. at 837, 812 N.W.2d at 319. (This requirement is now codified at Neb. Rev. Stat. § 43-261 (Cum. Supp. 2014).)

Here, the petitions did not contain any specific factual allegations to give Richard notice of the bases upon which the State was seeking adjudication. Rather, it merely alleged, in the language of the statute, that Richard and Susan neglected or refused to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of the children; that the children were in a situation dangerous to life or limb or injurious to their health and morals; and that the children lacked proper parental care by reason of the fault or habits of Richard and Susan. We find that the petitions were insufficient to meet the notice requirement set forth in *In re Interest of Taeven Z., supra*, and therefore, Richard's objections on the basis of lack of notice should have been sustained.

[7] We note that on the same day the petitions were filed, the State also filed motions for temporary custody and a supporting affidavit. Contained within that affidavit are specific facts relating to the incident when Jasmine, Ashlee, and Bella were left at the motel room without adult supervision, a concern that their parents were abusing prescription drugs and alcohol, and the parents' involvement with Child Protective Services in Tennessee. We do not view the facts contained within this affidavit as being a substitute for the requirements of § 43-274 that the "petition . . . set[] forth the facts verified by affidavit." Absent a statutory indication to the contrary, we give words in a statute their ordinary meaning. *In re Interest of Erick M.*, 284 Neb. 340, 820 N.W.2d 639 (2012). The plain language of § 43-274 indicates that a petition is to set forth the facts. The affidavit simply verifies the facts set forth in the petition. Accordingly, we look solely to the petitions to determine whether Richard was given proper notice.

Although the petitions were factually insufficient to provide notice of *any* basis upon which the State was seeking adjudication, Richard does not contest the sufficiency of notice with respect to evidence that the children had been left unsupervised at the motel and evidence regarding his

alleged prescription drug and alcohol abuse. In fact, Richard conceded at the adjudication hearing that he had been put on notice of those allegations through the affidavit attached to the motion for temporary custody. Accordingly, we find that the evidence related to those allegations was properly considered by the juvenile court in determining whether to adjudicate the minor children, but the remaining evidence, to which Richard objected on the basis of lack of notice, was not properly admitted and should not have been considered. Therefore, we will not consider it when analyzing Richard's next assignment of error regarding the sufficiency of the evidence to support the adjudications.

Sufficiency of Evidence.

Richard next assigns that the juvenile court erred in finding sufficient evidence to support adjudication, because the State failed to prove that his alleged prescription drug and alcohol abuse or leaving the children unattended at the motel posed a definite risk of future harm to the children. We agree that the State failed to prove that the children faced a definite risk of future harm without intervention by the juvenile court based upon the alleged actions of Richard.

[8,9] At the adjudication stage, in order for a juvenile court to assume jurisdiction of a minor child under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance of the evidence, and the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsections of § 43-247. *In re Interest of Taeven Z.*, 19 Neb. App. 831, 812 N.W.2d 313 (2012). While the State need not prove that the juvenile has actually suffered physical harm, at a minimum, the State must establish that without intervention, there is a definite risk of future harm. *Id.*

The State presented evidence that Richard and Susan left Jasmine, Ashlee, and Bella in a motel room for several hours without adult supervision while they walked to Neligh for Susan's court appearance. Richard and Susan ensured that the children ate breakfast before they left and that there was sufficient food for lunch and snacks. Jasmine was less than a month

away from her 13th birthday at the time, and Susan testified that Jasmine was responsible and capable of caring for Bella. There was a telephone in the room, and both Jasmine and Ashlee knew how to dial 911 in the case of an emergency. In addition, the children knew that they could call Richard's cell phone or contact Richard's boss at the front desk if they needed anything. Buhl-Jorgensen acknowledged at the hearing that "plenty" 13-year-old children are capable of providing supervision for younger children. Based on this evidence, we cannot say that there was a definite risk of future harm to the minor children or that they were neglected, in a situation dangerous to life or limb, or lacked proper parental care under the circumstances. We therefore find that the court erred in adjudicating the children on this ground.

Regarding the use of alcohol and prescription drugs by Richard, we find that there was no evidence the minor children were affected by such behavior or that it placed the children at risk of harm. The only evidence presented as to Richard's alleged alcohol abuse was Sheryl's testimony that he and Susan drank heavily on one occasion while the children were present in the home. We reversed an adjudication based upon similar evidence in *In re Interest of Brianna B. & Shelby B.*, 9 Neb. App. 529, 614 N.W.2d 790 (2000). There, the evidence established a pattern of drinking by both parents and, in particular, one night of heavy drinking after the children went to bed. We found that although there was evidence that the parents had consumed alcohol on occasions when the children were present in the home, there was no evidence that their alcohol use had any impact on the children or that the children were placed in harm or lacked proper care as a result. *Id.* Similarly, here, while there was evidence that the children were in the home during Richard's and Susan's drinking binge, there was no evidence that the children witnessed the drinking or were affected by it in any way. Thus, we find that Richard's use of alcohol on this one occasion, although excessive, is insufficient to support an adjudication due to the lack of evidence that his alcohol use had any impact on the children or that the children were placed in harm or lacked proper care as a result.

Regarding Richard's alleged use of prescription medication, the only evidence presented was Sheryl's testimony that she observed Susan give him four of her prescription oxycodone pills and then saw Richard immediately ingest at least one of them. Both Richard and Susan denied those allegations. Assuming Sheryl's testimony is true, we find that this isolated incident, without any evidence of its effect on the children, is insufficient to support adjudication. While taking an unprescribed medication may be illegal, a parent's illegal activity—without more—is not sufficient to adjudicate a child. *In re Interest of Taeven Z.*, 19 Neb. App. 831, 812 N.W.2d 313 (2012). Furthermore, the State failed to adduce any evidence regarding whether Richard had a history of drug use, whether the children were present when Richard ingested drugs, or whether they were in any way affected by Richard's action. No evidence was presented that allowed a reasonable inference that Richard's alleged abuse of prescription drugs placed the children at risk for harm. See *In re Interest of Carrdale H.*, 18 Neb. App. 350, 781 N.W.2d 622 (2010) (reversing adjudication based upon father's possession of crack cocaine). Because there is no evidentiary nexus between Richard's consumption of drugs and alcohol and any definite risk of future harm to the minor children, the trial court erred in adjudicating on this ground.

Despite our determination that the State failed to prove by a preponderance of the evidence that the children were at definite risk of future harm due to Richard's actions, Susan failed to properly perfect an appeal and, therefore, the adjudications still stand. See *In re Interest of Devin W. et al.*, 270 Neb. 640, 707 N.W.2d 758 (2005).

In *In re Interest of Devin W. et al., supra*, the State filed a petition alleging that a minor lacked proper parental care by reason of the fault or habits of his mother. The juvenile court found him to be a child as defined under § 43-247(3). At the time, the minor was residing with his mother and father. At a later hearing, the court determined it would be in the child's best interests if he was removed from the physical custody of his parents and placed in foster care. The father appealed for the reason that there were no allegations that the child

lacked proper parental care by reason of the conduct of the father. On appeal, we reversed and remanded with directions to dismiss the proceedings. On further review, the Nebraska Supreme Court reversed our decision.

[10] In reaching its conclusion, the Supreme Court determined that the adjudication based on allegations against the mother was sufficient to extend jurisdiction over the father based upon the language of § 43-247. This statute grants to the juvenile court exclusive jurisdiction as to any juvenile defined in § 43-247(3) and, under subsection (5), jurisdiction over the parent, guardian, or custodian who has custody of such juvenile. Therefore, once a child is adjudicated under § 43-247, both custodial parents are within the jurisdiction of the court, even if the adjudication is based upon the acts of only one parent. The court specifically disapproved of the concept that a child is "adjudicated as to" one parent or the other because it is the child, not the parent, that is adjudicated in order to protect the child's rights. The court distinguished that the parents' rights are determined in the dispositional phase of the case, not the adjudication phase.

Therefore, under the reasoning of *In re Interest of Devin W. et al., supra*, the children in the present case remain adjudicated under § 43-247 based upon the acts of Susan. Our decision here affects only the nature of the dispositional order concerning the placement of the children and the rights of the parties. Richard's rights concerning the children and their placement will be determined during that phase of the case.

CONCLUSION

Upon our de novo review of the record, we find that the State failed to adduce sufficient evidence to support the adjudications of the children based upon Richard's actions, and we therefore reverse the adjudications on that ground; however, because Susan did not properly appeal, the trial court's order adjudicating the juveniles as children under § 43-247(3)(a) remains. We remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

TJ 2010 Corporation, appellant, v. Dawson County Board of Equalization, appellee.

866 N.W.2d 93

Filed June 23, 2015. No. A-14-660.

1. **Taxation: Judgments: Appeal and Error.** Decisions rendered by the Tax Equalization and Review Commission shall be reviewed by an appellate court for errors appearing on the record of the commission.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo on the record.
4. **Taxation: Valuation: Presumptions: Proof: Appeal and Error.** There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.
5. **Taxation: Valuation: Proof.** The burden of proof is on the taxpayer to establish the taxpayer's contention that the value of the taxpayer's property has been arbitrarily or unlawfully fixed by the county board of equalization at an amount greater than its actual value, or that its value has not been fairly and properly equalized when considered in connection with the assessment of other property and that such disparity and lack of uniformity result in a discriminatory, unjust, and unfair assessment.
6. ____: ____: ____. The burden of persuasion imposed on a complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon the taxpayer's property, when compared with valuations placed on other similar properties, is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain legal duty, and not mere errors of judgment.
7. **Evidence: Words and Phrases.** Competent evidence is evidence that is admissible and tends to establish a fact in issue.
8. ____: ____. Clear and convincing evidence is evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.

9. **Constitutional Law: Statutes: Appeal and Error.** To raise a valid challenge to the constitutionality of a statute, a litigant is required to properly raise and preserve the issue before the trial court.

Appeal from the Tax Equalization and Review Commission. Affirmed.

Patrick M. Heng, of Waite, McWha & Heng, for appellant.

Katharine L. Gatewood, Deputy Dawson County Attorney, for appellee.

IRWIN, PIRTLE, and RIEDMANN, Judges.

RIEDMANN, Judge.

INTRODUCTION

TJ 2010 Corporation (TJ) appeals the order of the Tax Equalization and Review Commission (TERC) affirming the decision of the Dawson County Board of Equalization (Board) regarding the 2013 taxable value of a hotel owned by TJ. Because we find that TJ failed to establish by clear and convincing evidence that the county's valuation was arbitrary or unreasonable, we affirm TERC's decision.

BACKGROUND

TJ owns property in Gothenburg, Dawson County, Nebraska. The subject property is a 44,000-square-foot hotel operating under a franchise, with 74 guestrooms, a swimming pool, a small meeting room, and a breakfast area. The property is located right next to Interstate 80. It was built in 2010 for approximately $4 million.

The Dawson County assessor determined that the value of the property was $4,510,230 for tax year 2013. TJ protested the assessment to the Board and requested a valuation of $2.8 million. The Board determined that the taxable value was $4,510,230, as originally assessed. TJ appealed the Board's decision to TERC. A hearing was held before TERC, during which the following evidence was adduced:

Terry Jessen is the president and sole owner of TJ, which owns and operates the hotel at issue in Gothenburg. Jessen testified that the property was constructed with funds secured

from his personal contributions, a mortgage, and tax increment financing. As part of the tax increment financing agreement with the city of Gothenburg, he agreed not to request a tax valuation of less than $2.8 million in any subsequent tax protests or appeals.

Jessen owns five hotels in Nebraska and one in Wyoming. He testified that although he is not an appraiser, he is very familiar with the market value of hotels and the various methods of valuation. He opined that the most important method for valuing hotels is the income stream approach, which he determines by using a multiplier of the property's annual gross revenue averaged over the past 3 years. He indicated that in his experience, the appropriate multiplier for most mainstream hotels is between 2.8 and 3.

Jessen submitted the property's profit and loss statements for the year 2013, which indicate that the gross revenue for 2013 was $1,097,000. Using his income stream approach with a multiplier of 3, Jessen opined that the actual value of the property was approximately $3,291,000. He explained that the value would be even lower if he had used the average annual gross revenue over the past 3 years, rather than just the gross revenue for 2013, because the property's revenue increased each year from 2011 to 2013. He testified that if the property were placed on the market for sale, he would be able to find a buyer in that price range.

Mark Stanard is a licensed appraiser that was contracted by the county assessor to determine the value of the subject property as of January 1, 2013. Stanard testified that he used both the cost approach and the income approach to calculate the value of the property. Stanard opined that the income approach is generally more applicable to income-producing properties, but that for newer or unique properties such as this one, the cost approach is a better indicator of actual value.

Stanard testified that the cost approach is determined by calculating the replacement cost new, less depreciation, plus land. To determine the property's value under the cost approach, Stanard utilized the 2010 "Marshall Swift costing tables," which indicated a value of $4,546,446. He acknowledged that the more current version of the tables would have

been more accurate in determining the actual value of the property as of January 1, 2013.

Stanard calculated the property's value under the income approach by estimating the property's potential gross income (average room rate multiplied by the total number of rooms for 365 days), then deducting estimated vacancy and expense rates to determine the estimated net operating income, and then dividing that by a market capitalization rate. Stanard testified that he used market data, rather than actual data, to estimate the property's room rate, vacancy rate, expense rate, and capitalization rate. This approach yielded a valuation of approximately $4,538,000.

Jessen criticized the use of market data in Stanard's income approach. He explained that Stanard's analysis applied an estimated vacancy rate of 30 percent, whereas the property's actual vacancy rate is 45.13 percent. Similarly, Jessen testified that Stanard's approach assumed an average room rate of $99, while the property's actual average room rate is only $78.91. In response, Stanard testified that he did not have access to the property's profit and loss statements when he conducted his income analysis, but that even if he had, he would have elected to use market data instead of the property's actual figures due to concerns that the property's actual income had not yet stabilized.

Stanard testified that he did not conduct a full analysis under the sales comparison approach due to the lack of truly comparable properties. However, he did provide a list of "the most comparable sales we could find . . . simply to supplement or to support the assessed value based on sales." Stanard explained that if he had done a full sales comparison analysis, he would have made adjustments for variables such as age, location, functional utility, quality, and condition of the comparable properties. Stanard acknowledged that the capitalization rate and other market factors used in his income analysis were derived from this list of comparable sales, even though he did not make necessary adjustments to account for the differences between these comparable properties and the subject property. Jessen asserted that truly comparable properties

would need to be located along Interstate 80 in a similarly sized town to Gothenburg that could not be classified as a destination location.

TERC concluded that TJ provided competent evidence to rebut the presumption that the Board had faithfully performed its duties and had sufficient competent evidence to make its determination. It criticized Stanard's valuation for using outdated costing tables in the cost approach and for using market factors derived from comparable sales without making the necessary adjustments to the comparable properties. However, it determined that TJ's valuation method was not a commonly accepted real property appraisal method and was not supported by market data. Therefore, it found that while there were concerns about the reliability of Stanard's appraisal, there was no market data received in evidence to support a different opinion of any of the income approach factors. Thus, it concluded that TJ failed to present clear and convincing evidence that the Board's valuation was unreasonable or arbitrary.

ASSIGNMENTS OF ERROR

TJ assigns, summarized and restated, that TERC erred in (1) determining that TJ failed to establish by clear and convincing evidence that the county's valuation was arbitrary or unreasonable, (2) failing to apply the proper statutory standard of review, and (3) denying TJ due process by applying an unconstitutional presumption in Neb. Rev. Stat. § 77-5016(9) (Cum. Supp. 2014).

STANDARD OF REVIEW

[1-3] Decisions rendered by TERC shall be reviewed by an appellate court for errors appearing on the record of the commission. *Darnall Ranch v. Banner Cty. Bd. of Equal.*, 276 Neb. 296, 753 N.W.2d 819 (2008). When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record. *Id.*

ANALYSIS

Reasonableness of County's Assessment.

TJ assigns that TERC erred in determining that TJ failed to establish by clear and convincing evidence that the county's valuation was arbitrary and unreasonable. In support of this assignment of error, TJ argues that TERC erred in failing to accept TJ's valuation of the property, and by accepting the county's flawed valuation.

[4] Under § 77-5016(9), TERC's standard of review in appeals from a board of equalization is as follows:

> In all appeals, excepting those arising under section 77-1606, if the appellant presents no evidence to show that the order, decision, determination, or action appealed from is incorrect, [TERC] shall deny the appeal. If the appellant presents any evidence to show that the order, decision, determination, or action appealed from is incorrect, such order, decision, determination, or action shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.

The Nebraska Supreme Court has construed this statutory standard of review to mean that

> "'[t]here is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.'"

Zabawa v. Douglas Cty. Bd. of Equal., 17 Neb. App. 221, 224-25, 757 N.W.2d 522, 526 (2008), quoting *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 753 N.W.2d 802 (2008).

Here, TERC determined that there was competent evidence to rebut the statutory presumption in favor of the Board, and

the county does not challenge that finding on appeal. Thus, TJ presented competent evidence to overcome the presumption that the Board faithfully performed its official duties in making an assessment and acted upon sufficient competent evidence to justify its action. From that point forward, the reasonableness of the county's valuation became a question of fact based upon all the evidence presented, and the burden of showing such valuation to be unreasonable rested upon TJ. We find, based on the evidence presented and the factual findings set forth in TERC's order, that TJ failed to meet its burden of establishing by clear and convincing evidence that the valuation adopted by the Board was arbitrary and unreasonable.

[5,6] In *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002), we addressed what is required after the presumption of § 77-5016(9) has been overcome. We said:

> The burden of proof is on the taxpayer to establish the taxpayer's contention that the value of the taxpayer's property has been arbitrarily or unlawfully fixed by the county board of equalization at an amount greater than its actual value, or that its value has not been fairly and properly equalized when considered in connection with the assessment of other property and that such disparity and lack of uniformity result in a discriminatory, unjust, and unfair assessment. *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959). Such a burden is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon the taxpayer's property, when compared with valuations placed on other similar properties, is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain legal duty, and not mere errors of judgment. *Id.*

Omaha Country Club v. Douglas Cty. Bd. of Equal., 11 Neb. App. at 174-75, 645 N.W.2d at 826.

Our focus in this case is not on equalization, but, rather, on the initial question of whether the property valuation was fixed arbitrarily, which cannot be established simply by showing a

difference of opinion on value between the property owner and the appraiser. Rather, arbitrariness must be demonstrated by evidence that the assessment is grossly excessive and is a result of arbitrary or unlawful action and not just a mere error in judgment. *Cabela's Inc. v. Cheyenne Cty. Bd. of Equal.*, 8 Neb. App. 582, 597 N.W.2d 623 (1999).

TERC found that "Stanard's valuation approach contained errors in the application of accepted mass appraisal techniques." It concluded that its concerns over Stanard's methods "call into question the reliability of Stanard's appraisal"; however, "no market data was received in evidence supporting a different opinion of any of the income approach factors." It therefore determined that "there is not clear and convincing evidence that the . . . Board's determination of value was unreasonable or arbitrary." We interpret TERC's remarks as a finding that TJ did not satisfy its burden of proof. We agree.

Stanard used a cost approach and an income approach supported by an examination of sales of alleged comparable properties. However, Stanard testified that the included properties were from dissimilar locations without appropriate adjustments. TERC concluded that without appropriate adjustments, the alleged comparable properties were less relevant indicators of the actual value of the property.

As to the cost approach, TERC was critical of Stanard's use of outdated costing tables. It found that "the use of outdated costing tables is less likely to produce the actual value of the Subject Property as of January 1, 2013." As to the income approach, TERC stated it had "concerns about the methods employed by Stanard to develop his market factors." These concerns were based in part upon testimony from Jessen that it would be inappropriate to compare the subject property, located in a rural community, to destination hotels in larger communities. The concerns were also based upon Stanard's use of published room rates to determine potential gross income when Jessen testified that the published rate for the subject property was not the actual room rate. TJ produced evidence of gross income based upon actual numbers,

which were significantly lower than the numbers proffered by Stanard.

While these deficiencies are the basis for finding that the presumption of correctness by the Board has been overcome, we find them insufficient to satisfy the second half of TJ's burden of proof: to show by clear and convincing evidence that the Board's valuation is arbitrary. In order to meet this burden, TJ needed to present competent evidence of the property's actual value as of January 1, 2013.

Pursuant to Neb. Rev. Stat. § 77-201(1) (Reissue 2009), all taxable property shall be valued at actual value for taxation purposes. "Actual value" means the market value of real property in the ordinary course of trade. Neb. Rev. Stat. § 77-112 (Reissue 2009). Additionally, real property value shall be assessed as of January 1 of each tax year. Neb. Rev. Stat. § 77-1301 (Cum. Supp. 2014). TJ failed to present any evidence of the property's actual value as of January 1, 2013, because its income valuation was based on the property's 2013 profit and loss figures. In order to support its calculation of the property's actual value as of January 1, 2013, TJ should have produced the profit and loss statement for 2012. In addition, as noted by TERC, the property's income had not yet stabilized and TJ failed to produce any market data to support its income approach valuation.

We acknowledge the deficiencies in both parties' valuations; however, TJ failed to produce competent evidence of the property's actual value as of January 1, 2013. While Stanard's income approach had deficiencies, particularly in the development of the market factors, TJ did not present any market data supporting a different opinion of any of the income approach factors. We therefore affirm TERC's decision that TJ failed to present clear and convincing evidence that the county's valuation was arbitrary and unreasonable.

TERC's Standard of Review.

TJ next assigns that TERC erred in failing to apply the proper standard of review. It argues that TERC merged its consideration of the reasonableness presumption with the

taxpayer's ultimate burden of persuasion, causing improper deference to the county's determination without consideration of all the evidence.

Once the statutory presumption is overcome, as it was in this case, the reasonableness of the valuation fixed by a board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board. *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 753 N.W.2d 802 (2008). The taxpayer must prove unreasonableness by clear and convincing evidence. See *JQH La Vista Conf. Ctr. v. Sarpy Cty. Bd. of Equal.*, 285 Neb. 120, 825 N.W.2d 447 (2013).

[7,8] We reject TJ's argument that TERC merged its consideration of the reasonableness presumption with the taxpayer's ultimate burden of persuasion. TERC recognized that TJ overcame the presumption by the production of competent evidence; however, it found that TJ failed to present clear and convincing evidence that the valuation was arbitrary or unreasonable. Competent evidence is evidence that is admissible and tends to establish a fact in issue. See *Mathes v. City of Omaha*, 254 Neb. 269, 576 N.W.2d 181 (1998). Clear and convincing evidence, however, is evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. See *In re Interest of Zachary D. & Alexander D.*, 289 Neb. 763, 857 N.W.2d 323 (2015). While TJ's evidence may have been competent to overcome the presumption, that does not mean that it was clear and convincing to produce a firm belief that the valuation was arbitrary or unreasonable. Thus, we find this assignment of error to be without merit.

Constitutionality of § 77-5016.

Finally, TJ argues that the procedures to appeal tax assessments as set forth in § 77-5016 are unconstitutional because they violate due process and are impermissibly biased toward the government.

[9] To raise a valid challenge to the constitutionality of a statute, a litigant is required to properly raise and preserve

the issue before the trial court. See *Clark v. Tyrrell*, 16 Neb. App. 692, 750 N.W.2d 364 (2008). TJ did not challenge the constitutionality of § 77-5016 until the present appeal. Additionally, we note that TJ failed to comply with the notice provision for challenging the constitutionality of a statute as set forth in Neb. Ct. R. § 2-109(E) (rev. 2014). Because this issue was not raised before TERC, it is not properly before this court and we will not address it further on appeal.

CONCLUSION

We conclude that TJ failed to prove by clear and convincing evidence that the Board's valuation was arbitrary and unreasonable. Accordingly, we affirm TERC's decision.

AFFIRMED.

ELIZABETH S. CANAS-LUONG, APPELLEE, V.
AMERICOLD REALTY TRUST, APPELLANT.

866 N.W.2d 101

Filed June 23, 2015. No. A-14-751.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the Workers' 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.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court, the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong.
3. **Workers' Compensation: Time.** A claimant has not reached maximum medical improvement until all the injuries resulting from an accident have reached maximum medical healing.
4. ____: ____. The appropriate time to award permanent disability benefits is after the worker reaches maximum medical improvement.
5. **Workers' Compensation.** The Nebraska Workers' Compensation Act authorizes an award of permanent disability, either partial or total, as a means of compensating the injured worker for the loss of earning capacity.
6. ____. When a whole body injury is the result of a scheduled member injury, the member injury should be considered in the assessment of the whole body

impairment; and under such circumstances, the trial court should not enter a separate award for the member injury in addition to the award for loss of earning capacity because to allow both awards creates an impermissible double recovery.

Appeal from the Workers' Compensation Court: MICHAEL K. HIGH, Judge. Affirmed in part, and in part reversed.

Jon S. Reid, of Lamson, Dugan & Murray, L.L.P., for appellant.

Jeffrey F. Putnam, of Law Offices of Jeffrey F. Putnam, P.C., L.L.O., for appellee.

INBODY, PIRTLE, and BISHOP, Judges.

BISHOP, Judge.

Elizabeth S. Canas-Luong was shot 11 times by a coworker while working for Americold Realty Trust (Americold) in Crete, Saline County, Nebraska, on September 22, 2010. She sustained injuries to her right arm, left chest wall, lower abdomen, back, spleen, colon, liver, right kidney, and abdomen. She also suffered from psychological problems due to posttraumatic stress syndrome and depression. The Workers' Compensation Court found that Canas-Luong had reached maximum medical improvement (MMI) with respect to the physical injuries to her body, but that she had not yet reached MMI for her psychological injuries. The compensation court ordered temporary total disability from the date of the injuries through the date of trial and until such time as she reaches MMI for the psychological injuries. The compensation court also awarded Canas-Luong a 39-percent permanent partial disability for the impairment to her right upper extremity. The compensation court further ordered that after reaching MMI, Canas-Luong was entitled to be evaluated by a vocational rehabilitation counselor both for a loss of earning power evaluation and for help to find suitable work. Americold was ordered to continue to pay for future medical and hospital care as may be reasonably necessary, and Americold was given a credit for payments already made to Canas-Luong for indemnity benefits and medical bills. Americold appealed. Because

Canas-Luong has not reached MMI with respect to all of her injuries and was awarded ongoing temporary total disability benefits, we find that the compensation court erred by prematurely awarding her permanent partial disability for her right upper extremity. We therefore reverse that portion of the compensation court's award.

PROCEDURAL BACKGROUND

On October 4, 2012, Canas-Luong petitioned for workers' compensation benefits for the injuries she sustained. Americold contested the extent and nature of Canas-Luong's injuries.

At the time of trial on October 17, 2013, the parties stipulated to the following: (1) Canas-Luong sustained an accident arising out of and in the course of employment with Americold on or about September 22, 2010, which resulted in injury to her right arm, left chest wall, lower abdomen, back, spleen, colon, liver, right kidney, and abdomen; (2) the accident occurred in Crete; (3) Canas-Luong gave timely notice of the accident; (4) Canas-Luong is entitled to benefits under the Nebraska Workers' Compensation Act; (5) on the date of the accident, Canas-Luong was earning an average weekly wage of $596.65 for purposes of temporary disability and permanent disability; (6) all of the medical expenses incurred as of the date of trial that were reasonably related to the accident and injury of September 22 had been paid or would be paid as set forth in exhibit 37; and (7) pursuant to Neb. Rev. Stat. § 48-120 (Cum. Supp. 2014), Canas-Luong is entitled to future medical care that is reasonable and necessary as a result of the accident and injury of September 22.

Canas-Luong testified at trial. Additionally, numerous exhibits (including medical records, vocational assessments, and loss of earning capacity analyses with multiple scenarios) were offered and received into evidence.

In its award filed on July 25, 2014, the compensation court found that (1) Canas-Luong was temporarily totally disabled from and including September 22, 2010, to and including the date of trial, a period of 160$\frac{2}{7}$ weeks; (2) although Canas-Luong had attained MMI with respect to the physical injuries to her body, she was not at MMI for the psychological

injuries she suffered in the accident and therefore continued to be temporarily totally disabled; (3) the temporary total disability rate was $401.91 per week; (4) Canas-Luong was entitled to $401.91 per week for 160⅖ weeks of temporary total disability, and such payments shall continue thereafter for so long as Canas-Luong continues to be temporarily totally disabled; (5) once Canas-Luong reaches MMI with respect to all of her injuries, she is entitled to be evaluated by a vocational rehabilitation specialist both for determination of her present disability measured by loss of earning power and for help to find work that is suitable for her; (6) Canas-Luong was entitled to payment of $401.91 per week for 87.75 weeks of permanent partial disability for a 39-percent impairment to her right upper extremity; (7) Americold was entitled to a credit for payment to Canas-Luong for the indemnity benefits shown in exhibit 36 and for payment of all medical expenses incurred in the case as shown in exhibit 37; and (8) Americold was to provide and pay for such future medical and hospital care as may be reasonably necessary as a result of the accident and injury.

Americold timely appeals from the award.

ASSIGNMENTS OF ERROR

Americold assigns as error that the compensation court (1) did not provide a decision with a meaningful basis for appellate review, (2) ordered Americold to pay Canas-Luong permanent partial disability benefits for her scheduled member injury to her right upper extremity without considering the impact of the scheduled member upon Canas-Luong's employability, and (3) awarded an impermissible double recovery to Canas-Luong when it ordered that Canas-Luong was to receive a separate award for a scheduled member injury and for a body as a whole injury, both of which occurred in the same accident.

STANDARD OF REVIEW

[1,2] A judgment, order, or award of the Workers' 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. *Simmons v. Precast Haulers*, 288 Neb. 480, 849 N.W.2d 117 (2014). In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court, the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong. *Id*.

ANALYSIS

Americold's assignments of error and argument revolve around how to handle awarding compensation when a scheduled member injury and a body as a whole injury arise from the same accident. Americold suggests that the compensation court's permanent partial disability award of 39 percent for Canas-Luong's scheduled member injury (right upper extremity) and its order for a future separate loss of earning capacity for her body as a whole injury will result in an impermissible double recovery. Americold suggests that the facts in this case are similar to those in *Bishop v. Specialty Fabricating Co.*, 277 Neb. 171, 760 N.W.2d 352 (2009), which stands for the proposition that when a whole body injury is the result of a scheduled member injury and the member injury was considered in the assessment of the whole body impairment, a separate award for the member injury should not be entered. However, the application of *Bishop, supra*, to this case cannot be determined until such time as Canas-Luong is at MMI for all of her injuries, as will be discussed further later in our analysis.

Initially, we note that contrary to Americold's first assignment of error, the compensation court did provide a decision with a meaningful basis for appellate review. The details of that opinion were set forth in the background section of this opinion.

[3-5] The problem in the compensation court's order is not a lack of meaningful basis for review or that it is ambiguous; rather, the problem lies in its decision to award a permanent

partial disability benefit when Canas-Luong was not yet at MMI for all of her injuries. Although she had reached maximum medical recovery for her physical injuries, she had not yet reached that point with her psychological injuries. "[A] claimant has not reached [MMI] until all the injuries resulting from an accident have reached maximum medical healing." *Rodriguez v. Hirschbach Motor Lines*, 270 Neb. 757, 765, 707 N.W.2d 232, 239 (2005). The appropriate time to award permanent disability benefits is after the worker reaches MMI. *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001). The Nebraska Workers' Compensation Act authorizes an award of permanent disability, either partial or total, as a means of compensating the injured worker for the loss of earning capacity. *Foote, supra*. Accordingly, the trial court was correct when it stated that loss of earning capacity would be determined when Canas-Luong reaches MMI. However, the trial court erred in awarding Canas-Luong payment for a 39-percent permanent impairment to her right upper extremity before she reached MMI for all of her injuries. This permanent partial scheduled member award was premature, since the compensation court determined that Canas-Luong was not yet at MMI for her psychological injury and was entitled to ongoing temporary total disability benefits.

In *Rodriguez, supra*, Santana Rodriguez suffered injuries to his neck, shoulder, knees, and back, in addition to severe depression, as a result of a work-related accident. The trial judge found that Rodriguez had reached MMI with respect to his neck, back, shoulder, and psychological injuries, but that he had not reached MMI with respect to his bilateral knee injuries. The trial judge determined that Rodriguez had suffered no permanent disability as a result of his neck, back, shoulder, and psychological injuries. Therefore, the single judge entered an award maintaining temporary total disability benefits for the injury to Rodriguez' knees, but denying permanent disability benefits for the other injuries. The Workers' Compensation Court review panel affirmed. The Nebraska Supreme Court reversed, finding that the trial court erred in concluding that Rodriguez had reached MMI and in making a determination as to Rodriguez' permanent disability.

The Nebraska Supreme Court noted that the trial court's reasoning (that Rodriguez had reached MMI with respect to his neck, back, shoulder, and psychological injuries, but that he had not reached MMI with respect to his bilateral knee injuries) would result in a claimant's being potentially entitled to simultaneous permanent and temporary disability benefits resulting from the same accident, "a result that is inconsistent with established precedent." *Rodriguez*, 270 Neb. at 763, 707 N.W.2d at 238. The Supreme Court stated that "a given condition cannot at one and the same time be both temporary and permanent." *Id*. The Supreme Court held that MMI, for purposes of deciding when a claimant's disability has become permanent, is determined by reference to the date on which all of the claimant's injuries from the accident have reached maximum recovery. *Rodriguez, supra*.

The *Rodriguez* court noted that "it may be difficult, if not impossible, to ascertain a claimant's true permanent disability when not all of the claimant's disabling injuries have reached maximum healing." 270 Neb. at 763, 707 N.W.2d at 238. The court cited to *Zavala v. ConAgra Beef Co*., 265 Neb. 188, 655 N.W.2d 692 (2003), for the principle that determination of a claimant's permanent disability may require the court to consider the effect of different injuries that occurred in the same accident. The court said:

> As we explained in *Zavala*, 265 Neb. at 199-200, 655 N.W.2d at 702, "when assessing the loss of earning capacity for a back injury, it may not be reasonable to ignore the impact that the loss of a leg would have upon the loss of earning capacity when both injuries occurred in the same accident. The back injury does not increase the disability to the scheduled member, but the impact of the scheduled member injury should be considered when assessing the loss of earning capacity of the employee. The failure to do so would ignore the realities of the situation."

Rodriguez v. Hirschbach Motor Lines, 270 Neb. 757, 764, 707 N.W.2d 232, 238 (2005). And "'[w]hen multiple conditions prevent a claimant's return to the former position of employment, it is imperative that a permanency determination

include consideration of all allowed conditions.'" *Id*. at 764, 707 N.W.2d at 239 (quoting *State ex rel. Tilley v. Indus. Comm*., 78 Ohio St. 3d 524, 678 N.E.2d 1392 (1997)). The Nebraska Supreme Court held that "a claimant has not reached [MMI] until all the injuries resulting from an accident have reached maximum medical healing." *Rodriguez*, 270 Neb. at 765, 707 N.W.2d at 239. The Supreme Court stated that the trial court erred in concluding that Rodriguez had reached MMI and that the trial court's determination regarding permanent disability benefits was premature.

Similarly, in our case, because Canas-Luong had not reached MMI with respect to all of her injuries, the trial court erred in determining that Canas-Luong had reached MMI with respect to the physical injuries to her body and in finding that she is entitled to payment for a 39-percent permanent impairment to her right upper extremity. See *Rodriguez, supra* (there is no provision in Nebraska law for partial MMI). Canas-Luong's physical injuries may have reached maximum medical recovery, but she will not reach MMI until her psychological injuries have also reached maximum medical recovery. By awarding payment for a 39-percent permanent partial disability to her right upper extremity and continuing temporary total disability payments, the trial court gave Canas-Luong simultaneous permanent and temporary disability benefits resulting from the same accident, "a result that is inconsistent with established precedent." See *Rodriguez*, 270 Neb. at 763, 707 N.W.2d at 238.

[6] It is unknown at this time whether Canas-Luong's permanent impairment to her right upper extremity should be factored into the loss of earning capacity analysis or whether a separate scheduled member award may be appropriate. In *Bishop v. Specialty Fabricating Co*., 277 Neb. 171, 760 N.W.2d 352 (2009), and *Madlock v. Square D Co*., 269 Neb. 675, 695 N.W.2d 412 (2005), the Nebraska Supreme Court held that when a whole body injury is the result of a scheduled member injury, the member injury should be considered in the assessment of the whole body impairment; and that under such circumstances, the trial court should not enter a separate award for the member injury in addition to the award

for loss of earning capacity because to allow both awards creates an impermissible double recovery. But, as previously noted, whether Canas-Luong's right upper extremity impairment should be considered in her loss of earning capacity cannot be determined until Canas-Luong reaches MMI for all of her injuries and a loss of earning capacity analysis is performed; and at that point, all injuries and their effects on loss of earning capacity can be considered at one time. See *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001) (appropriate time to award permanent disability benefits is after worker reaches MMI). Accordingly, we reverse the trial court's finding that Canas-Luong is entitled to payment for a 39-percent permanent partial disability to her right upper extremity, as such determination regarding permanent disability benefits was premature.

CONCLUSION

Because Canas-Luong has not reached MMI with respect to all of her injuries, we find that the trial court erred in finding that she is entitled to payment for a 39-percent permanent partial disability to her right upper extremity. We therefore reverse that portion of the trial court's award. We affirm the remainder of the trial court's award as Americold claims no error with regard to the remainder of the award.

AFFIRMED IN PART, AND IN PART REVERSED.

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