THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

JUNE 5, 2018 and MARCH 11, 2019

IN THE

Nebraska Court of Appeals

NEBRASKA APPELLATE REPORTS

VOLUME XXVI

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No. A-18-480: **State v. Mitchell**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Welch, Judge.

No. A-18-481: **State v. Redmond**. Affirmed in part, and vacated in part and remanded for resentencing. Welch, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-18-497: **Colburn v. Reeves**. Affirmed. Arterburn, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-18-504: **In re Interest of Louis W**. Affirmed. Welch, Judge, and Moore, Chief Judge, and Riedmann, Judge.

†No. A-18-507: **In re Interest of Joe C. et al**. Affirmed. Bishop, Pirtle, and Arterburn, Judges.

No. A-18-520: **State v. Roberts**. Affirmed in part, and in part vacated and remanded for resentencing. Riedmann, Pirtle, and Welch, Judges.

†No. A-18-527: **State v. Wells**. Affirmed. Arterburn, Pirtle, and Bishop, Judges.

No. A-18-528: **In re Interest of Gavin K**. Affirmed. Pirtle, Bishop, and Arterburn, Judges.

†No. A-18-529: **In re Interest of Lillie C**. Affirmed. Arterburn, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-18-533: **State v. Arellano**. Affirmed. Moore, Chief Judge, and Riedmann and Welch, Judges.

No. A-18-549: **In re Interest of Da'Laysia B**. Affirmed. Welch, Riedmann, and Bishop, Judges.

CASES DISPOSED OF BY MEMORANDUM OPINION

No. A-18-550: **State on behalf of Kamryn F. v. Justin F**. Affirmed. Arterburn, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-18-551: **State v. Bitter**. Affirmed. Moore, Chief Judge, and Riedmann and Welch, Judges.

No. A-18-560: **In re Interest of Ivanna E**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Arterburn, Judge.

†No. A-18-562: **In re Interest of Parker B**. Affirmed. Bishop, Pirtle, and Arterburn, Judges.

No. A-18-563: **In re Interest of Chevelle W. & Raquel W**. Affirmed. Riedmann, Bishop, and Welch, Judges.

†No. A-18-571: **In re Interest of Jayden K. et al**. Affirmed. Welch, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-18-602: **State v. Dominguez**. Affirmed and remanded with instructions. Arterburn, Judge (1-judge).

No. A-18-610: **In re Interest of Riley H**. Affirmed. Riedmann, Bishop, and Welch, Judges.

No. A-18-611: **In re Interest of Jairius P**. Affirmed. Arterburn, Judge, and Moore, Chief Judge, and Pirtle, Judge.

No. A-18-624: **In re Interest of Louis C**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Arterburn, Judge.

No. A-18-638: **In re Interest of Devin M. et al**. Affirmed. Riedmann, Bishop, and Welch, Judges.

No. A-18-653: **In re Interest of Zachary M**. Affirmed. Riedmann, Bishop, and Welch, Judges.

†No. A-18-654: **State v. Franco**. Affirmed. Moore, Chief Judge, and Arterburn and Welch, Judges.

†No. A-18-662: **State v. Smith**. Affirmed in part, and in part reversed. Riedmann, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-18-676: **In re Interest of Cordae W. & Jayden W**. Affirmed. Moore, Chief Judge, and Pirtle and Arterburn, Judges.

Nos. A-18-677, A-18-678: **In re Interest of Marcus M. & Makayla M**. Affirmed. Moore, Chief Judge, and Pirtle and Arterburn, Judges.

†No. A-18-737: **In re Interest of Emmanuel K. & Daniel K.D**. Affirmed. Welch, Riedmann, and Bishop, Judges.

No. A-18-753: **State v. Fay**. Affirmed in part, and in part vacated and remanded for resentencing. Arterburn, Pirtle, and Bishop, Judges.

†No. A-18-767: **State v. Herrera**. Vacated and remanded for resentencing. Riedmann, Bishop, and Welch, Judges.

†Nos. A-18-768 through A-18-772: **State v. Wilson**. Affirmed in part, and in part remanded for resentencing. Moore, Chief Judge, and Pirtle and Arterburn, Judges.

†No. A-18-811: **State v. Lam**. Affirmed. Riedmann, Pirtle, and Welch, Judges.

†No. A-18-941: **State v. Morton**. Affirmed. Pirtle, Riedmann, and Welch, Judges.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. A-17-836: **Kuhlman v. City of Hastings**. Affirmed. See § 2-107(A)(1).

No. A-17-860: **State v. Davis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-17-888: **Secora v. Secora**. Appeal dismissed. See, § 2-107(A)(2); *Meisinger v. Meisinger*, 230 Neb. 37, 429 N.W.2d 721 (1988); *In re Interest of Karlie D.*, 19 Neb. App. 135, 809 N.W.2d 510 (2011).

No. A-17-1083: **Nebraska Title Co. v. Cormack Real Estate**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-1113: **Secord v. Kracht**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-17-1143: **Smith v. Madsen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016); *Johnson v. Gage*, 290 Neb. 136, 858 N.W.2d 837 (2015).

No. A-17-1151: **Merrihew v. Merrihew**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-1184: **State v. Ross**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-17-1198: **Heaton v. Heaton**. Stipulation allowed; appeal dismissed.

No. A-17-1208: **State v. Phillips**. Motion of appellee for summary dismissal granted; appeal dismissed. See *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009). See, also, *State v. Dill*, 300 Neb. 344, 913 N.W.2d 470 (2018).

No. A-17-1211: **Robertson v. Stieren**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 81-8,209 (Reissue 2014); *Moats v. Republican Party of Neb.*, 281 Neb. 411, 796 N.W.2d 584 (2011); *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010); *Moore v. Grammer*, 232 Neb. 795, 442 N.W.2d 861 (1989).

No. A-17-1223: **Harris v. Hansen**. Motion of appellee for summary affirmance granted; judgment affirmed. See *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016).

No. A-17-1239: **State v. Ludi**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Benavides*, 294 Neb. 902, 884 N.W.2d 923 (2016).

No. A-17-1244: **In re Nebraska Pub. Serv. Comm. v. CTIA**. Stipulation allowed; appeal dismissed.

No. A-17-1253: **State v. Loebig**. 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-17-1255: **State v. Hinrichs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-17-1280: **State v. Moten**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-17-1288: **State v. Nasert**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-17-1293: **Discover Bank v. Hineline**. Stipulation allowed; appeal dismissed.

No. A-17-1314: **County of Douglas v. Hansen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2). See, also, Neb. Rev. Stat. § 77-201(1) (Cum. Supp. 2016).

No. A-17-1326: **State v. Morrison**. 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-18-004: **Chuol v. Frakes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2). See, also, *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016).

No. A-18-011: **State v. Langfeldt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-020: **Applied Underwriters v. Van De Pol Enters**. Affirmed. See § 2-107(A)(1). See, also, *Applied Underwriters v. E.M. Pizza*, 26 Neb. App. 906, 923 N.W.2d 789 (2019).

No. A-18-021: **Applied Underwriters v. Warwick Amusements**. Affirmed. See § 2-107(A)(1). See, also, *Applied Underwriters v. E.M. Pizza*, 26 Neb. App. 906, 923 N.W.2d 789 (2019).

No. A-18-022: **State v. Wilson**. Appeal dismissed. See *State v. Kissell*, 13 Neb. App. 209, 690 N.W.2d 194 (2004).

No. A-18-024: **State v. Brown**. Motion of appellee for summary affirmance granted; judgment affirmed. See *State v. Russell*, 299 Neb. 483, 908 N.W.2d 669 (2018).

No. A-18-032: **State v. Endicott**. Motion of appellee for summary dismissal granted; appeal dismissed. See, Neb. Rev. Stat. § 25-1912 (Supp. 2017); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-18-037, A-18-040: **State v. Reed**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Vanness*, 300 Neb. 159, 912 N.W.2d 736 (2018); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-039: **State v. Sitting Holy**. Motion of appellee for summary affirmance granted; judgment affirmed. See, *State v. Russell*, 299 Neb. 483, 908 N.W.2d 669 (2018); *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

No. A-18-041: **State v. Hughes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Wofford*, 298 Neb. 412, 904 N.W.2d 649 (2017).

No. A-18-076: **Florence Lake Investments v. Berg**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-18-077, A-18-078: **State v. Schmidt**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-18-087: **State v. Kraf**. Appellee's suggestion of remand sustained. Sentence vacated and cause remanded with instructions to enter sentence in accordance with Neb. Rev. Stat. § 29-2204.02 (Reissue 2016). See, also, *State v. Dyer*, 298 Neb. 82, 902 N.W.2d 687 (2017); *State v. Baxter*, 295 Neb. 496, 888 N.W.2d 726 (2017).

No. A-18-091: **State v. Glandt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-097: **State v. Gardner**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-099: **State v. Howard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Wofford*, 298 Neb. 412, 904 N.W.2d 649 (2017).

No. A-18-104: **State v. Parker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-105: **State v. Feliciano Williams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-18-106: **State v. Perez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-107: **State v. Sanders**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Hill*, 254 Neb. 460, 577 N.W.2d 259 (1998).

Nos. A-18-116, A-18-117: **Claborn v. Walker**. Motions of appellee for summary dismissal sustained; appeals dismissed. See § 2-107(B)(1). See, also, Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-18-121: **Pochop v. Pochop**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-125: **State v. Hayes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Collins*, 292 Neb. 602, 873 N.W.2d 657 (2016).

No. A-18-130: **State v. Pulliam**. Appellee's suggestion of remand sustained. Order dated January 31, 2018, reversed and matter remanded with directions. See, *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009). See, also, *State v. Lintz*, 298 Neb. 103, 902 N.W.2d 683 (2017).

No. A-18-131: **Lewis v. Johnson**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 36-105 (Reissue 2016).

No. A-18-136: **State v. O'Toole**. 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-18-138: **State v. Daily**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-18-141: **State v. Robinson**. Motion of appellee for summary dismissal sustained; appeal dismissed. See § 2-107(B)(1).

No. A-18-143: **State v. Lansden**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-147: **State v. Chandler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-18-148: **State v. Davies**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dyer*, 298 Neb. 82, 902 N.W.2d 687 (2017).

No. A-18-150: **State v. Johnson**. Motion of appellee for summary affirmance granted; judgment affirmed. See *State v. Russell*, 299 Neb. 483, 908 N.W.2d 669 (2018).

No. A-18-151: **State v. King**. Stipulation allowed; appeal dismissed.

No. A-18-157: **GC Money v. Wayne**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-159: **State v. Stubblefield**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-163: **State v. Bergman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-18-171: **State v. Fletcher**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Wofford*, 298 Neb. 412, 904 N.W.2d 649 (2017).

No. A-18-172: **State v. Wiggins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-173: **State v. Cage**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-175: **State v. Sparish**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-176: **In re Interest of Kyra L. & Charissa L**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-182: **State v. Walker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-18-187: **State v. Leisure**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Cotton*, 299 Neb. 650, 910 N.W.2d 102 (2018); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-190: **State v. Kucera-Fitzgerald**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-198: **In re Interest of Brock S**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-199: **In re Interest of Brock S**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-203: **State v. Arnold**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-204: **State v. Delay**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Wofford*, 298 Neb. 412, 904 N.W.2d 649 (2017).

No. A-18-205: **State v. Burling**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Russell*, 299 Neb. 483, 908 N.W.2d 669 (2018); *State v. Wills*, 285 Neb. 260, 826 N.W.2d 581 (2013).

No. A-18-209: **Adler v. Garcia**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-213: **State v. Clark**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Russell*, 299 Neb. 483, 908 N.W.2d 669 (2018).

No. A-18-221: **Torres v. Western Cooperative Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-224: **State v. Cage**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

Nos. A-18-225, A-18-245: **State v. Leal-Castaneda**. Motions of appellee for summary affirmance granted; judgments affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-229: **State v. Farley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-18-230: **State v. Garcia**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-231: **In re Interest of Matthew H**. Motion of appellee for summary dismissal granted; appeal dismissed. See *BryanLGH v. Nebraska Dept. of Health & Human Servs.*, 276 Neb. 596, 755 N.W.2d 807 (2008).

No. A-18-235: **State v. McDonald**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-238: **State v. Baxter**. Motion of appellant to dismiss appeal granted; appeal dismissed.

No. A-18-240: **State v. Sundberg**. 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-18-242: **State v. Goos**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-247: **State v. West**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Russell*, 299 Neb. 483, 908 N.W.2d 669 (2018).

No. A-18-257: **State v. Strong**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

Nos. A-18-263 through A-18-265: **State v. Franke**. Motions of appellant to dismiss appeal sustained; appeals dismissed.

No. A-18-266: **State v. Spencer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-268: **State v. Hinton**. Motion of appellee for summary affirmance granted; judgment affirmed. See, *State v. Russell*, 299 Neb. 483, 908 N.W.2d 669 (2018); *State v. Bond*, 23 Neb. App. 916, 877 N.W.2d 254 (2016).

No. A-18-270: **State v. Patterson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Vanness*, 300 Neb. 159, 912 N.W.2d 736 (2018); *State v. Russell*, 299 Neb. 483, 908 N.W.2d 669 (2018); *State v. Baker*, 250 Neb. 896, 553 N.W.2d 464 (1996); *State v. McLeaney*, 6 Neb. App. 807, 578 N.W.2d 68 (1998).

No. A-18-271: **State v. Page**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-272: **Finley v. Finley**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-276: **Bowman v. Bowman**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-282: **Oeltjen v. Kentucky Fried Chicken**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-286: **State v. Surber**. Stipulation allowed; appeal dismissed.

No. A-18-289: **State v. Kekela**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Cotton*, 299 Neb. 650, 910 N.W.2d 102 (2018); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

Nos. A-18-290, A-18-291: **State v. Hall**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-292: **State v. Cox**. Motion of appellee for summary affirmance granted; judgment affirmed. See, *State v. Russell*, 299 Neb. 483, 908 N.W.2d 669 (2018); *State v. Baxter*, 295 Neb. 496, 888 N.W.2d 726 (2017).

No. A-18-298: **State v. Frakes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-324: **State v. Dunbar**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-325: **Pittman v. Frakes**. Motion of appellee for summary dismissal sustained; appeal dismissed. See § 2-107(D)(1). See, also, *Al-Ameen v. Frakes*, 293 Neb. 248, 876 N.W.2d 635 (2016).

No. A-18-330: **State v. Trimble**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-337: **State v. Wilson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-345: **Harrison v. FedEx Express**. Affirmed. See § 2-107(A)(1).

No. A-18-347: **Applied Underwriters Captive Risk v. Relton Corp**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-361: **Atkinson v. Lenhoff**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-362: **City of Atkinson v. Widtfeldt**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1902 (Reissue 2016).

No. A-18-363: **Gray v. Hansen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-18-364: **Bates v. Bates**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-366: **Anthis v. TFL, Inc., RS Holdings**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-18-370: **Lin v. Na**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-105(B)(1)(a). See, also, *Sindelar v. Hanel Oil, Inc.*, 254 Neb. 975, 581 N.W.2d 405 (1998); *Woods v. Woods*, 175 Neb. 788, 124 N.W.2d 197 (1963).

No. A-18-371: **State v. Ware**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 28-106(2) (Reissue 2016); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-373: **In re Interest of Chase S. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-378: **State v. Cox**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-379: **State v. Hill**. Stipulation allowed; appeal dismissed.

No. A-18-387: **State v. Samaroo**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-389: **In re Adoption of Faith H**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-391: **Armstrong v. Armstrong**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-18-394: **State v. Gonzalez**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-399: **State v. Arop**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-404: **Johnson v. Nebraska Dept. of Corr. Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-405: **Cain v. Cain**. Appeal dismissed. See § 2-107(A)(2).

No. A-18-411: **State v. White**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-414: **In re Interest of Jayden M**. Affirmed. See §§ 2-107(A)(1) and 2-101(B)(1)(b).

No. A-18-414: **In re Interest of Jayden M**. Motion of appellant to reconsider and reinstate appeal sustained. Appeal reinstated.

No. A-18-416: **Pittman v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-417: **Pittman v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-418: **Pittman v. Frakes**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-421: **State v. Jensen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-422: **Wilke v. Tonniges**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-423: **Wells v. Lewein**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Haynes*, 299 Neb. 249, 908 N.W.2d 40 (2018); *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016).

No. A-18-424: **Hodgen v. Hodgen**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-430: **Meehan v. CHI Health Bergan Mercy**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-432: **State v. Beecroft**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-433: **State v. Strodtman**. Appeal dismissed. See § 2-107(A)(2). See, also, Neb. Rev. Stat. § 25-1912(1) (Supp. 2017); *Metrejean v. Gunter*, 240 Neb. 166, 481 N.W.2d 176 (1992).

No. A-18-434: **Smith v. Helm**. Appeal dismissed. See § 2-107(A)(2).

No. A-18-440: **Eisenmann v. Jones**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Supp. 2017).

No. A-18-444: **State v. Chase**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-448: **Robinson v. Overton**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-452: **Reznicek Farms v. Lickteig**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-455: **In re Interest of Mercedes K. et al**. Stipulation allowed; appeal dismissed; each party to pay own costs and attorney fees.

No. A-18-457: **In re Interest of Malachi J**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-462: **Lechner v. ACH Immanuel Med. Ctr**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-18-464: **Castonguay v. Frakes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016).

No. A-18-465: **Lundahl v. Walmart**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-18-468: **Perkins v. Nebraska Med. Ctr**. Motion of appellee to dismiss appeal sustained; appeal dismissed.

No. A-18-469: **McElroy v. Davita Dialysis Clinics Corp**. Appeal dismissed. See § 2-107(A)(2). See, e.g., *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-18-473: **Rosendahl v. Plourde**. Appeal dismissed. See § 2-107(A)(2).

No. A-18-475: **State v. Hauersperger**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018). See, also, *State v. Spotted Elk*, 227 Neb. 869, 420 N.W.2d 707 (1988).

No. A-18-477: **State v. Whitney**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-484: **State v. Tucker**. Appeal dismissed. See § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-485: **State v. Livingston**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Russell*, 299 Neb. 483, 908 N.W.2d 669 (2018).

Nos. A-18-490 through A-18-492: **State v. Winters**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018); *State v. Mora*, 298 Neb. 185, 903 N.W.2d 244 (2017).

No. A-18-493: **Strawder v. Frakes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, Neb. Rev. Stat. § 29-2801 (Reissue 2016); *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016).

No. A-18-494: **State v. Jane**. Stipulation allowed; appeal dismissed.

No. A-18-495: **State v. Jane**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-499: **State on behalf of Emilio C. v. Raul C**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Supp. 2017).

No. A-18-505: **State v. Pass**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-506: **State v. Pass**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-509: **State v. Hillard**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 29-118 (Reissue 2016); *State v. McArthur*, 12 Neb. App. 657, 685 N.W.2d 733 (2004).

No. A-18-512: **State v. Jennings**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-18-513: **State v. Kuhl**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017); *State v. Baxter*, 295 Neb. 496, 888 N.W.2d 726 (2017).

No. A-18-514: **State v. Crane**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-515: **Wedekind v. Smith**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 1017).

No. A-18-519: **State v. Schaffert**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-522: **State v. Pradhan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-18-526: **Falcone v. Falcone**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-530: **Lay v. Board of Supervisors of Adams Cty**. Appeal dismissed. See, § 2-107(A)(2); *Last Pass Aviation v. Western Co-op Co.*, 296 Neb. 165, 892 N.W.2d 108 (2017). See, also, *Addy v. Lopez*, 295 Neb. 635, 890 N.W.2d 490 (2017).

Nos. A-18-531, A-18-532: **State v. Ruffcorn**. Appellee's suggestions of remand granted. Sentences vacated and causes remanded for resentencing before different judge. See *State v. Birge*, 263 Neb. 77, 638 N.W.2d 529 (2002).

No. A-18-535: **State v. Hadi**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Williams*, 295 Neb. 575, 889 N.W.2d 99 (2017).

No. A-18-536: **State v. Gardner**. Appeal dismissed. See §§ 2-107(A)(2) and 2-101(B)(4).

No. A-18-537: **State v. Reinhardt**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-541: **In re Interest of Esequiel G. et al**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Zachary B.*, 299 Neb. 187, 907 N.W.2d 311 (2018).

No. A-18-548: **Seldin v. Estate of Silverman**. Appeal dismissed. See, § 2-107(A)(2); *Jacob v. Nebraska Dept. of Corr. Servs.*, 294 Neb. 735, 884 N.W.2d 687 (2016); *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002); *State v. Blair*, 14 Neb. App. 190, 707 N.W.2d 8 (2005). See, also, Neb. Rev. Stat. § 25-1912(3) (Supp. 2017).

No. A-18-552: **State v. Kubik**. Motion of appellee for summary affirmance granted; judgment affirmed. See, *State v. Dyer*, 298 Neb. 82, 902 N.W.2d 687 (2017); *State v. Tucker*, 17 Neb. App. 487, 764 N.W.2d 137 (2009).

Nos. A-18-553, A-18-554: **State v. Martinez**. Motions of appellee for summary affirmance granted; judgments affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-555: **State v. Addleman**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Supp. 2017).

No. A-18-559: **In re Interest of Raylen W**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-561: **Crow v. Chelli**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-564: **Lampe v. Lampe**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-567: **Graves v. Frakes**. Motion of appellee for summary dismissal on basis of mootness sustained; appeal dismissed. See § 2-107(D). See, also, *Al-Ameen v. Frakes*, 293 Neb. 248, 876 N.W.2d 635 (2016).

No. A-18-568: **State v. Trevino**. Appeal dismissed. See, § 2-107(A)(2); *State v. Gill*, 297 Neb. 852, 901 N.W.2d 679 (2017); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-18-573: **Oswald v. Oswald**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-573: **Oswald v. Oswald**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-18-574: **Scharp v. Scharp**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-576: **Bierman v. Benjamin**. Stipulation to dismiss considered; appeal dismissed.

No. A-18-577: **State v. Cortez-Arias**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-580: **State v. Glynn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-18-584: **American Meter Co. v. Otoe Cty. Bd. of Equal**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 77-5019(2)(b) (Cum. Supp. 2016); *McLaughlin v. Jefferson Cty. Bd. of Equal.*, 5 Neb. App. 781, 567 N.W.2d 794 (1997).

No. A-18-591: **Mumin v. Hansen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-18-594: **Plastilite Corp. v. Edwards**. Appeal dismissed. See, § 2-107(A)(2); *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002).

No. A-18-598: **Campbell v. Frakes**. Motion of appellee for summary affirmance granted; judgment affirmed. See § 2-107(B)(2). See, also, *Mumin v. Frakes*, 298 Neb. 381, 904 N.W.2d 667 (2017).

No. A-18-609: **In re Name Change of Wagner**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-612: **State v. Walters**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-613: **State v. Hollings**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

Nos. A-18-614, A-18-615: **State v. Orozco**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-616: **Fletcher v. Joseph**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-617: **State v. Alberts-Roach**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-619: **State v. Milton**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-620: **State v. Gunsolley**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-622: **Curtiss v. Seward Cty. Bd. of Adjustment**. Motion of appellant to dismiss appeal considered; appeal dismissed; each party to pay own costs.

No. A-18-626: **Lloyd v. State**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-627: **Cloyd v. Foral**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-18-630 through A-18-632: **State v. Taylor**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-633: **Denali Real Estate v. Denali Custom Builders**. Appeal dismissed. See, § 2-107(A)(2); *Meisinger v. Meisinger*, 230 Neb. 37, 429 N.W.2d 721 (1988). See, also, *In re Interest of Karlie D.*, 19 Neb. App. 135, 809 N.W.2d 510 (2011).

No. A-18-635: **Helleberg v. Springer Roofing**. Stipulation allowed; appeal dismissed.

No. A-18-637: **Krafka v. Krafka**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-644: **State v. Wood**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-645: **State v. Wood**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-649: **State v. Tate**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-650: **Engstrom v. Frakes**. Motion of appellee for summary affirmance granted; judgment affirmed. See § 2-107(B)(2). See, also, *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016).

No. A-18-652: **Stewart v. Department of Corr. Servs**. Appeal dismissed. See § 2-107(A)(2). See, also, Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-659: **Isidore Land Holdings v. City of Omaha**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-660: **Moss v. Thomas Lakes Owners Assn**. Appeal dismissed. See, Neb. Rev. Stat. § 25-1315(1) (Reissue 2016); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

Nos. A-18-663, A-18-664: **State v. Sturgeon**. Motions of appellee for summary affirmance granted; judgments affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-666: **Guardian Tax Partners v. Riffel**. Stipulation allowed; appeal dismissed.

No. A-18-667: **In re Estate of Moody**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-672: **Huisman v. Vyhnalek Trucking**. Stipulation allowed; appeal dismissed.

No. A-18-673: **State v. Goodwin**. Appeal dismissed. See § 2-107(A)(2). See, also, Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-674: **State v. Goodwin**. Appeal dismissed. See § 2-107(A)(2). See, also, Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-681: **Duncan v. CHI Health Alegent Creighton Clinic**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-683: **Yah v. Fontenelle Realty**. Appeal dismissed. See § 2-107(A)(2).

No. A-18-684: **Meadows v. Prchal**. Appeal dismissed. See, Neb. Rev. Stat. § 25-1315(1) (Reissue 2016); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-18-685: **In re Name Change of Smith**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-686: **City of Ord v. Koch**. Appeal dismissed. See, § 2-107(A)(2); *Jill B. & Travis B. v. State*, 297 Neb. 57, 899 N.W.2d 241 (2017).

No. A-18-689: **State v. Zerrenner**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-690: **Doerr v. Falls City Airport Authority**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-691: **State v. Xoquic**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.01 (Reissue 2016); *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-18-694: **State v. Bush**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-696: **State v. Corrado**. Stipulation allowed; appeal dismissed.

No. A-18-698: **Chuol v. Frakes**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Edward B.*, 285 Neb. 556, 827 N.W.2d 805 (2013). See, also, *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-18-702: **State v. Lee**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-703: **State v. Soto-Herrera**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-18-704: **State v. Gardner**. Appeal dismissed. See § 2-107(A)(2).

No. A-18-705: **State v. Gardner**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-706: **State v. Gardner**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-707: **Davis v. Ridder**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-18-708: **Geller v. Gustafson**. Appeal dismissed. See, § 2-107(A)(2); *Tilson v. Tilson*, 299 Neb. 64, 907 N.W.2d 31 (2018).

No. A-18-714: **State v. Wheeler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-716: **In re Interest of Marion H**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-720: **Bremers v. Bremers**. Motion and stipulation to dismiss appeal sustained; appeal dismissed.

No. A-18-724: **In re Interest of Veanna N**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-725: **Powell v. Powell**. Appeal dismissed. See, § 2-107(A)(2); *Bhuller v. Bhuller*, 17 Neb. App. 607, 767 N.W.2d 813 (2009).

No. A-18-726: **Rosberg v. Rosberg**. Appeal dismissed. See, § 2-107(A)(2); *Friedman v. Friedman*, 20 Neb. App. 135, 819 N.W.2d 732 (2012).

No. A-18-727: **Rosberg v. Rosberg**. Appeal dismissed. See, § 2-107(A)(2); *Friedman v. Friedman*, 20 Neb. App. 135, 819 N.W.2d 732 (2012).

No. A-18-728: **Rosberg v. Rosberg**. Appeal dismissed. See, § 2-107(A)(2); *Friedman v. Friedman*, 20 Neb. App. 135, 819 N.W.2d 732 (2012).

No. A-18-734: **State v. Mohammad-Aziz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-735: **State v. Sawaged**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-739: **State v. Gray**. Motion of appellee for summary affirmance granted; judgment affirmed. See, Neb. Rev. Stat. § 29-3001(4)(e) (Reissue 2016); *State v. Watkins*, 284 Neb. 742, 825 N.W.2d 403 (2012).

No. A-18-742: **Bremers v. Bremers**. Motion and stipulation to dismiss appeal sustained; appeal dismissed.

No. A-18-746: **State v. Boye**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-749: **Mumin v. State**. Appeal dismissed. See § 2-107(A)(2).

No. A-18-750: **Jerabek v. Jerabek**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-755: **Gray v. Peterson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-18-756: **Harrison v. Hansen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016); *State v. Jackson*, 291 Neb. 908, 870 N.W.2d 133 (2015).

No. A-18-757: **State v. McPeak**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-759: **State v. Hasbrouck**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-18-760: **State v. Ward**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-763: **Watts v. BH Media Group Holdings**. Stipulation allowed; appeal dismissed.

No. A-18-765: **Krafka v. Krafka**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-766: **State v. Trevino**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-773: **Clayborne v. Hansen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Buggs v. Frakes*, 298 Neb. 432, 904 N.W.2d 664 (2017); *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016).

No. A-18-774: **Geren v. Geren**. Appeal dismissed. See, § 2-107(A)(2); *Deines v. Essex Corp.*, 293 Neb. 577, 879 N.W.2d 30 (2016).

No. A-18-776: **In re Interest of Daviear W**. Appeal dismissed due to appellant's failure to file brief. See § 2-110(A).

No. A-18-783: **State v. Vargas-Aguilar**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Russell*, 299 Neb. 483, 908 N.W.2d 669 (2018).

No. A-18-786: **State v. Walton**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-787: **State v. Liggins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018); *State v. Collins*, 299 Neb. 160, 907 N.W.2d 721 (2018).

No. A-18-788: **Longs v. Beck**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2016); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-18-789: **State v. Hempel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Tucker*, 301 Neb. 856, 920 N.W.2d 680 (2018); *State v. Wills*, 285 Neb. 260, 826 N.W.2d 581 (2013).

No. A-18-791: **State v. Rheome**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-796: **Prinzing v. Prinzing**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-801: **In re Interest of Daniel C. & James C**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009).

No. A-18-804: **State v. Robles**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-805: **State v. Munson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-807: **State v. Martinez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-3001(4) (Reissue 2016).

No. A-18-809: **Peters v. Walker**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-812: **State v. Tomlin**. Stipulation allowed; appeal dismissed.

No. A-18-814: **State v. Tomlin**. Stipulation allowed; appeal dismissed.

No. A-18-819: **State v. Patterson**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-820: **State v. Patterson**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-821: **Nebraska Enterprise Fund v. Love**. Appeal dismissed. See § 2-107(A)(2). See, also, Neb. Rev. Stat. § 25-2301.02 (Reissue 2016); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-18-826: **State v. Sidzyik**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-830: **In re Interest of Marlix T. & Sophia T**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-832: **State v. Phillips**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 29-1816 (Supp. 2017); *State v. Comer*, 26 Neb. App. 270, 918 N.W.2d 13 (2018).

No. A-18-833: **State v. Barnhouse**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-835: **State v. Costa**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-838: **State v. Webster**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-18-842: **State v. Gardner**. Appeal dismissed. See, § 2-107(A)(2); *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-18-844: **State v. Longs**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2016).

No. A-18-845: **LHP, LLC v. Scottsdale Ins. Co**. Appeal dismissed.

No. A-18-850: **In re Estate of Winters**. Motion of appellee for summary dismissal granted; appeal dismissed. See Neb. Rev. Stat. § 25-1912 (Supp. 2017).

Nos. A-18-854, A-18-855: **Newman v. Frakes**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016). See, also, *Leach v. Dahm*, 277 Neb. 452, 763 N.W.2d 83 (2009).

No. A-18-857: **State v. Jackson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-859: **State v. Puentes**. Appeal dismissed. See, § 2-107(A)(2); *State v. Harper*, 233 Neb. 841, 448 N.W.2d 407 (1989).

No. A-18-862: **State v. Henderson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Tucker*, 301 Neb. 856, 920 N.W.2d 680 (2018); *State v. Dyer*, 298 Neb. 82, 902 N.W.2d 687 (2017).

No. A-18-865: **Cooper v. Union Pacific RR. Co**. Motion of appellee for summary dismissal granted; appeal dismissed. See Neb. Rev. Stat. § 25-1912(1) (Supp. 2017). See, also, Neb. Rev. Stat. § 25-1301(3) (Reissue 2016).

No. A-18-867: **State v. Vyhlidal**. Stipulation allowed; appeal dismissed.

No. A-18-868: **State v. Fisk**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-869: **State v. Overshiner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-2204.02(7)(d) (Reissue 2016); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017); *State v. Baxter*, 295 Neb. 496, 888 N.W.2d 726 (2017); *State v. Policky*, 285 Neb. 612, 828 N.W.2d 163 (2013).

No. A-18-870: **State v. Wesner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 23-1204.01 (Reissue 2012); *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011).

No. A-18-871: **Akeyo v. Teryl Corp**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-881: **Robinson v. Pivovar**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-18-882: **Modlin v. Modlin**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-890: **State v. Snow**. Appeal dismissed. See § 2-107(A)(2). See, also, Neb. Rev. Stat. § 29-2315.01 (Reissue 2016); *State v. Thalken*, 299 Neb. 857, 911 N.W.2d 562 (2018).

No. A-18-891: **State v. Duffek**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

No. A-18-895: **Otto v. Otto**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-18-896: **State v. Hay**. Appeal dismissed as untimely. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-898: **Stricklin v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-904: **State v. Rollins**. Stipulation allowed; appeal dismissed.

No. A-18-905: **Huddleston v. Huddleston**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3) (Supp. 2017); *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004).

No. A-18-914: **Zapata v. Roberts**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2016).

No. A-18-916: **Boone v. Stewart**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-918: **Longs v. Draper**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-919: **State v. Morris**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-18-921: **State v. Nelson**. Stipulation allowed; appeal dismissed.

No. A-18-926: **Portwood v. Mariner Wealth Advisors-Omaha**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-18-929: **State v. Cave**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-931: **State v. Rivas**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-932: **State v. Cave**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-935: **Wall v. Owens**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-937: **Applied Underwriters v. Energy Conservation Group**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-938: **Swift v. Amy & Saath**. Appeal dismissed. See, § 2-107(A)(2); *Nichols v. Nichols*, 288 Neb. 339, 847 N.W.2d 307 (2014).

No. A-18-942: **Finley v. Black**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-943: **State v. Smith**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

Nos. A-18-944, A-18-945: **State v. Garaas**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 192, 893 N.W.2d 421 (2017); *State v. Baxter*, 295 Neb. 496, 888 N.W.2d 726 (2017).

No. A-18-950: **Longs v. State**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-951: **Mumin v. Peterson**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-18-955: **State v. Llanes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-18-957: **State v. Durham**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-18-960: **State v. Chavers**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-960: **State v. Chavers**. By order of the court, dismissal for failure to file briefs set aside. Appeal reinstated.

No. A-18-961: **State v. Longsine**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-962: **In re Interest of E'Lin B**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Latenser v. Intercessors of the Lamb, Inc.*, 245 Neb. 337, 513 N.W.2d 281 (1994).

No. A-18-963: **State v. Boyce**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-966: **State v. Hillard**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-967: **State v. Burhan**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017). See, also, *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

No. A-18-974: **State v. Clark**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-976: **Cutler v. Frakes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(1); *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016); *Rehbein v. Clarke*, 257 Neb. 406, 598 N.W.2d 39 (1999).

No. A-18-977: **Widtfeldt v. Holt Cty. Bd. of Equal**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 77-5019(1) (Cum. Supp. 2016).

No. A-18-985: **Groeteke v. Stock Realty & Auction Co**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016). See, also, Neb. Rev. Stat. § 25-1902 (Reissue 2016); *Ginger Cove Common Area Co. v. Wiekhorst*, 296 Neb. 416, 893 N.W.2d 467 (2017).

No. A-18-987: **Burkinshaw v. State**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-988: **State v. Woolridge**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-990: **State v. Gorman**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-991: **Harden v. State**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016).

No. A-18-992: **In re Interest of Leah B. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-995: **State v. Hamilton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-18-999: **State v. McCroy**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-1000: **Dixon v. Dixon**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017).

No. A-18-1001: **State v. Povich**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-1002: **State v. Dunn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Savage*, 301 Neb. 873, 920 N.W.2d 692 (2018).

No. A-18-1004: **State v. Waschinek**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-1006: **In re Estate of Gedgoud**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-18-1008: **Owens v. Owens**. Appeal dismissed. See, § 2-107(A)(2); *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003).

No. A-18-1015: **Longs v. Johnson**. Appeal dismissed. See § 2-107(A)(2).

No. A-18-1016: **Midwestern Cattle Mktg. v. Points West Comm. Bank**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-18-1024: **Swift v. Doe**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-1030: **State v. Duoth**. Stipulation allowed; appeal dismissed.

No. A-18-1032: **State v. Hillard**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-1034: **State v. Dunham**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-18-1035: **State v. Hay**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017); *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001).

No. A-18-1049: **In re Estate of Johnson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-1050: **Mercer v. Mercer**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Reissue 2016); *Bryson L. v. Izabella L.*, 302 Neb. 145, 921 N.W.2d 829 (2019).

No. A-18-1055: **State v. Gomez-Molina**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-1056: **Longs v. State**. Appeal dismissed as moot.

No. A-18-1057: **Longs v. Johnson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-1058: **Longs v. Hawk**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-1059: **Longs v. Goodro**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-1060: **State v. Kishk**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-1063: **Alford v. Hansen**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-1070: **State v. Gardner**. Appeal dismissed. See, § 2-107(A)(2); *State v. Combs*, 297 Neb. 422, 900 N.W.2d 473 (2017).

No. A-18-1071: **State v. Williams**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-1072: **In re Interest of Blaze C**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-1073: **State v. Huff**. Motion of appellant pro se to dismiss appeal sustained; appeal dismissed.

No. A-18-1075: **State v. Harris**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-1083: **State v. Zepeda**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-1084: **State v. Ortiz**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-1085: **Mumin v. McLaughlin**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-18-1089: **Hill v. State**. Appeal dismissed. See, § 2-107(A)(2); *Jacobitz v. Aurora Co-op*, 287 Neb. 97, 841 N.W.2d 377 (2013).

No. A-18-1101: **Dortch v. City of Omaha**. Appeal dismissed. See, § 2-107(A)(2); *Klingelhoefer v. Monif*, 286 Neb. 675, 839 N.W.2d 247 (2013); *Bayliss v. Clason*, 26 Neb. App. 195, 918 N.W.2d 612 (2018).

No. A-18-1106: **State v. Iddings**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-1108: **State on behalf of Brody S. v. Jordan K**. Motion of appellant to dismiss appeal considered; appeal dismissed; each party to pay own costs.

No. A-18-1112: **Zapata v. Waller**. Appeal dismissed. See § 2-107(A)(2). See, also, *Nichols v. Nichols*, 288 Neb. 339, 847 N.W.2d 307 (2014).

No. A-18-1113: **McElroy v. Davita Dialysis Clinics Corp**. Appeal dismissed. See § 2-107(A)(2). See, e.g., *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-18-1116: **State v. Holzapfel**. Stipulation allowed; appeal dismissed.

No. A-18-1124: **Rfissa v. Kujman**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-1145: **In re Estate of Chambers**. Appeal dismissed. See § 2-107(A)(2).

CASES DISPOSED OF WITHOUT OPINION

No. A-18-1153: **State v. Choul**. Appeal dismissed. See § 2-107(A)(2). See, also, *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-18-1154: **State v. Pigee**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-1161: **Denali Real Estate v. Denali Custom Builders**. Appeal dismissed. See § 2-107(A)(2).

No. A-18-1167: **In re Interest of Evelyn G**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-1168: **In re Interest of Adrian N**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-1169: **State v. Wesner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2). See, also, *State v. Jones*, 254 Neb. 212, 575 N.W.2d 156 (1998).

No. A-18-1171: **Priesner v. Starry**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1090 (Reissue 2016); *Friedman v. Friedman*, 20 Neb. App. 135, 819 N.W.2d 732 (2012).

No. A-18-1175: **Perez v. Perez**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2016); *Jennifer T. v. Lindsay P.*, 298 Neb. 800, 906 N.W.2d 49 (2018).

No. A-18-1190: **Crow v. Chelli**. Appeal dismissed. See, § 2-107(A)(2); *Weatherly v. Cochran*, 301 Neb. 426, 918 N.W.2d 868 (2018).

No. A-18-1193: **City of Atkinson v. Widtfeldt**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2016); *Friedman v. Friedman*, 20 Neb. App. 135, 819 N.W.2d 732 (2012).

No. A-18-1195: **Hooper v. Hooper**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017); *Fitzgerald v. Fitzgerald*, 286 Neb. 96, 835 N.W.2d 454 (2013).

No. A-18-1206: **Muyonga v. Johnson**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-1213: **Perez v. Doane College**. Motion of appellant to dismiss appeal considered; appeal dismissed; each party to pay own costs.

No. A-18-1215: **Bailey v. M.B.C. Constr. Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-1216: **Sharp v. M.B.C. Constr. Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

CASES DISPOSED OF WITHOUT OPINION

No. A-18-1220: **Gray v. Johnson**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1912 (Supp. 2017) and 25-1329 (Reissue 2016); *State v. Lotter*, 301 Neb. 125, 917 N.W.2d 850 (2018).

No. A-19-005: **FTR Farms v. Rist Farm**. Appeal dismissed. See, § 2-107(A)(2); *Murray v. Stine*, 291 Neb. 125, 864 N.W.2d 386 (2015).

No. A-19-012: **Bishop v. Fehderau**. Appeal dismissed. See § 2-107(A)(2).

No. A-19-021: **Schurman v. Schurman**. Appeal dismissed. See, § 2-107(A)(2); *In re Guardianship of S.T.*, 300 Neb. 72, 912 N.W.2d 262 (2018); *Ptak v. Swanson*, 271 Neb. 57, 709 N.W.2d 337 (2006).

No. A-19-038: **State v. Cavitt**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.01 et seq. (Reissue 2016); *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-19-041: **State v. Salomon**. Appeal dismissed. See § 2-107(A)(2).

No. A-19-045: **State v. Gomez-Molina**. Appeal dismissed. See § 2-107(A)(2).

No. A-19-052: **State v. Romero-Romero**. Appeal dismissed. See, § 2-107(A)(2); *State v. Thalmann*, 302 Neb. 110, 921 N.W.2d 816 (2019).

No. A-19-053: **In re Interest of Madison B. & Olivia B**. Appeal dismissed. See § 2-107(A)(2). See, also, *In re Interest of Octavio B. et al.*, 290 Neb. 589, 861 N.W.2d 415 (2015); *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002); *In re Interest of Angeleah M. & Ava M.*, 23 Neb. App. 324, 871 N.W.2d 49 (2015).

No. A-19-066: **Clayborne v. Hansen**. Appeal dismissed. See, § 2-107(A)(2); *Mumin v. Frakes*, 298 Neb. 381, 904 N.W.2d 667 (2017); *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-19-077: **State v. Gardner**. Appeal dismissed. See, § 2-107(A)(2); *Al-Ameen v. Frakes*, 293 Neb. 248, 876 N.W.2d 635 (2016).

No. A-19-078: **State v. Gardner**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2018).

No. A-19-079: **State v. Gardner**. Appeal dismissed. See § 2-107(A)(2).

No. A-19-104: **State v. Corbitt**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 29-2103 (Reissue 2016).

No. A-19-106: **State v. Johnson-El**. Appeal dismissed. See § 2-107(A)(2).

CASES DISPOSED OF WITHOUT OPINION

No. A-19-107: **State v. Johnson-El**. Appeal dismissed. See § 2-107(A)(2).

No. A-19-110: **State v. Sanchez-Andrade**. Appeal dismissed. See, § 2-107(A)(2); *Mumin v. Frakes*, 298 Neb. 381, 904 N.W.2d 667 (2017); *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-19-118: **State v. Hellbusch**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-119: **MM Finance v. McAlister**. Appeal dismissed. See, § 2-107(A)(2); *Engler v. State*, 283 Neb. 985, 814 N.W.2d 387 (2012).

No. A-19-138: **State v. Williams**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2018).

No. A-19-139: **State v. Williams**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2018).

No. A-19-140: **State v. Walton**. Appeal dismissed. See § 2-107(A)(2). See, also, Neb. Rev. Stat. § 25-1902 (Reissue 2016); *State v. Combs*, 297 Neb. 422, 900 N.W.2d 473 (2017).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

Nos. A-16-887, A-16-933: **In re Estate of Tiedeman**, 25 Neb. App. 722 (2018). Petitions of appellant for further review denied on June 6, 2018.

No. A-16-968: **Thomas v. Kiewit Bldg. Group**, 25 Neb. App. 818 (2018). Petition of appellee for further review denied on July 13, 2018.

No. A-16-1115: **Crossman & Hosford v. Harbison**, 25 Neb. App. 849 (2018). Petition of appellee for further review denied on June 19, 2018.

No. A-16-1213: **Gustafson v. Bodlak**. Petition of appellants for further review denied on February 26, 2019.

No. A-16-1218: **Gray v. Nebraska Dept. of Corr. Servs**. Petition of appellant for further review denied on June 7, 2018.

No. A-17-019: **State v. Fessler**. Petition of appellant for further review denied on June 1, 2018.

No. S-17-054: **Simms v. Friel**, 25 Neb. App. 640 (2018). Petition of appellant for further review sustained on June 4, 2018.

No. A-17-084: **State v. Bosse**. Petition of appellant for further review denied on June 26, 2018.

No. A-17-097: **Roth Grading v. Martin Bros. Constr.**, 25 Neb. App. 928 (2018). Petition of appellant for further review denied on July 17, 2018.

No. A-17-105: **State v. Bates**. Petition of appellant for further review denied on June 11, 2018.

No. A-17-153: **Leonor v. Frakes**. Petition of appellant for further review denied on June 1, 2018.

No. A-17-161: **Carr v. Ganz**, 26 Neb. App. 14 (2018). Petition of appellee for further review denied on October 2, 2018.

No. A-17-162: **Apkan v. Life Care Centers of America**, 26 Neb. App. 154 (2018). Petition of appellant for further review denied on September 26, 2018.

No. A-17-181: **Schilke v. Battiato**. Petition of appellant for further review denied on August 9, 2018.

No. A-17-256: **State v. De Los Santos**. Petition of appellant for further review denied on August 7, 2018.

PETITIONS FOR FURTHER REVIEW

No. A-17-270: **Bayliss v. Clason**, 26 Neb. App. 195 (2018). Petition of appellant for further review denied on October 22, 2018.

No. A-17-272: **State v. Colligan**. Petition of appellant for further review denied on October 18, 2018.

No. A-17-278: **State v. Brown**. Petition of appellant for further review denied on September 20, 2018.

No. A-17-332: **State v. Erpelding**. Petition of appellant for further review denied on November 15, 2018.

No. A-17-341: **Rosberg v. Rosberg**, 25 Neb. App. 856 (2018). Petition of appellant for further review denied on June 18, 2018.

No. A-17-347: **State v. Weston**. Petition of appellant for further review denied on July 12, 2018.

No. A-17-351: **Tunga-Lergo v. Rebarcak**. Petition of appellant for further review denied on August 31, 2018. See § 2-102(F)(1).

No. A-17-372: **State v. St. Cyr**, 26 Neb. App. 61 (2018). Petition of appellant for further review denied on August 21, 2018.

No. A-17-409: **Williams v. Williams**. Petition of appellant for further review denied on August 8, 2018.

No. A-17-416: **State v. Reed**. Petition of appellant for further review denied on August 21, 2018.

No. A-17-447: **State v. Mohammed**. Petition of appellant for further review denied on July 6, 2018.

No. A-17-465: **Moss v. C&A Indus.**, 25 Neb. App. 877 (2018). Petition of appellant for further review denied on August 21, 2018.

No. A-17-500: **State v. Kelley**. Petition of appellant for further review denied on June 18, 2018.

No. A-17-507: **Shaw v. Nebraska Med. Ctr**. Petition of appellant for further review denied on July 10, 2018, as untimely.

No. A-17-532: **State v. Muhammad**. Petition of appellant for further review denied on August 16, 2018.

No. A-17-537: **Silver v. Silver**. Petition of appellant for further review denied on September 26, 2018.

No. A-17-543: **State v. Howard**, 26 Neb. App. 628 (2018). Petition of appellant for further review denied on February 12, 2019.

No. A-17-560: **State v. Stephens**, 26 Neb. App. 1 (2018). Petition of appellant for further review denied on July 17, 2018.

No. A-17-562: **State v. Huerta**, 26 Neb. App. 170 (2018). Petition of appellant for further review denied on October 3, 2018.

No. A-17-574: **Cohrs v. Bruns**. Petition of appellant for further review denied on June 26, 2018.

No. A-17-595: **Gardner v. Burkley Envelope Co**. Petition of appellant for further review denied on June 7, 2018.

No. A-17-603: **In re Interest of Jose H. et al**. Petition of appellant for further review denied on June 26, 2018.

No. A-17-610: **State v. Barber**, 26 Neb. App. 339 (2018). Petition of appellant pro se for further review denied on November 15, 2018.

No. A-17-644: **State v. Bradley**. Petition of appellant for further review denied on October 15, 2018.

No. A-17-656: **Sampson Construction Co. v. Martin**. Petition of appellant for further review denied on September 4, 2018.

No. S-17-675: **State v. Shiffermiller**, 26 Neb. App. 250 (2018). Petition of appellant for further review sustained on October 24, 2018.

No. A-17-676: **State v. Ruaikot**. Petition of appellant for further review denied on June 7, 2018.

Nos. A-17-677, A-17-678: **In re Interest of Benjamin C. & Alizaeya D**. Petitions of appellant for further review denied on July 25, 2018.

No. A-17-692: **State v. Hallauer**. Petition of appellant for further review denied on July 10, 2018.

No. S-17-710: **Gerber v. P & L Finance Co**. Petition of appellee for further review sustained on July 20, 2018.

No. A-17-724: **In re Interest of Treasean J. et al**. Petition of appellant for further review denied on January 9, 2019.

No. A-17-726: **State v. Malone**, 26 Neb. App. 121 (2018). Petition of appellant for further review denied on September 28, 2018.

No. A-17-732: **State v. Ueding-Nickel**. Petition of appellant for further review denied on January 8, 2019.

No. A-17-733: **State v. Moss**. Petition of appellant for further review denied on August 7, 2018.

No. A-17-749: **In re Guardianship of Aimee S.**, 26 Neb. App. 380 (2018). Petition of appellant for further review denied on November 9, 2018, as premature. See § 2-102(F)(1).

No. A-17-749: **In re Guardianship of Aimee S.**, 26 Neb. App. 380 (2018). Petition of appellants for further review denied on February 26, 2019.

No. A-17-749: **In re Guardianship of Aimee S.**, 26 Neb. App. 380 (2018). Petition of appellee Dempsey-Cook for further review denied on February 26, 2019.

No. A-17-749: **In re Guardianship of Aimee S.**, 26 Neb. App. 380 (2018). Petition of appellee Turner for further review denied on February 26, 2019.

No. A-17-752: **State v. Guerrero**. Petition of appellant for further review denied on June 7, 2018.

PETITIONS FOR FURTHER REVIEW

No. A-17-762: **State v. Huffman**. Petition of appellant for further review denied on July 13, 2018.

No. A-17-778: **State v. Liner**, 26 Neb. App. 303 (2018). Petition of appellant for further review denied on October 15, 2018, as untimely.

No. A-17-779: **State v. Pester**. Petition of appellant for further review denied on July 19, 2018.

No. S-17-782: **State v. Ettleman**. Petition of appellee for further review sustained on October 18, 2018.

No. A-17-788: **Fischer v. Fischer**. Petition of appellant for further review denied on July 20, 2018.

Nos. A-17-795, A-17-796: **In re Interest of Amari B. & Alyssa B**. Petitions of appellant for further review denied on June 19, 2018.

No. S-17-801: **Starks v. Wal-Mart Stores**. Petition of appellee for further review sustained on September 20, 2018.

No. A-17-804: **In re Interest of Dae Lyn W**. Petition of appellant for further review denied on June 4, 2018.

Nos. A-17-808, A-17-809: **State v. Castellanos**, 26 Neb. App. 310 (2018). Petitions of appellant for further review denied on December 7, 2018.

No. S-17-813: **Chase County v. City of Imperial**, 26 Neb. App. 219 (2018). Petition of appellee for further review sustained on October 11, 2018.

No. A-17-834: **Farm & Garden Ctr. v. Kennedy**, 26 Neb. App. 576 (2018). Petition of appellant for further review denied on January 23, 2019.

No. A-17-836: **Kuhlman v. City of Hastings**. Petition of appellant for further review denied on July 25, 2018.

No. A-17-839: **State v. Young**. Petition of appellant for further review denied on July 6, 2018.

No. A-17-846: **In re Guardianship of K.R.**, 26 Neb. App. 713 (2018). Petition of appellant for further review denied on February 11, 2019, as premature. See § 2-102(F)(1).

No. A-17-853: **State v. Ross**. Petition of appellant for further review denied on November 15, 2018.

No. A-17-855: **Thompson v. Thompson**. Petition of appellant for further review denied on August 9, 2018.

No. A-17-860: **State v. Davis**. Petition of appellant for further review denied on November 19, 2018.

No. A-17-867: **State v. Coleman**. Petition of appellant for further review denied on August 9, 2018.

PETITIONS FOR FURTHER REVIEW

No. A-17-875: **State v. Janousek**. Petition of appellant pro se for further review denied on September 25, 2018, as untimely. See § 2-102(F)(1).

No. A-17-877: **State v. Williams**, 26 Neb. App. 459 (2018). Petition of appellant for further review denied on December 27, 2018.

No. A-17-880: **State v. Hopkins**. Petition of appellant for further review denied on July 24, 2018, as untimely.

No. A-17-881: **State v. Russell**. Petition of appellant for further review denied on January 16, 2019.

No. S-17-898: **St. John v. Gering Public Schools**. Petition of appellant for further review granted on July 17, 2018.

No. A-17-919: **In re Interest of Gerald B. & Leia C**. Petition of appellant for further review denied on July 6, 2018.

Nos. A-17-920, A-17-944: **State on behalf of Brooklynn H. v. Joseph B**. Petitions of appellant for further review denied on November 6, 2018.

No. A-17-927: **State v. Bogenreif**. Petition of appellant for further review denied on December 17, 2018.

No. A-17-934: **State v. Whitcomb**. Petition of appellee for further review denied on October 24, 2018.

No. A-17-935: **State v. Myles**. Petition of appellee for further review denied on February 7, 2019.

No. A-17-939: **State v. Frazier**. Petition of appellant for further review denied on August 13, 2018.

No. A-17-948: **Moulton v. Moulton**. Petition of appellant for further review denied on December 4, 2018, as premature.

No. A-17-967: **State v. Davis**. Petition of appellant for further review denied on September 6, 2018.

No. A-17-969: **State v. Moody**, 26 Neb. App. 328 (2018). Petition of appellant for further review denied on October 29, 2018.

No. A-17-976: **Peterson v. Peterson**. Petition of appellant for further review denied on November 30, 2018, as prematurely filed. See § 2-102(F)(1).

No. A-17-976: **Peterson v. Peterson**. Petition of appellant for further review denied on February 7, 2019, as untimely. See § 2-102(F)(1).

No. A-17-981: **In re Interest of Kirsten H.**, 25 Neb. App. 909 (2018). Petition of appellant for further review denied on July 20, 2018.

No. A-17-996: **State v. Busch**. Petition of appellant for further review denied on March 1, 2019.

PETITIONS FOR FURTHER REVIEW

No. A-17-1036: **State v. Churchich**. Petition of appellant for further review denied on November 19, 2018.

No. A-17-1041: **White v. State**. Petition of appellant for further review denied on July 10, 2018.

No. A-17-1046: **State v. House**. Petition of appellant for further review denied on June 7, 2018.

No. A-17-1067: **In re Interest of Harley F**. Petition of appellant for further review denied on August 21, 2018.

No. A-17-1081: **State v. Butcher**. Petition of appellant for further review denied on July 12, 2018.

No. A-17-1093: **Castonguay v. Vandenbosch**. Petition of appellant for further review denied on October 4, 2018.

No. A-17-1100: **State v. Martinez**. Petition of appellant for further review denied on June 18, 2018.

No. A-17-1102: **State v. Henderson**. Petition of appellant for further review denied on June 19, 2018.

No. A-17-1114: **State v. Valdez**. Petition of appellant for further review denied on January 28, 2019.

No. A-17-1143: **Smith v. Madsen**. Petition of appellant for further review denied on August 23, 2018.

No. A-17-1147: **State v. Parnell**. Petition of appellant pro se for further review denied on December 7, 2018.

No. A-17-1160: **State v. Leroux**, 26 Neb. App. 76 (2018). Petition of appellant for further review denied on October 18, 2018.

No. A-17-1163: **Mumin v. Hansen**. Petition of appellant for further review denied on June 7, 2018.

No. A-17-1200: **Yah v. Fontenelle Realty**. Petition of appellant for further review denied on June 26, 2018.

No. S-17-1210: **State on behalf of Kaaden S. v. Jeffery T.**, 26 Neb. App. 421 (2018). Petition of appellee Mandy S. for further review sustained on December 12, 2018.

No. A-17-1214: **State v. Laravie**. Petition of appellant for further review denied on September 6, 2018.

No. A-17-1223: **Harris v. Hansen**. Petition of appellant for further review denied on November 6, 2018.

No. A-17-1225: **State v. Almusa**. Petition of appellant for further review denied on July 25, 2018.

No. A-17-1237: **In re Interest of Aly T. & Kazlynn T.**, 26 Neb. App. 612 (2018). Petition of appellant for further review denied on January 23, 2019.

No. A-17-1253: **State v. Loebig**. Petition of appellant for further review denied on July 20, 2018.

PETITIONS FOR FURTHER REVIEW

No. S-17-1272: **State v. Gibson**, 26 Neb. App. 559 (2018). Petition of appellee for further review sustained on January 23, 2019.

No. A-17-1273: **State v. Garibo**. Petition of appellant for further review denied on June 13, 2018, for failure to comply with § 2-102(F)(1).

No. A-17-1290: **State v. Gray**. Petition of appellant pro se for further review overruled as untimely filed. See § 2-102(F)(1).

No. A-17-1304: **State v. Hughes**. Petition of appellant for further review denied on July 6, 2018.

No. A-17-1314: **County of Douglas v. Hansen**. Petition of appellant for further review denied on September 4, 2018. See § 2-102(F)(1).

No. A-17-1318: **State v. Ellwanger**. Petition of appellant for further review denied on December 17, 2018.

No. A-17-1319: **Gray v. Nebraska Dept. of Corr. Servs.**, 26 Neb. App. 660 (2018). Petition of appellant for further review denied on January 9, 2019.

No. A-18-004: **Chuol v. Frakes**. Petition of appellant for further review denied on September 6, 2018.

No. A-18-008: **State v. Claiborne**. Petition of appellant for further review denied on January 23, 2019.

No. A-18-016: **State v. Marcial**. Petition of appellant for further review denied on February 1, 2019.

No. A-18-018: **In re Interest of Hope M. et al**. Petition of appellee Jon M. for further review denied on October 15, 2018.

Nos. A-18-037, A-18-040: **State v. Reed**. Petitions of appellant for further review denied on September 20, 2018.

No. A-18-038: **State v. Wagner**. Petition of appellant pro se for further review denied on January 28, 2019.

No. A-18-053: **In re Interest of Orlando D**. Petition of appellant for further review denied on January 23, 2019.

No. A-18-054: **State v. Cappucci**. Petition of appellant for further review denied on February 4, 2019.

No. A-18-106: **State v. Perez**. Petition of appellant for further review denied on September 12, 2018.

No. A-18-123: **In re Interest of Losciano T**. Petition of appellant for further review denied on November 6, 2018.

No. A-18-125: **State v. Hayes**. Petition of appellant for further review denied on August 9, 2018.

No. A-18-136: **State v. O'Toole**. Petition of appellant for further review denied on August 29, 2018.

PETITIONS FOR FURTHER REVIEW

No. A-18-148: **State v. Davies**. Petition of appellant for further review denied on October 3, 2018.

No. A-18-169: **State v. Vallejo**. Petition of appellant for further review denied on January 16, 2019.

No. A-18-182: **State v. Walker**. Petition of appellant for further review denied on December 17, 2018.

No. A-18-194: **State v. Brown**. Petition of appellant for further review denied on October 18, 2018.

Nos. A-18-211, A-18-212: **In re Interest of Londyn W. & Itally W**. Petitions of appellant for further review denied on February 26, 2019.

No. A-18-235: **State v. McDonald**. Petition of appellant for further review denied on July 13, 2018.

No. A-18-271: **State v. Page**. Petition of appellant for further review denied on August 29, 2018.

No. A-18-337: **State v. Wilson**. Petition of appellant for further review denied on August 21, 2018.

No. A-18-401: **State v. Meints**. Petition of appellant for further review denied on February 21, 2019.

No. A-18-421: **State v. Jensen**. Petition of appellant for further review denied on December 3, 2018.

No. A-18-423: **Wells v. Lewein**. Petition of appellant for further review denied on October 26, 2018.

No. A-18-439: **In re Interest of Jacquetta S**. Petition of appellant for further review denied on January 28, 2019.

No. A-18-469: **McElroy v. Davita Dialysis Clinics Corp**. Petition of appellant for further review denied on July 10, 2018.

No. A-18-475: **State v. Hauersperger**. Petition of appellant for further review denied on October 18, 2018.

No. A-18-480: **State v. Mitchell**. Petition of appellant for further review denied on February 11, 2019, as untimely. See § 2-102(F)(1).

No. A-18-522: **State v. Pradhan**. Petition of appellant for further review denied on January 23, 2019.

No. A-18-537: **State v. Reinhardt**. Petition of appellant for further review denied on October 5, 2018.

No. A-18-561: **Crow v. Chelli**. Petition of appellant for further review denied on March 1, 2019.

No. A-18-568: **State v. Trevino**. Petition of appellant for further review denied on October 9, 2018, for lack of jurisdiction.

No. A-18-645: **State v. Wood**. Petition of appellant for further review denied on October 5, 2018.

PETITIONS FOR FURTHER REVIEW

No. A-18-650: **Engstrom v. Frakes**. Petition of appellant for further review denied on February 26, 2019.

No. A-18-686: **City of Ord v. Koch**. Petition of appellant for further review denied on October 18, 2018.

No. A-18-739: **State v. Gray**. Petition of appellant for further review denied on February 7, 2019.

No. A-18-766: **State v. Trevino**. Petition of appellant for further review denied on November 6, 2018, for lack of jurisdiction.

No. A-18-832: **State v. Phillips**. Petition of appellant for further review denied on November 2, 2018.

No. A-18-842: **State v. Gardner**. Petition of appellant for further review denied on December 6, 2018, as untimely. See § 2-102(F)(1).

No. A-18-844: **State v. Longs**. Petition of appellant for further review denied on December 6, 2018, as untimely. See § 2-102(F)(1).

No. A-18-859: **State v. Puentes**. Petition of appellant for further review denied on December 19, 2018.

No. A-18-918: **Longs v. Draper**. Petition of appellant for further review denied on January 28, 2019. See § 2-102(F)(1).

No. A-18-1002: **State v. Dunn**. Petition of appellant for further review denied on February 26, 2019.

No. A-18-1153: **State v. Choul**. Petition of appellant for further review denied on February 11, 2019.

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STATE v. STEPHENS
Cite as 26 Neb. App. 1

State of Nebraska, appellee, v. Chad N. Stephens, appellant.

915 N.W.2d 828

Filed June 5, 2018. No. A-17-560.

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. **Rules of Evidence: Appeal and Error.** Where 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.
3. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction for 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.
4. **Rules of Evidence: Other Acts: Intent.** No exact limitation of time can be fixed as to when other conduct tending to prove intent to commit the offense charged is remote under Neb. Rev. Stat. § 27-414(1) (Reissue 2016).
5. **Rules of Evidence: Other Acts: Time.** The question whether evidence of other conduct is too remote in time is largely within the discretion of the trial court. While remoteness in time may weaken the value of the evidence, such remoteness does not, in and of itself, necessarily justify exclusion of the evidence.
6. **Criminal Attempt: Intent.** A defendant's conduct rises to criminal attempt if he or she intentionally engages in conduct which, under the

circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime.

7. **Criminal Attempt.** Whether a defendant's conduct constitutes a substantial step toward the commission of a particular crime and is an attempt is generally a question of fact.
8. **Lesser-Included Offenses: Sexual Assault.** Attempted first degree sexual assault on a child is a lesser-included offense of first degree sexual assault on a child.
9. **Lesser-Included Offenses: Sexual Assault: Intent.** A finder of fact may convict of the lesser-included offense if it finds that the act of penetration was not proved beyond a reasonable doubt but also finds that a defendant intentionally engaged in conduct which, under the circumstances as the defendant believed them to be, constituted a substantial step in a course of conduct intended to culminate in first degree sexual assault.

Appeal from the District Court for Douglas County: Gregory M. Schatz, Judge. Affirmed.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Sarah E. Marfisi for appellee.

Pirtle, Bishop, and Arterburn, Judges.

Arterburn, Judge.

INTRODUCTION

Following a bench trial, the district court for Douglas County found Chad N. Stephens guilty of attempted sexual assault of a child in the first degree. On appeal, Stephens argues that the district court improperly allowed Neb. Rev. Stat. § 27-414 (Reissue 2016) evidence and that there was insufficient evidence to support his conviction. For the reasons set forth below, we affirm.

BACKGROUND

Stephens was married to Desiree Stephens. Desiree had a daughter from a previous relationship, C.H., born in 2000.

C.H. and Desiree began living with Stephens in 2003. C.H., who was 16 years old at the time of trial, testified to a series of contacts involving Stephens which were of concern. These contacts all occurred in the spring and summer of 2011 when C.H. was 10 years old. By that time, C.H. had two younger sisters living with the family.

The first alleged encounter C.H. testified about occurred one evening when Desiree was not in the same room as Stephens. Stephens was watching a movie in the living room at the time. Stephens asked C.H. to rub his feet, which was the first time he had asked her to do so. Stephens was sitting on the couch, and C.H. agreed. C.H. testified that she was in her pajamas at the time, but that no other contact occurred between Stephens and herself. C.H. testified that after this incident, Stephens would request foot rubs frequently. C.H. stated that this would occur both when the two were alone and when others were present in the room.

The next specific encounter described by C.H. occurred when Desiree was not home. It followed the prior foot rubbing incidents during the summer of 2011. C.H. testified that during one evening, Stephens was lying on the bed in his bedroom watching television. Stephens asked C.H. to rub his feet. C.H. stated that eventually she became positioned on her stomach, on top of Stephens, with her face toward his feet and her buttocks near Stephens' face. Stephens asked C.H. if she thought "it was hot" in the room, to which she replied, "'no.'" Stephens proceeded to remove C.H.'s pajama bottoms. C.H. stated that she did not ask Stephens to remove her pajama bottoms, nor was there any reason for him to do so. Stephens did not touch her any further on this occasion. C.H. did not tell Desiree about the alleged incident.

The next alleged incident occurred later during the summer of 2011. C.H. was walking from her bedroom to the bathroom while Stephens was in the bathroom. Stephens asked C.H. if she wanted to shower with him. C.H. stated that she went to her bedroom and kept on her bra and underwear, but covered

herself with a towel. C.H. then went into the bathroom where Stephens was located. Stephens asked if she showered with a towel on, and C.H. said, "'no.'" C.H. removed her towel, and Stephens asked if she showered with her bra and underwear on, and C.H. said, "'no.'" C.H. removed her undergarments. C.H. testified that Stephens "stared at me for, like, a long time." Stephens remained fully clothed at the time. According to C.H., Stephens did not speak to her or touch her while he stared. Eventually he said "'bye,'" at which time she left. This was the first time that Stephens had asked C.H. if she wanted to shower with him. C.H. did not tell Desiree about this alleged incident.

The final alleged incident C.H. testified to at trial occurred shortly after the previous incident. C.H. testified that she was sleeping in her bedroom when she was awoken. She noticed that her alarm clock said it was 3:14 a.m. C.H. had been sleeping on her back when she woke up and saw Stephens enter her room. She smelled a strong odor of alcohol on him. According to C.H., Stephens got into her bed with her. She stated that she turned her head away. Stephens did not say anything. She then "felt something . . . inside of [her vagina]," describing it as a painful, burning sensation. Stephens asked her if she was "okay," and C.H. did not respond.

C.H. was 16 years old at the time of trial. She testified that upon reflection, she has been able to determine that Stephens digitally penetrated her during the incident. She testified that she believed this based on the positions their bodies were in at the time. C.H. believed the incident lasted approximately 5 minutes. C.H. did not inform Desiree of this incident until her initial disclosure 2 to 3 months after the alleged penetration incident.

C.H. continued to live in the same home as Stephens for nearly 1 year following the last incident. C.H. then moved to Kansas to be with her biological father's family. During the time C.H. spent in Kansas, law enforcement interviewed her regarding allegations of sexual abuse by Stephens. Desiree

messaged C.H. and instructed her not to divulge any information to law enforcement. C.H. then moved to Oklahoma to live with her biological father's sister. She lived there for approximately 3 years. When she returned to the Omaha, Nebraska, area in September 2016, she began living with Stephens' parents, where she resided up to the time of trial. C.H. stated that she previously had a good relationship with Stephens.

Desiree testified at trial. When C.H. disclosed the incident to Desiree, Desiree immediately telephoned Stephens to confront him with the allegation. Desiree stated that Stephens initially denied any inappropriate contact with C.H. She testified that she followed up the conversation with Stephens "hundreds" of times. In a subsequent conversation the evening of C.H.'s initial disclosure, Desiree testified that Stephens told her he had been with friends the night of the alleged penetration incident. Stephens told Desiree that the children were asleep on his and Desiree's bed when he returned home. He carried each of the children to their own bed. When he carried C.H. to her bed, Stephens stated that his hand was placed near her vagina, over her underwear. Stephens stated that he laid down next to C.H. and that he did not want to move his hand from her vaginal area because he thought she would wake and it would frighten her. He asked C.H. if she was "okay." When she did not respond, he left the room.

Desiree testified that she talked to Stephens' parents about him getting treatment. She testified that she should have gone to the police with C.H.'s disclosure, but that instead, she began using methamphetamine and left home for 6 to 8 months. Desiree testified that she told C.H. to delete certain text messages before she was first interviewed by law enforcement in Kansas. Desiree stated she was trying to protect Stephens at that point. Desiree stated that her approach to the allegations changed several years later after another of her children made a disclosure.

C.H. was interviewed by a forensic interviewer at a child advocacy center in the summer of 2016. The forensic

interviewer testified that the proper protocol was utilized on the day of her interview with C.H. She testified that C.H.'s demeanor and responses were appropriate during the interview. She testified that she did not have any concerns about C.H.'s credibility during the interview. During Stephens' case, he introduced the video recording of C.H.'s interview. The district court viewed the entirety of the video.

Prior to trial, the State submitted notice that it wished to present prior sexual assault evidence pursuant to § 27-414. The district court held a hearing on the issue before trial. At the hearing, the parties stipulated to the receipt of police reports and other evidence regarding the former and current charges against Stephens and presented argument.

The evidence of Stephens' prior crime shows that in February 2003, when Stephens was 20 years old, he solicited sex from an undercover officer posing as a 14-year-old girl in an internet chat room. In particular, Stephens asked the "girl," "'Would you let me touch your body?'" He then attempted to get her to call him on his cell phone. The "girl" stopped responding to Stephens, and Stephens logged into the chat room using a different screen name and approached her again, this time representing that he was only 16 years old. Stephens then attempted to get the "girl" to agree to a meeting for the purpose of kissing, oral sex, and vaginal sex. The two agreed to meet at a grocery store at a certain time. Stephens described the vehicle he would drive. The "girl" requested that Stephens bring a condom for vaginal sex.

Officers set up surveillance at the chosen meeting place and observed Stephens' arriving in the type of vehicle he had indicated he would drive at the designated time. Officers arrested Stephens and discovered that he was carrying a single condom in his pocket. After being advised of his rights, Stephens spoke with the officers and corroborated the above information. Stephens also consented to a search of his "Yahoo Instant Messenger" accounts. Stephens provided the password for both accounts used to contact the 14-year-old "girl." The evidence

admitted at the hearing also includes a signed statement from Stephens admitting that he planned to meet the "girl" at the grocery store for the purposes of oral sex and "whatever she wanted." Stephens was initially charged with conspiracy to commit first degree sexual assault. Pursuant to a plea agreement, Stephens pled no contest to an amended information charging him with debauching a minor.

Following the hearing, the district court issued an order in which it found that as to the sexual assault charge concerning C.H., the evidence of the 2003 events was admissible under § 27-414. The district court found that clear and convincing evidence existed that Stephens conspired with an individual whom he thought was a 14-year-old girl to engage in sexual penetration. The district court further found that the evidence of the prior offense was sufficiently similar to the present offense to be probative of propensity to commit the offense against C.H., that it was not too remote in time, and that the evidence was not substantially more prejudicial than probative. Therefore, the district court ruled that the prior crimes evidence would be admissible under § 27-414. At trial, over an objection, the State offered and the district court received the above referenced evidence under § 27-414 of a prior sexual offense committed by Stephens.

Following a bench trial, the district court issued its findings and judgment from the bench. The district court stated that based upon the lack of detail about actual penetration, the court could not find that the act of penetration was proved beyond a reasonable doubt. However, the district court found that on the night Stephens entered C.H.'s bed, he engaged in conduct which constituted a substantial step in a course of conduct intended to culminate in first degree sexual assault. The district court based this finding upon the testimony of C.H., the statements made to Desiree by Stephens, and the § 27-414 evidence. The district court then found Stephens guilty of attempted sexual assault of a child in the first degree. At sentencing, the district court sentenced Stephens

to a period of incarceration of 15 to 18 years. Stephens appeals here.

ASSIGNMENTS OF ERROR

Stephens argues that the district court erred by (1) allowing § 27-414 evidence and (2) finding him guilty because there was insufficient evidence to support his conviction.

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. Hill*, 298 Neb. 675, 905 N.W.2d 668 (2018). Where 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. *Id.*

[3] In reviewing a criminal conviction for 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. Mora*, 298 Neb. 185, 903 N.W.2d 244 (2017).

ANALYSIS

§ 27-414 Evidence

Stephens argues that the district court erred in admitting and considering evidence under § 27-414. Stephens argues that his prior conviction did not involve physical contact with any victim and was therefore too dissimilar to the alleged

crime in this matter. Additionally, Stephens argues that the prior conviction was too remote in time to be admitted under § 27-414.

Section 27-414 provides in relevant part:

> (1) In a criminal case in which the accused is accused of an offense of sexual assault, evidence of the accused's commission of another offense or offenses of sexual assault is admissible if there is clear and convincing evidence otherwise admissible under the Nebraska Evidence Rules that the accused committed the other offense or offenses. If admissible, such evidence may be considered for its bearing on any matter to which it is relevant.
>
> . . . .
>
> (3) Before admitting evidence of the accused's commission of another offense or offenses of sexual assault under this section, the court shall conduct a hearing outside the presence of any jury. At the hearing, the rules of evidence shall apply and the court shall apply a section 27-403 balancing and admit the evidence unless the risk of prejudice substantially outweighs the probative value of the evidence. In assessing the balancing, the court may consider any relevant factor such as (a) the probability that the other offense occurred, (b) the proximity in time and intervening circumstances of the other offenses, and (c) the similarity of the other acts to the crime charged.

In its written order on the State's motion to introduce § 27-414 evidence, the district court determined that there was clear and convincing evidence Stephens' 2003 conduct met the elements of conspiracy to commit sexual assault of a child in the first degree. The district court determined that although the conduct had occurred approximately 7 years prior to the charged conduct in this matter, it was not too remote in time to be excluded under § 27-414. The district court found that the 2003 conduct was similar to the current

matter as it involved the intent to vaginally penetrate a minor female, therefore demonstrating Stephens' propensity to commit the alleged crime. Finally, the district court found that the probative value of the 2003 conduct outweighed the risk of prejudice against Stephens and was therefore admissible at trial.

[4,5] Section 27-414 allows evidence of prior offenses of sexual assault to prove propensity. *State v. Valverde*, 286 Neb. 280, 835 N.W.2d 732 (2013). Section 27-414(1) explicitly provides that evidence of the accused's commission of another offense of sexual assault may be considered for its bearing on any matter to which it is relevant. *State v. Valverde, supra*. No exact limitation of time can be fixed as to when other conduct tending to prove intent to commit the offense charged is remote under § 27-414(1). *State v. Kibbee*, 284 Neb. 72, 815 N.W.2d 872 (2012). The question whether evidence of other conduct is too remote in time is largely within the discretion of the trial court. While remoteness in time may weaken the value of the evidence, such remoteness does not, in and of itself, necessarily justify exclusion of the evidence. *State v. Valverde, supra*.

Based on our review of the record, we find that the district court did not abuse its discretion by admitting and considering the § 27-414 evidence. Although there was no actual victim who was touched in the 2003 case, the similarity lies in the intent displayed by Stephens. The 2003 conduct involved Stephens' conspiring with what he believed was a 14-year-old girl to engage in sexual penetration. His intent was demonstrated through his messages, his being apprehended with a condom, and his own statements. In the present case, the evidence also demonstrated a desire on Stephens' part to penetrate C.H. who was 10 years old at the time. Although the 2003 conduct occurred approximately 7 years before the charged incident, this timeframe is well within the range acceptable to prove propensity under § 27-414, particularly given the similarity of intent. See *State v. Kibbee, supra* (citing to cases

allowing admittance of prior bad acts in range of 6 to 27 years). Given the foregoing factors, we agree with the district court that the probative value of the 2003 conduct outweighed the risk of prejudice to Stephens. Therefore, we find the district court did not err in receiving the evidence of the 2003 events under § 27-414.

Sufficiency of Evidence

Stephens argues that there is insufficient evidence to convict him of attempted sexual assault of a child in the first degree. He argues that the district court properly discounted C.H.'s testimony, but improperly relied on the § 27-414 evidence and Desiree's testimony regarding his alleged statements.

[6,7] Nebraska law provides that a person commits sexual assault of a child in the first degree when he or she subjects another person under 12 years of age to sexual penetration and the actor is at least 19 years of age or older. Neb. Rev. Stat. § 28-319.01 (Reissue 2016). A defendant's conduct rises to criminal attempt if he or she intentionally engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime. *State v. Babbitt*, 277 Neb. 327, 762 N.W.2d 58 (2009). Conduct shall not be considered a substantial step unless it is strongly corroborative of the defendant's criminal intent. See Neb. Rev. Stat. § 28-201 (Cum. Supp. 2017). Whether a defendant's conduct constitutes a substantial step toward the commission of a particular crime and is an attempt is generally a question of fact. *State v. Babbitt, supra.*

[8,9] Attempted first degree sexual assault on a child is a lesser-included offense of first degree sexual assault on a child. See *State v. James*, 265 Neb. 243, 655 N.W.2d 891 (2003). A finder of fact may convict of the lesser-included offense if it finds that the act of penetration was not proved beyond a reasonable doubt but also finds that a defendant intentionally engaged in conduct which, under the circumstances as the

defendant believed them to be, constituted a substantial step in a course of conduct intended to culminate in first degree sexual assault. See *id.*

Stephens argues that the district court erred in finding sufficient evidence to convict him of attempted sexual assault of a child in the first degree. Stephens contends that because the court found that the State failed to prove penetration, it was necessarily discounting C.H.'s testimony. He then argues that either there was a sexual assault or there was not. However, the district court explicitly gave credit to the testimony of C.H. and cited it in conjunction with the testimony of Desiree regarding Stephens' account of the event and Stephens' propensity to seek out underage females for sexual gratification in the past.

When applying our standard of review, we must view the evidence in the light most favorable to the prosecution. Having done so, we find that there was sufficient evidence adduced to support his conviction. C.H. testified to events preceding the alleged penetration that can be viewed as grooming behaviors. These events showed a pattern of behavior wherein Stephens progressively engaged in acts that indicated a sexual interest in C.H. We note that C.H. testified that she was certain that Stephens penetrated her. However, although she was steadfast that she felt pain, burning, and discomfort from Stephens' actions, she provided alternative theories over time as to whether the penetration was accomplished digitally or with Stephens' penis. She also stated that at age 10, she did not understand exactly what was going on. Her testimony demonstrated that since this incident, she had talked with Desiree and had subsequent experiences which clarified in her mind what had happened. On this record, the district court found that the evidence failed to sufficiently support a finding that Stephens actually penetrated C.H. However, it still found that Stephens took a substantial step toward doing so.

We find that a rational trier of fact could reach this conclusion. Much of the district court's analysis is based on its

assessment of the credibility of the testimony. The district court credited most of the testimony of C.H., particularly those portions that were at least in part corroborated through other testimony or evidence. The district court stopped short of crediting the testimony of C.H. regarding penetration. However, credibility determinations are for the trier of fact. We will not and do not pass on the credibility of the witnesses. *State v. Rocha*, 295 Neb. 716, 890 N.W.2d 178 (2017); *State v. Luff*, 18 Neb. App. 422, 783 N.W.2d 625 (2010). Therefore, we find that viewing the evidence in the light most favorable to the State, a rational finder of fact could have found the essential elements of attempted sexual assault of a child in the first degree beyond a reasonable doubt.

CONCLUSION

We find that the district court did not abuse its discretion by receiving evidence under § 27-414. We further find that there was sufficient evidence to support Stephens' conviction.

Affirmed.

Richard Carr, appellant, v. Gordon Ganz, doing business as G & H Farms, appellee.

916 N.W.2d 437

Filed June 12, 2018. No. A-17-161.

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. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower 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.
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; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
5. **Jurisdiction: Appeal and Error.** When an appellate court is without jurisdiction to act, the appeal must be dismissed.
6. **Final Orders: Appeal and Error.** Generally, when multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while expressly reserving some issue or issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal.
7. **Statutes: Courts.** When interpreting a statute, a court will first consider the plain language.

8. **Statutes: Legislature: Intent.** In discerning the meaning of 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, as it is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
9. **Workers' Compensation.** Under the Nebraska Workers' Compensation Act, it has long been the policy to construe the statute liberally so that its beneficent purposes may not be thwarted by technical refinements of interpretation.
10. ____. The obvious purpose of Neb. Rev. Stat. § 48-120 (Cum. Supp. 2016) is to authorize the compensation court to order an employer to pay the costs of the medicines and medical treatment reasonably necessary to relieve the worker from the effects of the injury.
11. ____. An order modifying an award to exclude a specific surgery does not foreclose an employee from establishing at a later date that the surgery is reasonably necessary to treat his or her compensable injury and is therefore encompassed under the terms of the award.
12. ____. The general rule under Neb. Rev. Stat. § 48-120 (Cum. Supp. 2016) is that, should a court determine a medical treatment for a condition unrelated to a work-related injury is medically reasonable and necessary to treat the underlying work-related injury, the medical treatment is required by the nature of the injury and is compensable.

Appeal from the Workers' Compensation Court: J. Michael Fitzgerald, Judge. Reversed and remanded for further proceedings.

Ryan C. Holsten and Brynne Holsten Puhl, of Atwood, Holsten, Brown, Deaver & Spier Law Firm, P.C., L.L.O., for appellant.

John W. Iliff and Adam J. Wachal, of Gross & Welch, P.C., L.L.O., for appellee.

Moore, Chief Judge, and Inbody and Bishop, Judges.

Inbody, Judge.

INTRODUCTION

Richard Carr appeals the Nebraska Workers' Compensation Court's denial of his motion to compel Gordon Ganz, doing

business as G & H Farms, to pay for Carr's coronary artery bypass procedure. Specifically, Carr appeals the compensation court's orders on December 23 and 30, 2016, and January 19, 2017. Because we conclude the December 30, 2016, order modified the December 23 order to reserve disposition of some of the issues, the December 23 order was not final and appealable until the January 19, 2017, order. Thus, we find Carr's February 7 notice of appeal was timely filed and we have jurisdiction to consider the appeal. For the reasons set forth below, we reverse the compensation court's order pertaining to the compensability of Carr's coronary artery bypass procedure and remand the cause for further proceedings.

FACTUAL BACKGROUND

In January 2012, while employed by Ganz, Carr was "bucked off" a horse and injured in the course of his employment. Specifically, Carr received the following injuries due to the accident: symphysis pubis and sacral fractures, hernia, urinary incontinence, and erectile dysfunction. Following a petition filed with the Nebraska Workers' Compensation Court, the parties entered into a stipulation in April 2014, and the court entered an award pursuant to this stipulation wherein Carr was awarded temporary total disability benefits to be paid by Ganz until Carr reached maximum medical improvement for his injuries. The court stated "[Ganz] is to pay for [Carr's] future medical care all as required by [Neb. Rev. Stat.] § 48-120 [(Cum. Supp. 2016)]."

In February 2015, Carr filed a petition for further award in which he alleged that his doctors felt a "penile prosthesis [was] required" before he would reach maximum medical improvement and that such surgery could not be performed without him first undergoing a heart catherization that Ganz refused to authorize. After the petition was filed, Ganz agreed to pay for the heart catherization and Carr subsequently submitted a notice of dismissal of the petition without prejudice. A dismissal was ordered by the court in July 2015.

Due to the results of the heart catherization, Carr underwent a coronary artery bypass procedure to address issues prior to his penile prosthesis. In May 2016, Carr filed a motion to compel Ganz to pay for the coronary artery bypass procedure. Carr supported his motion by stating that "[p]rior to undergoing the penile prosthesis surgery, [Carr] was required to undergo cardiac treatment [for which Ganz] refused to pay," and Carr asked that "a hearing be held before the Nebraska Workers' Compensation Court and an Order entered compelling payment of outstanding medical bills." In a hearing on the motion, Carr offered various exhibits pertaining to his health expenses, including expenses for the coronary artery bypass procedure, other expenses related to treatment for his injuries, mileage, and attorney fees. Ganz objected to these exhibits and specifically as to any information they contained which documented expenses unrelated to the coronary artery bypass procedure, arguing that they went beyond the scope of Carr's motion. In making this objection, Ganz' counsel stated:

> We're here for a motion to compel on one issue alone, and I believe the stipulated award indicates concisely what the injuries consisted of. And [these offered exhibits and their outlining of other medical expenses, mileage, and attorney fees] really [have] no bearing on this particular motion and also [are] duplicative and not necessary.

The court overruled Ganz' objection.

On December 23, 2016, the compensation court denied Carr's request to compel Ganz to pay medical expenses for the coronary artery bypass procedure. In reaching this determination, the court stated:

> Section 48-120(l)(a) requires an employer to pay for medical services which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment. There is no question that the [coronary artery bypass procedure] would relieve pain or promote and hasten [Carr's] restoration to health and employment because

> [the procedure] is necessary to enable [Carr] to undergo the [penile prosthesis surgery] which will enable [Carr] to reach maximum medical improvement, relieve pain, and allow [Carr] to return to employment. The real issue is whether or not the coronary artery bypass [procedure] was required by the nature of the injury.

The court went on to provide a test for determining when a medical procedure is required by the nature of the injury, and explained:

> The test is whether or not there is a reasonable relationship between the accident at work and the medical condition found after the accident. In this case, the coronary blockage is not part of the nature of the injury and has no reasonable relationship to the injuries suffered in the accident.

This order further contained reference to a lump-sum settlement and mentioned such a settlement could impact the imposition of benefits, but the order was otherwise silent as to the other medical expenses, mileage, and attorney fees discussed at the hearing.

On December 30, 2016, the court entered an "Order Nunc Pro Tunc" wherein the court stated that it had been "notified" by counsel of certain minor errors in the December 23 order, including that no such lump-sum settlement occurred and that the court had neglected to address issues of medical expenses, mileage, and attorney fees. Specifically, the court stated:

> The Court finds counsel are correct, and, as a result, the Order entered December 23, 2016 is not a final order. A further hearing must be held to correct the order and address medical expenses, mileage, attorney fees, and to correct the portion of the Order on lump sum settlement and erectile dysfunction surgery.

The December 30 order set a further hearing on those issues for January 2017, and the court again denied Carr's request to compel Ganz to pay for the medical expenses for the coronary artery bypass procedure.

On January 19, 2017, the court entered an order requiring Ganz to pay $324 associated with other medical expenses, $500 in attorney fees, and calculated mileage amounts. The court added that "[t]he case is now final." Carr appealed on February 7, which is timely from the January 19 order but not from the December 23, 2016, order.

ASSIGNMENT OF ERROR

Carr assigns, restated, that the Nebraska Workers' Compensation Court erred as a matter of law in determining his coronary artery bypass procedure was not compensable under Neb. Rev. Stat. § 48-120 (Cum. Supp. 2016).

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. *Damme v. Pike Enters.*, 289 Neb. 620, 856 N.W.2d 422 (2014). We independently review questions of law decided by a lower court. *Guinn v. Murray*, 286 Neb. 584, 837 N.W.2d 805 (2013).

ANALYSIS

Jurisdiction

Carr appeals the compensation court's denial of his request that Ganz be ordered to pay for the coronary artery bypass procedure. Although an initial order denied the request on December 23, 2016, Carr argues it was not a final, appealable order because the December 30 order reserved issues for later determination which were finally determined in the January 19, 2017, order. Because the December 23, 2016, order was not a final, appealable order until the January 19, 2017, order

was entered, Carr asserts his filing of a notice of appeal on February 7 was within the 30-day requirement of Neb. Rev. Stat. § 48-182 (Cum. Supp. 2016).

[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. *Larsen v. D B Feedyards*, 264 Neb. 483, 648 N.W.2d 306 (2002); *Waite v. City of Omaha*, 263 Neb. 589, 641 N.W.2d 351 (2002). 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. *Larsen v. D B Feedyards, supra*. When an appellate court is without jurisdiction to act, the appeal must be dismissed. *Id.*

Once a final order is entered, § 48-182 and Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016) provide the procedure for a party to appeal that order. Within §§ 48-182 and 48-185 is the requirement that once a final order is entered, the parties have 30 days to file a notice of appeal with the compensation court. Any appeal in which notice is not filed within the 30-day period must be dismissed for lack of jurisdiction. See *id.*

In the instant case, Carr filed a motion seeking to compel Ganz for the "payment of outstanding medical bills," including for the coronary artery bypass procedure. In the hearing on the motion, Carr offered various exhibits pertaining to his health expenses, including for the coronary artery bypass procedure, other expenses related to treatment for his injuries, mileage, and attorney fees. Ganz objected to these exhibits as to any information they contained which documented expenses unrelated to the coronary artery bypass procedure, arguing that they went beyond the scope of Carr's motion. Specifically, Ganz stated:

> We're here for a motion to compel on one issue alone, and I believe the stipulated award indicates concisely what the injuries consisted of. And [these offered exhibits and their outlining of other medical expenses,

> mileage, and attorney fees] really [have] no bearing on this particular motion and also [are] duplicative and not necessary.

The court overruled Ganz' objection, and on December 23, 2016, entered the first order denying Carr's request to compel Ganz to pay for the medical expenses for the coronary artery bypass procedure. This order contained a reference to a lump-sum settlement and mentioned such a settlement could impact the imposition of benefits. The order was otherwise silent as to the other medical expenses, mileage, and attorney fees discussed at the hearing.

Seven days later, on December 30, 2016, the court entered an order captioned "Order Nunc Pro Tunc." In this order, the court made various corrections to the wording of the December 23 order, including eliminating the reference to the lump-sum settlement. The December 30 order also stated:

> The Court finds counsel are correct, and, as a result, the Order entered December 23, 2016 is not a final order. A further hearing must be held to correct the order and address medical expenses, mileage, attorney fees, and to correct the portion of the Order on lump sum settlement and erectile dysfunction surgery.

The court again denied Carr's request to compel Ganz to pay for the medical expenses for the coronary artery bypass procedure. Following an additional hearing, the court made further findings and ordered that Ganz pay sums associated with other medical expenses, attorney fees, and mileage.

Neb. Rev. Stat. § 48-180 (Cum. Supp. 2016) provides the compensation court the ability to modify an order within 14 days of its entry. Specifically, § 48-180 states:

> The Nebraska Workers' Compensation Court may, on its own motion or on the motion of any party, modify or change its findings, order, award, or judgment at any time before appeal and within fourteen days after the date of such findings, order, award, or judgment. The time for appeal shall not be lengthened because of the

> modification or change unless the correction substantially changes the result of the award.

In 2011, § 48-180 was revised to remove the qualifying language that a court could modify a previously entered order "for the purpose of correcting any ambiguity, clerical error, or patent or obvious error." See § 48-180 (Reissue 2010 & Supp. 2011). See, also, *Walsh v. City of Omaha*, 11 Neb. App. 747, 755, 660 N.W.2d 187, 194 (2003) (interpreting previous language as "the statutory embodiment of nunc pro tunc principles"). The removal of the above-quoted language eliminated a limitation to a modification under § 48-180 to permit a compensation court to modify only through nunc pro tunc orders and expanded a court's ability to modify a previously entered judgment. Therefore, even though the December 30, 2016, order was mislabeled and went beyond an order nunc pro tunc to modify the holding of the December 23 order, such modification was within the court's authority under § 48-180 (Cum. Supp. 2016) and occurred within 14 days after the original order's entry.

Having determined the compensation court's December 30, 2016, order was within the court's authority under § 48-180, the next issue for our consideration is whether the court reserved a determination of the issues of the other medical expenses, attorney fees, and mileage; and, if so, whether such reservation made the court's December 23 order interlocutory and not a final, appealable order.

[6] Generally, when multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while expressly reserving some issue or issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal. *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005). See, also, *Jacobitz v. Aurora Co-op*, 287 Neb. 97, 841 N.W.2d

377 (2013) (holding that compensation court's finding of compensable injury or its rejection of affirmative defense without determination of benefits is not order that affects employer's substantial right in special proceeding); *Hamm v. Champion Manuf. Homes*, 11 Neb. App. 183, 645 N.W.2d 571 (2002) (determining that order was interlocutory which awarded temporary total disability and permanent partial disability benefits while reserving ruling on medical expenses and mileage and set later hearing date to resolve those issues).

Here, the compensation court did not expressly reserve some of the issues for later determination in the December 23, 2016, order. However, as previously discussed, the court had the authority to modify its December 23 order and did so in its December 30 order. In the December 30 order, the court reserved ruling on the unresolved issues of medical expenses, attorney fees, and mileage until after it held an additional hearing. As entered and then modified, the court's order did not determine all of the issues and was an interlocutory order. As such, the court's ruling was not final and appealable until the reserved issues were decided in the January 19, 2017, order. By doing so, the court modified the time in which Carr would be allowed to appeal, because modifying the December 23, 2016, order to reserve a determination of medical expenses, attorney fees, and mileage substantially changed the result of the award. See § 48-180. See, also, *Yost v. Davita, Inc.*, 23 Neb. App. 482, 873 N.W.2d 435 (2015) (determining that, where award was entered February 13, 2015, motion to reopen evidence was filed February 24, and hearing was held sometime in March, because motion was filed 11 days after entry of further award and prior to appellant's appeal, compensation court had authority under § 48-180 to modify its findings), *modified on denial of rehearing* 23 Neb. App. 732, 877 N.W.2d 271 (2016). When the January 19, 2017, order determined these remaining issues, the 30-day period in which either party could appeal began. Because Carr filed a notice of appeal on February 7,

Carr's appeal was timely filed and this court has jurisdiction to consider his appeal.

Compensability of Carr's Coronary Artery Bypass Procedure

Carr assigns that the compensation court erred as a matter of law in determining the coronary artery bypass procedure was not compensable under § 48-120. Specifically, Carr claims the coronary artery bypass procedure was medically reasonable and necessary before he could treat his work-related injuries. Carr argues a medical procedure that is a medical necessity is compensable if it is designed to directly relieve the effects of the claimant's work-related injury or make him or her a candidate for a compensable treatment. As such, Carr asserts the compensation court erred in failing to utilize this medical necessity standard and failing to find the coronary artery bypass procedure was compensable, because it was necessary to perform the compensable penile prosthesis surgery.

Carr sustained injuries arising out of his employment with Ganz, including the following injuries: symphysis pubis and sacral fractures, hernia, urinary incontinence, and erectile dysfunction. The compensation court entered an award on stipulation of Carr and Ganz to compensate Carr for these work-related injuries, stating that "[Ganz] is to pay for [Carr's] future medical care all as required by § 48-120." Presently, Carr does not contend that the work-related injuries caused the cardiac condition, but instead argues that, because the procedure was necessary to address his work-related injuries, such procedure was covered under § 48-120.

In its December 23, 2016, order, the compensation court determined that the "real issue is whether or not the coronary artery bypass surgery . . . was required by the nature of the injury," because Carr's heart condition was not a result of the work-related injuries but was medically necessary to treat a compensable injury. In analyzing this issue, the court stated that "[t]here are no Nebraska cases on point." The court cited

Straub v. City of Scottsbluff, 280 Neb. 163, 784 N.W.2d 886 (2010), and *Manchester v. Drivers Mgmt.*, 278 Neb. 776, 775 N.W.2d 179 (2009), as Nebraska cases in which courts have found that injuries which arise after a work-related accident, but are causally linked to the injuries occurring at work, are compensable. However, the court noted 8 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 94.03[5] (2017); a Wyoming Supreme Court case, *State ex rel. Workers' Comp. v. Girardot*, 807 P.2d 926 (Wyo. 1991); and § 48-120's limitation on the payment of medical expenses to those required by "the nature of the injury," and the court determined that "[t]he test is whether or not there is a reasonable relationship between the accident at work and the medical condition found after the accident." Finding "the coronary blockage is not part of the nature of the injury and has no reasonable relationship to the injuries suffered in the accident," the court denied Carr's request to compel Ganz to pay for the medical expenses for the coronary artery bypass procedure.

[7-9] Section 48-120(1) provides that an "employer is liable for all reasonable . . . services . . . and medicines as and when needed, which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment." When interpreting a statute, a court will first consider the plain language. See *Fisher v. PayFlex Systems USA*, 285 Neb. 808, 829 N.W.2d 703 (2013). In discerning the meaning of 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, as it is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Id*. Under the Nebraska Workers' Compensation Act, it has long been the policy to construe the statute liberally so that its beneficent purposes may not be thwarted by technical refinements of interpretation. See *Marlow v. Maple Manor Apartments*, 193 Neb. 654, 228 N.W.2d 303 (1975).

[10] The obvious purpose of § 48-120 is to authorize the compensation court to order an employer to pay the costs of the medicines and medical treatment reasonably necessary to relieve the worker from the effects of the injury. *Sellers v. Reefer Systems*, 283 Neb. 760, 811 N.W.2d 293 (2012) (further explaining that provision exists because it is obvious fact of industrial life that injured worker can reach maximum medical improvement from injury and yet require periodic medical care to prevent further deterioration in his or her physical condition). The language of § 48-120 does not state that a medical procedure is compensable only if it is directly treating an injury caused by the work-related accident. Instead, § 48-120's language is more inclusive and describes that a compensable medical procedure must be "required by the nature of the injury" and "will relieve pain or promote and hasten the employee's restoration to health." Ganz argues the phrase "required by the nature of the injury" limits compensation to only those treatments which are reasonably related by causal connection to the injury, while Carr argues "required by the nature of the injury" encompasses all medical treatment that would lead to a relief in pain or promote the employee's restoration to health.

In *Rodriguez v. Hirschbach Motor Lines*, 270 Neb. 757, 707 N.W.2d 232 (2005), the Nebraska Supreme Court considered this question. There, an employee sought benefits for a gastric bypass surgery that was not causally connected to the work-related injuries, but which he contended was medically necessary because his weight precluded him from undergoing the surgery necessary to treat his work-related injuries. The compensation court upheld the employer's objection to liability for this treatment, noting that although future medical benefits had been awarded, the record "'at this point'" did not establish that the gastric bypass surgery was necessary to treat the work-related injuries. *Id.* at 766, 707 N.W.2d at 240. The Nebraska Supreme Court concluded that the denial was not clearly erroneous and stated:

> Given the sparseness of the record concerning whether gastric bypass surgery was medically reasonable and necessary to treat [the employee's] compensable injuries, and whether gastric bypass surgery would even suffice to make [him] a candidate for further surgery to treat his compensable injuries, we cannot say the single judge was clearly wrong in determining that there was not sufficient evidence at this time to establish that gastric bypass surgery was necessary to the treatment of [the employee's] work-related injuries.

Id. at 767, 707 N.W.2d at 240.

[11] In the later case of *Sellers v. Reefer Systems*, 283 Neb. 760, 765, 811 N.W.2d 293, 296 (2012), the Nebraska Supreme Court analyzed this holding in *Rodriguez* and explained that implicit in *Rodriguez* is that "if necessity had been established, the gastric bypass surgery would have been compensable notwithstanding the fact that it was not specifically included in the award of future medical expenses." In *Sellers*, the court determined that an order modifying an award to exclude a specific surgery "'*at present*'" did not foreclose the employee from establishing at a later date that the surgery is "reasonably necessary to treat his compensable injury and is therefore encompassed under the terms of the award." 283 Neb. at 766, 811 N.W.2d at 297.

[12] We find the holdings in *Rodriguez* and *Sellers* to interpret § 48-120 as providing the general rule that, should a court determine a medical treatment for a condition unrelated to a work-related injury is medically reasonable and necessary to treat the underlying work-related injury, the medical treatment is "required by the nature of the injury" and is compensable. See, also, *Zitterkopf v. Aulick Indus.*, 16 Neb. App. 829, 753 N.W.2d 370 (2008) (finding that use of medicine was medically necessary and compensable even though it was used to treat employee's unrelated sleep apnea, because it was also used to treat side effects of pain medication necessitated by compensable injury).

Here, rather than using the medically reasonable and necessary test provided for in *Rodriguez* and *Sellers*, the compensation court used a "reasonable relationship" test that essentially required the non-work-related medical condition to have resulted from the work-related injury in order for treatment of that condition to be compensable. We acknowledge that such a test incorporates the general rule that there be a relationship between the medical care sought and the original injury and its treatment. *Zitterkopf v. Aulick Indus., supra* (explaining that § 48-120 contemplates causal connection between compensable injury and future medical care). However, as described above, *Rodriguez* and *Sellers* provide an exception when treatment of a non-work-related condition is medically reasonable and necessary in order to treat the compensable injury. See, also, 8 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 94.03[5] at 94-63 (2017) (explaining that although "the employer cannot be charged with the cost of repairing various non-work-related conditions that are discovered in the course of treatment," "[a]n exception may be recognized . . . when the nonindustrial condition must be dealt with in order to achieve the optimum treatment of the compensable injury"). Thus, the compensation court erred by not applying the medically reasonable and necessary exception and deciding the compensability of Carr's coronary artery bypass procedure only on the question of whether Carr's coronary condition was caused by his work-related injuries.

The compensation court did not consider the evidence under the framework of *Rodriguez v. Hirschbach Motor Lines*, 270 Neb. 757, 707 N.W.2d 232 (2005), and *Sellers v. Reefer Systems*, 283 Neb. 760, 811 N.W.2d 293 (2012), but found that "the [coronary artery bypass procedure was] necessary to enable [Carr] to undergo the [penile prosthesis] surgery," since Ganz did not present any evidence to the contrary. Therefore, we reverse the compensation court's order on the issue of the compensability of Carr's coronary artery bypass

procedure and remand the cause to the compensation court for further proceedings consistent with this opinion.

CONCLUSION

Since the compensation court did not consider the evidence in the present matter under the framework of *Rodriguez* and *Sellers*, as discussed herein, we reverse, and remand for further proceedings consistent with this opinion.

Reversed and remanded for
further proceedings.

Harold Lucas Helm, appellant, v. Ashley Dawn Helm, appellee.

916 N.W.2d 598

Filed June 19, 2018. No. A-17-737.

1. **Adoption: Appeal and Error.** In an appeal from a denial of consent to adoption, the appellate court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion, subject to the best interests of the children.
2. **Adoption: Statutes.** The matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed.
3. **Adoption: Parent and Child: Parental Rights.** Consent of a biological parent to the termination of his or her parental rights is the foundation of our adoption statutes, and an adoption without such consent must come clearly within the exceptions contained in the statutes.
4. **Divorce: Courts: Adoption.** Consent from a district court that has issued a dissolution decree concerning minor children is a prerequisite for adoption of those children.
5. **Courts: Jurisdiction: Adoption.** The consent for adoption given by a district court is not a determination of the child's best interests or any other issue pertaining to adoption; such determination rests solely in the county court's exclusive jurisdiction.
6. ____: ____: ____. The consent provision of Neb. Rev. Stat. § 43-104(1)(b) (Reissue 2016) contemplates that another court has jurisdictional priority over the custody of the child and that only with the other court's consent will the adoption be allowed to proceed.
7. **Courts: Adoption: Parental Rights.** Neb. Rev. Stat. § 43-104 (Reissue 2016) gives the district court two opportunities to influence an adoption proceeding. It may have already made determinations in past proceedings which are decisive on the issue of adoption or the fitness of a parent. Or, it may be in a position to make a significant contribution

to the county court's determination based on its prior experience with the parties.

8. **Courts: Adoption: Legislature.** The Legislature has granted the district court the discretion to grant or deny a request for its consent for adoption.

Appeal from the District Court for Sarpy County: Stefanie A. Martinez, Judge. Reversed and remanded with directions.

Kelly N. Tollefsen, of Kelly Tollefsen Law Offices, P.C., for appellant.

Robin L. Binning, of Binning & Plambeck, for appellee.

Riedmann, Bishop, and Welch, Judges.

Riedmann, Judge.

Harold Lucas Helm appeals from the order of the district court for Sarpy County that denied his motion seeking the district court's consent to a stepparent adoption. As explained more fully below, we find that the district court abused its discretion in denying Harold's motion on the basis that abandonment was the only issue before the court. We therefore reverse the district court's order and remand the cause with directions.

FACTUAL BACKGROUND

Harold and Ashley Dawn Helm were married in 2007 and had two children, born in 2007 and 2011. The parties were divorced in February 2015, at which time Harold was granted sole legal and physical custody of the children, subject to Ashley's supervised visitation.

On April 18, 2017, Harold filed a "Motion for District Court's Consent to Adoption & Determination of Mother's Consent." Harold alleged that he had married Lindsay Helm in October 2015, that Lindsay was a fit and proper person to adopt the minor children, and that he had given his consent to the proposed adoption. Harold further alleged that Ashley

had abandoned the children and that her last contact with them was in April 2015. Harold moved the court to grant its consent to Lindsay's adoption of the children, and he prayed that the court determine that Ashley had abandoned them.

The district court initially granted its consent for the adoption in an order filed May 4, 2017. It also found that Ashley had abandoned the children and that, therefore, her consent was not required. However, that order was vacated on May 17, because of "insufficient service" on Ashley. At a June 21 hearing, Ashley testified as to her unsuccessful attempts to keep in contact with the children and to her belief that most of those attempts were deliberately thwarted by Harold. Nonetheless, both parties acknowledged that the issue of abandonment was not within the scope of the district court's inquiry when considering a request for consent to adoption.

On July 6, 2017, the district court denied Harold's motion. The court cited extensively from relevant statutes and case law involving its authority to consider abandonment issues in a consent to adoption proceeding. The court found that it lacked the authority to consider the issue of abandonment, and it further found that abandonment was the sole issue raised in Harold's motion. The court thus concluded that Harold's motion for consent to adoption must be denied. Harold timely appealed from this order.

ASSIGNMENTS OF ERROR

Harold asserts, summarized and restated, that the district court erred in finding that abandonment was the only issue raised in his "Motion for District Court's Consent to Adoption & Determination of Mother's Consent" and in concluding that it lacked authority to hear his motion.

STANDARD OF REVIEW

[1] In an appeal from a denial of consent to adoption, the appellate court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in

the absence of an abuse of discretion, subject to the best interests of the children. *Smith v. Smith*, 242 Neb. 812, 497 N.W.2d 44 (1993).

ANALYSIS

[2,3] The matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed. *In re Adoption of Madysen S. et al.*, 293 Neb. 646, 879 N.W.2d 34 (2016). Consent of a biological parent to the termination of his or her parental rights is the foundation of our adoption statutes, and an adoption without such consent must come clearly within the exceptions contained in the statutes. *Id.*

[4,5] As applicable to this case, Neb. Rev. Stat. § 43-104 (Reissue 2016) provides:

> (1) . . . [N]o adoption shall be decreed unless written consents thereto are filed in the county court of the county in which the person or persons desiring to adopt reside . . . and the written consents are executed by . . . (b) any district court . . . in the State of Nebraska having jurisdiction of the custody of a minor child by virtue of proceedings had in any district court . . . .

This includes district courts that have issued a dissolution decree concerning the minor children. *In re Adoption of Madysen S. et al., supra.* The consent granted by the district court does nothing more than permit the county court, as the tribunal having exclusive original jurisdiction over adoption matters, to entertain such proceedings. *Jennifer T. v. Lindsay P.*, 298 Neb. 800, 906 N.W.2d 49 (2018). Such consent is not a determination of the child's best interests or any other issue pertaining to adoption. *Id*. Because county courts have exclusive jurisdiction over adoption, a nonadoption court lacks authority to decide such matters. *Id.*

[6] The Nebraska Supreme Court has reasoned the consent provision of § 43-104(1)(b) contemplates that another court has jurisdictional priority over the custody of the child and

that only with the other court's consent will the adoption be allowed to proceed. *Jennifer T. v. Lindsay P., supra.* The court stated that the consent required under that statute can be understood as a limited deferral to the adoption court of the first court's jurisdictional priority. *Id.* In the same vein, the court has noted that the adoption statutes, including Neb. Rev. Stat. §§ 43-102 and 43-103 (Reissue 2016) and § 43-104, require that such consents be filed before a county court holds hearings and entertains the merits of any issue in the adoption proceeding. *In re Adoption of Chase T.*, 295 Neb. 390, 888 N.W.2d 507 (2016). The court observed that requiring necessary court consents to be filed before entertaining the merits of an issue in the adoption proceeding serves to promote judicial efficiency and prevent an adoption court from issuing inconsistent or premature rulings on matters affecting the best interests of the child. *Id.*

In addition to requiring consent from a court having jurisdiction over a child, § 43-104(1)(c) also requires that prior to adoption, consent from both parents of a child born in lawful wedlock if living be given, but § 43-104(2) excepts from this requirement any parent who has abandoned the child for at least 6 months prior to the filing of the adoption petition.

Given this background regarding the purpose and limitations of the district court's authority to grant or deny consents, and the effect of abandonment on the need for parental consent, we turn to a discussion of the factors that may be considered by a district court in granting or denying its consent under § 43-104. *Smith v. Smith*, 242 Neb. 812, 497 N.W.2d 44 (1993), is the pivotal case with regard to these factors. The parties in S*mith* had been divorced in the district court, and subsequently, the mother, who had custody of the children, moved the district court for its consent for her new husband to adopt the children. The district court denied the mother's motion, determining that voluntary abandonment had not occurred and that it was not in the children's best interests to permit the adoption. *Id.*

On appeal, the *Smith* court stated that consideration of the issue of abandonment constituted plain error, noting that the question of abandonment is to be addressed exclusively by the county court. The court explained: "'The consent of the district court means only that the [opposing parent] must defend against the adoption sought in the county court.'" *Id*. at 817, 497 N.W.2d at 49, quoting *Klein v. Klein*, 230 Neb. 385, 431 N.W.2d 646 (1988). The *Smith* court further noted that if a county court grants an adoption, an opposing parent is free to appeal that decision.

[7] The *Smith* court observed that the factors to be considered by the district court in granting or denying its consent under § 43-104 are not enumerated in the statute itself or in the legislative history, but it rejected the appellant's contention that § 43-104 is only a "bookkeeping device" intended to keep the district court informed of the status of parties over which it had jurisdiction. *Smith v. Smith*, 242 Neb. at 818, 497 N.W.2d at 49. Rather, the court held:

> [T]he statute gives the district court two opportunities to influence an adoption proceeding. First, the district court may have already made determinations within the dissolution proceedings which are decisive on the issue of adoption or the fitness of a parent. If such is the case, it would be unnecessary for the county court to rehear these issues and the district court may deny consent based upon such findings. It should be understood, however, that a determination of custody is not, on its face, determinative as to later petitions for adoption made by either the custodial or non-custodial parent. . . .
>
> Second, the district court may be in the position to make a significant contribution to the determination of the county court based on its experience from the parties' dissolution proceedings. In addition to considering jurisdictional factors and prior determinations in deciding whether to grant consent to an adoption proceeding, the district court may, at its volition, make a written

> recommendation to the county court concerning the resolution of the proceedings in the context of knowledge obtained through the dissolution proceedings. This recommendation should be accompanied by, whenever possible, a reference to the record of the dissolution action. Such a recommendation would only be necessary when the district court has granted consent to the adoption proceedings.

Smith v. Smith, 242 Neb. 812, 818-19, 497 N.W.2d 44, 49 (1993) (citations omitted).

In the instant case, Harold asked the district court to grant its consent for his present wife, Lindsay, to adopt his minor children, and he also sought a determination that Ashley had abandoned the children. Among other allegations, his motion stated that Lindsay was a fit and proper person to adopt the children and to assume parental responsibilities for them. We disagree with the district court's assertion that abandonment was the sole issue raised in Harold's motion. Although Harold indeed asserted that Ashley had abandoned the children, the essence of the motion was Harold's request that the court grant its consent for a stepparent adoption.

At the hearing, the parties and the court all recognized the district court's inability to adjudicate issues of abandonment. Harold's counsel stated, "[T]he only consent that the District Court is giving is whether or not we can have the fight in County Court on abandonment." Ashley's counsel contended that the district court was uniquely positioned, having heard the dissolution case, to determine whether Harold had violated provisions of the decree pertaining to Ashley's access to the children.

During the hearing, the district court noted that a different judge had presided over the parties' dissolution proceedings and stated that, with regard to those proceedings, "I don't have any information firsthand, nor do I see any information within the court file [of determinations made during the dissolution proceedings that may be decisive on the issue of adoption or

fitness of a parent].” The court noted that it was clear it could not address the issue of abandonment in the present hearing, but took the motion under advisement.

In its order denying consent, the district court stated it was without the authority to decide the issue of abandonment and concluded that “[a]bandonment is the only allegation made by [Harold] in his motion, and thus, based upon the evidence adduced at trial, this Court finds that [Harold] failed to meet his burden in this matter.” We disagree.

[8] The Legislature has granted the district court the discretion to grant or deny a request for its consent for adoption. *Smith v. Smith, supra*, provides the factors a district court is to consider in evaluating requests for consent for adoption. Because the district court failed to consider those factors, it abused its discretion in denying the motion for consent. We therefore reverse the district court’s order and remand the cause for a determination by the district court based upon the factors set forth in *Smith v. Smith, supra*.

CONCLUSION

Although the district court was correct in concluding it lacked jurisdiction to address the issue of abandonment, it abused its discretion in failing to consider the factors set forth in *Smith v. Smith*, 242 Neb. 812, 497 N.W.2d 44 (1993), in determining Harold’s motion for consent to adoption. We therefore reverse the district court’s order and remand the cause to the district court with directions to determine whether or not to grant consent to adoption based upon the *Smith v. Smith* factors.

Reversed and remanded with directions.

Dan Kaiser, appellant and cross-appellee, v. Metropolitan Utilities District, appellee and cross-appellant.

916 N.W.2d 448

Filed June 26, 2018. No. A-17-686.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (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. ____: ____. Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence.
3. ____: ____. On appellate review, the factual findings made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless they are clearly wrong.
4. **Judgments: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact, an appellate court considers the evidence in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the appellate court gives the successful party the benefit of every inference reasonably deducible from the evidence.
5. **Workers' Compensation: Appeal and Error.** With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
6. **Workers' Compensation: Proof.** To recover under the Nebraska Workers' Compensation Act, a claimant must prove by a preponderance of the evidence that an accident or occupational disease arising out

of and occurring in the course of employment caused an injury which resulted in disability compensable under the act.

7. **Workers' Compensation: Expert Witnesses.** Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish the causal relationship between the employment and the injury or disability.
8. **Workers' Compensation: Appeal and Error.** The determination of causation is, ordinarily, a matter for the trier of fact, whose factual findings will not be set aside unless clearly wrong.
9. **Workers' Compensation: Notice.** Knowledge imputed to an employer can satisfy the notice requirement of Neb. Rev. Stat. § 48-133 (Reissue 2010).
10. ____: ____. When an employer's foreman, supervisor, or superintendent has knowledge of the employee's injury, that knowledge is imputed to the employer.
11. **Presumptions: Proof: Words and Phrases.** A rebuttable presumption is generally defined as a presumption that can be overturned upon the showing of sufficient proof.
12. **Workers' Compensation: Presumptions: Proof.** In all cases not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence. This rule applies to the rebuttable presumption that an opinion regarding loss of earning capacity expressed by a vocational rehabilitation counselor appointed or selected pursuant to Neb. Rev. Stat. § 48-162.01(3) (Reissue 2010) is correct.
13. **Moot Question: Appeal and Error.** An appellate court need not reach any remaining assignment of error which is rendered moot by its decision to reverse, and remand for further proceedings.

Appeal from the Workers' Compensation Court: Daniel R. Fridrich, Judge. Affirmed in part, and in part reversed and remanded with direction.

James E. Harris and Britany S. Shotkoski, of Harris & Associates, P.C., L.L.O., for appellant.

Thomas D. Wulff, of Law Office of Thomas D. Wulff, P.C., and Mark Mendenhall, of Metropolitan Utilities District, for appellee.

Moore, Chief Judge, and Pirtle and Arterburn, Judges.

Arterburn, Judge.

I. INTRODUCTION

Dan Kaiser appeals and Metropolitan Utilities District (MUD) cross-appeals from an order entered by the Nebraska Workers' Compensation Court finding Kaiser had suffered a work-related injury, awarding a 70-percent loss of earning capacity, and finding him entitled to 300 weeks of permanent partial disability benefits and 43.1429 weeks of temporary total disability benefits. On appeal, Kaiser argues the compensation court erred in failing to find him to have suffered a 100-percent loss of earning capacity and in failing to find him to be totally disabled. On cross-appeal, MUD argues the compensation court erred in finding Kaiser suffered an accident and injury arising out of the scope of his employment and in finding Kaiser gave adequate notice of his alleged injury under the workers' compensation statutes. For the reasons set forth below, we affirm in part, and in part reverse and remand with direction.

II. BACKGROUND

On March 10, 2015, Kaiser was employed by MUD as a gas plant engineer. Kaiser alleges that on March 10, he injured his lower back lifting a 150-pound toolbox by himself at a MUD facility. Kaiser continued to work for the remainder of the day. He returned to the main MUD facility and informed Joe Pawoll that he had injured his back while working that day. Pawoll was the senior maintenance mechanic who routinely assigned work duties and ensured that employees' work, including Kaiser's work, was performed correctly. Pawoll told Kaiser that he should inform Thomas Costello, the person designated by MUD as Kaiser's supervisor, about his injury. Kaiser was unable to find Costello and speak with him that day.

Kaiser visited the office of Dr. Mark Shirley, his longstanding family practice physician, on March 11, 2015, in order to receive a testosterone treatment. Kaiser did not see Dr. Shirley that day, because a nurse performed the injection procedure.

Kaiser then saw his chiropractor, Dr. Marshall Jacobs, on March 12. No mention of his workplace injury is mentioned in Dr. Jacobs' reports; however, Kaiser testified that he did mention the injury to Dr. Jacobs on that day.

On March 17, 2015, Kaiser had an office visit with Dr. John Cook at a pain clinic. Kaiser was there for a medication refill, and he informed the staff that he had injured his lower back while at work. He reported that his pain level was a 6 out of 10, when at his last visit to Dr. Cook on February 20, he had reported his pain level at 0 out of 10.

Kaiser has had a long history of back pain prior to his alleged workplace injury. We will not recount every medical record or procedure, but Kaiser has been receiving treatment for back pain on an ongoing basis since 2002. The longest gap in treatment appears to be in 2011. Dr. Shirley diagnosed Kaiser with thoracic spine pain, para lumbar spasm, and lumbar spine pain in January 2002. Dr. Shirley also noted right lower extremity and interior thigh discomfort and radiculopathy in his left leg. Kaiser was treated continuously by Dr. Shirley through 2015, with the noted exception above.

Kaiser was treated by Dr. James Devney beginning in 2006. Dr. Devney diagnosed Kaiser with chronic low-back pain, degenerative disk disease, lumbar disk herniation, lumbar spinal stenosis, and lumbar radiculitis on the left side. Kaiser was treated by Dr. Devney from 2006 to 2009, and Kaiser received repeated epidural steroid injections in his lumbar spine.

Kaiser visited Dr. Peter Lennarson in 2010 for low-back pain and left leg pain. Dr. Lennarson agreed with Dr. Devney's previous diagnoses and believed surgical intervention may be required in the future, but recommended continuing treatment with Kaiser's other doctors.

Kaiser subsequently began treating with Dr. Cook at the pain clinic in 2012. Dr. Cook diagnosed Kaiser with opioid dependence, lumbar radiculitis, and lumbar facet disease. Dr. Cook prescribed medication to end Kaiser's opioid dependence and began treating Kaiser with a number of different therapies

to relieve his low-back pain. Kaiser was treated by Dr. Cook through 2015.

In 2014, Kaiser underwent a gastric bypass surgery. He weighed approximately 360 pounds at the time of the surgery. Kaiser testified that after the surgery, his low-back pain had greatly subsided and he was able to perform more physical activities. By 2015, Dr. Cook noted that Kaiser's weight had dropped to 250 pounds and that Kaiser reported little to no low-back pain. However, Kaiser's chiropractor, Dr. Jacobs, noted in December 2014 that Kaiser reported his low-back pain to be "moderate to severe."

Kaiser continued to treat with Dr. Cook regularly through June 2015. He complained of constant low-back pain following the alleged March 10 injury. On June 22, Dr. Shirley took Kaiser off work due to "worsening" pain. Kaiser was referred to Dr. John Hain, a neurologist, on June 23. Dr. Hain reviewed Kaiser's medical records, examined his previous MRI's, and determined that Kaiser had "3 levels of degeneration [and] severe spinal stenosis [at multiple levels]." Dr. Hain recommended "decompression at all three levels" and a L3-S1 spinal fusion. Dr. Hain performed the recommended surgery on July 17.

In a report dated August 5, 2016, Dr. Hain opined that the alleged work-related back injury Kaiser suffered on March 10, 2015, was causally related to the need for Kaiser's July 17 surgery. Dr. Hain also opined that the acute changes in Kaiser's medical condition and MRI results were related to the alleged work-related injury. Dr. Shirley agreed with Dr. Hain's conclusion that Kaiser's injury was caused by lifting the 150-pound toolbox.

MUD provided Kaiser's medical records to Dr. Chris Cornett in order to provide a medical opinion as to whether Kaiser's medical condition was related to the alleged work-related injury. Dr. Cornett stated that Kaiser had a multiyear history of significant back and radicular leg pain into one or the other leg. He reviewed the MRI's of Kaiser, comparing the ones from before the March 2015 accident to the one done after the

March 2015 accident and stated that Kaiser had "no new large herniations, no fractures and I do not think given his multi-year history of similar problems that his work condition had any permanent affect or permanent change on his spine condition." Dr. Cornett ultimately opined that the two March incidents could have temporarily aggravated Kaiser's preexisting condition, but did not permanently injure Kaiser.

A functional capacity evaluation (FCE) was completed on Kaiser on March 18, 2016. The FCE concluded that Kaiser could "safely lift 55 pounds from 4-inch level and 80 pounds from the crate handles . . . to waist level and 60 pounds to shoulder level on an occasional basis." He safely pushed 180 pounds and pulled 205 pounds. Kaiser did not meet the requirements for working beyond the medium demand classification.

Michael Newman served as the parties' agreed-upon vocational rehabilitation counselor. Newman authored a report dated August 1, 2016. Newman determined that Kaiser's restrictions were appropriate and opined that he had sustained a 70- to 75-percent loss of earning capacity due to his work-related injury. Newman concluded his report with the following: "If this information proves to be untrue, substantially in error, or new information comes to light I reserve the right to amend my opinions accordingly."

Dr. Hain endorsed the results of the FCE in a letter dated April 19, 2016. In a June 6 "Physician's Statement," Dr. Shirley referred to the FCE report for some of his responses on the form. This form is not complete, but appeared to the compensation court to be part of a claim for an insurance disability policy.

Dr. Shirley authored a report dated October 28, 2016, on Kaiser's medical condition. Dr. Shirley wrote that he disagreed with the results of the FCE, stating that Kaiser should be limited to "light sedentary level, with a maximum lifting capacity of no more than 20 pounds on an occasional basis." He went on to write that Kaiser should "avoid any repetitive bending, twisting, turning, and carrying any amount of weight

on uneven surfaces, up or down stairways." Dr. Shirley concluded by writing that Kaiser "should be limited to no more than a four hour workday. This should include break periods of ten minutes every couple of hours. He should also be given the opportunity to change positions from sitting to standing every fifteen minutes."

Newman authored a supplemental report dated November 9, 2016. Newman stated that he had reviewed additional records, including the reports by Drs. Hain and Shirley. He believed that Dr. Shirley's report was "vocationally significant" and determined that Kaiser had "no measurable earning power at the medium, light or sedentary physical demand level."

After trial, the compensation court issued its findings in a written order. The court found that on March 10, 2015, Kaiser suffered a work-related injury. Kaiser had given sufficient notice to MUD through notifying Pawoll. He was entitled to temporary total disability and permanent partial disability. Kaiser was not entitled to an award of future medical care or attorney fees. His cause of action related to any alleged injury occurring on March 20, 2015, was dismissed with prejudice. Regarding its disability award, the compensation court issued the following findings:

> The Court has considered all the evidence and the testimony of [Kaiser], his wife and Allen. The Court finds [Kaiser] has suffered a 70% loss of earning capacity as opined by Newman. The Court finds the restrictions set forth in the FCE are the appropriate restrictions for [Kaiser]. The Court so finds for two reasons. First, both Dr. Hain and Dr. Shirley endorsed the result of the FCE, which were deemed valid. Dr. Shirley withdrew his endorsement of the FCE but never explained why. Obviously, at one point, the result of the FCE seemed reasonable to him. What changed? Without any explanation for the change in position by Dr. Shirley, the Court is reticent to side with his more stringent restrictions set forth in Exhibit 3. The results of the FCE were deemed

> valid and adopted by the treating surgeon, which seems both impartial and objective.
>
> Secondly, the Court believes [Kaiser] can work. [Kaiser] told Newman his pain is a 3 out of l0 without activity and that he has constant low back pain and leg pain. . . . It should be noted that [Kaiser] remained employed by [MUD] while suffering from chronic back pain from 2002 until June of 2015. [Kaiser] has worked with pain for years. He has worked with leg pain, and he has worked with back pain. In the many years prior to his accident and while still remaining employed, [Kaiser's] pain has been called "excruciating," rated as high as a 7 out of 10 and been described as "constant" and "chronic." [Kaiser] continued to work for [MUD] while admittedly "babying his back." . . . The crux of this evidence is that [Kaiser] is capable of working and has experience in working with self-imposed restrictions and through pain. Based upon the opinion of Dr. Hain, the opinion of Newman, and the preponderance of the evidence, the Court finds [Kaiser] suffered a 70% loss of earning capacity. [Kaiser] is entitled to PPD benefits at the rate of $742.25 starting on April 19, 2016 and continuing for so long until [Kaiser] has been paid 300 weeks of indemnity benefits, which includes the 43.1429 weeks of TTD benefits awarded to [Kaiser] earlier in this paragraph.

Kaiser appeals and MUD cross-appeals from that order.

III. ASSIGNMENTS OF ERROR

Kaiser argues the compensation court erred in failing to find him to have suffered a 100-percent loss of earning capacity and in failing to find him to be totally disabled. On cross-appeal, MUD argues the compensation court erred in finding Kaiser suffered an accident and injury arising out of the scope of his employment and in finding Kaiser gave adequate notice of his alleged injury under the workers' compensation statutes.

IV. STANDARD OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (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. *Tchikobava v. Albatross Express*, 293 Neb. 223, 876 N.W.2d 610 (2016).

[2-5] Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence. *Id.* On appellate review, the factual findings made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless they are clearly wrong. *Gardner v. International Paper Destr. & Recycl.*, 291 Neb. 415, 865 N.W.2d 371 (2015). In testing the sufficiency of the evidence to support the findings of fact, an appellate court considers the evidence in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the appellate court gives the successful party the benefit of every inference reasonably deducible from the evidence. *Id.* With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Lovelace v. City of Lincoln*, 283 Neb. 12, 809 N.W.2d 505 (2012).

V. ANALYSIS

We will first address MUD's cross-appeal, because the issues raised necessarily would preclude a reversal of the compensation court's award to Kaiser. We will then address Kaiser's issues raised on appeal.

1. MUD's Cross-Appeal

(a) Finding of Work-Related Injury

MUD argues that the compensation court erred in finding that Kaiser had suffered a work-related injury on March 10, 2015. MUD argues that Kaiser had a long history of low-back pain and that his medical condition simply progressed, rather than being caused by an acute injury.

[6,7] To recover under the Nebraska Workers' Compensation Act, a claimant must prove by a preponderance of the evidence that an accident or occupational disease arising out of and occurring in the course of employment caused an injury which resulted in disability compensable under the act. *Potter v. McCulla*, 288 Neb. 741, 851 N.W.2d 94 (2014). Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish the causal relationship between the employment and the injury or disability. *Id.*

[8] The determination of causation is, ordinarily, a matter for the trier of fact, whose factual findings will not be set aside unless clearly wrong. *Kerkman v. Weidner Williams Roofing Co.*, 250 Neb. 70, 547 N.W.2d 152 (1996). We cannot say the court was clearly wrong in concluding the evidence established that Kaiser had suffered a work-related injury to his lower back. The compensation court, after a detailed review of the medical evidence, concluded as follows:

> In total, the medical records from Drs. Cook, Jacobs, Shirley and Devney support Dr. Hain's opinion that [Kaiser's] preexisting condition was aggravated or made worse as a result of the accident on March 10, 2015. The medical records also generally support [Kaiser's] testimony that his back was improved after his bariatric surgery. These facts support the conclusion that [Kaiser] suffered a new injury with new symptoms and resulting disability as a result of the accident on March 10, 2015. Dr. Hain opined that while [Kaiser] had some long-standing back pain prior to March 10, 2015, the accident

> on March 10, 2015 aggravated, exacerbated or combined with his preexisting condition in his lumbar spine to make his condition worse so as to necessitate surgery. . . . Dr. Hain's opinion regarding causation meets the standard set forth by the Nebraska Supreme Court in Spangler v. State . . . .
>
> . . . .
>
> The Court finds that on March 10, 2015, [Kaiser] suffered an accident arising out of and in the course of his employment with [MUD] resulting in an injury to his low back (specifically an aggravation of his preexisting degenerative disc disease from L3 to Sl). The Court relied on the opinions of Drs. Hain and Shirley to so find.

Based on the record before us, we conclude that the evidence supports the findings of the compensation court. We find the compensation court did not err in finding that Kaiser had suffered a work-related injury on March 10, 2015, which aggravated his preexisting degenerative disk disease.

(b) Requisite Notice

MUD argues that Kaiser did not provide sufficient notice of his work-related injury in accordance with MUD's policy regarding suspected work-related accidents or injuries. MUD argues that Pawoll was not a supervisor, since he did not have the authority to grant vacations, conduct employee reviews, grant time off of work, discipline employees, or give awards.

[9,10] Neb. Rev. Stat. § 48-133 (Reissue 2010) provides, "No proceedings for compensation for an injury under the Nebraska Workers' Compensation Act shall be maintained unless a notice of the injury shall have been given to the employer as soon as practicable after the happening thereof . . . ." Knowledge imputed to an employer can satisfy the notice requirement of § 48-133. *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009). When an employer's foreman, supervisor, or superintendent has knowledge of the employee's injury, that knowledge is imputed to the employer. *Id.* The compensation court found that Kaiser's notice to Pawoll constituted notice

under the act. Evidence was adduced that Kaiser considered Pawoll to be his supervisor. Pawoll routinely assigned work to employees and ensured the work was satisfactorily completed. Employees were instructed to follow Pawoll's directions. The evidence further established that Pawoll would act as foreman in the absence of Costello, the person designated by MUD as Kaiser's supervisor. The evidence demonstrates that on Pawoll's advice, Kaiser looked for Costello on the date of the injury, but could not find him. Based upon our review of the record, we find that the compensation court was not clearly wrong in its determination that Kaiser provided adequate notice of his work-related injury to MUD.

2. Kaiser's Appeal

(a) Loss of Earning Capacity

Kaiser argues the compensation court erred in failing to give a rebuttable presumption of correctness to the final loss of earning power report of Newman, the agreed-upon vocational rehabilitation counselor. He argues that this report included the final opinions of Drs. Shirley and Hain, which led to Newman's supplementing his first report.

Neb. Rev. Stat. § 48-162.01(3) (Reissue 2010) provides in relevant part:

> If entitlement to vocational rehabilitation services is claimed by the employee, the employee and the employer or his or her insurer shall attempt to agree on the choice of a vocational rehabilitation counselor . . . . Any loss-of-earning-power evaluation performed by a vocational rehabilitation counselor shall be performed by a counselor . . . according to the procedures described in this subsection. It is a rebuttable presumption that any opinion expressed as the result of such a loss-of-earning-power evaluation is correct.

[11,12] A "'rebuttable presumption'" is generally defined as a presumption that can be overturned upon the showing of sufficient proof. *Variano v. Dial Corp.*, 256 Neb. 318, 326, 589

N.W.2d 845, 851 (1999). In all cases not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence. *Id.* The Nebraska Supreme Court held that this rule applies to the rebuttable presumption that an opinion regarding loss of earning capacity expressed by a vocational rehabilitation counselor appointed or selected pursuant to § 48-162.01(3) is correct. *Variano, supra.*

In *Variano*, the Supreme Court considered a factual scenario much like the present case. A vocational rehabilitation counselor prepared a loss of earning capacity report based on the impairment ratings of two doctors and an FCE. The vocational rehabilitation counselor's initial report stated that the employee "'will have sustained'" a 25- to 30-percent loss of earning power after receiving vocational rehabilitation. *Id.* at 326, 589 N.W.2d at 851. After issuing this report, the vocational rehabilitation counselor received clarifying information from the employee's treating physician, and in a letter to the employee's attorney, the vocational rehabilitation counselor concluded that the employee was totally disabled. The trial court relied on the initial report in reaching its conclusion that the claimant had sustained a 30-percent loss of earning capacity. The Supreme Court reversed. The court found "the phrase 'loss-of-earning-power evaluation' in § 48-162.01(3) to refer to a process as opposed to a document." *Variano*, 256 Neb. at 326, 589 N.W.2d at 851. As such, the letter that followed the initial report was part of this previously "incomplete" evaluation process. *Id.* The court found that the subsequent letter was therefore entitled to the rebuttable presumption of correctness. Finding no evidence in the record which could rebut the final opinion expressed by the vocational rehabilitation counselor, the court found that the trial court erred in not finding that the claimant's loss of earning power was total.

We find *Variano* to be applicable in this matter. Newman's first report concluded that Kaiser's restrictions were appropriate

and opined that he had sustained a 70- to 75-percent loss of earning capacity due to his work-related injury. Newman concluded his report with the following: "If this information proves to be untrue, substantially in error, or new information comes to light I reserve the right to amend my opinions accordingly." Thereafter, Newman received the additional reports authored by Drs. Shirley and Hain. Newman then issued his supplemental letter finding Kaiser to have sustained a 100-percent loss of earning capacity. Therefore, as was the case in *Variano*, we must find that Newman's second report was entitled to the rebuttable presumption analysis. MUD argues, and the trial court agreed, that the issue comes down to which expert should be credited in determining what capabilities Kaiser had demonstrated. The trial court clearly questioned Dr. Shirley's apparent change of opinion from the answers given on a questionnaire as part of Kaiser's application for long-term disability benefits on June 6, 2016, until his written report issued on October 28. In the questionnaire, Dr. Shirley referenced the FCE when inquiry was made about Kaiser's physical restrictions. However, in the October report, he found that Kaiser's restrictions and limitations were much more severe. The trial court asked, "What changed?" It then found that the lack of explanation by Dr. Shirley for his change of position made the court reticent to side with the more stringent restrictions.

In *Variano v. Dial Corp.*, 256 Neb. 318, 589 N.W.2d 845 (1999), a similar argument was made. The employer argued that the vocational rehabilitation counselor's final opinion was rebutted by the evidence of physical restrictions given by some of the medical experts. The Supreme Court held, however, that "workers' compensation benefits . . . 'are not measured by loss of bodily function, but by reduction in earning power or employability.'" *Id.* at 327, 589 N.W.2d at 852 (citing *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 288 N.W.2d 482 (1980)). The court then held that no sufficient competent evidence existed in the record to rebut the opinions of the vocational rehabilitation counselor as to earning power.

In this case, it is apparent that Newman, the vocational rehabilitation counselor, relied on the October 2016 opinion of Dr. Shirley to reach the conclusions he made in his November letter. While contrasting opinions exist in the record as to Kaiser's physical restrictions, the only evidence in the record as to earning capacity is Newman's opinion. Much like in *Variano, supra*, we can find no competent evidence herein which would rebut Newman's final opinion. For this reason, we reverse, and remand to the compensation court with the direction that the compensation court find that Kaiser sustained a 100-percent loss of earning capacity.

(b) Kaiser's Ability to Work

[13] Kaiser argues that the compensation court erred in its finding that he was not totally disabled based on the court's belief that Kaiser was able to work while in pain. We need not reach Kaiser's remaining assignment of error, which is rendered moot by our decision to reverse, and remand with direction on the foregoing issue. See *Richardson v. Children's Hosp.*, 280 Neb. 396, 787 N.W.2d 235 (2010).

VI. CONCLUSION

We conclude that the compensation court did not err in finding Kaiser to have suffered a work-related injury. Additionally, we find that the court did not err in finding that Kaiser provided sufficient notice under the statutes. We find the compensation court did err in not finding Kaiser to have sustained a 100-percent loss of earning capacity due to his injury, and we reverse the finding of the compensation court and remand the cause with direction to find that Kaiser sustained a 100-percent loss of earning capacity.

Affirmed in part, and in part reversed and remanded with direction.

State of Nebraska, appellant, v. Olajuwon A. Felix, appellee.

916 N.W.2d 604

Filed June 26, 2018. No. A-17-1062.

1. **Sentences: Appeal and Error.** When reviewing a sentence within the statutory limits, whether for leniency or excessiveness, an appellate court reviews for an abuse of discretion.
2. **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.
3. **Sentences.** A sentencing court is not limited in its discretion to any mathematically applied set of factors.
4. ____. 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.
5. ____. A sentencing court must have some reasonable factual basis for imposing a particular sentence.
6. **Sentences: Appeal and Error.** In determining whether a sentence is excessively lenient, an appellate court considers the following factors: (1) the nature and circumstances of the offense; (2) the history and characteristics of the defendant; (3) the need for the sentence imposed to afford deterrence; (4) the need for the sentence to protect the public from further crimes of the defendant; (5) the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (6) the need for the sentence to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (7) any other matters appearing in the record that the appellate court deems pertinent.

7. ____: ____. When reviewing sentences for excessive leniency, an appellate court does not review the sentence de novo and the standard is not what sentence it would have imposed.

Appeal from the District Court for Douglas County: Marlon A. Polk, Judge. Affirmed.

Donald W. Kleine, Douglas County Attorney, and James M. Masteller for appellant.

Thomas C. Riley, Douglas County Public Defender, and Cindy A. Tate for appellee.

Riedmann, Bishop, and Welch, Judges.

Riedmann, Judge.

INTRODUCTION

The State, through the Douglas County Attorney, appeals from a district court sentencing order after Olajuwon A. Felix entered pleas to five felony charges. The State argues that the sentences were excessively lenient. Finding no abuse of discretion, we affirm.

BACKGROUND

Felix was originally charged with count 1, manufacturing, distributing, or possession with intent to distribute marijuana; count 2, manufacturing, distributing, or possession with intent to distribute cocaine; count 3, manufacturing, distributing, or possession with intent to distribute methamphetamine; count 4, possession with intent to distribute a Schedule IV or V controlled substance; count 5, possession with intent to distribute a Schedule IV or V controlled substance; count 6, possession of a deadly weapon by a prohibited person; count 7, possession of a deadly weapon by a prohibited person; and count 8, possession of a deadly weapon by a prohibited person. Pursuant to a plea agreement with the State, Felix agreed to plead no contest to an amended count 2, which changed the class of crime to a

Class II felony, as well as to counts 3 and 6 through 8 as originally charged. Counts 1, 4, and 5 were dismissed.

According to the factual basis provided by the State at the plea hearing, a task force officer working for the Bureau of Alcohol, Tobacco, Firearms and Explosives utilized a confidential informant who made contact with Felix. On August 2, 2016, the informant met Felix in the parking lot of a gas station and purchased 27.3 grams of cocaine and 1.7 grams of methamphetamine from Felix. On August 8, the informant met Felix in a parking lot and purchased a "Charter Arms .38 special revolver" from Felix. On August 10, the informant again met with Felix in a parking lot and purchased a "Kel-Tec 9 millimeter semiautomatic handgun" from him. On August 18, the informant again met with Felix in a parking lot and Felix sold him a "Sig Sauer .45 caliber handgun." At all relevant times, Felix was a prohibited person by virtue of a previous felony conviction in April 2015. The district court accepted Felix's pleas and found him guilty.

At sentencing, Felix argued that the court should impose the mandatory minimum sentence of 3 years' imprisonment for the weapons convictions and asked that they run concurrently. He acknowledged that the convictions resulted from three separate offenses, but argued that the offenses occurred before his last prison sentence—he had been released from prison for just 6 days before he was arrested on the current charges.

The State noted that Felix accepted the opportunity to plead to five felony charges after he was originally charged with eight felonies. The State argued that not only did Felix sell cocaine and methamphetamine, but he also sold 59 Xanax pills to the informant, and that Felix contacted the informant on three separate occasions to sell him three separate guns. The State emphasized that Felix knew he was a convicted felon but chose to deal drugs and guns and argued that the sentences should not run concurrently because the offenses occurred on separate dates and involved separate guns.

The court reviewed the presentence investigation report and then sentenced Felix to 1 to 1 year's imprisonment on count 2, 1 to 1 year's imprisonment on count 3, 3 to 3 years' imprisonment on count 6, 3 to 3 years' imprisonment on count 7, and 3 to 3 years' imprisonment on count 8. The sentences on counts 2 and 3 were to run concurrently, and the sentences on counts 6 through 8 were to run concurrently, but the terms were to run consecutive to each other. In other words, Felix was sentenced to 1 to 1 year's imprisonment and a consecutive term of 3 to 3 years' imprisonment, for a total of 4 to 4 years' imprisonment, which includes the mandatory minimum of 3 years. He also received credit for 206 days served.

The State requested and received the Attorney General's approval to appeal the sentences as excessively lenient pursuant to Neb. Rev. Stat. §§ 29-2320 and 29-2321 (Reissue 2016).

ASSIGNMENT OF ERROR

The State assigns that the district court abused its discretion by imposing excessively lenient sentences.

STANDARD OF REVIEW

[1,2] When reviewing a sentence within the statutory limits, whether for leniency or excessiveness, an appellate court reviews for an abuse of discretion. *State v. Parminter*, 283 Neb. 754, 811 N.W.2d 694 (2012). 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. *Id.*

ANALYSIS

Pursuant to a plea agreement, Felix was convicted of two counts of manufacturing, distributing, or possession with intent to distribute a controlled substance, which is a Class II felony. See Neb. Rev. Stat. § 28-416 (Reissue 2016). Class II felonies are punishable by 1 to 50 years' imprisonment. Neb. Rev. Stat. § 28-105 (Reissue 2016). Felix was also convicted of three

counts of possession of a weapon by a prohibited person, which is a Class ID felony. See Neb. Rev. Stat. § 28-1206(3)(b) (Reissue 2016). This offense carries a mandatory minimum sentence of 3 years' imprisonment up to a maximum of 50 years' imprisonment. § 28-105. Therefore, Felix's sentences come within the statutory limits, and we review them for an abuse of discretion.

[3-5] A sentencing court is not limited in its discretion to any mathematically applied set of factors. *State v. Parminter, supra*. 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.* But the court must have some reasonable factual basis for imposing a particular sentence. *Id*.

[6] In determining whether the sentence is excessively lenient, we consider the following factors: (1) the nature and circumstances of the offense; (2) the history and characteristics of the defendant; (3) the need for the sentence imposed to afford deterrence; (4) the need for the sentence to protect the public from further crimes of the defendant; (5) the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (6) the need for the sentence to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (7) any other matters appearing in the record that the appellate court deems pertinent. *State v. Parminter, supra*. See Neb. Rev. Stat. § 29-2322 (Reissue 2016).

At first blush, we agree that Felix's sentences appear lenient. He was convicted of two Class II felonies and three Class ID felonies, which stemmed from four separate incidents. He faced up to 250 years' imprisonment; yet, he received the minimum period of incarceration for each count and concurrent sentences for four of his crimes. However, keeping in mind our standard of review and considering the applicable case law, we

cannot find that the sentencing court abused its discretion in the sentences imposed.

Generally, when the Nebraska appellate courts have concluded that a sentence is excessively lenient, the defendant's present crimes and criminal history display significant violence or the defendant has committed multiple driving under the influence offenses and received probation, which has been determined to be insufficient to protect the safety of the public. See, e.g., *State v. Parminter*, 283 Neb. 754, 811 N.W.2d 694 (2012); *State v. Moore*, 274 Neb. 790, 743 N.W.2d 375 (2008); *State v. Rice*, 269 Neb. 717, 695 N.W.2d 418 (2005); *State v. Fields*, 268 Neb. 850, 688 N.W.2d 878 (2004); *State v. Hatt*, 16 Neb. App. 397, 744 N.W.2d 493 (2008). See, also, *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001); *State v. Silva*, 7 Neb. App. 480, 584 N.W.2d 665 (1998).

None of those factors are present here. We recognize that Felix has an extensive history of failing to follow the law, which is particularly evidenced by numerous charges of driving during suspension and failure to appear. None of his charges have been violent, however. He has three prior felony convictions, for which he was sentenced to terms of incarceration.

In 2014, he was convicted of an amended charge of theft by receiving stolen property, a Class IV felony, and sentenced to 270 days' incarceration. By virtue of this felony conviction, Felix was prohibited from possessing weapons. Four months after his release from incarceration, however, police found him in possession of a handgun and marijuana. In August 2014, police officers observed Felix and two other men sitting outside an abandoned residence. When the officers approached, all three men began to walk away, and the officers observed Felix holding the front of his waistband under his shirt. An officer told Felix to stop and show his hands, but Felix took off running. The officer gave chase, and as Felix was being "taken to the ground," he observed Felix toss a firearm into the tree line. Marijuana was also located in Felix's pants pocket. The

firearm was located and found to be loaded and unregistered. Felix was convicted of an amended charge of attempted possession of a firearm by a prohibited person, a Class II felony, and sentenced to 2 years' imprisonment. For both of these felony convictions, Felix underwent presentence investigations, and at both times, he denied responsibility for his crimes and was assessed to be a high risk for rearrest.

In 2016, Felix was convicted of felony flight to avoid arrest and leaving the scene of a property damage accident. Charges of felony possession of a controlled substance and "Operating During Suspension" were dismissed. Felix was sentenced to 1 year's incarceration and 12 months' postrelease supervision. Six days after his release from incarceration, however, he was arrested for the current offenses, which were the result of incidents that occurred before he began his 1-year sentence.

Accordingly, the record demonstrates that Felix has a history of breaking the law and failing to take responsibility for his actions. According to the presentence investigation report for the present convictions, however, Felix was assessed to be a high risk for rearrest but was a low risk for violence, antisocial behavior, aggressiveness, and stress coping; he has no drug or alcohol issues; and he has accepted responsibility for his actions. In a letter to the court included in the presentence investigation report, Felix admitted that he was the "middle man" selling drugs and guns in order to earn money to help his family. Additionally, and significantly, as noted above, his history does not suggest the level of aggressiveness and violence present in cases such as *State v. Fields*, 268 Neb. 850, 688 N.W.2d 878 (2004), and *State v. Silva*, 7 Neb. App. 480, 584 N.W.2d 665 (1998).

Moreover, we recognize that the State has a public safety interest in deterring repeat felons and that the purpose of statutes prohibiting the possession of firearms by convicted felons is to limit the possession of firearms by persons who, by their past commission of certain specified serious felonies, have demonstrated a dangerous disregard for the law and present a

potential threat of further or future criminal activity. See, *State v. Erpelding*, 292 Neb. 351, 874 N.W.2d 265 (2015); *State v. Comeau*, 233 Neb. 907, 448 N.W.2d 595 (1989).

But this is not a case where the defendant received probation and public safety remains at risk. The sentences imposed on Felix in the present case represent his longest period of incarceration. In addition, he must serve 3 of the 4 years of his prison sentence as a mandatory minimum for which he is not eligible to earn good time credit. See *State v. Russell*, 291 Neb. 33, 863 N.W.2d 813 (2015) (good time credit not allowed until full amount of mandatory minimum term of imprisonment has been served).

[7] Although Felix's history and the nature and circumstances of the present offenses certainly could have supported a longer term of incarceration, when reviewing sentences for excessive leniency, we do not review the sentence de novo and the standard is not what sentence we would have imposed. See *State v. Antoniak*, 16 Neb. App. 445, 744 N.W.2d 508 (2008). Keeping this standard in mind, we conclude that the sentences imposed do not constitute an abuse of discretion. We therefore affirm.

CONCLUSION

We conclude that the district court did not abuse its discretion in the sentences imposed. Accordingly, we affirm.

Affirmed.

State of Nebraska, appellee, v. Luke A. St. Cyr, appellant.

916 N.W.2d 753

Filed July 3, 2018. No. A-17-372.

1. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
2. **Effectiveness of Counsel: Appeal and Error.** Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law.
3. ____: ____. In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only questions of law: Are the undisputed facts contained within the record sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance?
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. **Sentences.** When imposing a sentence, the 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 violence involved in the commission of the offense.
6. ____. 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.

7. **Criminal Law: Restitution: Damages.** Neb. Rev. Stat. § 29-2280 (Reissue 2016) vests trial courts with the authority to order restitution for actual damages sustained by the victim of a crime for which a defendant is convicted.
8. **Sentences: Restitution: Damages.** After the sentencing court determines that a conviction warrants restitution, it then becomes the sentencing court's factfinding responsibility to determine the victim's actual damages and the defendant's ability to pay.
9. **Effectiveness of Counsel: Appeal and Error.** When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred.
10. **Effectiveness of Counsel: Proof.** 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 counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
11. **Effectiveness of Counsel: Pleas: Proof.** To show prejudice when the alleged ineffective assistance relates to the entry of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have entered the plea and would have insisted on going to trial.
12. **Effectiveness of Counsel: Proof.** The two prongs of the ineffective assistance test under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), deficient performance and prejudice, may be addressed in either order.
13. **Effectiveness of Counsel: Sentences.** Neb. Rev. Stat. §§ 29-2261 and 29-2204.03 (Reissue 2016) give the court the discretion to order further evaluations of the defendant prior to sentencing when it deems such evaluations necessary for determining the sentence to be imposed; neither statute provides that a defendant can or should request the evaluations. Trial counsel cannot be deficient for failing to request evaluations that the court itself could have ordered, but in its discretion deemed unnecessary.

Appeal from the District Court for Madison County: James G. Kube, Judge. Affirmed in part, sentence of restitution vacated, and cause remanded with directions.

Ryan J. Stover, of Stratton, DeLay, Doele, Carlson & Buettner, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Moore, Chief Judge, and Bishop and Arterburn, Judges.

Bishop, Judge.

I. INTRODUCTION

Luke A. St. Cyr pled guilty to one count of first degree assault pursuant to Neb. Rev. Stat. § 28-308 (Reissue 2016), and the district court for Madison County sentenced him to 40 to 50 years' imprisonment and ordered him to pay $100,000 in restitution. St. Cyr argues that his sentence is excessive and that his counsel was ineffective. For the following reasons, we affirm in part, but because we find the court did not meaningfully consider St. Cyr's ability to pay restitution, we vacate the sentence of restitution and remand the cause with directions.

II. BACKGROUND

On December 13, 2016, the State filed an information charging St. Cyr with first degree assault pursuant to § 28-308, a Class II felony. The offense was alleged to have occurred on October 28.

On January 30, 2017, pursuant to a plea agreement, St. Cyr pled guilty to the charge in the information in exchange for the State's agreement to not file additional charges arising from the incident. The factual basis was derived from statements by St. Cyr, his attorney, and the State. St. Cyr's counsel said that after a "brief verbal altercation," St. Cyr "punched the victim several times, knocked the victim out and then [St. Cyr] proceeded to kick the victim several times in the head and cause serious bodily injury." St. Cyr told the court that "I punched him and I kicked him and I assaulted him." The State added that the police responded to a call at a bar in Norfolk, Madison County, Nebraska. They found the victim bleeding, unable to talk, and unable to get up. The victim was taken to a hospital, and

> the doctors that continued to treat the victim would have indicated and testified that the injuries sustained by the victim fit the definition of serious bodily injury because there was a substantial risk from the injuries that . . . the victim may have died and it required . . . medical intervention to keep him alive.

The State said there was a videotape, and the evidence would show that the victim did nothing wrong and that there was nothing that would justify the use of force against the victim.

The district court accepted St. Cyr's guilty plea to the information and later sentenced him to 40 to 50 years' imprisonment, with 111 days' credit for time served. The court also ordered him to pay restitution in the amount of $100,000. St. Cyr appeals.

III. ASSIGNMENTS OF ERROR

St. Cyr assigns as error that (1) the district court imposed an excessive sentence both in the length of incarceration ordered and by ordering him to pay restitution without considering his ability to pay and (2) he received ineffective assistance of counsel.

IV. STANDARD OF REVIEW

[1] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Dyer*, 298 Neb. 82, 902 N.W.2d 687 (2017). 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.*

[2,3] Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law. *State v. Loding*, 296 Neb. 670, 895 N.W.2d 669 (2017). In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only questions of law: Are the undisputed facts contained within the record sufficient to conclusively determine whether counsel did or did

not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance? *Id*.

V. ANALYSIS

1. Excessive Sentence

(a) Length of Incarceration

St. Cyr assigns the district court erred by sentencing him to 40 to 50 years' imprisonment, instead of a lesser term of incarceration. St. Cyr was convicted of first degree assault pursuant to § 28-308, which is a Class II felony. Under Neb. Rev. Stat. § 28-105 (Reissue 2016), a Class II felony is punishable by 1 to 50 years' imprisonment. St. Cyr's sentence was therefore within the statutory limits.

[4-6] 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. Stone*, 298 Neb. 53, 902 N.W.2d 197 (2017). When imposing a sentence, the 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 violence involved in the commission of the offense. See *id.* 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. *State v. Chacon*, 296 Neb. 203, 894 N.W.2d 238 (2017).

St. Cyr was 32 years old at the time of sentencing. He was single and had no dependents. He has a high school diploma and reportedly attended one semester of college. St. Cyr's employment history is "inconsistent due to being in and out of incarceration." He reports that both of his parents suffered

from addiction to alcohol in the past, but that his father had been sober for 10 to 15 years and his mother had been sober for 20 years. All of his siblings have suffered from addiction to alcohol in the past, but they were all sober at the time of his presentence investigation. St. Cyr first consumed alcohol at age 11 and reported regular use by age 14. He indicated he attended substance abuse treatment and relapsed in 2015 or 2016, and he said that each of his convictions originally began with the use of alcohol. He "described a desire to consume alcohol in the future because he feels hopeless." He also uses marijuana and peyote. St. Cyr "recalled being traumatized by a combination of his parent[s'] alcoholism and growing up in Winnebago, which he described as a hostile and violent environment." He "described how 'retaliation is rampant on the reservation'" and indicated three of his brothers have "been injured due to retaliatory assaults"—one of his brothers suffered a gunshot wound to the face, one was started on fire, and another has been beaten and stabbed. He reported being the victim of violence or abuse on numerous occasions, including being stabbed in the chest twice during fights in 1998 and 2003. He reported being diagnosed with anxiety and depression during his incarceration in federal prison and attempting suicide numerous times between the ages of 17 and 21 (since then his suicidal thoughts "'come and go'"). St. Cyr "identified his excessive alcohol consumption and poor choice in peers as problematic, noting he desires immediate substance abuse intervention."

St. Cyr's criminal history includes convictions for possession of marijuana (community service and 1 year's probation); attempted robbery (36 months' probation revoked and subsequently sentenced to 14 to 18 months' imprisonment); third degree assault (365 days' jail time); and burglary and assault with a dangerous weapon resulting in serious injury in "Indian Country" ("6 years Bureau of Prisons [and] 3 years supervised release"; probation revoked and subsequently sentenced to "12 months federal prison").

Regarding his current conviction, St. Cyr told the probation officer that he went to a friend's house in Winnebago, Nebraska, and that two other females he did not know were there. They were all drinking. The females wanted to go to Norfolk, and they all headed that way. On the drive, one of the women received telephone calls which became "heated." She told St. Cyr and the others that the caller would often beat her up. St. Cyr "felt compelled to offer [himself] as her champion" and said he would "'kick his ass.'" When they arrived in Norfolk, they encountered the man, but nothing happened and they parted ways. St. Cyr and his group went to a bar and got "kicked out" after a bar fight. After St. Cyr and his friend left a second bar, a person asked "if [they] were Indians." St. Cyr "became offended and started an argument." St. Cyr believed that the argument had escalated into a fight and that he had "made the first move." He said, "I assaulted a man I never . . . knew," and the man received serious injuries. St. Cyr explained that he assaulted the victim in the current matter so severely because St. Cyr had been "involved in two past assaults in which he allowed the victim to regain consciousness, [and as] a result, those individuals came to and retaliated against [him], assaulting him severely." St. Cyr said, "'This is why I went so far'"; "'I would never have done this if sober.'" The record reflects that the victim suffered extensive injuries as a result of the assault, including being placed on life support and experiencing a coma; due to the extent of the injuries sustained, the victim has been unable to return to employment and has accumulated a massive amount of medical debt.

As part of the presentence investigation, the probation officer conducted a "Level of Service/Case Management Inventory." St. Cyr was assessed at a "very high risk level for recidivism." The probation officer recommended that St. Cyr be sentenced to a term of incarceration.

At the sentencing hearing, the court noted it had read through the facts and St. Cyr's statement and still did not understand what caused the "pretty violent incident." St. Cyr

said that it was "somewhat motivated by the people [he] was with, but still that [wasn't] cause for such a horrible act to happen to another person." He said, "I already suffer from a lot of mental health issues, but when it comes to alcohol, it just brings out the worse [sic] in me. So I guess I really don't have really nothing to say to support it or justify it. It was horrible. I'm ashamed of it." He acknowledged that he did not know the victim and that the victim did not make movements or threatening gestures toward him.

The State called the victim's brother to testify at the sentencing hearing. The brother testified that the victim was "life-flighted" to a medical center, was given a "30-percent chance of living," and "was hooked to every machine available, even for breathing, feeding tubes. Numerous IV's." The brother testified that the victim

> experienced a very heavy head injury, brain trauma. They were even talking about doing surgery and putting in drains and everything else due to the swelling on his brain. He had a fractured skull across his left side. His nose was broke[n]. It was pretty extensive, where they were so worried about the vertebrae in his neck that they left the collar on for an extended period of time.
>
> They didn't even try attempting to back off the breathing machine for approximately ten days. He was in basically a medically-induced coma just to see if he would even breathe on his own again.

The victim "had no vision at that time" and had broken ribs. Because of the brain injury, he has short-term memory loss and did not even recognize his mother. He was in the hospital for "[a]bout a month." The victim (25 years old at the time of St. Cyr's sentencing hearing) was self-employed as a contractor and has no insurance, and his Medicaid was denied, so they could not get him the recovery therapy he needed at any rehabilitation facilities.

The State also played "actual video from behind the bar" from an outside camera (which video does not appear in our record).

The State asked for a "significant amount of incarceration." St. Cyr's counsel noted his client's background and said "it doesn't justify anything," but "[i]t just explains an unfortunate convergence of everything that was brought in where he was that night." And St. Cyr apologized to the victim's family on the record.

The court said, "I don't know if I've ever seen anybody beaten this bad before." The court further said:

> [W]atching that video was pretty shocking. . . . I don't know if I've ever seen anything like that before and I don't think I ever want to. It's just a brutal attack. . . . [C]learly this victim was unconscious. When you continued to kick and stomp at his head and, you know, that's just something I just don't understand. . . .
>
> . . . It seemed to me, at least from what I understand from the police reports and from watching the video and the comments that have been made, that this was pretty much non-provoked. . . .
>
> You may not have killed this victim . . . but you definitely have altered his life in a very negative way and who knows whether he will fully recover ever from these injuries.

The court found that St. Cyr was not a qualified candidate for probation and that there was a substantial likelihood of his reoffending in a similar manner. The court determined that "the most effective recourse" was incarceration and sentenced him to 40 to 50 years' imprisonment.

In his brief, St. Cyr argues that the district court "did not properly consider [his] rehabilitative needs in light of his background, his acknowledgment of responsibility, and his willingness to enter a plea of guilty, saving the State the expense of and the victim the trauma of trial." Brief for appellant at 14. He argued a reduced sentence would have been more appropriate. However, upon our review of the record and consideration of the relevant sentencing factors in this case, we find the district court did not abuse its discretion in the length of the prison sentence ordered.

(b) Restitution

St. Cyr argues that the district court erred in ordering him to pay restitution in the amount of $100,000, without conducting a meaningful examination of his ability to pay that amount. The State asserts, "While no one objected to the imposition of restitution even when it was imposed, . . . actions which would ordinarily waive the argument on appeal, it is still plain error since the imposition of restitution did not comply with state statutes." Brief for appellee at 13. 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. Kidder*, 299 Neb. 232, 908 N.W.2d 1 (2018).

[7] A sentencing court may order the defendant to make restitution for the actual physical injury or property damage or loss sustained by the victim as a direct result of the offense for which the defendant has been convicted. Neb. Rev. Stat. § 29-2280 (Reissue 2016). Section 29-2280 vests trial courts with the authority to order restitution for actual damages sustained by the victim of a crime for which the defendant is convicted. *State v. Ramirez*, 285 Neb. 203, 825 N.W.2d 801 (2013). According to Neb. Rev. Stat. § 29-2281 (Reissue 2016):

> To determine the amount of restitution, the court may hold a hearing at the time of sentencing. The amount of restitution shall be based on the actual damages sustained by the victim and shall be supported by evidence which shall become a part of the court record. The court shall consider the defendant's earning ability, employment status, financial resources, and family or other legal obligations and shall balance such considerations against the obligation to the victim. In considering the earning ability of a defendant who is sentenced to imprisonment, the court may receive evidence of money anticipated to be earned by the defendant during incarceration. . . . The court may order that restitution be made immediately,

> in specified installments, or within a specified period of time not to exceed five years after the date of judgment or defendant's final release date from imprisonment, whichever is later.

Further, if the offense results in bodily injury, the court may require payment of necessary medical care, including, but not limited to, physical or psychological treatment and therapy, and payment for income lost due to such bodily injury. Neb. Rev. Stat. § 29-2282 (Reissue 2016).

[8] After the sentencing court determines that a conviction warrants restitution, it then becomes the sentencing court's factfinding responsibility to determine the victim's actual damages and the defendant's ability to pay. *State v. Ramirez, supra*. An evidentiary hearing is required to support a restitution order under § 29-2281, and restitution should be based on evidence of both actual damages and the defendant's ability to pay. See *State v. Holecek*, 260 Neb. 976, 621 N.W.2d 100 (2000). Restitution ordered by a court pursuant to § 29-2280 is a criminal penalty imposed as a punishment for a crime and is part of the criminal sentence imposed by the sentencing court. *State v. Holecek, supra*.

The victim's brother testified at the sentencing hearing. He testified about the extent of the victim's injuries and some of the medical costs, saying it was "well over a hundred thousand." And the presentence investigation report contains copies of the victim's medical bills that total well over $100,000—his medical center bill alone was over $100,000, his "life-flight" bill was $59,999, and there were numerous other medical bills totaling several thousands of dollars.

However, as noted by the State, there was no consideration by the court of St. Cyr's ability to pay. In fact, at the sentencing hearing, the State indicated St. Cyr "has been incarcerated . . . and has no financial means. We're not officially seeking restitution, but the restitution . . . is clearly in the [presentence investigation report] as to what medical bills are still owed." The court asked St. Cyr if he had any money to pay for the medical bills; his response was no. The court then

asked St. Cyr how he thought the bills would get paid, and he responded: "[I]f you were to give me the bill for the restitution, I would try to do my best to pay it off. Day by day, year by year, however it can be done."

The district court stated: "I will also order restitution, even though I'm sure you won't ever be able to pay it, but I'm going to order it, in the amount of $100,000. Clearly the medical bills that I've reviewed add up to more than that." The court did not state how restitution of $100,000 would be paid by St. Cyr, especially given his lengthy term of incarceration.

Although the district court considered St. Cyr's ability to pay the restitution from the standpoint that the court concluded St. Cyr "won't ever be able to pay it," the court did not state when and how the restitution was to be paid or whether it was to be paid immediately, in installments, or within a specified period of time. In light of the applicable law, we find plain error and must vacate the restitution portion of St. Cyr's sentence, remanding the cause back to the trial court for proceedings that are consistent with this opinion and the statutory factors set forth in § 29-2281. See *State v. Mick*, 19 Neb. App. 521, 808 N.W.2d 663 (2012) (finding record did not indicate trial court meaningfully considered factors mandated by § 29-2281 with respect to defendant's ability to pay restitution; trial court's order regarding restitution vacated and cause remanded to trial court for proceedings consistent with appellate opinion and statutory factors set forth in § 29-2281).

2. Effectiveness of Counsel

[9] When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred. *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

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. Loding*, 296 Neb. 670, 895 N.W.2d 669 (2017). The determining factor is whether the record is sufficient to adequately review the question. *Id*.

[10-12] 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 counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010). To show prejudice when the alleged ineffective assistance relates to the entry of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have entered the plea and would have insisted on going to trial. *State v. Fester*, 287 Neb. 40, 840 N.W.2d 543 (2013). The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *Id*.

St. Cyr contends that his trial counsel was ineffective because counsel "failed to utilize all means available to place mitigating evidence before the sentencing court, prior to sentencing." Brief for appellant at 22. More specifically, he argues counsel could have offered letters of support for St. Cyr as mitigating evidence. He also argues that counsel could have motioned the court to utilize "the evaluations authorized in §§29-2261 or 29-2204.03." Brief for appellant at 25. St. Cyr claims, "It is conceivable that had trial counsel done so," then "a more appropriate sentence would have been imposed." Brief for appellant at 25 and 26.

Neb. Rev. Stat. § 29-2261(5) (Reissue 2016) states that before imposing sentence, the court may order the offender to submit to psychiatric observation and examination for a period not exceeding 60 days or such longer period as the court determines to be necessary for that purpose. And Neb. Rev. Stat. § 29-2204.03(1) (Reissue 2016) states:

> When the court is of the opinion that imprisonment may be appropriate but desires more detailed information as a basis for determining the sentence to be imposed than

> has been provided by the presentence report required by section 29-2261, the court shall commit an offender to the Department of Correctional Services for a period not exceeding ninety days. The department shall conduct a complete study of the offender during that time, inquiring into such matters as his or her previous delinquency or criminal experience, social background, capabilities, and mental, emotional, and physical health and the rehabilitative resources or programs which may be available to suit his or her needs.

[13] Both §§ 29-2261 and 29-2204.03 give the court the discretion to order further evaluations of the defendant prior to sentencing when it deems such evaluations necessary for determining the sentence to be imposed; neither statute provides that a defendant can or should request the evaluations. Trial counsel cannot be deficient for failing to request evaluations that the court itself could have ordered, but in its discretion deemed unnecessary.

Furthermore, St. Cyr does not say who would have provided letters of support (or what information those letters would have contained). See, generally, *State v. Abdullah*, 289 Neb. 123, 133, 853 N.W.2d 858, 867 (2014) (showing witnesses whom defendant advised counsel would have been "'beneficial'" to defendant's case at trial raises potential issues of deficient performance and prejudice; but vague assertion referring to "'at least two'" witnesses seems little more than placeholder; "[w]ithout such specific allegations, the postconviction court would effectively be asked to '"conduct a discovery hearing to determine if anywhere in this wide world there is some evidence favorable to defendant's position"'").

St. Cyr does not say what other information his attorney should have presented to provide "a more complete picture" of St. Cyr. Brief for appellant at 25. In his brief, he mentions that he was the product of dysfunction and violence, that he had post-traumatic stress disorder, and that alcohol contributed to the events. However, St. Cyr himself provided all of this

information during the presentence investigation, and the court considered that information. We cannot say that St. Cyr's trial counsel was deficient. But even if trial counsel was deficient, St. Cyr cannot establish prejudice based on his counsel's failure to offer mitigating factors. The court read the presentence investigation report which, as set forth previously in this opinion, went into great detail about St. Cyr's background and the struggles he had encountered. Even in light of this information, the sentence imposed was not excessive, as we have concluded. The result of the proceeding would not have been different had counsel offered additional information regarding St. Cyr's social background, capabilities, rehabilitative needs, and mental, emotional, and physical health. Considering the circumstances of the offense, St. Cyr's criminal history, and his history of alcohol abuse, argument from counsel or other information reiterating the same background factors that St. Cyr himself provided would not have resulted in a lesser sentence. Because St. Cyr cannot show prejudice, his claim of ineffective assistance of counsel fails.

VI. CONCLUSION

We affirm the district court's sentencing order imposing 40 to 50 years' imprisonment; however, the restitution portion of the sentence is vacated, and the cause is remanded for proceedings consistent with this opinion.

Affirmed in part, sentence of restitution vacated, and cause remanded with directions.

State of Nebraska, appellee, v. Amadeus L. Leroux, appellant.

916 N.W.2d 903

Filed July 10, 2018. No. A-17-1160.

1. **Criminal Law: Courts: Juvenile Courts: Jurisdiction: Appeal and Error.** A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion.
2. **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.
3. **Courts: Juvenile Courts: Evidence.** Under Neb. Rev. Stat. § 29-1816(3)(a) (Reissue 2016), after considering the evidence and the criteria set forth in Neb. Rev. Stat. § 43-276 (Reissue 2016), the court shall transfer the case to juvenile court unless a sound basis exists for retaining the case in county court or district court.
4. **Courts: Juvenile Courts: Jurisdiction: Proof.** In a motion to transfer to juvenile court, the burden of proving a sound basis for retaining jurisdiction in county court or district court lies with the State.
5. **Courts: Juvenile Courts: Jurisdiction.** In order to retain proceedings in criminal court, the court need not resolve every statutory factor in favor of transfer against the juvenile, and there are no weighted factors and no prescribed method by which more or less weight is assigned to a specific factor. It is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile.
6. **Courts: Juvenile Courts: Jurisdiction: Evidence.** When a district court's basis for retaining jurisdiction over a juvenile is supported by appropriate evidence, it cannot be said that the court abused its discretion in refusing to transfer the case to juvenile court.

Appeal from the District Court for Keith County: Donald E. Rowlands, Judge. Affirmed.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Snyder, Chaloupka & Longoria, P.C., L.L.O., and Daniel R. Stockmann, of Stockmann Law Office, for appellant.

Douglas J. Peterson, Attorney General, and Sarah E. Marfisi for appellee.

Moore, Chief Judge, and Bishop and Welch, Judges.

Bishop, Judge.

I. INTRODUCTION

Amadeus L. Leroux, age 15 at the time of his charged offenses, appeals from the Keith County District Court's order denying his motion to transfer his pending criminal proceeding to the juvenile court. Although more of the statutory factors set forth in Neb. Rev. Stat. § 43-276(1) (Reissue 2016) favored transferring the case than those retaining it, the statutory scheme does not provide a mathematical approach to these decisions. Further, the statutory factors are not weighted, and the trial court does not need to resolve every factor against the juvenile in deciding whether to retain the case in adult court. Finally, even if this court found the factors tipped more favorably for granting the transfer, we are constrained by our standard of review. An appellate court may determine only if the trial court abused its discretion by denying a request to transfer the case to juvenile court, and under this standard of review, we must affirm.

II. BACKGROUND

A complaint was filed in the county court for Keith County by the Keith County Attorney on March 30, 2017. The complaint alleged that on or about March 28, Leroux (date of birth September 2001) intentionally committed murder in the second degree, but without premeditation, a Class IB felony, and

intentionally used a knife, or other deadly weapon, to commit a felony, a Class II felony. Leroux waived a preliminary hearing, and the case was bound over to the district court on May 8. An amended information was filed, and on October 9, Leroux filed a motion to transfer jurisdiction to the juvenile court. A hearing on Leroux's motion took place on October 18; a summary of the evidence adduced at that hearing follows.

1. Law Enforcement
Witness for State

Nebraska State Patrol Trooper Peter Rutherford testified that he was on duty on March 28, 2017, and was called to investigate the death of John Fratis, who he believed was 25 years old. Raylynn Garcia referred to Fratis as "her brother," but they are not biological siblings—they were raised together. Trooper Rutherford believed Fratis had moved in with Garcia at a home on "North Spruce" in Ogallala, Nebraska, in December or January, "[s]o several months leading up" to the incident. Larry Derrera also grew up in the same home as Garcia, and they "have since moved in together and have two children in common."

Garcia and Derrera had gone to Colorado for a family event, and on their way back, they brought Leroux "to come back to Ogallala to spend some time in the area and see the lake." Once they arrived back in Ogallala, Garcia, Derrera, Leroux, Fratis, and the two minor children went to the home. Derrera, Leroux, and Fratis were drinking alcohol, and Garcia had smoked a marijuana "blunt" with Fratis. At 2 a.m., Garcia, Derrera, and the two children went to bed, while Leroux and Fratis remained in the living room. A short time later, Garcia and Derrera were awakened to the sound of fighting; Derrera saw Leroux and Fratis "kind of wrestling around with each other in conflict." Derrera separated them and told them to "cool down [and] go their separate ways." Derrera returned to bed. He later heard another commotion and went out to see Leroux and Fratis "in what he believed to be the tailend [sic] of a fight." Furniture

was in disarray, a fish tank was knocked over, and a television had been knocked over and broken. Derrera again told Leroux and Fratis to "chill out," and he separated the two. (Trooper Rutherford explained that this had been taking place over several hours.) Fratis went outside to smoke, and Leroux headed to the bathroom just off the kitchen.

Derrera returned to bed, but Garcia, who had also been awakened from the commotion, assisted with the cleanup. Garcia was "fed up . . . with the stress and fighting," so she started to get the two children changed into new clothes to put them in the car. When Garcia was in the laundry room area just off the kitchen, she heard another commotion coming from the main living area. When she rounded the corner, she saw Leroux standing next to Fratis with a knife in his hand. Garcia saw Fratis grasping his side, and "[h]e made the exclamation, What the Fuck, did you [just] stab . . . me?"

Garcia told Trooper Rutherford that she "freaked out," grabbed the knife, and threw it into the sink. She grabbed the two children and took them out to the car, then returned to the house and retrieved her marijuana in her purse. She then drove away from the residence. Meanwhile, Derrera came out of the bedroom and saw Fratis bleeding profusely, with blood coming from his mouth and from his side. Derrera helped Fratis out of the living room and on to the front porch. At 8:15 a.m., a vehicle was flagged down and the driver, who was a dentist, transported Fratis to the local hospital.

When processing the scene, footprints were noted leaving the residence going west along the alley just north of the residence. A few blocks away from the residence, Leroux flagged down a passing motorist, a local Ogallala resident. Leroux told the driver he had been in a fight with "six guys . . . over a video game earlier that morning." Leroux asked for a ride to a gas station. During the ride, the driver noted that Leroux had a "knot" over his left eye and some deep scratches on his left hand, which corroborated Leroux's story about the fight. Later that day, the driver "ran into" the dentist, who told him about

picking Fratis up and taking him to the hospital. The driver then thought about Leroux who said he had been in a fight, so he went to the crime scene and met with Trooper Rutherford there. That prompted Trooper Rutherford to call the gas station where the driver had dropped off Leroux, and the gas station clerk knew who Trooper Rutherford was describing. The clerk said "this kid came in" and asked to borrow the clerk's telephone so he could call his mother. The clerk let him make the call, and a few minutes later, "he jumped in a car and left."

Trooper Rutherford traced the call made by Leroux to Leroux's mother, and he also retrieved surveillance video from the gas station. The video showed Leroux getting into a vehicle with a window broken out on the driver's side. The video showed Leroux, who was wearing a white T-shirt, jeans, and white shoes. According to Trooper Rutherford, the shirt in the video "did not appear to be covered in blood." Based on information from local law enforcement, Trooper Rutherford knew the vehicle was driven by Garcia. Garcia claimed she called Leroux's mother to let her know that Leroux had been in a fight with Fratis and that Fratis was injured. Leroux's mother instructed Garcia to look for Leroux, and while Garcia was driving around looking for him, Leroux's mother called to tell her Leroux was at the gas station and to pick him up and bring him to her in Colorado. When Garcia picked Leroux up at the gas station, Leroux "proceeded to the rear of the cargo area and covered himself up with blankets." Garcia drove to Sterling, Colorado, with Leroux and the two children.

The autopsy of Fratis showed approximately six stab wounds: one on the front of his torso, three on the left side of his torso, and two on his back. Several of the stab wounds were direct and deep; Fratis' left lung was struck once, and his heart was struck twice.

Under cross-examination by Leroux's counsel, Trooper Rutherford acknowledged that there was a prior assault between Derrera and Fratis. Trooper Rutherford interviewed

Garcia twice following Fratis' death, and he agreed she lied to law enforcement several times on substantial things. Garcia acknowledged in her second interview that she had "done cocaine" in the 24 hours before Fratis' death. Derrera had been interviewed three times and lied to law enforcement on multiple occasions. Trooper Rutherford said Derrera and Garcia had been charged with child abuse related to the presence of drugs in the home and the violent events that occurred with the two children present the day of Fratis' death.

2. Probation Officer Witness for State

Amber Pierce, a juvenile specialized probation officer, testified that she supervises only juvenile cases. Pierce met with Leroux because Leroux was under the age of 19 and there was a warrant, so probation was responsible for his placement. Pierce discussed the Youth Rehabilitation and Treatment Center (YRTC) in Kearney, Nebraska, noting there was no one currently in the YRTC with a murder conviction. There are no special programs or services specific to a murder conviction at the YRTC. Pierce testified that the average time a juvenile spends in the YRTC is 7 to 9 months and that after such period, the juvenile would be released back to the community. The YRTC does offer therapy services, which would be equivalent to outpatient services.

Pierce also discussed the Nebraska Correctional Youth Facility (NCYF), which is under the Department of Correctional Services and is a facility specific for juveniles charged and convicted as adults. The age range of individuals jailed there is 14 years to 21 years 10 months. Pierce testified that the services available at the NCYF are more substantial than those at the YRTC. She said it was her understanding that if Leroux was convicted as an adult, he would automatically be placed at the NCYF so long as he is under the age of 19. Pierce also noted that if a juvenile came to Nebraska from Colorado, and as a result of a predisposition investigation (which she said is

similar to a presentence investigation for an adult), it was recommended the juvenile go to the YRTC, the juvenile would not be transferred back to Colorado, but would instead complete the YRTC term in Nebraska.

On cross-examination, Pierce acknowledged that it is detrimental for a juvenile to be exposed to trauma and to not receive treatment for that trauma. Pierce did not know what the provisions are for "trauma informed care" at the NCYF, nor did she know the ratio of mental health providers to juveniles at the NCYF. Pierce knew there was a psychologist and two mental health practitioners on staff; she did not know if they had additional staff. Pierce said she did not know how many "kids [were] at NCYF with that one psychologist and two [mental health practitioners]," and when offered an estimate of several hundred, Pierce said she did not know. After redirect examination of Pierce, the State rested.

3. Defense Witness
Tessa Frederick

Tessa Frederick is the assistant site director at a Boys & Girls Club in Denver, Colorado, of which Leroux was a member. The club provides afterschool programs in underserved communities, offering "high yield activities in healthy lifestyles, character leadership and academic success, as well as providing community support, supporting the schools around, providing dinner, those kinds of things." Children are eligible to participate from age 6 through 18. Leroux participated in service learning projects, such as raising funds and supplies for the victims of a forest fire, and more recently, the club served food to the homeless at a Denver rescue facility. Children can be suspended or expelled from the club if they bring a weapon or drug, if they fight, or if they are disrespectful to staff.

According to Frederick, Leroux started coming to the club, along with his older brother and younger sisters, when he was 8 or 9 years old. Leroux was a "very shy kid" and would need

to be coaxed to participate in activities. He played on sports teams, was a member of a leadership group, and participated in a "computer lab." Other than for a period after the death of Leroux's father, Leroux was in attendance at the club "[b]asically every day." Frederick said that Leroux's mother "wanted a place for her kids to go after school while she worked that would be safe and purposeful."

Frederick said that she got to know Leroux and his family well and that she would "[n]ever" describe his personality as aggressive or forceful. Rather, she described Leroux as "so quiet" and said that it took years before Leroux trusted Frederick enough to open up to her. However, Leroux "was an active listener" and "was engaged." "[W]hen it came to speaking out or doing a little bit more as far as the activities go, he was just a spectator," she said. Leroux was "a very strong reader," so Frederick would sometimes have him help the younger members in the reading program. In terms of maturity, Leroux behaved "within his age."

Frederick testified she was not aware of Leroux doing any traveling other than with the club. She described Leroux as a "[v]ery normal, very average, just a normal 15-year-old." To her knowledge, Leroux never had a violent outburst or any type of problem interacting socially in the club, nor had he ever been suspended or thrown out of the club. The club is aware of Leroux's charges, and Frederick was not aware of any problems with the staff or other children as a result. Leroux has continued to go to the club where he does his homework and "hangs out in the peace and quiet of the teen room where there is always lots to do there, whether it's a game or activity [that] is going on, cooking club, that kind of thing and occasionally staying for a teen night."

4. Defense Witness
Dr. Joseph Peraino

Dr. Joseph Peraino, from Denver, has been a clinical psychologist for over 30 years and is licensed in Colorado. He

spends about half of his time in office practice, with the other half spent in forensic work. About 60 percent of his time is spent with adults, and 40 percent with teenagers. He has been doing psychological assessments since 1978.

Dr. Peraino testified that literature indicates that for juveniles, trauma "actually affects their psychological, and to some degree depending on the severity, their brain development." Noting that "trauma [is] a distraction for anybody," Dr. Peraino said it has more impact early in life because a child does not have as much life experience. Dr. Peraino went on to state:

> [S]ome children and teens will withdraw and become depressed. Others will become highly anxious. Others will not know what to do with their anxiety and essentially act out, kind of don't think clearly, and they act impulsively and get in trouble. At some level it shakes their foundation, their view of the world, and makes them not trust others.

Dr. Peraino said that psychotherapy can be helpful and that medication can help in extreme cases if a person is severely anxious or depressed. Speaking more generally about brain development, Dr. Peraino said:

> The brain continues to develop until around 25 years old. And the process of the brain maturing goes from kind of the brain stem to the back of the brain all the way to the front of the brain. So the last thing that develops is the prefrontal cortex and that is where the center of judgment is, the executive function is for individuals.
>
> And even though you have — at a midteen level you might find somebody who is pretty bright and kind of knows the rules, they don't necessarily have the judgment to go along with that.
>
> So we know that, for example, the teen accident rate is very high compared to adults. They know all the rules just as well as the adults do. But they just don't exercise the judgment because that part of the brain hasn't developed very well yet.

Dr. Peraino said that based on "longitudinal studies . . . a small percentage of teenagers who commit crimes actually continue to do so in adulthood. So in that sense for the majority of teenagers, punishment should be secondary to treatment or rehabilitation." And if they are incarcerated instead, "they don't get the chance to experience the many aspects of the world that they can learn" and "[t]here are extreme limits to the aspects of life that can help them mature, grow, and psychologically develop."

As to Leroux specifically, Dr. Peraino had done a psychological assessment of him over a 2-day period at the request of Leroux's counsel. That assessment included interviews with Leroux and his mother, both jointly and separately. In addition to conducting a juvenile risk assessment, Dr. Peraino also administered psychological tests, including tests related to intellect and academic skills, emotional intelligence, and personality assessments. In this type of evaluation, Dr. Peraino is looking for personality, maturity level, learning disabilities, intelligence level, how the teenager processes information, and whether recommendations of a psychological nature are needed.

Leroux scored 86 on the "IQ tests overall," which "falls within the below average range." Leroux's "processing speed," or "how quickly one intakes information and outputs as a result," was "well below average, at the fifth percentile given his age." He also scored below average in verbal comprehension, while his perceptional reasoning and working memory were within the average range. Leroux scored "significantly higher on the academic testing, reading, word reading, sentence comprehension, spelling . . . even math calculation problems, computation was higher than what his IQ score would have indicated." According to Dr. Peraino, that "means that he learns well. That probably the IQ score was suppressed because of slow processing speed and somewhat verbal comprehension as well." Dr. Peraino stated Leroux's reading was at the 12th grade level, spelling was at the 11th grade level, and math was

at the 7th grade level; he is "[c]ognitively intact," but "probably functioning a little below an average 16-year-old because of the lower IQ score, 14, 15, in that range."

Dr. Peraino concluded Leroux has the capability to learn, but has some difficulty processing information quickly; Leroux is "somebody that needs time to kind of reflect and think about what's going on." Dr. Peraino described Leroux as "calm . . . [f]riendly, engaging," and he noted that Leroux "[k]ept calling me bro." Dr. Peraino was struck by Leroux's trauma exposure or negative events. "He has seen a video of his father being shot and killed, being in a car accident, being attacked by dogs, . . . a couple of uncles committing suicide[.]" Leroux indicated to Dr. Peraino that the trauma has affected him; Dr. Peraino thought it caused Leroux to "maintain distance from people, to kind of disengage from the environment."

Leroux was given a standard personality scale called the Millon Adolescent Clinical Inventory, as well as an "emotional IQ scale" and the "Rorschach" and "Thematic Apperception Test." Dr. Peraino testified that Leroux's overall emotional IQ "is average compared to teens his age," but that "[h]e was elevated on a scale called stress management." This showed that while Leroux perceives himself as being able to handle stress, "when it comes down to it, he has difficulty, more difficulty than the average 16- to 18-year-old male in actually coping with that stress." The emotional IQ tests also showed Leroux has some difficulty establishing relationships; he scored "a little low on his ability to make connections with other people and maintain them." In personality testing, Leroux scored high in categories of "[s]ubmissive, [d]ramatizing, [e]gotistic, and [c]onforming." He scored "pretty low — or average compared to other teens on unruliness and being oppositional." He scored "fairly low on being forceful, being dominating, being aggressive, that kind of thing." Leroux scored fairly low on substance abuse proneness, and Dr. Peraino saw no evidence of psychotic thinking in his assessment of Leroux. "So what you've got is a picture of an individual who goes with the

flow, who is submissive, who is passive. He's kind of dependent, gives into other people usually. Coupled with sort of maybe elevated, overconfident sense of self."

Dr. Peraino also discussed a violence risk assessment, which is an evidence-based test that contains a scale of 24 risk factors research has found to be predictive of whether a juvenile will reoffend. Leroux "scored relatively low on risk for reoffense. 15 of those 24 items or factors were in the low range." According to Dr. Peraino, these factors included:

> Anger management problems, peer rejection, lack of personal social support, having attitudes of violence, growing up or living in a disorganized crime filled community, a history of violence, a history of self-harm, exposure to violence in the home, early initiation of violence, caretaker disruption in life or people that go to foster, poor parental management, substance abuse difficulties, empathy, and childhood history of mental treatment. Those were all low.

Leroux scored "moderate" for

> history of nonviolent offending, past supervision intervention failures. He admitted he failed a drug test when he was on probation. Somewhat risk taking and impulsive, low interest in school, parent criminality. His father was in prison. Period of delinquency, that was moderate because he was hanging out with someone that stole a car, and stress and poor coping.

Dr. Peraino rated Leroux "high" on two risk factors: "having ADHD and poor school achievement."

The violence risk assessment also includes "[p]rotective factors," which "are things that you would kind of defend against a person acting out in a criminal way or unlawful way. And those factors often include having connections with people, having strong bonds." Dr. Peraino testified that Leroux "had strong bonds with his family . . . strong social support" and that he is "currently committed to school and work." Dr. Peraino said that Leroux "has a positive attitude towards

intervention," which "means he accepts help. He's willing to accept help. He's willing to accept guidance. He will follow the advice of others." He agreed these are influential areas that help to reduce the risk of recidivism.

Dr. Peraino diagnosed Leroux with attention deficit disorder and post-traumatic stress disorder. The "cardinal characterization of somebody" with attention deficit disorder includes "inattention, impulsivity, and hyperactivity, . . . a lot of mood variability as well. But those are the three main ones." Leroux was placed on medication in 2014 "to see if psychostimulant medication would help him. And medication is the first line of treatment for [attention deficit disorder] despite what we all might hear."

As for the diagnosis of post-traumatic stress disorder, Dr. Peraino said the appropriate treatment is psychotherapy "to try to work through the traumas and put it in perspective." Medication can be useful depending on whether anxiety and depression symptoms are associated with the post-traumatic stress disorder. Dr. Peraino testified that if Leroux received appropriate treatment, his prognosis in terms of psychological development "would be great." Whereas, if he was put into a correctional setting, "given our discussion previously about his vulnerability, submissiveness, dependency, . . . he would be vulnerable to learning things that are antisocial in nature. And that would not be good for his long-term adult functioning."

In addition to his testimony, a written report prepared by Dr. Peraino was received over the State's objection. We note that in his "Conclusions and Recommendations," Dr. Peraino indicated that Leroux's "underdeveloped psychological development falls primarily in emotional areas. He appears to be a good learner but has difficulty managing his emotions and relationships." Noting that Leroux has responded well in a structured setting such as probation, Dr. Peraino said this means that Leroux "would very likely be responsive to treatment. He will need to experience a few years of a healthy environment to re-socialize him." The report further states

that Leroux "is at low risk for criminal recidivism based on a well-validated measure or risk assessment" and that "[d]ue to his positive response to probation, he would do well in a community placement." However, upon questioning by the State at the hearing, Dr. Peraino acknowledged that none of the information used in his evaluation included any information related to second degree murder and "those events."

5. Defense Witness
Jenifer Stinson

Jenifer Stinson, a criminal defense attorney from Denver who specializes in juvenile defense (specifically youth charged in adult court), testified about processes and assessments used in Colorado when dealing with juvenile offenders, as well as services available for treatment of such offenders. The gist of her testimony, it appears, is to support the notion that if Leroux's case was handled in juvenile court, there was a possibility that after adjudication the case could be transferred to Colorado's youth services division, which continues to provide services for a juvenile who has been adjudicated and placed within the system until age 21. Stinson also discussed a 2013 study which found that youth prosecuted in the adult system instead of the juvenile system were 34 percent more likely to recidivate.

Stinson and/or her law firm partner have been working with Leroux's family for the past couple of years; Stinson was representing Leroux in Colorado proceedings. Stinson discussed Leroux's 2016 adjudication in Colorado where he pled guilty to obstructing a peace officer, a "Class 2 Misdemeanor." He was sentenced to probation. When the situation in Nebraska arose, Stinson ultimately had Leroux and his mother meet her in court in Denver to get him into custody, and she described Leroux's demeanor as "very quiet," "very calm," and "almost stoic looking." She clarified that it was not that he was not taking matters seriously, but it was "more like taking a really deep breath before doing something that's really hard."

Stinson testified about the standard terms and conditions of juvenile probation in Colorado, which included being law abiding, attending school, having no school discipline problems, and being subject to alcohol and drug testing at any time. Stinson said that within the last month or two, Leroux's probation officer had stopped urine testing for Leroux because he had been compliant for a significant period of time. A Colorado warrant was filed due to Leroux's failure to comply with probation (leaving jurisdiction without permission), and then a motion to revoke probation was filed.

Leroux's Colorado case is being held in abeyance pending the disposition of the Nebraska case. Meanwhile, Leroux has been living at home with his mother, attending school online, and attending Boys & Girls Club. Stinson noted that since Leroux has been charged in Nebraska, there has been no change to the terms of his Colorado probation. And even though probation has the ability to use on Leroux an "ankle monitor, either electric home monitoring [or] GPS tracking," the district attorney had not asked for that.

6. District Court's Order Denying Transfer to Juvenile Court

On October 27, 2017, the district court entered an order denying the motion to transfer the case to juvenile court. The court acknowledged that § 43-276 requires the court to consider 15 factors in making its decision and that the law requires the case be transferred to juvenile court unless a sound basis exists for retaining the case in district court. The court noted that murder in the second degree is a Class IB felony which carries a maximum sentence of life imprisonment and a minimum sentence of 20 years' imprisonment; the use of a deadly weapon to commit a felony is a Class II felony, which carries a maximum sentence of 50 years' imprisonment, with a minimum sentence of 1 year's imprisonment. If convicted of the deadly weapon charge, any sentence for that conviction must be served consecutively to the other conviction. The court's

discussion of the 15 factors contained in § 43-276 is set forth in the analysis section of this opinion. In its summary, the district court stated:

> [W]hile a number of factors set forth above favor treating [Leroux] with psychotherapy and medication in a juvenile facility, which would be of obvious benefit to [Leroux], the serious nature of the charges which allege that [Leroux] killed [Fratis] intentionally, but without premeditation, and with a deadly weapon, require this Court to conclude after balancing all of the factors and findings set forth above, that the safety of the public, and the necessity of confining [Leroux] to a secured facility well beyond the age of 19 years, will be required if he is convicted in this case. A sound basis thus exists for retaining this case in district court and trying [Leroux] as an adult. Accordingly, the Motion to Transfer to Juvenile Court . . . should be and the same is hereby denied.

The district court did reduce Leroux's bond to "$50,000 cash," stating that there was no suggestion Leroux had committed any criminal offenses while out on bond and that he had appeared for all scheduled hearings. It was noted that reducing Leroux's bond would allow him to continue to employ private counsel. Finally, the court indicated that if no appeal was filed within 10 days, Leroux and his counsel were to appear on December 8, 2017, for a status hearing, during which the case would be set for jury trial.

On November 6, 2017, Leroux appealed the October 27 order denying his request to be transferred to the juvenile court.

III. ASSIGNMENT OF ERROR

Leroux assigns the district court erred by denying his motion to transfer his case to juvenile court.

IV. STANDARD OF REVIEW

[1,2] A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion. *State v. Hunt*, 299 Neb. 573, 909 N.W.2d

363 (2018). 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. *Id.*

V. ANALYSIS

1. Jurisdiction

When a juvenile seeks to transfer a criminal case from adult court to juvenile court, Neb. Rev. Stat. § 29-1816(3)(c) (Supp. 2017) provides that "[a]n order granting or denying transfer of the case from county or district court to juvenile court shall be considered a final order for the purposes of appeal" and that "[u]pon entry of an order, any party may appeal to the Court of Appeals within ten days." This statutory amendment providing for interlocutory appeals became effective August 24, 2017. Leroux has properly perfected his appeal from the district court's denial of his motion to transfer his criminal proceeding to the juvenile court.

2. Motion to Transfer to Juvenile Court

Neb. Rev. Stat. § 43-246.01(3) (Reissue 2016) grants concurrent jurisdiction to the juvenile court and the county or district courts over juvenile offenders who (1) are 11 years of age or older and commit a traffic offense that is not a felony or (2) are 14 years of age or older and commit a Class I, IA, IB, IC, ID, II, or IIA felony. Actions against such juveniles may be initiated either in juvenile court or in the county or district court. In the present case, all of the allegations against Leroux put him within this category of juvenile offenders.

[3,4] In the instant case, when Leroux moved to transfer his case to juvenile court, the district court conducted a hearing pursuant to § 29-1816(3)(a), which requires consideration of the following factors set forth in § 43-276(1):

> (a) The type of treatment such juvenile would most likely be amenable to; (b) whether there is evidence that the

> alleged offense included violence; (c) the motivation for the commission of the offense; (d) the age of the juvenile and the ages and circumstances of any others involved in the offense; (e) the previous history of the juvenile, including whether he or she had been convicted of any previous offenses or adjudicated in juvenile court; (f) the best interests of the juvenile; (g) consideration of public safety; (h) consideration of the juvenile's ability to appreciate the nature and seriousness of his or her conduct; (i) whether the best interests of the juvenile and the security of the public may require that the juvenile continue in secure detention or under supervision for a period extending beyond his or her minority and, if so, the available alternatives best suited to this purpose; (j) whether the victim agrees to participate in mediation; (k) whether there is a juvenile pretrial diversion program established pursuant to sections 43-260.02 to 43-260.07; (l) whether the juvenile has been convicted of or has acknowledged unauthorized use or possession of a firearm; (m) whether a juvenile court order has been issued for the juvenile pursuant to section 43-2,106.03; (n) whether the juvenile is a criminal street gang member; and (o) such other matters as the parties deem relevant to aid in the decision.

The customary rules of evidence shall not be followed at a hearing on a motion to transfer from county or district court to the juvenile court. See § 29-1816(3)(a). Under § 29-1816(3)(a), after the court considers the evidence in light of the § 43-276(1) factors, the case shall be transferred to juvenile court unless a sound basis exists for retaining the case in county court or district court. See *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018). The burden of proving a sound basis for retention lies with the State. *Id.*

[5] As the Nebraska Supreme Court has explained, "In order to retain the proceedings, the court need not resolve every statutory factor against the juvenile, and there are no weighted

factors and no prescribed method by which more or less weight is assigned to a specific factor." *Id.* at 582, 909 N.W.2d at 371. It is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile. *Id*.

Leroux argues that the State failed to meet its burden and says that the focus of the district court should have been the "[p]rospects and need for rehabilitation" rather than the presumption that Leroux committed murder. Brief for appellant at 20. Leroux quotes substantially from *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), to explain the physical, mental, and emotional distinctions between juvenile and adult offenders. *Roper* addresses the "lesser culpability" of a juvenile offender and notes that "[w]hether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult." 453 U.S. at 571.

Leroux claims the State did not address the scientific and sociological studies discussed by Dr. Peraino that "prove the differences between adolescent juveniles and adults." Brief for appellant at 21. Leroux also contends the arguments in favor of retaining the case in district court, which are based on alleged community outrage and a need for retribution, should be disregarded.

We disagree with Leroux that the district court's reasons for retaining jurisdiction were based on community outrage and the need for retribution. Although we view some of the transfer factors differently than the district court, as explained later, the district court has the discretion to determine whether certain factors outweigh others, and there are no weighted factors and no prescribed method by which more or less weight is assigned to a specific factor. Instead, all factors must be considered by the court, and after considering all those factors, the court shall transfer the case to juvenile court unless a sound basis exists for retaining it. See § 29-1816(3)(a). In this case, the court

determined a sound basis to retain jurisdiction was supported by the evidence when considering the § 43-276(1) factors. Accordingly, we set forth the court's findings as to each of those factors.

3. Juvenile Transfer Factors

The district court made findings as to each of the 15 factors contained in § 43-276(1), which under § 29-1816(3)(a) "shall be considered" at a hearing. We first summarize the factors the district court concluded favored retaining jurisdiction, followed by the factors which favored transferring the case to juvenile court, and then the remaining factors which were either inapplicable to this case or could not be decided. We also summarize Leroux's and the State's arguments as to these factors.

(a) Factors Favoring Retention in District Court

The district court found four of the factors set forth in § 43-276(1) favored retaining jurisdiction in the district court, namely: (a) the type of treatment Leroux would most likely be amenable to, (b) evidence of violence, (g) consideration of public safety, and (i) whether Leroux's best interests and the security of the public may require that Leroux continue in secure detention or under supervision for a period extending beyond his minority and, if so, the available alternatives best suited to this purpose.

The court concluded that if convicted, Leroux would most likely be amenable to treatment at the NCYF rather than the YRTC. It explained that the NCYF is a male correctional facility designed for youthful offenders adjudicated as adults who range in age from early adolescence to 21 years 10 months. The court found:

> NCYF offers anger management programs, clinical treatment for depression, a high school for individuals under 18 who have not graduated from high school, as well as college classes and various sports programs . . . . NCYF

> is a secured facility. In contrast, YRTC is a non-secured facility which may house juvenile offenders until they reach 19 years of age, at which time the juvenile offender must be released from custody.

The court also expressed concern that according to the juvenile probation officer's testimony, "no person is now or ever has been committed to YRTC for murder" and, further, "[t]he average stay at YRTC is 7 to 9 months, and YRTC has no programs or services for a juvenile adjudged guilty of homicide."

As to evidence of violence, the court stated that there is evidence Leroux fought with the victim several times over several hours prior to the victim's death and that there "is obviously considerable evidence that the alleged offense included violence. . . . [T]he victim . . . sustained six stab wounds, which were penetrating in nature, rather than defensive."

Regarding public safety, the district court said, "[I]n the opinion of the Court, [this is] the most important factor to be evaluated in this case." The court explained that if Leroux was convicted, his minimum sentence for second degree murder would be 20 years' imprisonment coupled with a mandatory consecutive sentence for use of a deadly weapon to commit a felony of at least 1 year's imprisonment. The court concluded, "It is therefore obvious that if [Leroux] is convicted in this case, any sentence will extend well into his adulthood. [Leroux] could not be properly punished for the violent crimes which he allegedly committed, if he were transferred to juvenile court."

The court emphasized this point again when addressing § 43-276(1)'s factor (i), which considers whether secure detention or supervision is needed for a period extending beyond Leroux's minority. The court stated, "[T]he security of the public clearly requires that [Leroux] continue in secure detention for a period greatly extending beyond his minority if he is convicted of one or both of the crimes . . . ." The court observed that the YRTC is the most restrictive facility available to the juvenile court and that the YRTC is not a secure

facility. The NCYF, a secure facility, could hold Leroux until age 21 years 10 months. And the court concluded that "a secured facility is clearly the best available alternative in the event of Leroux's conviction."

(i) Leroux's Argument

We initially note that with regard to amenability to treatment, Leroux focuses on his individual amenability to treatment as opposed to the district court's focus on the facilities and services available to treat Leroux. We discuss this distinction further when later considering whether the court abused its discretion.

Leroux contends rehabilitation rather than punishment is the better course for him given the evidence. As to what treatment Leroux would most likely be amenable to, Leroux relies heavily on Dr. Peraino's testimony, describing the areas of low, moderate, and high risk for Leroux. Leroux points out his "protective factors of 'strong attachment/bonds,' 'strong social support,' 'current commitment to school/work,' and 'positive attitude toward intervention and authority.'" Brief for appellant at 23. "The latter protective factor 'means he accepts help. He's willing to accept help [and] guidance. He will follow the advice of others.'" *Id*. Leroux also notes that Dr. Peraino found him to be very amenable to treatment and thought he would do well in community placement. Leroux further states:

> The record from this hearing shows that [Leroux] is in fact doing well in community placement now: he is engaged in schoolwork online, and spends time at Boys & Girls Clubs, where he participates in age-appropriate activities, receives tutoring and has the support of [Frederick], the Club staff and other children and teens who participate in the Club.

Id. at 24.

Leroux also directs us to the testimony of his Colorado attorney, Stinson, who explained the options for rehabilitation

treatment in Colorado if Leroux was adjudicated in juvenile court in Nebraska.

Leroux acknowledges that "[n]o reasonable person would dispute that the murder of . . . Fratis included violence," but Leroux disputes whether he was "the murderer." *Id*. at 28.

With regard to public safety, Leroux relies on the testimony from Stinson, noting that public safety is served by adjudicating juveniles in a rehabilitation-focused juvenile system rather than in an adult correctional system. Leroux directs us to a 2013 federal study discussed by Stinson, which indicates that "'youth who were prosecuted in the adult system versus the juvenile system were 34% more likely to recidivate if placed into the adult system,'" thus making the community less safe by putting a child into the adult system. *Id.* at 32-33.

Leroux also argues that he had "not been a threat to public safety before the stabbing of . . . Fratis; and he disputes that he is the perpetrator of Fratis' murder." *Id.* at 33. Further, Leroux was released on bond on May 1, 2017, and since then has attended online classes and "resumed participation at the Boys & Girls Clubs, whose staff and other participants know of [Leroux's] charges but are providing a supportive environment for him." *Id*. Leroux points out that Colorado has the ability to obtain orders for "ankle monitors, GPS tracking and other forms of restrictions for offenders" believed to present a risk to public safety. *Id.* However, even after Leroux was charged in this case, no Colorado court, nor Colorado juvenile probation, has requested such restrictions, despite being aware of this case.

Finally, regarding whether Leroux's best interests and the security of the public may require that he continue in secure detention or under supervision for a period extending beyond his minority, Leroux argues that if this subsection was the most compelling factor, "it was incumbent on [the State] to present evidence that [Leroux] could not be rehabilitated before the expiration of juvenile court jurisdiction." *Id.* at 34.

Leroux contends that the evidence shows he is doing well on probation and that no new restrictions have been placed on him. Leroux also submits that there was no evidence presented that Leroux "represents an ongoing threat to the public." *Id*. at 40.

(ii) State's Argument

The State points to Pierce's testimony that the scope of services offered at the NCYF are more substantial than those at the YRTC. As for consideration of Colorado's youth residential facilities, the State says the district court's decision to disregard such services is supported by the record. The State directs us to Pierce's testimony that, hypothetically speaking, in the case of a juvenile from another state who is adjudicated in Nebraska, if more than 90 days of supervision remain, juvenile probation supervision would be transferred to the juvenile's home state. However, "a juvenile from Colorado who was recommended confinement in a juvenile facility would complete that sentence in Nebraska." Brief for appellee at 12. "The record does not suggest that confinement in a secure Colorado facility would be available to be ordered by the juvenile court in Nebraska in connection with this case." *Id*.

Regarding violence, the State contends that "[t]he district court is not asked to evaluate whether there is evidence that *the defendant* committed violence," but, rather, it must consider whether there is evidence that the alleged offense included violence. *Id.* at 13. There was evidence of the stabbing in this case; therefore, the State contends it was appropriate for the court to determine that this offense included violence.

Regarding public safety, the State combines its argument for § 43-276(1)'s factors (g) and (i). The State points out the district court's determination that the YRTC did "not have secure enough facilities or lengthy enough jurisdiction over Leroux to ensure public safety." Brief for appellee at 15. The YRTC is the most restrictive facility available to the juvenile

court, and it is not a secure facility. The State argues it was not an abuse of discretion for the court to determine that "public safety would require a person convicted of the violent crimes in this case to be secured beyond Leroux's minority." *Id*. The State contends that "the factors do not require the district court to speculate upon Leroux's guilt or innocence" and that "this crime was violent and the charges against Leroux are serious." *Id*. at 16.

(b) Factors Favoring Transfer to Juvenile Court

The district court found six of the factors set forth in § 43-276(1) favored transfer to the juvenile court, namely: (d) Leroux's age, (e) Leroux's previous history, (f) Leroux's best interests, (h) Leroux's ability to appreciate the nature and seriousness of his conduct, (l) whether Leroux has been convicted of or has acknowledged unauthorized use or possession of a firearm, and (n) whether Leroux is a criminal street gang member.

The district court noted that Leroux was 15 years old on the date of the charged offenses and was 16 years old at the time of the juvenile transfer hearing. The court further stated that "[t]he alleged victim was 25 years of age at the time of his death" and that "two other adults were living in the residence with two minor children." The court indicated that the adults were charged with child abuse because of the drug activity in the residence, but that no other parties were charged with the homicide.

The court acknowledged that Leroux had "a minimal prior record" and that his only conviction was for a Class II misdemeanor involving obstruction of a police officer. The court did point out that Leroux was presently on probation in Colorado, that the probationary order prohibited Leroux from traveling outside Colorado without permission, and that a violation of that probation was filed based upon the current offenses. Also, Leroux's presence in Nebraska on the date of the offenses

could be considered a violation of his probation, as well as any possession or consumption of alcohol or marijuana. According to the court, "No other criminal convictions or juvenile adjudications were proven by the State."

When considering Leroux's best interests, the court stated, "The best interests of [Leroux] would be served according to Dr. . . . Peraino, a Licensed Clinical Psychologist, by treatment in a juvenile facility, rather than incarceration with adults, where [Leroux] would be subject to negative peer influences." And as for Leroux's ability to appreciate the nature and seriousness of his conduct, the district court acknowledged evidence presented by Dr. Peraino regarding Leroux's IQ, academic testing, and maturity level. The court also considered Dr. Peraino's testimony that the risk of Leroux's reoffending is relatively low, that treatment options should include psychotherapy and medication, and that for a majority of teenagers, punishment should be secondary to treatment.

The district court determined that the State failed to prove that Leroux has been convicted of or has acknowledged unauthorized use or possession of a firearm (§ 43-276(1)'s factor (l)), and there was no evidence that Leroux was a criminal street gang member (§ 43-276(1)'s factor (n)). Neither party disputes the court's findings as to these two factors.

(i) Leroux's Argument

Leroux points out Dr. Peraino's observation that Leroux "is psychologically functioning at a less-than-average level for a 16-year-old . . . with his underdevelopment falling primarily in emotional areas, with a personality style of submission, dependency and conformity." Brief for appellant at 29. Leroux states, "Dr. Peraino found that [Leroux] is not inherently oppositional or unruly, and that he 'remains minimally engaged with others allowing him to avoid taking the initiative,' per his valid scores on normed personality testing." *Id*. Further, Leroux states that he "did not score at elevated risk of anger

and violence compared to other juveniles his age — to the contrary, he scored low-risk on those metrics" and that "evidence was not disputed." *Id*. at 29-30.

Leroux argues that the State presented no evidence to challenge the testimony of Dr. Peraino, Frederick, or Stinson.

As to Leroux's prior history, Leroux acknowledges the prior history as set forth by the district court and points out that the State "presented no evidence that [Leroux] had a history of antisocial behavior; no patterns of physical violence; and his criminal history was neither against the person or relating to property." *Id.* at 31.

As for best interests, Leroux points to Stinson's testimony about Colorado's evidence-based practice resources and interventions to reduce recidivism and provide treatment to a juvenile and Leroux argues Colorado provides "one-on-one trauma-informed care, which is indicated for [him] as he has been exposed to trauma multiple times in his short life." *Id.* Leroux says the State's probation officer witness "could not identify whether [Leroux] would receive trauma-informed care . . . or what programs are actually available for [Leroux] at NCYF." *Id*. Leroux suggests that if he were first ordered to a term at the YRTC in Kearney, he could then be transferred to Colorado where his treatment needs and risk potential would be reassessed, and an appropriate treatment plan would be developed and administered in Colorado.

Leroux directs us to Dr. Peraino's testimony that Leroux's best interests would not be served by correctional placement; rather, Leroux would be vulnerable to learning things that are antisocial in nature, which would not be good for his long-term adult functioning. Also, Dr. Peraino has observed that Leroux has responded well to his current juvenile probation program, which suggests he is responsive to treatment.

As to § 43-276(1)'s factor (h) (ability to appreciate nature and seriousness of conduct), Leroux refers to Dr. Peraino's findings regarding Leroux's subaverage maturity and his

submissive and conforming nature. Leroux also contends that this factor again presumes a defendant's guilt and that the State presented no evidence bearing on this factor.

(ii) State's Argument

The State says there "is no serious dispute" as to § 43-276(1)'s factors (d) (age of juvenile and others involved), (l) (no firearm use or conviction), and (n) (not a gang member). Brief for appellee at 14. As for the remaining factors favoring transfer to the juvenile court, the State acknowledges the district court's findings as to those factors.

(c) Neutral Factors

The district court found four of the factors set forth in § 43-276(1) to be either inapplicable or incapable of being determined at this stage of the proceedings, namely: (c) motivation for the commission of the offense, (j) whether the victim agrees to participate in mediation, (k) whether there is a juvenile pretrial diversion program pursuant to Neb. Rev. Stat. §§ 43-260.02 to 43-260.07 (Reissue 2016), and (m) whether a juvenile court order has been issued for the juvenile pursuant to Neb. Rev. Stat. § 43-2,106.03 (Reissue 2016). Factor (m) is relevant when after a disposition under Neb. Rev. Stat. § 43-247(1), (2), (3)(b), or (4) (Reissue 2016), the court enters an order, after an evidentiary hearing, finding the juvenile is not amenable to rehabilitative services provided under the Nebraska Juvenile Code; such an order may be considered in a future juvenile transfer motion. Neither party disputes the court's conclusion that factors (j), (k), and (m) are inapplicable to the present case.

As to § 43-276(1)'s factor (c), the motivation for the commission of the offense, the district court stated:

> The motivation for the commission of the offense is inconclusive at this point. [Leroux] and the victim [were] allegedly consuming alcohol and using Marijuana, and fought on several occasions during the early morning

> hours of March 28, 2017. No other motive was proven during the hearing held on October 18, 2017.

(i) Leroux's Argument

With regard to the motivation factor, Leroux contends, "This is a factor that presumes that [Leroux] is guilty." Brief for appellant at 28. Leroux claims that Nebraska appellate courts have not "answered whether guilt may be presumed for the purposes of disposition of a motion to transfer jurisdiction to juvenile court." *Id*. Further, the State presented no evidence of any theories related to motivation. Although Garcia and Derrera said Leroux and Fratis were fighting, "there was no explanation of what the reason for the fight was" and there are "documented histories of violence with Fratis" involving Derrera, and possibly Garcia. *Id*.

(ii) State's Argument

The State acknowledges that the district court concluded the motivation for the commission of the offenses is inconclusive.

(d) Other Matters Relevant to Aid Decision

Factor (o) is the final consideration set forth in § 43-276(1), and it provides for "such other matters as the parties deem relevant to aid in the decision." For this factor, the district court stated it was disregarding all evidence of rehabilitative services in Colorado because, whether Leroux was committed by the juvenile court to the YRTC or sentenced to confinement at the NCYF, there was no evidence that the State would seek or agree to transfer Leroux to Colorado.

Under this factor, Leroux asks this court to consider the evidence presented thus far:

> [T]wo adults, cousins to each other who have two children together, have accused of murder their much younger third cousin who was in Nebraska only because they brought him here. . . . The female adult left the crime scene without summoning help for her "brother"/cousin

> who was exsanguinating on the floor, although she did take the time to throw the knife in the sink, perhaps rinse the knife and collect her marijuana and drug paraphernalia as well as taking the presumably greater time to gather her two small children before leaving the house. . . . The male adult, who has a documented history of violence involving the deceased . . . , also did not call 911, nor did he take his "brother"/cousin to the hospital himself. . . . Both adult cousins lied repeatedly to law enforcement in the course of multiple interviews. . . . A convenience store video image of [Leroux] just minutes after the murder shows him in a white T-shirt with no blood anywhere on him.

Brief for appellant at 36-37.

4. Was Denial of Transfer Abuse of Discretion?

The district court found four of the § 43-276(1) factors favored retaining jurisdiction in the district court, namely: (a) the type of treatment Leroux would most likely be amenable to, (b) evidence of violence, (g) consideration of public safety, and (i) whether Leroux's best interests and the security of the public may require that Leroux continue in secure detention or under supervision for a period extending beyond his minority and, if so, the available alternatives best suited to this purpose. There were six factors favoring transfer to the juvenile court, namely: (d) Leroux's age, (e) Leroux's lack of previous history, (f) Leroux's best interests, (h) Leroux's ability to appreciate the nature and seriousness of his conduct, (l) no past conviction of or unauthorized use or possession of a firearm; and (n) Leroux is not a gang member. There were three factors that were not applicable (mediation, pretrial diversion, and prior juvenile disposition order finding juvenile not amenable to rehabilitation services). The factor regarding motivation for the commission of the offense could not be determined at this stage of the proceedings.

With regard to the four § 43-276(1) factors upon which the district court based its decision to retain the case, no one disputes the violent nature of the offenses charged. However, we view the evidence from a slightly different perspective than the district court as to two other factors: (a) amenability to treatment and (g) public safety. With regard to Leroux's amenability to treatment, as mentioned earlier, Leroux points to evidence focusing on his individual amenability to treatment as opposed to the district court's focusing on the facilities and services available to treat Leroux. While it was reasonable for the district court to consider the treatment options available at the NCYF as compared to the YRTC, we think it is also important to take into consideration Leroux's individual amenability to treatment. In that regard, the evidence from Dr. Peraino established that Leroux has strong bonds with his family, has strong social support, and is currently committed to school and work. Importantly, Dr. Peraino stated that Leroux "has a positive attitude towards intervention," which "means he accepts help. He's willing to accept help. He's willing to accept guidance. He will follow the advice of others." He agreed these are influential areas that help to reduce the risk of recidivism. Dr. Peraino also stated that if Leroux received appropriate treatment, his prognosis in terms of psychological development "would be great." The evidence certainly supports that Leroux is amenable to treatment. That said, we cannot say the district court abused its discretion in determining that Leroux's best option for such treatment would be at the NCYF rather than the YRTC.

With regard to public safety, the district court said that "in the opinion of the Court, [this is] the most important factor to be evaluated in this case." The explanation given by the court was that if Leroux is convicted, the minimum sentence for second degree murder would be 20 years (plus the consecutive sentence on the deadly weapon charge), and so if convicted, any sentence would extend well into Leroux's adulthood. Also, the court stated that Leroux could not be properly punished

for the violent crimes which he allegedly committed if he was transferred to juvenile court. Based on this explanation, it appears the district court approached the public safety factor from a sentencing and punitive perspective, rather than considering whether Leroux posed a threat to public safety. We see the public safety factor as encompassing whether the record supports that Leroux is likely to be a danger to the public if his proceedings were transferred to the juvenile court for his custody and treatment. Considering the record from that perspective, there was no apparent public safety issue at the time the court entered its order denying transfer on October 27, 2017. By that time, Leroux had not been in custody since May 1. A bond of $1 million, "Ten Percent Allowed," was set on April 11, and on May 1, the 10 percent was posted and Leroux signed a waiver of extradition consenting to return to Nebraska to answer to the charges pending against him. In its October 27 order denying transfer, the district court observed, "There is no suggestion that [Leroux] has committed any criminal offenses while out on bond, and he has appeared for all scheduled hearings." The court then proceeded to reduce Leroux's bond to "$50,000 cash."

Leroux points out that since his May 1, 2017, release on bond, he has attended online classes, has "resumed participation at the Boys & Girls Clubs, whose staff and other participants know of [Leroux's] charges but are providing a supportive environment for him." Brief for appellant at 33. There was no evidence of any trouble with Leroux from the time of his release on bond to the time of the juvenile transfer hearing. Further, Dr. Peraino testified that Leroux scored "fairly low on being forceful, being dominating, being aggressive," and "relatively low on risk for reoffense," and Frederick described Leroux as a "[v]ery normal, very average, just a normal 15-year-old." The Boys & Girls Club was aware of Leroux's charges, and Frederick was not aware of any problems with the staff or other children as a result. Leroux has continued to go to the club where he does his homework and "hangs out in

the peace and quiet of the teen room where there is always lots to do." Clearly, Leroux was not a present threat to the public based on this record, and we construe the court's reasoning on public safety as related more to having sufficient time to rehabilitate Leroux so that upon his ultimate release, there would be no danger to the public. Notably, public safety is closely tied to the final factor which the court found supported retaining the case, as discussed next.

Section 43-276(1)(i) requires the court to consider "whether the best interests of the juvenile and the security of the public may require that the juvenile continue in secure detention or under supervision for a period extending beyond his or her minority and, if so, the available alternatives best suited to this purpose." The district court stated, "[T]he security of the public clearly requires that [Leroux] continue in secure detention for a period greatly extending beyond his minority if he is convicted of one or both of the crimes." The court observed that the YRTC is the most restrictive facility available to the juvenile court and that the YRTC is not a secure facility. On the other hand, the court noted that the NCYF, a secure facility, could hold Leroux until age 21 years 10 months. And the court concluded that "a secured facility is clearly the best available alternative in the event of [Leroux's] conviction."

Summarized, when weighing public safety, it is evident that the district court was not convinced that Leroux could be rehabilitated within the limited time the juvenile court would retain jurisdiction. Therefore, the district court determined that the best alternative available to provide Leroux's treatment would be in a secured facility for the necessary amount of time to ensure the public's safety, and such a facility would only be available if the case was retained in the district court. And as noted earlier, in order to retain the proceedings, the court need not resolve every statutory factor against the juvenile, and there are no weighted factors and no prescribed method by which more or less weight is assigned to a specific factor. *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018). Rather,

it is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile. *Id*. In this case, the district court concluded, "after balancing all of the factors and findings," that the safety of the public required confining Leroux beyond the age of 19 if he is convicted and that, therefore, a "sound basis thus exists for retaining [the] case."

Leroux argues that the State did not meet its burden and that 2017 legislative changes "reflect a growing sense by our state senators, reflective of an evolved national understanding, that absent competent evidence that a juvenile is a sociopathic monster, our calling is to identify problems and treat those problems." Brief for appellant at 41. "Our calling is to recognize that a 15-year-old boy with a minimal criminal history and exposure to trauma has many years ahead of him, and is at a critical fork in his road." *Id*. Leroux acknowledges that "[n]ot every juvenile charged with murder may belong in juvenile court — but this is a case in which a decision to transfer jurisdiction is supportable and is, simply, the right thing to do." *Id*. at 42. Further, Leroux correctly points out that § 43-276 does not prevent transfer of homicide charges to juvenile court.

Leroux asks this court to consider four cases in which the Nebraska Supreme Court affirmed each district court's denial of a request to transfer the case to juvenile court. Leroux argues he "is not comparable" to the defendants in those cases. Brief for appellant at 40. We briefly summarize the cases noted by Leroux: *State v. McCracken*, 260 Neb. 234, 240, 615 N.W.2d 902, 911 (2000) (13-year-old defendant convicted of first degree murder after he retrieved and loaded handgun from his mother's bedroom, then shot her twice in head while she slept on sofa; evidence showed defendant had "'persistent preoccupation with morbid content, with death and violence,'" and he was described as "'time bomb waiting to explode'"), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002); *State v. Mantich*, 249

Neb. 311, 317, 543 N.W.2d 181, 187 (1996) (juvenile defendant convicted of first degree murder and use of firearm to commit felony; victim was kidnapped, robbed, and terrorized at gunpoint before being shot in head; defendant admitted pulling trigger and being "a big shot"; and defendant was 16 years old at time of crimes as stated in *State v. Mantich*, 287 Neb. 320, 842 N.W.2d 716 (2014)); *State v. Reynolds*, 247 Neb. 608, 529 N.W.2d 64 (1995) (16-year-old defendant was on parole from YRTC when he attempted to steal car, and when trying to escape, threatened owner with screwdriver; defendant previously served in juvenile detention facility, and his history indicated he did not respond to rehabilitation efforts); and *State v. Garza*, 241 Neb. 934, 492 N.W.2d 32 (1992) (16-year-old defendant sexually assaulted and murdered 17-year-old girl, who he knew from school, in home where she was babysitting, and brutality of crimes evidenced by numerous injuries to victim, including hemorrhages around her neck caused by electrical cord wrapped around it; injuries caused by vaginal and anal penetration; bruises on her back, shoulder, and hip; traumatic laceration on her head; deep blunt injury between her eyebrows and upper portion of her nose; blackened eye; and large, gaping laceration on her right wrist down to bone).

Leroux claims that in each of these cases, there were four factors in common: each defendant was known to be a violent and aggressive offender, each defendant had needs beyond that of the juvenile justice system, each defendant was a repeat offender, and each defendant had exhausted the services of the juvenile justice system. Leroux argues that these same factors are not supported by the evidence in this record and that Leroux "is not comparable" to those defendants. Brief for appellant at 40.

Leroux is correct that there are distinguishing factors in the cited cases when compared to the circumstances present here. Although the factual record relevant to the crimes in this case has not yet been fully developed due to our appellate review

now being conducted at this interlocutory stage rather than at the conclusion of the proceedings, the record nevertheless does present considerable evidence regarding Leroux. We know that Leroux does not have a history of being a violent and aggressive offender, nor can he be characterized as a repeat offender. Other than his misdemeanor offense and the circumstances underlying this case, Leroux has no criminal history or other history of violent behavior. Leroux has been responsive to services made available to him through the Boys & Girls Club, and he has participated and behaved appropriately there. He also appears to have complied with his juvenile probation terms, other than for issues related to the present charges.

These characteristics do set Leroux apart from the defendants in the cases noted above, and they certainly support transferring Leroux's case to the juvenile court. If Leroux's history, best interests, ability to appreciate the nature and seriousness of his conduct, and his amenability to treatment were the only factors prescribed by statute, it would have been an abuse of discretion to not transfer the case. However, even though these factors may distinguish Leroux from the cases he directs us to, there are other factors to be considered.

Some of the other factors the district court had to consider in this case are also present in the cases cited by Leroux. Most notably, there are similarities with regard to the severity of the offense charged, the perceived threat to the public's safety, and the concern that rehabilitation could not be completed before the defendant would reach the age of majority and the juvenile court would no longer have jurisdiction. We note that while the factors favoring transfer in this case center on the individual characteristics of Leroux and his ability to be rehabilitated, the factors favoring retention focus more on the severity of the offense and the rehabilitative and/or punitive options available to keep the public secure while the juvenile is being rehabilitated. In some of the cases summarized above, neither the personal characteristics of the defendant nor the

available options for the protection of the public supported transferring the case to juvenile court.

For example, in *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000) (13-year-old defendant shot mother in head while she was sleeping), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002), the key factors noted for retaining jurisdiction in the district court included the violent and aggressive nature of the act perpetrated against a person and the obvious threat to the public from the defendant. The Nebraska Supreme Court stated:

> In spite of [the defendant's] youthful age at the time of the crime, the extreme violence perpetrated upon the victim and the protection of the public in light of [the defendant's] poor psychiatric prognosis lead us to conclude that the district court did not abuse its discretion when it denied [the defendant's] motion to transfer to the juvenile court.

State v. McCracken, 260 Neb. at 249, 615 N.W.2d at 916-17.

While the defendant in *McCracken* had a poor psychiatric prognosis, Leroux's psychiatric prognosis is certainly more positive. Dr. Peraino testified that if Leroux received appropriate treatment, his prognosis in terms of psychological development "would be great." *McCracken* would suggest that a poor psychiatric prognosis combined with an extremely violent crime and concerns about the safety of the public can tip the balance toward keeping the case in adult court and that doing so does not constitute an abuse of discretion.

In the other cases summarized above, the focus appears to have been more on the severity of the offense and the lack of juvenile facility options which would be capable of safely housing and rehabilitating a juvenile who has committed such an offense. In other words, the courts express concern about the lack of an appropriate facility where the juvenile can be securely detained while receiving necessary services and treatment, and further, the courts express concern for the public's safety in the event that treatment is not completed by the

time the juvenile system would lose jurisdiction. For example, in *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996) (juvenile defendant; victim kidnapped, robbed, and terrorized at gunpoint, then shot in head), the district court found that the offense included violence and was performed in a highly aggressive manner; further, the defendant had previously been involved with the police for property offenses, and there were no juvenile facilities appropriate for treatment and rehabilitation of a juvenile who had committed murder. The security of the public required that the defendant be incarcerated for a period extending beyond his minority, "which would render the juvenile system inadequate to address these needs." *Id.* at 319, 543 N.W.2d at 189.

These were the same concerns the district court had in the present case. The other two cases cited by Leroux similarly focus on the limitations of the juvenile justice system to address the needs of those particular defendants when weighed against the safety of the public.

In addition to the cases pointed out by Leroux, this court has reviewed several other cases in which a request to transfer to juvenile court was denied by the trial court and affirmed on appeal. In *State v. Stevens*, 290 Neb. 460, 860 N.W.2d 717 (2015), a 15-year-old defendant and accomplices struck the victim in the face with a gun and took her vehicle and cell phone. The defendant was previously adjudicated at age 13 and failed to take advantage of many opportunities for treatment options. The crime was committed in an aggressive and premeditated manner, and the defendant had gang involvement and a history of violence. It was determined that custody or supervision would be needed beyond his minority.

In *State v. Dominguez*, 290 Neb. 477, 860 N.W.2d 732 (2015), the 15-year-old defendant was involved in the same crime as the defendant in *State v. Stevens, supra*. This defendant had been in secure detention at least four times, had run away three times, had escaped from the YRTC, and was previously adjudicated for two assaults and various criminal

mischief violations. He identified with a gang, and the offense was committed in an aggressive and premeditated manner. Further, the defendant demonstrated an unwillingness to participate in programming in juvenile court over a 3-year span.

In *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009), a 14-year-old defendant fired shots which killed a 6-year-old child sitting in a car. The shooting stemmed from the defendant's earlier confrontation with a woman who the defendant then shot at later, but at least two shots fired by the defendant entered the rear window of the car, striking and killing the child. The defendant was previously in juvenile court by age 11 for third degree arson, and again for disorderly conduct. The defendant had a history of behavior problems at home and in school, used marijuana daily and alcohol periodically, and after weapons-related charges, the defendant was placed in a group home for therapy and chemical dependency counseling but failed to return twice after weekend passes and then ran away. The defendant's caseworker testified that the defendant was unfriendly, very rude, and disrespectful and that the defendant blamed the caseworker for the fatal shooting. It was concluded the defendant could not be rehabilitated before reaching age 19. The defendant claimed the State failed to present evidence he was not amenable to further treatment through the juvenile court. However, the violent nature of the crime, the defendant's previous history of violent and aggressive behavior, and the defendant's failure to respond positively to corrective treatment, all supported retaining jurisdiction in the district court.

In *State v. Jones*, 274 Neb. 271, 739 N.W.2d 193 (2007), a nearly 17-year-old defendant, along with others, attacked and fatally stabbed the victim 69 times. Although the defendant was not as culpable as his accomplices, he was involved in the planning and commission of the crime. There was concern whether, given the severity of the crime, there were appropriate juvenile services available, plus there was limited time before the juvenile court would cease to have jurisdiction.

In *State v. Johnson*, 242 Neb. 924, 497 N.W.2d 28 (1993), a 15-year-old defendant fatally shot a man and was convicted of first degree murder and use of a firearm to commit a felony. The severity of the crime and the public's security weighed against transfer. Also of concern was the fact that the juvenile court could only retain jurisdiction until age 19 and would be ill-suited to effectively rehabilitate the defendant.

In *State v. Doyle*, 237 Neb. 60, 464 N.W.2d 779 (1991), a 15-year-old defendant and a coperpetrator burglarized a pawn shop, taking guns and ammunition. They subsequently stole a van and went to a shopping mall where the coperpetrator pointed a loaded gun at the victim in an attempt to rob her of her vehicle. The district court failed to set forth specific findings when it denied the transfer, so the cause was remanded for the court to make its findings. When the case returned in *State v. Doyle*, 237 Neb. 944, 468 N.W.2d 594 (1991), the denial of the transfer was affirmed. The primary concerns in that case included the following: the ability to rehabilitate the defendant by age 19, the defendant's failure to observe terms of a prior juvenile probation order, the defendant was on probation for burglary when he engaged in further unlawful conduct, the motivation for the charged offense was to use violence and unlawful conduct for enrichment of the defendant, and the facilities for treatment and rehabilitation were better available if the case was kept in the district court.

In another case that also had to be remanded for specific findings, a denial of a juvenile transfer request was affirmed when it returned after remand in *State v. Phinney*, 236 Neb. 76, 459 N.W.2d 200 (1990). In that case, a 15-year-old defendant committed a "premeditated act of violence which resulted in the death of his mother." *Id.* at 82, 459 N.W.2d at 204. There was evidence that the defendant's social skills were "fairly primitive," the defendant had "character problems" that would require therapy, and it was possible "retraining" could not be accomplished before the defendant turned 19. *Id*. at 79, 459 N.W.2d at 202. The defendant had no prior criminal history, but

there was no evidence that the defendant could be "retrained" and "cured" by the time he was 19. *Id*. at 80, 459 N.W.2d at 203. The Nebraska Supreme Court pointed out that although there was testimony that the defendant could be successfully treated at a youth center in Kearney and could be released back into society without posing a danger to society, it also noted the evidence that it was possible the defendant might still have problems after turning 19. The Supreme Court stated, "The district court apparently was not convinced that defendant could be rehabilitated within the time the juvenile court would retain jurisdiction over him and was concerned about defendant's premeditated act of violence which resulted in the death of his mother." *Id*. at 82, 459 N.W.2d at 204.

The Nebraska Supreme Court recently released a decision involving the denial of a juvenile transfer request. In *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018), a 15-year-old defendant was charged in district court with attempted second degree murder, robbery, attempted robbery, and three counts of using a deadly weapon (firearm) to commit a felony, all arising from two armed robberies which took place in March 2016 in Omaha, Nebraska. The defendant had previously committed armed robberies when he was 14 years old, and he was ultimately returned to his mother's home in December 2015. He was ordered to wear an electronic monitoring device and to abide by certain conditions; he was also ordered to participate in counseling and gang prevention services. Despite these efforts, the defendant committed the March 2016 robberies.

The defendant's evidence at the transfer hearing in *Hunt* included testimony from the defendant's juvenile probation officer, who claimed that the defendant had been "respectful, patient, open, and honest with her." 299 Neb. at 577, 909 N.W.2d at 368. The probation officer said the defendant was a member of a gang in Omaha and would benefit from a structured rehabilitative environment. However, the defendant "was rejected by both Boys Town and Omaha Home for Boys

primarily due to the serious nature of his [earlier] charges." *Id.* The defendant and his family received numerous services, including family support, gang intervention, therapy, and electronic monitoring. The defendant was ordered to attend school and therapy, but within a few weeks he was suspended from school for fighting, began missing curfew, cut off his electronic monitoring device, and used marijuana. The probation officer testified that the secure youth detention facility in Kearney could not reject the defendant and offered therapy and services directed to youth which the probation officer believed would benefit the defendant. The probation officer did note that therapy and other services were also available in adult prisons.

[6] The Nebraska Supreme Court observed that the district court found that the defendant's current and prior offenses were extremely violent and aggressive and were committed in a premeditated manner. The defendant was charged with crimes of violence involving guns, and "his crimes exhibited sophistication and maturity." *Id.* at 578, 909 N.W.2d at 369. The defendant was a gang member, and although he might be amenable to treatment, "there were no guarantees 'or even reasonable assurances' that [the defendant] would be accepted into a group home setting given this was his second episode of seriously violent offenses within a 9-month period." *Id*. The district court had concluded that without detention and rehabilitative treatment, the defendant presented a serious risk to the community, and further, that it was in the defendant's best interests to be continued in secure detention. After weighing the statutory factors, the district court concluded there was a sound basis for retaining jurisdiction over the case. The Supreme Court affirmed, noting that "[w]hen a district court's basis for retaining jurisdiction over a juvenile is supported by appropriate evidence, it cannot be said that the court abused its discretion in refusing to transfer the case to juvenile court." *State v. Hunt*, 299 Neb. 573, 583, 909 N.W.2d 263, 372 (2018).

The theme evident in the cases discussed above is this: When a juvenile commits a violent crime, the trial court is not likely to grant a request to transfer to the juvenile court because (1) the juvenile court will lose jurisdiction when the defendant turns 19 years of age which may not allow sufficient time for the complete rehabilitation of the juvenile, and therefore retention is necessary to ensure public safety, and (2) there is no secure youth detention facility available which can safely provide the appropriate services and treatment for a juvenile who has committed a more serious offense. This means that a trial court must balance a juvenile's amenability to complete rehabilitation by age 19 against the public's safety in the event that rehabilitation fails or requires more time than anticipated. The trial court's decision carries the consequence that if the decision is wrongly made, we have either missed an opportunity to rehabilitate a juvenile outside the negative influences of adult incarceration or failed to adequately incarcerate a potentially dangerous juvenile who will go on to commit further violent crimes. As exemplified in Dr. Peraino's testimony, if Leroux received appropriate treatment, his prognosis in terms of psychological development "would be great." Whereas, if he was put into a correctional setting, "given our discussion previously about his vulnerability, submissiveness, dependency, . . . he would be vulnerable to learning things that are antisocial in nature. And that would not be good for his long-term adult functioning."

While in some of the cases discussed above, the aggressive, violent, or premeditated nature of the offense, combined with the mental health or historic behaviors of the juvenile, was such that it was clear that the services, facility options, and age limit of the juvenile system could not safely house and rehabilitate the juvenile before the juvenile court would lose jurisdiction. In the instant case, it is less clear. Although the district court found many of the statutory factors favored transferring Leroux to the juvenile court, the court weighed more heavily its concerns for public safety, namely, that the time left to

treat Leroux under the juvenile court's jurisdiction would not be sufficient and the security and services at the YRTC would not be adequate for someone convicted of more serious crimes, such as the ones at issue here.

The State agrees with the district court's focus on the serious nature of the crimes and the limited timeframe in which to treat Leroux if under the juvenile court's jurisdiction. The State acknowledges that although Leroux "made a significant factual record at the transfer hearing," the "weighing [of] those facts is the province of the trial court." Brief for appellee at 16. The State points out that Leroux is alleged to have violently and fatally stabbed the victim six times, and at age 16, Leroux "will only remain in the jurisdiction of the Nebraska juvenile court system for 2.5 years." *Id.* at 17. Because the YRTC is not secure and can house offenders for only a limited period of time and because the NCYF has more extensive programming available for offenders, the State contends the district court did not abuse its discretion in retaining jurisdiction over the case.

There is no question that Leroux presented the district court, and thus, this court, with a very well-considered and thorough record to review an extremely difficult issue. That Leroux "is at a critical fork in his road" no doubt weighed heavily on the trial court, as it does this court. See brief for appellant at 41. In our review of the record, we can certainly agree with Leroux that there was evidence supporting his request to transfer the case to juvenile court, and perhaps even enough to tip the scale more toward granting his transfer request. On the other hand, we can also agree with the State that the record supports the district court's decision to retain jurisdiction. And unless the evidence fails to support the district court's decision, then, as we noted at the onset of this opinion, we are constrained by our standard of review. Therefore, since the district court's basis for retaining jurisdiction over Leroux is supported by appropriate evidence, it cannot be said that the court abused its discretion in refusing

to transfer the case to juvenile court. See *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

VI. CONCLUSION

For the foregoing reasons, we affirm the district court's order denying Leroux's request to transfer the case to the juvenile court.

Affirmed.

State of Nebraska, appellee, v. Kevin W. Malone, appellant.

917 N.W.2d 164

Filed July 24, 2018. No. A-17-726.

1. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction for 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.
2. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
3. **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.
4. **Pleadings: Directed Verdict.** A motion for judgment of acquittal is simply another name for a motion for directed verdict of acquittal.
5. **Directed Verdict: Waiver.** Where a defendant makes a motion for a directed verdict at the end of the State's case, whether ruled upon or not, and the defendant thereafter presents evidence, the defendant has waived any error in connection with the motion for directed verdict made at the end of the State's case.
6. **Criminal Law: Pleadings: Directed Verdict.** A motion for judgment of acquittal is a criminal defendant's request, at the close of the government's case or the close of all evidence, to be acquitted because there is no legally sufficient evidentiary basis on which a reasonable jury could return a guilty verdict.

7. **Motions to Dismiss: Directed Verdict.** A motion to dismiss at the close of all the evidence has the same legal effect as a motion for directed verdict.
8. **Pleadings: Motions to Dismiss: Directed Verdict.** Whether styled as a motion for judgment of acquittal, motion for directed verdict, or motion to dismiss, these motions all have the same effect when used to challenge the sufficiency of the State's evidence at the conclusion of the State's case or the conclusion of the evidence.
9. **Witnesses: Juries: Appeal and Error.** The credibility and weight of witness testimony are for the jury to determine, and witness credibility is not to be reassessed on appellate review.
10. **Convictions: Appeal and Error.** In determining whether the evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented to the jury, which are within the jury's province for disposition.
11. **Criminal Law: Motor Vehicles: Words and Phrases.** Recklessness, for purposes of Neb. Rev. Stat. § 60-6,213 (Reissue 2010), has been defined as the disregard for or indifference to the safety of another or for the consequences of one's act.
12. **Sentences.** When imposing a sentence, the sentencing court should customarily 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 violence involved in the commission of the offense. However, the sentencing court is not limited to any mathematically applied set of factors.
13. ____. 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.

Appeal from the District Court for Douglas County: Shelly R. Stratman, Judge. Affirmed.

William F. McGinn, of McGinn, Springer & Noethe, P.L.C., for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Pirtle, Riedmann, and Bishop, Judges.

Pirtle, Judge.

INTRODUCTION

Kevin W. Malone appeals his convictions and sentences for motor vehicle homicide and manslaughter in the district court for Douglas County. He argues that the evidence was insufficient to support guilty verdicts on the charges and that his sentences are excessive. Based on the reasons that follow, we affirm.

BACKGROUND

On March 10, 2017, Malone was charged by an amended information with count 1, motor vehicle homicide, a Class II felony; count 2, manslaughter, a Class IIA felony; count 3, leaving the scene of a personal injury accident resulting in serious bodily injury or death, a Class III felony; and count 4, driving without an ignition interlock device, a Class I misdemeanor. The charges arose from a traffic accident in which Malone's car collided with Justin Hart's motorcycle, resulting in Hart's death. Malone pled not guilty to all four charges.

A jury trial began on May 1, 2017. The evidence at trial was as follows: On August 31, 2016, at approximately 7:25 p.m., Malone was traveling eastbound on West Center Road in Omaha, Nebraska, in a black Nissan 350Z sports car when he pulled into the left-hand turn lane to turn north onto 140th Street. The traffic light controlling Malone's lane displayed a red arrow, which meant Malone was not allowed to turn. Hart was traveling westbound on West Center Road and had a green traffic light. With his light still red, Malone pulled into the nearest westbound lane of West Center Road to turn left, just as Hart was approaching the intersection on his motorcycle. Hart applied his brakes and tried to "lay his bike down" to avoid the collision but was unsuccessful. Hart collided with the rear passenger's side of Malone's car and was ultimately separated from his motorcycle. Hart landed face down on the road, approximately 6 feet from Malone's car, and Hart's motorcycle landed in the median between the eastbound lanes

and the left-hand turn lane. Hart sustained massive internal injuries during the collision and was declared dead after he arrived at a hospital. His cause of death was "blunt trauma to the head, chest, and abdomen."

The accident was witnessed by several individuals, some of whom attempted to render aid to Hart. An off-duty paramedic and an individual who was a respiratory therapist began administering CPR. The off-duty paramedic observed blood coming out of Hart's mouth with each compression, and he was unable to find a pulse.

As the two individuals were administering CPR to Hart, Malone exited his car and walked over to their location. He knelt down next to Hart's body and started to perform "mouth-to-mouth," which struck the off-duty paramedic as odd, given the amount of blood coming from Hart's mouth. Both the off-duty paramedic and the respiratory therapist told Malone to stop, but he did it a second time. Malone then wiped off his mouth, slowly stood up, and walked away.

By this time, several people had called the 911 emergency dispatch service, and both fire department and police department employees were on their way to the scene. In addition, several witnesses, including Karla Villatoro, were trying to identify the driver of the Nissan. As Villatoro was looking for identification inside the Nissan, Malone walked around the rear of the Nissan and picked up some car parts off the ground and placed them in the back seat of the car. Villatoro asked Malone if the car belonged to him, and he replied that it did. Malone then got into the driver's seat, and Villatoro asked him what he was doing. Malone told her he was going to move his car out of the way. Villatoro instructed Malone to move his car to a certain place and to stay there.

Malone fumbled with his keys as he placed them in the ignition. After he started the car, he began to move it while holding the driver's side door open with his arm and his foot hanging out of the car. Malone drove a short distance and stopped briefly, but then started driving again and left

the scene of the accident. Malone's car was smoking as he drove away.

Officer Stephen Venteicher of the Omaha Police Department arrived on the scene moments later, and several people told him that the driver of the car involved in the collision "just took off." Venteicher made contact with Villatoro, who described the car and told him the direction Malone was headed. Venteicher activated his emergency lights and initiated a pursuit.

After Venteicher began his pursuit, he saw a white cloud of smoke dissipating in the air. He followed the trail of smoke, which led him into a residential neighborhood. He soon observed that the Nissan was in front of him and that it was swerving as it drove down the road. Venteicher activated his sirens, in addition to the emergency lights which had already been activated. Malone slowed down and stayed to the right but did not stop. Venteicher then pulled up next to the driver's side door and "screamed" at Malone to pull over and stop. Malone did not appear startled, but, rather, rolled his head slowly to the left toward Venteicher and then slowly back to the right before finally bringing his car to a stop.

Venteicher parked next to the Nissan, and Malone immediately said, "I just thought it would be best if I got my car home." Venteicher removed Malone from the car, placed him face down on the ground, and handcuffed him. When Venteicher requested identification, Malone said his license was in his wallet. Venteicher retrieved Malone's wallet and identified him by an ignition interlock permit. Notably, there was no ignition interlock device installed on the Nissan. Venteicher also discovered that the license plates on the Nissan were expired. Venteicher then advised dispatch that he had the suspect in custody.

While Malone was still lying on the ground, he repeatedly stated, "[H]e just came out of nowhere. I tried to help, but I just thought it would be best to get my car home." Venteicher helped Malone to his feet and noticed that he had blood on his

hands, his shirt, and his chin. As Malone explained that the blood belonged to the motorcycle driver, Venteicher detected a faint odor of alcohol on Malone's breath and noticed his eyes were watery and his speech was mumbled. Venteicher, who had been a police officer for 25 years and had conducted more than 1,000 driving under the influence (DUI) investigations, suspected Malone may be impaired and decided to begin a DUI investigation. Venteicher asked Malone if he had been drinking, and Malone admitted that he had consumed two beers earlier in the day.

Following some preliminary questions, Venteicher administered a series of field sobriety tests to Malone. Malone was able to correctly recite the alphabet when asked, but his speech was mumbled. Malone showed signs of impairment on the remaining tests. Specifically, four out of six clues or indicators on the horizontal gaze nystagmus (HGN) indicated impairment, Malone was unable to count backward from 92 to 78, he was unable to touch his nose with his fingertip, six of eight clues on the nine-step walk-and-turn indicated impairment, and Malone failed to follow instructions on the "Romberg" balance test. In addition, Venteicher noted Malone was swaying slightly during both the finger-to-nose test and the balance test. Based on his observations, Venteicher concluded Malone was impaired to the extent that he could not safely operate a motor vehicle.

Shortly after Venteicher finished administering the field sobriety tests to Malone, Officer Matthew Kelly, of the Omaha Police Department, arrived. Like Venteicher, Kelly had conducted more than 1,000 DUI investigations during his 25-year career as a police officer. In addition, he was a certified drug recognition expert (DRE) and had conducted approximately 150 DRE examinations. After speaking to Venteicher, Kelly made contact with Malone. Kelly asked Malone if he had taken any drugs, and Malone stated he was taking a prescription drug called Celexa. He also admitted that he had consumed two beers earlier in the day.

Kelly administered the HGN test to Malone and observed the same four clues as Venteicher, which suggested to Kelly that Malone could be under the influence of a central nervous system depressant (CNSD), an inhalant, or a dissociative anesthetic. Kelly decided to transport Malone to Douglas County Corrections to conduct a DRE examination.

Upon arrival at Douglas County Corrections, Malone agreed to submit to the DRE examination and provide a urine sample. He also submitted to a chemical breath test, which showed he did not have any alcohol in his system. Kelly again questioned Malone about any prescription drugs he was taking. Malone stated he was taking Celexa, as well as medications for high blood pressure and depression.

Kelly then began the 12-step DRE examination. Malone displayed several signs indicative of impairment, including the same four out of six clues on the HGN that he had seen when Malone did the test earlier, lack of convergence (i.e., he was unable to cross his eyes), four out of eight clues on the walk-and-turn test, two out of four clues on the one-leg stand, and an inability to accurately touch his nose with his fingertip (missing three out of six attempts). Malone did not show any signs of impairment on the balance test. Malone's blood pressure and pulse rates were also elevated, and his pupils were dilated. His muscle tone appeared normal.

Based on Malone's driving behavior and his performance during the DRE examination, Kelly concluded that Malone was under the influence of a CNSD and cannabis and that he was impaired to an extent he was unable to safely operate a motor vehicle. Kelly stated that Malone's driving behavior that indicated impairment included the following: his claim that his light was green, which was not possible based on the cycle of the light; the fact that Malone left the scene to get his car home; and Malone's actions at the scene. The indicators from the field sobriety tests that led Kelly to conclude that Malone was under the influence of a CNSD were Malone's HGN test results, his lack of convergence, and his performance on the divided

attention tests (walk-and-turn, one-leg stand, and finger-to-nose test). The indicators for cannabis included Malone's lack of convergence, dilated pupils, and elevated blood pressure and pulse rates. Kelly also noted that some antidepressants can elevate a person's pulse rate and cause dilated pupils.

At the conclusion of the DRE examination, Kelly collected a urine sample from Malone and sent it to the Nebraska State Patrol crime laboratory for testing. Malone's urine tested positive for four different CNSD's, but negative for cannabinoids. The CNSD's present in Malone's urine were zolpidem (also known as Ambien), diphenhydramine (also known as Benadryl), clonazepam (also known as Klonopin), and citalopram (also known as Celexa). When asked about the absence of cannabinoids in Malone's urine, Kelly again explained that some antidepressants can cause elevated pulse rates and blood pressure, as well as dilated pupils, similar to the effects of cannabinoids. In addition, Kelly testified that the presence of multiple drugs in a person's system can have an "additive effect," meaning the drugs can interact in ways that enhance impairment. In this case, Malone had four CNSD's in his urine and admitted to drinking alcohol, which is also a CNSD.

At the close of the State's evidence, Malone made a motion for judgment of acquittal, alleging the State had not made a prima facie case against him. The trial court denied the motion.

Malone testified in his own defense. He admitted that the accident was his fault but denied that he was impaired when he was driving. He questioned the accuracy of Venteicher's and Kelly's testimony about his performance on the field sobriety tests. Malone also testified that after the accident, he tried to help Hart by doing mouth-to-mouth resuscitation. He also testified that when he got back in his car after the accident, he was just going to move it out of the way, but then he panicked and drove off.

Malone stated that he had another vehicle at his home equipped with an ignition interlock device, which device he

was required to have in order to drive. He testified that on the day of the accident, he was driving the Nissan because he was taking it to a carwash to have it cleaned so he could try to sell it.

Malone offered into evidence the labels from his prescriptions for zolpidem, citalopram, and clonazepam, all of which carried the same warning: "May cause drowsiness. Alcohol may intensify this effect. Use care when operating a vehicle, vessel (e.g., boat), or machinery."

Malone also offered the testimony of a professor of pathology, who testified that urine testing alone cannot prove that a drug is present in a person's bloodstream or in what amount. He explained that the amount of drugs in a person's urine does not have a correlation to the amount of drugs in the bloodstream. He also testified that the presence of a drug in urine does not prove that the drug caused the person to be impaired. He acknowledged on cross-examination that field sobriety tests and DRE examinations are valid methods for determining whether a person is impaired by drugs.

At the conclusion of all the evidence, Malone again made a motion for judgment of acquittal, which motion the trial court denied. The case was submitted to the jury, and it returned verdicts of guilty on all four counts. The district court accepted the jury's verdicts and adjudged Malone guilty of the offenses.

Malone's sentencing hearing was held on June 28, 2017. The State offered a certified copy of Malone's conviction for DUI, third offense, into evidence. The district court found the conviction valid for enhancement purposes, making Malone's conviction for motor vehicle homicide a Class II felony.

The district court then sentenced Malone to 40 to 50 years' imprisonment on count 1, 20 to 20 years' imprisonment on count 2, 4 years' imprisonment on count 3, and 1 year's imprisonment on count 4. The district court ordered the sentences to run concurrently and also revoked Malone's driver's license for 15 years.

ASSIGNMENTS OF ERROR

Malone assigns, restated, that the trial court erred in (1) denying his motion for directed verdict at the conclusion of the State's evidence and failing to grant a judgment of acquittal at the close of his case on counts 1 and 2 and (2) imposing excessive sentences.

STANDARD OF REVIEW

[1] In reviewing a criminal conviction for 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. Mora*, 298 Neb. 185, 903 N.W.2d 244 (2017).

[2,3] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Dyer*, 298 Neb. 82, 902 N.W.2d 687 (2017). 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.*

ANALYSIS

Motion for Directed Verdict and Judgment of Acquittal.

[4] Malone assigns that the trial court erred in overruling his motion for directed verdict at the conclusion of the State's evidence and failing to grant a judgment of acquittal at the close of all the evidence on counts 1 and 2. At the close of the State's evidence, Malone motioned for a judgment of acquittal, rather than a directed verdict, as he refers to in his assignment of error. However, a motion for judgment of

acquittal is simply another name for a motion for directed verdict of acquittal. *State v. Combs*, 297 Neb. 422, 900 N.W.2d 473 (2017).

[5-8] Malone has waived error in relation to the ruling on a directed verdict by presenting evidence after his motion. See *State v. Burke*, 23 Neb. App. 750, 756, 876 N.W.2d 922, 928 (2016), citing *State v. Rodriguez*, 6 Neb. App. 67, 569 N.W.2d 686 (1997) ("'where a defendant makes a motion for a directed verdict at the end of the State's case, whether ruled upon or not, and the defendant thereafter presents evidence, the defendant has waived any error in connection with the motion for directed verdict made at the end of the State's case'"). However, Malone may proceed on his failure to grant a judgment of acquittal at the close of all the evidence assignment of error, as that is essentially a sufficiency of the evidence argument. A motion for judgment of acquittal is "'[a] criminal defendant's request, at the close of the government's case or the close of all evidence, to be acquitted because there is no legally sufficient evidentiary basis on which a reasonable jury could return a guilty verdict.'" *State v. Combs*, 297 Neb. at 429, 900 N.W.2d at 480, quoting Black's Law Dictionary 1170 (10th ed. 2014). As previously stated, a motion for judgment of acquittal is simply another name for a motion for directed verdict of acquittal. *Id.* And a motion to dismiss at the close of all the evidence has the same legal effect as a motion for directed verdict. *Id.* Thus, whether styled as a motion for judgment of acquittal, motion for directed verdict, or motion to dismiss, these motions all have the same effect when used to challenge the sufficiency of the State's evidence at the conclusion of the State's case or the conclusion of the evidence. *Id.*

Malone first argues that the evidence was insufficient to convict him of motor vehicle homicide. A person commits motor vehicle homicide when he or she causes the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska

or in violation of any city or village ordinance. Neb. Rev. Stat. § 28-306(1) (Reissue 2016). Pursuant to § 28-306(3)(c), if the proximate cause of the death of another is the operation of a motor vehicle in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2010) (operating motor vehicle while under influence of alcoholic liquor or drugs) or Neb. Rev. Stat. § 60-6,197.06 (Cum. Supp. 2016) (operating motor vehicle during revocation period), motor vehicle homicide is a Class II felony if the defendant has a prior conviction for a violation of § 60-6,196 or § 60-6,197.06.

[9,10] The State had to prove that Malone was engaged in the operation of a motor vehicle while under the influence of alcoholic liquor or drugs and that his operation of the motor vehicle while under the influence of alcoholic liquor or drugs was the proximate cause of Hart's death. Malone argues that the evidence was insufficient to show that he was under the influence of alcohol or drugs at the time of the collision. He contends that the testimony of Venteicher and Kelly was inconsistent and unreliable, or in other words, that their testimony was not credible. However, it is well established that the credibility and weight of witness testimony are for the jury to determine, and witness credibility is not to be reassessed on appellate review. *State v. France*, 279 Neb. 49, 776 N.W.2d 510 (2009). Moreover, in determining whether the evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented to the jury, which are within the jury's province for disposition. *State v. Hudson*, 268 Neb. 151, 680 N.W.2d 603 (2004).

Venteicher and Kelly were both experienced police officers, and they individually administered field sobriety tests to Malone. They both observed multiple signs indicative of impairment, and both concluded Malone was impaired.

After Venteicher stopped Malone and removed him from his car, Venteicher suspected that Malone may be impaired

because there was a faint odor of alcohol on his breath, his eyes were watery, and his speech was mumbled. After Malone admitted he had consumed two beers earlier in the day, Venteicher administered a series of field sobriety tests to Malone. Malone correctly recited the alphabet, although his speech was mumbled, but showed signs of impairment on the remaining tests. Malone was also swaying slightly during two of the tests. Venteicher concluded Malone was impaired to an extent that he could not safely operate a motor vehicle.

Kelly, a certified DRE, made contact with Malone after Venteicher conducted his field sobriety tests. Malone told Kelly he was taking a prescription drug called Celexa and admitted to consuming two beers earlier in the day. Kelly administered the HGN, and he observed the same four clues of impairment that Venteicher had observed, which suggested to him that Malone could be under the influence of a CNSD, an inhalant, or one of the "dissociative anesthetics."

Kelly subsequently conducted a full DRE examination and had Malone provide a urine sample. When asked about prescription medication, Malone stated he was taking medication for high blood pressure, as well as Celexa and another antidepressant. During the DRE examination, Malone showed several signs indicative of impairment. His blood pressure and pulse rate were also elevated and his pupils were dilated. Based on Malone's driving behavior and his performance during the DRE examination, Kelly concluded that Malone was under the influence of a CNSD and cannabis and that Malone was unable to safely operate a motor vehicle.

Malone's urine sample tested positive for four CNSD's, but negative for cannabinoids. Kelly explained that some antidepressants can cause symptoms similar to those caused by cannabinoids. He also testified multiple drugs in a person's system can have an "additive effect," thereby enhancing impairment.

Malone's own witness, the professor of pathology, acknowledged on cross-examination that field sobriety tests and DRE

examinations are valid methods for determining whether a person is impaired by drugs.

The testimony of Venteicher and Kelly, as well as Malone's behavior after the accident, was sufficient evidence to support a finding that Malone was under the influence of drugs at the time of the collision with Hart. We conclude the evidence was sufficient to support Malone's conviction for motor vehicle homicide.

Malone also argues that the evidence was insufficient to convict him of manslaughter. "A person commits manslaughter if he or she . . . causes the death of another unintentionally while in the commission of an unlawful act." Neb. Rev. Stat. § 28-305 (Reissue 2016). The alleged unlawful act was reckless driving. Malone contends that the evidence failed to show that he recklessly operated a motor vehicle.

[11] Reckless driving occurs when any person drives a motor vehicle in such a manner as to indicate an indifferent or wanton disregard of the safety of persons or property. See Neb. Rev. Stat. § 60-6,213 (Reissue 2010). Recklessness, for purposes of § 60-6,213, has been defined as the disregard for or indifference to the safety of another or for the consequences of one's act. See *State v. Green*, 238 Neb. 475, 471 N.W.2d 402 (1991).

Malone argues that the evidence fails to show that he acted with disregard or indifference for the safety of others. He contends that he was not speeding, not driving erratically, and did not "blow through" the traffic signal. Brief for appellant at 12. Rather, the evidence showed that he had stopped at the intersection and "slowly inched his vehicle into the intersection looking for an opportunity to turn." *Id.* Malone acknowledged that he violated a traffic law by turning left when the traffic light for his lane was red, but stated that he mistakenly "thought he had the green light to turn and was observing the traditional right of way rule." *Id.*

Malone drove his car while impaired by his medication, and he disregarded a red light—turning into oncoming traffic

and causing a collision resulting in Hart's death. However, the evidence also established that Malone chose to drive a motor vehicle which he was not authorized to drive because it was not equipped with an ignition interlock device. He had another vehicle at his home equipped with an ignition interlock device. He also disregarded the warning labels on his prescription medications, all of which warned that they may cause drowsiness, that alcohol may intensify the effect, and that care must be taken when operating a motor vehicle. We conclude that the evidence was sufficient for the jury to conclude that Malone's conduct was "reckless," and thereby sufficient to support his conviction for manslaughter.

Excessive Sentences.

Malone next argues that his sentences for counts 1 and 2 are excessive. The court sentenced Malone to 40 to 50 years' imprisonment for the motor vehicle homicide conviction and 20 to 20 years' imprisonment for the manslaughter conviction, with the sentences to run concurrently. Motor vehicle homicide is a Class II felony, punishable by a maximum sentence of 50 years' imprisonment and a minimum sentence of 1 year's imprisonment. § 28-306(3)(c); Neb. Rev. Stat. § 28-105 (Reissue 2016). Manslaughter is a Class IIA felony, punishable by a maximum of 20 years' imprisonment, with no minimum sentence. § 28-305; § 28-105. The sentences imposed by the district court were within the statutory limits. An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Dyer*, 298 Neb. 82, 902 N.W.2d 687 (2017).

Malone argues that the court abused its discretion in sentencing because it had a personal bias against him. At the sentencing hearing, the court discussed that it had previously sentenced Malone to probation for DUI, third offense. The court stated that the presentence investigation at that time did not include all the specifics of Malone's prior DUI's and that if it had, the court would have likely sentenced him differently.

The court stated that the presentence investigation before it in this case included all the specifics of his past crimes. The court further addressed Malone's past behavior and his continuous effort to make excuses for himself rather than taking responsibility for his actions.

[12,13] When imposing a sentence, the sentencing court should customarily 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 violence involved in the commission of the offense. However, the sentencing court is not limited to any mathematically applied set of factors. *State v. Mora*, 298 Neb. 185, 903 N.W.2d 244 (2017). 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.*

Although the court discussed Malone's past criminal history and behavior at sentencing, it did not take anything inappropriate into consideration nor does that record indicate any bias against Malone that affected sentencing. The court stated that it had reviewed the presentence investigation and that it had considered the above-mentioned factors. We conclude that the trial court did not abuse its discretion in the sentences it imposed for the motor vehicle homicide and manslaughter convictions.

CONCLUSION

We conclude that there was sufficient evidence to support guilty verdicts on the charges of motor vehicle homicide and manslaughter and that the sentences for these convictions are not excessive. Accordingly, the judgment of the district court is affirmed.

Affirmed.

Deena M. Cook, appellee, v.
Joshua J. Cook, appellant.
918 N.W.2d 1

Filed July 31, 2018. No. A-17-480.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In a marital dissolution action, an appellate court reviews the case 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 custody, child support, division of property, alimony, and attorney fees.
2. **Evidence: Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists if 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.
4. **Child Custody: Visitation: Courts.** A trial court has an independent responsibility to determine questions of custody and visitation of minor children according to their best interests, which responsibility cannot be controlled by an agreement or stipulation of the parties.
5. **Divorce: Child Custody: Evidence.** If the court disapproves of a custody stipulation, it must give the parties an opportunity to present evidence relevant to a complete reexamination of the question of custody.
6. **Divorce: Child Custody.** Personal observations by the court are not sufficient to support an award of custody in a dissolution proceeding in the absence of evidence establishing the best interests of the child.
7. ____: ____. A court is required to review a parenting plan and determine if it meets the requirements of the Parenting Act and if it is in the best interests of the minor child or children.

8. ____: ____. If a parenting plan lacks any of the elements required by the Parenting Act or is not in the child's best interests, the court shall modify and approve the parenting plan as modified, reject the parenting plan and order the parties to develop a new parenting plan, or reject the parenting plan and create a parenting plan that meets all the required elements and is in the best interests of the child.
9. ____: ____. If a court rejects a stipulated parenting plan, it must provide written findings as to why the parenting plan is not in the best interests of the child.
10. **Divorce: Property Division.** Equitable division of property is a three-step process: (1) classify the parties' property as marital or nonmarital, setting aside the nonmarital property to the party who brought that property to the marriage; (2) value the marital assets and marital liabilities of the parties; and (3) calculate and divide the net marital estate between the parties in accordance with the principles contained in Neb. Rev. Stat. § 42-365 (Reissue 2016).
11. ____: ____. All property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to this general rule.
12. **Antenuptial Agreements: Property Division.** A premarital agreement allows prospective spouses to avoid the application of the general rule that all property accumulated and acquired by either spouse during marriage is part of the marital estate.
13. **Antenuptial Agreements: Proof.** The party opposing enforcement of a premarital agreement has the burden of proving that the agreement is not enforceable.
14. **Antenuptial Agreements.** Nebraska's Uniform Premarital Agreement Act broadly allows prospective spouses to protect their interests during a marriage and in contemplation of a divorce through a premarital agreement.
15. **Antenuptial Agreements: Property Division.** Nebraska's Uniform Premarital Agreement Act specifically allows prospective spouses to create premarital agreements providing that property acquired by each of the parties during the marriage, which by definition includes income separately earned, is to be his or her separate property.
16. **Property Division.** A marital debt is one incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties.

Appeal from the District Court for Custer County: Karin L. Noakes, Judge. Affirmed in part as modified, and in part reversed and remanded for further proceedings.

Nathan T. Bruner, of Bruner Frank, L.L.C., for appellant.

Michael S. Borders, of Borders Law Office, for appellee.

Moore, Chief Judge, and Arterburn and Welch, Judges.

Moore, Chief Judge.

I. INTRODUCTION

The marriage of Deena M. Cook and Joshua J. Cook was dissolved by a decree of the district court for Custer County. Before the marriage, Joshua and Deena signed a premarital agreement that provided for separate ownership of their present or future property. They also submitted a stipulated parenting plan that provided the parties would share joint final say in certain parenting decisions regarding their children. The district court found certain agricultural assets and a joint operating debt to be part of the marital estate. The court also altered the stipulated parenting plan, giving Deena final decisionmaking authority over the children. On appeal, Joshua challenges these findings as contrary to the respective agreements. For the foregoing reasons, we affirm in part as modified and in part reverse, and remand for further proceedings.

II. BACKGROUND

Before Joshua and Deena were married on September 5, 2009, they signed a premarital agreement that defined and valued both parties' premarital property. The attached schedules to the premarital agreement show that Joshua owned real estate, pickup trucks, a horse, a "[t]racker," a stock trailer, a saddle, and guns and that he had real estate debt. Joshua's amortization schedules also included two cows. Deena's schedule showed that she owned a vehicle and a gun collection and that she had a vehicle loan. The agreement also included the following provision:

> **3. SEPARATE OWNERSHIP OF PROPERTIES**
>
> It is understood and agreed by each of the parties hereto that each party will retain full and complete

> ownership of all real and personal property that they now own, and shall retain full and complete ownership of all property which shall come into their possession as the result of each party's work and labor, investments, inheritance or otherwise. No property now owned or hereinafter acquired by either party shall be considered marital or jointly owned property unless said property is specifically transferred into a joint or survivorship account by mutual consent of the parties. Each party shall continue to manage and operate their own investments and business interests, and the other party shall take no action which would be detrimental to the business or investments of the other, and shall make no claim of a right to use, or inherit said property, whether now owned or hereinafter acquired. Each party agrees to execute any documents necessary to allow the other to conduct their business affairs, so long as the execution of such documents do [sic] not adversely impact the party being asked to sign such document. If either party desires to sell, transfer or otherwise convey his or her separate property, the other shall join in the deed of conveyance or other instrument as may be necessary to make the same effectual.

On August 19, 2015, Deena filed a complaint for dissolution of marriage. Joshua filed an answer and countercomplaint for dissolution of marriage, requesting, among other things, that the court divide the parties' assets in compliance with their premarital agreement. The parties filed a stipulated parenting plan on January 5, 2017, which plan provided that Deena would have physical custody of the parties' two minor children, subject to Joshua's parenting time. In the plan, Joshua and Deena agreed to share joint legal custody of the children and to share joint final say in the choices regarding the children's education, religious upbringing, and medical needs.

Trial was held on February 28, 2017. The court admitted the parties' stipulated parenting plan into evidence. Neither Joshua

nor Deena presented evidence concerning custody, parenting time, decisionmaking, or the ability of the parties to communicate on issues pertaining to the children. The parties did present evidence, however, about the enforceability and interpretation of their premarital agreement. Although Deena initially argued the premarital agreement was unenforceable, she eventually stipulated at trial to its validity and enforceability. Still, Deena argued that the agreement did not apply to various property, including a house, a "40 × 40 [b]uilding," and agricultural assets Joshua used to produce income.

The parties submitted a joint property statement to the court, which listed the parties' assets and debts, each party's estimation of the value of each asset or debt, and each party's claim regarding whether the asset or debt was separate or marital property. The listed assets relevant to this appeal were a cow, item G1; corn, item G2; "[c]ash [r]ent," item G3; and 30 head of yearling steers, item G4. Deena valued item G1 at $900, item G2 at $35,000, item G3 at $4,225, and item G4 at $45,000 based on the values assigned to them in a balance sheet prepared for Bruning State Bank in 2015. Joshua listed no values for these items, instead claiming them as his separate property. Also listed on the joint property statement as item I1 was a secured debt from the Bank of Broken Bow, which each party claimed to be marital and valued at $27,000. At trial, Joshua and Deena stipulated that this debt corresponds to the corn, item G2.

A loan officer at the Broken Bow branch of Bruning State Bank, also known as Bank of Broken Bow, testified that Joshua and Deena have an operating loan with his bank. The court admitted into evidence the loan note, which both Joshua and Deena signed. The operating loan is a line of credit that Joshua uses to fund his agricultural operation. To maintain the loan, the bank required Joshua and Deena to file a balance sheet of their assets and debts each year. The balance sheets contained property belonging to both Joshua and Deena. Although the loan officer had not researched the values the parties assigned

to equipment or real estate in the balance sheet, he verified the values assigned to corn, feed, and cattle using local market prices. The court admitted into evidence two of those balance sheets, the first dated July 6, 2015, and the second dated June 24, 2014. Deena's signature appeared on the June 2014 balance sheet but not on the July 2015 balance sheet. The loan officer indicated the discrepancy was a clerical error. The court also admitted the transaction history for this line of credit into evidence, which showed the loan had an outstanding balance of $27,000 at the time Deena filed for divorce.

Deena testified about the extent and value of the property she claimed to be marital, specifically stating that items G1 through G4 were not included by name in the premarital agreement. She noted that item G4, the 30 head of yearling steers, must have been purchased during the marriage because they were not listed on Bruning State Bank's June 2014 balance sheet. Deena admitted that, consistent with their premarital agreement, she and Joshua kept their finances separate during their marriage, having separate bank accounts, vehicles, and, with some exceptions, debts. At the time of trial, Deena had been employed for 5 years and was earning an annual salary of $40,100. Deena's employment provides health and dental insurance for the family, as well as a retirement account. Deena deposited her earnings into her separate bank account.

Joshua testified that he farms, ranches, and drives a truck for a living and that he custom farms corn and raises cattle on leased ground. Joshua further testified that he attempts to sell the corn and cattle at the high points of their respective markets, although each year's corn crop and yearling steers are grown or raised and sold in the same year. He subleases some of his rental land, but does not charge his sublessees more for the land than he pays to rent it. Joshua's 2015 tax return does not reflect any rental income, and he could not explain the $4,225 in cash rent shown as an asset on Bruning State Bank's July 2015 balance sheet. The balance sheet includes cash rent of $6,500 as a current liability. Joshua uses

his separate bank accounts for his farming, ranching, and trucking operations. The court admitted bank statements for Joshua's separate accounts into evidence, which demonstrate that Joshua deposited the income from his various operations into those accounts.

At the conclusion of evidence, the trial court expressed the following concerns with the premarital agreement:

> I'm just going to point out to the parties my concern with the language in the Prenuptial Agreement in section three where it says, shall retain full and complete ownership of all property which shall come into their possession as the result of each party's work and labor. You know, typically I've upheld prenuptial agreements where it is income-produced [sic] on premarital property that remains separate. But, this appears as though it's too broad to be allowed. The result of each party's work and labor typically goes into a marital estate . . . . So, anyway, that wording concerns me that that may not be equitable.

The court filed the decree in April 2017. The decree recited that the parties submitted a stipulated parenting plan, which the court found to be fair, reasonable, and in the best interests of the minor children. The court awarded the parties joint legal custody of the children and awarded Deena the primary care, custody, and control of the children subject to the parenting plan. The court then stated:

> The parenting plan (Exhibit 24) is approved and ordered **EXCEPT that the mother shall have the final say in decisions regarding the children upon which the parties cannot agree**. The court does not approve the portion of the plan under the Parenting Responsibilities and Cooperation section that states the parents shall have the "joint final say in the choices regarding the children's education, religious upbringing and medical needs" and the parties are not ordered to comply with that provision. The parties are ordered to comply with the remaining terms of the parenting plan.

The decree further acknowledged that the parties stipulated to the premarital agreement's validity and enforceability. It explained, "The findings and orders hereinafter made incorporate such stipulations insofar as they go, and the Court determines the other issues upon the evidence presented." The court found various property and debts to be nonmarital or separate property under the premarital agreement. The court awarded to Deena as her separate property two bank accounts, a life insurance policy, and a retirement account. And to Joshua as his separate property, the court awarded a 2006 Chevy Silverado pickup, a 2006 Kawasaki, a residence in Custer County, a "40 × 40 [b]uilding," a life insurance policy, and three investment accounts. The court found the mortgage on the residence to be Joshua's nonmarital debt under the premarital agreement. But the court included the property disputed here—items G1, G2, G3, G4, and the debt, item I1—in the marital estate. The court awarded assets to Deena valued at $12,622 and did not assign her any marital debt. The court awarded assets to Joshua, including those presently disputed, with a total value of $137,733, and assigned him the $27,000 operating debt, resulting in a net marital estate of $110,733. To equalize the marital estate, the court awarded Deena a judgment of $49,056.

Joshua appeals.

III. ASSIGNMENTS OF ERROR

Joshua assigns, restated, that the district court erred in (1) modifying the parties' stipulation contained in the joint parenting plan to give Deena final decisionmaking authority over the children and (2) including items G1, G2, G3, G4, and I1 in the marital estate.

IV. STANDARD OF REVIEW

[1-3] In a marital dissolution action, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.

Becher v. Becher, 299 Neb. 206, 908 N.W.2d 12 (2018). This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees. *Id.* In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. *Connolly v. Connolly*, 299 Neb. 103, 907 N.W.2d 693 (2018). A judicial abuse of discretion exists if 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*.

V. ANALYSIS

1. Parenting Plan

Joshua assigns the district court erred in giving Deena final decisionmaking authority over the children. He argues that because he and Deena agreed to a parenting plan that awarded them joint decisionmaking authority and presented no evidence beyond the stipulated parenting plan, the court could not alter the parties' parenting plan without an evidentiary hearing. He further argues that the court should have included in the decree factual findings about why Joshua and Deena's stipulated parenting plan was not in the best interests of the children. We agree.

(a) Evidentiary Hearing

Joshua argues that if a court alters a stipulated parenting plan, it must hear evidence concerning the custody arrangement that is in the best interests of the children. He asserts the court erred in altering the plan to award Deena final decisionmaking authority over the children, because the only evidence regarding the parenting plan presented at trial was the testimony of Joshua and Deena that the stipulated parenting plan is in their children's best interests.

[4-6] A trial court has an independent responsibility to determine questions of custody and visitation of minor children according to their best interests, which responsibility cannot be controlled by an agreement or stipulation of the parties. *Becher, supra*. But if the court disapproves of a custody stipulation, it must give the parties an opportunity to present evidence relevant to a complete reexamination of the question of custody. *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007) (citing *Lautenschlager v. Lautenschlager*, 201 Neb. 741, 272 N.W.2d 40 (1978)). Personal observations by the court are not sufficient to support an award of custody in a dissolution proceeding in the absence of evidence establishing the best interests of the child. See *Lautenschlager, supra*.

In *Lautenschlager, supra*, a mother and father agreed by stipulation that the mother should have custody of their child. In the course of the divorce trial, the mother falsely answered a question posed to her. The trial court concluded that because she lied to the court, the mother's character was not conducive for custody. The mother appealed, arguing that the record did not contain sufficient evidence to support the trial court's custody decision. The Nebraska Supreme Court held that when a trial court concludes that a stipulation should not be approved, it must give the parties an opportunity to secure and present evidence relevant to a competent reexamination of the question of custody and the best interests of the child. Because the trial court did not offer that opportunity to the mother, the Nebraska Supreme Court reversed the decree and remanded the custody issue to the trial court for further proceedings.

So too, in *Zahl, supra*, when a mother and father divorced, they each sought sole custody of their child. The parents each submitted evidence to support their claims for sole custody and their different proposed parenting plans. The trial court's dissolution decree did not adopt either party's proposal. Instead, it decreed that the parties would share joint custody, without

discussing the best interests of the child. On appeal, the father challenged the court's ability to enter a joint custody order without allowing the parties to present evidence on that issue. The Nebraska Supreme Court held that under *Lautenschlager, supra*, the trial court was required to give the parties an opportunity to present evidence relevant to a competent reexamination of the question of custody when it disapproved of the plans they submitted.

Here, the parties presented no evidence on child custody other than their testimony that the agreed-upon parenting plan was in their children's best interests. The parties agreed to share joint legal custody of the children. "Joint legal custody" is defined by statute as "mutual authority and responsibility of the parents for making mutual fundamental decisions regarding the child's welfare, including choices regarding education and health." Neb. Rev. Stat. § 43-2922(11) (Reissue 2016). Consistent with this definition, the parties' stipulated parenting plan provided that the parents shall have "the joint final say in the choices regarding the children's education, religious upbringing and medical needs." At no time during the trial did the court inform the parties that it was dissatisfied with this provision. The court offered no opportunity for the parties to present evidence on why they believed the joint final decisionmaking authority to be in the best interests of their children. Under the rule announced in *Lautenschlager* and *Zahl*, the court was required to give the parties due process before altering their stipulated arrangement, and the court's observation of the parties during the dissolution hearing is insufficient to support altering a stipulated parenting plan. See *Lautenschlager, supra*. We find the district court abused its discretion in failing to provide the parties an opportunity to present evidence before altering their stipulated parenting plan as it relates to joint decisionmaking. We, therefore, reverse the portion of the decree granting Deena final decisionmaking authority over the children and remand that issue to the

district court for further proceedings to allow the parties to present evidence on it.

(b) Written Findings Regarding Why Parenting Plan Was Not in Children's Best Interests

Joshua also argues that when the district court chose to reject a portion of the stipulated parenting plan, under Neb. Rev. Stat. § 43-2923(4) (Reissue 2016), the court was required to provide written findings as to why the stipulated parenting plan was not in the best interests of the children.

[7-9] A court is required to review a parenting plan and determine if it meets the requirements of the Parenting Act and if it is in the best interests of the minor child or children. *Becher v. Becher*, 299 Neb. 206, 908 N.W.2d 12 (2018). If the parenting plan lacks any of the elements required by the act or is not in the child's best interests, the court shall modify and approve the parenting plan as modified, reject the parenting plan and order the parties to develop a new parenting plan, or reject the parenting plan and create a parenting plan that meets all the required elements and is in the best interests of the child. *Id.* See, also, Neb. Rev. Stat. § 43-2935(1) (Reissue 2016). But if the court rejects a parenting plan, it must provide written findings as to why the parenting plan is not in the best interests of the child. *Becher, supra.* See, also, § 43-2923(4).

In *Becher, supra*, the dissolution trial was conducted by a referee whose report included recommended findings of fact related to child custody and a proposed parenting plan. The district court modified the referee's proposed parenting plan. On appeal, the Nebraska Supreme Court found that the district court did not abuse its discretion in modifying the proposed parenting plan, because of its independent responsibility to determine custody and parenting time according to the children's best interests. In reaching this conclusion, the court noted that the district court provided written findings of why

the modification to reduce potential conflicts was in the children's best interests.

In the instant case, beyond the district court's statement that it did not approve of the parties sharing joint decisionmaking authority over their children, the dissolution decree provided no written findings explaining why it rejected and modified this provision in the stipulated parenting plan. Under § 43-2923(4), the district court is required to provide such written findings. Because we are reversing the portion of the decree that rejected the decisionmaking provision in the parenting plan and remanding the issue for further proceedings, we need not address this argument further, other than to point out the statutory obligation of the court.

2. Determination of Marital Estate

Joshua assigns that the district court erred in including items G1, G2, G3, G4, and I1 in the marital estate, contrary to the provisions of the premarital agreement. The court enforced the provisions of the premarital agreement with respect to some of the parties' separate property as outlined above. But the court disregarded the premarital agreement with respect to a $900 cow, item G1; $35,000 in corn, item G2; $4,225 in cash rents, item G3; and $45,000 in yearling steers, item G4. Based on this division, it appears the court determined that the premarital agreement applied only to items with a specific title or account name. We disagree with the court's interpretation.

[10] Under Nebraska's divorce statutes, "The purpose of a property division is to distribute the marital assets equitably between the parties." Neb. Rev. Stat. § 42-365 (Reissue 2016). Equitable division of property is a three-step process: (1) classify the parties' property as marital or nonmarital, setting aside the nonmarital property to the party who brought that property to the marriage; (2) value the marital assets and marital liabilities of the parties; and (3) calculate and divide the net marital estate between the parties in accordance

with the principles contained in § 42-365. See *Osantowski v. Osantowski*, 298 Neb. 339, 904 N.W.2d 251 (2017).

[11,12] All property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to this general rule. *Stephens v. Stephens*, 297 Neb. 188, 899 N.W.2d 582 (2017). Thus, income from either party that accumulates during the marriage is a marital asset. *Id*. (citing *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001)). But spouses are able to contract around this general rule using a premarital agreement. See *Strickland v. Omaha Nat. Bank*, 181 Neb. 478, 491, 149 N.W.2d 344, 354 (1967) ("it is the very purpose of an antenuptial contract to exclude the operation of statutory law with respect to the property rights of the parties"), *overruled on other grounds, In re Estate of Stephenson*, 243 Neb. 890, 503 N.W.2d 540 (1993).

[13] Under Nebraska's Uniform Premarital Agreement Act (UPAA), a "[p]remarital agreement" is an agreement between prospective spouses made in contemplation of marriage that is effective upon marriage. Neb. Rev. Stat. § 42-1002(1) (Reissue 2016). The party opposing enforcement of a premarital agreement has the burden of proving that the agreement is not enforceable. *Edwards v. Edwards*, 16 Neb. App. 297, 744 N.W.2d 243 (2008) (citing Neb. Rev. Stat. § 42-1006(1) (Reissue 2016)). Joshua and Deena stipulated that the premarital agreement is valid and enforceable.

[14] The UPAA broadly allows prospective spouses to protect their interests during a marriage and in contemplation of a divorce through a premarital agreement. It provides, in relevant part, as follows:

> (1) Parties to a premarital agreement may contract with respect to:
>
> (a) *The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;*
>
> (b) The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security

> interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
>
> (c) The disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;
>
> (d) The modification or elimination of spousal support;
>
> (e) The making of a will, trust, or other arrangement, to carry out the provisions of the agreement;
>
> (f) The ownership rights in and disposition of the death benefit from a life insurance policy;
>
> (g) The choice of law governing the construction of the agreement; and
>
> (h) Any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

(Emphasis supplied.) Neb. Rev. Stat. § 42-1004 (Reissue 2016). The act defines property as "an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings." § 42-1002(2).

[15] Joshua and Deena's premarital agreement in section 3 specifically provided "each party will retain full and complete ownership of all real and personal property that they now own, and shall retain full and complete ownership of all property which shall come into their possession as the result of each party's work and labor, investments, inheritance or otherwise." Despite the concerns the court voiced at the conclusion of the trial, Nebraska's UPAA specifically allows prospective spouses to create premarital agreements providing that property acquired by each of the parties during the marriage, which by definition includes income separately earned, is to be his or her separate property. See §§ 42-1002(2) and 42-1004(1). Therefore, we find section 3 of Joshua and Deena's premarital agreement to be enforceable under Nebraska's UPAA.

The evidence shows that Joshua acquired items G1, G2, G3, and G4 as the result of his separate farming and ranching

activities and through his individual labor. Joshua placed earnings from the sale of his corn and yearling steers and from subletting land in his separate account. And Joshua and Deena followed the terms of their premarital agreement by keeping their finances separate during marriage. As a result, the cow, corn, yearling steers, and rental income were Joshua's separate property under the premarital agreement.

[16] Both parties labeled item I1, which is a $27,000 debt secured by Joshua's corn, as a marital debt on their joint property statement, and Joshua and Deena owe the debt jointly. A marital debt is one incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties. *McGuire v. McGuire*, 11 Neb. App. 433, 652 N.W.2d 293 (2002). But the record shows that this joint debt was for the benefit of Joshua's separate operations. Joshua and Deena's stipulation at trial connected this debt to Joshua's corn, item G2. Deena presumably executed the loan in compliance with the provision in the premarital agreement to execute any documents necessary to allow Joshua to conduct his business affairs. Thus, also consistent with the agreement, she should not be adversely impacted by signing the loan. And there was no evidence that the parties used Deena's income or money from her separate bank account to make payments on the debt. Because we have determined that the corn is Joshua's separate property pursuant to the premarital agreement, the associated debt likewise should be considered Joshua's separate debt and not included in the marital estate, because the debt is not for the joint benefit of the parties.

We find the district court abused its discretion in including items G1, G2, G3, and G4 in the marital estate. Thus, we modify the decree to exclude those items from the division of the marital estate and to award them to Joshua as his separate property under the premarital agreement. Similarly, we modify the decree to exclude the debt in item I1 from the marital estate and to assign the debt to Joshua as his separate debt under the premarital agreement.

Because we modified the determination of the marital estate, we must recalculate the equalization judgment due to Deena. Neither party has challenged the court's valuation of the marital property, so we use the court's values in calculating the division of the marital estate. The court found Deena's net marital estate to equal $12,622. After removing the disputed assets and debt from the marital estate, Joshua's net marital estate equals $52,608. The difference between the awards is $39,986. To equalize the division, Deena is entitled to a judgment of $19,993. Therefore, we modify the decree to award Deena a judgment in the sum of $19,993, as opposed to $49,056.

VI. CONCLUSION

We find the district court abused its discretion in altering the parties' stipulated parenting plan without affording the parties an opportunity to present evidence on their ability to make joint decisions concerning the children. We reverse the portion of the decree that altered the parenting plan and remand the cause for further proceedings on this issue. We also find the court abused its discretion in including items G1, G2, G3, G4, and I1 in the marital estate. We modify the classification of the marital estate to provide that these items are Joshua's separate, nonmarital property in accordance with the premarital agreement. As a result, we modify the court's equalization judgment against Joshua to $19,993.

Affirmed in part as modified, and in part reversed and remanded for further proceedings.

David Apkan, Special Administrator of the Estate of Musa Gwelo, appellant, v. Life Care Centers of America, Inc., and Consolidated Resources Health Care Fund I, L.P., doing business as Life Care Center at Elkhorn, appellees.

918 N.W.2d 601

Filed August 7, 2018. No. A-17-162.

1. **Appeal and Error.** In the absence of plain error, an appellate court considers only claimed errors that are both assigned and discussed.
2. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **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 that party the benefit of all reasonable inferences deducible from the evidence.
4. **Trial: Expert Witnesses: Appeal and Error.** Generally, an appellate court will reverse a trial court's decision to receive or exclude the otherwise relevant testimony of an expert only when there has been an abuse of discretion.
5. **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.
6. **Summary Judgment: Affidavits.** Supporting affidavits in summary judgment proceedings 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.

7. **Malpractice: Health Care Providers: Statutes.** Because of the statutory difference between skilled nursing facilities and assisted living facilities, they have differing standards of care.
8. **Expert Witnesses.** An expert's opinion is ordinarily admissible if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination.
9. **Negligence: Summary Judgment: Proof.** For the court to grant summary judgment to the defendant in a negligence action, the defendant need only prove that there is no issue of material fact as to one of the elements such that the defendant is entitled to judgment as a matter of law.
10. **Expert Witnesses.** When the character of an alleged injury is subjective rather than objective, a plaintiff must establish the cause and extent of the injury through expert medical testimony.
11. **Negligence: Malpractice: Expert Witnesses.** The common-knowledge exception to the requirement for expert medical testimony applies where the causal link between the defendant's negligence and the plaintiff's injuries is sufficiently obvious to laypersons that a court can infer causation as a matter of law.
12. **Negligence: Proof.** To prevail in any negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and resulting damages.
13. **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.
14. ____: ____. A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.
15. ____: ____. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact that prevents judgment for the moving party.
16. **Trial: Evidence: Proximate Cause.** Speculation and conjecture are not sufficient to establish causation.

Appeal from the District Court for Douglas County: James T. Gleason, Judge. Affirmed.

Richard F. Hitz, of Law Office of Rich Hitz, for appellant.

Mark E. Novotny and Cathy S. Trent-Vilim, of Lamson, Dugan & Murray, L.L.P., for appellees.

Moore, Chief Judge, and Pirtle and Arterburn, Judges.

Moore, Chief Judge.

I. INTRODUCTION

David Apkan, special administrator of the estate of Musa Gwelo, brought an action against Life Care Centers of America, Inc., and Consolidated Resources Health Care Fund I, L.P., doing business as Life Care Center at Elkhorn (collectively Life Care), asserting Life Care's negligence caused Gwelo pain and suffering and led to her subsequent death. Apkan appeals the order of the district court for Douglas County, which granted summary judgment in favor of Life Care. On appeal, Apkan challenges the district court's admission of two affidavits over his objection. He further assigns the district court erred in failing to apply the "common-knowledge exception" to the requirement of expert testimony to prove causation. For the reasons set forth below, we affirm.

II. BACKGROUND

Apkan filed a complaint on June 17, 2014. He alleged that Gwelo was a resident of Life Care's nursing home in Elkhorn, Nebraska, from July 6 to 9, 2012, and that Life Care breached its duty to care for Gwelo, resulting in Gwelo's falling from her bed and suffering injury and in her subsequent death on July 12. The complaint set forth a negligence claim for Gwelo's pain and suffering prior to her death and for her wrongful death.

In its answer, Life Care admitted that Gwelo was its resident during the alleged time period, that it is skilled in the performance of nursing, and that it is properly staffed and licensed by the Department of Health and Human Services as alleged in Apkan's complaint. In all other respects, it denied the allegations of Apkan's complaint.

Life Care filed a motion for summary judgment, alleging that there were no genuine issues of material fact and that it was entitled to judgment as a matter of law. On August 19, 2016, the court heard arguments on the summary judgment motion. In support of its motion, Life Care offered the affidavits of Kirk Sweeney and Dr. Donald R. Frey, which the court received into evidence over Apkan's foundational objection.

Sweeney's affidavit stated that he was the director of Life Care's Elkhorn facility at all times relevant to Apkan's complaint. His affidavit included the following statements: Life Care admitted Gwelo on July 6, 2012, when she was transferred there from a hospital where she had been for several weeks. Gwelo was admitted to Life Care with several medical diagnoses, including multiple myeloma, bacteremia, chronic pain, osteoporosis, thrombocytopenia, anemia, tachycardia, and depressive disorder. Gwelo requested "Do Not Resuscitate" status at the time of her admission and completed the appropriate forms. Around 5 p.m. on July 6, a nurse checked on Gwelo, finding her on the floor on her left side "in a fetal position." Life Care was not aware of anyone who witnessed how Gwelo got from her bed to the floor. On July 9, Gwelo was transported to a cancer center for treatment, was readmitted to the hospital that day, and did not return to Life Care. Gwelo died on July 12. Her death certificate lists multiple myeloma as her immediate cause of death. A copy of her "Do Not Resuscitate" form and her death certificate were attached to Sweeney's affidavit.

Dr. Frey's affidavit and attached curriculum vitae stated that he is a medical doctor specializing in family medicine in Omaha, Nebraska. Frey outlined his educational background, his board certification in family and geriatric medicine, and his special qualifications in the area of geriatric medicine. Frey practices at a medical center and a family healthcare facility. He has written peer-reviewed and non-peer-reviewed articles and books about family and geriatric medicine and has given presentations and radio interviews on the same. Frey's affidavit

included the following statements: Frey has regularly seen and cared for residents, like Gwelo, who reside in assisted living facilities, like Life Care. Based on his education, training, and experience, he is familiar with the generally recognized standard of care for assisted living facilities and healthcare providers working in assisted living facilities. He reviewed Apkan's complaint and "hundreds, if not more than a thousand," pages of medical records related to Gwelo's medical condition and treatment prior to her death.

Gwelo was 51 years old at the time of her death. Her official cause of death was multiple myeloma, a cancer of the blood, with which she was first diagnosed in October 2004. When the hospital discharged Gwelo to Life Care, her medical providers recommended she either be placed in hospice care or be moved to a nursing home. In addition to her multiple myeloma, Gwelo was being treated for a sepsis infection of her "port (used to provide chemotherapy treatments)." She also suffered from pancytopenia, secondary to her multiple myeloma, which required frequent blood transfusions; acute respiratory failure; congestive heart failure; hypokalemia (low potassium); malnutrition; headaches; and various other medical conditions. At the time of her admission to Life Care, Gwelo's prognosis was poor and she appeared extremely weak. Gwelo had no history of falls prior to her admission to Life Care.

In the early evening of July 6, 2012, only hours after her admission to Life Care, a nurse found Gwelo "lying on the floor in a fetal position." But no one reported observing or witnessing how she got from her bed to the floor. The records from Life Care reflect that its staff followed all appropriate precautions regarding falls. In addition, based on a review of the records, "little evidence" suggests Gwelo actually fell out of her bed, other than the allegations in Apkan's complaint. Gwelo suffered from low platelets, which posed a risk of her passing out and falling. Although the hospital noted some bleeding on Gwelo's brain on July 9, her low platelets may

have caused a spontaneous bleed. Based on Dr. Frey's review of the evidence and information in the case, his credentials, and his knowledge of the applicable standard of care, he opined to a reasonable degree of medical certainty that Life Care at all times met the applicable standard of care and that the alleged actions or inactions of Life Care did not cause Gwelo's death, alleged damages, or both.

In response to Life Care's motion, Apkan submitted his own affidavit, which the court received into evidence. Apkan stated he was Gwelo's longtime companion for over 12 years. At 11:48 p.m. on July 6, 2012, a staff member at Life Care contacted him, saying Gwelo had fallen to the floor. The staff member explained that Gwelo was examined after the fall, returned to her bed, and would be monitored for the rest of the night. Apkan immediately drove to Life Care in Elkhorn. When he arrived at Gwelo's room, he found her lying on the floor, motionless, in a soiled nightgown. Apkan looked for help but could find no staff members in the hallway or near Gwelo's room. Apkan lifted Gwelo and placed her on her bed, noticing the bed linens were also soiled with feces and urine. Apkan alerted Life Care's staff to her situation. He returned to Gwelo's room where he waited 30 minutes for a staff member to check on her. The staff member told Apkan that Gwelo was "'all right,'" and Apkan left when he felt Gwelo was safe and asleep.

Apkan returned to Life Care each day until Gwelo left the facility on July 9, 2012. Apkan did not recall nursing staff conducting any medical tests or evaluating Gwelo's thinking or neurological status while he was visiting. During his visits, Gwelo complained of a severe headache, which Life Care's staff acknowledged. They occasionally provided her with pain medication. Apkan was not aware of whether Life Care informed Gwelo's physician of her falls or her subsequent headache complaints. Gwelo had an outpatient appointment on July 9. Upon Gwelo's arrival at the clinic, the nursing staff concluded her condition was not stable, and she was

transferred to a hospital emergency room. At the emergency room, Apkan informed the doctors of Gwelo's falls and headaches. The hospital staff informed him that Gwelo suffered from two subdural hematomas on her brain that were actively bleeding and could not be surgically treated due to her platelet deficiency. Due to the hematomas, her cancer treatments were suspended, and she died on July 12.

The court granted the parties leave to submit briefs and took the matter under advisement. On January 11, 2017, the court entered an order on Life Care's motion for summary judgment. The court found that Dr. Frey's affidavit established that Life Care met the applicable standard of care. The court noted, "Implicit in this is the determination that if the actions of [Life Care] in treating [Gwelo] comported with the applicable standard of care, the actions of [Life Care] could not have been a proximate cause of any damage suffered by [Gwelo]." Because Apkan failed to provide contrary evidence on the issue of causation, the court granted Life Care's motion for summary judgment. The court further found that Apkan could not proceed under the common-knowledge exception to the requirement for expert testimony to prove causation because the evidence did not support a determination that Life Care's conduct was extreme and obvious misconduct. Apkan appeals.

III. ASSIGNMENTS OF ERROR

Apkan assigns, restated, that the district court erred in (1) overruling his objections to Life Care's affidavits in support of summary judgment, (2) finding that Dr. Frey's affidavit provided evidence that Life Care met the applicable standard of care, (3) finding that the common-knowledge exception did not apply, and (4) entering summary judgment in favor of Life Care.

[1] As addressed by Life Care in its appellate brief, Apkan does not specifically argue his assignment of error regarding Sweeney's affidavit. In the absence of plain error, an appellate court considers only claimed errors that are both assigned and

discussed. *Salem Grain Co. v. Consolidated Grain & Barge Co.*, 297 Neb. 682, 900 N.W.2d 909 (2017).

IV. STANDARD OF REVIEW

[2,3] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Oldfield v. Nebraska Machinery Co.*, 296 Neb. 469, 894 N.W.2d 278 (2017). 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 that party the benefit of all reasonable inferences deducible from the evidence. *Walters v. Sporer*, 298 Neb. 536, 905 N.W.2d 70 (2017).

[4,5] Generally, an appellate court will reverse a trial court's decision to receive or exclude the otherwise relevant testimony of an expert only when there has been an abuse of discretion. See *Cohan v. Medical Imaging Consultants*, 297 Neb. 111, 900 N.W.2d 732 (2017). 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. *ACI Worldwide Corp. v. Baldwin Hackett & Meeks*, 296 Neb. 818, 896 N.W.2d 156 (2017).

V. ANALYSIS

In essence, Apkan's appeal assigns that because the court erred in admitting the affidavits of Sweeney and Dr. Frey, it also erred in granting Life Care's motion for summary judgment. As discussed below, the district court properly admitted both affidavits into evidence. While Dr. Frey's expert opinion applied the incorrect standard of care, he also found Life Care's action or inaction did not cause Gwelo's death or damages. As a result, we find that Life Care has made a

prima facie case for summary judgment to which Apkan did not respond with contradictory evidence. More, the cause of Gwelo's death was not obvious to the layperson such that Apkan did not need to support his allegations with expert testimony. Therefore, we affirm the decision of the district court.

1. Affidavit of Sweeney

[6] Apkan assigns as error, but does not argue, that the district court erred in admitting Sweeney's affidavit into evidence. Therefore, we review the court's decision for plain error. See *Salem Grain Co. v. Consolidated Grain & Barge Co., supra*. Under Neb. Rev. Stat. § 25-1334 (Reissue 2016), supporting affidavits in summary judgment proceedings 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. See *Green v. Box Butte General Hosp.*, 284 Neb. 243, 818 N.W.2d 589 (2012).

Life Care submitted Sweeney's affidavit, which stated that he was the director of the Life Care's Elkhorn facility and that his affidavit was based on his personal knowledge. On our review for plain error, we find Sweeney had sufficient personal knowledge, his affidavit set forth facts that would be admissible in evidence, and he was competent to testify to the matters stated in his affidavit. The district court did not abuse its discretion in entering it into evidence.

2. Affidavit of Dr. Frey

Apkan assigns that the district court erred in admitting Dr. Frey's affidavit into evidence. He argues that Dr. Frey's affidavit does not apply the appropriate standard of care in determining whether Life Care was negligent, because his affidavit applies the standard of care for "assisted living facilit[ies]" while the parties agreed that Life Care is a "skilled nursing facility." Apkan argues that because assisted living facilities

and skilled nursing facilities require a different standard of care, Dr. Frey's opinion as to whether Life Care's conduct met the required standard of care is irrelevant. In response, Life Care argues that Dr. Frey's references to the standard of care for assisted living facilities was a scrivener's error that did not affect the standard of care he applied. An examination of the statutory differences between skilled nursing facilities and assisted living facilities is useful to our determination of the appropriate standard of care in this case.

(a) Standards of Care

Under Nebraska law, skilled nursing facilities provide a higher level of care than assisted living facilities. Neb. Rev. Stat. § 71-429 (Reissue 2009) defines a skilled nursing facility as "a facility where medical care, skilled nursing care, rehabilitation, or related services and associated treatment are provided for a period of more than twenty-four consecutive hours to persons residing at such facility who are ill, injured, or disabled." The Nebraska Nursing Home Act regulates these facilities. See Neb. Rev. Stat. §§ 71-6008 to 71-6037 (Reissue 2009). With some exceptions, skilled nursing facilities must maintain a licensed registered nurse for at least 8 consecutive hours every day and must always have a licensed registered nurse or licensed practical nurse on duty. § 71-6018.01(1). The Nebraska Nursing Home Act does not place restrictions on the types of patients a skilled nursing facility may admit based on their needs.

By contrast, Neb. Rev. Stat. § 71-5904 (Reissue 2009), at the time relevant to this appeal, intended assisted living facilities to promote "resident self-direction and participation in decisions which emphasize independence, individuality, privacy, dignity, and residential surroundings." According to Neb. Rev. Stat. § 71-5905 (Reissue 2009), assisted living facilities are unable to admit certain patients based on the level of care they require and, at the time relevant to this appeal, provided:

> (1) An assisted-living facility shall not admit or retain a resident who requires complex nursing interventions or whose condition is not stable or predictable unless:
>
> . . . .
>
> (b) The resident or his or her authorized representative agrees to arrange for the care of the resident through appropriate private duty personnel, a licensed home health agency, or a licensed hospice[.]

[7] Based on the statutory differences between skilled nursing facilities and assisted living facilities, we conclude they have differing standards of care. Dr. Frey applied the standard of care for assisted living facilities rather than the standard of care for skilled nursing facilities such as Life Care. We cannot dismiss Dr. Frey's assessment of Life Care based on the standard of care applicable to assisted living facilities as a mere scrivener's error. Even if, as Life Care alleges, Dr. Frey's curriculum vitae demonstrates that he was qualified to provide an expert opinion as to the standard of care for skilled nursing facilities, his failure to explicitly do so makes his opinion as to whether Life Care met the applicable standard of care irrelevant. See *Green v. Box Butte General Hosp.*, 284 Neb. 243, 818 N.W.2d 589 (2012).

But Dr. Frey also opined in his affidavit that the alleged actions or inactions of Life Care did not cause Gwelo's death or alleged damages. We find the district court properly admitted the portions of the affidavit describing the element of causation, which we discuss below.

(b) Causation

Regardless of the relevance of Dr. Frey's affidavit as to the standard of care, it provides uncontroverted evidence that Life Care's actions or inactions did not cause Gwelo's death or alleged damages. Because Dr. Frey's affidavit and curriculum vitae establish his credentials to evaluate cause of injuries and death, we find the district court did not err in finding sufficient foundation for the affidavit under § 25-1334 and admitting it into evidence.

[8] An expert's opinion is ordinarily admissible under Neb. Rev. Stat. § 27-702 (Reissue 2016) if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination. *ACI Worldwide Corp. v. Baldwin Hackett & Meeks*, 296 Neb. 818, 896 N.W.2d 156 (2017). Dr. Frey's affidavit clearly establishes his credentials that qualify him as an expert. In it, Dr. Frey stated his opinion about the cause of Gwelo's death and damages and set forth the basis for that opinion.

Apkan insists the district court should have disregarded Dr. Frey's entire expert opinion based on his application of the inappropriate standard of care. He bases this argument on *Green v. Box Butte General Hosp., supra*. In *Green*, a rural hospital admitted a paraplegic patient who, during his unassisted attempt to move from his wheelchair to a shower chair, fell and injured his left shoulder. The patient filed suit against the hospital, alleging that the hospital's negligence caused his left shoulder injury. A professor of nursing gave deposition testimony in which she opined that the hospital violated the standard of care in its treatment of the patient. But she did not claim to be familiar with the standard of care for rural hospitals. The patient moved for partial summary judgment on the issues of negligence and causation, which the district court granted. On appeal, the Nebraska Supreme Court found the district court erred in granting the patient's motion of summary judgment because the professor did not testify about the standard of care applicable to nurses in rural hospitals. *Id.*

The present case is distinguishable from *Green*. Although Dr. Frey did not provide the appropriate standard of care, he did provide an opinion about the cause of Gwelo's death and damages. Based on the credentials listed in Dr. Frey's curriculum vitae, the district court found he was qualified to provide expert testimony about causation. Although Apkan provided sufficient foundational reasons to disregard Dr. Frey's opinion

about whether Life Care met the applicable standard of care, he provides no reason to disregard the contents of the remainder of Dr. Frey's affidavit regarding causation.

[9] Further in *Green*, the plaintiff filed the motion for summary judgment. For the court to grant his motion, he was required to prove all elements of a negligence case: a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and resulting damages. See *id*. Here, the defendant, Life Care, moved for summary judgment. For the court to grant summary judgment to the defendant in a negligence action, the defendant need only prove that there is no issue of material fact as to one of the elements such that the defendant is entitled to judgment as a matter of law. See, e.g., *McReynolds v. RIU Resorts and Hotels*, 293 Neb. 345, 880 N.W.2d 43 (2016) (finding hotel guest's negligence claim precluded due to absence of hotel's duty to guest); *Latzel v. Bartek*, 288 Neb. 1, 846 N.W.2d 153 (2014) (finding summary judgment in favor of defendant was appropriate because intervening cause eliminated element of causation from plaintiff's negligence action).

Dr. Frey's affidavit and attached curriculum vitae establish that he is qualified to assess the cause of Gwelo's alleged damages (i.e., her alleged pain and suffering) and subsequent death. We find, therefore, that the district court did not abuse its discretion in admitting Dr. Frey's affidavit into evidence at the hearing on Life Care's motion for summary judgment.

3. Common-Knowledge Exception Does Not Apply

[10,11] Apkan assigns that the district court erred in finding Life Care's negligence was not so palpable that a layperson could recognize it without expert proof. When the character of an alleged injury is subjective rather than objective, a plaintiff must establish the cause and extent of the injury through expert medical testimony. *Lewison v. Renner*, 298 Neb. 654, 905 N.W.2d 540 (2018). But the common-knowledge exception,

which stems from the doctrine of res ipsa loquitur, applies where the causal link between the defendant's negligence and the plaintiff's injuries is sufficiently obvious to laypersons that a court can infer causation as a matter of law. See, *Thone v. Regional West Med. Ctr.*, 275 Neb. 238, 745 N.W.2d 898 (2008); *Keys v. Guthmann*, 267 Neb. 649, 676 N.W.2d 354 (2004).

After our review of the record, we find the district court did not abuse its discretion in finding that the common-knowledge exception does not apply. Gwelo suffered from multiple myeloma for 8 years prior to her stay in Life Care's facilities. The record shows that the disease had taken a dramatic toll on her well-being at the time Life Care admitted her, and by all accounts, she was nearing the end of her life. As Dr. Frey's affidavit outlined, Gwelo arrived at Life Care with many different health problems. No witnesses could identify how Gwelo came to be found on the floor or to show that she actually fell from her bed. Dr. Frey noted that Gwelo suffered from low platelets, which may have caused the brain bleed the hospital found after Gwelo left Life Care. Given this evidence, the district court did not abuse its discretion in finding that Life Care's conduct did not obviously cause Gwelo's death or damages such that a layperson could identify it without the assistance of expert testimony.

4. Summary Judgment

[12] Apkan assigns that the district court erred in granting Life Care's motion for summary judgment. To prevail in any negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and resulting damages. *Lewison v. Renner, supra*. See, also, *King v. Crowell Memorial Home*, 261 Neb. 177, 622 N.W.2d 588 (2001) (affirming directed verdict for nursing home in negligence action where plaintiff provided no evidence that any actions or inactions of nursing home caused decedent's death).

[13-15] 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. *Bernard v. McDowall, LLC*, 298 Neb. 398, 904 N.W.2d 679 (2017). A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial. *Id.* After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact that prevents judgment for the moving party. *Midland Properties v. Wells Fargo*, 296 Neb. 407, 893 N.W.2d 460 (2017).

Life Care, the party moving for summary judgment, provided sufficient evidence through the affidavits of Sweeney and Dr. Frey to establish that Gwelo's alleged injuries and death were not caused by any actions or inactions on the part of Life Care. Apkan adduced no evidence to support his allegation that Gwelo actually fell while in Life Care or how she came to be on the floor. And the record contained no evidence that Gwelo suffered an actual injury while in the Life Care facility. Apkan points to the subdural hematomas noted at the hospital after Gwelo left the facility. But after Dr. Frey's review of Gwelo's extensive medical records, he found that the subdural hematomas noted at the hospital could have resulted from a spontaneous bleed caused by her low platelet count. Apkan did not adduce evidence to contradict Dr. Frey's findings or to establish what caused the subdural hematomas.

Dr. Frey provided an expert medical opinion that Life Care's alleged actions or inactions did not cause Gwelo's death or alleged damages. Gwelo's death certificate stated that her multiple myeloma was her immediate cause of death. Apkan did not adduce evidence to contradict this cause of death.

[16] Life Care sustained its burden to show that no genuine issue of material fact existed as to causation. The burden then shifted to Apkan to prove genuine issues of material fact remained. Apkan failed to do so. Speculation and conjecture are not sufficient to establish causation. *King v. Crowell, supra*.

Without evidence that Life Care's actions or inactions caused Gwelo's injuries and death, the district court could not find Life Care liable in negligence for any resulting damages. Although our analysis differs, in part, from that of the district court in that we do not rely upon Dr. Frey's opinion regarding standard of care, we conclude the district court did not abuse its discretion in granting Life Care's motion for summary judgment, because there is no genuine issue of fact regarding causation.

VI. CONCLUSION

The district court did not err in admitting Sweeney's affidavit or the affidavit of Dr. Frey as it relates to causation. Nor did the district court err in finding that the common-knowledge doctrine did not apply. We affirm the district court's grant of summary judgment in favor of Life Care, because the evidence was unrebutted that the alleged actions or inactions of Life Care did not cause Gwelo's death or damages.

Affirmed.

State of Nebraska, appellee, v. Jose Huerta, appellant.

917 N.W.2d 175

Filed August 7, 2018. No. A-17-562.

1. **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.
2. **Trial: Rules of Evidence: Expert Witnesses.** A trial court exercises its discretion in determining whether evidence is relevant and whether its prejudicial effect substantially outweighs its probative value and in admitting or excluding an expert's testimony.
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. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2) does not apply to evidence of a defendant's other crimes or bad acts if the evidence is inextricably intertwined with the charged crime.
5. ____: ____. Inextricably intertwined evidence includes evidence that forms part of the factual setting of the crime, or evidence that is so blended or connected to the charged crime that proof of the charged crime will necessarily require proof of the other crimes or bad acts, or if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime.
6. **Evidence: Words and Phrases.** Unfair prejudice means an undue tendency to suggest a decision based on an improper basis.
7. **Trial: Evidence: Appeal and Error.** On appeal, a defendant may not assert a different ground for his objection to the admission of evidence than was offered at trial.
8. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.

9. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
10. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court.
11. **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.
12. **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.
13. **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.
14. **Criminal Law: Trial: Proof: Jury Instructions: Due Process.** In a criminal trial, the State must prove every element of the offense beyond a reasonable doubt, and a jury instruction violates due process if it fails to give effect to that requirement.
15. **Trial: Jury Instructions: Due Process.** Not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is whether the ailing instruction so infected the entire trial that the resulting conviction violates due process.
16. **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.
17. **Trial: Prosecuting Attorneys: Jury Instructions.** A statement made by a prosecutor during closing argument can assist a jury in resolving any ambiguity in the jury instructions and may be considered particularly where the prosecutor's argument resolves the ambiguity in favor of the defendant.
18. **Effectiveness of Counsel: Appeal and Error.** When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise the issue will be procedurally barred.

19. **Effectiveness of Counsel: Records: Appeal and Error.** 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.
20. **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 counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.

Appeal from the District Court for Buffalo County: William T. Wright, Judge. Affirmed.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Moore, Chief Judge, and Arterburn and Welch, Judges.

Arterburn, Judge.

I. INTRODUCTION

Jose Huerta was convicted by a jury of first degree sexual assault. The district court subsequently sentenced Huerta to 6 to 8 years' imprisonment. Huerta appeals from his conviction here. On appeal, he assigns numerous errors, including that the district court erred in making certain evidentiary rulings and in failing to properly instruct the jury. In addition, Huerta alleges that he received ineffective assistance of trial counsel in various respects. Upon our review, we affirm Huerta's conviction.

II. BACKGROUND

The State filed an information charging Huerta with first degree sexual assault pursuant to Neb. Rev. Stat. § 28-319(1)(c) (Reissue 2016). Specifically, the information alleged that Huerta, who is 19 years of age or older, subjected a person, who was at least 12 years old, but less than 16 years

old, to sexual penetration. The charge against Huerta stems from an incident which occurred on April 3, 2016. Evidence adduced at trial revealed that during the evening of April 3, 14-year-old C.W. was spending time with her 16-year-old friend, C.G., when C.G. contacted Huerta, whom she referred to as her "uncle," to come pick them up. After Huerta picked the girls up, he drove them to a liquor store where he purchased beer, and then he drove all of them to an apartment owned by his friend, William McGregor.

The events that transpired after Huerta, C.W., and C.G. arrived at McGregor's apartment were disputed at trial. C.W. testified that once they arrived at the apartment, she, C.G., and Huerta all began to drink the beer he had purchased and to smoke cigarettes, which were also provided by Huerta. C.W. testified that she drank four beers, which was more alcohol than she had ever previously consumed. In fact, she drank so much that she threw up in a trash can which was located in the kitchen of the apartment. C.W. testified that after they had been at the apartment for a few hours, C.G. and Huerta went into the bathroom together and shut the door. While they were in the bathroom, C.W. could hear "kissing sounds." When they returned from the bathroom, C.W. observed Huerta touching C.G. "in her vaginal area" over her clothing and kissing C.G.

C.W. testified that at some point, Huerta began touching her vaginal area. C.G. then instructed C.W. to come into the bedroom with her and Huerta. Once inside the bedroom, C.W. sat on the corner of the bed. C.W. testified that C.G. told C.W. that C.W. was "not going to be a virgin anymore." Then C.G. and Huerta undressed and began having sexual intercourse on the bed next to where C.W. was sitting. C.W. testified that Huerta used a condom during his sexual contact with C.G. She indicated that she had observed Huerta obtain this condom from the laundry room in the apartment.

After C.G. and Huerta finished, they dressed and all three of them returned to the living room. However, a few minutes

later, Huerta obtained another condom from McGregor, and C.W., C.G., and Huerta returned to the bedroom. This time, Huerta took off C.W.'s clothes and removed his own clothes. He began having penile-vaginal intercourse with C.W. She testified that she had never had sexual intercourse before and that it was "very painful." She also testified that she told Huerta to stop because she was in pain, but he did not stop. C.W. indicated that during this portion of the assault, C.G. remained in the bedroom. After C.G. left the room, C.W. described that Huerta had anal sex and oral sex with her. She explained that Huerta had "stuck his penis through my anus," that he had "placed my mouth on his penis," and that he "was biting" her vaginal area.

After the assault, C.G.'s boyfriend came to McGregor's apartment to take the girls home. C.W. testified that in the days following the assault, she felt anxiety and depression about what had happened. Ultimately, she was admitted to a mental health hospital where she disclosed the assault.

C.G. also testified at trial and essentially corroborated C.W.'s version of the events which transpired on the evening of April 3, 2016. C.G. testified that she, C.W., and Huerta went to McGregor's apartment where they all began to drink beer, which was provided by Huerta. She testified that at some point, she, C.W., and Huerta went into the bedroom where she and Huerta had consensual sexual intercourse. C.G. described that C.W. was on the bed while she and Huerta had sex. She also explained that after she and Huerta finished, Huerta began having sexual intercourse with C.W. C.G. indicated that after C.W. and Huerta began having sex, she left the bedroom.

During the trial, the State also offered DNA evidence which was recovered from two condoms located in the bedroom of McGregor's apartment. This evidence revealed that on one of the condoms, both C.G.'s and Huerta's DNA was present. On the second condom, C.W.'s DNA was present, but no conclusions could be drawn about the presence of any other DNA

because the sample was "too complex." Both condoms tested positive for the presence of semen.

Huerta did not testify at trial, nor did he offer any evidence in his defense. However, during the trial the State did offer the testimony of Investigator Daniel Warrington with the Kearney Police Department, who had previously interviewed Huerta about his version of the events of April 3, 2016. During the interview, Huerta admitted that the girls were with him at McGregor's apartment, but he denied he had any type of sexual contact with either C.W. or C.G. He described himself as "a mentor" to C.G. During a subsequent interview with Huerta, Huerta continued to "adamantly" deny that he had provided the girls with any alcohol, but admitted that he had drank "a large amount of alcohol." He also admitted that C.G. tried to give him a "lap dance." Huerta told Investigator Warrington that he had observed C.W. and C.G. kissing each other. He then went into the bedroom to sleep.

When Investigator Warrington indicated that law enforcement was testing the condoms found in the bedroom for DNA, Huerta explained that when he awoke after being asleep on the bed, his "pants were loose on him." He told Investigator Warrington that he was concerned that the girls "did something to him while he was passed out."

After hearing all of the evidence, the jury convicted Huerta of first degree sexual assault. The district court subsequently sentenced Huerta to 6 to 8 years' imprisonment.

Huerta appeals his conviction here.

III. ASSIGNMENTS OF ERROR

On appeal, Huerta assigns four errors. First, Huerta argues that the district court erred in overruling his objections to evidence regarding his sexual contact with C.G. Second, he argues that the court erred in allowing the State to offer evidence of DNA testing which provided inconclusive results. Third, he alleges that the court committed plain error in instructing the jury prior to its deliberations. Finally, he asserts

that he received ineffective assistance of trial counsel in various respects.

IV. ANALYSIS

1. Evidentiary Rulings

On appeal, Huerta alleges that the district court erred in making two evidentiary rulings. First, he alleges that the court erred in permitting the State to present evidence regarding his sexual contact with C.G. on the night of April 3, 2016. Second, he alleges that the court erred in allowing the State to present evidence regarding DNA testing that was done on the two condoms found in a trash can in McGregor's bedroom.

(a) Standard of Review

[1,2] When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, we review the admissibility of evidence for an abuse of discretion. *State v. Johnson*, 290 Neb. 862, 862 N.W.2d 757 (2015). A trial court exercises its discretion in determining whether evidence is relevant and whether its prejudicial effect substantially outweighs its probative value. *Id*. In addition, a trial court exercises its discretion admitting or excluding an expert's testimony. See *State v. Braesch*, 292 Neb. 930, 874 N.W.2d 874 (2016).

[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. Johnson, supra*.

(b) Evidence of Huerta's Sexual Contact with C.G.

During the State's opening statement, Huerta objected to comments regarding Huerta's sexual contact with C.G. on the night of April 3, 2016. Huerta's counsel argued:

> The objection is that, Your Honor, this is prejudicial. It's a 404 objection in that the evidence would tend to indicate

> rather than what actually happened between [Huerta] and the alleged victim, [C.W.], that it's probable because he had legal sex with what the law would consider a consenting adult, although, she's a 16-year-old and a minor, that he also did have sex with [C.W.]
>
> So I think that that being the case, that evidence is more prejudicial than probative in that it would allow the jury to make an improper conclusion that, well, if he had sex with this person, then he must have had sex with this other person.

The district court overruled Huerta's objection to the evidence. The court stated:

> And at least the Court's understanding is that this is all part and parcel of a series of acts leading to the actual sexual act, which is the basis for the charge. It is not a separate act in and of itself.
>
> And so on that basis, I am going to overrule the objection. I'll allow the State to make an opening statement with regard to what the alleged victim in this case, [C.W.], observed, in large part because it is part of the ongoing criminal act and at least potentially preparatory for grooming her for something that might later have occurred. So I believe it is probative. I believe under the circumstances it is more probative than prejudicial in any event.

When Huerta renewed his objection to this evidence at various points during the State's presentation of evidence, the district court continued to overrule the objection.

On appeal, Huerta argues that the district court erred in overruling his objections to evidence regarding his sexual contact with C.G. on April 3, 2016. He argues that this evidence was not "inextricably intertwined" with evidence regarding the sexual assault of C.W. Brief for appellant at 15. In addition, he argues that the probative value of the evidence was clearly outweighed by its potential prejudice. We conclude that Huerta's assertions have no merit. The district court did not abuse its

discretion in admitting evidence of Huerta's sexual contact with C.G. into evidence.

[4,5] We conclude first that the district court did not err in determining that evidence of Huerta's sexual contact with C.G. was inextricably intertwined with evidence of his sexual assault of C.W. so as to exclude such evidence from the parameters of Neb. Evid. R. 404(2). Rule 404(2) provides the following:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(2) does not apply to evidence of a defendant's other crimes or bad acts if the evidence is inextricably intertwined with the charged crime. *State v. Burries*, 297 Neb. 367, 900 N.W.2d 483 (2017). Inextricably intertwined evidence includes evidence that forms part of the factual setting of the crime, or evidence that is so blended or connected to the charged crime that proof of the charged crime will necessarily require proof of the other crimes or bad acts, or if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime. *Id*.

Huerta's sexual contact with C.G. on the evening of April 3, 2016, was part of the factual setting for the assault of C.W., which occurred on the same evening. The State presented evidence that Huerta and C.G. instructed C.W. to come into the bedroom with them and that they proceeded to have sexual intercourse on the bed while C.W. was seated next to them. In addition, C.W. testified that once they all got into the bedroom, C.G. told C.W. that after that night, C.W. was no longer going to be a virgin. C.W. also testified that while Huerta and C.G. were engaging in sexual intercourse, he tried to pull her down so that she, too, was lying on the bed next to them. The sexual assault of C.W. happened very close in time to Huerta's

sexual contact with C.G. While C.W. testified that there was a little time between the two events because all three of them left the bedroom to go to the living room for a few minutes, C.G. testified that Huerta began having sexual intercourse with C.W. almost immediately after she and Huerta stopped having sexual intercourse.

The record supports a conclusion that the evidence of Huerta's sexual contact with C.G. was necessary to present a coherent picture of the events of the evening of April 3, 2016. In addition, we find that there is some evidence to suggest that Huerta had some sort of plan to "groom" C.W. for the sexual encounter by involving her in the sexual contact with C.G.

[6] We also find that the district court did not err in concluding that evidence of Huerta's sexual contact with C.G. was more probative than prejudicial. Neb. Evid. R. 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Unfair prejudice means an undue tendency to suggest a decision based on an improper basis. *State v. Chauncey*, 295 Neb. 453, 890 N.W.2d 453 (2017).

Evidence of Huerta's sexual contact with C.G. was probative for multiple reasons. First, the evidence demonstrated that Huerta lied to Investigator Warrington about the events of April 3, 2016, on two separate occasions. Huerta repeatedly told Investigator Warrington that he did not have any sexual contact with either C.W. or C.G. Huerta also indicated during his interview with Investigator Warrington that he considered himself to be a mentor to C.G. and that he would not do anything like that to her. Second, as we discussed above, evidence of Huerta's sexual contact with C.G. provided necessary factual context to the events leading up to Huerta's sexual assault of C.W. The evidence suggests that Huerta intended C.W.'s exposure to the sexual contact between him and C.G. to be a

step toward his sexual assault of C.W. Accordingly, while the evidence may have been prejudicial to Huerta, its probative value clearly outweighed any unfair prejudice.

Upon our review, we do not find that the district court abused its discretion in allowing the State to present evidence of Huerta's sexual contact with C.G. on the evening of April 3, 2016. Huerta's assertions on appeal to the contrary are without merit.

(c) DNA Evidence

During the trial, the State called Jeff Bracht, a forensic scientist with the Nebraska State Patrol, to testify regarding his analysis of the two condoms found in a trash can in McGregor's bedroom. Bracht testified that the presence of semen was detected on both condoms. He went on to testify that on the first condom he analyzed, both C.G.'s and Huerta's DNA were present. Huerta objected to Bracht's testimony regarding the DNA on the first condom on the basis that such evidence was more prejudicial than probative. The court overruled the objection.

Bracht testified that his analysis indicated that on the second condom, C.W.'s DNA was present on one side of the condom. Bracht did indicate that on the side of the condom where C.W.'s DNA was present, Huerta was excluded as a contributor of the sample. However, on the other side of the condom, Bracht was unable to include or exclude anyone as a contributor to the DNA present. He testified, "There is just a lot going on. The mixture was too complex to really determine how many people were in that mixture."

Huerta alleges on appeal that the district court erred in allowing the State to present evidence regarding the DNA testing completed on the two condoms. Specifically, he argues that evidence that the first condom contained both C.G.'s and his DNA should have been excluded because the evidence was not relevant to the question of whether he had sexual contact with C.W. Additionally, he argues that evidence that the

second condom contained C.W.'s DNA, but that the remaining sample was "too complex" to reach any conclusions about other contributors of DNA, constituted "inconclusive" test results that "could cause the jury to speculate." Brief for appellant at 17. Because Huerta failed to properly object to the DNA evidence regarding both condoms, we conclude that he has waived his right to appellate review of this issue.

[7] During Bracht's testimony, Huerta objected to the admission of evidence about the condom that contained both his and C.G.'s DNA because the evidence was more prejudicial than probative. However, on appeal, he argues that the evidence should not have been admitted because it was not relevant to whether he had sexual contact with C.W. Essentially, he is asserting a different ground for his objection on appeal than he did at trial. On appeal, a defendant may not assert a different ground for his objection to the admission of evidence than was offered at trial. *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012). Because at trial Huerta did not object to the admission of evidence about the condom that contained both his and C.G.'s DNA on the basis of relevance, he is precluded from arguing that assertion in this appeal.

[8] In addition, Huerta did not object at all to Bracht's testimony regarding the DNA found on the second condom. It is well settled that failure to make a timely objection waives the right to assert prejudicial error on appeal. *State v. Casterline*, 293 Neb. 41, 878 N.W.2d 38 (2016). We conclude that Huerta has waived appellate review regarding the district court's decision to admit the DNA evidence.

2. Jury Instructions

Huerta alleges that the district court committed plain error in improperly instructing the jury regarding the elements of first degree sexual assault and the State's burden of proof regarding those elements. Although we agree with Huerta that the district court did err in its instructions to the jury, we find that such error was harmless.

(a) Standard of Review

[9-11] Whether jury instructions given by a trial court are correct is a question of law. *State v. Abejide*, 293 Neb. 687, 879 N.W.2d 684 (2016). When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court. *Id*. 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. Hinrichsen*, 292 Neb. 611, 877 N.W.2d 211 (2016).

(b) Analysis

Jury instruction No. 7 provided to the jury informed it of the elements of the charge of first degree sexual assault. That instruction, as given to the jury in this case, read as follows:

> The elements of the crime of first degree sexual assault are:
>
> (1) That the Defendant, . . . Huerta, subjected C.W. to sexual penetration;
>
> (2) That when [Huerta] subjected C.W. to sexual penetration he was a person nineteen years of age or older;
>
> (3) That when [Huerta] subjected C.W. to sexual penetration she was a person at least 12 years of age but less than 16 years of age;
>
> (4) That events occurred on or about April 3, 2016; and
>
> (5) These events occurred in Buffalo County, Nebraska.

During the jury instruction conference, Huerta did not object to this instruction, nor did he offer an alternative instruction in its place. On appeal, however, he argues that the district court erred in giving jury instruction No. 7 because the instruction does not conform to the applicable pattern jury instruction and does not properly instruct the jury that the State has to prove each element of the crime charged beyond a reasonable doubt. We agree with Huerta's basic contention

that the district court erred in failing to model jury instruction No. 7 after the applicable pattern instruction.

[12] As Huerta concedes in his brief on appeal, he did not object to jury instruction No. 7 during the trial. As such, we review only for plain 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. *State v. Abram*, 284 Neb. 55, 815 N.W.2d 897 (2012).

Whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should usually be given to the jury in a criminal case. *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011). NJI2d Crim. 3.0 provides a pattern instruction for explaining to the jury the elements of the charged crime or crimes. Included in NJI2d Crim. 3.0, in addition to the elements of the charged crime, is a separate section which instructs the jury regarding the "Effect of Findings." That section reads as follows: "If you decide that the state proved each element beyond a reasonable doubt then you must find the defendant guilty. Otherwise, you must find the defendant not guilty."

In this case, the district court properly instructed the jury regarding the elements of first degree sexual assault in jury instruction No. 7. However, the court did not include in that instruction the separate section regarding the effect of the jury's findings. Essentially, jury instruction No. 7 failed to inform the jury that it had to find that the State proved each element of first degree sexual assault beyond a reasonable doubt in order to find Huerta guilty of that crime. We agree with Huerta that the district court committed plain error in omitting that portion of the instruction. Nevertheless, we find that the court's omission does not require reversal because such omission constituted a harmless error.

[13] 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. *State v. Merchant*, 288 Neb. 439, 848 N.W.2d 630 (2014). Upon our review, we conclude that the district court's error in giving jury instruction No. 7 is harmless because the other instructions given to the jury properly instructed it regarding the State's burden to prove Huerta's guilt beyond a reasonable doubt.

[14,15] In a criminal trial, the State must prove every element of the offense beyond a reasonable doubt, and a jury instruction violates due process if it fails to give effect to that requirement. See, e.g., *Middleton v. McNeil*, 541 U.S. 433, 124 S. Ct. 1830, 158 L. Ed. 2d 701 (2004); *Rose v. Clark*, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). Nonetheless, not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is whether the ailing instruction so infected the entire trial that the resulting conviction violates due process. *Middleton v. McNeil, supra*. To determine whether Huerta's due process rights have been violated, the question that must be answered is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution. See *id*.

Our review of the case law in this area reveals that many courts have considered the effect of failing to instruct the jury regarding each and every element of the charged crime or failing to properly instruct the jury as to the meaning of each and every element of the charged crime. However, this is not the situation presented by this case. The district court properly instructed the jury regarding each element of Huerta's first degree sexual assault charge. However, the court did not explicitly indicate that the jury had to find that the State proved each and every element of first degree sexual assault beyond a reasonable doubt in order to find Huerta guilty of that charge. We have been unable to find a similar case where

a court has failed to specifically delineate to the jury that the State must prove each element of the charged crime beyond a reasonable doubt.

[16] We have examined all of the jury instructions provided to the jury in this case. Notwithstanding the district court's error in giving jury instruction No. 7, we conclude that the jury was properly instructed that it had to find the State proved each element of first degree sexual assault beyond a reasonable doubt in order to return a guilty verdict. 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. *State v. Merchant*, 288 Neb. 439, 848 N.W.2d 630 (2014). And the appellant has the burden to show that a questioned jury instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Id*.

Jury instruction No. 2 stated:

> As I told you at the beginning of the trial this is a criminal case in which the State of Nebraska has charged [Huerta] with first degree sexual assault. The fact that the State has brought this charge is not evidence of anything. The charge is simply an accusation, nothing more. [Huerta] has pleaded not guilty. He is presumed to be innocent. That means you must find him not guilty unless and until you decide that the State has proved him guilty beyond a reasonable doubt.

In addition, jury instruction No. 9 instructed the jury regarding the definition of reasonable doubt:

> A reasonable doubt is one based upon reason and common sense after careful and impartial consideration of all the evidence. Proof beyond a reasonable doubt is proof so convincing that you would rely and act upon it without hesitation in the more serious and important transactions of life. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

The district court also informed the jury prior to reading the jury instructions that "[n]o one of these instructions contain all of the law applicable to this case. You must consider each instruction in light of all the others." This admonition is also contained in jury instruction No. 1.

[17] In addition to the jury instructions provided by the district court, we note that the State correctly informed the jury about its burden of proof during its closing argument:

> So what I really want you to focus on right now is Jury Instruction No. 7. And that's going to be the elements the State has to prove. As we talked about during my voir dire with you initially when we did the jury selection, if you can remember we talked about what the State's burden is and it is to prove [Huerta] guilty beyond a reasonable doubt of the elements, not every fact that the witnesses say, okay. So let's go over those elements and how the State has proven each one of those individually beyond a reasonable doubt.

Following this statement, counsel for the State explained in her argument to the jury how the burden of proof had been met as to each element of the charged offense. The U.S. Supreme Court noted in *Middleton v. McNeil*, 541 U.S. 433, 124 S. Ct. 1830, 158 L. Ed. 2d 701 (2004), that a statement made by a prosecutor during closing argument can assist a jury in resolving any ambiguity in the jury instructions and may be considered particularly where, as here, the prosecutor's argument resolves the ambiguity in favor of the defendant.

Based upon our reading of the entirety of the jury instructions provided in this case and considering the statements of the State in its closing argument, we find that the district court's failure to include in jury instruction No. 7 a separate section informing the jury regarding the effect of its findings was harmless error. Read as a whole, the jury instructions properly inform the jury that it had to find that the State had proved all of the elements of first degree sexual assault

beyond a reasonable doubt in order to find Huerta guilty of that crime. To the extent the instructions were ambiguous in any way, the State's clear and explicit explanation of its burden of proof during closing argument resolved that ambiguity. There is no reasonable likelihood that the jury applied jury instruction No. 7 in a way that violates the Constitution. Huerta cannot show he was prejudiced in any way by the district court's omission of the separate section from jury instruction No. 7, and his guilty verdict was surely unattributable to the court's error.

3. Ineffective Assistance of Trial Counsel

On appeal, Huerta alleges that his trial counsel was ineffective in (1) failing to object to the testimony of Investigator Warrington regarding Huerta's date of birth, (2) failing to file a motion in limine to exclude evidence of Huerta's sexual contact with C.G., (3) failing to object to jury instruction No. 7, and (4) failing to object to the DNA evidence. We will address each of Huerta's allegations of ineffective assistance of counsel below. First, however, we detail the relevant law which overlays our analysis of ineffective assistance of counsel claims which are made on direct appeal.

[18,19] Huerta is represented in this direct appeal by different counsel than the counsel who represented him during trial. However, we do note that appellate counsel did begin representing Huerta at his sentencing hearing. When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise the issue will be procedurally barred. *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015). 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. Mendez-Osorio*, 297 Neb. 520, 900 N.W.2d 776 (2017). The determining factor is

whether the record is sufficient to adequately review the question. *Id*.

[20] 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 counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015).

When an ineffective assistance of counsel claim is raised in a direct appeal, the appellant is not required to allege prejudice; however, an appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel. *State v. Casares, supra*. General allegations that trial counsel performed deficiently or that trial counsel was ineffective are insufficient to raise an ineffective assistance claim on direct appeal and thereby preserve the issue for later review. *Id*.

Appellate courts have generally reached ineffective assistance of counsel claims on direct appeal only in those instances where it was clear from the record that such claims were without merit or in the rare case where trial counsel's error was so egregious and resulted in such a high level of prejudice that no tactic or strategy could overcome the effect of the error, which effect was a fundamentally unfair trial. *Id*. An ineffective assistance of counsel claim made on direct appeal can be found to be without merit if the record establishes that trial counsel's performance was not deficient or that the appellant could not establish prejudice. *Id*. See, also, *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

(a) Failure to Object to Investigator Warrington's Testimony

Huerta alleges that his trial counsel was ineffective in failing to object to the testimony of Investigator Warrington regarding Huerta's date of birth. That testimony reads as follows:

> Q[:] And were you familiar with . . . Huerta from previous contacts with him?
>
> A[:] Just aware from previous law enforcement. We have a database that contains reports, any type of a contact with the individual, which we were able to determine. And based upon his current address . . . being that of . . . Huerta with the date of birth of [March] 1980.
>
> Q[:] And at that time then that would have made him a person over 19 years of age?
>
> A[:] Correct.

Huerta contends that trial counsel failed to make a foundational objection to Investigator Warrington's testimony and that if counsel had done so, the objection would have been sustained and the State would not have had any evidence to prove that Huerta was 19 years of age or older at the time of the offense.

Upon our review, we conclude that the record is insufficient to address Huerta's claim, because it does not contain any indication of why counsel did not object to Investigator Warrington's testimony on foundational grounds or whether the decision to not object was part of counsel's trial strategy.

(b) Failure to Make Motion in Limine Regarding Evidence of Sexual Contact Between Huerta and C.G.

Huerta alleges that his trial counsel was ineffective in failing to file a motion in limine to exclude evidence of Huerta's sexual contact with C.G. at trial. Huerta acknowledges that his trial counsel did object to such evidence during the trial, but he argues that the issue "would have been better presented at a motion in limine which would have given the Court more time to determine if the sexual contact/intercourse between [Huerta] and C.G. was inextricably intertwined to the sexual assault of C.W." Brief for appellant at 26. Essentially, Huerta argues that had trial counsel presented his objection to this evidence

to the district court prior to trial, such objection would have been successful.

Huerta's allegation of ineffective assistance of counsel has no merit. As we discussed more thoroughly above, the district court did not err in admitting evidence of Huerta's sexual contact with C.G. into evidence, because such evidence was relevant and was more probative than prejudicial. Had trial counsel filed a motion in limine regarding his objection to this evidence, such motion would have failed. Whether the objection was made prior to or during the State's presentation of evidence, the result would have been the same. The evidence was properly admitted.

(c) Failure to Object to
Jury Instruction No. 7

Huerta alleges that his trial counsel was ineffective in failing to object to jury instruction No. 7 and in failing to offer NJI2d Crim. 3.0 as an alternative to jury instruction No. 7. Huerta's allegation of ineffective assistance of trial counsel has no merit. As we discussed above, although the district court did err in its giving of jury instruction No. 7 without including the separate section informing the jury about the effect of its findings, we concluded that such error was harmless. Accordingly, even if counsel had objected to the instruction or had offered an alternative instruction, such action would not have had any effect on the ultimate outcome of the trial. Huerta's guilty verdict was not attributable to the district court's error or to his trial counsel's failure to object. Simply stated, Huerta cannot show he was prejudiced by counsel's actions.

(d) Failure to Object
to DNA Evidence

Finally, Huerta alleges that his trial counsel was ineffective in failing to properly object to the DNA evidence offered by the State. Our record on appeal is sufficient to address Huerta's claim. The record before us does not support a claim of

ineffective assistance of counsel regarding the failure to object to the DNA evidence.

Huerta argues that trial counsel should have made a relevance objection to evidence that both his DNA and C.G.'s DNA were found on a condom located in a trash can in McGregor's bedroom. He contends that this evidence is not relevant to the question of whether he had sexual contact with C.W. We disagree. Huerta concedes in his brief on appeal that he had sexual contact with C.G. on the evening of April 3, 2016, when he states, "[T]here is no question that [Huerta] had sexual contact/intercourse with C.G. that night. So no surprise that [Huerta's] DNA would be found in the semen on the inside of that condom." Brief for appellant at 18. This statement is in direct contrast to Huerta's statements to Investigator Warrington that he did not have sexual contact with either C.W. or C.G. In addition, it is in contrast to the position he seemingly took at trial.

Contrary to Huerta's assertions on appeal, evidence that both Huerta's DNA and C.G.'s DNA were on the condom was relevant to disprove Huerta's original version of what happened on April 3, 2016. In addition, as we discussed above, it was relevant to support C.W.'s testimony about all of the events which transpired on that date. Accordingly, any objection by trial counsel to this evidence on relevance grounds would not have been successful and trial counsel was not ineffective for failing to raise an unsuccessful objection.

Huerta also argues that trial counsel should have objected to inconclusive DNA evidence which was found on the condom where C.W.'s DNA was identified. Huerta argues that the results of the DNA testing of that condom "were so inconclusive that they could cause the jury to speculate." Brief for appellant at 17. Based on our review of Bracht's testimony regarding the inconclusive DNA evidence, we conclude that Huerta cannot show that he was prejudiced by the admission of the testimony and that, as a result, he cannot demonstrate he received ineffective assistance of counsel.

As we discussed above, Bracht testified that his analysis of the condom indicated that C.W.'s DNA was present on one side of the condom. Bracht did indicate that on the side of the condom where C.W.'s DNA was present, Huerta was excluded as a contributor of the sample. However, on the other side of the condom, Bracht was unable to include or exclude anyone as a contributor to the DNA present. He testified, "There is just a lot going on. The mixture was too complex to really determine how many people were in that mixture." Bracht also testified that the presence of semen was found on the condom with C.W.'s DNA.

We find that this evidence is relevant, in that it supports both C.W.'s testimony and C.G.'s testimony that C.W. had sexual intercourse in McGregor's bedroom on the evening of April 3, 2016. We also find that this evidence is more probative than prejudicial. However, we do note that the weight of the evidence is decreased somewhat due to the inability to identify the male contributor of the semen. We also note that to some extent, Bracht's testimony was exculpatory because he was able to completely exclude Huerta as a contributor of DNA as to one side of the condom. To the extent Bracht was unable to give any identifying information about the other side of the condom, there is no indication of any kind that suggested that Huerta may be a contributor on that side or that would lead the jury to insinuate that he was a contributor to the mixture of DNA. We conclude that Huerta cannot show that he was prejudiced by the admission of this DNA evidence. As such, he cannot demonstrate that he received ineffective assistance of trial counsel in this regard.

V. CONCLUSION

Upon our review, we affirm Huerta's conviction for first degree sexual assault. As to Huerta's claims of ineffective assistance of trial counsel, we find that he was not denied effective assistance of counsel when counsel failed to make a motion in limine regarding evidence of sexual contact

between Huerta and C.G., failed to object to jury instruction No. 7, or failed to object to the DNA evidence presented by the State. We find that the record is insufficient to review whether trial counsel was ineffective when he failed to object to Investigator Warrington's testimony regarding Huerta's date of birth.

Affirmed.

Welch, Judge, concurring.

While I concur in the result reached by the majority, I respectfully disagree with the reasoning touching on the jury instruction issue.

In *Middleton v. McNeil*, 541 U.S. 433, 437, 124 S. Ct. 1830, 158 L. Ed. 2d 701 (2004), the U.S. Supreme Court held:

> In a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement. . . . Nonetheless, not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is "'whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process.'" . . . "'[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" . . . If the charge as a whole is ambiguous, the question is whether there is a "'reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution."

(Citations omitted.)

In *Middleton*, the U.S. Supreme Court found that the combined instructions were, at worst, ambiguous because they were internally inconsistent. In response, the State of California argued that the prosecutor cured any potential ambiguity by arguing a correct statement of the law to the jury. The U.S. Supreme Court noted that the Ninth Circuit "faulted the state court for relying on the prosecutor's argument, noting that

instructions from a judge are presumed to have more influence than arguments of counsel." *Middleton*, 541 U.S. at 438. In response, the U.S. Supreme Court held:

> But this is not a case where the jury charge clearly says one thing and the prosecutor says the opposite; the instructions were at worst ambiguous because they were internally inconsistent. Nothing in *Boyde* [*v. California*, 494 U.S. 370, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990),] precludes a state court from assuming that counsel's arguments clarified an ambiguous jury charge. This assumption is particularly apt when it is the *prosecutor's* argument that resolves an ambiguity in favor of the *defendant*.

Middleton, supra (emphasis in original).

I agree with the majority that the omission of NJI2d Crim. 3.0's "Effect of Findings" from jury instruction No. 7 which sets forth the State's burden of proof as to each and every element of the crime rendered that instruction, in isolation, an erroneous jury instruction. When read as a whole with all instructions, the district court properly instructed the jury that the State had the burden of proof beyond a reasonable doubt for the offense, but left out that the burden attached to each and every element. I disagree with the majority that the combined instructions "properly instructed that [the jury] had to find the State proved each element of first degree sexual assault beyond a reasonable doubt in order to return a guilty verdict." Without reference to the burden attaching to each and every element, the instructions were ambiguous. That said, the instructions as a whole, taken together with the prosecutors' argument to the jury which clearly delineated that the State's burden attached to each and every element of the offense, left no reasonable likelihood that the jury applied the challenged instructions in a way that violates the Constitution. As such, I concur with the majority that the judgment of the district court should be affirmed as to this issue, and I join with the court as to the remainder of the majority opinion.

Susan J. Bayliss, Personal Representative of the Estate of Ruth E. Clason, deceased, appellee, v. Steven E. Clason, Personal Representative of the Estate of F.W. Eugene Clason, deceased, appellant, and David W. Pederson, Special Fiduciary of the Clason Living Trust Dated March 31, 2008, and Any Amendments Thereto, et al., appellees.

918 N.W.2d 612

Filed August 14, 2018. No. A-17-270.

1. **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.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Judgments: Pleadings: Appeal and Error.** A motion to alter or amend a judgment is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
4. **Judgments: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result.
5. **Jurisdiction: Parties: Waiver.** The absence of an indispensable party to a controversy deprives the court of subject matter jurisdiction to determine the controversy and cannot be waived.
6. **Jurisdiction: Appeal and Error.** When a lower court lacks the power, that is, the subject matter jurisdiction, to adjudicate the merits of a 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.

7. **Parties: Equity: Appeal and Error.** When it appears that all indispensable parties to a proper and complete determination of an equity cause were not before the district court, an appellate court will remand the cause for the purpose of having such parties brought in.
8. **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.
9. **Parties: Words and Phrases.** Necessary parties are parties who have an interest in the controversy, and should ordinarily be joined unless their interests are separable so that the court can, without injustice, proceed in their absence.
10. **Declaratory Judgments: Courts: Jurisdiction: Parties: Waiver.** The presence of necessary parties in declaratory judgment actions is jurisdictional and cannot be waived, and if such persons are not made parties, then the district court has no jurisdiction to determine the controversy.
11. **Parties: Words and Phrases.** An indispensable party to a suit is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.
12. **Jurisdiction: Service of Process: Waiver.** Participation in the proceedings on any issue other than the defenses of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process, waives all such issues except as to the objection that the party is not amenable to process issued by a court of this state.
13. **Service of Process: Waiver.** A general appearance waives any defects in the process or notice, the steps preliminary to its issuance, or in the service or return thereof.
14. **Jurisdiction: Pleadings: Parties.** A party will be deemed to have appeared generally if, by motion or other form of application to the court, he or she seeks to bring its powers into action on any matter other than the question of jurisdiction over that party.
15. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

16. **Summary Judgment: Proof.** A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law. If the movant meets this burden, then the nonmovant must show the existence of a material issue of fact that prevents judgment as a matter of law.
17. **Summary Judgment: Evidence.** When the parties' evidence would support reasonable, contrary inferences on the issue for which a movant seeks summary judgment, it is an inappropriate remedy.
18. **Trial: Evidence.** Where reasonable minds could draw different conclusions from the facts presented, such presents a triable issue of material fact.
19. **Deeds: Proof.** It is essential to the validity of a deed that there be a delivery, and the burden of proof rests upon the party asserting delivery to establish it by a preponderance of the evidence.
20. **Deeds: Intent.** To constitute a valid delivery of a deed, there must be an intent on the part of the grantor that the deed shall operate as a muniment of title to take effect presently.
21. **Deeds.** The essential fact to render delivery effective is always that the deed itself has left the control of the grantor, who has reserved no right to recall it, and it has passed to the grantee.
22. **Deeds: Intent.** Whether a deed or other instrument conveying an interest in property has been delivered is largely a question of intent to be determined by the facts and circumstances of the particular case.
23. **Deeds.** Recordation of a deed generally presumes delivery.
24. **Deeds: Intent.** Whether or not a deed has been delivered is a mixed question of law and fact. The element which controls the resolution of that question is the intention of the parties, especially the intention of the grantor. The vital inquiry is whether the grantor intended a complete transfer—whether the grantor parted with dominion over the instrument with the intention of relinquishing all dominion over it and of making it presently operative as a conveyance of the title to the land.
25. ____: ____. It is not necessary, to effectuate delivery, that a deed actually be handed over to the grantee or to another person for the grantee. There may be a delivery notwithstanding that the deed remains in the custody of the grantor. If a valid delivery takes place, it is not rendered ineffectual by the act of the grantee in giving the deed into the custody of the grantor for safekeeping. It is all a question of the intention of the parties, which may be manifested by words or acts or both.
26. ____: ____. If a deed, although acknowledged, is not recorded and is in the grantor's possession at the time of death, those circumstances,

unless explained, are deemed conclusive that the parties did not intend a complete transfer.

27. **Deeds: Presumptions.** There is a presumption of nondelivery if the evidence shows that a deed was in the grantor's possession at the time of death and was not then recorded. Such a showing places upon the grantees the burden of going forward with the evidence, more accurately, the burden of persuasion, to rebut the presumption of nondelivery.
28. **Deeds: Intent: Proof.** The burden of proof rests upon the party asserting delivery to establish it by a preponderance of the evidence, and to constitute a valid delivery of a deed there must be an intent on the part of the grantor that the deed shall operate as evidence of title to take effect presently.
29. **Deeds: Presumptions: Proof.** When a deed is found in the grantee's possession during the lifetime of the grantor, this is prima facie evidence of delivery, and the burden of proof is upon the one who disputes this presumption.
30. **Deeds.** Where the same individual is both a deed's grantor and its sole grantee, no justifiable inference regarding the effectiveness of delivery may be drawn merely from that individual's continuous possession and control of the deed.
31. **Trusts: Intent.** When there are two or more instruments relating to a trust, they should be construed together to carry out the settlor's intent.
32. **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.
33. **Summary Judgment.** At the summary judgment stage, the trial court determines whether the parties are disputing a material issue of fact. It does not resolve the factual issues.
34. **Summary Judgment: Motions for New Trial.** A motion for new trial following the entry of summary judgment is not a proper motion.
35. **Pleadings: Judgments: Appeal and Error.** An appellate court reviews a postjudgment motion based on the relief it seeks, rather than its title.
36. **Pleadings: Judgments.** Under Neb. Rev. Stat. § 25-1329 (Reissue 2016), if a postjudgment motion seeks a substantive alteration of the judgment—as opposed to the correction of clerical errors or relief wholly collateral to the judgment—a court may treat the motion as one to alter or amend the judgment.
37. **Pleadings: Judgments: Time.** In order to qualify for treatment as a motion to alter or amend a judgment, the motion must be filed no later than 10 days after the entry of judgment, as required under Neb. Rev. Stat. § 25-1329 (Reissue 2016), and must seek substantive alteration of the judgment.

38. **Pleadings: Judgments: Time: Appeal and Error.** In cases involving a motion to alter or amend the judgment, a critical factor is whether the motion was filed within 10 days of the final order, because a timely motion tolls the time for filing a notice of appeal.
39. **Pleadings: Judgments.** Under Neb. Rev. Stat. § 25-1329 (Reissue 2016), a motion for reconsideration is the functional equivalent of a motion to alter or amend a judgment.
40. **Judgments: Appeal and Error.** A correct result will not be set aside even when the lower court applied the wrong reasoning in reaching that result.

Appeal from the District Court for Furnas County: David W. Urbom, Judge. Affirmed.

Siegfried H. Brauer, of Brauer Law Office, for appellant.

David W. Rowe, of Kinsey, Rowe, Becker & Kistler, L.L.P., for appellee Susan J. Bayliss.

Roger L. Benjamin, P.C., for appellees Jim L. Clason and Lee A. Clason.

Damien J. Wright, of Welch Law Firm, P.C., for appellees Deshane Nelson et al.

Moore, Chief Judge, and Riedmann and Arterburn, Judges.

Moore, Chief Judge.

INTRODUCTION

Steven E. Clason, personal representative of the estate of F.W. Eugene Clason (Eugene), deceased, appeals from the order of the district court for Furnas County, which granted summary judgment in favor of Susan J. Bayliss (Susan), personal representative of the estate of Ruth E. Clason, deceased. For the reasons that follow, we affirm.

BACKGROUND

Eugene and Ruth are the parents of eight adult children, including Susan, Steven, Jim L. Clason, Lee A. Clason, and

Bonnie S. Wright. These five children are the beneficiaries of the Clason Living Trust created by Eugene and Ruth in 2008 (the 2008 Trust); Eugene and Ruth's other three children were specifically disinherited under the terms of the 2008 Trust. A second trust was created by Ruth in 2011 after Eugene's death, which trust was entitled the "Ruth E. Clason Living Trust" (the 2011 Trust). The beneficiaries of the 2011 Trust are the five children identified above, plus, per stirpes, the children of the three disinherited children. The present appeal involves a dispute over whether certain quitclaim deeds signed by Eugene and Ruth in 2008, but not recorded until 2013 after the death of both Eugene and Ruth, were delivered and became part of the 2008 Trust or are void, thus making the real estate part of Ruth's estate and subject to the terms of the 2011 Trust.

Before their deaths, Eugene and Ruth retained attorney Allen Daubman to develop an estate plan for them. On March 31, 2008, Eugene and Ruth executed the trust agreement for the 2008 Trust. Eugene and Ruth were named in the trust agreement as the initial trustees, with Steven and Susan named as successor cotrustees. As noted previously, the five children identified above were named as trust beneficiaries, and among other things, the 2008 Trust provided for specific distributions of real estate to these five children. The 2008 Trust provided that the three disinherited children "and the descendants of each of them" were "specifically and intentionally exclude[d]" from "receiving any part of the Trust Estate." In terms of "Initial Trust Property," the 2008 Trust provided: "We will assign, convey, transfer and deliver to the Trustee certain property to be made part of the Trust Estate. The Trustee agrees to hold, manage, and distribute the Trust Estate under the provisions set forth in this Trust Agreement." Also on March 31, Eugene and Ruth signed 14 quitclaim deeds governing certain real property owned by them (five from Ruth as grantor to Eugene and Ruth, husband and wife, as grantees; one from Eugene as grantor to Eugene and Ruth, husband and wife,

as grantees; and eight from Eugene and Ruth, husband and wife, as grantors to Eugene and Ruth, trustees of the 2008 Trust, as grantees). Daubman specifically informed Eugene and Ruth that to fund the 2008 Trust, the deeds would need to be recorded.

On July 28, 2008, Eugene and Ruth, as husband and wife, individually executed a "Nebraska Deed of Trust" pledging the real estate as collateral for a loan.

Eugene died on May 16, 2010. After Eugene's death, Ruth retained Daubman to represent her as the personal representative of Eugene's estate. She later retained attorney Ward Urbom to replace Daubman when he withdrew, and subsequently, she retained attorney Jerrod Gregg to replace Urbom.

On September 24, 2010, Ruth executed an amendment to the 2008 Trust, appointing Lee to serve as her cotrustee and further appointing Susan as cotrustee with Lee if he was unwilling to serve as sole trustee. In a separate proceeding from the present declaratory judgment, the district court determined that the amendment was not the result of undue influence by Susan and/or Lee.

On July 13, 2011, Ruth signed documents to execute a will and the 2011 Trust. The 2011 Trust documents prepared by Gregg were intended to, but did not, recreate the terms of the 2008 Trust. Although Gregg testified about various provisions of the 2011 Trust in his deposition, a copy of the 2011 Trust is not in the record on appeal.

Ruth entered into a written crop share lease with Lee as the tenant on March 13, 2012. The lease was executed by Ruth, as the personal representative of Eugene's estate, and Ruth, an individual, as lessor. The lease was for real property at issue in this appeal.

Ruth died on January 12, 2013. On the date of her death, she was the record owner of 17 tracts of land (corresponding to the land represented in the 14 original quitclaim deeds). Eugene and Ruth personally paid the 2008 through 2011 real estate taxes on this property. Ruth reported all income and deducted

all expenses generated by this property on her individual income tax returns for 2010, 2011, and 2012.

Steven recorded the quitclaim deeds with the Furnas County register of deeds on May 17, 2013.

On May 26, 2015, Susan, as the personal representative of Ruth's estate, filed a complaint for declaratory judgment in the district court, naming various interested parties, including Steven both individually and as the personal representative of Eugene's estate, as defendants. In the body of the complaint, Susan described Steven in his capacity both as the "duly appointed" personal representative of Eugene's estate and as an interested party by virtue of his "possible status as a beneficiary of the 2008 Trust and the 2011 Trust." Susan alleged that on the date of Ruth's death, Ruth was the record owner of (or owned a one-half interest in) certain tracts of real property; that the 2008 Trust claimed title to this real property, adverse to Susan as the personal representative, based on the 14 quitclaim deeds dated March 31, 2008, and recorded on May 17, 2013; that the 2008 Trust had no interest in the land; that Eugene and Ruth had never authorized the recording of the 14 quitclaim deeds; and that such recording, if "left outstanding," would "totally deprive [Susan as the personal representative] of one-half ownership of said property." Susan sought a declaration that the 14 quitclaim deeds recorded on May 17, 2013, were not valid transfers of an interest in the real estate and asked the court to void the deeds.

On May 26, 2015, Susan, as the personal representative of Ruth's estate, filed a praecipe requesting that the clerk of the district court issue a summons for Steven both personally and in his capacity as the personal representative of Eugene's estate for personal service of the complaint by the Furnas County sheriff upon Steven at his residence. The clerk issued a summons on May 26 directed to "Steven Clason PR Est Eugene Clason." On June 1, the sheriff filed a return of service showing that the complaint and summons were personally handed to Steven at his residence.

On June 26, 2015, Steven, as the personal representative of Eugene's estate, filed a motion to dismiss the complaint, alleging that it failed to state a claim upon which relief could be granted, that it failed to join one or more necessary parties, and that Susan did not have standing to bring the claim. The bill of exceptions in this case does not include a transcription of the hearing held on Steven's motion, and a notation from the court reporter indicates that no record was made of the hearing held on July 29. On August 12, the district court entered an order, denying Steven's motion, but finding that Susan in her individual capacity was a necessary party. The court granted Susan as the personal representative 10 days to amend the complaint and granted an additional 10 days thereafter for all of the defendants to answer or plead if they had not already filed an answer.

On August 14, 2015, Susan, as the personal representative of Ruth's estate, filed an amended complaint, adding herself in her individual capacity as a defendant. As before, she named Steven as a defendant both in his capacity as the personal representative of Eugene's estate and in his individual capacity and described him in the body of the complaint as the appointed personal representative of Eugene's estate and as an interested party by virtue of being a possible beneficiary of the two trusts. The certificate of service for the amended complaint indicates that a copy was provided electronically to Steven, both individually and as the personal representative, to his attorney at the attorney's email address.

On August 17, 2015, Susan, as the personal representative of Ruth's estate, filed a praecipe asking the clerk of the district court to issue an "alias summons" for "Defendant, **Steven E. Clason, personally**" for personal service by the sheriff upon Steven at his residence. The clerk issued the second summons on August 18, which was again directed to "Steven Clason PR Est Eugene Clason." The sheriff filed a return of service on August 25, showing that the amended complaint and summons were personally handed to Steven at his residence.

On January 5, 2016, Susan, as the personal representative of Ruth's estate, filed a motion for summary judgment. She asserted that there was no genuine issue of material fact and that she was entitled to judgment as a matter of law and asked the court to "declare that the Qui[t] Claim Deeds filed by and between F.W. Eugene Clason, Ruth E. Clason, F.W. Eugene Clason and Ruth E. Clason as co-trustees of the 2008 [T]rust on May 17, 2013, are void." The certificate of service for the summary judgment motion indicates that a copy was provided electronically to Steven, both individually and as the personal representative, to his attorney at the attorney's email address.

On January 22, 2016, Steven, as the personal representative of Eugene's estate, filed a pleading entitled "Objection to Hearing on Plaintiff's Motion for Summary Judgment," alleging that "not all Defendants have been served with summons and granted an opportunity to respond to the Amended Complaint."

Steven, in his individual capacity, filed a suggestion of bankruptcy with the district court on January 27, 2016, and an amended suggestion of bankruptcy on February 1.

On August 16, 2016, Steven, as the personal representative of Eugene's estate, filed a motion to continue the hearing on the summary judgment motion. He alleged that Susan, as the personal representative of Ruth's estate, had failed to summon all necessary parties, specifically, Steven, individually, and Lee and Susan as trustees of the 2008 Trust. Following a hearing, the district court denied Steven's motion to continue. The bill of exceptions on appeal does not include a transcription of the hearing on the motion to continue, and a notation from the court reporter indicates that a record was not made of that hearing. We note that Susan filed a voluntary appearance in her capacity as a cotrustee of both trusts prior to the summary judgment hearing and that Lee filed an answer to both the complaint and the amended complaint seeking affirmative relief. Lee also filed an answer to the amended complaint in

his capacity as cotrustee of the 2008 Trust and as a copersonal representative of Ruth's estate.

A hearing on the motion for summary judgment was held on August 25, 2016. At the start of the hearing, the district court noted that Steven's bankruptcy stay was resolved effective August 1 and that Steven was present in both his fiduciary capacity and his individual capacity. The following exchange occurred between the court and the attorney for Steven as the personal representative:

> [ATTORNEY]: . . . I want to make sure the record is clear on that that is not the case because we do not accept the fact that . . . Steven . . . , as an individual, has had summons issued against him or served. My representation here today is as appearing for [Steven] as Personal Representative of [Eugene's estate].
>
> THE COURT: Okay. Steven . . . , Personal Representative of [Eugene's estate,] is represented by [the attorney]. The Defendant, Steven . . . , is present in person, pro se.
>
> [ATTORNEY]: He is not present in person, he's present as [the personal representative].
>
> THE COURT: I see him. He's here in person. The record will reflect that . . . Steven . . . is present in person.

The attorney for Steven, as the personal representative of Eugene's estate, made an oral motion for recusal, which the district court denied. The court asked Steven if he had anything he wanted to say in response to the motion, but Steven declined, stating, "No. I mean since I've not had legal notice I don't want to say — thank you." The court then received various depositions, affidavits, and other documentary evidence offered by the parties in connection with the summary judgment motion. The attorney for Steven, as the personal representative of Eugene's estate, offered certain evidence in opposition to the summary judgment motion, but Steven in his individual capacity did not offer any evidence, nor did the court ask him whether he wished to do so.

In addition to the information we have already set forth above about the deeds and the formation of the two trusts, there was evidence received at the summary judgment hearing about the location of the deeds and 2008 Trust documents between March 31, 2008, when they were signed by Eugene and Ruth and May 17, 2013, when they were recorded by Steven, although the record is not particularly revealing on this point.

In his deposition, Daubman testified that he may have kept the original quitclaim deeds after they were signed by Eugene and Ruth, but he was not certain. If he kept them, he was not certain for how long, and he had no recollection "either way" of conveying them or transferring them to anyone at any time. Daubman had no memory of being asked by Eugene and Ruth to hold the deeds so that Daubman could record them. Nor did he recall any specific request from them to hold the deeds because they were not ready to fund the trust. He did not have any recollection of either of them making an expression that they were not ready to fund the trust, and he had only a vague recollection that they were giving some consideration to "maybe making some changes to who got what land."

Gregg testified that at some point after he was retained by Ruth, he received from Urbom a binder containing the 2008 Trust agreement, Eugene's will, and the original quitclaim deeds. Elsewhere in his deposition, he testified that the "2008 tax plan documents" were delivered to his office by Susan or "some family member," but he did not recall when they were delivered or by whom, although he clearly stated they were not delivered prior to July 13, 2011. Gregg testified that he did not see the quitclaim deeds until after Ruth's death. He also indicated that Ruth did not "express the existence of those deeds" to him prior to her death.

In his deposition, Steven stated that after Ruth's death, he personally retrieved the original 14 quitclaim deeds from Gregg's office.

On December 8, 2016, the district court entered an order, granting Susan's motion for summary judgment. The court found it undisputed that Eugene and Ruth signed the quitclaim deeds on March 31, 2008, and that Steven recorded them on May 17, 2013. The court stated that the burden of proof of delivery shifts to Steven to prove by a preponderance of the evidence that Eugene and Ruth intended to convey title to the real property to the 2008 Trust. The court found that Steven presented no evidence to prove delivery of the quitclaim deeds by Eugene and Ruth. Accordingly, the court found that there was no delivery of the deeds by Eugene and Ruth. The court granted Susan's motion for summary judgment and ordered that the 14 quitclaim deeds dated March 31, 2008, and recorded on May 17, 2013, are void.

On December 15, 2016, Steven, as the personal representative of Eugene's estate, filed a "Motion for New Trial or for Order Vacating Judgment." The district court denied Steven's motion on February 17, 2017.

ASSIGNMENTS OF ERROR

Steven asserts, consolidated and restated, that the district court erred in (1) failing to dismiss for lack of an indispensable party, (2) granting summary judgment, and (3) denying his motion to vacate.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *McCullough v. McCullough*, 299 Neb. 719, 910 N.W.2d 515 (2018).

[2] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Lombardo v. Sedlacek*, 299 Neb. 400, 908 N.W.2d 630 (2018).

[3,4] A motion to alter or amend a judgment is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Id.* A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result. *McCullough v. McCullough, supra*.

ANALYSIS

Indispensable Party.

Steven asserts that the district court erred in failing to dismiss for lack of an indispensable party. He argues that he was never summoned into the case in his individual capacity and that he was an indispensable party given the differing sets of beneficiaries defined in the 2008 Trust and the 2011 Trust and the effect on the beneficiaries of the 2008 Trust of voiding the quitclaim deeds.

[5-8] Neb. Rev. Stat. § 25-323 (Reissue 2016) provides in part:

> The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in.

The absence of an indispensable party to a controversy deprives the court of subject matter jurisdiction to determine the controversy and cannot be waived. *Midwest Renewable Energy v. American Engr. Testing*, 296 Neb. 73, 894 N.W.2d 221 (2017). When a lower court lacks the power, that is, the subject matter jurisdiction, to adjudicate the merits of a 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. *Id.* When it appears that all indispensable parties to a proper and complete determination of an equity cause were not before the district court,

an appellate court will remand the cause for the purpose of having such parties brought in. *Id.* 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. *Carlson v. Carlson*, 299 Neb. 526, 909 N.W.2d 351 (2018).

[9-11] Necessary parties are parties who have an interest in the controversy, and should ordinarily be joined unless their interests are separable so that the court can, without injustice, proceed in their absence. *Midwest Renewable Energy v. American Engr. Testing, supra*. The presence of necessary parties in declaratory judgment actions is jurisdictional and cannot be waived, and if such persons are not made parties, then the district court has no jurisdiction to determine the controversy. *Carlson v. Allianz Versicherungs-AG*, 287 Neb. 628, 844 N.W.2d 264 (2014). An indispensable party to a suit is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. *Midwest Renewable Energy v. American Engr. Testing, supra*.

Clearly, Steven has an interest in this case both in his capacity as the personal representative of Eugene's estate and in his individual capacity by virtue of being a potential beneficiary of both trusts, and he was named as a defendant in both capacities and identified as such in both the complaint and the amended complaint. The question becomes whether Steven was properly served in both capacities. The record shows that both summonses issued by the clerk of the court were directed to "Steven Clason PR Est Eugene Clason." Steven does not dispute that he was served in his capacity as the personal representative, only arguing that he was not served in his individual capacity.

Neb. Rev. Stat. § 25-508.01(1) (Reissue 2016) provides that an individual party "may be served by personal, residence, certified mail, or designated delivery service." "Personal service . . . shall be made by leaving the summons with the individual to be served," and "[r]esidence service . . . shall be made by leaving the summons at the usual place of residence of the individual to be served, with some person of suitable age and discretion residing therein." Neb. Rev. Stat. § 25-505.01(1) (Reissue 2016). Neb. Rev. Stat. § 25-506.01(1) (Reissue 2016) provides that "[u]nless the plaintiff has elected certified mail service or designated delivery service, the summons shall be served by the sheriff of the county where service is made . . . ."

Here, the returns of service filed by the sheriff show that the summonses, complaint, and amended complaint were personally handed to Steven at his home address in compliance with the above statutory requirements. Regardless of whether the reference to Steven in the summons is only in his capacity as the personal representative of Eugene's estate and not in his individual capacity, he has made a general appearance, thereby waiving any such defect.

[12-14] Participation in the proceedings on any issue other than the defenses of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process, waives all such issues except as to the objection that the party is not amenable to process issued by a court of this state. *Burns v. Burns*, 293 Neb. 633, 879 N.W.2d 375 (2016). A general appearance waives any defects in the process or notice, the steps preliminary to its issuance, or in the service or return thereof. *Id.* A party will be deemed to have appeared generally if, by motion or other form of application to the court, he or she seeks to bring its powers into action on any matter other than the question of jurisdiction over that party. *Id.* See Neb. Rev. Stat. § 25-516.01(2) (Reissue 2016).

Susan argues that by filing the suggestion in bankruptcy and the amended suggestion in bankruptcy, Steven made a

general appearance. We agree. Neb. Ct. R. § 6-1506 (rev. 2008) states:

> Upon the filing of the Suggestion of Bankruptcy . . . , no further action will be taken in the case by the court or by the parties until it can be shown to the satisfaction of the court that the automatic stay imposed by 11 U.S.C. § 362 does not apply or that the automatic stay has been terminated, annulled, modified, or conditioned so as to allow the case to proceed.

By filing the stay, Steven asked the court to bring its powers into action on a matter other than the question of jurisdiction, thus making a general appearance and waiving any defects in the service of process. See, also, *Ohio Nat. Life Ins. Co. v. Baxter*, 139 Neb. 648, 298 N.W. 530 (1941) (filing by mortgagor of request for stay of order of sale under foreclosure decree was general appearance by mortgagor in action and constituted waiver of all errors prior to filing of request); *Franse v. Armbuster*, 28 Neb. 467, 44 N.W. 481 (1890) (mortgagor, by availing himself of stay taken in his name by his brother, thereby appeared in action).

Steven's assignment of error is without merit.

Summary Judgment.

[15-18] Steven asserts that the district court erred in granting summary judgment. Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Wynne v. Menard, Inc.*, 299 Neb. 710, 910 N.W.2d 96 (2018). A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law. *Id.* If the movant meets this burden, then the nonmovant must show the existence of a material issue of fact that prevents judgment as a

matter of law. *Id.* When the parties' evidence would support reasonable, contrary inferences on the issue for which a movant seeks summary judgment, it is an inappropriate remedy. *Id.* Where reasonable minds could draw different conclusions from the facts presented, such presents a triable issue of material fact. *Id.*

[19-22] In granting summary judgment, the district court considered Susan's argument that the quitclaim deeds at issue were not delivered and therefore not valid. It is essential to the validity of a deed that there be a delivery, and the burden of proof rests upon the party asserting delivery to establish it by a preponderance of the evidence. *Caruso v. Parkos*, 262 Neb. 961, 637 N.W.2d 351 (2002). To constitute a valid delivery of a deed, there must be an intent on the part of the grantor that the deed shall operate as a muniment of title to take effect presently. *Id.* The essential fact to render delivery effective is always that the deed itself has left the control of the grantor, who has reserved no right to recall it, and it has passed to the grantee. *Id.* Whether a deed or other instrument conveying an interest in property has been delivered is largely a question of intent to be determined by the facts and circumstances of the particular case. *Id.*

[23,24] Recordation of a deed generally presumes delivery. *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994). Whether or not a deed has been delivered is a mixed question of law and fact. *Id.* The element which controls the resolution of that question is the intention of the parties, especially the intention of the grantor. *Id.* The vital inquiry is whether the grantor intended a complete transfer—whether the grantor parted with dominion over the instrument with the intention of relinquishing all dominion over it and of making it presently operative as a conveyance of the title to the land. *Id.*

[25] It is not necessary, to effectuate delivery, that a deed actually be handed over to the grantee or to another person for the grantee. *Id.* There may be a delivery notwithstanding that the deed remains in the custody of the grantor. *Id.* If a

valid delivery takes place, it is not rendered ineffectual by the act of the grantee in giving the deed into the custody of the grantor for safekeeping. *Id.* It is all a question of the intention of the parties, which may be manifested by words or acts or both. *Id.*

[26-29] If a deed, although acknowledged, is not recorded and is in the grantor's possession at the time of death, those circumstances, unless explained, are deemed conclusive that the parties did not intend a complete transfer. *Id.* There is a presumption of nondelivery if the evidence shows that a deed was in the grantor's possession at the time of death and was not then recorded. *Id.* Such a showing places upon the grantees the burden of going forward with the evidence, more accurately, the burden of persuasion, to rebut the presumption of nondelivery. *Id.* The burden of proof rests upon the party asserting delivery to establish it by a preponderance of the evidence, and to constitute a valid delivery of a deed there must be an intent on the part of the grantor that the deed shall operate as evidence of title to take effect presently. *Id.* When a deed is found in the grantee's possession during the lifetime of the grantor, this is prima facie evidence of delivery, and the burden of proof is upon the one who disputes this presumption. *Id.*

[30] The district court in this case found it undisputed that Eugene and Ruth signed the quitclaim deeds on March 31, 2008, and that Steven recorded those deeds on May 17, 2013. The court stated that the burden of proof of delivery shifts to Steven to prove by a preponderance of evidence. The court concluded that Steven presented no evidence to prove delivery of the quitclaim deeds by Eugene and Ruth and concluded that there was no delivery of the quitclaim deeds by Eugene and Ruth. Contrary to Steven's assertions, the court made no findings about who was in possession of the deeds, constructively or otherwise, as of the date of Ruth's death. Further, the record is not particularly enlightening on this issue, and given that Eugene and Ruth, in different capacities, were both the

grantors and grantees, any inferences about the effectiveness of delivery based on who possessed the deeds at any given time is less useful than an examination of Eugene's and Ruth's words and actions as evidence of their intent. See *In re Estate of Plance*, 175 A.3d 249 (Pa. 2017) (where same individual is both deed's grantor and its sole grantee, no justifiable inference regarding effectiveness of delivery may be drawn merely from that individual's continuous possession and control of deed). A determination of whether summary judgment was properly granted then rests on whether there are genuine issues of material fact with respect to Eugene's and Ruth's intent as to the effectiveness of the deeds as evidence of title.

[31] On appeal, Steven essentially argues that summary judgment was improper because there was at least some evidence that Eugene and Ruth intended to convey the real property at issue to the 2008 Trust. He cites several out-of-state cases addressing methods of creating a trust, which cases cite to the Restatement (Second) of Trusts § 17 (1959) and the Restatement (Third) of Trusts § 10(c) at 145 (2003) (trust may be created by "a declaration by an owner of property that he or she holds that property as trustee for one or more persons"). In this declaratory judgment action, of course, the district court was not asked to rule on whether the 2008 Trust agreement created a valid trust; rather, it was asked to declare that the quitclaim deeds were not valid transfers of an interest in real estate. We do, however, consider the language of the 2008 Trust agreement in considering whether there was a genuine issue of material fact with respect to Eugene's and Ruth's intent as to the deeds. The trust agreement specified only, "We will . . . transfer . . . to the Trustee certain property to be made part of the Trust Estate." The agreement does not contain any reference to the particular property represented by the deeds or any indication of when Eugene and Ruth planned to make such a transfer, but the fact that the 2008 Trust agreement and the quitclaim deeds were executed on the same date has some relevance. See *In*

re Wendland-Reiner Trust, 267 Neb. 696, 677 N.W.2d 117 (2004) (when there are two or more instruments relating to trust, they should be construed together to carry out settlor's intent). The 2008 Trust agreement did identify specific property, including property at issue in this case, in the section concerning "Specific Distributions of Trust Estate." The evidence is undisputed, however, that Daubman told Eugene and Ruth that they would need to record the deeds in order to fund the trust. And, Daubman's undisputed testimony indicates at least some uncertainty by Eugene and Ruth as to how they wanted to distribute their property. The deeds were not recorded during either Eugene's or Ruth's lifetime, and Ruth was the record owner of the property at issue on the date of her death.

The undisputed facts also show that Eugene and/or Ruth took numerous acts inconsistent with an intent of making the deeds effective transfers of title. These acts included executing a deed of trust in their individual capacities, paying real estate taxes on the property as individuals, entering a crop share lease for the property as an individual, receiving various agricultural program payments with respect to the property, and reporting the payments on their individual tax returns.

Viewing and construing the evidence in the light most favorable to Steven and giving him the benefit of all reasonable inferences deducible from the evidence, we conclude that there is no genuine issue of material fact concerning the lack of delivery of the quitclaim deeds at issue by Eugene and Ruth to the 2008 Trust. The court did not err in granting Susan's motion for summary judgment and finding that the quitclaim deeds are void.

Motion to Vacate.

Steven asserts that the district court erred in denying his motion to vacate. In denying Steven's motion, the district court observed that a motion for new trial is not a proper motion after the entry of summary judgment, and it stated:

> The sole result sought by [Steven's] motion is a new trial or to vacate the summary judgment. No other remedy is sought. The motion cannot reasonably be construed as a motion to alter or amend. The Court finds that [Steven's] *Motion For New Trial Or For Order Vacating Judgment* cannot be interpreted as anything other than a motion for new trial under *Neb. Rev. Stat.* §25-1142.

The court then denied Steven's motion.

[32] We agree that the court incorrectly determined Steven's motion could not be construed as being a motion to alter or amend, and we address that issue below. However, because we have already determined that the court did not err in granting Susan's motion for summary judgment, we need not further address the substantive issues raised in Steven's motion to vacate. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Nesbitt v. Frakes*, 300 Neb. 1, 911 N.W.2d 598 (2018).

[33,34] "A new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a trial and decision by the court." Neb. Rev. Stat. § 25-1142 (Reissue 2016). At the summary judgment stage, the trial court determines whether the parties are disputing a material issue of fact. *Wynne v. Menard, Inc.*, 299 Neb. 710, 910 N.W.2d 96 (2018). It does not resolve the factual issues. *Id.* A motion for new trial following the entry of summary judgment is not a proper motion. *Clarke v. First Nat. Bank of Omaha*, 296 Neb. 632, 895 N.W.2d 284 (2017).

[35-39] However, an appellate court reviews a postjudgment motion based on the relief it seeks, rather than its title. *Id.* Under Neb. Rev. Stat. § 25-1329 (Reissue 2016), if a postjudgment motion seeks a substantive alteration of the judgment—as opposed to the correction of clerical errors or relief wholly collateral to the judgment—a court may treat the motion as one to alter or amend the judgment. *Clarke v. First Nat. Bank of Omaha, supra*. In order to qualify for treatment

as a motion to alter or amend a judgment, the motion must be filed no later than 10 days after the entry of judgment, as required under § 25-1329, and must seek substantive alteration of the judgment. *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005). In cases involving a motion to alter or amend the judgment, a critical factor is whether the motion was filed within 10 days of the final order, because a timely motion tolls the time for filing a notice of appeal. *Fitzgerald v. Fitzgerald*, 286 Neb. 96, 835 N.W.2d 44 (2013). Under § 25-1329, a motion for reconsideration is the functional equivalent of a motion to alter or amend a judgment. *Clarke v. First Nat. Bank of Omaha, supra*.

In *Clarke v. First Nat. Bank of Omaha*, the appellant filed a motion entitled "'Motion for New Trial to Amend Judgment of Summary Judgment Order'" 4 days after the trial court granted a motion for summary judgment. 296 Neb. at 636, 895 N.W.2d at 288. In his motion, the appellant asked the court to vacate its summary judgment decision and hold trial to resolve genuine issues of material fact. The request was based on grounds including claims of irregularities in the proceedings and that the summary judgment order was contrary to law. On appeal, the Nebraska Supreme Court determined that the motion was effectively a motion for reconsideration, which the Supreme Court treated as a motion to alter or amend. See, also, *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004) (treating timely filed motion for new trial following summary judgment as motion for reconsideration where motion asked court to grant new hearing based upon newly discovered evidence); *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 679 N.W.2d 235 (2004) (treating timely filed motion as motion to alter or amend under § 25-1329 where motion asked court to vacate order dismissing petition on basis that decision was contrary to law).

[40] In this case, Steven, as the personal representative of Eugene's estate, filed his motion for new trial or for order vacating judgment within 10 days of the entry of summary

judgment. He asked the district court for a new trial or to vacate the summary judgment, alleging grounds including that the court's decision was not sustained by sufficient evidence and was contrary to law. Steven was effectively asking the court to reconsider its decision, which is equivalent to a motion to alter or amend under § 25-1329. See *Clarke v. First Nat. Bank of Omaha, supra*. The court erred in concluding otherwise. Nonetheless, because the court did not err in granting summary judgment, Steven's motion to vacate was properly denied. While the court did not address the substance of Steven's motion, it reached the correct result. A correct result will not be set aside even when the lower court applied the wrong reasoning in reaching that result. *Bel Fury Invest. Group v. Palisades Collection*, 19 Neb. App. 883, 814 N.W.2d 394 (2012).

CONCLUSION

The district court did not err in failing to dismiss for lack of an indispensable party, granting summary judgment, or denying Steven's motion to vacate.

Affirmed.

Chase County, a political subdivision of the State of Nebraska, appellee, v. City of Imperial, a political subdivision of the State of Nebraska, appellant.

918 N.W.2d 631

Filed August 14, 2018. No. A-17-813.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant 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. **Administrative Law: Statutes: Appeal and Error.** The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Declaratory Judgments: Statutes.** An action for a declaratory judgment is an appropriate remedy to determine the validity, construction, or interpretation of a statute.
4. **Declaratory Judgments.** The general rule is that an action for declaratory judgment does not lie where another equally serviceable remedy is available.
5. **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.
6. **Statutes: Legislature: Intent: Appeal and Error.** In discerning the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
7. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.

8. **Arrests: Health Care Providers: Costs.** Under Neb. Rev. Stat. § 47-703(2) (Cum. Supp. 2016), the costs of medical services are chargeable to the agency responsible for operation of the correctional facility where the recipient is lodged in all cases where medical services were not necessitated by injuries or wounds suffered during the course of apprehension or arrest.
9. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
10. **Arrests: Health Care Providers: Costs.** Neb. Rev. Stat. §§ 47-701 and 47-702 (Reissue 2010) apply to the costs of medical services for any person in need of such services at the time such person is arrested, detained, taken into custody, or incarcerated, and their application is not limited to only those arrestees who are ultimately lodged into a correctional facility.
11. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.

Appeal from the District Court for Chase County: David W. Urbom, Judge. Reversed and remanded for further proceedings.

Joshua J. Wendell, of McQuillan & Wendell, P.C., L.L.O., for appellant.

Arlan G. Wine, Chase County Attorney, for appellee.

Andre R. Barry and Nathan D. Clark, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for amicus curiae League of Nebraska Municipalities.

Pirtle, Riedmann, and Bishop, Judges.

Riedmann, Judge.

INTRODUCTION

The City of Imperial (the City) appeals from an order of the district court for Chase County, which entered summary judgment in favor of Chase County (the County). For the reasons that follow, we reverse the district court's order and remand the cause for further proceedings.

BACKGROUND

On the evening of December 24, 2016, a police officer who worked for the City arrested an individual for disturbing the peace and transported him to the Chase County jail, a correctional facility operated by the County. Upon arrival at the jail, the arrestee was intoxicated, uncooperative, and belligerent. The jail employees began the booking process. Based on the arrestee's intoxicated condition, noncompliance, and refusal to answer medical questions, a jail employee asked the police officer to take the arrestee to a hospital for medical clearance. The arrestee was evaluated at the hospital, and after receiving medical clearance, he was returned to the jail. He was much more cooperative at that point, the booking process was completed, and he was lodged into the jail.

The hospital presented a medical bill for the arrestee's medical evaluation in the amount of $436 to each party for payment. Each party denied payment, claiming the other party was responsible for payment of the bill. As a result of the disagreement, the County filed a complaint in the Chase County District Court seeking a declaratory judgment as to whether the County or the City was responsible for payment of the medical bill.

The County filed a motion for summary judgment. After holding an evidentiary hearing, the district court granted the motion and found that the City was responsible for payment of the medical bill. The City appeals.

ASSIGNMENT OF ERROR

The City assigns, summarized, that the district court erred in granting the County's motion for summary judgment.

STANDARD OF REVIEW

[1] An appellate court will affirm a lower court's grant 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. *Sulu v. Magana*, 293 Neb. 148, 879 N.W.2d 674 (2016).

[2] The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Bridgeport Ethanol v. Nebraska Dept. of Rev.*, 284 Neb. 291, 818 N.W.2d 600 (2012).

ANALYSIS

The parties agree that either the County or the City is the party responsible for payment of the medical bill at issue. They also agree that the matter is governed by Neb. Rev. Stat. §§ 47-701 to 47-703 (Reissue 2010 & Cum. Supp. 2016). We therefore provide no comment on whether the medical bill at issue is for "medical services" as that term is defined in § 47-701.

[3,4] We note that the relief sought in the County's complaint was a declaration that the City was responsible to pay the medical bill, rather than a request that the district court interpret and apply the applicable statutes. In fact, the County's complaint does not specifically reference the statutes at issue here. An action for a declaratory judgment is an appropriate remedy to determine the validity, construction, or interpretation of a statute. *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388 N.W.2d 93 (1986). But the general rule is that an action for declaratory judgment does not lie where another equally serviceable remedy is available. *Carlson v. Carlson*, 299 Neb. 526, 909 N.W.2d 351 (2018). In this case, however, neither party has challenged the availability of declaratory relief nor alleged that a more serviceable remedy is available. We therefore assume, without deciding, that it was proper for the district court to entertain the parties' request for declaratory relief. See *id*.

The City argues that the district court erred in concluding that the City was responsible for paying the medical

bill, rather than holding the County responsible for payment. We agree.

[5-7] A determination of which governmental agency is responsible for payment requires statutory interpretation. Thus, we begin by recalling basic principles of statutory interpretation. 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. *Bridgeport Ethanol v. Nebraska Dept. of Rev., supra*. In discerning the meaning of a statute, we must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Id*. If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Id*.

We now turn to the applicable statutes themselves. Section 47-701(1) provides that "[n]otwithstanding any other provision of law, sections 47-701 to 47-705 shall govern responsibility for payment of the costs of medical services for any person ill, wounded, injured, or otherwise in need of such services at the time such person is arrested, detained, taken into custody, or incarcerated."

Section 47-702 places primary responsibility for payment of the costs of medical services "provided to individuals who are arrested, detained, taken into custody, or incarcerated" with the recipients of such services if they have insurance coverage available to them.

Section 47-703(1) states that upon a showing that reimbursement from the sources enumerated in § 47-702 is not available, in whole or in part, the costs of medical services shall be paid by the appropriate governmental agency.

The County and the City agree that reimbursement from the sources listed in § 47-702 is not available in the instant case, and thus, the costs of the medical services are to be paid by the appropriate governmental agency. They disagree, however, on which governmental agency is responsible.

According to § 47-703(2):

> In the case of medical services necessitated by injuries or wounds suffered during the course of apprehension or arrest, the appropriate governmental agency chargeable for the costs of medical services shall be the apprehending or arresting agency and not the agency responsible for operation of the institution or facility in which the recipient of the services is lodged. In all other cases, the appropriate governmental agency shall be the agency responsible for operation of the institution or facility in which the recipient of the services is lodged, except that when the agency is holding the individual solely for another jurisdiction, the agency may, by contract or otherwise, seek reimbursement from the other jurisdiction for the costs of the medical services provided to the individual being held for that jurisdiction.

It is undisputed that the arrestee in the present case did not require medical services because of an injury or wound suffered during the course of his arrest. Therefore, the first portion of § 47-703(2) does not apply here.

[8] The remainder of § 47-703(2) indicates that it applies "[i]n all other cases" or, in other words, in all cases where there was no injury or wound suffered during the course of apprehension or arrest. Stated another way, the costs of medical services are chargeable to the agency responsible for operation of the correctional facility where the recipient is lodged in all cases where medical services were not necessitated by injuries or wounds suffered during the course of apprehension or arrest.

The County argues that its payment responsibility arises only once the recipient of services has been lodged into the facility, meaning after the booking process has been completed and the arrestee becomes an inmate. In support of its argument, the County cites to the Nebraska jail standards, see Neb. Rev. Stat. §§ 83-4,124 to 83-4,134 (Reissue 2014 & Cum. Supp. 2016), which it claims prohibits a jailer from

accepting a prisoner until booking procedures have been completed. The district court agreed with the County, interpreting § 47-703(2) to find that the point at which the payment obligation transferred from the arresting agency to the facility receiving the prisoner rested on the term "lodged." The court went on to conclude that a person is not "lodged" in jail until such person has been accepted by the facility after the person and arresting officer have complied with all requirements for acceptance, including any medical examination of the arrestee. The district court therefore determined that because the medical services in the instant case were rendered before the booking process was complete, the City was responsible for the medical costs.

[9] We disagree with the County and the district court. The language of § 47-703(2) is clear and unambiguous. If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning, and we are therefore precluded from looking beyond the words of the statute to construe its meaning. See *Stewart v. Nebraska Dept. of Rev.*, 294 Neb. 1010, 885 N.W.2d 723 (2016). Thus, consideration of and reference to the Nebraska jail standards is unnecessary and prohibited.

[10] Sections 47-701 and 47-702 apply to the costs of medical services for any person in need of such services *at the time such person is arrested, detained, taken into custody, or incarcerated*, and their application is not limited to only those arrestees who are ultimately lodged into a correctional facility.

[11] Additionally, we do not read § 47-703(2) to require lodging the arrestee into the facility as a condition precedent to holding the County responsible for medical costs. Considering the plain language of § 47-703(2) as a whole, determination of the appropriate governmental agency responsible for the payment of medical costs falls under two categories: If the medical services were required because of an injury or wound suffered during the course of the arrest, then the arresting agency bears

the responsibility of the costs. In all other cases where medical services were necessary, the agency responsible for operation of the correctional facility where the individual is lodged must pay the costs. Accepting the County's argument would require us to read out of the statute the words "[i]n all other cases" and create a third category of circumstances. It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute. *Stewart v. Nebraska Dept. of Rev., supra*.

Furthermore, application of the County's argument would allow the County to circumvent payment for medical services for any person who is arrested, detained, or taken into custody by requiring medical services for that individual prior to completing the booking process. Section 47-703 clarifies payment responsibility and imposes responsibility on the arresting agency only when the need for services is necessitated by injuries or wounds suffered in the course of apprehension or arrest. To interpret the statute in any other manner would require us to treat the phrase "[i]n all other cases" as superfluous. We view the phrase "facility in which the recipient of the services is lodged" to describe the governmental agency that operates the facility rather than to limit its responsibility for payment.

Consequently, we conclude that the district court erred in determining that the City was responsible for the medical costs. We therefore reverse the district court's order entering summary judgment in favor of the County and, there being no competing summary judgment motion from the City, remand the cause for further proceedings.

CONCLUSION

The district court's order is reversed, and the cause is remanded for further proceedings.

Reversed and remanded for
further proceedings.

Clayton B. Schroeder, appellee, v. Maria A. Schroeder, now known as Maria A. Michaelis, appellant.

918 N.W.2d 323

Filed August 21, 2018. No. A-17-874.

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. **Judgments: Pleadings: Appeal and Error.** A motion to alter or amend a judgment is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
3. **Contempt: Appeal and Error.** 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 are reviewed for abuse of discretion.
4. **Contempt: Proof.** Outside of statutory procedures imposing a different standard, it is the complainant's burden to prove civil contempt by clear and convincing evidence.
5. **Child Custody.** While the wishes of a child are not controlling in the determination of custody, if a child is of sufficient age and has expressed an intelligent preference, the child's preference is entitled to consideration.
6. **Judgments.** In the absence of a request by a party for specific findings, a trial court is not required to make detailed findings of fact and need only make its findings generally for the prevailing party.
7. **Trial.** Even where the civil procedure code mandates specific findings, it does so only upon a party's request.

8. **Trial: Time.** Motions for specific findings of fact pursuant to Neb. Rev. Stat. § 25-1127 (Reissue 2016) must be made before the final submission of the case to the court.
9. **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 an 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.
10. **Contempt: Presumptions: Proof.** Outside of statutory procedures imposing a different standard or an evidentiary presumption, all elements of contempt must be proved by the complainant by clear and convincing evidence.
11. **Divorce: Attorney Fees: Costs.** Customarily in dissolution cases, attorney fees and costs are awarded only to prevailing parties or assessed against those who file frivolous suits.
12. **Modification of Decree: Attorney Fees: Appeal and Error.** In an action for modification of a dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
13. **Attorney Fees.** Attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.
14. **Divorce: Modification of Decree: Attorney Fees.** A uniform course of procedure exists in Nebraska for the award of attorney fees in dissolution and modification cases.
15. **Attorney Fees.** The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and general equities of the case.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Affirmed.

Benjamin E. Maxell, of Govier, Katskee, Suing & Maxell, P.C., L.L.O., for appellant.

Matthew Stuart Higgins, of Higgins Law, for appellee.

Pirtle, Riedmann, and Bishop, Judges.

Pirtle, Judge.

INTRODUCTION

Maria A. Schroeder, now known as Maria A. Michaelis, appeals the order of modification entered by the district court for Douglas County on June 20, 2017, and the order overruling her motion to alter or amend, filed August 7. The court denied Maria's request to hold her former husband, Clayton B. Schroeder, in contempt of court and granted Clayton's request for legal custody and attorney fees. The court denied Clayton's request to hold Maria in contempt of court. For the reasons that follow, we affirm.

BACKGROUND

Clayton and Maria were married in June 2002 and divorced in June 2006. Their daughter, Alexis Schroeder (Lexi), was born in May 2004. The original decree of dissolution was entered on June 8, 2006. The parties have returned to the district court for Douglas County numerous times for the purpose of modifying their decree or to allege violations of the decree by the other party.

In the present matter, Clayton filed a complaint to modify and an application for contempt citation on March 15, 2016. He alleged that Maria had scheduled and fostered Lexi's participation in a number of activities without giving Clayton notice or obtaining his consent. He argued that third parties, including coaches and school officials, were not honoring the authority given to him by the district court in an order entered in December 2015. He argued that Maria defied his authority by interacting with third parties on Lexi's behalf without Clayton's consent or knowledge. Clayton requested that he be awarded full legal custody of Lexi and that Maria be held in contempt of court.

Maria filed an application to modify and an application for contempt citation on November 30, 2016. She alleged that Clayton acted unilaterally, in violation of the court's orders. She also alleged that Clayton was in contempt of the provision

regarding telephone calls to the nonpossessory parent. She also requested that she be awarded legal custody of Lexi and attorney fees.

Trial was held on April 25 and 26, 2017, and the court issued a written order on June 20. The court found that both parties had the best interests of their child at heart, but they "cannot agree or get along as to how to best raise their child in lieu of a variety of activities and how to provide each party their respective time with the child that is somewhat uninterrupted by the variety of activities that are scheduled and to which they disagree." The court found that "[b]ecause of the continued and unrelenting problems the parties continued to have," there had been a material change in circumstances. The court observed that the parties could not communicate or cooperate properly to serve Lexi's best interests. Therefore, the court found it was in Lexi's best interests to modify the decree, and Clayton was granted sole legal custody. The order states, "This means that [Clayton] has the sole authority to make the decisions for the minor child."

The court found that Maria was not in contempt of court. The court found that Maria had violated the orders of the court, but her violations were not done "willfully and contumaciously." The court found that attorney fees were appropriate and that Maria was to pay Clayton the sum of $10,000. The court did not rule on Maria's request that Clayton be held in contempt.

Maria filed a motion to alter or amend and for the court to provide more detailed findings. The court acknowledged that there had been no ruling on Maria's request to hold Clayton in contempt. The court found Clayton was not in contempt, and the motion was overruled. Maria's motion to alter or amend was overruled, and she timely appealed.

ASSIGNMENTS OF ERROR

Maria alleges the court erred in (1) awarding sole legal custody to Clayton; (2) overruling her motion to alter or amend, and failing to provide a sufficiently detailed opinion; (3)

finding Clayton was not in contempt of court; and (4) awarding excessive attorney fees to Clayton.

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. *Floerchinger v. Floerchinger*, 24 Neb. App. 120, 883 N.W.2d 419 (2016).

[2] A motion to alter or amend a judgment is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Lombardo v. Sedlacek*, 299 Neb. 400, 908 N.W.2d 630 (2018).

[3,4] 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 are reviewed for abuse of discretion. *Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012). Outside of statutory procedures imposing a different standard, it is the complainant's burden to prove civil contempt by clear and convincing evidence. *Id.*

ANALYSIS

Award of Sole Legal Custody to Clayton.

Maria asserts the court abused its discretion in awarding legal custody of Lexi to Clayton, because Clayton refuses to cooperate or communicate with Maria, he dismisses her requests and opinions unilaterally, and he ignores her. She argues that she is the more cooperative parent and that she takes Lexi's interests and wishes into account.

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. *Floerchinger v. Floerchinger, supra*.

In the order overruling Maria's motion to alter or amend, the court found the evidence showed that after the court granted Clayton the final decisionmaking authority, Maria "continued to ignore that Order and do as she generally desired with the minor child." The court found that Clayton was better able to cooperate with Maria and was more reasonable in the action taken as to the activities of Lexi.

The record shows that Clayton and Maria agree that Lexi should participate in a variety of activities, but disagree about the frequency and extent of Lexi's involvement. Maria testified that she signed Lexi up for activities which occurred only on the days Lexi stayed with her and that if there were times when the activity occurred on days Lexi was with Clayton, Lexi just would not go. For example, Maria signed Lexi up for a swim team and Lexi only attended practices and meets which occurred during Maria's parenting time. Maria's testimony demonstrates her belief that it was not necessary to inform Clayton regarding activities Lexi was enrolled in, if Lexi was participating only during Maria's parenting time. Clayton testified that he did not think it was "appropriate" for Lexi to "sign up for multiple events and only attend half." He also testified that there were activities and camps that Maria signed Lexi up for that he did not find out about until after they had taken place.

Maria asserts Clayton made unilateral decisions with regard to Lexi's activities. Clayton testified that he did not make any decisions without first consulting with Maria. He said there were times when she agreed, times when she disagreed, and times that she did not respond in a timely manner to his requests for input.

Maria argues that the decision to switch Lexi's softball teams "[took] Lexi away from the friends and team she knows best." Brief for appellant at 13. She also argued that Clayton

had not taken her input into account in a single decision with regard to Lexi's extracurricular activities. Lexi testified that she enjoyed playing on the softball team and the basketball team that were coached by her stepfather. Clayton testified that he was concerned because the softball team played approximately 40 games during the season and Lexi was involved in other activities as well. Because the parties could not agree, he exercised the decisionmaking authority the court assigned to him and picked another softball team, offering Maria and her husband the opportunity to coach with him. The team he chose was made up of students who attended the same school as Lexi.

Maria also asserts that Clayton refuses to take Lexi's choice of activities into account. The evidence shows that Lexi likes to stay busy and that she enjoys a wide variety of sports and activities, including volleyball, basketball, piano lessons, softball, swimming, and horseback riding. Clayton testified that he takes input from Lexi and from Maria, but recognizes that if Lexi was allowed to choose, she would "say yes to everything" and would "overschedule herself." He stated that he was trying to parent and make decisions based upon Lexi's input, whether the activity will fit into the schedules for both parents' families, and whether the schedule Lexi was keeping was reasonable.

The evidence shows that the joint legal custody arrangement was unworkable. The parties did not agree on many things, and it was causing significant strain on the cooperative parental relationship between the parents and stress for Lexi. Maria does not argue that a transition to sole legal custody was in error; she simply believes that legal custody should have been awarded to her. Upon our review of the evidence, we find the decision of the district court was not an abuse of discretion.

Maria asserts Clayton's "[f]ear" of Lexi's testifying at court is indicative that he does not take Lexi's wishes into account. Brief for appellant at 17. Clayton stated that he did not want

Lexi to leave the courthouse feeling the weight of responsibility for the consequences of the outcome of the trial. Upon our review, it does not appear that Clayton was fearful of the court's hearing the testimony of Lexi, but, rather, he did not want Lexi to feel caught in the middle of her parents. In the end, Lexi was asked to testify in camera. Lexi did not speak negatively about either parent, and she expressed her desire to participate in a number of activities. Her testimony regarding both parents was, for the most part, very positive.

Maria asserts the court erred in awarding legal custody of Lexi to a parent who chose not to enroll Lexi on a volleyball team, despite the fact that volleyball is Lexi's favorite sport and she wants to play volleyball in college. Lexi testified that she enjoys volleyball but that the club team "takes up a lot of time and most of the people that play for that will — that's the only sport they play. And I don't want to do that. I want to play as many sports as possible."

Maria asserts there was independent witness testimony showing that Clayton's decisions have had a detrimental effect on Lexi and that Clayton abuses his power. Clayton sent letters to two athletic organizations in which Lexi participated, indicating that he was Lexi's legal guardian and that he had not given his permission for Lexi to participate. He requested that Lexi be removed from the team rosters. In one letter, Clayton asserted he was Lexi's legal guardian, and in the other, he asserted that he was "granted sole decision making authority." The individuals interpreted this communication to mean that he possessed sole legal custody of Lexi. Maria argues that Clayton expressed he had "sole legal custody" or was granted "'sole decision making authority,'" which statements she alleges were "blatantly false" at the time they were made. Brief for appellant at 20. The emails, which were entered as exhibits, do not show that Clayton asserted that he was Lexi's sole legal guardian, even though that was the inference the individuals drew from his statements. This particular argument is not supported by the record, as neither of the witnesses

testified that Clayton's actions were detrimental to Lexi. The organizations ultimately decided not to honor Clayton's request to remove Lexi from their rosters, and there is no showing that the letters affected Lexi in any way.

Maria argues the district court's "[g]ratuitous [c]omments" indicated that the district court was prejudging the evidence and that the court had reached a decision on the weight to give to Lexi's testimony prior to her testimony. Brief for appellant at 20. The record shows that during the cross-examination of Clayton, wherein Lexi was described as "brilliant" and "gifted," the court interjected and stated the view that children can be "brilliant," yet still not always make great decisions which are supported by common sense. Maria argues that the court had clearly "already made up its mind regarding the weight" to be given to Lexi's testimony and that "it would not give any credence to such testimony." *Id.* at 21.

Lexi was ultimately allowed to testify, and Maria asserts the comments made to Lexi "signified the stance it would take on Lexi's thought process" when the court stated, "'[W]hat you've told me so far, may not have anything to do with my decision. My decision is basically based upon what your parents have told me so far.'" *Id.* at 23. Prior to Lexi's testimony, the court informed the parties that, although he does not like to involve minor children in these matters, sometimes it is necessary. He stated that he does not ask children to answer pointed questions that will make them uncomfortable. Rather, he said:

> I always, depending upon the age, tell them that they shouldn't be concerned as to what they tell me because, you know, I may or may not use any of this stuff in my decision and I probably won't use any of this information in my decision to make it as nonpainful [sic] as possible.

[5] Nonetheless, Nebraska case law is clear that the court should consider "[t]he 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." Neb. Rev. Stat. § 43-2923(6)(b) (Reissue 2016). The Nebraska Supreme Court, in applying this provision, has stated that while the wishes of a child are not controlling in the determination of custody, if a child is of sufficient age and has expressed an intelligent preference, the child's preference is entitled to consideration. See *Wild v. Wild*, 15 Neb. App. 717, 737 N.W.2d 882 (2007), citing *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002).

Upon our review of the court's comments, we find the district court applied the correct standard of law, considered the appropriate factors, and gave the appropriate weight to Lexi's testimony. We find the district court did not abuse its discretion in finding that it was in Lexi's best interests to grant sole legal custody to Clayton.

Motion to Alter or Amend.

Maria asserts the court erred in not sustaining her motion to alter or amend and in refusing to include a detailed rationale as to why the court chose to award Clayton sole legal custody of Lexi. She asserts the district court's "precursory" order hinders her ability to properly prosecute her appeal. Brief for appellant at 27.

In the June 20, 2017, order, the court stated:

> Since that Decree of Dissolution, the parties have had joint legal and physical custody and have had numerous problems with each other as to the raising of the minor child. There have been numerous filings by each party to have the other party held in contempt of court and each party has filed applications to modify the Decree.
>
> The Decree was modified by this court on December 22, 2015, in which the Court found that the parties should continue to have joint legal and physical custody except that [Clayton] shall have the final decision making authority. That has not proved to be effective as the parties are still having problems and each party has recently

> filed Applications to Modify the Decree and Applications to Show Cause why the other party should not be held in Contempt of Court. This Court has found that both parties have the best interest of their child at heart, however, they cannot agree or get along as to how to best raise their child in lieu of a variety of activities and how to provide each party their respective time with the child that is somewhat uninterrupted by the variety of activities that are scheduled and to which they disagree.

The court found that there had been a material change of circumstances due to the "continued and unrelenting problems the parties continue to have." The court found it was in Lexi's best interests to transfer sole legal custody to Clayton. Maria filed a motion to alter or amend on June 27, 2017, requesting that the court provide the rationale to support its ruling.

In its August 7, 2017, order, the court acknowledged Maria's request and stated that Clayton was "better able to cooperate" with Maria and was "more reasonable in the action taken as to the activities of the minor child." Therefore, the court found that it was in the best interests of Lexi that Clayton be granted sole legal custody of her.

[6-8] Maria has made no reference to statutes or case law requiring the district court to include a detailed rationale in its award of custody. In the absence of a request by a party for specific findings, a trial court is not required to make detailed findings of fact and need only make its findings generally for the prevailing party. *Hall v. County of Lancaster*, 287 Neb. 969, 846 N.W.2d 107 (2014), *overruled on other grounds, Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017). See Neb. Rev. Stat. § 25-1127 (Reissue 2016). The Nebraska Supreme Court has held that "even where our civil procedure code mandates specific findings, it does so only upon a party's request." *Becher v. Becher*, 299 Neb. 206, 215, 908 N.W.2d 12, 23 (2018). Nebraska case law provides that motions for specific findings of fact pursuant to § 25-1127 must be made "before the final submission of the case to the court." *Stuczynski v.*

Stuczynski, 238 Neb. 368, 370, 471 N.W.2d 122, 124 (1991). Maria's request for the court to provide a detailed rationale was not made until after the case was submitted to the court; therefore, the court was not under any obligation to provide specific findings.

Further, any deficiency in the district court's initial order appears to have been remedied by the rationale included in the order following Maria's motion to alter or amend. Having found the district court did not abuse its discretion in awarding Clayton sole legal custody, we find the district court did not abuse its discretion in overruling Maria's motion to alter or amend. We further find that the court did not refuse to "include a detailed rationale" as to why Clayton was awarded sole legal custody. Brief for appellant at 27.

Clayton Was Not in Contempt.

Maria argues the district court erred by not finding Clayton in contempt because of his "incessant refusal to allow [her] to speak to Lexi on a daily basis via telephone." Brief for appellant at 24. Specifically, Maria asserts that Clayton should have been held in contempt for failing to allow Lexi to call Maria while Lexi and Clayton were on vacation in Alaska in the summer of 2016. She also argues Clayton was in contempt for failing to keep her apprised of Lexi's whereabouts during that vacation. She alleges that Clayton failed to "have Lexi telephone [her] at any point" during the trip. Brief for appellant at 24.

[9,10] When a party to an action fails to comply with a court order made for the benefit of the opposing party, such an 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.* Outside of statutory procedures imposing a different standard or an evidentiary presumption, all elements of contempt must be proved by the complainant by clear and

convincing evidence. *Martin v. Martin*, 294 Neb. 106, 881 N.W.2d 174 (2016).

The order of the court entered on November 9, 2009, states:

> 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.

The telephone provision has been changed a few times, most recently in the December 2015 order, which states that "the possessory parent or the child shall initiate one phone call to the non-possessory parent each day at the appropriate time that the parties shall agreed [sic] upon."

Clayton testified that he allowed Lexi to make daily telephone calls to Maria during the trip. Email records show that Clayton notified Maria prior to the trip that telephone service would be "as previously decided with all vacations." He noted that Lexi would call at the beginning and near the end of the 10-day trip and that his cell phone would be off during much of the trip because cellular service would be unavailable. At trial, Clayton testified that he allowed Lexi to make a call to Maria from his cell phone every day. Lexi testified that she called Maria "a few times." When asked to clarify, Lexi stated, "I called her whenever I could, but sometimes we got too far away from land or something and then nothing was — nothing could work."

Maria testified that she did not receive any telephone calls from Lexi for 8 days. She sent daily emails to Clayton noting that she had not talked to Lexi and that his voicemail was

full, so she had been unable to leave a message. These emails were entered as exhibits, as was a record of her cell phone call history during that period. Maria testified that Lexi does not call her home telephone number, but Maria did not provide a record of calls to or from her home telephone during that period.

Upon our de novo review of the record, we cannot say that Clayton willfully disobeyed the court order. The evidence shows he was not unwilling to allow Lexi to have daily telephone contact with Maria, and Lexi testified that she was in regular contact with Maria during the trip. Additionally, the record indicates there were circumstances and technological limitations during the vacation that were outside of Clayton's control. Accordingly, the district court did not abuse its discretion when it found Clayton was not in contempt.

To the extent that Maria also argues that Clayton was in contempt because he "waits in the wings to rush Lexi off" of calls, in an attempt to frustrate her, we find the court did not abuse its discretion. Brief for appellant at 25. Maria testified that "for the most part she calls me every night," but she alleged that Clayton listened to the calls or forced Lexi to end her calls prematurely. On cross-examination, Maria testified that she could not recall any other days other than the days during the trip when she did not receive a call from Lexi.

Clayton testified that Lexi makes a telephone call to Maria every day that she is with him. He also said that there have been times when he has heard Maria yelling at Lexi about choosing activities that Maria wants Lexi to participate in. Clayton testified there have been times that Maria was "grilling" Lexi about her test scores and that the pressure caused Lexi to cry. As a result, he said that at times, he stands in the area when Lexi talks to Maria to support her. He said, "I'm standing in the area so that when I see she reacts with tears or fear or wants to hold the phone away that I can say you can blame this on me and you can shut the phone call down now."

Lexi testified that nobody listened to her calls when she spoke to either parent. Lexi testified that when she is at Clayton's house, the family is "always doing something together," and Maria "likes to talk . . . for a long time on the phone," a habit Clayton does not like. At times, Clayton interrupted Lexi's telephone calls to tell her it was time to hang up. Lexi said that she tries not to "cut [Maria] off in the middle of something" and that she has spoken to Clayton about not interrupting her during her calls with Maria. Clayton told Lexi that he would let Lexi "keep track" of her time on the telephone on her own. Upon our de novo review of the record, we cannot say that Clayton's behavior with regard to Lexi's daily telephone contact with Maria amounts to contempt.

Attorney Fees.

Maria asserts the district court erred in "arbitrarily" assessing a $10,000 award against her because she was not found to be in contempt of court, she did not file any frivolous pleadings, she was not dilatory in conducting her litigation, and Clayton was the initiating party of the modification proceedings. Brief for appellant at 26. She asserts the award of attorney fees was punitive.

[11,12] Customarily in dissolution cases, attorney fees and costs are awarded only to prevailing parties or assessed against those who file frivolous suits. *Roberts v. Roberts*, 25 Neb. App. 192, 903 N.W.2d 267 (2017). In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Id.*, citing *Garza v. Garza*, 288 Neb. 213, 846 N.W.2d 626 (2014).

[13,14] Attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. *Garza v. Garza, supra.* A uniform course of procedure exists in Nebraska for the award of attorney fees

in dissolution and modification cases. See, *id.*; *Nimmer v. Nimmer*, 203 Neb. 503, 279 N.W.2d 156 (1979). Thus, there was authority, in this modification of a dissolution decree case, for awarding attorney fees.

[15] The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and general equities of the case. *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008).

The original application to modify was filed in 2009, and multiple complaints to modify have been filed prior to the instant case. Clayton sought modification of the decree in this case because the parties had difficulty reaching cooperative agreements regarding Lexi's best interests when they shared legal custody. Clayton testified that he has spent approximately $100,000 throughout the ongoing modification cases, and he requested, and was awarded, $10,000 for fees related to this action. He requested sanctions against Maria in the amount of $5,000, which the court denied.

Maria asserts that "no evidence exists within the record to support a finding as to the specific Ten Thousand Dollar and No Cent ($10,000.00) amount awarded by the District Court." Brief for appellant at 27. This assertion is not supported by the record. Clayton's request was supported by exhibit 26, the affidavit of Clayton's counsel, which was received without objection from Maria's counsel. Exhibit 26 contains an accounting of attorney fees incurred between April 1, 2015, and April 24, 2017, and an estimate of 6 hours of trial time. The total came to just under $10,000. Trial took place over the course of 2 days, April 25 and 26. We note that Maria's attorney submitted an affidavit in support of Maria's motion for attorney fees requesting an amount similar to Clayton's counsel: $6,551.92 for pretrial expenses and approximately $4,000 for anticipated trial expenses and fees.

The court found that Maria had violated the court's order, but that her violation was not willful or contumacious; as such, she was not found to be in contempt. As previously discussed, Clayton was not found to be in contempt of the court's orders and he prevailed in his request for sole legal custody of Lexi. Although Clayton initiated this action, the record shows that he was prompted to file by Maria's continued attempts to circumvent the spirit of the court's previous order, which ordered the parties to have joint legal custody but granted Clayton the "final decision making authority." The order also stated, "With regard to the sporting events, in order for there to be sporting events, the parties have to agree as to that event." Maria was aware of Clayton's activity preferences for Lexi, but Maria signed Lexi up for activities which Lexi would only attend during Maria's parenting time and she did not keep Clayton informed about these extracurricular activities. The standard of review in this case is whether the court abused its discretion, and we conclude that it did not and that the amount of the fee was not unreasonable.

CONCLUSION

We find the district court did not abuse its discretion in awarding sole legal custody to Clayton, in awarding him attorney fees of $10,000, or in finding that he was not in contempt. The court did not abuse its discretion in overruling Maria's motion to alter or amend.

Affirmed.

Joshua Dortch, appellant, v. City of Omaha and Douglas County Sheriff, appellees.

918 N.W.2d 637

Filed August 21, 2018. No. A-17-1068.

1. **Affidavits: Appeal and Error.** A district court's denial of an application to proceed in forma pauperis under Neb. Rev. Stat. § 25-2301.02 (Reissue 2016) is reviewed de novo on the record based on the transcript of the hearing or written statement of the court.
2. **Actions: Words and Phrases.** A frivolous legal position is one wholly without merit, that is, without rational argument based on the law or on the evidence.
3. **Jurisdiction: Search and Seizure: Property.** Neb. Rev. Stat. § 29-818 (Reissue 2016) makes clear that if the matter in which the property or funds is seized results in a charge, the court in which such complaint was filed has exclusive jurisdiction for disposition of the property or funds.
4. **Search and Seizure: Property.** While the government is permitted to seize evidence for use in investigation and trial, such property must be returned once criminal proceedings have concluded, unless it is contraband or subject to forfeiture.
5. ____: ____. The proper procedure to obtain the return of seized property is to apply to the court for its return.
6. **Pleadings: Notice.** Under the liberalized rules of notice pleading, a party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief.
7. **Affidavits: Judgments.** When, pursuant to Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2016), a trial court denies leave to proceed in forma pauperis on its own motion on the ground that the party seeking leave is asserting legal positions which are frivolous or malicious, its order shall include the court's reasons for such conclusion.

Appeal from the District Court for Douglas County: Duane C. Dougherty, Judge. Reversed and remanded for further proceedings.

Joshua Dortch, pro se.

No appearance for appellees.

Pirtle, Riedmann, and Welch, Judges.

Welch, Judge.

INTRODUCTION

Joshua Dortch appeals the district court's denial of his application to proceed in forma pauperis (IFP). The court denied Dortch's application based on its finding that the underlying replevin petition was a frivolous pleading. We find that the district court erred in denying Dortch's application to proceed IFP on the basis that it was frivolous without providing a written statement of its reasons, findings, and conclusions for that denial. Therefore, we reverse the decision of the district court and remand the cause for further proceedings.

STATEMENT OF FACTS

Dortch, acting pro se, filed a petition for replevin naming the "City of Omaha" and the "[D]ouglas County Sheriff" as defendants. The entirety of Dortch's petition for replevin set forth: "Police illegally seized $5,512.00 from us on or about 8-18-17 and continue to hold same on pretext of some [n]ebulous investigation. We pray that [r]eplevin [b]e granted, and our [$]5,512.00 returned to us as is said." Dortch also filed an application to proceed IFP and an affidavit alleging that he had no assets. The district court denied his application, finding that Dortch's "[r]eplevin [p]etition is a frivolous pleading." Dortch, acting pro se, has timely filed his notice of appeal and poverty affidavit properly perfecting his appeal to this court. See *Campbell v. Hansen*, 298 Neb. 669, 673, 905 N.W.2d 519, 522 (2018) ("[i]n an interlocutory appeal from an order denying leave to proceed IFP, an appellate court obtains

jurisdiction over the appeal upon the timely filing of a notice of appeal and a proper IFP application and affidavit").

ASSIGNMENT OF ERROR

Dortch contends that the district court erred in denying his application to proceed IFP on the basis that his petition was frivolous.

STANDARD OF REVIEW

[1] A district court's denial of an application to proceed IFP under Neb. Rev. Stat. § 25-2301.02 (Reissue 2016) is reviewed de novo on the record based on the transcript of the hearing or written statement of the court. See *Mumin v. Nebraska Dept. of Corr. Servs.*, 25 Neb. App. 89, 903 N.W.2d 483 (2017).

ANALYSIS

[2] In his brief on appeal, Dortch contends, "Police [j]ust can[']t seize $5,512.00 from a United [States] citizen, as was done at Bar, [t]hen Trial Judge pooh-pooh us out of court willy [n]illy shilly shally." Brief for appellant at 4. As previously stated, the district court denied Dortch's application to proceed IFP on his action for replevin on the basis that the action was frivolous. "A frivolous legal position is one wholly without merit, that is, without rational argument based on the law or on the evidence." *State v. Carter*, 292 Neb. 16, 21, 870 N.W.2d 641, 645 (2015).

The procedure for IFP is generally governed by Neb. Rev. Stat. §§ 25-2301 to 25-2310 (Reissue 2016). Pursuant to those statutes, any county or state court, except the Nebraska Workers' Compensation Court, may authorize the commencement, prosecution, defense, or appeal therein, of a civil or criminal case without prepayment of fees and costs or security. § 25-2301.01. An application to proceed IFP shall include an affidavit stating that the affiant is unable to pay the fees and costs or give security required to proceed with the case; the nature of the action, defense, or appeal; and the affiant's

belief that he or she is entitled to redress. *Id.* Section 25-2301.02(1) sets forth that an application to proceed IFP "shall be granted unless there is an objection that the party filing the application (a) has sufficient funds to pay costs, fees, or security or (b) is asserting legal positions which are frivolous or malicious." An objection may be made by the court on its own motion or on the motion of any interested person. *Id.* "An evidentiary hearing shall be conducted on the objection unless the objection is by the court on its own motion on the grounds that the applicant is asserting legal positions which are frivolous or malicious." *Id.* If no hearing is held, the court shall provide a written statement of its reasons, findings, and conclusions for denial of the applicant's application to proceed IFP which shall become a part of the record of the proceeding. *Id*. See, also, *Mumin v. Nebraska Dept. of Corr. Servs., supra*.

The district court, on its own motion and without an evidentiary hearing, denied Dortch's application to proceed IFP on the basis that his petition was frivolous. The court did not provide any additional reasons, findings, or conclusions for that denial. Dortch's pleading requests return of cash seized by law enforcement based upon the theory of replevin. Although he refers to a "[n]ebulous investigation," he does not identify when the cash was seized, why the cash was seized, or if charges have been filed against him. Dortch does not cite to any statutory authority for his petition for return of his seized cash.

We note that Neb. Rev. Stat. § 29-818 (Reissue 2016) provides that a party may apply to the court by replevin or other writ for the return of property seized pursuant to a search warrant or validly seized without a warrant under certain conditions. Specifically, § 29-818 provides:

> Except for animals as provided in section 28-1012.01, property seized under a search warrant or validly seized without a warrant shall be safely kept by the officer seizing the same, unless otherwise directed by the judge or

> magistrate, and shall be so kept so long as necessary for the purpose of being produced as evidence in any trial. Property seized may not be taken from the officer having it in custody by replevin or other writ so long as it is or may be required as evidence in any trial, nor may it be so taken in any event where a complaint has been filed in connection with which the property was or may be used as evidence, and the court in which such complaint was filed shall have exclusive jurisdiction for disposition of the property or funds and to determine rights therein, including questions respecting the title, possession, control, and disposition thereof. This section shall not preempt, and shall not be construed to preempt, any ordinance of a city of the metropolitan or primary class.

[3-5] Section 29-818 makes clear that if the matter in which the property or funds is seized results in a charge, the court in which such complaint was filed has exclusive jurisdiction for disposition of the property or funds. See *State v. Agee*, 274 Neb. 445, 741 N.W.2d 161 (2007). That said, "While the government is permitted to seize evidence for use in investigation and trial, such property must be returned once criminal proceedings have concluded, unless it is contraband or subject to forfeiture." *Id*. at 450, 741 N.W.2d at 166. The proper procedure to obtain the return of seized property is to apply to the court for its return. *State v. Buttercase*, 296 Neb. 304, 893 N.W.2d 430 (2017). We also note that there are various forfeiture statutes which govern the custody and return of seized property. For instance, Neb. Rev. Stat. § 28-431 (Reissue 2016) provides the procedure for the return or forfeiture of seized property, including currency, when said property is seized in connection with an alleged drug or narcotics violation.

[6] Nebraska is a notice pleading state. "Under the liberalized rules of notice pleading, a party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief." *Davio v. Nebraska Dept. of*

Health & Human Servs., 280 Neb. 263, 268, 786 N.W.2d 655, 661-62 (2010). Here, Dortch pled that his cash was illegally seized by police. Dortch seeks return of the money.

[7] We cannot say that a civil replevin action is an improper remedy for the return of seized property under all circumstances. For instance, an action in replevin may be available in connection with property seized but never returned in connection with certain investigations which never result in a charge being filed. Further, we note that in *Peterson v. Houston*, 284 Neb. 861, 866, 824 N.W.2d 26, 32 (2012), which held "prospectively that when, pursuant to § 25-2301.02(1), a trial court denies leave to proceed [IFP] on its own motion on the ground that the party seeking leave is asserting legal positions which are frivolous or malicious, its order shall include the court's reasons for such conclusion." Because we cannot ascertain from the pleading or the district court's order why the district court deemed this matter frivolous, we reverse the decision of the district court and remand the cause for further proceedings consistent with this opinion.

Reversed and remanded for
further proceedings.

State of Nebraska, appellee, v. Steven F. Shiffermiller, appellant.

919 N.W.2d 163

Filed August 28, 2018. No. A-17-675.

1. **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.
2. **Motions to Suppress: Trial: Pretrial Procedure: Appeal and Error.** When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from the trial and from the hearings on the motion to suppress.
3. **Trial: Investigative Stops: Warrantless Searches: Appeal and Error.** The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo, and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
4. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable search and seizure.
5. **Police Officers and Sheriffs: Investigative Stops: Search and Seizure: Arrests: Probable Cause.** The first tier of police-citizen encounters involves no restraint of the liberty of the citizen involved, but, rather, the voluntary cooperation of the citizen is elicited through noncoercive questioning. This type of contact does not rise to the level of a seizure and therefore is outside the realm of Fourth Amendment protection. The second category, the investigative stop, is limited to brief, nonintrusive detention during a frisk for weapons or preliminary

questioning. This type of encounter is considered a "seizure" sufficient to invoke Fourth Amendment safeguards, but because of its less intrusive character requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime. The third type of police-citizen encounters, arrests, is characterized by highly intrusive or lengthy search or detention. The Fourth Amendment requires that an arrest be justified by probable cause to believe that a person has committed or is committing a crime.

6. **Police Officers and Sheriffs: Investigative Stops: Search and Seizure: Arrests.** If unreasonable force is used or if a stop lasts for an unreasonably long period of time, then a detention may turn into a de facto arrest.
7. **Police Officers and Sheriffs: Investigative Stops.** The use of handcuffs has been approved when it was reasonably necessary to protect officer safety during an investigatory stop.
8. ____: ____. The use of handcuffs may not be justified when the facts do not justify a belief that the suspect may be dangerous.
9. **Police Officers and Sheriffs: Investigative Stops: Search and Seizure: Arrests.** In determining whether a detention is reasonable under the circumstances, for the purposes of analyzing whether an investigatory detention was converted to a de facto arrest, depends on a multitude of factors, including the number of officers and police cars involved; the nature of the crime and whether there is reason to believe the suspect might be armed; the strength of the officers' articulable, objective suspicions; the erratic behavior of or suspicious movements by the persons under observation; and the need for immediate action by the officers and lack of opportunity for them to have made the stop in less threatening circumstances.
10. **Police Officers and Sheriffs: Investigative Stops.** An investigative stop must be temporary and last no longer than is necessary to effectuate the purpose of the stop.
11. **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.
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.** The community caretaking exception to the Fourth Amendment should be narrowly and carefully applied in order to prevent its abuse.
14. **Police Officers and Sheriffs: Investigative Stops: Search and Seizure.** An officer is entitled, for the protection of himself or herself and the others in the area, to conduct a carefully limited search of the outer clothing of the persons stopped to discover weapons which might be used to assault the officer.
15. **Police Officers and Sheriffs: Search and Seizure: Warrantless Searches: Probable Cause.** Under the "plain feel" doctrine, the findings of a lawful pat-down can establish probable cause to extend the scope of a search, but the legality of the search depends upon the incriminating character of an object being immediately apparent.
16. **Police Officers and Sheriffs: Search and Seizure: Warrantless Searches.** If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.
17. **Search and Seizure: Warrantless Searches.** Searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions that must be strictly confined by their justifications.
18. **Search and Seizure: Warrantless Searches: Proof.** In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement.
19. **Search and Seizure: Warrantless Searches.** The warrantless search exceptions include searches undertaken with consent, searches justified by probable cause, searches under exigent circumstances, inventory searches, searches of evidence in plain view, and searches incident to a valid arrest.
20. **Police Officers and Sheriffs: Search and Seizure: Arrests.** After an arrest is made, the arresting officer may search the person to remove any weapons that the latter might seek to use in order to resist arrest or effect his or her escape and also to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Affirmed.

Matthew K. Kosmicki for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

Moore, Chief Judge, and Pirtle and Arterburn, Judges.

Pirtle, Judge.

I. INTRODUCTION

After a stipulated bench trial, Steven F. Shiffermiller was convicted of three counts of possession of a controlled substance and one count of possession of a deadly weapon by a prohibited person. He appeals the convictions and sentences imposed by the district court for Lancaster County, and he challenges the court's ruling on his motion to suppress. For the reasons that follow, we affirm.

II. PROCEDURAL BACKGROUND

On September 15, 2016, Shiffermiller was charged by information with three counts of possession of a controlled substance, each count a Class IV felony, and one count of possession of a deadly weapon by a prohibited person, a Class III felony. The charges arise out of an incident that occurred on June 6, 2016. A preliminary hearing was held on August 31, and the matter was bound over to the district court. Shiffermiller filed a written arraignment and waiver of physical appearance on September 2. Shiffermiller entered a plea of not guilty. On November 11, Shiffermiller filed a motion to suppress the evidence obtained and statements made during his detention and subsequent arrest. A hearing on the motion to suppress was held on March 8, 2017, and the motion was overruled.

At the hearing on Shiffermiller's motion to suppress, several witnesses testified regarding the events which occurred on June 6, 2016. At approximately 4:30 a.m., the Lincoln

Police Department received a report that two individuals were fighting near the intersection of South 31st Street and Sequoia Drive. Sgt. Benjamin Seeman was the first to arrive and made contact with Shiffermiller at approximately 4:32 a.m. When Seeman arrived in his marked cruiser, Shiffermiller was walking toward a parked car on the north side of Sequoia Drive. Shiffermiller appeared to have a torn shirt and blood on his face, arm, and knuckles. Shiffermiller matched the description of one of the men from the police call: a male wearing camouflage pants and a gray tank top.

Seeman approached Shiffermiller, asking whether he was injured and stating that there was a report of a fight at that location. Shiffermiller said that he had not been involved in the fight and that he had been running and "boxing trees" in a nearby park. Seeman observed that Shiffermiller was sweating profusely, his eyes were watery and bloodshot, his pupils were dilated, and he was swaying and staggering. Seeman asked Shiffermiller to sit down because he did not appear able to stand.

Within a few minutes, other officers arrived and the officers observed Shiffermiller to be agitated, angry, and uncooperative. They detected an odor of alcohol emanating from Shiffermiller and observed that he appeared to be under the influence of drugs or alcohol. Shiffermiller stated that he wanted to leave, but was told that he was not free to leave and that he would stay until the situation was investigated. Shiffermiller was placed in handcuffs and was seated on the curb while officers searched for the other party involved in the reported fight. Shiffermiller's cell phone was lying in the middle of the intersection. A "ball cap" was found in the intersection, and Shiffermiller denied that it belonged to him. No other party was found, so the officers discontinued their investigation of the potential assault.

The officers determined that Shiffermiller should be transported somewhere for his safety and because they wanted to avoid any further disturbances or issues. Seeman testified that

he was concerned Shiffermiller was under the influence of narcotics and was injured. Shiffermiller rejected medical attention and indicated that he wanted to walk home. Because he appeared to be under the influence of drugs or alcohol, the officers did not want to leave him alone or allow him to operate his car. They were worried about what would happen to him if left alone and were concerned for the safety of the public if he chose to drive.

The officers determined that it was their responsibility to find Shiffermiller a safe place to go, and the options were to leave him in the care of a "hospital, Cornhusker Place Detox, and/or responsible adult." They ruled out taking him to a hospital, given that Shiffermiller did not appear to have injuries that needed immediate medical attention. They opted to avoid "Detox," because it was possible that he would be turned away if it appeared that Shiffermiller would need to be evaluated at a hospital for "fitness for confinement." Shiffermiller refused to give the name or telephone number of his roommate. The officers found contact information for Shiffermiller's father, who agreed that Shiffermiller could be brought to his home.

Two police officers patted Shiffermiller down to make sure he did not have any weapons prior to placing him in a police cruiser for transport. Seeman and Officer Tyler Dean testified that the pat-down was conducted for officer safety reasons, because Shiffermiller had potentially been in a fight, and that it was unclear whether weapons had been involved.

Dean felt an object in Shiffermiller's left front pocket that he "immediately recognized" to be brass knuckles. He removed the object and confirmed that it was, in fact, brass knuckles. At that point, Shiffermiller was placed under arrest and the brass knuckles were seized. Once the brass knuckles were found, the officers conducted a complete search of Shiffermiller's person. Officer Matthew Eliker found keys and a flashlight, which was approximately 3 inches long, in Shiffermiller's right pocket. Eliker noticed that the flashlight rattled, and he "could just feel there weren't batteries inside."

He opened the flashlight and found several pills and a baggie of marijuana. Shiffermiller did not produce a prescription for the pills. The officers checked the pills, which had identifying markings, and confirmed that they were controlled substances. Shiffermiller was also placed under arrest for possession of a controlled substance.

A search of a police database showed that Shiffermiller had a previous felony conviction, which meant that the charge related to the brass knuckles became a felony, rather than a misdemeanor. The officers determined that Shiffermiller would be transported to jail, rather than to his father's home. Approximately 45 minutes to 1 hour passed between the initial stop and Shiffermiller's arrest. The first 30 to 40 minutes were spent investigating the reported assault, and the remainder of the time was spent figuring out where to take Shiffermiller. Shiffermiller was lodged for possession of a controlled substance and possession of a deadly weapon by a prohibited person.

The district court considered the evidence before it and overruled Shiffermiller's motion to suppress.

On April 25, 2017, a stipulated bench trial was held, and Shiffermiller renewed his motion to suppress. Exhibits 1 and 2 were offered and accepted as evidence. Exhibit 1 is a complete set of police reports and a laboratory report. Exhibit 2 is a certified copy of Shiffermiller's prior felony conviction.

The district court found Shiffermiller guilty of each of the charged crimes. At a sentencing hearing on June 1, 2017, Shiffermiller was committed to jail for a period of 50 days for each count, with credit for 117 days served—so no additional time would be served. The district court placed Shiffermiller on terms of probation, which were ordered to run concurrently: 1 year for count I, 2 years for count II, 3 years for count III, and 4 years for count IV. Shiffermiller timely appealed.

III. ASSIGNMENTS OF ERROR

Shiffermiller asserts the district court erred in failing to suppress the evidence because the government exceeded the

permissible scope and duration of a *Terry* stop. See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). He also asserts the court erred in failing to suppress the evidence because the warrantless search of his person violated the Fourth Amendment. Specifically, he asserts that there was no reasonable suspicion that Shiffermiller was armed and dangerous and that there was no basis to justify the search of the interior of the flashlight.

IV. STANDARD OF REVIEW

[1,2] 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. Bray*, 297 Neb. 916, 902 N.W.2d 98 (2017). 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. *Id.* When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from the trial and from the hearings on the motion to suppress. *State v. Rivera*, 297 Neb. 709, 901 N.W.2d 272 (2017).

[3] The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo, and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Woldt*, 293 Neb. 265, 876 N.W.2d 891 (2016).

V. ANALYSIS

1. Motion to Suppress

The issues presented by this case are whether the stop of Shiffermiller exceeded the permissible scope and duration of a *Terry* stop, and whether Shiffermiller's Fourth Amendment rights were violated, necessitating suppression of the evidence gathered during the stop.

[4] Shiffermiller sought to exclude evidence gathered by the Lincoln police officers on June 6, 2016, on the ground that it was obtained in violation of the Fourth Amendment. The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable search and seizure. *State v. Perry*, 292 Neb. 708, 874 N.W.2d 36 (2016).

2. Initial Detention

[5] To determine whether an encounter between an officer and a citizen reaches the level of a seizure under the Fourth Amendment to the U.S. Constitution, an appellate court employs the analysis set forth in *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993), which describes the three levels, or tiers, of police-citizen encounters. The first tier of police-citizen encounters involves no restraint of the liberty of the citizen involved, but, rather, the voluntary cooperation of the citizen is elicited through noncoercive questioning. *Id.* This type of contact does not rise to the level of a seizure and therefore is outside the realm of Fourth Amendment protection. The second category, the investigatory stop, is limited to brief, nonintrusive detention during a frisk for weapons or preliminary questioning. *State v. Van Ackeren, supra*. This type of encounter is considered a "seizure" sufficient to invoke Fourth Amendment safeguards, but because of its less intrusive character requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime. The third type of police-citizen encounters, arrests, is characterized by highly intrusive or lengthy search or detention. The Fourth Amendment requires that an arrest be justified by probable cause to believe that a person has committed or is committing a crime. *State v. Van Ackeren, supra*. The second and third tiers of police-citizen encounters are seizures sufficient to invoke the protections of the Fourth Amendment to the U.S. Constitution. See *State v. Wells*, 290 Neb. 186, 859 N.W.2d 316 (2015).

Shiffermiller asserts the trial court erred in overruling his motion to suppress, because the government exceeded the permissible scope and duration of a *Terry* stop. He argues that the stop in this case falls within the third category.

[6-8] If unreasonable force is used or if a stop lasts for an unreasonably long period of time, then a detention may turn into a de facto arrest. *State v. Wells, supra*. In *State v. Wells*, the Nebraska Supreme Court examined existing case law, which led to the conclusion that there is often a gray area between investigatory detentions and arrests. The court considered the circumstances under which the use of handcuffs transforms an investigatory detention into a custodial arrest. The use of handcuffs has been approved when it was reasonably necessary to protect officer safety during an investigatory stop. *State v. Wells, supra.* But the use of handcuffs may not be justified when the facts do not justify a belief that the suspect may be dangerous. *Id*.

[9] In *State v. Wells, supra*, the Nebraska Supreme Court stated that whether a detention is reasonable under the circumstances depends on a multitude of factors, including those factors set forth in *United States v. Jones*, 759 F.2d 633 (8th Cir. 1985), an Eighth Circuit case examining the reasonable use of force during a *Terry* stop. These factors include:

> the number of officers and police cars involved, the nature of the crime and whether there is reason to believe the suspect might be armed, the strength of the officers' articulable, objective suspicions, the erratic behavior of or suspicious movements by the persons under observation, and the need for immediate action by the officers and lack of opportunity for them to have made the stop in less threatening circumstances.

United States v. Jones, 759 F.2d at 639-40.

In *State v. Wells, supra*, the Nebraska Supreme Court found that the record indicated that the officers detained Aron D. Wells in a reasonable manner under the circumstances, which stopped short of a full custodial arrest. The officer had a strong

suspicion that Wells was in possession of a controlled substance. When the officer approached the car, he witnessed that Wells appeared to be digging into his pocket and that Wells' right arm was concealed underneath his jacket. The court found the nature of the suspected crime, trafficking narcotics, justified the officer's action. The officer had experience as a drug task force member, and he knew that narcotics users and traffickers often carry weapons. The court found the officer's decision to gain control of Wells' arm and handcuff him while conducting the investigation was a "'reasonable precaution . . . to protect [officer] safety and maintain the status quo.'" *Id.* at 198, 859 N.W.2d at 328.

Shiffermiller states that there was a significant showing of police presence, through the number of officers and cruisers present. He also argues that he was alone, there was no one else found in the area, and the investigation into whether a crime was committed was completed quickly. He argues that each of these factors weigh in his favor and demonstrate the detention was a tier-three stop.

The evidence shows that the officers responded to a call about a physical altercation at 4:30 a.m. Shiffermiller matched the description of one of the men, and he was observed to have a ripped shirt and blood on his face, arms, and knuckles. Shiffermiller appeared to be under the influence of drugs or alcohol. Seeman testified that Shiffermiller would not tell the officers what had happened. Shiffermiller was agitated, angry, and expressed his desire to leave. The officers handcuffed Shiffermiller to "calm things down and prevent him from leaving." He was seated on the curb while the officers investigated the reported altercation, to determine whether there had been an assault. Shiffermiller was not free to leave, but he had not been formally placed under arrest.

Shiffermiller argues that when considering the nature of the crime and whether there was reason to believe he was armed, this factor weighs in his favor. He also argues that the officers had no sense of urgency upon completion of the investigation

and that he was compliant, despite his desire to go home. The officers may not have had an indication that Shiffermiller was armed, but they did observe that he had blood on him and was agitated. Even if it had appeared that he was not armed, the facts supported the use of some form of control to maintain the status quo, to ensure that Shiffermiller did not attempt to leave during the investigation, and to ensure that Shiffermiller was not a danger to himself or to others.

The officers found items lying in the middle of the intersection, indicating that something had happened at that location; Shiffermiller claimed ownership of a cell phone, but not the "ball cap" which was nearby. This suggests that an incident had occurred at that location and that another person had been present, which was consistent with the initial police call. The officers searched the area to determine if someone else was present or was hurt.

[10] An investigative stop must be temporary and last no longer than is necessary to effectuate the purpose of the stop. *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003). The initial portion of the detention lasted approximately 30 to 40 minutes, while they determined whether Shiffermiller had been involved in a crime. There is nothing in the record to indicate any lack of diligence or abuse of discretion on the part of the officers investigating the potential assault. This portion of the detention was not highly intrusive or lengthy and was not unreasonable in scope or duration. Therefore, we find that the initial detention was reasonable and did not amount to a de facto arrest.

3. Continued Detention

Shiffermiller argues that an investigative detention may turn into an arrest if it "'lasts for an unreasonably long time.'" Brief for appellant at 14, quoting *U.S. v. Maltais*, 403 F.3d 550 (8th Cir. 2005). He argues that detainment is allowed for the time the investigation is ongoing, that there was no reason for the officers to continue to detain him, and that his continued

detention was a violation of his Fourth Amendment right to be free from unreasonable search and seizure.

[11] In the absence of any evidence that a crime had been or was being committed, the court must determine whether any exceptions to the Fourth Amendment apply. See *State v. Rohde*, 22 Neb. App. 926, 864 N.W.2d 704 (2015). One such exception is the community caretaker exception, first recognized by the U.S. Supreme Court in *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973), which states:

> 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.

[12,13] The Nebraska Supreme Court adopted the community caretaking exception in *State v. Bakewell*, 273 Neb. 372, 730 N.W.2d 335 (2007), and applied it to determine whether the seizure of a vehicle was reasonable. It held that to determine when the exception should apply, the 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. *Id.* If, based upon the totality of the circumstances, the seizing officer had a reasonable basis to believe his assistance was necessary, the stop is not unconstitutional. The Nebraska Supreme Court has also held that this exception should be narrowly and carefully applied in order to prevent its abuse. *Id*.

Nebraska law has applied the community caretaking exception in a few reported appellate cases. It has been found to apply in three cases, including a case wherein a vehicle was being driven in an erratic manner, *State v. Bakewell, supra*; a case wherein a vehicle was stopped at an intersection for

a period of several minutes, *State v. Smith*, 4 Neb. App. 219, 540 N.W.2d 374 (1995); and a case wherein a passenger was observed to have "'the upper half of her body through [the] moonroof'" of a moving vehicle and was waving her arms, *State v. Rohde*, 22 Neb. App. at 942, 864 N.W.2d at 715. While all of these cases concerned an exigency or need to protect or assist an occupant of the vehicle in question, we find the same analysis to be applicable when those needing protection are located outside the vehicle. In fact, it was the general public that the Supreme Court sought to protect when first applying the community caretaker exception in *Cady v. Dombrowski, supra.*

In the present case, there was an indication, when officers initially made contact with Shiffermiller, that a crime had been committed. We found, above, that the investigation of this potential crime was reasonable in scope and duration. The officers determined there was no need to pursue a further criminal investigation. However, after the initial detention and investigation, the officers were still concerned regarding the safety of Shiffermiller, as well as the safety of the general public if Shiffermiller were not properly cared for. Thus, the detention continued while the officers determined the appropriate next step.

Seeman testified that when he arrived, Shiffermiller was walking toward a parked car, which was determined to belong to Shiffermiller. Shiffermiller communicated his desire to go home during the investigation, and although at one point he stated that he wanted to walk, there was a possibility that he would drive. Eliker testified that Shiffermiller seemed to be under the influence of drugs or alcohol and that he did not want Shiffermiller to drive. Seeman testified that when someone is exhibiting signs of being under the influence, it is the responsibility of the officers to find them a safe place to go. Seeman also testified that he did not want Shiffermiller to get "behind the wheel," potentially hurting himself or others, or getting pulled over for "driving behavior and get a DUI." Dean

testified that if there had been an altercation, he was not comfortable with letting Shiffermiller walk home, because something could happen to him after the officers left.

The evidence shows that the continued detention was based upon the officers' observations that Shiffermiller appeared to be under the influence of drugs or alcohol and was potentially unable to care for himself, as well as the officers' duty to protect the community from a hazard created by a person potentially operating a vehicle while under the influence.

The evidence shows that after the initial inquiry into the potential assault, Shiffermiller was held only long enough to determine where the best place would be to transport him: to his apartment, to a parent's home, to a medical center, or to a detoxification center.

We recognize that the community caretaking exception is to be narrowly and carefully applied. Given the circumstances confronting the officers, we find that by detaining Shiffermiller and creating a plan to transport him to a safe location, the officers were carrying out an important noninvestigatory function in recognizing and resolving a potential threat to the safety of a private individual and the public at large. In considering the totality of the circumstances, we conclude that the officers' decision to transport Shiffermiller to a safe location was reasonable under the circumstances. Thus, we find the officers' continued detention of Shiffermiller in anticipation of transport was reasonable under the community caretaking exception to the Fourth Amendment.

4. Warrantless Search

Shiffermiller asserts the trial court erred in overruling his motion to suppress because the warrantless search of his person violated the Fourth Amendment. Specifically, he asserts (a) that the pat-down search was inappropriate because the officers did not have reasonable suspicion that he was armed and dangerous and (b) that there was no legal basis for the officers to search the interior of his flashlight.

(a) Pat-Down Search

As previously discussed, Shiffermiller's continued detention was lawful under the circumstances, because the officers determined he should be transported for his safety and the safety of the public.

Shiffermiller asserts that the officers did not have reasonable suspicion he was armed and dangerous and that, therefore, the officers did not have justification to perform a pat-down search, which is considered a search and a seizure for Fourth Amendment purposes. See *U.S. v. Davis*, 202 F.3d 1060 (8th Cir. 2000), citing *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (protective search for weapons is constitutional, even in absence of traditional Fourth Amendment probable cause, "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous").

[14] An officer is entitled, for the protection of himself or herself and the others in the area, to conduct a carefully limited search of the outer clothing of the persons stopped to discover weapons which might be used to assault the officer. See *State v. Vasquez-Arenivar*, 18 Neb. App. 265, 779 N.W.2d 117 (2010). The officers patted Shiffermiller down to ensure he was not carrying any weapons which would endanger the officers while they transported him to his father's home. The search was reasonable under the circumstances, given that Shiffermiller was agitated, uncooperative, and potentially hostile to the officers and that he appeared to be under the influence of drugs or alcohol. Shiffermiller matched the description of one of the men who had reportedly been involved in a fight, and he was observed to have a ripped shirt and blood on his face, arms, and knuckles. Dean testified that he "wanted to make sure before he was placed into my cruiser that there were no weapons on him in the back of my car." During the pat-down search, Dean felt an object in

Shiffermiller's left front pocket that he immediately recognized as brass knuckles.

[15,16] Under the "plain feel" doctrine, the findings of a lawful pat-down can establish probable cause to extend the scope of a search. *State v. Smith*, 279 Neb. 918, 782 N.W.2d 913 (2010). The legality of the search depends upon the incriminating character of an object being immediately apparent. *Id.*

> "If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context."

Id. at 928, 782 N.W.2d at 924.

Dean removed the object and confirmed that it was, in fact, brass knuckles. At that point, Shiffermiller was placed under arrest for possession of a deadly weapon by a prohibited person and the brass knuckles were seized. The court did not err in overruling Shiffermiller's motion to suppress as it related to the discovery of the brass knuckles.

(b) Search of Flashlight

Following the discovery of the brass knuckles, the officers searched Shiffermiller's right pocket and removed a small flashlight and keys. The officer noticed that the flashlight rattled and that it did not seem to contain batteries. The officer opened the flashlight and found that it held marijuana and pills, which were determined to be controlled substances.

Shiffermiller's motion to suppress included the evidence obtained during the stop. The court found that whether the search is of a "little plastic bag or little pill bottle, or a little Altoids tin," the result is the same: The search is not improper, because the search was incident to arrest and the drugs would

inevitably be discovered. On appeal, Shiffermiller asserts there was no basis in law to justify the search of the interior of the flashlight.

[17-19] Searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions that must be strictly confined by their justifications. *State v. Salvador Rodriguez*, 296 Neb. 950, 898 N.W.2d 333 (2017). The search here was conducted without a warrant. Thus, to be valid, it must fall within one of the warrantless search exceptions recognized by the Nebraska appellate courts. See *State v. Perry*, 292 Neb. 708, 874 N.W.2d 36 (2016). The State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement. *Id.* The warrantless search exceptions recognized by the Nebraska Supreme Court include searches undertaken with consent, searches justified by probable cause, searches under exigent circumstances, inventory searches, searches of evidence in plain view, and searches incident to a valid arrest. *State v. Smith*, 279 Neb. 918, 782 N.W.2d 913 (2010).

[20] After an arrest is made, the arresting officer may search the person to "'remove any weapons that the latter might seek to use in order to resist arrest or effect his escape'" and also "'to search for or seize any evidence on the arrestee's person in order to prevent its concealment or destruction.'" *State v. Wells*, 290 Neb. 186, 201-02, 859 N.W.2d 316, 330 (2015).

Certainly the discovery of the flashlight can be considered the product of a search incident to arrest, but the question is whether the interior of the flashlight can be searched. In *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), the U.S. Supreme Court upheld the search of a crumpled cigarette package containing gelatin capsules filled with heroin. The officer testified that he felt an object in the left breast pocket of the respondent's heavy coat, but the officer could not tell what the item was. The officer removed the object from the pocket and it turned out to be a "'crumpled

up cigarette package.'" *Id.*, 414 U.S. at 223. The officer did not know what was in the package, but he testified that he could feel objects inside the package and "'knew they weren't cigarettes.'" *Id.* The court held, "Having in the course of a lawful search come upon the crumpled package of cigarettes, he was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them as 'fruits, instrumentalities, or contraband' probative of criminal conduct." *Id.*, 414 U.S. at 236.

United States v. Robinson, supra, was cited in a more recent U.S. Supreme Court Case, *Riley v. California*, 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014). In *Riley v. California*, the U.S. Supreme Court considered the risks involved in a custodial search, i.e., harm to officers and destruction of evidence, as well as the fact that "unknown physical objects may always pose risks, no matter how slight, during the tense atmosphere of a custodial arrest." *Id.*, 573 U.S. at 387. The U.S. Supreme Court stated, in dicta, that a further search of the cigarette package was a reasonable protective measure. The circumstances of this case are similar. The officer testified that he shook the flashlight and that it rattled, like something was inside. He noted that the weight of the flashlight was unusual; it felt as though there were no batteries inside. Applying the reasoning the U.S. Supreme Court used in *United States v. Robinson, supra*, and *Riley v. California, supra*, we find the search of the interior of the flashlight was reasonable under the circumstances. Thus, the district court did not err in overruling Shiffermiller's motion to suppress the evidence found within the flashlight.

VI. CONCLUSION

We find that the government did not exceed the permissible scope and duration of a *Terry* stop and that Shiffermiller's continued detention was appropriate under the circumstances because it was undertaken with the goal to protect the safety of Shiffermiller and the public. A search of Shiffermiller's

person was justified because it was undertaken to ensure officer safety during Shiffermiller's transport. The search which yielded the brass knuckles was not a violation of Shiffermiller's Fourth Amendment rights. Therefore, we affirm the conviction and sentence for possession of a deadly weapon by a prohibited person.

Shiffermiller's arrest for possession of a deadly weapon by a prohibited person led to a valid search which yielded the flashlight. The search of the interior of the flashlight was a valid search incident to arrest. Therefore, we affirm Shiffermiller's convictions and sentences for possession of a controlled substance.

Affirmed.

State of Nebraska, appellee, v. Deyvion L. Comer, appellant.

918 N.W.2d 13

Filed August 28, 2018. No. A-18-133.

1. **Criminal Law: Courts: Juvenile Courts: Jurisdiction: Appeal and Error.** A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion.
2. **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.
3. **Courts: Juvenile Courts: Jurisdiction.** In determining whether a case should be transferred to juvenile court, a court should consider those factors set forth in Neb. Rev. Stat. § 43-276 (Reissue 2016). In order to retain the proceedings, the court need not resolve every factor against the juvenile, and there are no weighted factors and no prescribed method by which more or less weight is assigned to a specific factor. It is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile.
4. **Courts: Juvenile Courts: Jurisdiction: Proof.** In a motion to transfer to juvenile court, the burden of proving a sound basis for retaining jurisdiction in county court or district court lies with the State.
5. **Courts: Juvenile Courts: Jurisdiction: Evidence.** When a district court's basis for retaining jurisdiction over a juvenile is supported by appropriate evidence, it cannot be said that the court abused its discretion in refusing to transfer the case to juvenile court.

Appeal from the District Court for Douglas County: W. Russell Bowie III, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Korey T. Taylor for appellant.

Douglas J. Peterson, Attorney General, and Siobhan E. Duffy for appellee.

Pirtle, Bishop, and Arterburn, Judges.

Pirtle, Judge.

INTRODUCTION

Deyvion L. Comer was 15 years old when he was charged in the district court for Douglas County with two counts of robbery. His motion to transfer the case to juvenile court was overruled. Comer appeals, assigning error to the denial of the motion to transfer this case to the juvenile court. We affirm.

BACKGROUND

On December 1, 2017, Comer was charged with two counts of robbery, both Class II felonies. The charges stemmed from events alleged to have occurred on September 27 and October 24, 2017, in Douglas County, Nebraska. Comer was 15 years old at the time, and the charges were filed in the Douglas County District Court.

Comer filed a motion to transfer the case to juvenile court on January 25, 2018, and a hearing was held on the motion on January 26. The district court denied the motion to transfer in an order filed on February 5.

The State offered six exhibits, including a copy of Comer's local criminal history, police reports of prior contacts with law enforcement, and juvenile court dockets for cases Nos. JV 17-3, JV 17-729, and JV 17-1903.

Case No. JV 17-3 involves allegations of robbery, theft by unlawful taking, and obstructing a peace officer, crimes which were alleged to have occurred on January 2, 2017. Comer admitted to the charges of theft by unlawful taking and obstructing a peace officer. Comer was placed under the supervision of a probation officer and was ordered to attend "Youth Links." Shortly thereafter, he was ordered to be placed in a

group home at Boys Town. He absconded from "Youth Links" before he could be transported to Boys Town.

On April 20, 2017, Comer was charged in case No. JV 17-729 with criminal impersonation and obstructing a peace officer. Comer admitted to the charge of obstructing a peace officer, and the other charge was dismissed. Comer was adjudicated under Neb. Rev. Stat. § 43-247(1) (Reissue 2016).

In case No. JV 17-1903, Comer was charged with robbery, use of a deadly weapon to commit a felony, and obstructing a peace officer, crimes which were alleged to have occurred "[o]n or about the 25th day of October, 2017." Comer was adjudicated as a child within the meaning of § 43-247(2) and was ordered to be placed at Boys Town.

The circumstances of the first count in this case involve the robbery of a pizza delivery driver. The driver allegedly arrived at the stated address for the order where he was met by two males. The driver handed them the food, and they indicated that their friend was approaching with the money. The driver was struck in the side of the neck, while the three males fled with the food.

The second count of robbery in this case was dismissed because it had been the subject of the adjudication in case No. JV 17-1903. The police reports regarding that incident reflect that an order for pizza was made on October 24, 2017, and the driver was unable to find the apartment number with the information he had been provided. When the driver returned to his vehicle, he was confronted by two males. One suspect "pinn[ed]" the driver against his vehicle, displayed a handgun, and instructed the driver to "'give me everything that you got.'" The driver refused, and the suspect stated, "'I will shoot you'" and "'nothing bad if you give me all your stuff.'" The second suspect removed the pizza from the delivery bag in the driver's vehicle. The driver was able to push away the suspects, and he drove away. The driver picked Comer from a photographic lineup and identified him as the suspect who

had displayed the handgun. Comer's cell phone was used to place the orders to the pizza restaurants.

At the transfer hearing, Comer offered the testimony of his juvenile probation officer, Ashley Johnson. Johnson had supervised Comer since May 2017. Comer was placed in Boys Town from May 1 to August 21, 2017, and Johnson testified that Comer had done well during that time.

Johnson stated that Comer had a "fairly traumatic, chaotic history growing up." Comer was offered services under "other juvenile dockets," including "shelter and crisis stabilization, a chemical dependency evaluation, psychological evaluation, [intensive family preservation services,] and . . . individual therapy." Johnson testified that Comer was a member of a gang and that he associates with other known gang members. Gang intervention services were ordered at one time, but there is no record that Comer participated. Johnson could not say whether Comer's lack of participation was his choice or due to his previous probation officer.

Johnson testified that Comer ran away from his group home placement at Boys Town. While he was "on the run," he was charged with two separate robberies: the one at issue in this case and the crimes charged in case No. JV 17-1903. She stated that Comer "can do very well in structure" and that he did not have any behavior issues or violations while he was at Boys Town. She opined that he would benefit from a structured rehabilitative environment and the services which could be provided at Boys Town.

Comer also offered the testimony of his family teacher, or "house parent," at Boys Town. Comer lived with the family teacher, his wife and son, an assistant family teacher, and other youths assigned to the home. Comer was in the home for approximately 3 months. The family teacher testified that Comer was "doing great" before he ran away from their home. He testified that he was "shocked" when Comer ran away and committed crimes. Comer had been attending and doing well in school, started participating in activities, and was on the

football team. The family teacher testified that he was willing to work with Comer if he was to return to the home.

The district court took the motion to transfer under advisement and denied it in a written order entered February 5, 2018. In its order, the district court stated that it had reviewed the statutory factors found in Neb. Rev. Stat. §§ 29-1816 (Supp. 2017) and 43-276 (Reissue 2016). Ultimately, after weighing the statutory factors, the district court denied the motion to transfer this matter to the separate juvenile court of Douglas County.

ASSIGNMENT OF ERROR

Comer assigns the district court erred by denying his motion to transfer to juvenile court.

STANDARD OF REVIEW

[1,2] A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion. *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018). 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. *Id.*

ANALYSIS

Jurisdiction.

When a juvenile seeks to transfer a criminal case from county or district court to juvenile court, § 29-1816(3)(c) provides that "[a]n order granting or denying transfer of the case from county or district court to juvenile court shall be considered a final order for the purposes of appeal" and that "[u]pon entry of an order, any party may appeal to the Court of Appeals within ten days." This statutory amendment providing for interlocutory appeals became effective August 24, 2017. Comer has properly perfected his appeal from the district court's denial of his motion to transfer his criminal proceeding to the juvenile court.

Motion to Transfer to Juvenile Court.

Neb. Rev. Stat. § 43-246.01(3) (Reissue 2016) grants concurrent jurisdiction to the juvenile court and the county or district court over juvenile offenders who (1) are 11 years of age or older and commit a traffic offense that is not a felony or (2) are 14 years of age or older and commit a Class I, IA, IB, IC, ID, II, or IIA felony. Actions against these juveniles may be initiated either in juvenile court or in the county or district court. In the present case, the allegations against Comer put him within this category of juvenile offenders.

When an alleged offense is one over which both the juvenile court and the county or district court can exercise jurisdiction, a party can move to transfer the matter. For a matter initiated in county or district court, a party can move to transfer it to juvenile court pursuant to § 29-1816(3).

In the instant case, when Comer moved to transfer his case to juvenile court, the district court conducted a hearing pursuant to § 29-1816(3)(a), which requires consideration of the following factors set forth in § 43-276:

> (a) The type of treatment such juvenile would most likely be amenable to; (b) whether there is evidence that the alleged offense included violence; (c) the motivation for the commission of the offense; (d) the age of the juvenile and the ages and circumstances of any others involved in the offense; (e) the previous history of the juvenile, including whether he or she had been convicted of any previous offenses or adjudicated in juvenile court; (f) the best interests of the juvenile; (g) consideration of public safety; (h) consideration of the juvenile's ability to appreciate the nature and seriousness of his or her conduct; (i) whether the best interests of the juvenile and the security of the public may require that the juvenile continue in secure detention or under supervision for a period extending beyond his or her minority and, if so, the available alternatives best suited to this purpose; (j) whether the victim agrees to participate in mediation;

> (k) whether there is a juvenile pretrial diversion program established pursuant to sections 43-260.02 to 43-260.07; (l) whether the juvenile has been convicted of or has acknowledged unauthorized use or possession of a firearm; (m) whether a juvenile court order has been issued for the juvenile pursuant to section 43-2,106.03; (n) whether the juvenile is a criminal street gang member; and (o) such other matters as the parties deem relevant to aid in the decision.

The customary rules of evidence shall not be followed at such hearing, and "[a]fter considering all the evidence and reasons presented by both parties, the case shall be transferred to juvenile court unless a sound basis exists for retaining the case in county court or district court[.]" See § 29-1816(3)(a).

[3,4] As the Nebraska Supreme Court has explained, in determining whether a case should be transferred to juvenile court, a court should consider those factors set forth in § 43-276. "In order to retain the proceedings, the court need not resolve every factor against the juvenile, and there are no weighted factors and no prescribed method by which more or less weight is assigned to a specific factor." *State v. Stevens*, 290 Neb. 460, 465, 860 N.W.2d 717, 725 (2015). It is "a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile." *Id.* "The burden of proving a sound basis for retention lies with the State." *Id.*

Comer argues that the State failed to meet its burden and that the district court abused its discretion in failing to grant the transfer. We disagree.

Summarized, the evidence at the transfer hearing showed Comer was a gang member who was alleged to have committed crimes according to multiple juvenile court dockets. The evidence shows that Comer participated in services and activities and made some progress at Boys Town, but he absconded more than once and engaged in further criminal behavior.

In its order denying Comer's motion to transfer, the district court considered the applicable factors listed in § 43-276 and made specific findings. After weighing the various factors, the district court denied the transfer.

The record shows the court considered the nature of the crime and the amount of violence involved, Comer's age and motivation for the crime, and the type of treatment Comer may be amenable to. The court considered Comer's criminal history, as well as Comer's progress and participation during his placement at Boys Town. The court considered the decision to abscond from Boys Town, Comer's "numerous missing juvenile reports," and "the best interests of [Comer] and the security of the public." The court noted that Comer would turn 19 years old in 2021, leaving him with "sufficient time for meaningful involvement," if there was evidence that he would participate. However, the court found that Comer's actions during his previous juvenile cases "indicate a desire to be treated as an adult."

Comer argues that there is evidence he would be amenable to services and that there are a number of services still available to him through juvenile probation. He argues that he had not had any "higher-level" services while on probation, including "multi-systemic therapy, out-of-state group homes[,] and 'last resort' programming in Kearney." Brief for appellant at 16. Comer also argues the district court concluded that "the juvenile court does not have the ability to provide any benefit to . . . Comer." *Id.* at 23. This assertion is inaccurate and does not reflect the actual conclusion of the district court. The court listed a number of services which had been and continued to be available to Comer, but noted that "[i]t is not possible to provide services if the person to be served absconds from the place of service." Ultimately, the court found that "the best interests of [Comer] and security of the public may require that treatment, supervision/detention continue beyond [his] majority."

We note that Neb. Rev. Stat. § 29-2204(5) (Reissue 2016) provides:

> Except when the defendant is found guilty of a Class IA felony, whenever the defendant was under eighteen years of age at the time he or she committed the crime for which he or she was convicted, the court may, in its discretion, instead of imposing the penalty provided for the crime, make such disposition of the defendant as the court deems proper under the Nebraska Juvenile Code.

Further, individuals in county or district court can be placed on probation with conditions related to the rehabilitation of the offender. Neb. Rev. Stat. § 29-2262(2) (Reissue 2016); *In re Interest of Steven S.*, 299 Neb. 447, 908 N.W.2d 391 (2018). And adult probation can work with an offender for up to 5 years. Neb. Rev. Stat. § 29-2263(1) (Reissue 2016); *In re Interest of Steven S., supra.*

Comer was under 18 years of age when he allegedly committed the charged crimes. Thus, should the court determine that Comer's behavioral and therapeutic needs would be better handled at the juvenile level, the district court has the discretion to weigh the merits of disposition under either the Nebraska Juvenile Code or the Nebraska Criminal Code. See *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018). See, also, *In re Interest of Steven S., supra*.

In addition to Comer's argument that the court failed to consider all treatment services to which he would be amenable, he asserts that the court failed to consider his ability to appreciate the nature and seriousness of his conduct. The record shows the court did not make an explicit finding which directly relates to § 43-276(1)(h). Comer "does not deny that the charges allege violence," and there is some evidence that Comer was able to appreciate the seriousness of his alleged crimes, given that he had already been charged in cases Nos. JV 17-3 and JV 17-1903 for similar crimes involving theft and robbery. Brief for appellant at 19. The court specifically referenced many of the statutory factors in § 43-276(1), and

the Nebraska Supreme Court has stated that though it would have been preferable for the district court to refer to all the statutory considerations, the statute does not require it to do so. *State v. Tyler P.*, 299 Neb. 959, 911 N.W.2d 260 (2018). The denial of the motion to transfer without a specific finding with regard to § 43-276(1)(h) does not constitute an abuse of discretion.

[5] Comer compares the circumstances of this case to several cases in which the Supreme Court affirmed the district court's denial of a motion to transfer to juvenile court. Even if the circumstances of these cases are considered to involve more egregious behavior than that displayed in this case, we cannot say that the evidence herein is insufficient to justify retention in district court, particularly given our standard of review. When a district court's basis for retaining jurisdiction over a juvenile is supported by appropriate evidence, it cannot be said that the court abused its discretion in refusing to transfer the case to juvenile court. *State v. Hunt, supra*. The record in this case supports the reasoning of the district court, and we find no abuse of discretion in denying Comer's motion to transfer the case to juvenile court.

CONCLUSION

The judgment of the district court is affirmed.

Affirmed.

Gary R. Jordan, appellant, v. Kelly R. Jordan, now known as Kelly R. Fairchild, et al., appellees.

918 N.W.2d 20

Filed September 4, 2018. No. A-17-688.

1. **Collateral Estoppel: Res Judicata.** The applicability of the doctrines of collateral estoppel and res judicata is a question of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Issue Preclusion.** Issue preclusion bars relitigation of a finally determined issue that a party had a prior opportunity to fully and fairly litigate.
4. **Judgments: Issue Preclusion.** Issue preclusion applies where (1) an identical issue was decided in a prior action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom the doctrine is to be applied was a party or was in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
5. **Issue Preclusion.** Issue preclusion applies only to issues actually litigated.
6. **Judgments: Words and Phrases.** A judgment is on the merits if the judgment is based upon legal rights, as distinguished from mere matters of practice, procedure, jurisdiction, or form.
7. **Issue Preclusion: Parties.** Privity implies a relationship by succession or representation between the party to the second action and the party to the prior action in respect to the right adjudicated in the first action.
8. **Issue Preclusion: Words and Phrases.** In its broadest sense, "privity" is defined as mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right.

9. **Issue Preclusion.** For the purpose of issue preclusion, the mere fact that litigants in different cases are interested in the same question or desire to prove or disprove the same fact or set of facts is not a basis for privity between the litigants.
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 District Court for Phelps County: Terri S. Harder, Judge. Affirmed.

Kent A. Schroeder, of Ross, Schroeder & George, L.L.C., for appellant.

Galen E. Stehlik, of Stehlik Law Firm, P.C., L.L.O., for appellee.

Pirtle, Riedmann, and Bishop, Judges.

Pirtle, Judge.

INTRODUCTION

Gary R. Jordan appeals from an order of the district court for Phelps County finding that it lacked subject matter jurisdiction to determine Gary's action against Kelly R. Jordan, now known as Kelly R. Fairchild, because his causes of action were barred by collateral estoppel. Based on the reasons that follow, we affirm.

BACKGROUND

On July 21, 2016, Gary filed an amended complaint against Kelly, alleging that he was the owner of a "1976 Century manufactured home" (mobile home) and that on July 28, 2014, Kelly wrongfully converted a certificate of title for the mobile home to her own name. It further stated that Kelly may claim an interest in the property adverse to him, which claim is without any right. Gary asked the court to find that Kelly converted his personal property and to determine how much money it will take to compensate him for the conversion. Gary's

amended complaint also alleged a replevin cause of action. It stated that Kelly wrongfully detained the mobile home and asked for a judgment against Kelly for the return of the mobile home or the value thereof.

Kelly filed an answer alleging that she was the owner of the mobile home and that she was awarded the home in a decree of dissolution entered by the district court for Buffalo County. Kelly denied that she "wrongfully converted" the certificate of title to her own name. She also alleged, as an affirmative defense, that Gary was collaterally estopped from relitigating the issue of ownership of the mobile home, because the issue was previously litigated in the dissolution of marriage action between her and Richard Jordan, Gary's son, a final order was entered determining ownership, and no appeal was taken therefrom.

Trial on Gary's amended complaint was held in April 2017. The evidence showed that Kelly and Richard were divorced by a decree entered by the district court for Buffalo County on November 15, 2013. Prior to the dissolution trial, Kelly filed a property statement in which she identified the mobile home, located in Grand Island, Nebraska, as a marital asset valued at $10,000 and noted that the asset was in Richard's possession. An "Amended Joint Property Statement" was entered into evidence on the second day of the dissolution trial, which showed that Richard was disputing that he was in possession of the mobile home and claimed that Gary was the owner of the mobile home.

The ownership of the mobile home was an issue at the dissolution trial between Kelly and Richard. While Gary testified as a witness at the trial in regard to the mobile home, at no time did he seek to intervene in the proceeding. He testified that he bought the mobile home and that the initial title was issued in his name and in the name of his girlfriend, Gloria Siverly. Gary testified that neither Kelly nor Richard provided any funds to purchase the mobile home. He and Siverly lived in the home initially, and Gary claimed he was living in it at the time

of the dissolution trial. Gary testified that he later transferred title to Richard and Siverly because he was having health issues. The record before us contains a Nebraska certificate of title issued in October 1997, purportedly showing Richard and Siverly to be the titled owners of the mobile home. However, it should be noted that at no time did anyone seek to add Siverly as a necessary party to the divorce proceedings.

Gary testified in the present case that when he and Siverly broke up, prior to Kelly and Richard's divorce, Siverly signed over the title to the mobile home and then he had a new title issued in Richard's name only. Gary testified that shortly after the divorce, Richard also signed the title and Gary then had the title issued in his own name only. This explanation is supported by exhibits 10 and 11, where it appears that Siverly signed the title giving up her interest and then Richard added his signature after the divorce decree was entered.

The record also contains Gary's response to requests for admissions wherein he was asked to admit or deny that title to the mobile home was titled in Siverly's name from 1996 to 2002. He denied it, stating that title was initially issued in his and Siverly's names; that title was transferred to Richard and Siverly when Gary started having health issues; that he and Siverly broke up in 2002 or 2003; and that before she left, she signed the title and left it with him.

In the decree of dissolution, the court found that the mobile home was a marital asset valued at $10,000 and awarded it to Kelly. About a month after the divorce decree was entered, Richard transferred title to the mobile home to Gary.

No direct appeal was taken from the decree, but Kelly and Richard each filed a motion for new trial or, in the alternative, to alter or amend the decree. The court made a minor modification to the decree, but overruled both motions in an order dated June 17, 2014. No change to the decree was made with respect to the mobile home awarded to Kelly, but the district court for Buffalo County made the following findings with regard to the mobile home:

> [Richard's] affidavit offered at the time of motion hearing makes an additional reference to a mobile home not mentioned in the motion itself . . . .
>
> . . . .
>
> Richard's affidavit does appear to point out a potential problem in the Court's award. Unfortunately, the evidence is so meager as to whether this was marital property or the property of a third-party that there is no true basis for the Court to make an order other than paragraph 4 of Richard's affidavit, for which there is no foundation and which is apparently based upon hearsay. Kelly's counsel objected at the time of the motion for hearing on these grounds and the Court must find that the objection should be sustained.
>
> . . . .
>
> Richard's motion in this regard should be [and] the same hereby is overruled.

No appeal was taken from the order overruling the motions for new trial or, in the alternative, to alter or amend. At that point, Kelly utilized the divorce decree to obtain a title to the mobile home in her name in Hall County. She subsequently sold the mobile home to a third party for $10,000, the value that had been placed on it in the divorce decree.

Following trial in the instant case, the trial court found that collateral estoppel applied to Gary's action and that therefore, it lacked subject matter jurisdiction to determine the controversy, and it dismissed the amended complaint. The court went on to find that regardless of the doctrine of collateral estoppel, Gary did not meet his burden of proof to recover on his actions for conversion and replevin.

ASSIGNMENTS OF ERROR

Gary assigns that the district court erred in (1) finding that it lacked subject matter jurisdiction and dismissing his causes of action, (2) finding that he failed to establish the necessary elements of conversion, and (3) dismissing his amended complaint.

STANDARD OF REVIEW

[1,2] The applicability of the doctrines of collateral estoppel and res judicata is a question of law. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

ANALYSIS

Gary first argues that the court erred in finding that it lacked subject matter jurisdiction. The court made this determination after concluding that collateral estoppel applied to Gary's causes of action. As we begin our analysis of whether Gary's claims are barred by collateral estoppel, we note that courts and commentators have moved away from using the term "collateral estoppel" and now use the term "issue preclusion." See *Hara v. Reichert*, 287 Neb. 577, 843 N.W.2d 812 (2014). Accordingly, we will use the term "issue preclusion" in our analysis of the issue.

[3-5] Issue preclusion bars relitigation of a finally determined issue that a party had a prior opportunity to fully and fairly litigate. See *Shriner v. Friedman Law Offices*, 23 Neb. App. 869, 877 N.W.2d 272 (2016). Issue preclusion applies where (1) an identical issue was decided in a prior action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom the doctrine is to be applied was a party or was in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action. *Id*. Issue preclusion applies only to issues actually litigated. *Id*.

The trial court found that all four elements necessary for issue preclusion exist in this case. We agree.

The first element of issue preclusion—the identical issue was decided in a prior action—is met. In the instant case, Gary raises the issue of who owns the mobile home. He alleges that he is the rightful owner of the mobile home and that Kelly wrongfully converted title to her own name. However, the

issue of who owns the mobile home was previously litigated and decided in the decree dissolving the marriage between Kelly and Richard. Kelly claimed that the mobile home was a marital asset in Richard's possession; Richard contested that he had possession and claimed that Gary owned the home. Gary testified at the dissolution trial that the mobile home belonged to him, yet he never sought to intervene in the matter. The court ultimately determined that the mobile home was a marital asset and awarded it to Kelly in the decree. Therefore, the issue of who owned the mobile home was previously litigated and decided in a prior action.

[6] The second element of issue preclusion—a judgment on the merits which was final—is also met. The decision by the trial court in the divorce proceedings was on the merits. A judgment is on the merits if the judgment is based upon legal rights, as distinguished from mere matters of practice, procedure, jurisdiction, or form. See *Jamie N. v. Kenneth M.*, 23 Neb. App. 1, 867 N.W.2d 290 (2015). As previously discussed, the ownership of the mobile home was at issue in Kelly and Richard's dissolution proceedings and after hearing evidence on the matter, the trial court determined it was a marital asset and awarded it to Kelly. Neither party appealed the decree of dissolution or the order on the motion for new trial or to alter or amend the judgment. The decree is a final order as defined by Neb. Rev. Stat. § 25-1902 (Reissue 2016). Accordingly, the court's decision to award Kelly the mobile home in the divorce decree was a final judgment on the merits.

[7-9] The third element of issue preclusion is that the party against whom the doctrine is to be applied was a party or was in privity with a party to the prior action. Gary, the party against whom the rule is to be applied, was not a party in the divorce action, but was in privity with a party, Richard. Privity implies a relationship by succession or representation between the party to the second action and the party to the prior action in respect to the right adjudicated in the first action. *Thomas Lakes Owners Assn. v. Riley*, 9 Neb. App. 359,

612 N.W.2d 529 (2000). In its broadest sense, "privity" is defined as mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right. *Id.* For the purpose of issue preclusion, the mere fact that litigants in different cases are interested in the same question or desire to prove or disprove the same fact or set of facts is not a basis for privity between the litigants. *Id.*

In the present case, Gary and Richard are related—Gary is Richard's father. Further, the record shows that at the dissolution trial, Richard claimed that Gary owned the mobile home and Gary was called as a witness by Richard and allowed to testify in regard to his ownership status. Based on the relationship between Gary and Richard, and Gary's involvement in the dissolution trial, we agree with the trial court that privity exists between Gary and Richard and that the third element of issue preclusion has been met.

The fourth element of issue preclusion requires that there was an opportunity to fully and fairly litigate the issue in the prior action. Again, the ownership of the mobile home was an issue in the dissolution proceeding. The record shows that Richard presented evidence in the divorce proceeding to show that Gary owned the mobile home. Specifically, Gary himself testified about the ownership status of the home. There was no appeal filed from the decree, but Richard did file a motion for new trial or, in the alternative, to alter or amend the judgment. One of the issues he raised was the ownership of the mobile home. The court found there was no competent evidence to show that Gary owned the mobile home and denied the motion. No appeal was filed. We conclude that there was an opportunity to fully and fairly litigate the issue of ownership of the mobile home in the prior action, and the fourth element has been met.

We determine that issue preclusion bars Gary from relitigating the issue of who owned the mobile home. This issue was conclusively decided as part of the dissolution action between

Kelly and Richard. Accordingly, the court did not err in concluding that it did not have subject matter jurisdiction because issue preclusion barred Gary's causes of action.

[10] Gary next assigns that the trial court erred in finding that he failed to establish the necessary elements of conversion. Because we conclude that issue preclusion applies to Gary's cause of action for conversion and that the court properly dismissed his amended complaint, 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. *Essink v. City of Gretna*, 25 Neb. App. 53, 901 N.W.2d 466 (2017).

CONCLUSION

We conclude the trial court did not err in finding that Gary's causes of action were barred by issue preclusion and that it did not have subject matter jurisdiction. Accordingly, the order of the district court is affirmed.

Affirmed.

Ronald J. Clark, appellant, v. Nori D. Clark, now known as Nori D. Carter, appellee.

918 N.W.2d 336

Filed September 4, 2018. No. A-17-852.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Child Support: States.** The general purpose of the Uniform Interstate Family Support Act is to unify state laws relating to the establishment, enforcement, and modification of child support orders.
3. ____: ____. The goal of the Uniform Interstate Family Support Act is to streamline and expedite interstate enforcement of support decrees and to eliminate the problems arising from multiple or conflicting support orders from various states by providing for one tribunal to have continuing and exclusive jurisdiction to establish or modify a child support order.
4. ____: ____. The Uniform Interstate Family Support Act provides a system where only one child support order may be in effect at any one time.
5. ____: ____. Following the adoption of the Uniform Interstate Family Support Act, there should not exist multiple or conflicting support orders and only one tribunal shall have continuing and exclusive jurisdiction to establish or modify a child support order.
6. ____: ____. The Uniform Interstate Family Support Act's provisions may only be used to enforce an existing support order, establish a support order where no order has previously been established, or modify an existing support order.
7. **Jurisdiction: Waiver.** Generally speaking, the filing of a general appearance which does not preserve an objection to personal jurisdiction constitutes a waiver of personal jurisdiction.

8. **Statutes: Equity: Jurisdiction.** When a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and a party must exhaust the statutory remedy before it may resort to equity.

Appeal from the District Court for Lancaster County: Lori A. Maret, Judge. Reversed and remanded for further proceedings.

Mark T. Bestul, of Legal Aid of Nebraska, for appellant.

No appearance for appellee.

Moore, Chief Judge, and Arterburn and Welch, Judges.

Welch, Judge.

INTRODUCTION

Ronald J. Clark (Clark) appeals from an order issued by the Lancaster County District Court dismissing his request to (1) vacate or modify a Nebraska child support order originally issued in August 1999 and modified starting in April 2002 or (2) make a determination regarding whether the Nebraska order or a concurrent Wisconsin child support order is the controlling order. We reverse, and remand for further proceedings.

STATEMENT OF FACTS

In September 1985, Nori D. Clark, now known as Nori D. Carter (Carter), a resident of Wisconsin, gave birth to the parties' son. At the time of the son's birth, Carter was not married; however, 4 days later, she married Clark, who admitted he was the father. Because there were outstanding birth expenses paid by the State of Wisconsin, Wisconsin commenced a paternity action against Clark to recover those expenses. On March 2, 1989, the "State of Wisconsin[,] Circuit Court[,] Family Division[,] Milwaukee County," entered an order in case No. 80-641 finding that Carter gave birth to the parties' son in September 1985, that Clark was the father, that Carter and Clark were married 4 days later, and that Clark must pay the

State of Wisconsin $2,130 in birth expenses payable at the rate of $43 per month.

Also provided in the record is a document entered by the "State of Wisconsin[,] Circuit Court[,] Family Court Branch[,] Milwaukee County," in case No. 900-426. This document purports to be "In re the Marriage of: State of Wisconsin Nori Clark . . . Petitioner, and Ronald Clark . . . Respondent." The document also reads "FINDINGS AND ORDER" but then recites matters apparently occurring on different dates. The top section of the document references an "ACTION TO COMPEL SUPPORT" as of March 22, 1990, identifies that Clark appeared "in person" but not Carter, and provided that Clark was to pay "SUPPORT" of $152 per month to be payable at the rate of $35 per week commencing April 1, 1990. This top section of the document is not signed.

The lower section of the same document, bearing the date April 3, 1990, states as follows:

> ADJOURNED TO: 5-24-90 at 11:15 [and] both TO APPEAR IN PERSON[.]
>
> FINDINGS: THE FOLLOWING FINDINGS ARE MADE: Parties have been separated two years. Child was born 4 days before parent's [sic] marriage; husband acknowledges paternity[.]
>
> Mother works for Am[erican] Airlines, earning $500/mo[nth] gross working part time but she's been off work 3-4 months and just went back. She says she is going off [Aid to Families with Dependent Children]. She had child in a Montessori school but had to take child out because of financial problems.
>
> Order for support is based on husband's income from one job: wife claims he's working a second job, but he denies it. Husband is extremely antagonistic and doesn't want to pay support but he's going to have to do that. . . .
>
> ORDER: BASED ON THESE FINDINGS, THE FOLLOWING ORDERS ARE MADE: Suspend and

> hold open past support and birth expense payment in case P80-641.
>
> Matter adjourned to 5-24-90 at 11:15 for review on support; both parties to produce income tax returns for 1989 and YTD statement of current income.
>
> . . . .
>
> This assignment super[s]edes any other assignment in a case between these parties, including the one in Case P80-641.

The second page of this document is signed by "Lucy Cooper (Deputy/Asst.) Family Court Commissioner."

In September 2007, these two Wisconsin cases were consolidated by the "State of Wisconsin[,] Circuit Court[,] Milwaukee County." The court's "EXPARTE ORDER FOR CONSOLIDATION" provided that "[a]ny credit or debt balances owed on the former case(s) shall be removed from the former case(s) and added to the new case."

Separately, the record contains the parties' Nebraska divorce decree from the Lancaster County District Court dated August 24, 1999. On that date, the district court issued a decree governing the marriage of Carter and Clark, dissolved their marriage, divided their property, provided Clark with reasonable visitation of Carter and Clark's "minor child" (not named in the decree), and ordered Clark to pay $395 per month in child support for "one (1) minor child" commencing September 1. This order was modified by the district court on March 29, 2002, to reduce Clark's child support obligation to $300 per month starting April 1.

In October 2016, Clark filed a lawsuit in the Lancaster County District Court claiming that he was the obligor on two separate decrees governing the same obligee and the same child, entered in two separate states, and requesting that the "child support be reduced or modified retroactively to $0 per month or that the original decree and subsequent modification be vacated as to the provisions in said orders related to child support and for such other and further relief as the

Court deems just and equitable." After being served with the complaint, Carter wrote a letter to the district court in which she chastised Clark for serving her at her recently deceased mother's home and for not paying child support, expressing confusion as to why she was being sued in court. Carter did not appear or testify at trial.

At trial, Clark testified that he was formerly married to Carter; that he was the father of their son, who was now an adult; and that he and Carter separated long before their divorce. He testified that neither Carter nor their son ever lived in Nebraska, but that he had moved to Nebraska and sought the divorce from the Lancaster County District Court in 1999 in order to get that part of his life resolved. He also testified that at the time of his divorce, he was aware of the State of Wisconsin's original paternity order, but not the separate child support order. He then testified that he was asking the court to resolve the discrepancy so that he could take care of the arrearages and "move on" with his life.

In connection with the Lancaster County child support order, Clark offered, and the district court received into evidence, a "Payment History Report" from the Nebraska Department of Health and Human Services showing Clark's payment history, including both the arrears balance and interest balance on the obligation. The court also received into evidence a State of Wisconsin payment summary from "Milwaukee Co. Child Support Services," which references an "[o]rder established 4/1/90 @ $152 per month" showing both a "Principle [sic] Ending Balance" as of 2016 and an "AFFIDAVIT OF ARREARS" to the "Circuit Court[,] Milwaukee County" certifying Clark's arrears to the State of Wisconsin and custodial parent governing the consolidated case.

Following the trial, upon Clark's motion, the district court allowed Clark to amend his complaint to add the substantive allegations and prayer that "this court enter and [sic] order making a determination under NEB. REV. STAT. § 42-711 [(Reissue 2016)] as to which child support order

is the controlling order" and "for any such other and further relief as the Court deems just and equitable."

After reviewing the evidence, the district court held:

> The Court finds that [Clark] fails to provide the Court with the necessary evidence and information to make a determination between competing cases in differing jurisdictions. In order to make such determination, the Court lacks the present authority to effectuate the relief requested as it does not have jurisdiction over the out-of-state matter. The Amended Complaint is hereby overruled and the matter is dismissed.

Clark has timely appealed that final order of dismissal to this court.

ASSIGNMENTS OF ERROR

Clark's assignments of error, consolidated and restated, are that the district court erred (1) in determining that it did not have jurisdiction over the Wisconsin matter for the purpose of determining which state's order is the controlling child support order, (2) in determining that there was insufficient evidence and information to make a determination as to which of the concurrent Wisconsin and Nebraska child support orders was the controlling child support order, and (3) in failing to vacate or modify his Nebraska child support obligation.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *TransCanada Keystone Pipeline v. Nicholas Family*, 299 Neb. 276, 908 N.W.2d 60 (2018).

ANALYSIS

Jurisdiction

We first address the district court's finding that it lacked jurisdiction over the out-of-state matter in order to effectuate

the relief requested by Clark. This case involves a request by a Nebraska resident to have a Nebraska court determine which of two child support orders, issued in different states, is the "controlling" child support order. As framed by the amended complaint, the case fits squarely within the terms of the Uniform Interstate Family Support Act (UIFSA), Neb. Rev. Stat. §§ 42-701 to 42-751.01 (Reissue 2016).

[2-4] The Nebraska Supreme court had occasion to discuss the general purpose of the UIFSA in *Hamilton v. Foster*, 260 Neb. 887, 620 N.W.2d 103 (2000). In *Hamilton*, the Nebraska Supreme Court held:

> UIFSA, as its name implies, deals with the interstate enforcement and modification of support orders. The general purpose of UIFSA is to unify state laws relating to the establishment, enforcement, and modification of child support orders. *Groseth v. Groseth*, 257 Neb. 525, 600 N.W.2d 159 (1999); *Kasdan v. Berney,* 587 N.W.2d 319 (Minn. App. 1999). The goal of UIFSA is to streamline and expedite interstate enforcement of support decrees and to eliminate the problems arising from multiple or conflicting support orders from various states by providing for one tribunal to have continuing and exclusive jurisdiction to establish or modify a child support order. See, *OCSE v. Clemmons*, 65 Ark. App. 84, 984 S.W.2d 837 (1999); *Reis v. Zimmer*, 263 A.D.2d 136, 700 N.Y.S.2d 609 (1999); *In re Marriage of Zinke*, 967 P.2d 210 (Colo. App. 1998); *Cowan v. Moreno*, 903 S.W.2d 119 (Tex. App. 1995). UIFSA provides a system where only one child support order may be in effect at any one time. See Unif. Interstate Family Support Act, Prefatory Note, 9IB U.L.A. 241 (1999). See, also, *Linn v. State Child Support Enforcement*, 736 A.2d 954 (Del. 1999).

260 Neb. at 899, 620 N.W.2d at 114.

[5] It is clear from this general purpose statement that, following the adoption of the UIFSA, there should not exist

multiple or conflicting support orders and that only one tribunal shall have continuing and exclusive jurisdiction to establish or modify a child support order. It is also clear that both Nebraska and Wisconsin have adopted versions of the UIFSA. See Wis. Stat. Ann. ch. 769 (West 2009 & Cum. Supp. 2017). But Clark is not asking the district court to establish or modify an order; he is asking the district court to determine which child support order is controlling. Assuming, without deciding, that courts in both Wisconsin and Nebraska have issued two conflicting child support orders, we must first determine whether the district court has jurisdiction to determine which child support order is controlling. The district court held that it did not have jurisdiction to make a determination governing the Wisconsin court's order. We disagree.

Section 42-711(c) provides:

> If two or more child support orders have been issued for the same obligor and the same child, upon request of a party who is an individual or that is a support enforcement agency, a tribunal of this state having personal jurisdiction over both the obligor and the obligee who is an individual shall determine which order controls under subsection (b) of this section. The request may be filed with a registration for enforcement or registration for modification pursuant to sections 42-736 to 42-747.04 or *may be filed as a separate proceeding*.

(Emphasis supplied.) Section 42-711(b) provides, in pertinent part:

> If a proceeding is brought under the [UIFSA] and two or more child support orders have been issued by tribunals of this state, another state, or a foreign country with regard to the same obligor and the same child, a tribunal of this state having personal jurisdiction over both the obligor and individual obligee shall apply the following rules and by order shall determine which order controls and must be recognized:

> (1) If only one of the tribunals would have continuing, exclusive jurisdiction under the [UIFSA], the order of that tribunal controls.
>
> (2) If more than one of the tribunals would have continuing, exclusive jurisdiction under the [UIFSA]:
>
> (A) an order issued by a tribunal in the current home state of the child controls; or
>
> (B) if an order has not been issued in the current home state of the child, the order most recently issued controls.

[6] Notably, the Nebraska Supreme Court stated that the "UIFSA's provisions may only be used to enforce an existing support order, establish a support order where no order has previously been established, or modify an existing support order. See §§ 42–714 and 42–733." *Hamilton v. Foster*, 260 Neb. 887, 900, 620 N.W.2d 103, 114 (2000).

When read together with § 42-711(b) and (c), this means that in order for Clark to bring this action, the action must constitute one to enforce, establish, or modify a support order, and in connection therewith, if two or more child support orders have been issued, one of which has been issued in this state, he can request a tribunal in this state, if it has personal jurisdiction, to determine which order controls. Although this case is unusual in the sense that Clark is the obligor bringing the action, we hold that the action represents a claim by Clark to enforce a child support order wherein he properly requested the district court, under the UIFSA, to determine the controlling order.

That said, although the district court has subject matter jurisdiction to hear the controversy, it can only do so if it has "personal jurisdiction over both the obligor and individual obligee," see § 42-711(b). Here, Clark is a Nebraska resident filing the action and subjecting himself to the jurisdiction of the district court to resolve this controversy. Conversely, Carter is a nonresident of Nebraska residing in Wisconsin.

Section 42-705 provides, in relevant part:

> (a) In a proceeding to establish or enforce a support order or to determine parentage of a child, a tribunal of this state may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if:
>
> . . . .
>
> (2) The individual submits to the jurisdiction of this state by consent in a record, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;
>
> . . . .
>
> (8) There is any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction.

The record reflects that neither Carter nor the parties' son, now in his thirties, have ever lived in Nebraska. That said, after Clark filed this lawsuit and served Carter in Wisconsin, Carter sent a document addressed to the District Court of Lancaster County, Nebraska, referencing "Ronald J. Clark v. Nori D. Clark" and included both the case number assigned to this action ("Case ID: CI 98 9026904") and the case number governing the 1999 divorce action ("Old Case ID: 576589"). In that document, Clark generally directed that all future documents be sent to her at a different address; generally asked why she was being sued despite Clark's failure to consistently pay child support over the years; generally provided that she and her mother have funded the parties' son over the years, including his education; and expressed her disbelief that Clark will ever make good on his child support obligations. Carter signed the document, and the clerk of the district court filed the document. In the document, Carter never objected to the suit's being brought in Nebraska nor mentioned anything that could be reasonably construed as contesting personal jurisdiction.

[7] Generally speaking, the filing of a general appearance which does not preserve an objection to personal jurisdiction constitutes a waiver of personal jurisdiction. See *Friedman v. Friedman*, 290 Neb. 973, 863 N.W.2d 153 (2015). Section 42-705(a)(2) appears to provide an even broader grant of personal jurisdiction over a nonresident individual if that individual files "a responsive document having the effect of waiving any contest to personal jurisdiction." After reviewing the document filed by Carter in this matter, we believe the language of that document is sufficient to have effected a waiver of any contest to personal jurisdiction. In so finding, we note that Carter's written response made reference to both the pending action and the parties' divorce action—where she apparently waived any objection to personal jurisdiction, which action resulted in the child support order that is now part of the dispute. Under these facts, we hold that the district court had a basis to exercise personal jurisdiction over Carter pursuant to § 42-705.

Because we hold that Clark did properly file a claim under the UIFSA where the district court had subject matter jurisdiction to resolve the controversy and rightfully acquired personal jurisdiction over Carter to enforce a support order, we now turn to the district court's holding that it lacked "the necessary evidence and information to make a determination between competing cases in differing jurisdictions."

Insufficient Evidence and Information to Determine Controlling Child Support Order

As we previously described, § 42-711 governs proceedings brought under the UIFSA where two or more support orders have been issued in this state and others. When a court in this state is called upon to "determine which order controls and must be recognized," pursuant to § 42-711(b), the individual must follow the remaining directives in § 42-711. Those directives include: "A request to determine which is

the controlling order shall be accompanied by a copy of every child support order in effect and the applicable record of payments. The requesting party shall give notice of the request to each party whose rights may be affected by the determination." § 42-711(d).

The record appears to contain copies of the alleged conflicting orders and record of payments, and it is difficult to determine from the district court's order the specific bases of the district court's determination that it lacked "the necessary evidence and information to make a determination between competing cases in differing jurisdictions." But the UIFSA appears to provide for matters of uncertainty in connection with these claims. In addition to the special rules of evidence and procedure contained in § 42-729, the UIFSA contemplates, and includes a provision for, direct communication between courts of different jurisdictions. Specifically, § 42-730 provides:

> A tribunal of this state may communicate with a tribunal outside this state in a record or by telephone, electronic mail, or other means to obtain information concerning the laws, the legal effect of a judgment, decree, or order of that tribunal, and the status of a proceeding. A tribunal of this state may furnish similar information by similar means to a tribunal outside this state.

Additionally, § 42-731 provides: "A tribunal of this state may: (1) request a tribunal outside this state to assist in obtaining discovery; and (2) upon request, compel a person over which it has jurisdiction to respond to a discovery order issued by a tribunal outside this state."

We additionally note that § 42-714 provides:

> (a) Except as otherwise provided in the [UIFSA], sections 42-714 to 42-732 apply to all proceedings under the [UIFSA].
>
> (b) An individual petitioner or a support enforcement agency may initiate a proceeding authorized under the [UIFSA] by filing a petition in an initiating tribunal

> for forwarding to a responding tribunal or by filing a petition or a comparable pleading directly in a tribunal of another state or a foreign country which has or can obtain personal jurisdiction over the respondent.

The UIFSA then provides in § 42-717:

> (a) Upon the filing of a petition authorized by the [UIFSA], an initiating tribunal of this state shall forward the petition and its accompanying documents:
>
> (1) to the responding tribunal or appropriate support enforcement agency in the responding state; or
>
> (2) if the identity of the responding tribunal is unknown, to the state information agency of the responding state with a request that they be forwarded to the appropriate tribunal and that receipt be acknowledged.
>
> (b) If requested by the responding tribunal, a tribunal of this state shall issue a certificate or other document and make findings required by the law of the responding state. If the responding tribunal is in a foreign country, upon request the tribunal of this state shall specify the amount of support sought, convert that amount into the equivalent amount in the foreign currency under applicable official or market exchange rate as publicly reported, and provide any other documents necessary to satisfy the requirements of the responding foreign tribunal.

Accordingly, because of the statutory powers authorized by the legislatures of the respective states to cooperate and obtain or provide information necessary to resolve these controversies, we reverse the district court's decision and remand the cause to the district court—which tribunal we have held has jurisdiction of this matter—to forward the complaint to the appropriate responding tribunal within the State of Wisconsin, to obtain from the Wisconsin tribunal all information deemed necessary by the district court to "determine which order controls and must be recognized," to make all relevant findings under § 42-711(f), and to otherwise comply with the terms of the UIFSA.

[8] Upon remand, we note that, as it relates to counsel's claim during oral argument that his claim is grounded in both the UIFSA and equity, when a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and a party must exhaust the statutory remedy before it may resort to equity. See *Bock v. Dalbey*, 283 Neb. 994, 815 N.W.2d 530 (2012). See, also, *State on behalf of B.M. v. Brian F.*, 288 Neb. 106, 846 N.W.2d 257 (2014) (equitable remedies are generally not available where there exists adequate remedy at law); *Ganser v. County of Lancaster*, 215 Neb. 313, 317, 338 N.W.2d 609, 611 (1983) ("suit in equity will not lie when the plaintiff has a plain and adequate remedy at law").

Failure to Vacate or Modify Nebraska Child Support Obligation

Having determined that the order of the district court must be reversed and the cause remanded for further proceedings, we do not reach Clark's assigned error that the district court erred in failing to vacate or modify his Nebraska child support obligation.

CONCLUSION

The district court had jurisdiction over this matter, and the UIFSA provides the court with powers authorized by the legislatures of the respective states to cooperate and obtain or provide information necessary to resolve controversies such as those presented in the instant case. Accordingly, we reverse the order of the district court and remand the cause for further proceedings.

Reversed and remanded for further proceedings.

State of Nebraska, appellee, v. Dan M. Liner, appellant.

917 N.W.2d 194

Filed September 11, 2018. No. A-17-778.

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. **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.
3. **Postconviction: Limitations of Actions: Words and Phrases: Appeal and Error.** For purposes of Neb. Rev. Stat. § 29-3001(4)(a) (Reissue 2016), the "conclusion of a direct appeal" occurs when a Nebraska appellate court issues the mandate in the direct appeal.
4. **Rules of the Supreme Court: Postconviction.** Postconviction proceedings are not governed by the Nebraska Court Rules of Pleading in Civil Cases.
5. **Actions: Pleadings.** A cause of action pleaded by amendment ordinarily relates back to the original pleading, provided that claimant seeks recovery on the same general set of facts.

Appeal from the District Court for Buffalo County: William T. Wright, Judge. Affirmed.

Dan M. Liner, pro se.

Douglas J. Peterson, Attorney General, and Erin E. Tangeman for appellee.

Pirtle, Riedmann, and Welch, Judges.

Riedmann, Judge.

INTRODUCTION

Dan M. Liner appeals the order of the district court for Buffalo County which denied him postconviction relief. Because his amended motion for postconviction relief is time barred, we affirm.

BACKGROUND

Liner was charged in November 2013 with various drug and weapons offenses. In September 2014, he filed motions to discharge the charges on speedy trial grounds. The district court denied the motions to discharge, and Liner appealed to this court, which appeals were docketed as cases Nos. A-14-819 and A-14-820. On March 24, 2015, we affirmed in a memorandum opinion, and on April 28, a mandate was issued in each case. Thereafter, Liner entered a no contest plea to one count of possession of a deadly weapon by a prohibited person and stipulated to being a habitual criminal. He was sentenced to 15 to 20 years' imprisonment. Liner appealed, assigning only that he received an excessive sentence, which appeal was docketed as case No. A-15-771. This court summarily affirmed the sentence on January 8, 2016, and issued its mandate on February 18.

On December 1, 2016, Liner filed a pro se verified motion for postconviction relief. His motion contained nine grounds for relief. Specifically, he alleged that (1) his plea of no contest was entered unintelligently because the State failed to adequately advise him on the record of the maximum penalty, (2) the district court lacked jurisdiction to accept his plea when it also failed to properly advise him of the maximum penalty, (3) the district court failed to advise him on the record of the maximum term of incarceration he would be required to serve before obtaining mandatory release, (4) the district court lacked subject matter jurisdiction to sentence him for the reasons previously set forth, (5) trial counsel was ineffective in failing to alert the court of the State's failure

to adequately advise him of the maximum penalty, (6) trial counsel was ineffective in failing to object to the court's failure to advise him of the maximum term he must serve before mandatory release, (7) trial counsel was ineffective in failing to object to the impermissible sentence imposed by the court for the reasons previously set forth, (8) trial counsel was ineffective in failing to object to each claim set forth in the postconviction motion, and (9) appellate counsel was ineffective in failing to raise on direct appeal the claims set forth in the postconviction motion.

On March 1, 2017, Liner moved for leave to file an amended motion for postconviction relief. The district court granted leave to amend, and Liner filed an amended motion on April 19. The amended motion included only one ground for relief: Appellate counsel was ineffective in failing to raise on direct appeal that trial counsel was ineffective in failing to file a second motion for discharge on speedy trial grounds. The State filed a motion to dismiss the amended motion, alleging, as relevant here, that the amended motion was filed outside the limitation period set forth in the Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2016).

The district court held a hearing on the amended motion and corresponding request for an evidentiary hearing, the State's motion to dismiss, and Liner's objections to the motion to dismiss. The court subsequently entered an order, which purported to both grant the motion to dismiss and deny the amended motion for postconviction relief. The court first determined that the sole issue raised in the amended motion was raised or could have been raised in the course of the interlocutory appeal Liner filed in September 2014 after the court denied his motion for discharge. Additionally, the court found that because Liner's conviction was plea based, he waived many of his rights, including his right to complain about errors at the plea and sentencing hearing. Finally, the court concluded that the amended motion for postconviction relief did not relate back to the original motion because it raised an

entirely different issue and that therefore, because it had been filed more than 1 year after the conviction became final, it was untimely. Liner appeals.

ASSIGNMENT OF ERROR

Liner assigns, restated, that the district court erred in denying his motion for postconviction relief without holding an evidentiary hearing.

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. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011).

[2] 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. *State v. Goynes*, 293 Neb. 288, 876 N.W.2d 912 (2016).

ANALYSIS

The district court's order addressed the timeliness of the amended motion as raised in the State's motion to dismiss and the merits of the postconviction motion and purported to both (1) grant the motion to dismiss, thereby dismissing the amended motion, and (2) deny the amended postconviction motion on its merits. Despite the irregular procedural posture of the matter, we conclude that the district court did not err in granting the motion to dismiss. We therefore do not address the merits of the amended motion for postconviction relief.

[3] Section 29-3001(4) provides that a 1-year period of limitation shall apply to the filing of a verified motion for postconviction relief. As applicable in this case, the 1-year limitation period shall run from the date the judgment of conviction became final by the conclusion of a direct appeal or the expiration of the time for filing a direct appeal. See § 29-3001(4)(a).

For purposes of § 29-3001(4)(a), the "conclusion of a direct appeal" occurs when a Nebraska appellate court issues the mandate in the direct appeal. *State v. Huggins*, 291 Neb. 443, 866 N.W.2d 80 (2015).

This court's mandate in Liner's direct appeal was issued on February 18, 2016. Therefore, his original motion for postconviction relief filed on December 1 was filed within the 1-year limitation period, but the amended motion filed April 19, 2017, was untimely unless it related back to the filing of the original motion.

[4] The common-law doctrine of relation back was codified in Neb. Rev. Stat. § 25-201.02 (Reissue 2016). See John P. Lenich, Nebraska Civil Procedure § 15:8 (2018). Section 25-201.02 provides that an amendment of a pleading that does not change the party or the name of the party against whom the claim is asserted relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. Our review of Nebraska case law does not reveal an instance where the relation-back doctrine has been applied in a postconviction proceeding. And we recognize that the Nebraska Supreme Court has clarified that postconviction proceedings are not governed by the Nebraska Court Rules of Pleading in Civil Cases. See *State v. Robertson*, 294 Neb. 29, 881 N.W.2d 864 (2016). Whether the relation-back doctrine, codified in § 25-201.02, constitutes a rule of pleading is an issue we need not decide because we conclude that Liner's amended motion did not relate back to the original motion and was therefore untimely.

[5] A cause of action pleaded by amendment ordinarily relates back to the original pleading, provided that claimant seeks recovery on the same general set of facts. *Forker Solar, Inc. v. Knoblauch*, 224 Neb. 143, 396 N.W.2d 273 (1986). The theory of recovery is not itself a cause of action; therefore, if the general facts upon which the right to recover is based are

the same, the amendment relates back to the original pleading. *Id*.

The federal courts have rejected the broad argument that an amended postconviction claim related back to the original claim if it stemmed from the same trial, conviction, or sentence; rather, the Eighth Circuit relied upon the U.S. Supreme Court's holding in *Mayle v. Felix*, 545 U.S. 644, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005), that in order for claims in an amended motion to relate back, they must be of the same time and type as those in the original motion, such that they arise from the same core set of operative facts. *U.S. v. Hernandez*, 436 F.3d 851 (8th Cir. 2006). See, also, *Dodd v. U.S.*, 614 F.3d 512 (8th Cir. 2010) (facts alleged must be specific enough to put opposing party on notice of factual basis for claim, and thus, it is not enough that both original motion and amended motion allege ineffective assistance of counsel during trial).

Applying the applicable definitions and rejecting a broader interpretation of the relation-back doctrine, the Eighth Circuit in *U.S. v. Hernandez, supra*, determined that the amended ineffective assistance claim did not relate back to the original claim because the original claim referred to the admission of evidence, whereas the amended claim referred to trial testimony and cross-examination of witnesses. Thus, the facts alleged in the original claim were not such that would put the opposition on notice that cross-examination of witnesses was at issue, and the claims were not similar enough to satisfy the "'time and type'" test, nor did they arise out of the same set of operative facts. *Id*. at 858.

Likewise, in the instant case, the ineffective assistance of counsel claim raised in the amended motion is not based on the same set of facts as the claims contained in the original motion. The original claims related to entry of the plea and sentencing matters, whereas the amended claim related to Liner's right to a speedy trial, which occurred prior to the time he entered a plea. We cannot find that these claims are based

on the same general facts such that the amended motion relates back to the filing of the original motion. Accordingly, the amended motion was filed outside the 1-year limitation period set forth in § 29-3001(4)(a). The district court, therefore, did not err in granting the State's motion to dismiss the amended motion as untimely.

CONCLUSION

We conclude that the district court did not err in granting the State's motion to dismiss. We therefore affirm.

Affirmed.

State of Nebraska, appellee, v. Dominic L. Castellanos, appellant.

918 N.W.2d 345

Filed September 11, 2018. Nos. A-17-808, A-17-809.

1. **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.
2. **Motions to Suppress: Warrantless Searches: Appeal and Error.** In reviewing a trial court's denial of a motion to suppress evidence obtained by a warrantless search under the emergency doctrine, an appellate court employs a two-part standard in which the first part of the analysis involves a review of the historical facts for clear error and a review de novo of the trial court's ultimate conclusion that exigent circumstances were present. Where the facts are largely undisputed, the ultimate question is an issue of law.
3. **Rules of Evidence: Other Acts.** An appellate court reviews for abuse of discretion a trial court's evidentiary rulings on the admissibility of a defendant's other crimes or bad acts under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2016), or under the inextricably intertwined exception to the rule.
4. **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.
5. **Jury Instructions: Proof: Appeal and Error.** 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.

6. **Jury Instructions: Appeal and Error.** It is not error for a trial court to refuse a requested instruction if the substance of the proposed instruction is contained in those instructions actually given.
7. ____: ____. If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.
8. **Search and Seizure: Warrantless Searches.** Searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions that must be strictly confined by their justifications.
9. **Search and Seizure: Warrantless Searches: Proof.** In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement.
10. **Search and Seizure: Warrantless Searches: Police Officers and Sheriffs.** In the case of entry into a home, a police officer who has obtained neither an arrest warrant nor a search warrant cannot make a nonconsensual and warrantless entry in the absence of exigent circumstances.
11. **Search and Seizure: Police Officers and Sheriffs: Words and Phrases.** The emergency doctrine is a category of exigent circumstances. The elements of the emergency doctrine are that (1) the police must have reasonable grounds to believe there is an immediate need for their assistance for the protection of life or property and (2) there must be some reasonable basis to associate the emergency with the area or place to be searched.
12. **Search and Seizure: Warrantless Searches.** The first element of the emergency doctrine considers whether there were reasonable grounds to find an emergency, and the second element considers the reasonableness of the scope of the search.
13. **Constitutional Law: Police Officers and Sheriffs.** An action is reasonable under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances viewed, objectively, justify the action.
14. **Police Officers and Sheriffs: Probable Cause.** The presence of an emergency, like probable cause, hinges on the reasonable belief of the officers in light of specific facts and the inferences derived therefrom, not whether, in hindsight, one actually existed.

15. **Search and Seizure: Police Officers and Sheriffs: Probable Cause.** The first element of the emergency doctrine is similar to probable cause and asks whether the facts available to the officer at the moment of entry warranted a person of reasonable caution to believe that entry was appropriate.
16. **Search Warrants: Affidavits: Probable Cause.** Where an affidavit used for the purpose of obtaining a search warrant includes both illegally obtained facts as well as facts derived from independent and lawful sources, a valid search warrant may issue if the lawfully obtained facts, considered by themselves, establish probable cause to issue the warrant; not all evidence obtained is considered fruit of the poisonous tree, and such evidence may be admitted if there is a sufficient independent basis for the discovery of the evidence.
17. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2016), does not apply to evidence of a defendant's other crimes or bad acts if the evidence is inextricably intertwined with the charged crime.
18. ____: ____. Inextricably intertwined evidence includes evidence that forms part of the factual setting of the crime, or evidence that is so blended or connected to the charged crime that proof of the charged crime will necessarily require proof of the other crimes or bad acts, or if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime.
19. **Jury Instructions.** Whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should usually be given to the jury in a criminal case.
20. **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.

Appeal from the District Court for Lancaster County: Jodi L. Nelson and Darla S. Ideus, Judges. Affirmed.

Timothy S. Noerrlinger, of Naylor & Rappl Law Office, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

Pirtle, Riedmann, and Bishop, Judges.

Pirtle, Judge.

INTRODUCTION

Dominic L. Castellanos appeals his convictions in the district court for Lancaster County for possession of a firearm by a prohibited person and possession of methamphetamine. He takes issue with the court's overruling his motion to suppress, allowing certain "[rule] 404 evidence" under the "'inextricably intertwined' exception," and failing to give his proposed jury instructions on possession. Based on the reasons that follow, we affirm.

BACKGROUND

On April 29, 2016, an information was filed in the district court charging Castellanos with one count of possession of a firearm by a prohibited person, in violation of Neb. Rev. Stat. § 28-1206(1) and (3)(b) (Reissue 2016). On July 13, an information was filed in the district court charging Castellanos with one count of possession of a controlled substance, in violation of Neb. Rev. Stat. § 28-416(3) (Supp. 2015). The two cases were consolidated for trial and sentencing and have been consolidated for purposes of appeal.

On September 12, 2016, Castellanos filed a motion to suppress evidence in each case. A consolidated hearing was held on the motions. The evidence adduced at the suppression hearing was as follows:

On February 19, 2016, Officer Charity Hamm of the Lincoln Police Department was on an unrelated police call in the area of 17th and G Streets when she heard a single gunshot nearby. She testified that it sounded as if the gunshot came from an area southwest of her location. She got in her marked patrol car and headed toward the direction of the gunshot sound. When she got to the area of 16th and D Streets, she noticed a maroon sport utility vehicle parked oddly along the curb of D Street. As Officer Hamm approached the vehicle, she saw that there were three occupants in the vehicle and that the vehicle's passenger-side windows had both been shattered. There was

a circular impact on the passenger side of the vehicle, in between the two shattered windows, consistent with damage from a shotgun.

Officer Hamm, along with other police officers who had arrived at the scene, spoke with the three occupants in the vehicle. The occupants said that as they were driving on D Street, they observed a group of people gathered on the south side of the street. As they drove by the group of people, they heard a loud noise and felt the vehicle shake. The vehicle occupants reported that the group scattered after the gunshot, running toward a nearby house.

Officer Hamm started walking toward the house that the vehicle occupants had pointed to, and as she did, she went past an adjacent apartment building. She could see through the glass front door on the north side of the building; she observed a Hispanic male inside the building, standing in the hallway in front of an apartment unit, later determined to be apartment No. 2, and the door to apartment No. 2 was open. The male was holding some type of white towel or rag in his hands. She then observed another male come out of apartment No. 2, close the door behind him, and talk briefly with the Hispanic male. Officer Hamm tried to open the door to the apartment building, but it was locked. As she was trying to enter the building, both males ran in the opposite direction from her, toward another exit on the south side of the building. Officer Hamm ran around the building to chase after the two males and radioed for assistance from other officers.

Two police officers apprehended the two males almost immediately, locating them about a block away from the apartment building. The male with the white object in his hands was identified as Jeremy Cushing. The second male was identified as Castellanos. Officer Hamm subsequently identified the individuals as the same males she saw in the apartment building, outside apartment No. 2.

Officer Hamm and Lincoln police officer Richard Roh retraced the path Castellanos and Cushing had taken when

running from the apartment to the location where they were apprehended. In doing so, they found a white bathmat on the ground, which appeared to be the same white item Cushing was holding when Officer Hamm saw him in the apartment building. There was a dark red substance on the bathmat that looked like blood. The bathmat was wrapped around a Winchester .22 rifle. The rifle had a round jammed in the chamber, and the serial number was defaced, such that it was unreadable.

The officers also located a 20-gauge shotgun leaning against a fence on the west side of the apartment building. The shotgun had been shortened and had a spent casing in it. Both guns were located on the general path that Castellanos and Cushing would have taken as they ran from the apartment building.

Police officers entered the apartment building and located apartment No. 2. Officer Hamm, who was not one of the officers inside the apartment building, testified that she heard on the radio that the officers observed boot prints on the front door of apartment No. 2 and that there was damage to the doorframe, such that it appeared it had been kicked in at some point. In addition to that information, she was aware that there had been a shooting of the maroon sport utility vehicle and that two people had fled from apartment No. 2, one carrying a gun wrapped in a bathmat that had a red substance on it that looked like blood. Officer Hamm testified that based upon this information, the officers were concerned that there might be some sort of emergency in apartment No. 2, such that the life or health of others inside the apartment might be in jeopardy and they might need assistance. The officers made the decision to enter apartment No. 2.

Lincoln police officer Max Hubka was one of the officers who entered apartment No. 2. He testified that before entering apartment No. 2, he had been informed that a gun had been discharged, causing damage to a vehicle, that there was reason to believe someone may have been injured, and that there was preexisting damage to the door, which appeared to have been kicked or forced open. Officer Hubka also testified that before

going into apartment No. 2, he knew that Castellanos lived at the apartment, that he was a member of a gang, and that the gang was known to have weapons. Officer Hubka further testified that the police were working on another shooting at that time involving the same gang.

Officer Roh, who was with Officer Hamm and not inside the apartment building, testified that he believed there was an immediate need to enter apartment No. 2 based on the information the officers had at the time, which included that a vehicle had been shot; two individuals ran out of the apartment building, one carrying something white; and a rifle was found that was wrapped in a white bathmat with a substance on it that was possibly blood. Further, other officers in the hallway of the apartment building observed damage to the door to apartment No. 2, there were black marks on the door that looked like shoe marks, and it looked as if it had been kicked in. Roh testified the officers thought that there had possibly been a robbery and that someone could be injured inside apartment No. 2.

Sgt. Thomas Ward with the Lincoln Police Department testified that he made the decision to enter apartment No. 2 to make sure no one was injured inside. He testified that he made that decision based on the gunfire that struck a vehicle near the apartment building; the two males that ran out of the apartment building in the opposite direction of Officer Hamm, one of them carrying a white bathmat; the rifle, wrapped in a white bathmat, found when officers retraced the path of the two males; and the red substance on the bathmat that the officers thought could be blood. Sergeant Ward also testified that Cushing told one of the officers that when he arrived at Castellanos' apartment, the door had been kicked in, and that it appeared to the officers the door had in fact been kicked in.

Lincoln police officer Matthew Pulec was the officer that apprehended Cushing. Officer Pulec stated in his police report that after he apprehended Cushing, he asked him if he knew anything about the discharge of a firearm in the area. Cushing

did not indicate that he knew anything about the shooting, but told Officer Pulec that he had been at Castellanos' apartment only a short time before he saw Officer Hamm at the front entrance. He further stated that when he arrived at Castellanos' apartment, he observed the front door to have been kicked in and thought Castellanos might have been robbed.

When the police officers entered the apartment to check if anyone was injured or needed assistance, they did not find anyone inside the apartment. The officers observed several items of drug paraphernalia in plain view. Subsequently, Officer Hamm applied for and obtained a search warrant for apartment No. 2. When the search warrant was executed, a number of items were seized, including items of narcotics and ammunition for both guns that had been found.

Following the hearing, the trial court overruled Castellanos' motion to suppress, finding that the police were reasonably justified in their belief that an emergency might exist in apartment No. 2 such that immediate assistance might be needed to protect life. A jury trial was subsequently held, and Castellanos renewed his objections to evidence based on his motion to suppress.

After trial had started, the State discovered evidence that the Winchester .22 rifle had been stolen, which the State was not previously aware of, and it moved for a determination of whether such evidence would be deemed "rule 404" evidence. See Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 2016). The court held a hearing on the matter, and the following evidence was adduced:

Richard Lorance testified that he used to own a Winchester "Model 190" .22 rifle, which he kept in his bedroom closet in his house. He kept the rifle in a corner of the closet and had clothes on top of it. It was not secured in a gun safe, and the closet door did not lock. He also testified that his bedroom door had a lock on it, but that he did not keep it locked.

Lorance testified that between October 2015 and February 2016, his roommate would occasionally have visitors over to

the house, including Castellanos, who would typically come in the back door or through the roommate's bedroom window. Lorance testified that sometime around Christmas 2015, he discovered that his .22 rifle was missing. He told his roommate about it and then waited awhile to see if the rifle would get returned, but it was never returned. In February 2016, he contacted the police and reported it stolen.

Lorance testified that the serial number on the rifle was intact when he last had it and that he had the serial number stored on a document on his computer, which had since "crashed." He gave police permission to search his computer in an effort to retrieve the document containing the serial number. He was shown a document containing a list of serial numbers, passwords, and model numbers, including the serial number for a Winchester .22 rifle, and testified that it was the document he had stored on his computer before it quit working.

Lorance was also shown the Winchester .22 rifle found in this case, and he testified that it was the same make and model as the one he owned, but said that he was not entirely sure if it was his, because it was a very common rifle, the stock had been cut, there was tape around the end of the receiver, and the serial number had been removed. He recalled that his rifle had a "finicky" receiver and noticed that the one recovered in this case did as well.

For purposes of the rule 404 hearing, the State also introduced a laboratory report from Kent Weber, a forensic scientist with the Nebraska State Patrol crime laboratory. Weber's report indicated that the Winchester .22 rifle recovered in this case was examined by the crime laboratory, which included chemical processing of the defaced serial number, resulting in a full recovery of the serial number. It was determined that the rifle's serial number was the same as the one Lorance had owned and reported stolen.

The trial court found that the evidence regarding Lorance's stolen Winchester .22 rifle was inextricably intertwined with

Castellanos' charges and, therefore, was not excludable under rule 404 and was admissible.

The jury trial continued after the rule 404 evidence hearing. Officer Hamm was the primary officer to testify about the events leading up to Castellanos' arrest, and her testimony was consistent with the testimony she gave at the hearing on the motion to suppress. Lorance testified at trial, and his testimony was also consistent with the testimony he gave at the rule 404 hearing.

Weber testified about recovering the serial number on the .22 rifle, as well as other testing he performed on both guns recovered at the scene. He testified that the serial number was not visible when he received the rifle at the laboratory, but that by using a chemical reagent, he was able to read the serial number that had been defaced.

At the conclusion of the trial, the jury found Castellanos guilty of both charges. He was sentenced to 6 to 8 years' imprisonment for possession of a firearm by a prohibited person and 1 to 2 years' imprisonment for possession of methamphetamine. His sentences were ordered to run concurrently.

ASSIGNMENTS OF ERROR

Castellanos assigns that the trial court erred in (1) overruling his motion to suppress, (2) admitting rule 404 evidence under the inextricably intertwined exception, and (3) failing to give his proposed jury instructions.

STANDARD OF REVIEW

[1] 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. *State v. Nolt*, 298 Neb. 910, 906 N.W.2d 309 (2018).

[2] In reviewing a trial court's denial of a motion to suppress evidence obtained by a warrantless search under the emergency doctrine, an appellate court employs a two-part standard in which the first part of the analysis involves a review of the historical facts for clear error and a review de novo of the trial court's ultimate conclusion that exigent circumstances were present. Where the facts are largely undisputed, the ultimate question is an issue of law. *State v. Salvador Rodriguez*, 296 Neb. 950, 898 N.W.2d 333 (2017).

[3,4] An appellate court reviews for abuse of discretion a trial court's evidentiary rulings on the admissibility of a defendant's other crimes or bad acts under rule 404(2), or under the inextricably intertwined exception to the rule. See *State v. Burries*, 297 Neb. 367, 900 N.W.2d 483 (2017). 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. *Id.*

[5-7] 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. *First Nat. Bank North Platte v. Cardenas*, 299 Neb. 497, 909 N.W.2d 79 (2018). It is not error for a trial court to refuse a requested instruction if the substance of the proposed instruction is contained in those instructions actually given. *Id.* If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal. *Id.*

ANALYSIS

Motion to Suppress.

Castellanos first assigns that the trial court erred in overruling his motion to suppress all evidence obtained from his apartment. He argues that the initial warrantless entry into his apartment was unlawful and that therefore, any evidence obtained during the subsequent search pursuant to the search warrant was inadmissible as fruit of the poisonous tree and should have been suppressed. The trial court found that the initial warrantless entry was justified under the "emergency doctrine" and that therefore, any evidence obtained as a result of the initial search or the subsequent search warrant was lawful.

[8,9] Searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions that must be strictly confined by their justifications. *State v. Salvador Rodriguez, supra*. The State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement. *Id.*

[10] In the case of entry into a home, a police officer who has obtained neither an arrest warrant nor a search warrant cannot make a nonconsensual and warrantless entry in the absence of exigent circumstances. *Id.*

[11] The emergency doctrine is a category of exigent circumstances. *State v. Salvador Rodriguez*, 296 Neb. 950, 898 N.W.2d 333 (2017). The elements of the emergency doctrine are that (1) the police must have reasonable grounds to believe there is an immediate need for their assistance for the protection of life or property and (2) there must be some reasonable basis to associate the emergency with the area or place to be searched. *Id.*

[12] The first element considers whether there were reasonable grounds to find an emergency, and the second element considers the reasonableness of the scope of the search. *Id.* Castellanos focuses primarily on the first element and argues that reasonable police officers would not have had

grounds under the facts of this case to believe there was an immediate need for their assistance for the protection of life or property.

[13-15] An action is reasonable under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances viewed, objectively, justify the action. *State v. Salvador Rodriguez, supra.* The presence of an emergency, like probable cause, hinges on the reasonable belief of the officers in light of specific facts and the inferences derived therefrom, not whether, in hindsight, one actually existed. *Id.* The first element of the emergency doctrine is similar to probable cause and asks whether the facts available to the officer at the moment of entry warranted a person of reasonable caution to believe that entry was appropriate. *Id.*

In the present case, based on the totality of the circumstances, the police officers had a reasonable belief that there was an immediate need to enter Castellanos' apartment. The police were responding to a shooting that had just occurred in the immediate area, in which a vehicle was struck. After the occupants of the vehicle pointed in the direction people had scattered after the shooting, Officer Hamm saw two males inside a nearby apartment building. One of the males, Cushing, was holding what appeared to be a white towel or something similar, and the second male, Castellanos, had just come out of apartment No. 2. The two males ran when Officer Hamm tried to open the door to the building and went out an opposite exit of the building. The two men were quickly apprehended. When officers retraced Castellanos and Cushing's path, they found a white bathmat on the ground, which appeared to be the same white towel Officer Hamm saw Cushing holding when he was standing in the hallway outside apartment No. 2. The bathmat had a red substance on it that appeared to be blood, and there was a .22 rifle wrapped inside the bathmat. The officers also found a 20-gauge shotgun leaning against a fence outside the apartment building. The shotgun had a spent casing in the chamber.

The officers went inside the apartment building and located apartment No. 2, where Officer Hamm had seen Castellanos and Cushing. Prior to entering apartment No. 2, they saw boot or shoe marks on the door of the apartment and the door appeared to have been kicked in, because there was damage to the doorframe. The officers also knew prior to entering the apartment that Castellanos lived in the apartment and that he was a member of a gang. The officers were familiar with the gang, which was known to have weapons, and police were in the process of investigating another shooting involving the gang. Cushing had also told Officer Pulec when he was apprehended that when he arrived at Castellanos' apartment that night, he saw that the door had been kicked in and thought Castellanos might have been robbed. The officers then entered the apartment for the sole purpose of making sure there was no one in the apartment in need of assistance. Once inside, they remained there only long enough to determine whether there was anyone inside the apartment.

In our de novo review, we agree with the trial court that based on facts known to the officers before entering the apartment, they had reasonable grounds to believe there was an immediate need for their assistance for the protection of life or property. We also conclude that the officers had a reasonable basis to associate the emergency with apartment No. 2. Accordingly, the initial warrantless entry was justified under the emergency doctrine, and therefore, any evidence obtained as a result of the initial search or the subsequent search warrant was lawful. The trial court did not err in overruling Castellanos' motion to suppress.

[16] Further, even if we were to conclude the initial entry into the apartment did not satisfy the elements of the emergency doctrine, the evidence obtained pursuant to the search warrant still would have been admissible. The affidavit seeking the search warrant contained information independent from the facts derived from the initial short sweep of the apartment; such independent facts included the officer's detailed

summation of the entire incident, from hearing the gunshot to apprehending Castellanos and Cushing, as well as the discovery of the guns and white bathmat nearby. And although the search warrant sought authorization to seize controlled substances and related items, it also sought firearms, ammunition, loading devices, magazines, and other firearm paraphernalia—all of which were independently supported by the facts leading up to the discovery of the two guns found nearby. See *State v. Guilbeault*, 214 Neb. 904, 336 N.W.2d 593 (1983) (where affidavit used for purpose of obtaining search warrant includes both illegally obtained facts as well as facts derived from independent and lawful sources, valid search warrant may issue if lawfully obtained facts, considered by themselves, establish probable cause to issue warrant; not all evidence obtained is considered fruit of poisonous tree, and such evidence may be admitted if there is sufficient independent basis for discovery of evidence).

Rule 404 Evidence.

Castellanos next assigns that the trial court erred by admitting Lorance's testimony about his missing .22 rifle. He contends that this evidence was inadmissible under rule 404, and not subject to the inextricably intertwined exception.

Rule 404(2) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[17,18] It should be noted that rule 404(2)'s list of permissible purposes is not exhaustive. Nonetheless, under our decisional law, rule 404(2) does not apply to evidence of a defendant's other crimes or bad acts if the evidence is inextricably intertwined with the charged crime. *State v. Burries*, 297 Neb. 367, 900 N.W.2d 483 (2017). Inextricably intertwined evidence

includes evidence that forms part of the factual setting of the crime, or evidence that is so blended or connected to the charged crime that proof of the charged crime will necessarily require proof of the other crimes or bad acts, or if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime. *Id.*

Castellanos argues that Lorance's testimony does not provide information that would form the factual setting for either possession of a controlled substance or possession of a firearm by a prohibited person. We disagree. Lorance's testimony about his missing .22 rifle was connected to the charge of possession of a firearm by a prohibited person. The parties stipulated at trial that Castellanos was a prohibited person on the date in question, so the only issue the State had to prove was whether Castellanos possessed either the shotgun or the .22 rifle. Lorance testified that his .22 rifle was missing and presumably stolen less than 2 months before the incident that led to the charges against Castellanos. Castellanos was at Lorance's house on multiple occasions during the timeframe that the gun went missing and would have had access to the rifle, because it was kept in Lorance's unlocked bedroom closet.

Further, the evidence at the rule 404 hearing and at trial showed that the .22 rifle recovered by the officers had the same serial number as the one owned by Lorance, confirming that the gun recovered was Lorance's gun. Lorance had a document on his computer which contained the serial number for his .22 rifle, and the document was recovered by the police department. Weber, the forensic analyst at the State Patrol crime laboratory, used a chemical process to reveal the defaced serial number on the rifle recovered by the officers. The two serial numbers matched. We conclude that Lorance's testimony was inextricably intertwined with the charge of possession of a firearm by a prohibited person and that therefore, rule 404(2) did not apply. The trial court did not err in admitting Lorance's testimony about his missing .22 rifle at trial.

Even if we were to conclude that Lorance's testimony was not inextricably intertwined with the possession of a firearm by a prohibited person charge and should not have been admitted, it would nevertheless be harmless error. There was additional evidence linking Castellanos to the guns, specifically, the ammunition that was found in his apartment. Numerous rounds of .22-caliber and 20-gauge ammunition were found inside a closet, along with other items that belonged to Castellanos, including an identification card, a credit card, and a W-2 form. The ammunition in the closet was the same brand and had the same characteristics as the ammunition in the two guns found outside the apartment building.

Proposed Jury Instructions.

Finally, Castellanos assigns that the trial court erred in failing to give two jury instructions he proposed regarding the meaning of "possession." The first instruction stated: "The Defendant's mere presence in an area where items were ultimately discovered is not enough to establish that the defendant was in 'possession' of said items." The second instruction stated: "Assuming an item is not found on the defendant's person, the defendant's proximity to the item, standing alone, is insufficient to prove 'possession.'"

Castellanos argues that his proposed instructions were correct statements of the law and that because the State's theory of the case rested on constructive possession, the evidence supported the instructions. He also claims that he was prejudiced by the court's refusal to give his proposed instructions, because there is a substantial likelihood the jury's verdict would have been different if his instructions had been given.

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. Parnell*, 294 Neb. 551,

883 N.W.2d 652 (2016), *cert. denied* 580 U.S. 1164, 137 S. Ct. 1212, 197 L. Ed. 2d 254 (2017).

The trial court instructed the jury on the material elements of both charges and instructed the jury that the word "possession" means "either knowingly having it on one's person or knowing of the object's presence and having control over the object." It also instructed the jury that the word "knowingly" means "willfully or purposely."

[19,20] The definition of the word "possession" given by the trial court was based on NJI2d Crim. 4.2, which reads, "'Possession' of [the object] means either knowingly having it on one's person or knowing of the object's presence and having control over the object." Whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should usually be given to the jury in a criminal case. *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012). Further, 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. *State v. Kibbee*, 284 Neb. 72, 815 N.W.2d 872 (2012). Castellanos does not argue that the jury instructions given were given in error. He contends only that his proposed instructions also should have been given.

When the instructions are considered together, it is clear that the district court properly instructed the jury on the definition of the word "possession," and the trial court did not err in refusing to give Castellanos' proposed jury instructions.

CONCLUSION

We conclude that the trial court did not err in overruling Castellanos' motion to suppress, admitting evidence under the inextricably intertwined exception to rule 404, and failing to give his proposed jury instructions. Accordingly, Castellanos' convictions and sentences are affirmed.

Affirmed.

State of Nebraska, appellee, v.
James L. Moody, appellant.
918 N.W.2d 26

Filed September 11, 2018. No. A-17-969.

1. **Pleadings.** Issues regarding the grant or denial of a plea in bar are questions of law.
2. **Evidence: Appeal and Error.** On a question of law, an appellate court reaches a conclusion independent of the court below.
3. **Double Jeopardy.** The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
4. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Double Jeopardy: Legislature: Intent.** In analyzing whether administrative license revocation for driving under the influence constitutes punishment for purposes of double jeopardy, the court must inquire (1) whether the Legislature intended the statutory sanction to be criminal or civil and (2) whether the statutory sanction is so punitive in purpose or effect as to transform what was clearly intended as a civil sanction into a criminal one.
5. **Statutes: Legislature: Intent.** Whether the Legislature intended a civil or criminal sanction is a matter of statutory construction.
6. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Legislature: Intent.** The Legislature intended administrative license revocation to be a civil sanction.
7. **Statutes: Legislature: Intent.** In determining whether the Legislature intended a statute to establish civil or criminal proceedings, the language used by the legislators, on the floor and in the statute, is not dispositive.

Appeal from the District Court for Scotts Bluff County, Leo P. Dobrovolny, Judge, on appeal thereto from the County

Court for Scotts Bluff County, Kris D. Mickey, Judge. Judgment of District Court affirmed.

Bell Island, of Island Law Office, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Pirtle, Riedmann, and Welch, Judges.

Pirtle, Judge.

I. INTRODUCTION

James L. Moody was charged with driving under the influence of alcohol, and he filed a plea in bar which was overruled by the county court for Scotts Bluff County. He appealed to the district court for Scotts Bluff County which affirmed the county court's ruling. He argues on appeal that recent changes to the Nebraska Revised Statutes tie the administrative license revocation (ALR) procedure more closely to the criminal procedure, altering the nature of the sanctions from civil and nonpunitive to criminal sanctions which are intended to be punitive. He requests that we reverse, with directions to dismiss the criminal complaint, because he has already been punished in the ALR proceeding and any successive criminal action would violate the double jeopardy clause. For the reasons that follow, we affirm.

II. BACKGROUND

On November 4, 2016, Moody was charged by complaint with one count of driving under the influence, in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2010).

An ALR hearing was held on November 29, 2016, and evidence was presented that on or about October 29, Moody was driving and his car was stopped at a safety checkpoint. He was detained and arrested on suspicion of driving under the influence of alcohol. The report prepared by the state trooper who stopped Moody was presented as evidence. The report indicated that Moody had bloodshot, watery eyes and emitted "the

odor" of alcohol. The trooper conducted three field sobriety tests which provided evidence of probable intoxication, and the preliminary breath test confirmed the presence of alcohol in Moody's system. A chemical test registered at .093 of a gram of alcohol per 210 liters of breath, which is above the legal limit of .08 of a gram of alcohol per 210 liters of breath. The hearing officer recommended that Moody's license be revoked. The recommendation was adopted by the director of the Department of Motor Vehicles (DMV), and Moody's license was revoked for a period of 180 days.

Moody filed a plea in bar asserting that he had been tried by the DMV on substantially the same charge as the crime charged in the complaint and that his conviction by the DMV put him in jeopardy for the same offense, twice, which is prohibited by the Fifth Amendment to the U.S. Constitution and article I, § 12, of the Nebraska Constitution. At the hearing on the plea in bar on December 28, 2016, the court received exhibits which contained the complaint in his case and the finding of facts by the DMV. The county court overruled the plea in bar.

Moody appealed the denial of his plea in bar to the district court. The district court received the bill of exceptions from the county court and a transcript of the proceedings from the ALR hearing. The district court affirmed the decision of the county court. Moody timely appealed.

III. ASSIGNMENTS OF ERROR

Moody asserts the district court erred in affirming the county court's ruling that the ALR was not punitive and that the double jeopardy clause was not applicable.

IV. STANDARD OF REVIEW

[1,2] Issues regarding the grant or denial of a plea in bar are questions of law. *State v. Leon-Simaj*, 300 Neb. 317, 913 N.W.2d 722 (2018). On a question of law, an appellate court reaches a conclusion independent of the court below. *Id.*

V. ANALYSIS

Moody asserts the ALR process has become punitive and has lost its character as a civil remedial action. He argues that the consequences of the administrative procedure have been increased and are now intertwined with a criminal proceeding; thus, he argues, subsequent prosecution in a criminal court should be barred by the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution. The State disagrees and argues that the sanctions imposed are civil in nature and that, therefore, double jeopardy is not implicated.

[3] The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. Arterburn*, 276 Neb. 47, 751 N.W.2d 157 (2008). The protection provided by the double jeopardy clause of the Nebraska Constitution is coextensive with that provided by the U.S. Constitution. See *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998).

In *State v. Howell, supra*, the Nebraska Supreme Court addressed the question of whether the administrative revocation of a driver's license for refusal to submit to a chemical test constituted punishment such that any subsequent prosecution put the offender twice in jeopardy. Steven Howell was arrested and charged with refusal to submit to a chemical test and with driving under the influence. His driver's license was administratively revoked by the DMV. After the revocation, he filed a plea in bar alleging that criminal prosecution for refusal to submit to a chemical test and for driving under the influence placed him twice in jeopardy for the same offense. The county court denied his plea in bar, and he appealed to the district court. The district court affirmed the county court's decision, and Howell appealed to the Nebraska Supreme Court.

The Nebraska Supreme Court affirmed the district court's decision, holding that the administrative revocation of a

person's driver's license for refusing to submit to a chemical test was not "'punishment'" that could raise a double jeopardy bar to a criminal prosecution. *State v. Howell*, 254 Neb. at 250, 575 N.W.2d at 864. The court applied the analysis of multiple punishments under the Double Jeopardy Clause as set out in *United States v. Ward*, 448 U.S. 242, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980), supplemented by *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), and reaffirmed in *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). In *State v. Howell*, the Nebraska Supreme Court referred to the analysis as the "two-part *Kennedy-Ward* analysis, as applied in *Hudson*." 254 Neb. at 251, 575 N.W.2d at 865.

[4,5] In analyzing whether an ALR for driving under the influence constitutes punishment for purposes of double jeopardy, the court must inquire (1) whether the Legislature intended the statutory sanction to be criminal or civil and (2) whether the statutory sanction is so punitive in purpose or effect as to transform what was clearly intended as a civil sanction into a criminal one. See *State v. Howell, supra*. The Double Jeopardy Clause protects against the imposition of multiple criminal punishments for the same offense. *State v. Arterburn, supra*, citing *Hudson v. United States, supra*. It does not prohibit the imposition of a civil sanction and a criminal punishment for the same act. *State v. Arterburn, supra*. Whether the Legislature intended a civil or criminal sanction is a matter of statutory construction. *Id.*

1. Legislative Intent

We first determine whether the Legislature intended the sanction of license revocation to be civil in nature. If so, we ordinarily defer to the Legislature's stated intent. See *State v. Arterburn*, 276 Neb. 47, 751 N.W.2d 157 (2008).

Neb. Rev. Stat. § 60-498.01(1) (Cum. Supp. 2016) states:

> Because persons who drive while under the influence of alcohol present a hazard to the health and safety of all

> persons using the highways, a procedure is needed for the swift and certain revocation of the operator's license of any person who has shown himself or herself to be a health and safety hazard (a) by driving with an excessive concentration of alcohol in his or her body or (b) by driving while under the influence of alcohol.

[6] In *State v. Howell*, 254 Neb. 247, 253, 575 N.W.2d 861, 866 (1998), the Nebraska Supreme Court considered this exact language, then codified in Neb. Rev. Stat. § 60-6,205(1) (Cum. Supp. 1996), and concluded, "This language clearly states that the Legislature intended [ALR] to protect the public from the health and safety hazards posed by drivers who are under the influence of alcohol. Thus, the Legislature intended to create a civil sanction."

Moody asserts the increase in the revocation period from 90 to 180 days and the decision to intertwine the administrative and criminal proceedings are proof that the ALR procedure is now punitive. Moody refers to one legislator's remark during a floor debate that he wanted to "'send a message,'" brief for appellant at 6, as indicative of the Legislature's desire to impose a punishment, which in turn should be considered when determining whether § 60-498.01 is civil or criminal. Moody also notes that the 180-day suspension provided for in Neb. Rev. Stat. § 60-498.02(1)(b) (Cum. Supp. 2018) is the same period of revocation for a person who is convicted under Neb. Rev. Stat. § 60-6,197.03(1) (Cum. Supp. 2016) for driving under the influence.

[7] We note that the Nebraska Supreme Court has stated that the language used by legislators, on the floor and in the statute, is not dispositive. *State v. Howell, supra.* See *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996). In *State v. Howell, supra*, and *State v. Arterburn, supra*, the Nebraska Supreme Court considered whether revocations for a period of 1 year were criminal sanctions or civil sanctions—justified by the need to protect the public health and safety. These cases involved revocation of a driver's license for refusal to submit

to a chemical test and revocation of a commercial driver's license for driving under the influence of alcohol, respectively. The same set of factors was applied, and the court concluded, in both cases, that the Legislature intended ALR to be a civil sanction and that the sanctions were not so punitive in purpose or effect as to negate the Legislature's intent. Thus, the court found that the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions were not violated and that the civil sanctions did not constitute multiple punishment for the same offense.

Both of those cases, as well as this case, involve the revocation of a driver's license for the purpose of protecting the health and safety of the public following an alcohol-related offense which was alleged to have occurred on the roads in this state. Even though the period of revocation has increased from 90 to 180 days, it is still not as long as the 1-year revocation periods in *Howell* and *Arterburn.* In this case, there is a legitimate basis for concluding that an ALR can still be considered a civil sanction, even though the period of revocation has increased.

Moody asserts the Legislature "expressed its intent that the ALR scheme be criminal when it tied a Motion for Discovery in the ALR proceeding and treated it as a request for discovery in the criminal proceeding." Brief for appellant at 8. Section 60-498.01(9) provides, in part, "Any motion for discovery filed by the petitioner shall entitle the prosecutor to receive full statutory discovery from the petitioner upon a prosecutor's request to the relevant court pursuant to section 29-1912 in any criminal proceeding arising from the same arrest." This provision is a procedural mechanism for regulating discovery and does not have any bearing on the determination regarding the civil or criminal nature of the sanction.

2. Punitive in Purpose or Effect

Having determined that the Legislature intended an ALR for driving under the influence to be a civil sanction, we examine

whether § 60-498.01 is so punitive in purpose or intent as to negate the Legislature's intent. See *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998).

We look to the seven factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963):

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment[,] whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . .

See, also, *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997); *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998).

(a) Affirmative Disability or Restraint

We recognize that the loss of a driver's license imposes a sanction that a driver may not operate a vehicle for a 180-day period. This sanction is not an affirmative disability or restraint, as the term is normally understood. See *State v. Arterburn*, 276 Neb. 47, 751 N.W.2d 157 (2008).

In *State v. Arterburn*, 276 Neb. at 55, 751 N.W.2d at 165, the Nebraska Supreme Court referred to *Hudson v. United States, supra*, in which the U.S. Supreme Court found that prohibiting a person from participating in the banking industry was not an affirmative disability or restraint, stating that the prohibition was "'"certainly nothing approaching the 'infamous punishment' of imprisonment."'" In *Arterburn*, the Nebraska Supreme Court found that a 1-year revocation of a commercial driver's license compared more closely to prohibiting

a person from participating in the banking industry than to the punishment of imprisonment. Thus, the court concluded that an affirmative disability or restraint was not present. Following this reasoning, we conclude an affirmative disability or restraint is not present in this case, involving a 180-day revocation of a driver's license.

(b) Historically Regarded as Punishment

As shown in previous decisions on this topic, *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996), and *State v. Howell, supra*, an ALR has not traditionally been understood to constitute punishment. *State v. Arterburn, supra*. A driver's license is a privilege and not a right, and the revocation of a privilege is usually not considered punishment. See *id.* See, also, *Hudson v. United States, supra.*

(c) Scienter

The 180-day revocation does not come into play "only" on a finding of scienter. The revocation applies regardless of the offender's state of mind.

(d) Promotion of Punishment—Retribution and Deterrence

We recognize that the imposition of a 180-day revocation will deter others from emulating Moody's conduct, a traditional goal of criminal punishment; however, the mere presence of this purpose is insufficient to render a sanction criminal, as deterrence may serve civil as well as criminal goals. See *State v. Arterburn, supra*, citing *Hudson v. United States, supra.*

As the U.S. Supreme Court noted in *Hudson v. United States*, 522 U.S. at 102, "all civil [sanctions] have some deterrent effect." What is most significant in the instant case is that any deterrent purpose served by the ALR is secondary to its primary purpose of protection of the public health and safety. See *State v. Howell, supra*. See, also, *State v. Arterburn, supra.*

We conclude that the deterrent purposes do not render the 180-day revocation a criminal sanction.

Moody also asserts the Legislature made it clear that the ALR scheme is now punitive, because § 60-498.01(8)(d) states, "Any person who petitions for an [ALR] hearing shall not be eligible for an ignition interlock permit unless ordered by the court at the time of sentencing for the related criminal proceeding." He argues that when the Legislature imposed the additional sanction prohibiting the ignition interlock permit until a sentencing order is issued, the administrative process became a part of the related criminal action. He argues that "[p]reventing the installation of a machine that prevents a vehicle from starting if a person has consumed alcohol for those who challenge a revocation appears to be excessive to the alternatives." Brief for appellant at 13. He argues that "[i]f the goal is to make the roads safe, then preventing people from driving [with an ignition interlock permit] appears to be counterintuitive to [that] goal." *Id.*

While there are means by which the impact of the license revocation process can be decreased, such as allowing those who seek an ALR hearing to obtain an ignition interlock permit, this is not the purpose of the process. The purpose of the ALR is to ensure the health and safety of the public on the roads by removing drivers who pose a threat to that safety. As previously discussed, the relevant inquiry for double jeopardy purposes is whether the ALR is so punitive in purpose as to negate the Legislature's intent. In cases involving the revocation of a driver's license, Nebraska appellate courts have not typically considered the person's ability to obtain a work permit or an ignition interlock permit in the assessment of whether a sanction was civil or criminal, nonpunitive or punitive. See, *State v. Isham*, 261 Neb. 690, 625 N.W.2d 511 (2001); *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998). The fact that the Legislature has provided a mechanism by which some individuals whose licenses have been revoked may obtain limited driving privileges in the event they choose not to contest

the ALR does not change the essential character of the revocation, which is nonpunitive.

(e) Behavior Is Already Crime

The behavior to which ALR applies in this case is already a crime, but this fact is insufficient to render the sanction criminally punitive, particularly in the double jeopardy context. See, *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997); *State v. Howell, supra.*

(f) Alternative Purpose

Section 60-498.01 has an alternative, nonpunitive purpose of protection of the public health and safety by revoking the license of persons who drive while under the influence of alcohol because they have shown themselves to be a safety hazard. Any deterrent purpose is merely secondary to the statute's stated, nonpunitive purpose.

(g) Excessive

The nonpunitive purpose of § 60-498.01 is to protect the public health and safety by revoking the license of persons who drive while under the influence of alcohol, because they have shown themselves to be a safety hazard. Revocation is justified based on the offender's willingness to engage in conduct that, if continued, poses a danger to the public. In sum, there is very little showing that a 180-day revocation is so punitive in purpose or effect as to make the sanction criminal.

VI. CONCLUSION

For the above-stated reasons, we affirm the district court's judgment which affirmed the judgment of the county court overruling Moody's plea in bar.

Affirmed.

State of Nebraska, appellee, v.
RaySean D. Barber, appellant.
918 N.W.2d 359

Filed September 25, 2018. No. A-17-610.

1. **Judgments: 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, which requires the appellate court to reach a conclusion independent from the lower court's decision.
2. **Postconviction: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.
3. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
4. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.
5. ____: ____. 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.
6. **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.
7. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 2016) are (1) an order which affects a substantial right in an action and which in effect 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 a judgment is rendered.
8. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have

been litigated on direct appeal, no matter how those issues may be phrased or rephrased.

9. **Postconviction: Pleas: Waiver.** Normally, a voluntary guilty plea waives all defenses to a criminal charge.
10. **Postconviction: Pleas: Effectiveness of Counsel.** In a postconviction proceeding brought by a defendant because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
11. **Right to Counsel: Plea Bargains.** The plea-bargaining process presents a critical stage of a criminal prosecution to which the right to counsel applies.
12. **Effectiveness of Counsel: Proof.** 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 counsel's performance was deficient and that this deficient performance actually prejudiced his or her defendant.
13. ____: ____. 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. **Trial: Effectiveness of Counsel: Presumptions: Appeal and Error.** In determining whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.
15. **Effectiveness of Counsel: Proof.** 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.
16. **Postconviction: Effectiveness of Counsel: Proof.** The defendant has the burden in postconviction proceedings of demonstrating ineffectiveness of counsel, and the record must affirmatively support that claim.
17. **Postconviction: Constitutional Law: Proof.** A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.
18. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.
19. **Effectiveness of Counsel.** Defense counsel is not ineffective for failing to raise an argument that has no merit.
20. **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 Douglas County: J Russell Derr, Judge. Affirmed.

A. Michael Bianchi for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Pirtle, Riedmann, and Welch, Judges.

Pirtle, Judge.

I. INTRODUCTION

This is a postconviction appeal following a plea-based conviction for motor vehicle homicide. RaySean D. Barber was sentenced to 20 to 20 years' imprisonment, and his conviction and sentence were summarily affirmed on direct appeal.

A hearing was held because a mistake appeared in the bill of exceptions. On December 2, 2016, the district court overruled the first claim in Barber's second amended motion for postconviction relief. On May 10, 2017, the district court overruled the remaining claims in Barber's second amended motion for postconviction relief. Barber now appeals the May 10 order. We affirm.

II. BACKGROUND

1. Plea Hearing and Direct Appeal

On April 15, 2013, Barber was charged by information with one count of motor vehicle homicide in the death of Betty Warren. The information alleged:

> On or about 3 February 2013, in Douglas County, Nebraska, . . . BARBER did then and there unintentionally cause the death of . . . WARREN while engaged in the unlawful operation of a motor vehicle, and while in violation of section 60-6,196 or 60-6,197.06, in violation of Neb. Rev. Stat. §28-306(1)&(3)(b) a Class III Felony.

A plea hearing was held on June 24, 2013. Barber's attorney informed the court that Barber wished to withdraw his

previous plea of not guilty and enter a plea of no contest to the charge, and Barber pled no contest. The bill of exceptions reflects that during the plea colloquy, the court advised Barber that the State was required to prove that he *intentionally* caused the death of the victim, when the State actually had to prove that he unintentionally caused the death of the victim.

The following factual basis was presented in support of the charge:

> On February 3rd, 2013, here in Douglas County, Nebraska, [Barber] was observed by witnesses traveling southbound on Saddle Creek Road in excess of the speed limit. [Barber] approached the area of Saddle Creek and Poppleton Streets, where he was traveling approximately 98 miles per hour in a 35-miles-per-hour zone. [Barber] hit a curb, allowing him to lose control of his vehicle. He struck another car being driven by . . . Warren. . . . Warren was pronounced dead. An autopsy conducted by the Douglas County Coroner revealed that she died of internal injuries attributable to this car accident.
>
> The police suspected that [Barber] was under the influence of a controlled substance and/or alcohol. His blood was tested, by virtue of him being transported for medical treatment, where he had a blood alcohol content of a .146.
>
> All these events occurred here in Douglas County, Nebraska.

The district court found beyond a reasonable doubt that Barber understood the nature of the charge against him and the plea was made freely, knowingly, intelligently, and voluntarily, and that there was a factual basis to support the plea. The court accepted Barber's plea and found him guilty.

A sentencing hearing was held on October 1, 2013. After statements from the attorneys and Barber, the court sentenced Barber to 20 to 20 years' imprisonment.

On direct appeal, the sole assignment of error was that the district court erred by imposing an excessive sentence. This court summarily affirmed Barber's conviction and sentence. See *State v. Barber*, 21 Neb. App. xli (No. A-13-866, Jan. 23, 2014).

2. Postconviction Proceedings

After his conviction and sentence, Barber filed his first motion for postconviction relief on February 27, 2015. He amended his motion a number of times.

The most recent amended motion for postconviction relief, titled "Second Amended Motion for Post-Conviction Relief," was filed on October 17, 2016. In it, he alleges: (1) The trial court abused its discretion in failing to properly advise him of the nature of the charge; (2) "Plaintiff erred where he failed to make a distinct allegation of each essential element of the charge in the factual basis"; (3) trial counsel was ineffective for failing to move to dismiss the information, as it was insufficient and could not be used to convict him of the charged crime; (4) trial counsel was ineffective for failing to recuse herself; (5) trial counsel was ineffective for "making remarks against [Barber] which prejudiced the sentencing proceeding"; (6) trial counsel was ineffective for failing to bring an apology letter to the court and making certain statements with regard to the letter; and (7) trial counsel was ineffective for failing to review the presentence investigation report with Barber.

At a preliminary hearing on February 16, 2016, the State's attorney indicated that she had spoken to the court reporter and that, based on the court reporter's notes, the bill of exceptions contained an error in the advisement regarding the elements of the charged offense. Another preliminary hearing was held on June 28, and the court determined that an evidentiary hearing should be held.

On August 12, 2016, the State called the court reporter to testify. The court reporter testified that the bill of exceptions contained a mistake. She reviewed the section in question

and found that there was a "mistranslate in the steno notes." The "steno notes" are the official record, and when they were edited, she mistakenly "took off the 'un' that was clearly in [her] notes." The prefix "should have attached to intentionally." The court reporter checked her "backup audio which [was] synced with [her] steno notes" and found the court "clearly stated the word 'unintentionally' rather than 'intentionally'" at that point in the plea colloquy.

On December 2, 2016, the district court overruled Barber's postconviction motion on the issue of whether he was properly advised at the time he entered his plea. Barber did not appeal from this order.

The district court held a hearing on the State's motion to dismiss, and Barber was given the opportunity to respond to the State's motion in writing. On May 10, 2017, the district court overruled Barber's October 17, 2016, amended motion for postconviction relief in all respects. Barber filed a notice of appeal from the May 10, 2017, hearing on June 9.

III. ASSIGNMENTS OF ERROR

Barber assigns that the district court erred in denying him due process of law because he was improperly advised regarding the elements of the charged crime and in granting the State a hearing to amend the record, but failing to award him an evidentiary hearing on the remaining claims in his motion for postconviction relief. He assigns that the district court erred in accepting his no contest plea without a sufficient factual basis to support it. He asserts the district court erred in failing to find that trial counsel was ineffective with regard to "various matters occurring at Barber's plea hearing and in relation to Barber's sentencing."

IV. STANDARD OF REVIEW

[1,2] A jurisdictional question which 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 from the lower court's decision. *State v. Alfredson*,

287 Neb. 477, 842 N.W.2d 815 (2014). Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015).

[3-5] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *Id.*, citing *State v. Robinson*, 287 Neb. 606, 843 N.W.2d 672 (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. Thorpe, supra.*

V. ANALYSIS

1. Jurisdiction

[6,7] 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. *State v. Alfredson, supra.* The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 2016) are (1) an order which affects a substantial right in an action and which in effect 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 a judgment is rendered. *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

In *State v. Silvers, supra*, Thomas Silvers sought postconviction relief on two theories: double jeopardy and ineffective assistance of counsel. The district court filed an order which allowed the State 30 days to show cause or request a hearing regarding the double jeopardy issue and which denied the ineffective assistance of counsel claim. Silvers appealed from

that order. In the opinion, the Nebraska Supreme Court began by stating: "Because the district court left the issue of double jeopardy open to further proceedings and Silvers filed his appeal during that timeframe, we must first consider whether there is a final appealable order." *Id*. at 708, 587 N.W.2d at 331. The Supreme Court found that the order from which Silvers appealed "clearly affected a substantial right," *id.*, and determined that a postconviction action should be considered a "special proceeding" within the context of § 25-1902. Therefore, the Supreme Court found the order of the district court denying Silvers' claim for postconviction relief on the ineffective assistance of counsel claim was appealable under § 25-1902.

In this case, the district court entered two separate orders denying Barber's postconviction claims. The first order was issued on December 2, 2016, and the court addressed Barber's claim that he was not properly advised by the court in the plea dialogue of the elements of the offense for which he was convicted. In the December 2 order, the court found that there was an error in the transcription of the bill of exceptions and that the court reporter's notes and the tape recording of the dialogue establish the court properly advised Barber of the elements of the charged offense. Therefore, the district court found: "[Barber's] Motion for Postconviction Relief on this claim must fail." The court overruled Barber's motion for postconviction relief on this issue. The second order, entered on May 10, 2017, denied the remaining claims without an evidentiary hearing.

Following the reasoning set forth in *State v. Silvers, supra*, the December 2, 2016, order denying postconviction relief on Barber's first claim was an order which affected a substantial right in a special proceeding. Under Neb. Rev. Stat. § 25-1912 (Reissue 2016), to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court, a notice of appeal must be filed within 30 days after the entry of such judgment, decree, or final order.

Barber's notice of appeal, filed on June 9, 2017, is therefore untimely with respect to the December 2, 2016, order. Barber's right to appeal the December 2 order is time barred. Accordingly, our jurisdiction extends only to the assignments of error related to the postconviction claims which were denied in the May 10, 2017, order, as to which the appeal is timely.

2. Insufficient Factual Basis

Barber alleges the district court erred and denied him due process of law when it denied his claim that the plea was "infirm as a result of an insufficient factual basis to support it." Brief for appellant at 19.

First, Barber argues that the factual basis was insufficient because he was not properly advised of the elements of the crime because the bill of exceptions reflected that the word "intentionally" was used in the place of the word "unintentionally." The court determined that Barber was properly advised, because the official record shows that the word "unintentionally" was used, even though it was not reflected in the bill of exceptions. Barber did not appeal from the December 2, 2016, order, and therefore, this issue is time barred.

Further, Barber asserts the State "neglected to mention anything about causation in the factual basis." Brief for appellant at 20. Thus, he argues, "[T]he court accepted a guilty plea without an adequate factual basis as to how . . . Warren actually died." *Id.* at 20-21.

[8] A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased. *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015). Barber's claim that the factual basis was insufficient with regard to causation could have been raised on direct appeal; therefore this claim is procedurally barred. See *id.* See, also, *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010).

3. Ineffective Assistance of Counsel

[9,10] Normally, a voluntary guilty plea waives all defenses to a criminal charge. *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011). However, in a postconviction proceeding brought by a defendant because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *Id.*

[11] Barber assigns that the district court erred by failing to determine that his counsel was ineffective in several respects. The plea-bargaining process presents a critical stage of a criminal prosecution to which the right to counsel applies. *State v. Alfredson*, 287 Neb. 477, 842 N.W.2d 815 (2014). As in any other ineffective assistance of counsel claim, we begin by reviewing Barber's allegations under the two-part framework of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[12-14] To prevail on a claim of ineffective assistance of counsel under *Strickland*, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defendant. *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.* In determining whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably. *State v. McGuire*, 299 Neb. 762, 910 N.W.2d 144 (2018).

[15,16] 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. *State v. Vanderpool, supra.* The defendant has the burden in postconviction proceedings of demonstrating ineffectiveness of counsel, and the record must affirmatively support that claim. *Id.*

[17,18] A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion

contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution. *State v. Thorpe, supra.* If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing. *Id.* Thus, in a postconviction proceeding, an evidentiary hearing is not required (1) when the motion does not contain factual allegations which, if proved, constitute an infringement of the movant's constitutional rights; (2) when the motion alleges only conclusions of fact or law; or (3) when the records and files affirmatively show that the defendant is entitled to no relief. *Id.*, citing *State v. Phelps*, 286 Neb. 89, 834 N.W.2d 786 (2013).

(a) Failure to Object

Barber asserts that trial counsel was ineffective for failing to object to the information. He asserts trial counsel should have objected to the information because it "fail[ed] to allege that the proximate cause of the death of [Warren] was [Barber's] operating a motor vehicle in violation of §60-6,196 or §60-6,197.06." He asserts that trial counsel should have objected when the court improperly advised him of the nature of the charge and that the State alleged insufficient information within the factual basis. Finally, he asserts counsel should have moved to dismiss the information because it did not satisfy the requirements of Neb. Rev. Stat. § 28-306(1) and (3)(b) (Cum. Supp. 2014).

[19] A review of the information shows that the State sufficiently charged the crime of motor vehicle homicide under § 28-306. The information alleged that Barber "did then and there unintentionally cause the death of . . . WARREN while engaged in the unlawful operation of a motor vehicle, and while in violation of section 60-6,196 or 60-6,197.06, in violation of Neb. Rev. Stat. §28-306(1)&(3)(b) a Class III Felony." Even if an objection had been made, it would properly have

been overruled, and even if the issue had been preserved and raised on appeal, it would not have resulted in a reversal of Barber's conviction. Defense counsel is not ineffective for failing to raise an argument that has no merit. See *State v. Burries*, 297 Neb. 367, 900 N.W.2d 483 (2017).

Even though the bill of exceptions contained an error, the record shows that the court properly advised Barber regarding the nature of the charge during the plea colloquy. Because Barber was properly advised, we cannot find trial counsel was deficient because she did not object to the advisement during the plea colloquy.

Barber asserts that the factual basis was insufficient to support his conviction. This issue was addressed in the December 2, 2016, order, from which Barber did not appeal. If this issue had been preserved, we find that Barber cannot show that *but for* counsel's failure to object, there is a reasonable probability that the outcome would have been different.

From our review of the record, the State provided an adequate factual basis with regard to causation. Section 28-306(1) provides that a person who causes the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska or in violation of any city or village ordinance commits motor vehicle homicide. The State asserted that Barber was driving in excess of the speed limit and had a blood alcohol content of .146, which exceeds the statutory limit for a person in actual physical control of a motor vehicle. See Neb. Rev. Stat. § 60-6,196(1) (Reissue 2010). The State asserted that Barber struck a curb, lost control of his vehicle, and struck Warren's vehicle. The State asserted that the autopsy revealed that Warren died as a result of the injuries which were attributable to the accident. These facts adequately alleged causation. Defense counsel is not ineffective for failing to raise an argument that has no merit. See *State v. Burries, supra*.

For these reasons, we find the district court did not err in denying postconviction relief on this issue without an evidentiary hearing.

(b) Failure to Recuse Herself

In his motion for postconviction relief, Barber asserted that his counsel should have recused herself due to a conflict of interest. This issue was not addressed in his brief on appeal. Accordingly, we will not address this issue. See *State v. Henry*, 292 Neb. 834, 875 N.W.2d 374 (2016) (alleged error must be both specifically assigned and specifically argued in brief of party asserting error to be considered by appellate court).

(c) Ineffectiveness at Sentencing Hearing

In his motion for postconviction relief, Barber asserted that trial counsel made remarks at sentencing which were prejudicial. On appeal, Barber argues "counsel also proved ineffective at and in relation to sentencing." Brief for appellant at 25. He then refers to statements the district court made before pronouncing Barber's sentence. He also argues that counsel "made a number of comments" at sentencing which "hardly cast [him] in a more positive light." Brief for appellant at 27. He argues that counsel's performance did not rise to the level of a criminal defense attorney with ordinary training and skill in criminal law. However, Barber does not specifically assign and specifically argue which of trial counsel's statements were inappropriate or how he was prejudiced.

In his motion for postconviction relief, Barber also asserted that trial counsel was ineffective for failing to bring a letter to the court at the time of sentencing, an error which he asserted caused a number of issues for him at sentencing. On appeal, he asserts "counsel failed to bring an apology letter to the sentencing that Barber had provided her." *Id.* He suggests that he may have been "better off" handling the

sentencing hearing on his own, *id.*, but he does not go into detail regarding the contents of the letter or how it may have helped him.

[20] 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. Henry, supra*. Because neither of these arguments with regard to counsel's performance at sentencing were specifically assigned and specifically argued, we do not reach the merits of these issues.

(d) Failure to Review Presentence Investigation Report

Barber asserts trial counsel was ineffective for failing to review the presentence investigation report with him. Neb. Rev. Stat. § 29-2261(6) (Cum. Supp. 2014) provides, in part, that a court "may permit inspection of the [presentence investigation] report or examination of parts thereof by the offender or his or her attorney, or other person having a proper interest therein, whenever the court finds it is in the best interest of a particular offender." The plain language of the statute does not require an attorney to review the presentence investigation report with a defendant.

Barber asserts that counsel's failure to review the contents of the presentence investigation report with him prejudiced him "[f]or no other inference can be drawn by the district court's comments on the subject at sentencing and the maximum sentence it handed down." Brief for appellant at 27. Barber appears to argue that the court "truly had used the word 'intentionally,'" *id.* at 26, and that he was sentenced more harshly as a result. In other portions of his argument Barber argues that if trial counsel had "challenged" the court, *id.*, the court would have been on notice that Barber lacked the intent to commit this crime, that he lacked criminal history and education, and that he has been affected by injuries as a result of the crash on February 3, 2013.

The issue in the bill of exceptions was addressed in the December 2, 2016, order, from which Barber did not appeal. The information contains the word "unintentionally," and the official record kept by the court reporter indicates the court used the correct word at the plea hearing. There is no indication that the court needed to be "challenged" or reminded of the information contained in the presentence investigation report. Further, the record shows that "[i]n crafting an appropriate sentence," the court weighed the appropriate factors and the decision was most affected by Barber's blood alcohol content and the speed at which he was traveling when he lost control of the vehicle. Barber cannot show that he was prejudiced by counsel's alleged failure to review the contents of the presentence investigation report with him prior to the sentencing hearing. Thus, we find the court did not err in denying postconviction relief on this issue, without an evidentiary hearing.

VI. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

Affirmed.

J. Mark Dunbar, appellant, v. Twin Towers Condominium Association, Inc., a Nebraska nonprofit corporation, et al., appellees

920 N.W.2d 1

Filed September 25, 2018. No. A-17-682.

1. **Appeal and Error.** 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. **Rules of the Supreme Court: Appeal and Error.** Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2014) requires that a cross-appeal be prepared in the same manner and under the same rules as the brief of the appellant. 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.
3. ____: ____. In order for affirmative relief to be obtained, a cross-appeal must be properly designated in accordance with Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2014).
4. **Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach conclusions independent of the determination made below.
5. **Summary Judgment: Jurisdiction: Appeal and Error.** When reviewing cross-motions for summary judgment, an appellate court acquires jurisdiction over both motions and may determine the controversy that is the subject of those motions; an appellate court may also specify the issues as to which questions of fact remain and direct further proceedings as the court deems necessary.
6. **Statutes.** To the extent that there is conflict between two statutes on the same subject, the specific statute controls over the general statute.
7. **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.

8. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.
9. **Actions: Moot Question.** An action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action.
10. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question that no longer rests upon existing facts or rights—i.e., a case in which the issues presented are no longer alive.
11. **Moot Question.** 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.
12. **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.
13. **Declaratory Judgments: Moot Question.** A declaratory judgment action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action.
14. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine dispute as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Douglas County: Shelly R. Stratman, Judge. Affirmed in part, and in part reversed and remanded with directions.

J. Mark Dunbar, pro se.

Dennis P. Lee, of Lee Law Office, for appellee Twin Towers Condominium Association, Inc.

Pirtle, Riedmann, and Bishop, Judges.

Bishop, Judge.

I. INTRODUCTION

J. Mark Dunbar, a condominium unit owner, brought an action against Twin Towers Condominium Association, Inc. (Association); LRC Management II LLC; and anonymous

defendants "Does 1-10." Dunbar was seeking relief related to actions taken by the Association. The issues on appeal involve only Dunbar and the Association. Summary judgment motions and orders filed prior to trial disposed of some of Dunbar's claims, but not all of them. Dunbar appeals and the Association attempts to cross-appeal from the order entered by the Douglas County District Court following trial. Dunbar challenges the district court's conclusion that a pet policy amendment to the Association's master deed was valid. Dunbar also challenges the district court's conclusion that the Association's adopted resolution regarding an owner's access to records and its procedures for making records available were consistent with nonprofit corporation laws and condominium laws. The Association's attempted cross-appeal is related to attorney fees. We affirm in part and in part reverse the district court's decision and remand the cause with directions.

II. BACKGROUND

The "Twin Towers Condominium" was established by a master deed recorded on December 30, 1983, and consists of residential units, commercial units, and parking areas. The master deed provides that the Association, a Nebraska nonprofit corporation, was incorporated "to provide a vehicle for the management of the condominium" and that each "co-owner" of a condominium unit is automatically deemed a member of the Association. Dunbar purchased a residential unit in 2003 and is therefore a member. According to the Association's bylaws, a board of not fewer than three nor more than five administrators or directors (elected by the members annually) manages the affairs of the Association.

Since February 2010, Blackthorne Real Estate Property Development Company, Inc. (Blackthorne), has provided property management for the Association and is the Association's registered agent. David Davis, Blackthorne's president, testified that Blackthorne, as property manager for the Association, "handle[s] the day-to-day operations of the property," including

maintenance, collection of dues and special assessments, payment of vendor bills, negotiation of contracts with vendors, and "the day-to-day contact with unit owners and the Board." Blackthorne is the custodian of the Association's documents, and it prepares a budget and provides reports to the Association regarding the Association's financial affairs. Davis also attends board meetings, and his company, Blackthorne, staffs an office located in the Twin Towers Condominium. There is a computer in that office made available to owners, where they can view financial documents, the master deed, some correspondence, and minutes from meetings.

Dunbar, formerly a licensed architect in Texas and currently an attorney still active with the California bar, testified at trial that if the Association "should mismanage its expenses or should overpay vendors, it is owners like [him] who are forced to pay." Or if the Association decides to invest "hundreds of thousands or millions of dollars on capital improvements, the Association is able to assess [Dunbar] and force [him] on a personal basis to pay those expenses." Therefore, the right to examine documents is the only way Dunbar can determine why he is incurring "monthly dues assessments." He claims to have suffered damages as a result of the Association's mismanagement of its income, repairs, and capital improvements. As examples, he described his share of assessments he had to pay in 2011 ($3,000 for a parking garage renovation), 2013 ($1,200 for "chiller repair"), and 2014 ($5,000 for elevator and roof repairs). These assessments are in addition to "ordinary monthly or annual expenses" paid by owners for services such as property management, are in addition to utilities, and are "extraordinary, largely unexpected, unanticipated burdens on property owners such as [Dunbar]." Dunbar initially opened up a dialogue with his "fellow unit owners" through "telephone conversations, meetings and . . . a website [he] created" to assemble documents for the owners to "figure out what was happening to [the owners'] property investment." He then "took the formal steps necessary to force an

examination of the Association's records in order that [he] might be more fully informed about the nature of the income and expenses that the Association was handling for [him] and [his] fellow owners."

Dunbar requested and received documents in March 2014. According to an Association officer, "23 sets of various documents" were sent to Dunbar at that time. Dunbar proceeded to publish those documents on his personal website; the officer claimed some of the documents included vendor contracts which contained confidential information. A year later, on March 10, 2015, Dunbar sent a letter to the Association again requesting financial records. On April 14, the Association's board passed a "Resolution on Documents Provided on Request of an Owner" (resolution). According to Davis, the resolution was drawn up because Dunbar previously posted documents on his website. The resolution stated the board "desires to adopt a uniform policy and procedure to respond to such owner requests for Association records and documents." The resolution also stated, in part:

> 3: In responding to a request of an Owner for any financial records or financial information the [Association] other than the annual budget [sic], pursuant to Neb. Rev. Stat. section 21-19,166 (c), may make a policy decision on providing such documents to the requesting owner if:
>
> A: The [Association] determines that the owner's demand is made in good faith and for a proper purpose;
>
> B: In the written request the owner describes with reasonable particularity the purpose and the copies of the records the member desires; and
>
> [C]: The records are directly connected with such purpose as described by the owner.
>
> 4: Any request made by an owner for documents shall be referred to the . . . Board . . . for review and action. The Board may consider such request at its next . . . meeting. In the event the Board determines to produce any or all of the documents requested by the owner such

> documents shall be provided to the owner within five (5) days of the decision of the Board related to such document request and the Board's determination required by Neb. Rev. Stat[.] section 21-19,166 (c).

Also, after the adoption of the resolution, the board decided to create a website for the owners, which is managed by Blackthorne. Davis indicated that the board directed him to place on that website all financial documents, board meeting minutes, and other pertinent documents, such as the master deed, bylaws, and amendments. Email communications and announcements for elections and social events are posted on the website as well. Any document marked with "PDF" is a protected file that can be opened by an owner registered on the board's Twin Towers Condominium website, but the protected files cannot be copied. The financial records are all marked as protected files.

The Association sent a letter to Dunbar on April 20, 2015, which, in relevant part, purported it would provide him with copies of the documents he requested. Davis sent Dunbar six emails attaching various documents on April 25, but according to Dunbar, not a single document was responsive to Dunbar's requests. On November 16, Dunbar sent another letter again requesting various financial records. The Association sent a letter on November 20 informing Dunbar that the board voted to deny his request for documents. It explained that his request was denied because Dunbar received documents in March 2014 and posted documents on his personal Twin Towers Condominium website. The Association stated that this violated confidentiality provisions on some of the documents and exposed the Association "to potential claims of financial liability for disclosure of confidential proprietary information and breach of fiduciary duty." The letter also stated:

> [B]ased on Neb. Rev. Stat. section 21-19,166(c)(1) and 21-19,166(c)(3) the Board hereby denies your document request and finds that

> (1) your demand is not "made in good faith and for a proper purpose", and
>
> (2) . . . the records you have requested are not "directly connected with this purpose."

(Emphasis in original.)

On March 1, 2016, Dunbar filed a lawsuit related to a number of actions taken by the Association. Both Dunbar and the Association filed motions for summary judgment; each obtained some relief, but several claims remained undecided. The Association subsequently filed another summary judgment motion, and Dunbar filed a motion for reconsideration. Following another hearing, the Association was successful in getting one more claim resolved in its favor, but three claims still remained. Trial on the remaining claims took place on May 15, 2017. At the onset of trial, the parties reached an agreement and stipulated to an issue regarding the basic values for the condominium units. This left for trial only the claims related to Dunbar's request for access to and the right to copy Association records, and the Association's resolution regarding access to records. On June 2, the district court entered an order dismissing Dunbar's remaining claims. Dunbar appeals, and the Association attempts to cross-appeal.

III. ASSIGNMENTS OF ERROR

Dunbar assigns, consolidated and restated, that the district court erred by (1) failing to find that the Association's resolution limiting document inspection by unit owners was in conflict with Neb. Rev. Stat. § 76-876 (Reissue 2009) and thereby erroneously denying Dunbar's request to examine "'all'" records, (2) holding that the statutory right to examine records under § 76-876 does not include the right to copy those records, and (3) failing to find that the purported amendment to the master deed regarding pets was invalid.

[1] Although Dunbar assigns error and sets forth facts related to the parties' stipulation regarding basic values for

the condominium units, he does not specifically argue this error. Accordingly, we will not address it. 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. *Fetherkile v. Fetherkile*, 299 Neb. 76, 907 N.W.2d 275 (2018).

[2,3] In its attempted cross-appeal, the Association appears to be claiming the district court erred by failing to award it attorney fees pursuant to Neb. Rev. Stat. § 25-824 (Reissue 2016), which permits such fees when a court determines an action was frivolous. However, the Association's brief does not comply with Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2014), which requires that a cross-appeal be prepared "in the same manner and under the same rules as the brief of appellant." "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." *Friedman v. Friedman*, 290 Neb. 973, 984, 863 N.W.2d 153, 162 (2015). In order for affirmative relief to be obtained, a cross-appeal must be properly designated in accordance with § 2-109(D)(4). See *Bacon v. DBI/SALA*, 284 Neb. 579, 822 N.W.2d 14 (2012). We therefore do not address the Association's attempted cross-appeal.

IV. STANDARD OF REVIEW

[4] The meaning of a statute is a question of law, and a reviewing court is obligated to reach conclusions independent of the determination made below. *In re Application of City of Neligh*, 299 Neb. 517, 909 N.W.2d 73 (2018).

[5] When reviewing cross-motions for summary judgment, an appellate court acquires jurisdiction over both motions and may determine the controversy that is the subject of those motions; an appellate court may also specify the issues as to which questions of fact remain and direct further proceedings as the court deems necessary. *Johnson v. Nelson*, 290 Neb. 703, 861 N.W.2d 705 (2015).

V. ANALYSIS

1. Association's Resolution Limiting Access to Documents

The Association's resolution at issue incorporates some language from condominium statutes and nonprofit corporation statutes; the resolution limited an owner's access to certain Association records and, other than the annual budget, made discretionary to the board the decision to produce financial records and certain written communications. Dunbar claims the district court erred by failing to find that the resolution conflicts with § 76-876, which is a statute specific to condominiums and an owner's access to records. He asserts that the nonprofit corporation statutes are of "general application" in this case, that the statutes controlling condominiums are "more specific," and that therefore, to the extent they are in conflict, the "qualified right" provided by the nonprofit laws must yield to the "unqualified right" of the condominium laws to inspect all records of the Association. Brief for appellant at 23 (emphasis in original). On the other hand, the Association argues that the adoption of the resolution was lawful and is consistent with the condominium laws and the nonprofit corporation laws.

Accordingly, we next examine the relevant statutes for condominiums and nonprofit corporations as pertinent to Dunbar's request for access to and copies of Association records.

(a) Statutory Background Specific to Condominiums

Nebraska has two condominium acts: the Condominium Property Act (CPA), Neb. Rev. Stat. §§ 76-801 to 76-823 (Reissue 2009), and the Nebraska Condominium Act (NCA), Neb. Rev. Stat. §§ 76-825 to 76-894 (Reissue 2009 & Cum. Supp. 2016). See *Twin Towers Condo. Assn. v. Bel Fury Invest. Group*, 290 Neb. 329, 860 N.W.2d 147 (2015). Generally, the CPA governs condominium regimes created under a "master deed" before 1984, and the NCA governs those created

under a "declaration" on or after January 1, 1984. See *Twin Towers Condo. Assn. v. Bel Fury Invest. Group*, 290 Neb. at 336, 860 N.W.2d at 155. As noted earlier, the Twin Towers Condominium was established by a master deed recorded on December 30, 1983; therefore, the CPA is applicable and, as will be discussed, certain statutes under the NCA are also applicable.

Both sets of condominium laws provide for the examination of records. Section 76-816 under the CPA (pre-1984) states, in relevant part:

> The board of administrators . . . shall keep or cause to be kept a book with a detailed account, in chronological order, of the receipts and expenditures affecting the condominium property regime and its administration and specifying the maintenance and repair expenses of the common elements and all other expenses incurred. Both the book and the vouchers accrediting the entries made thereupon shall be available for examination by any co-owner or any prospective purchaser at convenient hours on working days that shall be set and announced for general knowledge. . . . For condominiums created in this state before January 1, 1984, the provision on the records of the administrative body or association in section 76-876 shall apply to the extent necessary in construing the provisions of [§] 76-876 . . . which apply to events and circumstances which occur after January 1, 1984.

Section 76-876 of the NCA (effective 1984) states: "The association shall keep financial records sufficiently detailed to enable the association to comply with section 76-884. All financial and other records of the association shall be made reasonably available for examination by any unit owner and his or her authorized agents."

Section 76-884, which pertains to the resale of a condominium unit, states in relevant part:

> (a) Except in the case of a sale where delivery of a public-offering statement is required . . . the unit owner

> and any other person in the business of selling real estate who offers a unit to a purchaser shall furnish to a purchaser before conveyance a copy of the declaration other than the plats and plans, the bylaws, the rules or regulations of the association, and the following information:
>
> (1) a statement setting forth the amount of the monthly common expense assessment and any unpaid common expense or special assessment currently due and payable from the selling unit owner;
>
> (2) any other fees payable by unit owners;
>
> (3) the most recent regularly prepared balance sheet and income and expense statement, if any, of the association;
>
> (4) the current operating budget of the association, if any;
>
> (5) a statement that a copy of any insurance policy provided for the benefit of unit owners is available . . . upon request; and
>
> (6) a statement of the remaining term of any leasehold estate affecting the condominium . . . .
>
> (b) The association, within ten days after a request by a unit owner, shall furnish in writing the information necessary to enable the unit owner to comply with this section.

Importantly, § 76-826(a) of the NCA states that certain sections of the NCA shall apply, to the extent necessary to construe that section, to all condominiums created before January 1, 1984, "but those sections apply only with respect to events and circumstances occurring after January 1, 1984, and do not invalidate existing provisions of the master deed, bylaws, or plans of those condominiums." Section 76-826(a) identifies §§ 76-876 and 76-884 as being applicable to all condominiums created before 1984 for events and circumstances occurring after January 1, 1984.

Therefore, we will consider both §§ 76-876 and 76-884 in determining Dunbar's rights to access and copy Association records. Neither Dunbar nor the Association contends that the

master deed or bylaws contain any language which should govern the outcome of the records issue raised, so our review focuses on the language of the statutes. We have provided the relevant condominium statutes above; however, since the Association has also relied on Nebraska's nonprofit corporation laws to support its position, we set forth those relevant statutory provisions next.

(b) Nonprofit Corporation Statutes Related to Records

The Association claims that because it is incorporated under the Nebraska Nonprofit Corporation Act, see Neb. Rev. Stat. § 21-1901 et seq. (Reissue 2012 & Supp. 2017), the records issue is governed by both Nebraska's nonprofit corporation statutes and the condominium statutes. As relevant here, the nonprofit corporation statutes require such corporations to maintain certain corporate records as set forth in § 21-19,165(a) through (e). Interestingly, § 21-19,165(a) requires a corporation to keep permanent records of minutes of all meetings of its members and board of directors, of all actions taken by members or directors without a meeting, and of all actions taken by committees of the board. Despite that requirement, we note that the Association's resolution indicates that it will provide minutes of any meeting "if maintained." However, maintaining permanent records of minutes of all meetings is not discretionary under the nonprofit statutes.

Section 21-19,165(b) requires the corporation to maintain appropriate accounting records. Section 21-19,165(e) requires the corporation to keep a copy of the following records at its principal office: articles of incorporation and all amendments currently in effect; bylaws and all amendments currently in effect; resolutions adopted by the board of directors related to characteristics, qualifications, rights, limitations, and obligations of members; minutes of all meetings of members; records of all actions approved by the members for the past 3 years; all written communications to members generally within the

past 3 years, including financial statements furnished under § 21-19,170; a list of names and addresses of current directors and officers; and its most recent biennial report delivered to the Secretary of State.

With regard to access to and copying of corporation records, we note the following statutory requirements: Other than an exception provided for a religious corporation, and subject to the requesting member being charged for costs, § 21-19,166(a) provides, in relevant part, that upon 5 days' written notice or written demand, "a member is entitled to inspect and copy, at a reasonable time and location specified by the corporation, any of the records of the corporation described" in § 21-19,165(e) (which we have identified in the preceding paragraph). Notably, that also includes all financial statements described in § 21-19,170, which provides for a corporation to furnish a member with its latest financial statements, including a balance sheet as of the end of the fiscal year and a statement of operation for that year. The documents referred to under § 21-19,166(a) are not subject to the requirements set forth under § 21-19,166(c), as discussed next.

Section 21-19,166(b) permits a member to inspect and copy additional records if the member meets the requirements of § 21-19,166(c). Again, other than an exception provided for a religious corporation, and subject to the requesting member being charged for costs, upon 5 days' written notice to the corporation, § 21-19,166(b) provides for the inspection and copying of the following: "(1) Excerpts from any records required to be maintained under subsection (a) of section 21-19,165, to the extent not subject to inspection under subsection (a) of this section; (2) Accounting records of the corporation; and (3) Subject to section 21-19,169, the membership list." The records described above in § 21-19,166(b) are in addition to those referred to in § 21-19,166(a) (which refers to the records identified in § 21-19,165(e)). Therefore, it is only the additional records under § 21-19,166(b) which are subject to the requirements set forth in § 21-19,166(c). Section 21-19,166(c)

states that a member may inspect and copy the records identified in subsection (b) only if "(1) [t]he member's demand is made in good faith and for a proper purpose; (2) [t]he member describes with reasonable particularity the purpose and the records the member desires to inspect; and (3) [t]he records are directly connected with this purpose." The resolution passed by the board in the present case made the requirements described in § 21-19,166(c) applicable to "any financial records or financial information" requested by an owner, except for "the annual budget." This is not consistent with § 21-19,166(a), which permits a member to inspect and copy, without conditions, those records described in § 21-19,165(e), which include financial statements that include a balance sheet as of the end of the fiscal year and a statement of operations for that year. See §§ 21-19,165(e)(5) and 21-19,170(a). Accordingly, the board's resolution incorporating the language of § 21-19,166(c) and making it applicable to all financial records requested (other than the annual budget) is not consistent with the nonprofit corporation statutes.

(c) District Court's Decisions

In addition to the nonprofit corporation statutes, the Association relied upon § 76-884 (information required for resale of a condominium unit) to support its position that the resolution was appropriate and that Dunbar had been provided all documents required under the law. Dunbar argued that the documents listed in § 76-884 were a minimum records requirement for the association and that § 76-876 required all financial and other records of the association to be made reasonably available for examination by any unit owner. In a summary judgment order entered August 31, 2016, the district court concluded that § 76-884 was not the controlling statute, stating:

> The two statu[t]es are plainly distinctive. As stated above, § 76-884 places a duty on the condominium owner to furnish the pr[e]scribed records to a prospective

> buyer. Neb. Rev. Stat. § 76-876 is more expansive and places a duty on the condominium association to maintain records and make them reasonably available to condominium owners.

The court then set forth the entirety of § 76-876 and pointed out that the statute is "two sentences long." The court noted that the first sentence required the Association to keep records sufficiently detailed to enable the Association to comply with § 76-884 and that "[i]f the records specifically enumerated in § 76-884 were the only records that § 76-876 required the [A]ssociation to make available to owners, then the statu[t]e would end after the first sentence." The court emphasized the language in the second sentence of § 76-876, which says, "All financial and other records of the association shall be made reasonably available for examination by any unit owner . . . ." We agree with the district court that § 76-884 does not govern which records a condominium owner has the right to access and that the second sentence contained in § 76-876 provides the controlling language.

The district court went on to find that there were genuine issues of material fact regarding the Association's compliance with the condominium laws and therefore denied summary judgment on the issues related to the resolution and access to records. Following trial, however, the court dismissed Dunbar's remaining claims. In its order entered June 2, 2017, the court stated, in relevant part:

> In applying the law associated with both non-profit organizations as well as condominiums, the Court finds the [Association] has complied with the law in providing owners with financial and other information pursuant to Neb. Rev. Stat. §76-876. The Association has established a process to provide owners financial and other records of the [A]ssociation and has this information reasonably available for examination by any unit owner and his or her authorized agents. In addition, the Court finds the methods of providing information to the

> owners by the [Association] comply with Nebraska law. The resolution adopted by the [Association] does not conflict with the law and is consistent with the Nebraska Non-Profit Corporation Act. In addition, the resolution does not conflict with the [NCA]. The documents and method of making the financial and other records available comply with the requirement that this information is made reasonably available to owners and their agents. Further, the resolution found in Exhibit 115 does not prohibit owners from the ability to examine financial and other records of the [Association]. The method [the Association] provide[s] to owners for examination of records is reasonable. The Court does not find there to be a statutory requirement for [the Association] to allow copies to be made. [The Association has] both a website and an on-site computer where owners can review financial and other documents at their leisure.

The relief sought by Dunbar was denied, and the case was dismissed.

(d) Reconciling Condominium Statutes With Nonprofit Statutes

The district court concluded the Association's resolution limiting access to records was in compliance with the nonprofit laws and the condominium laws. However, as already noted, the Association's reliance on § 21-19,166(c) to limit an owner's access to all financial records (other than annual budget) is not consistent with the nonprofit corporation statutes discussed above. Further, the resolution is not consistent with the applicable provision of the condominium laws, specifically § 76-876. The plain language of § 76-876 gives a condominium owner the right to examine "[a]ll financial and other records of the association . . . ." Therefore, even if the resolution had been written in a manner consistent with the nonprofit corporation statutes, it would have nevertheless conflicted with the rights conferred upon owners under the condominium laws

written specifically for their common ownership interests in the condominium regime.

[6] To the extent that there is conflict between two statutes on the same subject, the specific statute controls over the general statute. *Cox Nebraska Telecom v. Qwest Corp.*, 268 Neb. 676, 687 N.W.2d 188 (2004) (specific statutes governing telecommunications appeals control over general provisions governing appeals from Public Service Commission).

The Nebraska Nonprofit Corporation Act applies broadly to all nonprofit corporations and therefore is of general application in this case, whereas the NCA applies only to condominium regimes and condominium owners and therefore has specific application to the issues before us. To construe any language of the nonprofit corporation statutes to control the language of § 76-876 would have the effect of nullifying or making meaningless the words "[a]ll financial and other records," as set forth in the condominium statute. We therefore conclude § 76-876 controls a condominium owner's right to examine all financial and other records of its association.

The Association points us to the considerable records it does publish, including but not limited to "the Master Deed . . . , election results . . . , the financial records from 2015 . . . , the certificate of insurance . . . , the complete financial records of the [Association], the operating budget . . . , budget comparative balance and balance sheet . . . , income statement . . . , and the [Association] check register . . . ." Brief for appellee at 37. Those records are available on a website operated by the Association and available to owners without internet access in "the [Association] building office." *Id.* The Association argues that the "records resolution is a lawful and proper exercise of its fiduciary duty to its owners and members" and that it is a "proper balance between owners and members that seek records of the [Association] and the limited owners/members of the [Association], like [Dunbar], who abuse the rights to [Association] records by making demands that the [Association] Board reasonably

determines to not be in good faith and not for a proper purpose." *Id.* at 36.

However, that balance is not the Association's to strike; the decision regarding a condominium owner's access to records was decided by the legislative branch when enacting the CPA and NCA. Further, as Dunbar aptly points out, "[t]he right of condominium owners to examine records does not turn on whether the [A]ssociation happens to be organized as a corporation or not." Brief for appellant at 24. As Dunbar argues, "'all' means all," reply brief for appellant at 7, and condominium owners are entitled to examine whatever financial or other records exist, per the plain language of the NCA.

We therefore reverse the district court's order determining that the resolution did not conflict with Dunbar's rights under § 76-876. We also reverse the district court's finding that the resolution was in compliance with the nonprofit corporation statutes. We remand the cause to the district court with directions to issue an order finding that the Association's resolution was neither in compliance with the NCA, specifically § 76-876, nor in compliance with the nonprofit statutes as discussed above, and further finding that Dunbar is entitled to "[a]ll financial and other records of the association" under § 76-876, which records shall be made reasonably available for examination. We next discuss Dunbar's argument that making the records reasonably available includes allowing him to make copies.

2. Right to Copy Records

The district court's June 2, 2017, order states, "The Association has established a process to provide owners financial and other records of the [A]ssociation and has this information reasonably available for examination by any unit owner and his or her authorized agents." The court further found that there was no "statutory requirement for [the Association] to allow copies to be made. [The Association has] both a website and an on-site computer where owners can review financial

and other documents at their leisure." We agree with the court's determination on this issue, so long as the records being made available to the owners include, under § 76-876, "[a]ll financial and other records of the association."

Dunbar argues that § 76-876 carries with it "the right to 'copy' such records." Brief for appellant at 25. Dunbar points us to case law from several other jurisdictions interpreting various statutory rights to inspect or examine records which he claims supports his argument that the right to examine documents includes the right to copy them. He also points to Neb. Rev. Stat. § 84-712 (Reissue 2014), but that statute pertains to public records and is not applicable here.

[7,8] However, we need not consider how other states may handle the copying of records for condominium owners when the plain language of § 76-876 requires only that such records be made "reasonably available for examination by any unit owner and his or her authorized agents." 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. *Becher v. Becher*, 299 Neb. 206, 908 N.W.2d 12 (2018). It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute. *Id.*

We decline to read into the language of § 76-876 a right to make copies of the records. The Legislature did not include any such language regarding copies in the statute, which it could have done, like it has with other statutory schemes. For example, § 21-19,166(a) of the nonprofit corporation laws, set forth earlier, provides that "a member is entitled to inspect and copy" certain corporation records. Even the Association acknowledged, in its closing argument at trial, the existence of rights to inspect and copy certain records under the nonprofit corporation statutes. However, we need not address whether some of the records sought by Dunbar should be available for copying under the nonprofit corporation statutes, as Dunbar's

argument at trial and on appeal was only that his right to access all records included the right to copy all records under § 76-876. We agree with the district court that § 76-876 does not confer on condominium owners the right to make copies of all records; rather, it gives them the right to examine all of them.

3. Amendment to Master Deed Regarding Pets

The Association filed an amendment (regarding pets) to the master deed with the Douglas County register of deeds on August 3, 2011. Dunbar sought a declaration that the amendment was void or invalid and that it should be voided or "stricken by the Recorder of Deeds." Dunbar's requested relief was denied by the district court.

The master deed, at paragraph 7(i), states, "Household pets will be subject to regulation, restriction, exclusion and special assessment, as may be determined by the Association from time to time." The 2011 amendment, which was signed by the Association president on August 24, 2010, attaches a 2-page "Exhibit A" titled "Twin Towers Condominium Association Pet Addendum." The addendum limits the number of cats and dogs per unit, with dogs limited to a weight of "25 pounds or less per dog." Certain breeds of dogs are "never acceptable," and "[e]xotic pets" are not allowed. There are a number of rules regarding expectations of pet and owner behaviors set forth in the addendum, including that pets violating the policy may be required to be permanently removed from the property and owners may be subject to fines. The addendum also provides that the board or property manager "shall from time to time have the right to make reasonable changes and additions to the pet policies, if said changes are in writing and distributed to all owners/renters who are permitted to have pets."

Dunbar argues that the amendment to the master deed established "as a matter of deeded property rights" which pet breeds

and sizes were permitted and which were not. Brief for appellant at 29. Dunbar asserts that the amendment

> fundamentally changed the pet policy from one that was subject to the ongoing discretion of the revolving membership of the . . . board . . . to make and amend rules regarding the pet policy into one constituting a relatively permanent set of conditions that could only be altered by a subsequent master deed amendment.

Id. at 29-30. Dunbar's concern was that the amendment removed from the board the authority to regulate pets and, thus, altered the rights of every unit owner by "transforming the Association's rulemaking discretion . . . into a relatively permanent statement of policy with regard to pets." *Id*. at 30. Dunbar claims that he "has a legally cognizable interest" in not permitting "his rights under the master deed to be altered without the consent of the necessary two-thirds majority of ownership." *Id*. The question is, therefore, whether a two-thirds majority of the ownership approved and properly recorded the amendment. The Association asserts such a majority did; Dunbar disagrees.

Both parties filed motions for summary judgment on this issue, and the court ruled in favor of the Association. The court's August 2, 2016, "Order on Cross Motions for Summary Judgment" referenced the Association's affidavit, in which the person who was treasurer at the time of the amendment stated that an election was held in August 2010 to approve the amendment. The treasurer stated that although the ballots were no longer available, the election resulted in more than two-thirds of the owners voting in support of the amendment. Dunbar's affidavit asserted that based on his personal knowledge and his review of the board minutes, there was no election held in August 2010. The district court found that Dunbar failed to explain the extent of his personal knowledge, other than his reading of the minutes, and therefore concluded Dunbar failed to meet his burden of proof. The district court's order also stated, "It should also be noted [Dunbar] stated he

did not intend to overturn the decision of the Association to allow owners to have pets. He simply wanted a declaration that the Association did not follow proper procedure for the amendment." The court addressed this issue further in its subsequent order entered August 31 denying Dunbar's motion to reconsider this issue. The court stated that "the allegations . . . regarding the pet amendment are non-judiciable [sic], either as moot or as an advisory opinion because [Dunbar] is not seeking removal of pets from the condominium."

[9-13] We first address the district court's finding that this issue was nonjusticiable either as moot or as calling for an advisory opinion. As stated in *Nesbitt v. Frakes*, 300 Neb. 1, 5, 911 N.W.2d 598, 603 (2018):

> An action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action. A moot case is one which seeks to determine a question that no longer rests upon existing facts or rights—i.e., a case in which the issues presented are no longer alive. 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. Although mootness does not prevent appellate jurisdiction, it is a justiciability doctrine that can prevent courts from exercising jurisdiction.

Further, a "declaratory judgment action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action." *Id*. at 7, 911 N.W.2d at 604.

The amendment to the master deed altered Dunbar's property rights as a co-owner. The fact that he is not "seeking removal of pets from the condominium" does not resolve the issue of whether an invalid amendment to the master deed was recorded. As a co-owner and member of the Association, Dunbar continues to have a legally cognizable interest in the validity of any amendment to the master deed. Therefore, the

court erred in finding the issue was moot or called for an advisory opinion.

[14] We turn now to the court's finding that Dunbar failed to meet his burden of proof to overcome summary judgment against him. Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine dispute as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. See *Wynne v. Menard, Inc.*, 299 Neb. 710, 910 N.W.2d 96 (2018). See, also, Neb. Rev. Stat. § 25-1332 (Supp. 2017).

As noted above, the Association produced an affidavit from the person serving as treasurer at the time of the amendment which stated that more than two-thirds of the condominium owners voted in support of the amendment in August 2010.

Dunbar's affidavit stated that there was no election "or other approval by owners . . . that occurred on or before August 24, 2010, as claimed in the purported amendment recorded August 10, 2011." The minutes of the board meetings immediately preceding the signing of the amendment by the Association president on August 24, 2010, were received as evidence. The April, May, and June 2010 minutes all contain a reference to a "[p]et policy" or pet-policy-related "update." Notably, the May 19 minutes, at paragraph 10, states: "Pet policy update. Owners representing more than 50% of square footage have agreed to allow pets. 'No' votes represent about 5% of the building's square footage. There are still owners who haven't been contacted." The June 28 minutes indicate that a letter will be sent to "all remaining owners next week" and state, "After the deadline, we will put out notice of the results." The July 21 minutes are silent as to any further activity related to the pet policy. And then significantly, the September 2 minutes show that the board approved the July minutes; nothing is indicated showing an August meeting, nor is there anything contained in the September minutes regarding the final results of the vote on the pet policy.

Dunbar also offered into evidence, at the hearing on the motion to reconsider, the affidavit of an owner of a unit in the condominium, who averred:

> I did not receive any information or notice, formal or otherwise, of a unit owner's election that, according to [the treasurer's] affidavit, supposedly was held in August of 2010 regarding a pet amendment to the Master Deed. As a unit owner who was attentive to the affairs of the Association, I do not believe that any such unit owner's election to amend the Master Deed was held in August of 2010 and that, if any such election had been held in August of 2010, I would have become aware of it.

We conclude the evidence was sufficient to create a genuine dispute as to material facts related to whether a proper vote was taken and recorded approving an amendment to the master deed regarding pets. Therefore, summary judgment was not appropriate on this issue. However, the disposition of this issue can be decided on other grounds, as discussed next.

Dunbar had sought summary judgment on the basis that the amendment is invalid on its face, and we agree. Regarding how to effect an amendment to the master deed, the master deed states:

> Unless a greater number is required by law, co-owners representing two-thirds or more of the total basic value of the condominium may at any time in writing duly acknowledged and recorded effect an amendment to this Master Deed or the Bylaws of said condominium which are attached hereto . . . .

As previously noted, the amendment at issue is dated and signed by the Association's president on August 24, 2010, but was not filed with the register of deeds until August 3, 2011. The amendment states, "[T]he undersigned owners of more than two-thirds (2/3) of the basic value of the Condominium desire to amend the By-Laws, Amendment to Master Deed and Rules and Regulations to allow pets as is described in Exhibit 'A' (attached)." As observed by the district court in its

August 2, 2016, summary judgment order, the amendment is signed by the Association president at the time and attached to the amendment is a list of every owner of an Association unit. The district court specifically found, "The individual owners did not sign the amendment." Dunbar asserts the attachment is "a printed list of every owner," instead of signatures. Brief for appellant at 14.

We agree with Dunbar that the amendment was not in compliance with the master deed's language for how to effect a proper amendment to the master deed. The amendment on its face does not demonstrate that it is a "writing duly acknowledged and recorded" by "co-owners representing two-thirds or more of the total basic value of the condominium" as the master deed specifies. The president is not authorized by the master deed to amend the master deed in lieu of the requisite co-owners; nor do the bylaws provide such authority. We also observe that there is a past amendment to the master deed included in our record which has an attachment containing the personal signatures of unit owners supporting the amendment.

As to the remedy for an invalid amendment, we are guided by *McGill v. Lion Place Condo. Assn.*, 291 Neb. 70, 864 N.W.2d 642 (2015), which concluded an improper amendment to a condominium's declaration was void. *McGill* involved a district court judgment which invalidated the sale of limited common elements of a condominium governed by the NCA. The Nebraska Supreme Court affirmed, interpreting one of the statutes under the NCA (not applicable here) to require approval by 80 percent of the votes in the association and unanimous agreement of the unit owners to effectuate the sale. Unlike the terms of the master deed at issue in the present matter, in *McGill*, under the NCA, the association president could file an amendment to the condominium's declaration related to the sale. However, the sale of the limited common elements at issue still required the votes noted above, and an agreement for such a conveyance had to be evidenced by the execution of an agreement in the same manner as a deed and

by the requisite number of unit owners. The Supreme Court noted that there was "no evidence of any agreement executed by the unit owners approving the sale" as required by statute. *McGill v. Lion Place Condo. Assn.*, 291 Neb. at 92, 864 N.W.2d at 658. Given the lack of compliance with the statute regarding conveyances of common elements under the NCA, the Supreme Court agreed with the district court that the conveyance was void.

We similarly find, given the lack of compliance with the plain language of the master deed in the present matter, that the amendment related to the pet policy is void. No statute under the CPA, nor any of the statutes under the NCA designated to apply to condominiums created before January 2, 1984, change the requirement for how to amend the master deed in this case. The master deed in the present matter requires a "writing duly acknowledged and recorded" by "co-owners representing two-thirds or more of the total basic value of the condominium." That requisite acknowledgment and recording by two-thirds of the co-ownership have not been shown here. Accordingly, we find the district court erred in failing to grant summary judgment in favor of Dunbar on this issue, and we reverse that decision and remand the cause to the district court to enter an order granting judgment in favor of Dunbar on this issue and declaring the amendment void.

VI. CONCLUSION

In summary, we reverse the district court's decision on two matters: (1) its conclusion that the Association's resolution does not conflict with the applicable condominium law on a member's right to examine records, specifically § 76-876, and (2) its decision regarding the validity of the master deed amendment regarding pets. As to those two matters, we remand with directions to enter an order in accordance with this opinion. In all other respects, we affirm the district court's orders.

Affirmed in part, and in part reversed and remanded with directions.

In re Guardianship of Aimee S., an incapacitated and protected person.
Deborah S. and June Berger, appellants, v. Susanne Dempsey-Cook, Successor Guardian, and Kelly Henry Turner, guardian ad litem, appellees.

920 N.W.2d 18

Filed October 2, 2018. No. A-17-749.

1. **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.
2. **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.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court.
4. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.
5. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision allowing or disallowing attorney fees for frivolous or bad faith litigation will be upheld in the absence of an abuse of discretion.
6. ____: ____. When attorney fees are authorized, the trial court exercises its discretion in setting the amount of the fee, which ruling an appellate court will not disturb on appeal unless the court abused its discretion.
7. **Attorney Fees: Costs.** Attorney fees, where recoverable, are generally treated as an element of court costs.

8. **Judgments: Costs.** An award of costs in a judgment is considered a part of the judgment.
9. **Judgments: Attorney Fees.** A party seeking statutorily authorized attorney fees, for services rendered in a trial court, must make a request for such fees prior to a judgment in the cause.
10. **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 the litigation.
11. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant 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.
12. ____: ____. 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.
13. **Summary Judgment: Proof.** Once the moving party makes a prima facie case, the burden shifts to the party opposing the motion to produce admissible contradictory evidence showing the existence of a material issue of fact that prevents judgment as a matter of law.
14. **Trial: Waiver: Appeal and Error.** A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal.
15. **Waiver: Appeal and Error.** Errors not assigned in an appellant's initial brief are waived and may not be asserted for the first time in a reply brief.
16. **Summary Judgment: Evidence.** Conclusions based upon guess, speculation, conjecture, or choice of possibilities do not create material issues of fact for the purposes of summary judgment; the evidence must be sufficient to support an inference in the nonmovant's favor without the fact finder engaging in guesswork.
17. **Trial: Expert Witnesses.** It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his or her opinion about an issue in question.
18. **Expert Witnesses.** Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable the expert to express a reasonably accurate conclusion, and where the opinion is based on facts shown not to be true, the opinion lacks probative value.
19. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.

20. **Appeal and Error.** An issue not presented to or decided by the trial court is not appropriate for consideration on appeal.
21. ____. Generally, a party cannot complain of error which the party has invited the court to commit.
22. **Actions: Attorney Fees: Words and Phrases.** A frivolous action is one in which a litigant asserts a legal position wholly without merit; that is, the position is without rational argument based on law and evidence to support the litigant's position. The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.
23. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision allowing or disallowing attorney fees for frivolous or bad faith litigation will be upheld in the absence of an abuse of discretion.

Appeal from the County Court for Douglas County: Susan M. Bazis and Stephanie S. Shearer, Judges. Affirmed.

Brent M. Kuhn, of Brent Kuhn Law, for appellants.

Barbara J. Prince for appellee Susanne Dempsey-Cook.

John M. Walker and Cathy S. Trent-Vilim, of Lamson, Dugan & Murray, L.L.P., for appellee Kelly Henry Turner.

Pirtle, Riedmann, and Bishop, Judges.

Pirtle, Judge.

I. INTRODUCTION

Deborah S. is the mother of Aimee S., an incapacitated adult. In December 2013, Deborah and June Berger (June), her friend, (collectively appellants) filed a petition for removal of a court-appointed guardian and appointment of themselves as successor coguardians and coconservators. Summary judgment was granted against appellants in June 2015. In December 2016, it was determined that the application to remove the court-appointed guardian and conservator was frivolous and that Deborah should be ordered to pay attorney fees and expenses in the amount of $75,906.20. For the reasons that follow, we affirm.

II. BACKGROUND

Aimee was declared incapacitated at the age of 23. Deborah was appointed as the temporary legal guardian of Aimee on November 14, 2001, and permanent legal guardian on January 23, 2002.

In 2011, the Department of Health and Human Services became involved after being contacted by the police. The police had been called when Aimee was overheard screaming in her apartment. Upon her admission to a local hospital, Aimee was psychotic, disoriented, and malnourished and her personal hygiene was "badly neglected." The hospital staff contacted Adult Protective Services, expressing concern regarding Aimee's condition.

According to Deborah, Aimee's condition in January 2011 was generally the same for the 2 years prior to her hospitalization. Deborah did not recall Aimee's showering in the 2 years prior to her hospitalization in 2011. Deborah acted as Aimee's guardian at that time and visited with Aimee frequently, but took no responsibility for Aimee's condition. Deborah recalled that Aimee had seen her mental health provider approximately twice during the same 2-year period and that Aimee had skipped therapy appointments because she refused to leave her apartment.

A petition was filed by Adult Protective Services in 2011, alleging that Deborah failed to perform her duties as guardian, that she was not able to make appropriate decisions for Aimee's medical needs and treatment, and that it was in Aimee's best interests that a successor guardian be appointed. Deborah filed an answer denying the allegations against her, but she agreed to step down, requesting that June be appointed as successor guardian. Deborah was removed as guardian, and Sally Hytrek was appointed as the successor guardian.

On December 27, 2013, appellants filed a motion to be appointed coguardians and coconservators for Aimee and to have Hytrek removed as the court-appointed guardian and

conservator for Aimee. The petition set forth nine reasons why Hytrek should no longer be the guardian.

On May 30, 2014, Hytrek resigned as successor guardian, because the "constant demands, allegations and interference" by appellants made it impossible for her to carry out her fiduciary duties to Aimee and to the other individuals she served as guardian and/or conservator. On June 10, the county court overruled appellants' motion to appoint a substitute guardian. On or about June 12, the court accepted Hytrek's resignation and appointed Susanne Dempsey-Cook as temporary successor guardian. Appellants did not amend their petition, and Deborah continued to seek removal of the court-appointed guardian. At a later hearing, Deborah stated that the goal of her "petition to remove the state guardians was to have myself and June . . . be appointed as co-guardians." She stated that "in order for June and I to be co-guardians, yes, whoever was in there would have to be removed." Deborah conceded that when Dempsey-Cook was Aimee's guardian, Aimee's needs were being met—Aimee had a place to live, food to eat, clothing, shoes, and access to medical and mental health care providers.

On January 2, 2015, Aimee's guardian ad litem (GAL), Kelly Henry Turner, filed a motion for summary judgment, arguing there was no genuine issue as to any material fact with regard to whether it was in Aimee's best interests for Deborah to be reappointed as Aimee's guardian. In support of her motion, Turner asserted she would offer the evidence previously offered at the hearing on November 7, 2014, regarding appellants' motion to remove restrictions and appellants' motion to quash the psychological evaluation of Deborah, specifically the affidavits of Robert Troyer, Aimee's psychotherapist; the social services director for Sunrise Country Manor (Sunrise), where Aimee resides; and the administrator for Sunrise. Turner asserted she would also offer the evidence previously offered in support of her motion for a "Rule 6-335" psychological evaluation and other relief, dated October 31, 2014, specifically: the GAL report filed August 18; the GAL

report dated May 2, 2011; the clinical notes report filed on February 22; the affidavit of Deborah filed on May 5; and the petition of the Department of Health and Human Services to remove Deborah as guardian filed on October 6. A hearing was held on the matter on February 3, 2015, and the matter was taken under advisement.

On February 27, 2015, the motion for summary judgment was denied because Deborah had been ordered to complete a psychological evaluation to determine her fitness to serve as guardian, and the evaluation had not yet been completed. The court wrote that once Deborah "obtains her psychological evaluation it should address whether [she] is capable of carrying out the duties of being Aimee's Guardian and Conservator. Until the evaluation is completed and the results known there are genuine issues of material facts in this case."

On May 4, 2015, Turner and Dempsey-Cook (collectively appellees) filed a joint motion for summary judgment and requested attorney fees. Appellees moved for summary judgment "for the reason that the pleadings, evidence and affidavits disclose that there is no genuine issue as to any material fact as to whether it is in [Aimee's] best interest for Deborah . . . to be reappointed as Aimee's guardian." Appellees asserted they would support their motion with the same evidence identified in Turner's first motion for summary judgment. The motion sought an order finding it was not in Aimee's best interests for Deborah to be the guardian and conservator, and also sought a finding that the legal proceedings brought by Deborah were frivolous.

A hearing on the motion was held on May 28, 2015. In support of her motion, Turner offered into evidence exhibits 2 through 4, 6, 9, 14, and 15. In opposition to the motion, appellants offered exhibit 16.

Turner offered the affidavit of the administrator for Sunrise, who characterized the relationship between Aimee and Deborah as "co-dependen[t]" and commented that this codependent relationship "stifle[d] Aimee's ability and desire" to improve.

The administrator stated that Deborah often brought prohibited items into the facility, discouraged Aimee from using items provided by Sunrise, and performed activities for Aimee that Aimee should do for herself. Deborah ignored requests from the staff and conducted herself in ways that fed into Aimee's obsessive behaviors.

Turner offered the affidavit of the social services director for Sunrise, who described how differently and independently Aimee acted approximately 11 days after Aimee's contact with Deborah had terminated. The social services director stated her opinion that it was in Aimee's best interests to discontinue contact with Deborah.

Turner offered the affidavit and psychological evaluation of Deborah conducted by Stephanie Peterson on February 13, 2015. Peterson noted that Deborah's ability to serve again as Aimee's guardian "will depend upon her ability to trust and work cooperatively with others capable of clear-eyed assessment of Aimee's needs, abilities and behaviors." Peterson opined that Deborah was not competent to serve as Aimee's legal guardian. Peterson suggested that Deborah "may gain competency" by working with Aimee's current guardian, caregivers, and physicians to understand the elements of Aimee's treatment plan and gain insight regarding her role in Aimee's treatment.

Turner offered the affidavit of Troyer, Aimee's psychotherapist. He met with both Aimee and Deborah in family therapy sessions. He stated that Deborah cleaned Aimee's eyeglasses, lenses and frames, for anywhere from 15 to 45 minutes every session and that Deborah then spent the remainder of the time combing Aimee's hair, leaving little or no time for conversation. Troyer stated that he was in "full agreement" with the recommendations Peterson set forth in Deborah's psychological evaluation.

Appellants offered the affidavit of Deborah's therapist, Kevin Cahill. Cahill provided counseling to Deborah to "help her deal with the issues concerning care for [Aimee]." Appellees

objected to the admission of paragraphs 11 through 13, which contained Cahill's opinion regarding Deborah's qualifications to serve as guardian. Appellees objected on the basis that paragraphs 11 through 13 of Cahill's affidavit were hearsay, lacked proper foundation, and were not relevant.

On July 24, 2015, the court sustained appellees' joint motion for summary judgment. In the order, the court addressed the evidentiary objections, finding, in relevant part, that paragraphs 11 through 13 of Cahill's affidavit lacked foundation as Cahill was only "'generally familiar'" with Aimee's circumstances and his opinion was based upon information Deborah had relayed to him. Deborah was granted the right to visit Aimee where Aimee resided, subject to specific conditions set forth in the order. Deborah filed a notice of appeal on August 24. On February 3, 2016, this court granted Turner's motion for summary dismissal in part, concluding that the summary judgment order was not a final, appealable order because a request for attorney fees was still pending. See *In re Guardianship of Aimee S.*, 24 Neb. App. 230, 885 N.W.2d 330 (2016).

A hearing was held in the county court to determine whether appellants' petition for guardianship was frivolous and whether attorney fees owed the GAL's attorney should be paid by appellants. The GAL's attorney, Turner, Dempsey-Cook, Deborah, and June testified, as did a friend of Deborah's. The relevant portions of this proceeding will be discussed in detail, below.

On December 1, 2016, the county court entered an order finding that appellants' application was frivolous and approving attorney fees for the GAL's attorney. The court awarded attorney fees of $75,906.20 to be paid by Deborah. The December 1 order also appointed Dempsey-Cook as the permanent guardian of Aimee.

On December 6, 2016, Dempsey-Cook filed an application for fees. On December 8, appellants filed a motion to alter or amend the order of the county court. On December 16, a

motion for attorney fees was made for services rendered to Turner by her attorney. On January 13, 2017, Turner filed an application and affidavit to recover fees in her own capacity as the GAL. On May 23, the court entered a journal entry noting, "Pending before the Court are a Motion to Alter or Amend, Motions for Fees, Objections to the Fees, and Objection to the Appointment of . . . Dempsey[-]Cook. . . . [M]atter . . . set [for] an evidentiary hearing on . . . June 22, 2017."

On June 22, 2017, the court denied the motion to alter or amend and set a hearing on August 9 to address the motions for fees. On July 14, appellants filed a notice of appeal, appealing the summary judgment and visitation orders of July 24, 2015, and the order for attorney fees for the GAL's attorney.

Turner filed an amended application for allowance and payment of interim attorney fees on July 26, 2017. The next day, the county court canceled the hearing on all fee applications, finding that the appeal to this court filed by appellants meant the county court was without jurisdiction to consider any of the applications for fees.

On August 4, 2017, Turner filed a motion to reconsider, arguing the court did not lose jurisdiction because appellants filed an appeal from an order that did not comply with Neb. Rev. Stat. § 25-1902 (Reissue 2016). Turner argued that this court would find that it lacked jurisdiction to hear the appeal filed by the appellants because there were pending motions for attorney fees. On August 7, Dempsey-Cook also filed a motion to reconsider, for the same reasons stated by Turner.

III. ASSIGNMENTS OF ERROR

Appellants assert the court erred in finding Deborah was not suited to be appointed as coguardian and coconservator for Aimee and entering summary judgment against Deborah. Appellants assert the court abused its discretion in finding appellants' petition was frivolous and in awarding attorney fees and costs for the attorneys representing the GAL. They also assert the court erred in denying Deborah's motion to

alter or amend without giving her the opportunity to argue the motion.

IV. STANDARD OF REVIEW

[1] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction. *Murray v. Stine*, 291 Neb. 125, 864 N.W.2d 386 (2015).

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. *Thompson v. Johnson*, 299 Neb. 819, 910 N.W.2d 800 (2018).

[2,3] An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record made in the county court. *In re Guardianship & Conservatorship of Barnhart*, 290 Neb. 314, 859 N.W.2d 856 (2015). When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court. *Id.*

[4] A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Hike v. State*, 288 Neb. 60, 846 N.W.2d 205 (2014). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system. *Liberty Dev. Corp. v. Metropolitan Util. Dist.*, 276 Neb. 23, 751 N.W.2d 608 (2008).

[5,6] On appeal, a trial court's decision allowing or disallowing attorney fees for frivolous or bad faith litigation will be upheld in the absence of an abuse of discretion. *SBC v. Cutler*, 23 Neb. App. 939, 879 N.W.2d 45 (2016). When

attorney fees are authorized, the trial court exercises its discretion in setting the amount of the fee, which ruling we will not disturb on appeal unless the court abused its discretion. *In re Guardianship of Brydon P.*, 286 Neb. 661, 838 N.W.2d 262 (2013).

V. ANALYSIS

1. Preliminary Issues

(a) Jurisdiction

Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction. *Murray v. Stine, supra*. We must determine whether the absence of a ruling on certain motions for attorney fees prevents us from acquiring jurisdiction over this appeal.

The county court ruled on appellees' motion for summary judgment on July 24, 2015, and the order was appealed. This court determined that the order was not final because the issue of the fees and costs requested by the attorneys for the GAL had not been resolved. See *In re Guardianship of Aimee S.*, 24 Neb. App. 230, 885 N.W.2d 330 (2016).

Following the dismissal of the previous appeal, the county court heard the request for attorney fees by the GAL's attorney on August 26 and 29, 2016. On December 1, the county court found appellants' application was frivolous and approved fees for the GAL's attorney. On December 6, Dempsey-Cook filed an application for fees. On December 8, appellants filed a motion to alter or amend the judgment. On December 16, the GAL's attorney's law firm filed a motion for attorney fees for services rendered to Turner. On January 13, 2017, Turner filed an application and affidavit to recover fees in her own capacity as the GAL.

On June 22, 2017, the county court denied appellants' motion to alter or amend and set a hearing on the motions for fees. Before the hearing took place, appellants filed a notice of appeal, and the county court determined it was without jurisdiction to rule on the pending motions for fees.

Appellees argue that this court is without jurisdiction to consider this appeal because the three applications for fees filed by Dempsey-Cook, the GAL's attorney's law firm, and Turner were not ruled on prior to appellants' notice of appeal.

[7-9] Attorney fees, where recoverable, are generally treated as an element of court costs. *Murray v. Stine*, 291 Neb. 125, 864 N.W.2d 386 (2015). And an award of costs in a judgment is considered a part of the judgment. *Id.* The Nebraska Supreme Court has stated that a party seeking statutorily authorized attorney fees, for services rendered in a trial court, must make a request for such fees prior to a judgment in the cause. *Id.* When a motion for attorney fees for a frivolous action under Neb. Rev. Stat. § 25-824 (Reissue 2016) is made prior to the judgment, the judgment will not become final and appealable until the court has ruled upon that motion. See *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

In *Murray v. Stine*, 291 Neb. at 127, 864 N.W.2d at 388, the Nebraska Supreme Court found it lacked jurisdiction "[b]ecause of unresolved motions for attorney fees." In that case, the motions for fees were filed after the motion for summary judgment, but before the ruling was made. *Id.*

Due to the nature of this case, there are a number of individuals who incur ongoing costs. If this court was not able to acquire jurisdiction until each of the pending applications for fees was resolved, no party would be able to successfully appeal the county court's order granting summary judgment. Upon our review, we find the summary judgment order became final and appealable after the issue of attorney fees for the GAL's attorney was resolved in the December 1, 2016, order. We note that the timeline of this case is complicated by appellants' motion to alter or amend the judgment; however, the relevant date for jurisdiction is the date of the judgment itself. Each of the pending fee applications was filed after the December 1 order, which distinguishes this case from *Murray v. Stine, supra.* Therefore, we find the applications for fees do not prevent this court from acquiring appellate jurisdiction.

(b) Mootness

The petition filed by appellants sought removal of Hytrek, who resigned in 2014. Dempsey-Cook asserts that because no amended petition was filed, this appeal is moot.

[10] 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 the litigation. *Simms v. Friel*, 25 Neb. App. 640, 911 N.W.2d 636 (2018).

Dempsey-Cook notes that the county court found the petition to be frivolous, in part, because it was never amended to include the name of or specific allegations regarding the guardian who succeeded Hytrek. The petition could have, and perhaps should have, been amended following Hytrek's resignation and the appointment of Dempsey-Cook as the temporary successor guardian. However, at the heart of this case is Deborah's request for the removal of Aimee's court-appointed guardian and her desire to be appointed, along with June, as Aimee's coguardians and coconservators. These issues were presented in the petition and remained at issue during the summary judgment proceedings. Therefore, we find this issue is not moot.

Dempsey-Cook also argues the standard for removal of a guardian pursuant to Neb. Rev. Stat. § 30-2616 (Reissue 2016). She specifically asserts that appellants did not allege or offer any evidence that it was in Aimee's best interests for Dempsey-Cook to be removed as guardian and that therefore, the summary judgment issue must be moot.

Section 30-2616 provides that a person may petition for removal of a guardian on the ground that removal would be in the best interests of the ward. We note that § 30-2616 relates to the removal of a guardian when the protected person is a juvenile. The relevant statutory section for removal of a guardian of an incapacitated person is Neb. Rev. Stat. § 30-2623 (Reissue 2016), which provides that "the court may remove a guardian and appoint a successor if in the best interests of the ward." There is no specific requirement in § 30-2623 that the

issue of best interests related to a specific guardian must be pled. We find the issue is not moot simply because appellants did not plead Aimee's best interests in relation to Dempsey-Cook's service as successor guardian.

(c) Standing

Appellants argue that neither the GAL nor the attorneys for the GAL had standing to bring the summary judgment proceeding or object to the affidavit of Cahill at the time of the hearing, "pursuant to the precedent in In re Guardianship of Brydon P., 286 Neb. 661, 838 N.W.2d 262 (2013)." Brief for appellants at 24. The cited case does not relate to the argument that appellants make and is distinguishable from this case, as it involved guardianship of a minor as defined in chapter 30, article 26, part 2, of the Nebraska Revised Statutes, rather than an incapacitated adult as defined in chapter 30, article 26, part 3, of the Nebraska Revised Statutes.

In their reply brief, appellants again argue that the GAL and her attorneys did not have standing to bring the summary judgment motion or object to the evidence at the hearing, this time referring to *In re Guardianship of Robert D.*, 269 Neb. 820, 696 N.W.2d 461 (2005). In that case, a GAL was appointed for a minor child when the child objected to the termination of a guardianship. The GAL sought clarification of his role, as he could have been appointed as an attorney for the child instead. The court stated that the GAL should also perform the duties of counsel for the child, which could include questioning witnesses. On appeal, the Nebraska Supreme Court stated that a GAL's duties are to investigate the facts and learn where the welfare of his or her ward lies and to report these facts to the appointing court. *Id.*, citing *Betz v. Betz*, 254 Neb. 341, 575 N.W.2d 406 (1998). The Supreme Court in *In re Guardianship of Robert D.* also stated, "A [GAL] may be an attorney, but an attorney who performs the functions of a [GAL] does not act as an attorney and is

not to participate in the trial in an adversarial fashion such as calling or examining witnesses or filing pleadings and briefs." 269 Neb. at 833, 696 N.W.2d at 472, citing *Betz v. Betz, supra*.

In re Guardianship of Robert D., supra, addresses the role of a GAL appointed for a juvenile at trial in a guardianship proceeding. *Betz v. Betz, supra*, addresses the role of a GAL appointed for a juvenile in juvenile cases versus an appointed GAL's role at trial in a dissolution proceeding. Neither of these cases is directly applicable to the facts of this case.

Further, the Legislature has provided that a GAL has the ability to perform certain enumerated duties in certain cases. For example, Neb. Rev. Stat. § 43-272.01 (Reissue 2016) has long provided that a GAL in certain juvenile cases has certain duties, which may include filing petitions on behalf of juveniles, presenting evidence and witnesses, and cross-examining witnesses at all evidentiary hearings. See § 43-272.01(2)(a) through (h) (Reissue 2008). See, also, § 43-272.01(2)(a) through (h) (Reissue 1998). Recently, the Legislature created a statute enumerating a similar set of duties for a GAL in probate cases. See Neb. Rev. Stat. § 30-4203 (Reissue 2016). Section 30-4203 provides that a GAL appointed pursuant to the Nebraska Probate Code may "[c]onduct discovery, present witnesses, cross-examine witnesses, present other evidence, file motions, and appeal any decisions regarding the person for whom he or she has been appointed." Although § 30-4203 became effective in 2016 and is not controlling in this case, there was nothing in the statutes which explicitly prevented a GAL from performing these duties prior to § 30-4203. Further, § 30-4203 is informative of the role that guardians ad litem now play in the Nebraska courts.

We find the statutes and case law applicable to probate proceedings did not prevent the GAL or her attorneys from bringing the summary judgment proceeding or from objecting to evidence at the hearing.

2. Summary Judgment

(a) Court Did Not Err in Granting Summary Judgment

Appellants assert the county court erred in granting the GAL and successor guardian's joint motion for summary judgment.

[11,12] An appellate court will affirm a lower court's grant 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. *Thompson v. Johnson*, 299 Neb. 819, 910 N.W.2d 800 (2018). 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.*

[13] Once the moving party makes a prima facie case, the burden shifts to the party opposing the motion to produce admissible contradictory evidence showing the existence of a material issue of fact that prevents judgment as a matter of law. *Sulu v. Magana*, 293 Neb. 148, 879 N.W.2d 674 (2016).

At the hearing on the motion for summary judgment, appellees offered several affidavits detailing Deborah's interactions with Aimee, as well as health care professionals' observations that Deborah has been unwilling or unable to act in Aimee's best interests. The administrator for Sunrise, where Aimee is admitted, stated her observation that Aimee and Deborah have a "co-dependency" that "stifle[s] Aimee's ability and desire" to make progress. She observed that Deborah ignored requests from the Sunrise administration regarding sanitation standards and the provision of certain restricted items to individuals in Sunrise's care.

The affidavits and reports included recommendations that Deborah not have visits with Aimee until Deborah has made her own progress in individual therapy. Appellees presented

the results of Deborah's psychological evaluation, in which Peterson explicitly states her opinion that Deborah is "not competent to serve as [Aimee's] legal guardian." (Emphasis in original.) This evidence met the burden of proof for summary judgment, establishing that appellees were entitled to judgment if the evidence was uncontroverted at trial. Thus, the burden shifted to Deborah.

The only evidence appellants produced to rebut appellees' evidence was the affidavit of Deborah's therapist, Cahill, which the county court determined could not be considered in its entirety. Appellants assert the county court's ruling, excluding portions of Cahill's affidavit, was "erroneous." Brief for appellants at 28.

Objections were made by the attorneys for appellees on the basis that paragraphs 11 through 13 of Cahill's affidavit were hearsay, lacked proper foundation, and were not relevant. Specifically, appellees argued that Cahill's affidavit did not state the criteria upon which he based his opinion and that Cahill relied upon hearsay from Deborah to form his opinion. The court found that an expert can rely on hearsay to render an opinion, but for a court to receive an expert opinion, "the expert witness must possess competent facts and underlying data for their [sic] opinion."

Cahill stated in his affidavit that he was "generally familiar" with the situation involving Aimee and the circumstances of appellants' application. However, the court found the affidavit was lacking information that Cahill had reviewed Aimee's medical records or that he possessed or reviewed any other information, other than what was provided to him by Deborah.

Appellants assert that it was prejudicial error for the court to sustain the objections to paragraphs 11 through 13. They assert that the statements contained in paragraphs 5 through 10 were sufficient to establish foundation for Cahill's opinion that Deborah was qualified to serve as coguardian and coconservator for Aimee. They assert that if his affidavit had been

received in its entirety, it would have "establishe[d] a genuine issue of material fact." Brief for appellants at 22.

Turner, the GAL for Aimee, submitted a supplemental brief requesting this court to consider a Nebraska Supreme Court opinion published after oral argument, *Freeman v. Hoffman-La Roche, Inc.*, 300 Neb. 47, 911 N.W.2d 591 (2018). Turner argues that Cahill's opinions were not supported by a generally accepted methodology and that Cahill's opinion about best interests was based upon "self-serving statements" of a third party, namely Deborah. Supplemental brief for appellee Turner at 3.

Appellants responded to Turner's supplemental brief, asserting that paragraphs 1 through 13 of Cahill's affidavit set forth his methodology for evaluating Deborah, whereas Peterson's affidavit and report do not contain adequate information regarding her methodology.

[14,15] The record shows that Peterson's affidavit was received without objection for purposes of the summary judgment hearing. Although appellants argue that "[their] counsel objected to . . . Peterson's Affidavit based upon relevancy at the time of the Summary Judgment hearing," the record does not support this assertion. Supplemental brief for appellants at 6. A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal. *In re Estate of Clinger*, 292 Neb. 237, 872 N.W.2d 37 (2015). Any challenge to the receipt of Peterson's affidavit is waived. Further, even if appellants had objected, they did not assign error to the receipt of Peterson's affidavit or argue the designation of Peterson as an expert witness in their initial brief. Errors not assigned in an appellant's initial brief are waived and may not be asserted for the first time in a reply brief. *Linscott v. Shasteen*, 288 Neb. 276, 847 N.W.2d 283 (2014). Making an argument for the first time in a supplemental brief, as in a reply brief, is improper. See *City of Lincoln v. County of Lancaster*, 297 Neb. 256, 898 N.W.2d 374 (2017), citing *Linscott v. Shasteen, supra*. Thus, we will not consider

appellants' argument that Peterson's affidavit failed to set forth an adequate methodology.

[16] Paragraphs 5 and 6 of Cahill's affidavit state that he has provided counseling and therapy for Deborah "at intervals since 2001" and that he is "generally familiar with the situation involving Aimee." There is nothing in the affidavit to indicate that Cahill had any independent, personal knowledge of Aimee's condition, and thus, Cahill had no foundation upon which to assess Aimee's needs and Deborah's ability to meet her needs. Cahill had no basis from which to conclude what might be in Aimee's best interests. Conclusions based upon guess, speculation, conjecture, or choice of possibilities do not create material issues of fact for the purposes of summary judgment; the evidence must be sufficient to support an inference in the nonmovant's favor without the fact finder engaging in guesswork. *Sulu v. Magana*, 293 Neb. 148, 879 N.W.2d 674 (2016).

[17-19] It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his or her opinion about an issue in question. See *Liberty Dev. Corp. v. Metropolitan Util. Dist.*, 276 Neb. 23, 751 N.W.2d 608 (2008). Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable the expert to express a reasonably accurate conclusion, and where the opinion is based on facts shown not to be true, the opinion lacks probative value. *Hike v. State*, 288 Neb. 60, 846 N.W.2d 205 (2014). A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Id.*

The county court did not err in finding that paragraphs 11 through 13 of Cahill's affidavit lacked proper foundation. Because the only evidence Deborah presented regarding her ability to serve as Aimee's coguardian or coconservator is inadmissible, appellants failed to meet their burden to produce

admissible contradictory evidence creating a genuine issue of material fact to rebut appellees' prima facie case.

Appellants' "Petition for Removal of Guardian and Appointment of Successor Co-Guardians and Co-Conservators" set forth specific allegations that Hytrek's continued appointment as guardian was "no longer in the best interests of [Aimee]." Appellants sought removal of Hytrek pursuant to § 30-2616.

Section 30-2616 governs resignation or removal proceedings in cases involving guardians of minors. Appellants should have sought Hytrek's removal under § 30-2623, which provides, "On petition of the ward or any person interested in his welfare, the court may remove a guardian and appoint a successor if in the best interests of the ward." Even if appellants had sought removal of Aimee's guardian under § 30-2623, appellants did not amend their petition following the resignation of Hytrek, so the allegations in the petition did not pertain to the acting successor guardian, Dempsey-Cook. Although this does not make this issue moot, appellants failed to establish a basis for removal of the acting successor guardian. Further, as previously discussed, appellants were unable to provide evidence that Deborah was competent to serve as guardian and appellants offered no evidence that Dempsey-Cook was unfit or unable to perform the duties incumbent upon her. The record shows appellants failed to show that it was in Aimee's best interests to remove Dempsey-Cook as the temporary successor guardian.

We have considered the briefs and supplemental briefs and find, for the foregoing reasons, the county court did not err in granting the joint motion for summary judgment.

(b) "[P]referred [I]ndividual" to Be Appointed as Guardian

Appellants argue that Deborah is a "preferred individual" to be appointed as guardian and/or conservator for Aimee under

Neb. Rev. Stat. § 30-2627 (Reissue 2016). Brief for appellants at 26. Section 30-2627(a) provides that "[a]ny competent person" may be appointed guardian of a person alleged to be incapacitated and that nothing in this subsection prevents spouses, adult children, parents, or relatives of the person alleged to be incapacitated from serving in that capacity. Subsection (b) of § 30-2627 provides that persons who are not disqualified by subsection (a) of § 30-2627 and who exhibit the ability to exercise the powers to be assigned by the court have priority in the order listed. Section 30-2627(b)(4) allows a parent to serve as a guardian.

However, as previously stated, Deborah's psychological evaluation explicitly states Peterson's opinion that Deborah is "not competent to serve as [Aimee's] legal guardian." (Emphasis in original.) In the absence of evidence to contradict Peterson's opinion, Deborah could not meet the listed qualifications for an appropriate guardian under § 30-2627(a). Therefore, she does not have priority to be appointed under § 30-2627(b).

(c) "Limited Evidence" to Support Summary Judgment

Appellants assert the court erred in finding Deborah was not suited to be appointed as coguardian and coconservator for Aimee, "based upon the limited evidence before the county court." Brief for appellants at 24-25. Appellants state that the summary judgment was based upon the affidavits of Troyer and Peterson, whose opinions are "filled with information provided to them by third parties for the purpose of expressing their opinions, without the benefit of cross-examination." *Id.* at 25.

Appellants liken the affidavits of Troyer and Peterson to the affidavit of Cahill. However, the distinction is that Cahill's affidavit seemed to be supported only by his interaction with Deborah and the information she provided him about Aimee. Conversely, Peterson's affidavit was based upon her personal observations of and information received during

Deborah's psychological evaluation. Troyer's affidavit was based upon observations and information received through his personal interactions with Aimee and Deborah in family therapy, as well as his review of the psychological evaluation completed by Peterson, a fellow medical professional. Because portions of Cahill's affidavit were excluded, the affidavits of Troyer and Peterson were the only admissible, relevant evidence regarding Deborah's capability to be Aimee's guardian. Appellants did not meet their burden of proof to show a genuine issue of material fact, and therefore, the court did not err in granting summary judgment based upon the evidence before it.

(d) Opportunity to Cross-Examine Witnesses

Appellants argue that Deborah was not given the opportunity to cross-examine Troyer or Peterson regarding the statements in their affidavits and whether the conclusions were supported by the facts.

[20] Appellants never requested a continuance for the purpose of deposing Troyer or Peterson, nor did they ask the court for an in-court evidentiary hearing. Appellants did not object to Peterson's affidavit for purposes of the summary judgment motion. Appellants did not object to Troyer's affidavit on grounds that there was no opportunity to depose or cross-examine him. An issue not presented to or decided by the trial court is not appropriate for consideration on appeal. *Wayne L. Ryan Revocable Trust v. Ryan*, 297 Neb. 761, 901 N.W.2d 671 (2017). A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal. *In re Estate of Clinger*, 292 Neb. 237, 872 N.W.2d 37 (2015).

(e) Best Interests

Appellants assert that the county court erred in making a determination of the best interests of Aimee on a summary judgment basis and in dismissing Deborah's petition and

appointing Dempsey-Cook as guardian. Appellants acknowledge that the motion for summary judgment sought a finding that it was not in Aimee's best interests for Deborah to be appointed. Appellants then state that the county court "never got to the issue of the best interests of Aimee," because the only evidence offered pertained to Deborah's qualification to serve as guardian. Brief for appellants at 29. It is puzzling for appellants to assert that the court made a determination regarding best interests, and then state that the court never reached this issue. Nonetheless, it appears appellants' argument is that requiring appellants to present the evidence of their entire case on summary judgment gives appellees an unfair advantage at trial. Specifically, appellants argue that the motions for summary judgment were intended to force:

> Deborah . . . to give up all her evidence in support of her Petition prior to trial to the opposing side through affidavit and give the moving parties the unfair opportunity to attempt to contradict all such evidence at trial. Deborah . . . should not be required to give such an advantage to the opposing side.

Id. at 29.

Appellants argue that Deborah provided sufficient evidence on the issue of her competence and qualifications to establish a genuine issue of material fact, "which was all that was required of her at the time of the hearing on the Summary Judgment." *Id.* at 30. Although it is true that appellants were required to establish only a genuine issue of material fact, the record shows that they failed to present sufficient evidence to meet their burden of proof. If Deborah was unable to present any evidence at the summary judgment hearing to support her assertion that she is a competent and qualified person to be Aimee's guardian, then it stands to reason that it is not in Aimee's best interests for Deborah to be appointed as her guardian.

As part of appellants' argument that the court relied upon limited information in determining Deborah was not suitable to be appointed, appellants argue that Deborah "never got

the opportunity to present her evidence to the County Court concerning her qualifications to serve as Co-Guardian and Co-Conservator for [Aimee]." *Id.* at 25. However, this is not an accurate statement. When given the opportunity to present evidence, appellants offered exhibit 16, which was objected to by the GAL and the guardian on hearsay, relevance, and foundation grounds. After a discussion, the court took exhibit 16 under advisement, stating that it would be reviewed and the ruling on the exhibit would be in the court's order. When given the opportunity to do so, appellants offered no further evidence.

It appears that appellants made a strategic decision to be selective in the testimony they offered in opposition to appellees' summary judgment motion. As a result, when the portions of Cahill's affidavit which were crucial to appellants' theory of the case were excluded, appellants were left with no other competent, admissible evidence to rebut the evidence presented by appellees. Nothing prevented appellants from offering additional evidence at the hearing to show why Deborah should be reappointed as Aimee's guardian, but they chose not to do so.

[21] Generally, a party cannot complain of error which the party has invited the court to commit. *Becher v. Becher*, 299 Neb. 206, 908 N.W.2d 12 (2018). Appellants were on notice that Aimee's best interests were at issue in appellees' summary judgment motion. Appellants had the opportunity to present any evidence regarding Deborah's qualifications and Aimee's best interests, but, after presenting only Cahill's affidavit, appellants either had no further evidence or chose to reserve any additional evidence for trial. We find this assignment of error fails.

3. Frivolous Petition

Appellants argue the court abused its discretion in finding appellants' petition was frivolous and in awarding attorney fees to the GAL's attorney.

(a) Petition Was Frivolous

[22] Section 25-824(2) provides generally that a court can award reasonable attorney fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense that a court determines is frivolous or made in bad faith. In the context of § 25-824, a frivolous action is one in which a litigant asserts a legal position wholly without merit; that is, the position is without rational argument based on law and evidence to support the litigant's position. *TFF, Inc. v. SID No. 59*, 280 Neb. 767, 790 N.W.2d 427 (2010). The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous. *Id.*

Appellants argue that the fact that Deborah filed for reappointment as coguardian and coconservator does not make the proceeding frivolous. The record shows that the county court's reasoning for finding the petition was frivolous was not solely based upon the fact that Deborah had been previously appointed as guardian and had relinquished her role.

Section 30-2623 states that a court may remove a guardian and appoint a successor if it is in the best interests of the ward. In its order, the county court listed the nine allegations appellants asserted in their petition in support of their claim that Hytrek's continued appointment as guardian was not in Aimee's best interests. The court found the petition to be frivolous because, based on her testimony, Deborah had no information to substantiate the claims in the petition that Hytrek was not acting in Aimee's best interests. Deborah did not have frequent contact with Hytrek, she did not know whether there was a care plan in place for Aimee, and she did not express any concerns about Hytrek to Hytrek or the staff at Sunrise, Aimee's place of residence. There is ample evidence that the allegations against Hytrek were not brought in good faith, but, rather, they were brought because any appointed guardian would need to be removed before Deborah herself could be reappointed. After Hytrek resigned as guardian,

Dempsey-Cook was appointed to replace her, but the petition was never amended to include specific allegations regarding Aimee's best interests as they related to Dempsey-Cook.

Upon the joint motion for summary judgment filed by appellees, appellants provided no credible evidence that it was in the best interests of Aimee to have Hytrek or Dempsey-Cook removed. In addition, as previously discussed, appellants did not present any credible evidence that Deborah was competent to serve as coguardian.

Further, appellants provided no evidence at all that June was competent to serve as coguardian. June became involved in this case at the request of Deborah, when "[s]he realized that she couldn't do it alone any more, and she wanted to have someone to do it with her." The evidence shows the information June had about Aimee's condition was received secondhand, from Deborah. The evidence shows that the information that Deborah provided to June was not accurate, especially with regard to the condition Aimee was in when Deborah relinquished her role as guardian in 2011.

The record indicates that Deborah made little or no progress toward becoming an effective guardian between relinquishing her role in 2011 and filing the petition in 2013. The county court's order indicates that Deborah knew, or should have known, that her lack of progress would disqualify her from being appointed again at that time, and thus, the petition was frivolous.

Deborah testified that the role of guardian is to do what the ward desires. During the time Deborah acted as Aimee's guardian, Deborah acquiesced to Aimee's desires and Aimee's condition deteriorated to the point that Aimee had not bathed in 2 years, she refused to leave her apartment, and she did not engage in the activities of daily living. The court noted that Deborah's philosophy is what "got Aimee into the condition she was in when she was taken by police to [the hospital] on January 22, 2011." Aimee was found screaming in her apartment, and when she was admitted to the hospital, she

was psychotic, disoriented, and malnourished and her personal hygiene was "badly neglected." These events led to a report to Adult Protective Services, and ultimately, Deborah relinquished her role as guardian of Aimee. Deborah was placed on the "Central Registry," a list for those who have been proved or are suspected to be neglectful or abusive of vulnerable adults. After a review of the case, the record was amended, Deborah's name was removed from the registry, and the record was expunged. The court noted that Deborah struggled with the dual role of being Aimee's mother and her guardian, and it found that for Deborah to be "re-appointed Aimee's Guardian or Co-Guardian, she would have to have overcome the issues that prevented her from meeting Aimee's needs" when she was the guardian.

The psychological evaluation conducted by Peterson shows that Deborah does not currently have the skills to be Aimee's guardian or coguardian, and Peterson stated that Deborah is not competent to serve. It is true that in previous proceedings the court stated that Deborah could apply to be reappointed, but the county court found that it "should be apparent" that if Deborah was the subject of a petition to remove her as Aimee's guardian, then she should address and resolve the issues that led to the petition's being filed before she could be considered for reappointment. The court found that Deborah had not corrected these issues, and this contributed to the court's finding that the petition to remove Hytrek was frivolous.

Appellants had no evidence to support the allegations contained in their petition seeking removal of Hytrek, nor did they have a basis in either fact or law for the removal of Dempsey-Cook. Furthermore, Deborah had not taken any steps to remedy the shortcomings that led to the filing of the petition for her removal as Aimee's guardian. Because appellants' position was without rational argument based on law and evidence, the petition was frivolous and the county court did not err in so finding.

(b) Award of Attorney Fees

[23] On appeal, a trial court's decision allowing or disallowing attorney fees for frivolous or bad faith litigation will be upheld in the absence of an abuse of discretion. *Central Neb. Pub. Power Dist. v. North Platte NRD*, 280 Neb. 533, 788 N.W.2d 252 (2010).

In determining the amount of "a cost or an attorney's fee award" pursuant to § 25-824, the court shall exercise its sound discretion. Neb. Rev. Stat. § 25-824.01 (Reissue 2016). When granting an award of attorney fees and costs, the court shall specifically set forth the reasons for such award. In determining whether to assess attorney fees and costs and the amount to be assessed against offending attorneys and parties, the court considers a number of factors, including, but not limited to, the 10 factors listed in § 25-824.01. This court found that the petition was frivolous, pursuant to § 25-824.01(1) through (3), (5) through (7), and (10), and that the GAL's attorney fees should be paid by appellants. Specifically, the court found that Deborah should be responsible for the fees, because June joined the petition as a friend of Deborah and June was unaware of many of the crucial details of this case.

The evidence shows that appellants failed to make an effort to determine the validity of their claims; failed to amend the petition to reflect the resignation of Hytrek; and failed to dismiss the claims that were found to be invalid. The court ruled against Deborah in many material motions in this case. Each of these factors support the court's imposition of reasonable attorney fees and costs of Turner's counsel.

Appellants argue Deborah should not be held responsible for attorney fees for the attorney representing the GAL, because, they assert, Turner exceeded the scope of her role in these proceedings. Appellants cite case law regarding the role of a GAL in juvenile court, acknowledging that Nebraska law has been modified by statute, specifically allowing a GAL to conduct discovery, present and cross-examine witnesses, present other evidence, file motions, and appeal any decisions regarding the

person for whom he or she has been appointed. As previously discussed, the cases cited by appellants involve juveniles, rather than an incapacitated adult. Neb. Rev. Stat. § 30-2620.01 (Reissue 2016) provides for the "reasonable fees and costs" of an attorney, a GAL, a physician, and a visitor appointed by the court for the person alleged to be incapacitated, which may be assessed against a petitioner upon a showing that the action was frivolous.

At the hearing on August 22 and 29, 2016, Turner testified that this is "by far one of the more time-consuming and complex cases" she has been involved in due, in part, to the number of motions to respond to and the "litigious nature of the parties in trying to just ensure the best interest of the ward is being met." We found, above, that the county court did not abuse its discretion in determining that the petition was frivolous. Due to the ongoing nature of this case, and the numerous overlapping proceedings, we find the court could reasonably conclude that a GAL's attorney fees are included in the definition of "reasonable fees and costs" incurred by an appointed GAL. We affirm the county court's award of attorney fees.

Appellants also argue that the county court made an error of law concerning the source of fees and costs for the GAL and that "the only way for the attorneys for the [GAL] to be paid for their services was for the County Court to assess attorney's fees and costs against Deborah . . . on the basis of a frivolous proceeding." Brief for appellants at 35. As previously discussed, the GAL's fees were within the scope of reasonable fees and costs incurred as a result of this proceeding, which was determined to be frivolous. To the extent that appellants argue that they should not have to reimburse the county for the fees already paid, this alleged error was not specifically assigned and specifically argued, and therefore, we will not address it. See *Fetherkile v. Fetherkile*, 299 Neb. 76, 907 N.W.2d 275 (2018) (to be considered by appellate court, alleged error must be both specifically assigned and specifically argued in brief of party asserting error).

(c) Denial of Motion to Alter or Amend

Appellants assert that Deborah was denied substantive and procedural due process, because their motion to alter or amend was overruled without a hearing, and that appellants were denied substantive and procedural due process, because the motion was not heard by the same judge who heard the matter and issued the orders of July 24, 2015, and December 1, 2016.

In support of their argument, appellants cite *Newman v. Rehr*, 10 Neb. App. 356, 630 N.W.2d 19 (2001), in which the issue was whether a replacement or substitute judge may enter the judgment that the former judge indicated he or she would have entered. This case is distinguishable. The record shows that Judge Susan M. Bazis presided over the hearings on appellees' summary judgment and fee motions. She decided each of these motions and entered orders and judgments accordingly.

Judge Marcena M. Hendrix presided over the hearing on March 27, 2017. At a hearing on May 23, Judge Derek R. Vaughn informed the parties that Judge Stephanie S. Shearer would be the permanent judge in this case. At the hearing on June 22, Judge Shearer stated she would be assuming Judge Bazis' caseload, including this case, going forward. During that hearing, Judge Shearer stated that she had reviewed the record and the findings of Judge Bazis and determined that she did not need to hear argument on appellants' motion to alter or amend. At that point, the motion was overruled. Appellants cite no case law to support their position that a motion to alter or amend cannot be ruled on by a judge other than the judge who entered the judgment.

Appellants assert that they were "unfairly surprised" by Judge Shearer's ruling on the motion, because they had been "advised that no substantive matters would be addressed at that hearing." Brief for appellants at 39. Appellants cite no case law for the proposition that it is a violation of procedural or

substantive due process to overrule a motion without receiving oral argument, and we know of no authority requiring a judge to hold a hearing on a motion to alter or amend. Thus, we find the court's decision to rule on the motion to alter or amend at the June 22, 2017, hearing without allowing further argument on the motion does not violate appellants' substantive and procedural due process rights.

VI. CONCLUSION

We find the county court did not err in granting appellees' joint motion for summary judgment or in overruling appellants' motion to alter or amend. We find the court did not abuse its discretion in finding appellants' petition was frivolous or in awarding attorney fees. We therefore affirm the judgment of the county court.

Affirmed.

In re Interest of Joshua G., a child under 18 years of age. State of Nebraska, appellee, v. Fred G., appellant.

919 N.W.2d 541

Filed October 9, 2018. No. A-17-1309.

1. **Parental Rights: Notice.** Proceedings to terminate parental rights must employ fundamentally fair procedures satisfying the requirements of due process; this rule applies to notice requirements.
2. **Parental Rights: Due Process: Notice: Jurisdiction.** In proceedings to terminate parental rights, once the court acquires jurisdiction over the person, due process still requires that such person be afforded reasonable notice of further proceedings.
3. **Service of Process: Notice.** Service by publication under Neb. Rev. Stat. § 43-268(2) (Reissue 2016) can be made only after a reasonably diligent search fails to locate the party to be served.
4. ____: ____. A reasonably diligent search for the purpose of justifying service by publication does not require the use of all possible or conceivable means of discovery, but is such an inquiry as a reasonably prudent person would make in view of the circumstances and must extend to those places where information is likely to be obtained and to those persons who, in the ordinary course of events, would be likely to receive news of or from the absent person.
5. ____: ____. Whether all reasonable means to qualify a search as a "reasonably diligent" one have been exhausted must be determined by the circumstances of each particular case.

Appeal from the County Court for Scotts Bluff County: James M. Worden, Judge. Affirmed.

Darin J. Knepper, Deputy Scotts Bluff County Public Defender, for appellant.

Danielle Larson, Deputy Scotts Bluff County Attorney, for appellee.

Moore, Chief Judge, and Bishop and Arterburn, Judges.

Arterburn, Judge.

INTRODUCTION

Fred G. appeals the order of the county court for Scotts Bluff County which terminated his parental rights to his son, Joshua G. On appeal, Fred asserts that he was not provided with proper notice of the termination proceedings because the State's affidavit for service by publication was legally insufficient. As a result, Fred argues he was denied his due process right to participate in the termination proceedings. For the reasons set forth herein, we find Fred's assertion to be without merit, and we affirm the decision of the county court to terminate his parental rights.

BACKGROUND

The juvenile court proceedings below involve Joshua, born in January 2015, and his parents, Fred and Martha H. Martha previously relinquished her parental rights to Joshua. As a result, she is not a party to this appeal and will be discussed only to the extent necessary to provide context.

On May 10, 2016, when Joshua was almost 18 months old, the State filed a juvenile court petition alleging that Joshua was a juvenile as described by Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2015) due to the faults or habits of both Fred and Martha. Specifically, the petition alleged that Fred and Martha had failed to provide Joshua with safe and stable housing and with necessary care. In addition, it alleged that Joshua was at risk for harm due to Fred and Martha's engaging in domestic violence and using illegal substances. Fred was personally served with the petition.

A first appearance hearing was held on May 19, 2016. Fred appeared at this hearing, affirmed that he had been personally

served with a copy of the petition, and entered a denial to the allegations contained within the petition. Fred appeared at a subsequently held hearing in July, in order to contest Joshua's placement with his maternal grandparents.

Fred appeared in the county court again on August 15, 2016. At that time, a contested adjudication hearing was held. At this hearing, the State presented evidence that Fred had been repeatedly arrested for assaulting Martha, including on one occasion after the juvenile court petition had been filed and an active protection order was in place. Fred had been in jail since February. The State offered evidence to demonstrate that Fred used methamphetamine.

Fred testified at the hearing and denied that he was currently using drugs. However, he admitted to assaulting Martha. He testified that on one occasion, they got into an altercation and, while holding Joshua, Fred "hit [Martha] right in the eye as hard as [he] possibly could [and] gave her . . . basically two black eyes from it." He testified that he had recently been released from jail and was renting a two-bedroom house. Ultimately, the county court adjudicated Joshua as a child within the meaning of § 43-247(3)(a) as to Fred.

Subsequent hearings were held in September and December 2016 and in February and April 2017. Fred appeared at and participated in each of these hearings. Shortly after the April 2017 hearing, Fred appeared at an office of the Department of Health and Human Services (the Department) and indicated he wished to relinquish his parental rights to Joshua. He filled out all of the necessary paperwork, but then admitted that he was under the influence of drugs and, in fact, had taken drugs right before arriving. As a result of this admission, the Department could not accept Fred's relinquishment.

At a hearing in July 2017, Fred did not appear. The State offered evidence which demonstrated that Fred had not participated in any services, including visitation with Joshua, since April. In addition, Martha informed the court that Fred

was no longer in Nebraska and that she did not believe he was going to return. She stated, "[H]e works in Cheyenne, Wyoming, and he stays between there and Fort Collins, Colorado."

On September 13, 2017, the State filed a motion to terminate Fred's parental rights to Joshua. At a subsequent hearing, the State informed the county court that it had been unable to serve Fred with the motion to terminate "because nobody knows his address."

The State filed a motion for service by publication on October 12, 2017. In the motion, the State alleged that "service cannot be made upon [Fred] with reasonable diligence by either personal service or by leaving notice of summons at [Fred's] usual place of residence which is unknown at this time." Attached to the motion was an affidavit which alleged, among other things, that the State had attempted, unsuccessfully, to serve Fred at his last known address in Nebraska. The State also alleged that the Department had not had contact with Fred since April and that he was believed to be somewhere in Cheyenne, Wyoming.

The county court granted the State's motion to serve Fred by publication. Notice of the motion to terminate Fred's parental rights to Joshua and the date of the scheduled hearing on the motion was published in a Scottsbluff, Nebraska, newspaper on October 22 and 29 and November 5, 2017.

After the State had published notice of the motion to terminate Fred's parental rights, Fred's court-appointed counsel filed a document disclosing potential witnesses for the termination hearing. Included in the list of potential witnesses was Fred.

The termination hearing was held on November 20, 2017. Fred did not appear at the hearing. At the start of the hearing, the county court noted that Fred's counsel had previously filed a motion to continue the hearing, but that the motion had been denied. A copy of the motion to continue is not included in our record. The State offered into evidence an exhibit

demonstrating that Fred had been served "via publication." Fred's counsel did not object to the exhibit.

The State went on to present evidence in support of its motion to terminate Fred's parental rights. Part of the State's evidence addressed Fred's current whereabouts. The Department caseworker assigned to the family's case, Breanna Bird, testified that she had not had any contact with Fred from April 2017 to approximately 2 weeks prior to the termination hearing. At that time, she was able to reach Fred on the telephone. She indicated that Fred refused to tell her where he was, but he did say he was "in a different time zone." Bird testified that she did inform Fred that a motion to terminate his parental rights had been filed. However, she could not provide any more details because Fred immediately indicated that he was at work and could not talk at that time. He told Bird that he would be able to speak after work. However, when Bird called him back later, Fred did not answer.

Bird also testified that in July 2017, Martha told her that both she and Fred were residing in Wyoming. However, Martha also told Bird that she was "wanting to leave Fred there." By September, when the motion to terminate Fred's parental rights was filed, Martha told Bird that she did not know where Fred was. She thought he might be back in Nebraska, but had not had any contact with him.

Other evidence revealed that after April 2017, Fred had sent text messages to Joshua's foster mother to ask about Joshua. However, the text messages stopped about a month prior to the termination hearing and Joshua's foster mother did not know where Fred was located.

At the close of the State's evidence, Fred's counsel asked that the county court not terminate Fred's parental rights at that time so that Fred could participate in subsequent hearings. Counsel indicated, "[Fred] was unable to be back for his hearing." Ultimately, the county court entered an order terminating Fred's parental rights to Joshua.

Fred appeals from the county court's order.

ASSIGNMENT OF ERROR

On appeal, Fred asserts that the State's affidavit for service by publication was legally insufficient and that, as a result, he was denied due process because he did not receive proper notice of the termination proceedings.

ANALYSIS

In its brief to this court, the State argues that Fred has waived his objections to any insufficiency in the service of process because he failed to object to the service at any time prior to the conclusion of the termination hearing. Specifically, the State argues:

> Despite ample opportunities to raise issue with the form of service in this case, counsel for the father waited until quite literally the very end of the line. Allowing represented parties to wait until after the conclusion of the case on the merits to raise issue with the beginning of the case is against public policy, ideas about judicial efficiency, and case law.

Brief for appellee at 7.

While the State's argument regarding whether Fred has waived any objection to the service is well taken, we need not decide the issue of waiver in this case. Our record on appeal clearly provides sufficient evidence to demonstrate that the State conducted a reasonably diligent search for Fred and that service by publication was proper.

Our record discloses that Fred was personally served with the juvenile court petition filed by the State. In addition, he was present personally at many of the various hearings held by the county court, commencing with the first appearance hearing in May 2016 and continuing through a review hearing in April 2017. Even after Fred stopped appearing at the hearings, his court-appointed counsel continued to appear on his behalf. Therefore, there is no question as to the court's jurisdiction over Fred. However, Fred was still entitled to notice that a motion to terminate his parental rights had been filed and when

the hearing was to be held on that motion. Neb. Rev. Stat. § 43-267(2) (Reissue 2016) provides:

> Notice of the time, date, place, and purpose of any juvenile court hearing subsequent to the initial hearing, for which a summons or notice has been served or waived, shall be given to all parties either in court, by mail, or in such other manner as the court may direct.

[1,2] In addition, the Nebraska Supreme Court has held that proceedings to terminate parental rights must employ fundamentally fair procedures satisfying the requirements of due process. *In re Interest of A.G.G.*, 230 Neb. 707, 433 N.W.2d 185 (1988). This rule applies to notice requirements. *Id*. Once the court acquires jurisdiction over the person, as it did in this case, due process still requires that such person be afforded reasonable notice of further proceedings. However, we note that once a person has appeared and has been afforded the benefit of counsel, that person has an obligation to keep counsel and the court informed of his or her whereabouts. See *id*. This Fred failed to do. In fact, evidence in our record suggests that Fred was actively evading the State's efforts to locate him.

Because Fred removed himself from the state in the middle of the juvenile court proceedings and failed to provide anyone with his contact information, the State was unable to serve him with the motion to terminate his parental rights either personally or by mail. As a result, the State requested the court's permission to serve the motion by publication.

[3] Neb. Rev. Stat. § 43-268(2) (Reissue 2016) provides for service by publication in juvenile court proceedings as follows:

> [N]otice, when required, shall be given in the manner provided for service of a summons in a civil action. Any published notice shall simply state that a proceeding concerning the juvenile is pending in the court and that an order making an adjudication and disposition will be entered therein. . . . Such notice shall be published once

> each week for three weeks, the last publication of which shall be at least five days before the time of hearing.

Notice "in the manner provided for service of summons in a civil action," as described in § 43-268(2), is provided for in Neb. Rev. Stat. § 25-517.02 (Reissue 2016), which provides that service may be made by publication "[u]pon motion and showing by affidavit that service cannot be made with reasonable diligence by any other method provided by statute . . . ." Accordingly, service by publication under § 43-268(2) can be made only after a reasonably diligent search fails to locate the party to be served. See *In re Interest of A.W.*, 224 Neb. 764, 401 N.W.2d 477 (1987).

The crux of Fred's argument on appeal is that the State did not sufficiently demonstrate that it had conducted a reasonably diligent search to locate him and that, as a result, notice by publication was not proper. Upon our review of the record, we find that Fred's assertion lacks merit.

[4,5] A reasonably diligent search for the purpose of justifying service by publication does not require the use of all possible or conceivable means of discovery, but is such an inquiry as a reasonably prudent person would make in view of the circumstances and must extend to those places where information is likely to be obtained and to those persons who, in the ordinary course of events, would be likely to receive news of or from the absent person. *In re Interest of A.W., supra*. Whether all reasonable means to qualify a search as a "reasonably diligent" one have been exhausted must be determined by the circumstances of each particular case. *Id.*

In the State's affidavit in support of its request to provide notice by publication, it indicated that it had attempted to serve Fred with the motion to terminate his parental rights at his last known address in Nebraska. However, he was no longer at that address and, in fact, had not had contact with the Department for approximately 5 months. In addition, the affidavit indicated that Fred was "believed to be somewhere in Cheyenne, Wyoming, although an exact address is unknown."

The affidavit also detailed the Department's attempt to determine Fred's whereabouts through Martha. This attempt was not successful.

In determining whether the State conducted a reasonably diligent search for Fred, we also look to the evidence adduced at the termination hearing. That evidence reveals that by September 2017, when the motion to terminate Fred's parental rights was filed, Martha was no longer residing with Fred and did not know where he could be located. Previously, she had indicated that Fred was somewhere between Cheyenne, Wyoming, and Fort Collins, Colorado. She also indicated that Fred had been "hiding" from a warrant. Joshua's foster mother had received periodic text messages from Fred since his last contact with the Department, but she too did not know where Fred was residing.

In addition, when Bird was finally able to contact Fred by telephone 2 weeks prior to the termination hearing, Fred affirmatively declined to provide her with his address, instead simply indicating that he was "in a different time zone." During that same telephone call, Bird informed Fred that a motion to terminate his parental rights had been filed. Fred immediately ended the conversation before Bird could provide him with details about the scheduled hearing on the motion. Fred did not answer Bird's followup telephone call.

Given all of the evidence, we find that the State conducted a reasonably diligent search to locate Fred in order to serve him with the motion to terminate his parental rights. Of particular importance to our finding is that Fred voluntarily removed himself from Nebraska and from Joshua, knowing that the juvenile court proceedings were pending. After participating in the proceedings for months, Fred failed to provide his attorney, the court, or the Department with any contact information. And, based on Fred's telephone conversation with Bird just prior to the hearing, it appears that Fred was purposefully evading the State's diligent efforts to locate him. There is nothing in our record to indicate that Fred took any steps to

learn more about the motion to terminate his parental rights or the hearing on the motion after he was informed that the motion had been filed.

The State attempted to contact Fred through Martha, who presumably is the most likely person known to the State to have received any information about Fred's whereabouts. However, it is clear from our record that by the time the State filed the motion to terminate Fred's parental rights, Martha denied having any knowledge of Fred's location.

Despite the State's reasonably diligent efforts, it was unable to determine what state Fred was living in, let alone his specific physical address. The county court's decision to allow the State to serve the motion to terminate through publication is adequately supported by the record.

CONCLUSION

Upon our review, we find that the State made a reasonably diligent search for Fred in order to notify him of the pending termination proceedings. Because the State was unable to locate Fred after that search, service by publication was proper and Fred was not denied his right to due process. After the service by publication was completed, the county court held a termination hearing where it heard evidence and ultimately terminated Fred's parental rights. Fred does not challenge the sufficiency of the evidence to terminate his parental rights. We affirm the order of the county court in all respects.

Affirmed.

State of Nebraska on behalf of Kaaden S., a minor child, appellee, v. Jeffery T. appellant, and Mandy S., appellee.

920 N.W.2d 39

Filed October 16, 2018. No. A-17-1210.

1. **Paternity: Appeal and Error.** In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the 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.
2. **Minors: Names: Appeal and Error.** An appellate court reviews a trial court's decision concerning a requested change in the surname of a minor de novo on the record and reaches a conclusion independent of the findings of the trial court.
3. **Contempt: Appeal and Error.** 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 are reviewed for abuse of discretion.
4. **Paternity: Attorney Fees: Appeal and Error.** In a paternity action, attorney fees are reviewed de novo on the record to determine whether there has been an abuse of discretion by the trial judge, and absent such an abuse, the award will be affirmed.
5. **Modification of Decree: Divorce: Child Custody.** If trial evidence establishes a joint physical custody arrangement, courts will so construe it, regardless of how prior decrees or court orders have characterized the arrangement.

6. **Child Custody.** The amount of time children spend with each parent is less important than how the time is allocated when determining whether joint physical custody exists.
7. **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.
8. **Child Custody.** Joint physical custody should be reserved for those 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, rather than perpetuating turmoil or custodial wars.
9. **Child Custody: Evidence.** When considering joint custody, the focus is on the parents' ability to communicate with each other and resolve issues together.
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 Support: Rules of the Supreme Court: Appeal and Error.** The Nebraska Child Support Guidelines, specifically Neb. Ct. R. § 4-215(B) (rev. 2011), estimate $480 as an ordinary amount of nonreimbursed medical expenses, and that figure is then subsumed within the amount of child support that is ordered.
12. **Minors: Names.** The question of whether the name of a minor child should be changed is determined by what is in the best interests of the child.
13. **Minors: Names: Proof.** The party seeking the change in surname has the burden of proving that the change in surname is in the child's best interests.
14. **Minors: Names.** In Nebraska, there is no preference for a surname—paternal or maternal—in name change cases; rather, the child's best interests is the sole consideration.
15. ____: ____. Nonexclusive factors to consider in determining whether a change of surname is in a child's best interests are (1) misconduct by one of the child's parents; (2) a parent's failure to support the child; (3) parental failure to maintain contact with the child; (4) the length of time that a surname has been used for or by the child; (5) whether the child's surname is different from the surname of the child's custodial parent; (6) a child's reasonable preference for one of the surnames; (7) the effect of the change of the child's surname on the preservation and

development of the child's relationship with each parent; (8) the degree of community respect associated with the child's present surname and the proposed surname; (9) the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; and (10) the identification of the child as a part of a family unit.

16. **Contempt: Sentences.** A civil sanction is coercive and remedial; the contemnors carry the keys of their jail cells in their own pockets, because the sentence is conditioned upon continued noncompliance and is subject to mitigation through compliance.
17. **Criminal Law: Contempt: Sentences.** A criminal sanction is punitive; the sentence is determinate and unconditional, and the contemnors do not carry the keys to their jail cells in their own pockets.
18. **Contempt.** In order for the punishment to retain its civil character, the contemnor must, at the time the sanction is imposed, have the ability to purge the contempt by compliance and either avert punishment or, at any time, bring it to an end.
19. ____. A fine is an appropriate sanction in a civil contempt proceeding so long as the contemnor may avoid the fine by complying with the court's order.
20. ____. An unconditional fine is not an appropriate sanction in a civil contempt proceeding because the contemnor is unable to avoid the fine through his or her conduct.

Appeal from the District Court for Jefferson County: Ricky A. Schreiner, Judge. Affirmed in part, vacated in part, and in part reversed and remanded with directions.

Ronald R. Brackle for appellant.

Angelica W. McClure, of Kotik & McClure Law, for appellee Mandy S.

Pirtle, Riedmann, and Welch, Judges.

Riedmann, Judge.

INTRODUCTION

Jeffery T. appeals the order of the district court for Jefferson County which awarded custody, parenting time, and child support regarding the minor child Jeffery shares with Mandy S. The court also held Mandy in contempt of court

and imposed a fine of $50. For the reasons that follow, we affirm in part, vacate in part, and in part reverse and remand with directions.

BACKGROUND

Jeffery and Mandy are the parents of a minor child, Kaaden S., born in June 2014. They were never married and did not have a relationship prior to conception of the child. Jeffery was present at the hospital on the day Kaaden was born, but he claims that Mandy would not allow him to be part of Kaaden's life after that time and repeatedly insisted that he was not Kaaden's father. On the other hand, Mandy alleges that she notified Jeffery when she learned she was pregnant but that he refused to be involved other than attending one medical appointment and Kaaden's birth.

In August 2014, Jeffery contacted an attorney with the Nebraska Department of Health and Human Services in order to commence the present paternity action. Thus, the State filed a complaint on February 17, 2015, asking the court to establish paternity of Kaaden and order child support. Jeffery filed a cross-claim requesting that the court enter a custody order and change Kaaden's last name from Mandy's surname to Jeffery's surname. Genetic testing subsequently confirmed that Jeffery was Kaaden's biological father.

During the pendency of this action, Jeffery continued to have difficulty visiting Kaaden. In October 2015, Mandy began allowing Jeffery to have supervised visits with Kaaden for 1½ hours per week. At some point in 2015, Jeffery began paying voluntary child support to Mandy. In June 2016, the district court entered a temporary order ordering Jeffery to pay $694 per month in child support and awarding him supervised visitation for 60 days. After the initial 60 days, Mandy was to have primary physical custody and Jeffery received unsupervised parenting time every other weekend from Friday at 6 p.m. until Sunday at 6 p.m. and each Wednesday from 5 until 7 p.m. Despite the temporary order, Mandy refused

to allow Jeffery to have overnight visits with Kaaden, and at some point, she terminated Jeffery's Wednesday evening visits as well.

Around the time Jeffery's contact with Kaaden increased, Kaaden began exhibiting escalating behavior problems, such that Mandy began taking him to see a counselor in November 2016. The counselor initially diagnosed Kaaden with "separation trauma and extreme anxiety," but testified at trial that Kaaden experienced significant growth during the 5 months that she worked with him. She also opined that Mandy had "significant unresolved issues" toward Jeffery and recommended that Mandy participate in treatment to address her emotional trauma. The counselor believed, as of the time of trial, that it was best for Kaaden that contact between Jeffery and Mandy be limited.

At the same time Kaaden's behavior began changing, the already tense relationship between Jeffery and Mandy also started to deteriorate. On November 30, 2016, Jeffery audio recorded an exchange with Mandy when he was returning Kaaden from a visit. During the exchange, Mandy can be heard yelling at Jeffery and belittling his attempts at building a relationship with Kaaden. Mandy made clear that she did not want Jeffery in Kaaden's life and believed Jeffery's efforts at being a father to Kaaden were harmful to the child. At the conclusion of the recording, Mandy sprayed Jeffery in the face with pepper spray and apparently called the police on him. Jeffery was met at his residence by two sheriff's deputies, but after Jeffery played the recording for them, they did not arrest him. At trial, Mandy acknowledged that after the November 2016 incident, she did not try to communicate with Jeffery about Kaaden and said that it became even more difficult for the two of them to communicate at all.

In January 2017, Jeffery filed a motion to hold Mandy in contempt of court for denying him the parenting time awarded in the temporary order and refusing to provide him with Kaaden's medical information. Trial on the issues of custody,

parenting time, child support, and the contempt motion was held on May 9. At trial, Jeffery explained that he was requesting primary physical custody of Kaaden, and he believed that such an arrangement would be in Kaaden's best interests. He testified that if awarded custody, he would support Kaaden's relationship with Mandy and adhere to any visitation order the court imposed.

The evidence established that throughout the case, Mandy would allow Jeffery some daytime visits with Kaaden, but she permitted only two weekends of overnight visitation, both of which occurred in April 2017. The evidence additionally established that after the November 2016 recorded incident, she refused to allow Jeffery to see Kaaden again until December 24 and 31, and further denied him the extended overnight holiday visits allocated to him in the temporary order. Mandy admitted that she did not adhere to the temporary order, but she said that she denied overnight visits because Kaaden was scared and not ready for them and that she was following the recommendations of Kaaden's therapist. During the pendency of the matter, the parties attempted mediation twice, but were unsuccessful in reaching an agreement. Mandy admitted that she refused to even sit in the same room as Jeffery at both mediation sessions.

After trial, the district court entered an order on custody, parenting time, child support, and contempt. The court observed that Mandy loves Kaaden but that she wants nothing to do with Jeffery, nor does she want Kaaden to have anything to do with Jeffery. The court recognized that Jeffery complained that Mandy intentionally withheld his parenting time from him and was openly hostile during exchanges of Kaaden. The court cited the November 2016 exchange as an example of Mandy's hostility toward Jeffery, noting that Mandy "launched into a vulgar and accusatory tirade directed at Jeffery before spraying him in the face with pepper spray." The district court found that Mandy had been Kaaden's primary caregiver since birth, but the fact that she has had more time to parent

Kaaden and may have developed a stronger relationship with him appears entirely due to her absolute unwillingness to allow Jeffery to be involved in Kaaden's life. Nonetheless, the court determined that in the limited time Jeffery has had with Kaaden, he has managed to form a relationship and bond with Kaaden and parents him appropriately. The court found that although Kaaden "fusses" during exchanges with Jeffery, Kaaden appears to adjust well once in Jeffery's care, and that both parents adequately provide for Kaaden's welfare and appear concerned with his continued development.

The district court concluded that Jeffery was a fit and proper person to have custody of Kaaden, but that the complicating factor in this case is the lack of a relationship between Jeffery and Mandy, as well as Mandy's "obvious resentment" toward Jeffery and the situation. The court found that Mandy appears to do everything she can to limit or monitor Jeffery and Kaaden's relationship and has done everything in her power to prevent Jeffery from being a father to Kaaden. Although it is obvious that Mandy loves Kaaden, the court observed that her anger toward Jeffery "clouds her judgment" regarding what is in Kaaden's best interests at times, especially when it comes to allowing Jeffery to be involved in Kaaden's life.

The district court appointed a guardian ad litem (GAL) in April 2017, and in its order, the court found that the GAL's report was thorough and well-reasoned. The court observed the GAL reported that Mandy's obstructive behavior continued after trial and that it was her opinion those behaviors were detrimental to Kaaden's well-being. The court observed that the GAL recommended placing primary custody of Kaaden with Jeffery and that she felt "'completely confident'" in that recommendation.

The district court iterated that during the pendency of this matter, it attempted to encourage Mandy "to see past her hurt, fear, and anger" and allow Kaaden to have Jeffery in his life, but it appeared that her behavior had not changed and that she was still placing "more value on her hate and anger than she

[was] on Kaaden's ability to have a father actively engaged in his life."

Based on the foregoing and with the "firm belief that doing so best ensures compliance with the order of custody so that Kaaden can enjoy the full benefits of having both parents involved in his life to the greatest degree possible," the court concluded that it was in Kaaden's best interests to place his primary legal and physical custody with Jeffery subject to liberal parenting time with Mandy. The parties were therefore awarded alternating weekly parenting time. The court utilized the joint physical custody worksheet and ordered Jeffery to pay child support of $93 per month and the first $480 of Kaaden's nonreimbursed health care costs. The court's order did not specifically deny Jeffery's request to change Kaaden's last name, but the order states that any request for relief by any party not specifically granted by the order was denied. The district court also found Mandy in willful contempt of the court's temporary order and imposed a fine of $50.

Thereafter, Jeffery filed a motion to alter or amend, which the court denied. Jeffery timely appeals to this court.

ASSIGNMENTS OF ERROR

Jeffery assigns that the district court erred in (1) awarding in substance joint physical custody; (2) ordering him to pay child support, using the joint custody worksheet, and ordering him to pay the first $480 of Kaaden's health care costs; (3) failing to order Mandy to pay child support; (4) failing to change Kaaden's last name; (5) failing to fine Mandy in a greater amount for her contempt of court; and (6) refusing to award him attorney fees.

STANDARD OF REVIEW

[1] In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review,

when the evidence is in conflict, the 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. *Derby v. Martinez*, 24 Neb. App. 17, 879 N.W.2d 58 (2016).

[2] An appellate court reviews a trial court's decision concerning a requested change in the surname of a minor de novo on the record and reaches a conclusion independent of the findings of the trial court. *State on behalf of Connor H. v. Blake G.*, 289 Neb. 246, 856 N.W.2d 295 (2014).

[3] 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 are reviewed for abuse of discretion. *State on behalf of Mariah B. & Renee B. v. Kyle B.*, 298 Neb. 759, 906 N.W.2d 17 (2018).

[4] In a paternity action, attorney fees are reviewed 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). Absent such an abuse, the award will be affirmed. *Id.*

ANALYSIS

Joint Physical Custody

Jeffery first argues that the court abused its discretion in essentially awarding joint physical custody. We agree and determine that even though the district court stated that it was awarding primary physical custody to Jeffery, the court awarded de facto joint physical custody. We additionally conclude that an award of joint physical custody was an abuse of discretion given our de novo review of the record and the court's factual findings. We therefore reverse that portion of the court's order and remand the cause for a modification of

Mandy's parenting time consistent with an award of primary physical custody to Jeffery.

[5] If trial evidence establishes a joint physical custody arrangement, courts will so construe it, regardless of how prior decrees or court orders have characterized the arrangement. *Hill v. Hill*, 20 Neb. App. 528, 827 N.W.2d 304 (2013). "Joint physical custody means mutual authority and responsibility of the parents regarding the child's place of residence and the exertion of continuous blocks of parenting time by both parents over the child for significant periods of time." Neb. Rev. Stat. § 43-2922(12) (Reissue 2016).

[6] In *Hill v. Hill, supra*, this court outlined several cases discussing how to distinguish joint physical custody from sole physical custody with liberal parenting time. We observed that Nebraska case law establishes that the amount of time children spend with each parent is less important than how the time is allocated when determining whether joint physical custody exists. *Id*. We recognized that joint physical custody has been defined as joint responsibility for minor day-to-day decisions and the exertion of continuous physical custody by both parents for significant periods of time. *Id*., citing *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999). We noted that this type of arrangement is distinguishable from that where one parent enjoys liberal parenting time such as alternating weekends, one overnight visit per week, one additional overnight visit on the off weekends, and additional breaks and holidays. See, *Hill v. Hill, supra*; *Drew on behalf of Reed v. Reed, supra*. In *Hill*, we concluded that the physical custody arrangement amounted to joint physical custody where the children lived day in and day out with both parents on a rotating basis, and each parent was equally responsible for the physical and emotional demands of the children's day-to-day care.

The same is true in the present case. Despite the district court's characterization of the arrangement, Jeffery and Mandy are each responsible for the day-to-day care of Kaaden during the week they are exercising their parenting time. This is

the standard joint physical custody arrangement. Each parent is equally responsible for getting Kaaden to and from child-care while the parents are working and for handling his daily emotional demands. As a result, the arrangement in this case is properly characterized as joint physical custody, rather than primary custody with liberal parenting time. Even Mandy concedes in her brief that "[w]hile the court referred to the arrangement in this case as sole custody, the time allotted meets the statutory definition of joint custody because each party has equal continuous blocks of parenting time with the child." Brief for appellee at 18. We must now determine whether an award of joint physical custody was an abuse of the court's discretion.

[7-9] 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. *Erin W. v. Charissa W.*, 297 Neb. 143, 897 N.W.2d 858 (2017). Joint physical custody should be reserved for those 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, rather than perpetuating turmoil or custodial wars. *Id*. When considering joint custody, the focus is on the parents' ability to communicate with each other and resolve issues together. *Aguilar v. Schulte*, 22 Neb. App. 80, 848 N.W.2d 644 (2014).

In the instant case, the district court found that Jeffery was a fit and proper person to have custody of Kaaden. The court observed that Jeffery has a suitable residence and stable employment and that he encourages healthy behaviors with Kaaden. The court also recognized Mandy's resentment toward Jeffery and found that "she has done everything in her power to prevent Jeffery from being a father to Kaaden." The court found that the GAL issued a thorough and well-reasoned

report, which reported that Mandy's "obstructive behavior" continued and was "detrimental to Kaaden's emotional well-being." Thus, the GAL recommended awarding primary physical custody of Kaaden to Jeffery and felt "completely confident" in that recommendation.

The district court iterated that it "tried to encourage Mandy to see past her hurt, fear, and anger" and allow Kaaden to have Jeffery in his life, but Mandy did not heed the court's advice as it "appears she is still putting more value on her hate and anger than she is on Kaaden's ability to have a father actively engaged in his life and the benefits of that relationship." Therefore, when considering all of the evidence and circumstances of this case, including Mandy's defiance of the temporary order, so that Kaaden can enjoy the full benefits of having both parents involved in his life to the greatest degree possible, the district court concluded that it was in Kaaden's best interests to place his primary legal and physical custody with Jeffery subject to liberal parenting time with Mandy.

[10] We consider and give weight to the district court's factual findings and concerns, which are well-founded and supported by the record. 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. *Steffy v. Steffy*, 287 Neb. 529, 843 N.W.2d 655 (2014). Notwithstanding the temporary order awarding Jeffery overnight parenting time with Kaaden every other weekend and alternating Wednesday evenings, Mandy refused to allow Jeffery his allotted parenting time. She also refused to provide Jeffery with Kaaden's medical information despite his numerous requests. The parties attempted mediation on two separate occasions, but Mandy refused to even sit in the same room as Jeffery on each occasion. And her anger and hatred of Jeffery is evident in the recorded exchange. She made clear that she did not want Jeffery to be part of Kaaden's life and that she

believed his desire to exercise his parenting time was harming Kaaden.

The undisputed evidence also establishes that Jeffery and Mandy have virtually no ability to communicate with each other regarding Kaaden. Mandy acknowledged at trial that it has become more difficult for them to communicate at all, and she did not believe they could communicate well enough to make joint custody successful. Kaaden's counselor believed it was best for Kaaden that contact between Jeffery and Mandy be limited at that time. And the district court's order reports that the GAL was concerned that "[Mandy] and her mother feed off one another in their loathing of Jeffery and are unable to give him credit for anything he does right when it comes to Kaaden."

Therefore, considering the foregoing, the evidence and the district court's factual findings do not support a conclusion that joint physical custody is in Kaaden's best interests. To the contrary, the district court determined that it was in Kaaden's best interests to place his legal and physical custody with Jeffery, and we find that decision was not an abuse of discretion. Accordingly, we reverse the parenting plan ordered in this case, and remand the cause to the district court for implementation of a parenting time arrangement whereby Jeffery has primary physical custody subject to Mandy's parenting time.

Child Support and Health Care Expenses

Given our conclusion that the district court abused its discretion in awarding de facto joint physical custody, we also find that the court's use of the joint custody worksheet in order to calculate child support was in error. We therefore reverse the child support award and remand the cause for recalculation using the appropriate worksheet.

[11] Likewise, we reverse the requirement that Jeffery pay the first $480 of Kaaden's nonreimbursed health care costs. Children's health care expenses are specifically included in

the guidelines amount of up to $480 per child per year. See Neb. Ct. R. § 4-215(B) (rev. 2011). As such, the guidelines estimate $480 as an ordinary amount of such nonreimbursed medical expenses, and that figure is then subsumed within the amount of child support that is ordered. *State on behalf of Martinez v. Martinez-Ibarra*, 281 Neb. 547, 797 N.W.2d 222 (2011). All nonreimbursed health care costs in excess of $480 per child per year shall be allocated to the obligor parent. § 4-215(B). Thus, we reverse this portion of the order, and upon recalculation of child support, the district court shall also allocate nonreimbursed health care costs in excess of $480 accordingly.

Name Change

Jeffery assigns that the district court erred in denying his request to change Kaaden's name from Mandy's last name to Jeffery's last name. We find no merit to this argument.

[12,13] The question of whether the name of a minor child should be changed is determined by what is in the best interests of the child. *State on behalf of Connor H. v. Blake G.*, 289 Neb. 246, 856 N.W.2d 295 (2014). The party seeking the change in surname has the burden of proving that the change in surname is in the child's best interests. *Id*. Cases considering this question have granted a change of name only when the substantial welfare of the child requires the name to be changed. *Id*. On appeal, a trial court's decision is reviewed de novo on the record. See *id*.

[14,15] In Nebraska, there is no preference for a surname—paternal or maternal—in name change cases; rather, the child's best interests is the sole consideration. *Id*. Courts review a list of nonexclusive factors to determine whether a change of surname is in the child's best interests. *Id*. These factors include (1) misconduct by one of the child's parents; (2) a parent's failure to support the child; (3) parental failure to maintain contact with the child; (4) the length of time that a surname has been used for or by the child; (5) whether the child's

surname is different from the surname of the child's custodial parent; (6) a child's reasonable preference for one of the surnames; (7) the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent; (8) the degree of community respect associated with the child's present surname and the proposed surname; (9) the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; and (10) the identification of the child as a part of a family unit. *Id*.

In the present case, the district court's order did not consider any of the foregoing factors or make a finding of Kaaden's best interests with respect to his surname. Upon our de novo review of the record, we observe that there was little evidence presented at trial as to changing Kaaden's name. Jeffery indicated that he wanted Kaaden to share his last name, and we note that Jeffery is now the custodial parent. Mandy testified that she did not want Kaaden's name to be changed, but she did not further elaborate. At not quite 3 years old, Kaaden was too young to express a preference or to appreciate a change in his surname. Neither parent is married nor has any other children, so there is no concern as to whether Kaaden will share a name as part of a family unit. There was no evidence as to how changing Kaaden's surname from Mandy's to Jeffery's would serve Kaaden's best interests. Therefore, based on the totality of the evidence, we conclude that Jeffery failed to establish that the substantial welfare of the child requires the name to be changed. Accordingly, we affirm the decision of the district court denying Jeffery's request.

Contempt of Court

Jeffery argues that the fine imposed on Mandy for being in contempt of court was an abuse of discretion. We disagree with Jeffery's argument that the court should have imposed a fine greater than $50, but we find plain error in the fine as imposed.

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 are reviewed for abuse of discretion. *State on behalf of Mariah B. & Renee B. v. Kyle B.*, 298 Neb. 759, 906 N.W.2d 17 (2018).

The district court determined that the clear and convincing evidence established that Mandy was in willful contempt of the temporary order when she deprived Jeffery of his parenting time. The court therefore imposed a sanction of $50. There is no challenge on appeal to the finding that Mandy was in contempt of court; rather, the sole issue is whether the court abused its discretion in imposing a sanction of $50.

[16-18] A civil sanction is coercive and remedial; the contemnors carry the keys of their jail cells in their own pockets, because the sentence is conditioned upon continued noncompliance and is subject to mitigation through compliance. *Sickler v. Sickler*, 293 Neb. 521, 878 N.W.2d 549 (2016). In contrast, a criminal sanction is punitive; the sentence is determinate and unconditional, and the contemnors do not carry the keys to their jail cells in their own pockets. *Id*. A court can impose criminal, or punitive, sanctions only if the proceedings afford the protections offered in a criminal proceeding. *Id*. A criminal or punitive sanction is invalid if imposed in a proceeding that is instituted and tried as civil contempt, because it lacks the procedural protections that the Constitution would demand in a criminal proceeding. *Sickler v. Sickler, supra*. In order for the punishment to retain its civil character, the contemnor must, at the time the sanction is imposed, have the ability to purge the contempt by compliance and either avert punishment or, at any time, bring it to an end. *Id*.

In *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991), *overruled on other grounds, Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010), the Nebraska Supreme Court found plain error in the trial court's imposition of a punitive sanction in a civil contempt proceeding. Specifically, the trial court held the father in contempt for failure to pay child support. The court ordered that unless the father paid the amount due, he was sentenced to 30 days in jail commencing April 1, 1989. The Supreme Court determined that the order ceased to be coercive on April 1, because the jail sentence was no longer subject to mitigation. If the child support amounts due were not paid by April 1, the father was required to serve a punitive 30-day sentence, regardless of whether the amounts were paid subsequent to that date, and thus, the father no longer would be "'holding the keys to his jail cell'" after April 1. *Id*. at 242, 475 N.W.2d at 528. The Supreme Court iterated that an unconditional penalty is criminal in nature because it is solely and exclusively punitive in character. *Id*.

[19,20] Relying upon *Maddux v. Maddux, supra*, this court has recognized that a fine is an appropriate sanction in a civil contempt proceeding so long as the contemnor may avoid the fine by complying with the court's order. See *Jessen v. Jessen*, 5 Neb. App. 914, 567 N.W.2d 612 (1997), *overruled on other grounds, Smeal Fire Apparatus Co. v. Kreikemeier, supra*. In contrast, an unconditional fine is not an appropriate sanction in a civil contempt proceeding because the contemnor is unable to avoid the fine through his or her conduct. *Id*.

In the present case, the district court imposed an unconditional fine upon Mandy. The court provided no method for Mandy to avoid the fine through her conduct, and thus, the sanction was punitive rather than coercive. Because the matter was tried as a civil contempt, a solely punitive sanction was improper. We therefore vacate the punitive sanction and remand the cause for imposition of a proper coercive sanction.

Attorney Fees

Jeffery asserts that the district court's denial of his request for attorney fees was in error. We find no abuse of discretion.

In a paternity action, attorney fees are reviewed 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). Absent such an abuse, the award will be affirmed. *Id*.

The district court ordered that each party pay its own attorney fees and costs. We understand Jeffery's argument that Mandy's actions resulted in his incurring additional attorney fees which he otherwise would not have incurred. However, given the financial circumstances of the parties, we find that it was not an abuse of discretion for the court to order the parties to pay their own fees and costs.

CONCLUSION

We affirm in part, vacate in part, and in part reverse and remand with directions as explained above.

Affirmed in part, vacated in part, and in part reversed and remanded with directions.

In re Estate of Susan A. Loftus. Angela Loftus, Personal Representative of the Estate of Susan A. Loftus, deceased, appellee, v. Daniel Loftus, Jr., and Teri Loftus McClun, appellants.

920 N.W.2d 718

Filed October 23, 2018. No. A-17-1111.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases 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, the 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 for errors appearing on the record, will not substitute its factual findings for those of the trial court when competent evidence supports those findings.
4. **Wills.** The requirements of Neb. Rev. Stat. § 30-2327 (Reissue 2016) are satisfied if a will is (1) in writing, (2) signed by the testator, and (3) signed by at least two individuals, each of whom witnessed either the signing or the testator's acknowledgment of the signing of the will.
5. **Statutes: Appeal and Error.** The language of a statute 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.
6. ____: ____. Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.
7. **Statutes: Wills.** Statutory provisions regarding the manner in which wills must be executed are mandatory and subject to strict construction.
8. **Wills: Witnesses.** The attestation required of witnesses to a will consists of their seeing that those things exist and are done which the law requires to exist or to be done in order to make the instrument, in law, the will of the testator.

9. **Statutes: Wills: Words and Phrases.** Due execution of a will means compliance with the formalities required by the statute in order to make the instrument the will of the testator.
10. **Evidence.** Habit evidence makes it more probable that the person acted in a manner consistent with that habit.
11. **Evidence: Proof.** Evidence of habit may be the only vehicle available to prove that someone acted in a particular way on a particular occasion, and the lack of detail or specificity goes to the weight and credibility to be placed on the testimony by the factfinder.
12. **Witnesses: Testimony.** The credibility of a witness is a question for the trier of fact, and it is within its province to credit the whole of the witness' testimony, or any part of it, which seemed to it to be convincing, and reject so much of it as in its judgment is not entitled to credit.

Appeal from the County Court for Sarpy County: Robert C. Wester, Judge. Affirmed.

Bradley A. Boyum, of Boyum Law Firm, for appellants.

Dean J. Jungers for appellee.

Pirtle, Riedmann, and Welch, Judges.

Riedmann, Judge.

INTRODUCTION

The appellants, Daniel Loftus, Jr., and Teri Loftus McClun (Teri), appeal the order of the county court for Sarpy County which admitted the last will and testament of Susan A. Loftus to formal probate. On appeal, the appellants argue that the will was not properly acknowledged and, therefore, was not valid. Finding no merit to this argument, we affirm.

BACKGROUND

Susan died in April 2017. A document purported to be her last will and testament was thereafter presented to the county court for formal probate, and the appellants filed an objection to the admission of the will. A hearing on the matter was held on August 28, 2017.

The purported will was received into evidence at the hearing. The three-page document displays Susan's signature on the last page and the signature of Ruth Welstead as a witness.

Welstead testified at the hearing that Susan asked her if she would be a witness to Susan's last will and testament and that she agreed to do so. Welstead observed Susan sign the will, and then Welstead signed it.

The document also bears the signature and notary stamp of Allen Guidry, although it is undisputed that there is an error in the manner in which the notary statement was completed. Guidry was working at a bank at the time he signed the will, and he testified at the hearing that he did not specifically remember Susan's will, but was confident the signature on the document was his signature. He explained that generally when someone came into the bank and presented him a document that had already been signed, he would ask for identification if he did not recognize the person as a bank customer; however, if he did recognize the person, he would ask him or her to verify that it was his or her signature on the document. He recalled that Susan was a customer of the bank, and thus, if she had come into the bank with the document presigned, he would not have asked her for identification; but, rather, his normal practice would be to ask her to acknowledge her signature on the document.

In a written order, the county court noted that Guidry had testified as to his practice of always asking for identification unless he knew the signatory and always asking if the person acknowledged signing the document in question if it had been presigned. The court therefore found Guidry's testimony sufficient to establish that he required the acknowledgment of Susan's signature before he signed the document. As a result, the court concluded that Susan's will had been validly executed and admitted it to formal probate, determined the heirs, and appointed a personal representative for the estate. The appellants timely appeal to this court.

ASSIGNMENT OF ERROR

The appellants assign, summarized, that the county court erred in finding that Susan's signature on her will was properly acknowledged.

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 Pluhacek*, 296 Neb. 528, 894 N.W.2d 325 (2017). 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. *In re Estate of Forgey*, 298 Neb. 865, 906 N.W.2d 618 (2018). An appellate court, in reviewing a judgment for errors appearing on the record, will not substitute its factual findings for those of the trial court when competent evidence supports those findings. *Id*.

ANALYSIS

The appellants argue that the county court erred in determining that Susan's will was properly acknowledged. We disagree.

[4] Except as provided for holographic wills, writings within Neb. Rev. Stat. § 30-2338 (Reissue 2016), and wills within Neb. Rev. Stat. § 30-2331 (Reissue 2016), every will is required to be in writing signed by the testator or in the testator's name by some other individual in the testator's presence and by his direction, and is required to be signed by at least two individuals, each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will. Neb. Rev. Stat. § 30-2327 (Reissue 2016). When the requirements of § 30-2327 are met, the will is validly executed. *In re Estate of Pluhacek, supra*. The requirements of § 30-2327 are satisfied if a will is (1) in writing, (2) signed by the testator, and (3) signed by at least two individuals, each of whom witnessed either the signing or the testator's acknowledgment of the signing of the will. *In re Estate of Pluhacek, supra*.

There is no dispute in the present case that Susan's will was in writing and signed by her, and Susan's signature was witnessed by Welstead, who also signed the will. Thus, the parties agree that the relevant question is whether there is sufficient evidence to establish that Guidry witnessed Susan's

acknowledgment of her signature so as to satisfy the third requirement of § 30-2327.

The appellants rely upon Neb. Rev. Stat. § 64-203 (Reissue 2009) and *Johnson v. Neth*, 276 Neb. 886, 758 N.W.2d 395 (2008), to argue that the laws governing acknowledgments require a notary public to identify the acknowledging party in the notary statement. They claim that Guidry did not do so and that there was no evidence that it was Susan herself who presented the will to Guidry for his signature. Thus, in their opinion, the acknowledgment was improper and the will was not valid. Contrary to the appellants' argument, however, § 64-203 and *Johnson v. Neth, supra*, do not govern this case, because there is no requirement that a testator's signature on a will be acknowledged by a notary public except in the context of self-proved wills. See Neb. Rev. Stat. § 30-2329 (Reissue 2016).

[5,6] The language of a statute 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. *Johnson v. City of Fremont*, 287 Neb. 960, 845 N.W.2d 279 (2014). In other words, absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning. *Id*.

[7-9] Under § 30-2327, a will must be signed by two witnesses, each of whom witnessed either the signing or the testator's acknowledgment of the signing or of the will. Statutory provisions regarding the manner in which wills must be executed are mandatory and subject to strict construction. *In re Estate of Mecello*, 262 Neb. 493, 633 N.W.2d 892 (2001). The attestation required of witnesses to a will consists of their seeing that those things exist and are done which the law requires to exist or to be done in order to make the instrument, in law, the will of the testator. *Id*. Due execution of a will means compliance with the formalities required by the statute in order to make the instrument the will of the testator. *Id*. Contrary to the sworn report required under the facts of *Johnson v. Neth,*

supra, there is no requirement in § 30-2327 that the acknowledgment of a testator's signature on a will be duly sworn or confirmed by oath or affirmation. Rather, the two witnesses must witness either the signing of the will or the testator's acknowledgment of the signature.

Moreover, the language of § 30-2327 is based upon Unif. Probate Code § 2-502, 8 (part I) U.L.A. 209 (2013). See *In re Estate of Odenreider*, 286 Neb. 480, 837 N.W.2d 756 (2013) (chapter 30 of Nebraska Revised Statutes is based upon Uniform Probate Code). Except, § 2-502 allows an additional manner in which to acknowledge a will. Under § 2-502(a)(3), a will must be either

> (A) signed by at least two individuals, each of whom signed within a reasonable time after the individual witnessed either the signing of the will . . . or the testator's acknowledgment of that signature or acknowledgment of the will; or
>
> (B) *acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgments.*

(Emphasis supplied.) The official comments to § 2-502 note that subparagraph (B) was added in 2008 in order to recognize the validity of notarized wills. Thus, pursuant to the plain language of subparagraph (A), which is also contained in § 30-2327, there is no requirement that one of the witnesses is a notary public. Therefore, Guidry's failure to specifically identify Susan in the notary statement is not fatal to the validity of the will because no notary statement was required. However, there must have been sufficient evidence presented to establish that Guidry witnessed Susan's acknowledgment that she had, in fact, signed the will.

Guidry testified that he did not specifically recall signing Susan's will, but was confident the signature on the document was his signature. He then explained that he recognized Susan as a customer of the bank and that therefore, his routine practice when notarizing a document for someone he recognized was to

sign it without asking for identification to verify the person's identity. He explained his general practice, however, was that he would not have notarized an unsigned document and that if the document was presigned, his habit was to ask the person to acknowledge his or her signature on the document.

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. Neb. Rev. Stat. § 27-406(1) (Reissue 2016).

The Nebraska appellate courts have previously allowed testimony by professionals as to their habits in order to prove conformity on a particular occasion. In *Hoffart v. Hodge*, 9 Neb. App. 161, 609 N.W.2d 397 (2000), this court upheld the admission of the testimony of a defendant medical doctor in a medical malpractice action as to his regular practice and routine of advising his patients. In doing so, we recognized the practical reality that a doctor cannot be expected to specifically recall the advice or explanation he or she gives to each and every patient he or she treats. Thus, evidence of habit may be the only vehicle available for a doctor to prove that he or she acted in a particular way on a particular occasion. *Id.*

Relying upon the rationale of *Hoffart v. Hodge, supra*, the Nebraska Supreme Court allowed the testimony of a lawyer in a legal malpractice case regarding the advice he routinely gave to his clients under particular circumstances. See *Borley Storage & Transfer Co. v. Whitted*, 271 Neb. 84, 710 N.W.2d 71 (2006).

In a matter similar to the facts of the instant case, the Court of Appeals of Indiana permitted the testimony of a lawyer's habit and routine practice in a will contest. In *Fitch v. Maesch*, 690 N.E.2d 350 (Ind. App. 1998), a testator executed her will, and the execution was witnessed by her neighbor and her lawyer. After the testator's death, her brother objected to the admission of the will to probate.

Indiana law, similar to that of Nebraska, requires that a will be signed by the testator and at least two witnesses, mandating that the testator sign the will in the presence of the witnesses and that the attesting witnesses sign in the presence of the testator and each other. See Ind. Code Ann. § 29-1-5-3 (LexisNexis Cum. Supp. 2009). At trial in the matter, the lawyer's secretary testified as to the lawyer's habit in supervising the execution of wills, and on appeal, the court found that such testimony was relevant and admissible to show that the lawyer supervised the execution of the will in that particular case in conformity with that habit. And the evidence regarding his habit demonstrated that his habit was to have a will executed as recited in the attestation clause.

[10,11] Likewise in the present case, Guidry's testimony as to his routine practice of signing documents for bank customers tends to establish how he acted when signing Susan's will. Habit evidence makes it more probable that the person acted in a manner consistent with that habit. See *Hoffart v. Hodge, supra*. Like the professionals in *Hoffart v. Hodge* and *Borley Storage & Transfer Co. v. Whitted*, Guidry explained that he signed approximately 250 documents since the time he signed Susan's will and could not specifically remember that instance. Thus, evidence of habit may be the only vehicle available to prove that someone acted in a particular way on a particular occasion, see *Hoffart v. Hodge, supra*, and the lack of detail or specificity goes to the weight and credibility to be placed on the testimony by the factfinder, see *Borley Storage & Transfer Co. v. Whitted, supra*.

The appellants assert that there is no evidence that Susan personally presented her will to Guidry for his signature. However, Guidry's testimony established that had someone he did not recognize presented Susan's will to him, he would have asked that person for identification before signing the will and would not have signed the document without seeing identification matching the signature on the document. Thus, it can be inferred that because Guidry signed the will, it was Susan who presented the document to him.

[12] The county court found that Guidry's testimony as to his routine practice was sufficient to establish that he required that Susan acknowledge her signature on her will before Guidry signed it. The appellants argue that the court relied on a single statement from Guidry's testimony regarding his procedures and that had the court considered the entirety of the testimony, it would be clear that Guidry was unfamiliar with the proper procedures for notarizing a document. We again note that the will was not required to be notarized, but, rather, Guidry was required to sign the will after acknowledging Susan's signature. The credibility of a witness is a question for the trier of fact, and it is within its province to credit the whole of the witness' testimony, or any part of it, which seemed to it to be convincing, and reject so much of it as in its judgment is not entitled to credit. *Fredericks Peebles v. Assam*, 300 Neb. 670, 915 N.W.2d 770 (2018). Accordingly, the county court, as the factfinder, was permitted to accept Guidry's testimony as to his routine practice and habit in order to find the evidence sufficient to conclude that he acted accordingly when signing Susan's will.

An appellate court, in reviewing a judgment for errors appearing on the record, will not substitute its factual findings for those of the trial court when competent evidence supports those findings. *In re Estate of Forgey*, 298 Neb. 865, 905 N.W.2d 618 (2018). The record supports the county court's conclusion. We therefore find that the evidence was sufficient to satisfy the requirements of § 30-2327. Accordingly, the county court did not err in concluding that Susan's will had been validly executed and in admitting it to formal probate, determining her heirs, and appointing a personal representative.

CONCLUSION

Finding no error in the county court's decision admitting the will to formal probate, we affirm.

Affirmed.

S.B., appellee, v. Paul Pfeifler, appellant.
920 N.W.2d 851

Filed October 23, 2018. No. A-18-397.

1. **Judgments: Injunction: Appeal and Error.** A protection order is analogous to an injunction. Accordingly, the grant or denial of a protection order is reviewed de novo on the record.
2. **Judgments: Appeal and Error.** In a de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court. However, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Injunction: Proof.** A party seeking an injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle the claimant to relief.
4. **Sexual Assault: Proof.** A party seeking a sexual assault protection order pursuant to Neb. Rev. Stat. § 28-311.11 (Supp. 2017) must prove a sexual assault offense by a preponderance of the evidence.

Appeal from the District Court for Lancaster County: Lori A. Maret, Judge. Affirmed.

Seth W. Morris, of Berry Law Firm, for appellant.

David W. Watermeier, of Morrow, Poppe, Watermeier & Lonowski, P.C., L.L.O., for appellee.

Pirtle, Bishop, and Arterburn, Judges.

Bishop, Judge.

S.B. was granted a sexual assault protection order against Paul Pfeifler by the district court for Lancaster County. Pfeifler

claims the evidence was insufficient to support granting the protection order; we affirm.

BACKGROUND

S.B. filed a "Petition and Affidavit to Obtain Sexual Assault Protection Order" (petition) on September 29, 2017, in the district court pursuant to Neb. Rev. Stat. § 28-311.11 (Supp. 2017). She claimed that after a work event on September 22, she and a "group of girls" went out for drinks. They were with two doctors initially, one who joined them at their table and another who left. S.B alleged that she "got up to get a drink from the bar and upon returning to the table, [Pfeifler], who [she] barely [knew], smacked [her] butt while [she] was setting [her] drink down on the table." S.B. "was shocked and offended that this doctor, who [she] didn't know, assaulted [her] in this way in front of [her] co-workers." Since she and Pfeifler are part "of the same practice group" and have to attend weekend seminars at times where she would see Pfeifler, S.B. was "concerned that [Pfeifler would] continue this kind of behavior." An "Order to Show Cause Sexual Assault" was entered by the district court setting the matter for hearing on October 6. On that day, Pfeifler personally appeared and indicated he had been served the day before; he requested a continuance, which was granted.

On October 24, 2017, S.B., who was not represented by an attorney, and Pfeifler, who was now represented by an attorney, appeared for the hearing. S.B.'s petition was marked as an exhibit and received by the court. S.B. was sworn in to testify and was asked if the allegations contained in the petition were true; she replied, "Yes." Pfeifler was then sworn in to testify, and the court proceeded to ask him questions. The court asked Pfeifler to look at the paragraph of the petition which contained the allegations related to the incident on September 22 and to tell the court what was true in that statement. Pfeifler answered, "Yes, we were with a group of people. Yes, we were in a booth. No, I did not slap her

or smack her." When asked if he touched S.B. in any way, Pfeifler responded, "Yes. I did bump her with the back of my hand." He explained:

> We were at a bar. It was a tight, tight booth. She was shuffling between. I was watching the entertainment that was on the bar as well as in the aisle. She had stopped in front of me to put down drinks. I reached forward with the back of my hand and gave her a slight bump with the back of my hand — I'm not exactly sure where I contacted her, to my recollection — so that way she would move so I could continue watching the entertainment at the bar.

The court asked, "So it was your intent to touch [S.B.]?" Pfeifler responded, "Yes, I did bump her to have her move out of the way." Pfeifler did not recall anything being said and stated that it "was the only contact or communication that we had that evening." He further testified:

> [W]e were at the bar for more than an hour following such incident, and nothing was brought to my attention until the next morning that there was even a problem. Upon that I did apologize to [S.B.] And, I quote, she accepted my . . . apology and said, "Man, you are good."

The court asked if Pfeifler had anything else he wanted to tell the court about what happened; he responded, "That is it." The court asked S.B. if she had any questions to ask Pfeifler; she did not.

The court then proceeded to question S.B., asking initially whether there was anything more she wanted the court to know. She replied, "I'd say there is absolutely no mistaking between a bump and what he did. It was a full-on slap, and there's no mistaking it." S.B. said she was "not the one who actually saw it," but, rather, "[t]wo other girls saw it." She continued, "I was in shock. I didn't even know what happened. One of the girls told me, 'cause there was two girls who saw it. I didn't even see it. I just felt it." She said the "girls" told her that "[Pfeifler] slapped [her] butt." According to S.B., "There

was no one else in [her] radius besides [Pfeifler], and he was right behind [her] when [she] was putting [her] drink on the table." S.B. said she "tried to chill out for a little bit," finished her drink, and then left. She was "in shock" and did not say anything to Pfeifler at the time. She went back to her hotel and then "spoke with [her] boss in the morning, who spoke with [Pfeifler]."

S.B. said Pfeifler apologized to her the "Saturday after the meetings," and she accepted his apology, but she "probably would have said just about anything to get him away from [her]." According to S.B., Pfeifler said, "'I'm sorry if I offended you or made you feel uncomfortable in any way.'" S.B. said, "He didn't own up to what he did, but he did apologize . . . ." She claimed her boss told Pfeifler that he was "to not come anywhere near [S.B.]" and that he needed to "write a letter to the office apologizing." S.B. said she "made it very clear to [her] doctor and the girls who saw that [she did] not want this man near [her], and he still went against what [her] boss said and came up to [her] after the meeting." When the court finished questioning S.B., the court asked Pfeifler additional questions about the booth in the bar and how he was seated there. The court asked Pfeifler (not his attorney) whether he had any questions of S.B. He did not. The court proceeded to ask S.B. additional questions about the type of bar they were at, and she indicated there was music and dancing in the aisle by patrons and "workers there dancing as well, like, on the bar and stuff." Pfeifler testified that it was a "night club" where the bartenders and waitresses "are all dressed in various skimpy outfits" and "[t]hey dance on the bar." Pfeifler claimed he "was watching the girls dancing on the bar."

The court then asked, "Anything else you want to say?" Pfeifler's attorney responded, "No." The court immediately thereafter stated on the record that it found by a "preponderance of the evidence that the sexual assault protection order should be granted."

A "Sexual Assault Protection Order (After Hearing, No Ex Parte Order Issued)" was entered by the district court on October 24, 2017. The order states that Pfeifler is "enjoined from imposing any restraint upon the person or liberty of the protected party [S.B.]"; "enjoined from harassing, threatening, assaulting, molesting, attacking, or otherwise disturbing the peace of [S.B.]"; and "enjoined from telephoning, contacting, or otherwise communicating with [S.B.]" The protection order "is granted for a period of one year from the date of this order" unless renewed or otherwise dismissed or modified by order of the court.

Pfeifler filed a motion for new trial on October 31, 2017, and following a hearing, the district court entered an order on April 10, 2018, denying Pfeifler's motion. Pfeifler appeals from that order and the order granting the sexual assault protection order.

ASSIGNMENTS OF ERROR

Pfeifler claims, restated, that there was insufficient evidence to support a sexual assault protection order because there was insufficient evidence to prove that a sexual assault occurred, including that S.B. failed to prove the "element of sexual gratification."

STANDARD OF REVIEW

[1] A protection order is analogous to an injunction. Accordingly, the grant or denial of a protection order is reviewed de novo on the record. *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010).

[2] In such de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court. However, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Torres v. Morales*, 287 Neb. 587, 843 N.W.2d 805 (2014).

ANALYSIS

Sexual assault protection orders provide a new avenue of protection for victims of a sexual assault. Last year, the Nebraska Legislature enacted § 28-311.11, which became effective on August 24, 2017. It states, in relevant part:

> (1) Any victim of a sexual assault offense may file a petition and affidavit for a sexual assault protection order as provided in subsection (3) of this section. Upon the filing of such a petition and affidavit in support thereof, the court may issue a sexual assault protection order without bond enjoining the respondent from (a) imposing any restraint upon the person or liberty of the petitioner, (b) harassing, threatening, assaulting, molesting, attacking, or otherwise disturbing the peace of the petitioner, or (c) telephoning, contacting, or otherwise communicating with the petitioner.
>
> (2) The petition for a sexual assault protection order shall state the events and dates of acts constituting the sexual assault offense.
>
> (3) A petition for a sexual assault protection order shall be filed with the clerk of the district court and the proceeding may be heard by the county court or the district court as provided in section 25-2740.
>
> (4) A petition for a sexual assault protection order may not be withdrawn except upon order of the court. A sexual assault protection order shall specify that it is effective for a period of one year unless renewed pursuant to subsection (11) of this section or otherwise dismissed or modified by the court. Any person who knowingly violates a sexual assault protection order after service or notice . . . shall be guilty of a Class I misdemeanor except that for any second violation of a sexual assault protection order within a twelve-month period, or any third or subsequent violation, whenever committed, such person shall be guilty of a Class IV felony.
>
> . . . .

> (7) A sexual assault protection order may be issued or renewed ex parte without notice to the respondent if it reasonably appears from the specific facts shown by affidavit of the petitioner that irreparable harm, loss, or damage will result before the matter can be heard on notice. . . .
>
> . . . .
>
> (11) An order issued under subsection (1) of this section may be renewed annually. To request renewal of the order, the petitioner shall file a petition for renewal and affidavit in support thereof at least forty-five days prior to the date the order is set to expire. . . .
>
> (12) For purposes of this section, sexual assault offense means:
>
> (a) Conduct amounting to sexual assault under section 28-319 or 28-320 or sexual assault of a child under section 28-319.01 or 28-320.01 or an attempt to commit any of such offenses; or
>
> (b) Subjecting or attempting to subject another person to sexual contact or sexual penetration without his or her consent, as such terms are defined in section 28-318.

Neb. Rev. Stat. § 28-319 (Reissue 2016) states that first degree sexual assault occurs when any person "subjects another person to sexual penetration" without consent (or under other circumstances not relevant here). There is no claim of sexual penetration in the present matter. Neb. Rev. Stat. §§ 28-319.01 and 28-320.01 (Reissue 2016) pertain to sexual assault of a child; these sections are also not relevant here. However, relevant to the present case, Neb. Rev. Stat. § 28-320 (Reissue 2016) states that second and third degree sexual assault occurs when any person "subjects another person to sexual contact" without consent of the victim or when the victim was physically or mentally incapable of resisting or appraising the nature of his or her conduct. As applied here, the question is whether the facts support that Pfeifler subjected or attempted to subject S.B. to sexual contact without her consent.

According to Neb. Rev. Stat. § 28-318(5) (Reissue 2016), "[s]exual contact" means, in relevant part:

> [T]he intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts [genital area, groin, inner thighs, buttocks, or breasts, see § 28-318(2)]. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party.

Pfeifler described the place he and S.B. were at as a "night club." He said the bartenders and waitresses were "all dressed in various skimpy outfits" and "[t]hey dance[d] on the bar." Pfeifler testified that he "was watching the girls dancing on the bar," and he admitted to touching S.B. Pfeifler said that "[S.B.] had stopped in front of [him] to put down drinks" and that he "reached forward with the back of [his] hand and gave her a slight bump with the back of [his] hand." He said he "did bump her to have her move out of the way," but he was not sure where he touched her. However, S.B. said there was "absolutely no mistaking between a bump and what he did. It was a full-on slap, and there's no mistaking it." She said she did not see Pfeifler do this, but she "just felt it." She said the "girls" told her that "[Pfeifler] slapped [her] butt." Further, according to S.B., "There was no one else in [her] radius besides [Pfeifler], and he was right behind [her] when [she] was putting [her] drink on the table." She was "in shock" and did not say anything to Pfeifler at the time. She spoke with her boss, who then spoke with Pfeifler. Pfeifler subsequently apologized to S.B. According to S.B., he told her, "'I'm sorry if I offended you or made you feel uncomfortable in any way.'"

[3,4] A protection order is analogous to an injunction. *Elstun v. Elstun*, 257 Neb. 820, 600 N.W.2d 835 (1999). A party seeking an injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle the claimant to relief. See *Abboud v. Lakeview, Inc.*, 237 Neb. 326,

466 N.W.2d 442 (1991). Accordingly, a party seeking a sexual assault protection order pursuant to § 28-311.11 must prove a sexual assault offense by a preponderance of the evidence.

Pfeifler claims there "was no evidence adduced at the hearing that shows a clear intent of Pfeifler's actions." Brief for appellant at 5. He claims that "[S.B.] did not see who 'slapped' or 'smacked' her" and that Pfeifler "did not intentionally contact the sexual or intimate parts of [S.B.], [and] any contact that occurred was unintentional in an attempt to get a better view of the entertainment at the bar." *Id*. at 6. He claims this evidence falls short of establishing a sexual assault by a preponderance of the evidence. However, as noted above, S.B. testified to feeling the slap on her buttocks, and the two "girls" saw it happen. And nobody else but Pfeifler was near S.B. at the time. Even Pfeifler admits that S.B. stopped in front of him to put down drinks when the contact occurred. In summary, there was no dispute there was physical contact when Pfeifler intentionally touched S.B. However, the district court was presented with competing testimony as to the precise nature of the contact. Pfeifler admitted to intentional contact but claimed that it was a "slight bump" and that he was not sure where the contact occurred, whereas S.B. claimed it was an intentional slap on her buttocks.

Even on de novo review, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Torres v. Morales*, 287 Neb. 587, 843 N.W.2d 805 (2014). We apply this standard here and defer to the district court's acceptance of S.B.'s version of the facts over Pfeifler's version. There is sufficient evidence to support that Pfeifler slapped S.B. on her buttocks.

However, Pfeifler also claims there was "no evidence introduced that Pfeifer seemed sexually aroused by the contact." Brief for appellant at 7. He claims his conduct was "for the sole purpose of moving [S.B.] out of the way so that he could

see the entertainment at the bar." *Id.* He argues that there were no witnesses who testified about Pfeifler's demeanor after the contact occurred and no evidence that Pfeifler "seemed sexually aroused by the contact." *Id*. He claims, "To the contrary, all evidence adduced at the hearing points to the contact being accidental in nature." *Id*. He contends proof of sexual gratification is "a condition precedent necessary to reach the ultimate conclusion that [S.B.] was the victim of sexual contact, and therefore the District Court erred in granting the sexual assault protection order." *Id*.

"Whether there is sufficient evidence to prove sexual arousal or gratification (which, by necessity, must generally be inferred from the surrounding circumstances) is extraordinarily fact driven." *State v. Brauer*, 287 Neb. 81, 94, 841 N.W.2d 201, 210 (2013). Even sexual contact done for the defendant's amusement can be reasonably construed as being for the purpose of sexual arousal or gratification. *State v. Osborne*, 20 Neb. App. 553, 826 N.W.2d 892 (2013). See *State v. Charron*, 226 Neb. 871, 415 N.W.2d 474 (1987) (act of defendant who grabbed woman from behind, pressed forcefully in her vaginal area, and then walked away, laughing and bobbing his head, were circumstances from which trial court could find that defendant's conduct was for purpose of his sexual arousal or gratification).

In its order denying Pfeifler's motion for new trial, the district court addressed Pfeifler's argument that the evidence did not establish sexual arousal or gratification. The court noted, "According to [Pfeifler], the contact was accidental and was not made for the purpose of sexual arousal or gratification." The district court, quoting § 28-318(5), properly concluded that the conduct need only be "'reasonably construed as being for the purpose of sexual arousal or gratification.'" (Emphasis omitted.) The court then summarized the evidence, as we have already set forth above, and stated that it "found [S.B.] credible and the evidence to be sufficient to grant the sexual assault protection order."

The district court did not specifically say that Pfeifler's conduct would be reasonably construed as being for the purpose of sexual arousal or gratification, but as noted by S.B., the court "properly considered all attendant facts of the case and properly determined that [Pfeifler's] actions, in that setting and under those circumstances, rose to the level of being for the purpose set forth in the applicable statute." Brief for appellee at 12. In this court's de novo review, we have considered the circumstances surrounding the contact and conclude that a slap on a woman's buttocks in a nightclub can be reasonably construed as being for the purpose of sexual arousal or gratification.

CONCLUSION

We affirm the district court's entry of a sexual assault protection order in this case.

Affirmed.

State of Nebraska, appellee, v. Andrew D. Williams, appellant.

920 N.W.2d 868

Filed October 30, 2018. No. A-17-877.

1. **Criminal Law: Pretrial Procedure.** Discovery in a criminal case is generally controlled by either a statute or court rule.
2. ____: ____. Neb. Rev. Stat. §§ 29-1912 and 29-1913 (Reissue 2016) set forth specific categories of information possessed by the State which are discoverable by a defendant.
3. ____: ____. Neb. Rev. Stat. § 29-1916 (Reissue 2016) provides only reciprocal discovery to the State as to orders for discovery entered pursuant to Neb. Rev. Stat. §§ 29-1912 and 29-1913 (Reissue 2016).
4. ____: ____. A motion for deposition is filed pursuant to Neb. Rev. Stat. § 29-1917 (Reissue 2016). However, unlike general discovery, a motion for deposition can be filed by either party to a criminal case.
5. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection.
6. **Rules of Evidence: Hearsay: Proof.** Hearsay is an out-of-court statement made by a human declarant that is offered in evidence to prove the truth of the matter asserted.
7. **Rules of Evidence: Hearsay.** Generally, hearsay is inadmissible except as provided by a recognized exception to the rule against hearsay.
8. **Trial: Evidence: Testimony: Proof.** Demonstrative exhibits are admissible if they supplement a witness' spoken description of the transpired event, clarify some issue in the case, and are more probative than prejudicial.
9. **Trial: Evidence.** Demonstrative exhibits are inadmissible when they do not illustrate or make clearer some issue in the case.

10. **Trial: Judges: Juries: Evidence.** A trial judge may exercise his or her broad discretion to allow or disallow the use of demonstrative exhibits during jury deliberations.
11. **Convictions: Evidence: Appeal and Error.** Even if admitted in error, where the evidence is cumulative and there is other competent evidence to support the conviction, the improper admission or exclusion of evidence is harmless beyond a reasonable doubt.
12. **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.
13. **Rules of Evidence: Appeal and Error.** Where 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.
14. **Hearsay.** If an out-of-court statement is not offered for the purpose of proving the truth of the facts asserted, it is not hearsay.
15. **Trial: Hearsay.** A trial court should identify the specific nonhearsay purpose for which the making of a statement is relevant and probative.
16. **Trial: Appeal and Error.** An error is harmless when cumulative of other properly admitted evidence.
17. **Trial: Jurors.** Retention or rejection of a juror is a matter of discretion with the trial court.
18. **Trial: Motions to Dismiss: Jurors: Appeal and Error.** The standard of review in a case involving a motion to dismiss a juror is whether the trial court abused its discretion.
19. **Juror Qualifications.** Through the use of peremptory challenges or challenges for cause, parties can secure an impartial jury and avoid including disqualified persons.
20. ____. Jurors who form or express opinions regarding an accused's guilt based on witness accounts of the crime must be excused for cause. However, jurors whose source of information is from newspaper reports, hearsay, or rumor can be retained if the court is satisfied that such juror can render an impartial verdict based upon the law and the evidence adduced.
21. **Jurors: Appeal and Error.** The erroneous overruling of a challenge for cause will not warrant reversal unless it is shown on appeal that an objectionable juror was forced upon the challenging party and sat upon the jury after the party exhausted his or her peremptory challenges.
22. **Motions to Strike: Jurors: Appeal and Error.** Appellate courts ought to defer to the trial court's judgment on a motion to strike for cause, because trial courts are in the best position to assess the venire's demeanor.

23. **Jurors: Proof: Appeal and Error.** The complaining party must prove it used all its peremptory challenges and would have used a challenge to remove other biased jurors if not for the court's error.
24. **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 protection is a question of law that an appellate court reviews independently of the trial court's determination.
25. **Motions to Suppress: Confessions: Constitutional Law: Miranda Rights: Appeal and Error.** In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, including claims that it was procured in violation of the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law which an appellate court reviews independently of the trial court's determination.
26. **Motions to Suppress: Trial: Pretrial Procedure: Appeal and Error.** When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.
27. **Motions to Suppress: Courts: Records.** District courts shall articulate in writing or from the bench their general findings when denying or granting a motion to suppress.
28. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures.
29. **Arrests: Search and Seizure: Probable Cause.** An arrest constitutes a seizure that must be justified by probable cause to believe that a suspect has committed or is committing a crime.
30. **Criminal Law: Warrantless Searches: Probable Cause.** Probable cause to support a warrantless arrest exists only if law enforcement has knowledge at the time of the arrest, based on information that is reasonably trustworthy under the circumstances, that would cause a reasonably cautious person to believe that a suspect has committed or is committing a crime. Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances.

31. **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.
32. **Miranda Rights.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), adopted a set of safeguards to protect suspects during modern custodial interrogations.
33. **Constitutional Law: Arrests: Miranda Rights: Words and Phrases.** A person is in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), when formally arrested or otherwise restrained so as to be unable to move freely. It is undisputed that a person who is handcuffed and placed in a police cruiser's back seat is in custody.
34. **Miranda Rights: Police Officers and Sheriffs: Words and Phrases.** An interrogation includes express questioning, its functional equivalent, and any police conduct that police officers ought to know is reasonably likely to elicit incriminating responses. An arrestee's voluntary statements, which are not the product of interrogation, are not protected under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).
35. **Miranda Rights: Self-Incrimination.** When a custodial interrogation occurs in the absence of *Miranda*-style procedural safeguards, an arrestee's self-incriminating statements are inadmissible in court.
36. **Criminal Law: Confessions: Appeal and Error.** In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, an appellate court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous and, in doing so, will look to the totality of the circumstances.
37. **Trial: Evidence: Juries: Appeal and Error.** Erroneous admission of evidence is a harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact. The proper inquiry is whether the trier of fact's verdict was certainly not attributable to the error.
38. **Miranda Rights: Arrests: Self-Incrimination.** Courts must consider whether a *Miranda* warning, when given after an arrestee has already made incriminating statements, is sufficient to advise and convey that the arrestee may choose to stop talking even though he or she has spoken before the warning was administered.
39. **Miranda Rights.** The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function effectively as *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), requires.

40. **Miranda Rights: Evidence.** To determine whether a midinterrogation *Miranda* warning is sufficient to warrant the admission of post-*Miranda* statements, courts should consider five factors: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.
41. **Miranda Rights.** In instances of midinterrogation *Miranda* warnings, violations must include an inculpatory prewarning statement that somehow overlaps with statements made in the postwarning interrogation.

Appeal from the District Court for Douglas County: Duane C. Dougherty, Judge. Affirmed.

Bell Island, of Island Law Office, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Moore, Chief Judge, and Bishop and Arterburn, Judges.

Arterburn, Judge.

I. INTRODUCTION

Andrew D. Williams appeals from his convictions after a jury trial in the district court for Douglas County of two counts of driving under the influence causing serious bodily injury. On appeal, he argues the court erred in rulings regarding evidentiary issues, excusing a prospective juror for cause, and denying pretrial motions to suppress. For the reasons set forth below, we affirm.

II. BACKGROUND

1. Accident

On the evening of February 26, 2016, Williams' pickup truck collided with a car near the intersection of 52d and Parker Streets in Omaha, Nebraska. Kyle Phillips, Erin Sorenson, and Nathaniel Wissink were in the car when it was hit.

Phillips, who testified that he drives through the area on a near-daily basis, described 52d and Parker Streets as a T-intersection in which a driver on Parker Street faces uphill. From this perspective, a driver has a clear line of sight to the right, or north, but when looking to the left, or south, on 52d Street, can see for only a block or block and a half as a hill crests when 52d Street intersects near Decatur Street. Accordingly, Phillips testified that oncoming cars traveling on 52d Street from the south would not be visible from the intersection in question until the hill's crest.

On February 26, 2016, Phillips was accompanied by Wissink in the front passenger seat and Sorenson in the rear passenger seat as he drove westbound on Parker Street up the hill. Phillips testified that it was dark at about 6:45 or 7 p.m. when he stopped at the stop sign at the intersection of 52d and Parker Streets. After seeing no cars approaching from the left or the right, he pulled into the intersection and began to turn left when his car was "struck just . . . so fast that there was no time to comprehend anything" from the left while approximately halfway in the intersection.

During trial, the State elicited testimony from a number of neighbors who heard the accident and quickly arrived at the scene. Andrew Hale was sitting in his home on 52d Street and heard a vehicle approaching from the south at "what [he] thought would be a high rate of speed." The vehicle accelerated without stopping, sounding as if "somebody had pushed on the gas pedal." Hale testified that the vehicle continued accelerating until he heard a crash a few seconds after it passed his house. At no point did Hale hear the vehicle brake. When Hale got outside and saw there had been a crash, he called the 911 emergency dispatch service and spoke to the dispatcher.

Brett Bailes, who lived at the corner of 52d and Parker Streets, testified that he felt an explosion that shook his front door and saw a fireball go up into the trees. He ran outside and up to the car and immediately encountered Sorenson, who

had come out of the car and was engulfed in flames. Bailes took off his hooded sweatshirt, put it over her, and tackled her to the ground in order to smother out the flames with his body.

Bailes testified that once the flames engulfing Sorenson were extinguished, he noticed that Sorenson's face had significant burns and that much of her hair was gone. He further described that the jacket and jeans she was wearing appeared to be "melted into her skin": "You couldn't tell where skin and where clothing stopped and started." Bailes next noticed that Phillips, who was limply hanging out the car and beginning to regain consciousness, was being helped out of the car by another neighbor who lived on Parker Street and went outside after hearing "a very large, loud sound, kind of indescribable, extremely-violent-and-loud-explosion kind of a sound" and seeing a vehicle in flames.

Sorenson indicated there had been three people in the car, so Bailes and two neighbors ran back to the car that was completely engulfed in flames and found Wissink unconscious in the front passenger seat. Bailes testified that the car was split in half and appeared to be melting by that point; the front passenger door was "creased in" and would not open.

The three neighbors attempted to extricate Wissink from the car but struggled because his leg was pinned by the door and dashboard. Bailes said the back of Wissink's jeans were on fire and were "melting to him" by that point. Eventually, Bailes leaned in through the driver's window and freed Wissink's leg, enabling his two neighbors to pull Wissink out the front passenger window. Wissink remained unconscious when they laid him in the yard beside Sorenson and Phillips. Paramedic firefighters arrived shortly thereafter.

Bailes and one of the neighbors ran toward the pickup truck, which was near 52d and Blondo Streets, to see if anyone needed help. No one was in the pickup truck, however, and Bailes said he saw no one around who may have been the driver. Bailes testified that he observed "a plethora of beer cans

of Bud Light cans and Budweiser cans all along the street." He never saw anyone associated with the pickup truck.

On cross-examination, Bailes said that "you can see [south] one and a half or two blocks" from the intersection of 52d and Parker Streets. He also estimated that there were probably 12 to 15 beer cans in the street.

Jason Orduna, a paramedic firefighter, testified that he rode in the first vehicle out of the station, an ambulance, and that he could see the fiery car from approximately six blocks away. Various bystanders and neighbors had assembled by the time he arrived at the scene and directed him to the victims in the nearby yard. After speaking with Sorenson and briefly examining her wounds and also conversing with Gregory Hladik, another paramedic firefighter, Orduna determined that Sorenson was the most critically wounded victim. Hladik also testified that Sorenson was more severely injured than Phillips. As Orduna treated Sorenson, Hladik treated Phillips. Together, they transported Sorenson and Phillips via ambulance to a medical center, arriving there at 7:41 p.m. Upon arrival at the medical center, Orduna and Hladik transferred care to the medical center personnel.

Omaha Police Department officers, Mark Blice and Grant Gentile, were dispatched to the scene as well. They first observed a pickup truck on its side about a block away from a car that was engulfed in flames and virtually split in half. They also observed several unopened beer cans and ice in the road along with coolers in the back of the pickup truck. After ensuring no occupants remained in either vehicle, Blice and Gentile began separately speaking with potential witnesses who had gathered near the scene.

Witnesses told Blice that they observed the pickup truck driver exit his vehicle and walk away. They described the pickup truck driver as a white man who had short hair and wore blue jeans. As Blice continued speaking with witnesses, they identified a man walking around behind him as the pickup truck driver. That man was thereafter identified as Williams.

Blice made contact with Williams and observed that he appeared disoriented, smelled of alcohol, and exhibited slurred speech and watery eyes. When Blice asked Williams if he was the pickup truck driver, Williams confirmed that he was. Williams also matched the physical description given by witnesses. Blice then handcuffed Williams and placed him in the back seat of his police cruiser.

Without first administering a *Miranda* warning, Blice proceeded to briefly question Williams. In particular, Blice asked Williams what had happened, where he was going, and what he was doing when the accident occurred. Williams answered that he was traveling northbound on 52d Street when someone pulled out in front of him. Williams told Blice that he was unable to stop before hitting the car, and he acknowledged that he was traveling too fast.

Contemporaneous with Blice's speaking to witnesses and locating Williams, Gentile spoke with the victims who were being treated in a nearby yard prior to transport. Later medical examinations and treatment showed that Sorenson suffered second degree burns to her face and hands, a lung contusion, a small collapse of her lung, multiple broken ribs, and a ruptured spleen. Phillips sustained a cervical spine fracture near his lower neck or upper back. Meanwhile, Wissink suffered a concussion and a "bone dent" to his right femur.

After speaking with the three victims, Gentile approached Williams, who was at that time handcuffed and seated in the back of the police cruiser. Gentile asked Williams whether he was injured or needed medical attention, which Williams declined. During their conversation, Gentile noticed the strong odor of alcoholic beverage on Williams' person and further observed that his speech was thick and slurred.

2. Jail Transport

Blice and Gentile transported Williams to the police station. While transporting Williams, Blice asked him for the information of an emergency contact person as was Blice's routine

procedure while transporting someone. Williams provided the name and telephone number of his wife. Records show that Williams entered the police station at approximately 8:15 p.m. on February 26, 2016. Upon arrival, Blice and Gentile took Williams into a room designated for breath testing and read him a "Post Arrest Chemical Test Advisement," which advised Williams he had been arrested for driving under the influence and requested that he submit to a breath test. Blice also began observing Williams as part of the test and readied paperwork, including a driving under the influence supplementary report and field notes, which includes a *Miranda* rights advisory. Williams agreed to answer questions after being read the advisory.

Blice asked Williams whether he was driving, had been drinking earlier, and felt his drinking impaired his driving. Williams responded affirmatively to each question. When Blice asked Williams what signs of intoxication he thought he presented, Williams responded, "too many beers." Blice then asked about where Williams was going ("home") and from where he was coming ("work"). Williams articulated an understanding of where he was traveling and knew roughly what time it was.

Upon being asked, Williams acknowledged he had six beers at work from around 3 to 6:45 p.m. Williams again confirmed he was not injured. Blice ended the interview around 8:39 p.m. by asking whether there was anything else Williams would like documented. Williams said he noticed beer cans on the street and wanted it documented that those did not belong to him. Thereafter, Williams was administered a breath test via a DataMaster machine and registered a score of .134.

Blice testified that he continued noticing signs of Williams' intoxication throughout the time he transported him to the police station and interviewed him. In particular, Williams' "thick speech" and watery eyes persisted, as did the odor of alcoholic beverage. Based on his observations throughout the

day, Blice opined that Williams was under the influence of alcohol to an extent that it impaired his driving.

On cross-examination, Blice acknowledged that Williams did not exhibit many other factors indicating intoxication. Williams was not unsteady or swaying while he walked. He was cooperative in answering questions and respectful toward officers. Blice also acknowledged that he did not perform standard field sobriety tests on Williams. This was due, in part, to Blice's concern that the results might be affected by any injuries Williams sustained in the accident.

While at the police station, Williams made eight separate telephone calls, all to the same telephone number, which was later identified as belonging to his wife. Not all of the calls were completed or lasted very long, however. The telephone call system begins with an automated voice that advises the call is subject to being monitored and recorded. Williams' first call occurred around 11:30 p.m. During the calls, the couple discussed the accident in general terms, his intoxication level, the charges, the victims' conditions, bond, and whether he would be in jail over the weekend. Williams also told his wife he had been driving over the speed limit and was driving recklessly.

3. Pretrial

Williams was charged with two counts of driving under the influence causing serious bodily injury, each being a Class IIIA felony. Williams entered pleas of not guilty.

Before this matter proceeded to trial, Williams filed a series of motions to suppress. In his first two motions, Williams alleged that officers collected evidence from him following his arrest made without a warrant and without probable cause, thus violating his constitutional protections under the Fourth Amendment. He also alleged that any statements taken from him should be suppressed as a product of an illegal arrest and because he did not knowingly and intelligently waive his *Miranda* rights.

The court received testimony from Blice and Gentile and a Douglas County "911 audio tech." The court denied Williams' motion to suppress by an order dated November 1, 2016, finding the officers' actions did not violate Williams' constitutional rights. The court found the officers had probable cause to arrest Williams and "take the actions they did" thereafter.

On May 25, 2017, Williams filed a "Motion in Limine/Motion to Suppress" results of the breath test administered upon his arrest. On the same date, he filed a motion in limine to prevent the State from making any mention of (1) statements he made at the jail and (2) a written report which stated that the DataMaster machine was in proper working order at the time he was tested. The State filed a motion in limine seeking to prohibit Williams from calling an identified expert witness to testify. The court heard these motions on June 9 and denied Williams' motions by orders filed June 13. As to the State's motion, the district court required Williams to make disclosures to the State regarding Robert Belloto, Jr., an expert witness who would testify regarding issues with the DataMaster machine.

4. Trial

This matter then proceeded to a jury trial, which was held June 19 through 23, 2017. During trial, the State called 23 witnesses, which included Blice and Gentile, other emergency responders, other law enforcement personnel, the jail's telephone system administrator, an accident reconstructionist, the three victims, the victims' treating physicians, and various neighbors and bystanders from the accident scene. Williams called one witness, Belloto.

During trial, Blice and Gentile described their observations of the accident scene and Williams, and they detailed their conversations and questioning of Williams. Emergency responders and other law enforcement personnel likewise described the accident scene, and paramedic firefighters discussed the victims' injuries. The victims' treating physicians further detailed

the victims' particular injuries. Other law enforcement personnel and the jail's telephone system administrator described their observations of Williams while he was at the police station, which aligned with Blice's and Gentile's descriptions.

The State's accident reconstruction expert was Richard Ruth, who specialized in the use of "automobile event data recorders" to understand the manner in which a vehicle operated just before a crash. Ruth testified regarding the information that is captured by an "air bag control module" and an "event data recorder," and he also performed calculations of speed based on "inline momentum analysis" and "postcrash travel." In particular, he analyzed the data provided by the data recorder from Williams' pickup truck.

Based on all of the information available to him, Ruth testified that Williams was traveling between 63.1 and 78.6 miles per hour at the time of impact. The data recorder revealed that the accelerator of the pickup truck was depressed almost to the maximum until 2.4 seconds prior to impact. Williams' accelerator pedal was released, and the brake applied between 2.4 and 1.4 seconds before impact. Ruth estimated that the pickup truck would have slowed down by approximately 18 miles per hour between the application of the brakes and impact. Williams' pickup truck traveled for 246 feet after the crash impact. A number of Ruth's calculations and summaries were received, including exhibits 139 through 141, 143 through 147, and 150.

Later, during Williams' case in chief, he called Belloto, a pharmacist who has expertise related to the DataMaster machine. Belloto reviewed records and repair reports related to the DataMaster machine used to test Williams' breath. He said that multiple breath tests ought to be administered to the same person in order to avoid false positives caused by gastric reflux, breath spray that contains alcohol, radio interference, or the machine beginning to fail.

Belloto testified about his concerns with the DataMaster machine used to test Williams because there was no indication

that Williams' test was "bookend[ed]" by tests of known substances that would show the machine was still working properly. Moreover, Belloto was concerned with the machine's multiple repairs and eventual replacement. Belloto was further concerned that Williams' blow was unusually long at 50 seconds because longer blows into the machine cause a "spike" and register higher scores. During cross-examination, however, Belloto acknowledged that Williams' breath test result was a .12 after 15 seconds of blowing and only increased to .134 by the end of his 50-second blow.

Following Belloto's testimony, Williams rested, and the State offered no rebuttal evidence. The jury thereafter returned guilty verdicts on both counts of driving under the influence causing serious bodily injury. Williams was sentenced to 3 years' imprisonment on count 1 and 2 years' imprisonment on count 2. Additionally, Williams was sentenced to 9 months' postrelease supervision with regard to each conviction, and Williams' driver's license was revoked for 3 years with regard to each conviction. The sentences were ordered to run consecutive to each other.

Williams appeals.

III. ASSIGNMENTS OF ERROR

Williams assigns, restated and renumbered, that the district court erred in (1) ordering him to disclose the opinions, facts, and data of Belloto, an expert witness; (2) admitting the opinions and summaries of a State's expert over objection; (3) admitting jailhouse telephone calls over objection; (4) not striking a prospective juror for cause; and (5) denying his motions to suppress his arrest and the statements he gave before and after receiving a *Miranda* warning.

IV. ANALYSIS

1. Disclosure of Expert Opinion

Williams first assigns that the district court erred by sustaining in part a motion in limine filed by the State seeking

to preclude Williams from calling Belloto as a witness. At the hearing on the motion, the prosecutor alleged that shortly before the scheduled trial, he was provided a copy of Belloto's resume by defense counsel. The prosecutor then contacted one of Williams' attorneys and asked whether Belloto would testify and if so, whether a report of his opinions would be forthcoming. According to the prosecutor, he was told that no report existed to date. As such, the motion was filed seeking an order that would preclude Belloto from testifying or, in the alternative, require Williams to disclose the underlying facts and data supporting any opinions he might give. The district court sustained the motion in part, requiring Williams to either provide the State a copy of any report prepared by Belloto, make Belloto available for inquiry or deposition, or provide a written narrative report that contained a complete explanation of Belloto's substantive testimony. On June 15, 2017, defense counsel provided the State a one-paragraph letter which identified the topics that Belloto would testify about and the materials upon which his testimony would be based. The letter does not provide any information on what opinions or conclusions Belloto would include in his testimony. The State argues the court did not err in requiring Williams to provide the ordered information regarding Belloto's expected testimony. Alternatively, the State argues that if the district court erred in its requirements, such error was harmless. Finding no error by the district court, we affirm.

[1,2] Discovery in a criminal case is generally controlled by either a statute or court rule. *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616 (2014). Neb. Rev. Stat. §§ 29-1912 and 29-1913 (Reissue 2016) set forth specific categories of information possessed by the State which are discoverable by a defendant. Neb. Rev. Stat. § 29-1916 (Reissue 2016) provides in part:

> (1) Whenever the court issues an order pursuant to the provisions of sections 29-1912 and 29-1913, the court may condition its order by requiring the defendant to

> grant the prosecution like access to comparable items or information included within the defendant's request which:
>
> (a) Are in the possession, custody, or control of the defendant;
>
> (b) The defendant intends to produce at the trial; and
>
> (c) Are material to the preparation of the prosecution's case.

Williams argues that since he did not request the names of the State's witnesses in his motion for discovery, he was not obligated to disclose any names of witnesses he planned to call. His argument is largely founded on the case of *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998). In *Woods*, the Supreme Court affirmed as modified the Nebraska Court of Appeals' reversal of a conviction wherein the trial court had required the defendant to disclose the names of alibi witnesses prior to trial. See *State v. Woods*, 6 Neb. App. 829, 577 N.W.2d 564 (1998). The Supreme Court noted that the defendant did not seek the names of the State's witnesses in the defendant's discovery requests. As such, the court found that the reciprocal discovery provisions of § 29-1916 provided no basis for the trial court's order that the defendant be required to disclose his witnesses.

In this case, the district court rejected Williams' argument. In its decision, the district court first noted that in Williams' motion for depositions, he requested "an extensive amount of information pertaining to possible witnesses of the State." While that motion is not in our record, the district court quoted a paragraph of the motion as stating, "'Evidence which is highly complex, such as intricate mechanical or chemical evidence or prospective testimony from an expert witness, when such evidence would be better understood, or eventually rebutted, by availability of information before trial . . . .'" The court then noted that this motion for depositions was granted. The district court further noted that in its prior order as to Williams' discovery motion pursuant to § 29-1912, reciprocal discovery

was ordered. The district court then concluded that the State's request was essentially identical to Williams' request made in his motion for depositions. As such, reciprocal discovery as previously ordered required Williams to grant like access to his expert as was previously given to him as to the State's witnesses.

[3,4] While our rationale differs from that of the district court, we agree with its ultimate decision. By its terms, § 29-1916 provides only reciprocal discovery to the State as to orders for discovery entered pursuant to §§ 29-1912 and 29-1913. A motion for deposition is filed pursuant to Neb. Rev. Stat. § 29-1917 (Reissue 2016). However, unlike general discovery, a motion for deposition can be filed by either party to a criminal case. The State's ability to take the deposition of a defense witness is not dependent on the defense first taking depositions of prosecution witnesses. We note that Williams motion for depositions is not in our record. Therefore, it is difficult to discern whether the motion somehow goes beyond the parameters of § 29-1917 and is in essence a request for the identification of witnesses which would place it under § 29-1912 as apparently found by the district court.

What is clear is that this is not a case where defense counsel had not identified their expert witness to the State. According to the motion, counsel for Williams provided the State with Belloto's resume on May 31, 2017. Therefore, unlike the scenario in *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998), this is not a case where the State was seeking to force Williams to divulge the name of a witness. Rather, the State was trying to find out what it is that the identified witness would testify about. In his motion for discovery, Williams requested:

> (e) The results and reports of physical or mental examinations, and scientific tests, or experiments made in connection with this particular case, or copies thereof; [and]
>
> (f) Documents, papers, books, accounts, letters, photographs, objects, or other tangible things of whatsoever

> kind or nature which could be used as evidence by the prosecuting authority.

These requests are quite broad, and reciprocal discovery was granted to the State as to each of them.

Belloto's resume reveals that he holds several graduate degrees, including a Ph.D. in pharmacy. He also holds certifications with respect to several instruments used to measure alcohol in the breath, including the DataMaster machine—the instrument used in this case—and had made numerous presentations to attorney groups regarding alcohol and drug testing as it relates to driving under the influence cases. As such, we cannot find error in the district court's conclusion that Williams should provide any report generated by his expert that is in defense counsel's possession as that report would clearly fall within the parameters of Williams' discovery requests. Therefore, Williams had the affirmative obligation to turn over any such report pursuant to the prior order of the district court requiring him to provide reciprocal discovery to the State.

In addition, the district court did not err by giving the State the option to depose Belloto. The State's motion in limine sought disclosure of Belloto's opinions and the data upon which they were based. Under § 29-1917, the court may order the taking of a deposition when it finds the testimony of the witness may be material or relevant to the issue to be determined at the trial of the offense or may be of assistance to the parties in the preparation of their respective cases. Here, both justifications exist. While we recognize that the State's motion in limine in this case did not specifically seek to depose Belloto, it did seek information as to his opinions and the basis for those opinions. Consequently, there was no error in giving the State the ability to depose a witness already disclosed to them.

Finally, we note that even if the district court's order was considered to be error, such error was harmless. The record reveals that no report authored by Belloto existed or was

produced. No deposition or interview of Belloto took place. Rather, defense counsel provided a one-paragraph letter to the prosecutor which identified the topics about which Belloto would testify and the underlying materials upon which he would rely 4 days prior to trial. This disclosure falls far short of the "complete explanation of the subject matter upon which his expert will testify" ordered by the court. The substance of the disclosure tells the prosecutor that Belloto "will discuss the reliability of the DataMaster" and "the problems with the test" conducted. This information provides little more than could be surmised by a perusal of Belloto's resume, which Williams had voluntarily disclosed. Moreover, the materials identified upon which Belloto would opine were materials previously provided to defense counsel by the State. The State called as witnesses two technicians, one who administered the breath test and one who maintained the breath testing equipment. While testimony was adduced from these witnesses as to whether the equipment was functioning properly so as to receive an accurate result, no expert was called either during the State's case in chief or in rebuttal to specifically rebut the testimony of Belloto. As such, we cannot see how Williams' case was harmed. Accordingly, we find that even if we were to find that the court erred in requiring disclosure of Belloto's expected testimony, such requirement would be harmless error given the record before us.

2. Admission of Expert Calculations and Summaries

(a) Standard of Review

[5] Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection. *State v. Schwaderer*, 296 Neb. 932, 898 N.W.2d 318 (2017).

(b) Analysis

Williams next contends the district court erred in improperly admitting hearsay evidence in the form of Ruth's expert calculations and summaries, namely exhibits 139 through 141, 143 through 147, and 150, over objection during trial. In response, the State argues that Ruth's calculations and summaries were not hearsay evidence because they did not contain Ruth's opinions but only demonstrated the data and calculations upon which his opinions were based. Alternatively, the State argues such admission was harmless error.

[6,7] Hearsay is an out-of-court statement made by a human declarant that is offered in evidence to prove the truth of the matter asserted. See Neb. Rev. Stat. § 27-801 (Reissue 2016). See, also, *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010). Generally, hearsay is inadmissible except as provided by a recognized exception to the rule against hearsay. See Neb. Rev. Stat. §§ 27-802 through 27-804 (Reissue 2016).

Williams claims that the exhibits received all constituted hearsay. Williams relies on the case of *State v. Whitlock*, 262 Neb. 615, 634 N.W.2d 480 (2001). *Whitlock* involved a condemnation action brought by the State. At trial, the court received the full appraisal report and supplemental report of the defendant's appraiser and allowed the reports to go to the jury during deliberations. The Nebraska Supreme Court reversed the judgment and remanded the cause for a new trial, finding that allowing the reports to go to the jury "essentially amounted to a continued and more thorough testimony of his opinion during jury deliberations, without the benefit of cross-examination." *Id*. at 620, 634 N.W.2d at 484. The court noted that the expert's testimony on certain aspects of the appraisal were "superficial at best." *Id.* at 619, 634 N.W.2d at 484. The report was much more detailed than the testimony and contained photographs and maps for which no foundation was laid. As such, the court found that the report constituted inadmissible hearsay and should not have been provided to the jury.

In the instant case, Williams specifically complains of the admission of nine exhibits. Exhibits 139 and 140 are graphs taken from the crash data retrieval report that show the pickup truck's speed, brake activation, accelerator rate, "[e]ngine RPM," and precrash data status during the 4.4 seconds leading to impact. This graph is included in exhibits 137 and 138, which were received without objection. However, on exhibits 139 and 140, Ruth replaced the information found in some boxes of the graph with "RPM" data which tells him that the speed was higher and the pickup truck was accelerating during the first few seconds measured then slowed in the last 2 seconds. In his testimony, he explained that the recorder will only record a maximum speed of 78.3 miles per hour regardless of how fast the vehicle was traveling. Therefore, his testimony regarding acceleration and deceleration was noted into exhibits 139 and 140. Exhibits 141 and 143 through 147 all display speed calculations primarily at impact according to the various methods of calculation that he could perform based on the data retrieved from the pickup truck and the measurements taken at the crash scene. Exhibit 150 depicts the "EDR" data on a "Google Earth" photograph of the crash site.

For the most part, the exhibits display the data Ruth utilized to make his computations, the formulas used to compute the pickup truck's speed using three different sets of data, and then the resulting estimate of speed. His ultimate range of speed results from a combination of the three separate computations made and is recorded on exhibit 145. The testimony fully explained the information listed on the exhibits. Therefore, unlike the reports received in *State v. Whitlock, supra*, nothing exists in the exhibits herein that was not fully discussed in Ruth's testimony. While there is some level of opinion evidence embedded in the exhibits, they primarily serve as aids which demonstrate how Ruth reached his ultimate conclusion, and in the case of exhibit 150, they illustrate the distance traveled by Williams' pickup truck in the seconds leading up to the crash. Therefore, we view the exhibits as

being more akin to test results that display the raw data and then show the methodology utilized to generate a result.

As such, the vast majority of the information contained in the exhibits—the raw data and formulas—were not offered for the truth of the matter asserted but were offered for the purpose of demonstrating the information and analysis used by Ruth in reaching his conclusions. Accordingly, those portions of the exhibits are not hearsay.

[8,9] To the extent that some level of opinion exists in the exhibits, we find that those opinions were admissible as demonstrative evidence. Demonstrative exhibits are admissible if they supplement a witness' spoken description of the transpired event, clarify some issue in the case, and are more probative than prejudicial. *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009) (affirming admissibility of PowerPoint presentation that included several diagrams, photographs, and videos illustrating medical terms and concepts). Demonstrative exhibits are inadmissible when they do not illustrate or make clearer some issue in the case. *Id*. In this case, we find that the exhibits in question were supplemental to Ruth's spoken description of the transpired event, clarified an important issue in the case, and were more probative than prejudicial. We again note that no conclusion exists in the exhibits that was not fully explained in the testimony.

[10,11] We are mindful, however, that demonstrative exhibits are not automatically sent to the jury room to be utilized in deliberations. However, a trial judge may exercise his or her broad discretion to allow or disallow the use of demonstrative exhibits during jury deliberations. *State v. Pangborn*, 286 Neb. 363, 836 N.W.2d 790 (2013). Here, the exhibits in question were received without qualification. Therefore, no limiting instruction was given to the jury as to how the exhibits should be considered. While the cautious approach at trial may have been to receive the exhibits at least in part on a demonstrative basis only and give a limiting instruction, we find that no harm resulted from the district court's approach. As stated,

the majority of the information in the exhibits was not hearsay. Any opinion evidence was cumulative to the testimony. Moreover, there was significant further evidence adduced during the course of trial which established that Williams was traveling at a high rate of speed at the time of the impact. Even if admitted in error, where the evidence is cumulative and there is other competent evidence to support the conviction, the improper admission or exclusion of evidence is harmless beyond a reasonable doubt. See *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000). As such, we find that Williams suffered no prejudice as a result of the admission of exhibits 139 through 141, 143 through 147, and 150.

3. Admission of Jailhouse Telephone Call

(a) Standard of Review

[12,13] 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. Russell*, 292 Neb. 501, 874 N.W.2d 8 (2016). Where 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. *Id*.

(b) Analysis

Williams assigns the district court erred by admitting the entirety of a recorded telephone call he made to his wife from jail on the night of the accident over his objection. Williams contends specific portions of this call relating to the results of his breath test and the victims' injuries constitute inadmissible hearsay. In contrast, the State argues the complained of portions of the call were admissible nonhearsay evidence because they were not offered for their truth or, alternatively, their admission constitutes harmless error because they were

cumulative of other properly admitted testimony. We agree with the State's position.

[14,15] If an out-of-court statement is not offered for the purpose of proving the truth of the facts asserted, it is not hearsay. *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010). See § 27-801(3). A trial court should identify the specific nonhearsay purpose for which the making of a statement is relevant and probative. *State v. Baker, supra*.

In this matter, Williams complains of a handful of statements contained within a recorded telephone call that lasted 10½ minutes. First, Williams' statements regarding the results of his breath test, which were prompted by his wife's question, were not offered by the State for their truth because they were not accurate. On the recorded call, Williams references breath test scores of 1.2 and 1.4. The technician who administered Williams' breath test testified that Williams' test result was actually .134. Accordingly, Williams' telephonic statements regarding his breath test score were admissible nonhearsay evidence. Additionally, Williams' telephonic statements regarding the victims' injuries were also not offered for their truth, because Williams knew little about the particularities of the injuries and expressed uncertainty regarding the victims' conditions. Because the complained-of statements on the recorded call were not offered for the truth of the matter asserted, their admission was proper.

[16] Even assuming Williams' complained-of statements were improperly admitted, we determine any error was harmless as ample evidence was adduced regarding the subject matter of those statements from other sources. Thus, an error is harmless when cumulative of other properly admitted evidence. In particular, Williams' statements on the telephone regarding the results of his breath test were cumulative of the testimony of the technician who administered Williams' breath test. That technician testified that Williams' test result was .134 of a gram of alcohol per 210 liters of breath, which comports with exhibit 105, a copy of the Omaha Police Department's

"INFRARED ABSORPTION Checklist Technique" that the technician who administered Williams' breath test completed on the night in question.

Williams' statements on the telephone regarding the victims' injuries were also cumulative as multiple witnesses testified to the nature of the victims' injuries. Most notably, Sorenson's treating physician testified that Sorenson had burns to her face and hands and a ruptured spleen due to the accident. Sorenson also testified that she sustained injuries to her spleen and burns to her face and hands. Additionally, Gentile testified to seeing the three victims' injuries when he first arrived at the scene. Accordingly, even if admission of the complained-of statements constituted error, no harm resulted to Williams.

4. Striking Juror for Cause

(a) Standard of Review

[17,18] Retention or rejection of a juror is a matter of discretion with the trial court. *State v. Krutilek*, 254 Neb. 11, 573 N.W.2d 771 (1998). Thus, the standard of review in a case involving a motion to dismiss a juror is whether the trial court abused its discretion. *Id*.

(b) Analysis

Williams contends that a prospective juror ought to have been stricken for cause due to his familiarity with this case's underlying facts. Accordingly, Williams argues the district court erred in denying his motion to strike that prospective juror. The State argues that the prospective juror in question was not biased by his knowledge of the case, meaning there was no ground to remove him for cause. Additionally, the State argues that Williams was not prejudiced because the objectionable prospective juror did not actually sit on the jury. We find that the district court did not abuse its discretion by overruling Williams' motion to strike the juror for cause.

[19,20] Through the use of peremptory challenges or challenges for cause, parties can secure an impartial jury and avoid

including disqualified persons. See *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001), *modified on denial of rehearing* 261 Neb. 623, 633 N.W.2d 890. The retention or rejection of a juror is a matter of discretion for the trial court. *State v. Huff*, 298 Neb. 522, 905 N.W.2d 59 (2017). Jurors who form or express opinions regarding an accused's guilt based on witness accounts of the crime must be excused for cause. See, Neb. Rev. Stat. § 29-2006 (Supp. 2017); *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009). However, jurors whose source of information is from newspaper reports, hearsay, or rumor can be retained if the court is satisfied that such juror can render an impartial verdict based upon the law and the evidence adduced. See, § 29-2006; *State v. Galindo, supra*.

[21-23] Even the erroneous overruling of a challenge for cause will not warrant reversal unless it is shown on appeal that an objectionable juror was forced upon the challenging party and sat upon the jury after the party exhausted his or her peremptory challenges. *State v. Galindo, supra*. Appellate courts ought to defer to the trial court's judgment on a motion to strike for cause, because trial courts are in the best position to assess the venire's demeanor. See *id*. Notably, the court in *State v. Galindo, supra*, only considered arguments regarding 2 of the 19 potential jurors who the defendant claimed ought to have been stricken for cause because only those 2 potential jurors actually ended up seated on the jury. The complaining party must prove it used all its peremptory challenges and would have used a challenge to remove other biased jurors if not for the court's error. See *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007).

In the present matter, during the State's voir dire, the prospective juror at issue stated that he was familiar with the facts of this case. The prospective juror also stated he had served on a civil jury some time ago and had practiced law for many years, trying mostly civil cases and one shoplifting case in which he served as defense counsel.

In chambers, and with counsel and Williams present, the prospective juror in question recounted the particular facts of this matter that he remembered, stating he "followed it pretty closely." For example, the prospective juror recalled the area of the accident, basic descriptions of the parties involved, and basic facts of the accident. Upon questioning, he confirmed he was "going off [his] memory of some news reports" that he read or watched at the time. When asked by the State's attorney, the prospective juror confirmed he would follow the court's instructions and make a decision based only on the evidence presented in court.

Williams' counsel then questioned the prospective juror, who acknowledged discussing the accident with other people when it happened and stated that "it sounded pretty nasty" but denied having already made up his mind. Upon further questioning by Williams' counsel, the prospective juror agreed that separating what he already knew from the evidence was possibly difficult and expanded by saying, "I don't think that anybody can separate their life's experience from — from what they hear. You are going to have some opinions you come in with."

After Williams moved to strike this prospective juror for cause, the court inquired further, revealing that the prospective juror had practiced law for some 25 years. The court also noted that no jurors have "100 percent clean minds" and sought to determine whether the prospective juror would deliberate and decide the matter based solely on the evidence presented in court. The prospective juror stated, "Based upon my years practicing law, I would hope that all my jurors would look at the evidence and not anything else, and I would do my darnedest to do the same thing." Satisfied, the court overruled Williams' motion to strike the prospective juror for cause. The prospective juror in question was subsequently excused at the conclusion of the jury selection process after the parties exercised their peremptory strikes.

We find no abuse of discretion by the district court. Although additional questions could have been asked, we are

satisfied that the prospective juror's answers showed a clear intent and capability to be an impartial juror in this matter. After practicing law for some 25 years, the prospective juror's statements show that he recognized the practical reality that no person enters the jury box devoid of personal experiences. Even though the prospective juror's experiences happened to include reading publications about the accident for which Williams was charged, the prospective juror repeatedly stated his intent to consider only the evidence offered in the courtroom. It is also clear that the prospective juror intended to conduct himself as he expected all jurors would, judging Williams solely on the evidence offered in court and nothing else. As such, particularly given our standard of review and recognizing that the district court had the opportunity to observe the prospective juror's demeanor and the manner in which he answered questions, we find the court did not err in overruling Williams' motion to strike the prospective juror in question.

5. Motions to Suppress

(a) Standard of Review

[24] 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. Petsch*, 300 Neb. 401, 914 N.W.2d 448 (2018); *State v. Botts*, 299 Neb. 806, 910 N.W.2d 779 (2018). Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination. *State v. Petsch, supra*; *State v. Botts, supra*.

[25] In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, including claims that it was procured in violation of the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), we apply a

two-part standard of review. *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009). With regard to historical facts, we review the trial court's findings for clear error. *Id*. Whether those facts suffice to meet the constitutional standards, however, is a question of law which we review independently of the trial court's determination. *Id*.

[26] When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress. *State v. Rogers*, 297 Neb. 265, 899 N.W.2d 626 (2017).

(b) Arrest of Williams

[27] Before engaging in our analysis of the issues presented regarding Williams' motions to suppress, we must pause to note that our analysis is hampered by the brevity and absence of more particularized findings made by the district court in its order overruling Williams' motion. "[D]istrict courts shall articulate in writing or from the bench their general findings when denying or granting a motion to suppress." *State v. Osborn*, 250 Neb. 57, 67, 547 N.W.2d 139, 145 (1996). While the degree of specificity can vary from case to case and while some very brief general findings were made in this case, to the degree the district court can be more specific in its findings, our review of its ultimate disposition of the motion is aided.

Williams contends the court erred in denying his motion to suppress evidence arising from his arrest because the arrest was not supported by probable cause. In response, the State argues there was probable cause that Williams committed multiple crimes, which was sufficient to support Williams' arrest.

[28-31] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the state. *State v. Pester*, 294 Neb. 995, 885 N.W.2d 713 (2016). An

arrest constitutes a seizure that must be justified by probable cause to believe that a suspect has committed or is committing a crime. *Id.* Probable cause to support a warrantless arrest exists only if law enforcement has knowledge at the time of the arrest, based on information that is reasonably trustworthy under the circumstances, that would cause a reasonably cautious person to believe that a suspect has committed or is committing a crime. *State v. Botts*, 299 Neb. 806, 910 N.W.2d 779 (2018). Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances. *Id*. An appellate court determines whether probable cause existed under an objective standard of reasonableness, given the known facts and circumstances. *Id*.

Williams' arrest was supported by probable cause and therefore does not warrant suppression. Neither party disputes that Blice placed Williams under arrest. Williams' contention that this arrest was not supported by probable cause flies in the face of ample circumstances giving rise to probable cause for officers to arrest him.

At the hearing on Williams' motion to suppress, the State called Blice, who responded to the accident in this matter. He testified to investigating intoxicated drivers during the course of his time with the Omaha Police Department. He further testified that general signs of intoxication include poor balance, an appearance of confusion, red or watery eyes, slurred or thick speech, and an odor of alcoholic beverages.

Blice testified that he and Gentile were dispatched to the scene of the accident at 7:14 p.m. Upon arrival, he first saw the pickup truck on its side near 52d and Blondo Streets and a second vehicle on fire approximately one block south. The area wherein the accident took place was residential. Upon exiting his police cruiser, Blice walked to the area of the second vehicle and observed that it had been virtually split in half by the impact. He testified that the speed limit at that location was 30 miles per hour, but that from his assessment of the scene, the collision had to have occurred at a much higher speed.

After ensuring there were no occupants left inside the second vehicle, Blice walked back toward the pickup truck, noticing the presence of full beer cans and ice from the impact area all the way back to the pickup truck. Once back to the pickup truck, Blice spoke with witnesses who had heard the crash and presumably arrived very soon after. The witnesses described observing the pickup truck driver get out of his vehicle and walk to the north, away from the scene. As Blice continued speaking with witnesses, they pointed behind him and identified Williams, who was walking around, as the pickup truck driver. By that point, Williams was located to the south of Blice, between the two vehicles. When Blice made contact with Williams, he observed that Williams appeared disoriented, smelled of alcohol, and exhibited slurred speech and watery eyes. Williams acknowledged immediately that he was the driver of the pickup truck and was thereafter handcuffed and placed into the police cruiser.

We find that probable cause to arrest Williams existed at the time of arrest based on the totality of the facts and circumstances. Blice had probable cause to arrest Williams based on an objectively reasonable belief that Williams was driving under the influence of alcohol when involved in this accident. At the time of arrest, Williams was emitting an odor of alcoholic beverage, his eyes were bloodshot and watery, his speech was slurred and thick—all indicators of possible intoxication. Further, although Blice had not observed the accident, he knew that Williams had operated his pickup truck at a high rate of speed in a residential neighborhood sufficient to almost cut one vehicle in half and have his pickup truck roll onto its side and slide almost one block. This erratic driving behavior and lack of regard for the safety of others also supports the conclusion that probable cause existed for the arrest. Based on the totality of the facts and circumstances present, probable cause existed to believe Williams was operating a motor vehicle while under the influence of alcohol.

Moreover, Neb. Rev. Stat. § 60-697 (Cum. Supp. 2016) requires the driver of a vehicle involved in an accident to immediately stop and ascertain the identity of all persons involved; provide his name, address, and license number to the persons struck or occupying the other vehicle; and render reasonable assistance to injured persons. Given Blice's testimony that witnesses saw Williams exit the pickup truck and walk in the opposite direction of the accident scene and that officers did not locate Williams until witnesses observed and identified him, Blice had probable cause to believe Williams had left or was attempting to leave the scene of an accident.

Finding probable cause existed to support Williams' arrest, we find that the district court did not err by denying Williams' motion to suppress.

(c) Pre-*Miranda* Statements

Williams argues that the court erred in not suppressing statements he made after being handcuffed and placed in the police cruiser, because they were elicited in violation of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The State argues that, assuming the court erred, its error was harmless. We find that the court erred in overruling the motion to suppress Williams' responses to Blice's questions asked while at the scene in the police car, but we further find that the error was harmless.

[32-34] The *Miranda* Court adopted a set of safeguards to protect suspects during modern custodial interrogations, which have also been implemented through Nebraska courts. See *State v. DeJong*, 287 Neb. 864, 845 N.W.2d 858 (2014). These safeguards are implicated whenever a person is in custody and interrogated. See *id*. A person is in custody for purposes of *Miranda* when formally arrested or otherwise restrained so as to be unable to move freely. See *State v. Bormann*, 279 Neb. 320, 777 N.W.2d 829 (2010). It is undisputed that a person who is handcuffed and placed in a police cruiser's back seat is in custody. See *id*. An interrogation includes express

questioning, its functional equivalent, and any police conduct that police officers ought to know is reasonably likely to elicit incriminating responses. See *id*. An arrestee's voluntary statements, which are not the product of interrogation, are not protected under *Miranda*, however, and are therefore admissible. See *id*.

[35,36] When a custodial interrogation occurs in the absence of *Miranda*-style procedural safeguards, an arrestee's self-incriminating statements are inadmissible in court. See *State v. Juranek*, 287 Neb. 846, 844 N.W.2d 791 (2014) (holding arrestee's statements made aloud to himself while handcuffed in police cruiser before being administered *Miranda* warning were admissible because arrestee was not subject of custodial interrogation). In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, an appellate court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous and, in doing so, will look to the totality of the circumstances. *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007).

[37] Even when a trial court errs in failing to suppress a statement elicited in violation of *Miranda v. Arizona, supra*, the error may be harmless and thus not require reversal on appeal. Erroneous admission of evidence is a harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact. *State v. Juranek, supra*. Thus, harmless error analysis focuses on the basis on which the trier of fact's verdict rested. See *id*. The proper inquiry is whether the trier of fact's verdict was certainly not attributable to the error. See *id*. See, also, *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012) (holding trial court's error in admitting arrestee's statements obtained in violation of *Miranda* principles was harmless because there was overwhelming other evidence on which jury's conviction likely rested).

In this case, Williams was certainly in custody for purposes of *Miranda v. Arizona, supra*, when he was handcuffed, placed in the back seat of Blice's police cruiser, and locked in. Additionally, Blice directly questioned Williams. This questioning constituted interrogation. As a result, Williams' responses should not have been admitted unless the evidence demonstrated that Williams was first administered a *Miranda* warning and waived his rights thereunder. The district court, whose factual determinations should be accepted unless clearly erroneous, determined that the officers solicited statements from Williams before he was read a *Miranda* warning but nonetheless found those statements to be admissible. We find, however, that the express questioning by Blice while Williams was handcuffed in the back of the police cruiser constituted a custodial interrogation without the benefit of a *Miranda* warning. Therefore, those statements, some of which were incriminating, should have been suppressed.

However, in this instance, the court's error was harmless. A review of the record shows that the substance of the inadmissible statements was also introduced to the jury through admissible evidence. In violation of *Miranda* safeguards, Blice asked basically three questions to which Williams responded. Williams stated that someone pulled in front of him and that he tried to stop, but could not do so. Williams admitted that he was driving too fast and stated he was northbound on 52d Street when the collision occurred. The substance of this inadmissible evidence was properly admitted in other forms, however, including through Williams' jailhouse telephone calls to his wife and other witness accounts of hearing the collision and viewing the accident scene. In addition, expert witness testimony was adduced as to the speed Williams' pickup truck was traveling. The inadmissible statements were therefore cumulative of other properly admitted evidence. Accordingly, while the court erred in admitting Williams' statements that were made in the absence of *Miranda* safeguards, the error was harmless and thus does not warrant reversal on appeal.

We note for the sake of completeness that Williams did make some other statements while in the police cruiser which were received in evidence. However, on our review, we find that those statements either were volunteered and not in response to questioning or were in response to Gentile's inquiries regarding whether Williams needed medical attention. No incriminating response was made to Gentile's inquiries.

(d) Post-*Miranda* Statements

Williams contends the court erred in admitting statements he made after receiving a *Miranda* warning at the police station, arguing such post-*Miranda* statements were really made during the continuation of a custodial interrogation begun before the *Miranda* warning was administered. The State argues Williams' statements were not obtained as the result of a continuous two-step interrogation and thus were admissible. We find no error in the district court's denial of Williams' motion to suppress his post-*Miranda* statements.

[38,39] Generally, incriminating statements are admissible when elicited after officers have provided a *Miranda* warning and received the accused's voluntary waiver. See *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004). Courts must consider whether a *Miranda* warning, when given after an arrestee has already made incriminating statements, is sufficient to advise and convey that the arrestee may choose to stop talking even though he or she has spoken before the warning was administered. See *id*. "The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires." *Id*., 542 U.S. at 611-12. Where the warning is not effective to place an arrestee in a position to make an informed choice to stop talking, there can be reason neither to accept the warning as compliant with *Miranda* nor to treat the second stage of interrogation as separate from the first, inadmissible stage. See *Missouri v. Seibert, supra*.

[40] To determine whether a midinterrogation *Miranda* warning is sufficient to warrant the admission of post-*Miranda* statements, courts should consider five factors developed by the Court in *Seibert*:

> the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.

Id., 542 U.S. at 615.

In applying the *Seibert* factors, the court in *State v. Juranek*, 287 Neb. 846, 844 N.W.2d 791 (2014), held that the circumstances of the pre- and post-*Miranda* interrogations therein showed that the *Miranda* warning was effective. In particular, the court held that the accused's post-*Miranda* statements were not rendered inadmissible due to the pre-*Miranda* interrogation, because the initial interrogation consisted of only a single question that was focused on matters other than key points of the investigation. See *State v. Juranek, supra*.

[41] The court again examined and applied the *Seibert* factors in *State v. Clifton*, 296 Neb. 135, 156, 892 N.W.2d 112, 131 (2017), and held that in instances of midinterrogation *Miranda* warnings, violations under *Seibert* must include "an inculpatory prewarning statement that somehow overlaps with statements made in the postwarning interrogation." Notably, in *Clifton*, only 5 minutes of pre-*Miranda* questioning took place, and the questioning focused on information such as the spelling of the defendant's name, his address, and educational background. In fact, the defendant in *Clifton* made no incriminating statements before a *Miranda* warning was administered. Accordingly, the court in *Clifton* held that the trial court did not err in denying the defendant's motion to suppress his statements.

In this case, before administering to Williams a *Miranda* warning, Blice spoke with him while he was handcuffed and

in the back of a police cruiser shortly before 7:30 p.m. Blice asked Williams a few questions regarding what had happened, what direction he was going, and how fast he was driving when the accident occurred. The entire encounter was brief, lasting approximately a minute. Blice and Gentile then drove Williams to the police station.

After transporting Williams to the police station, Blice administered a *Miranda* warning to Williams at 8:34 p.m. as noted in the driving under the influence supplementary report and field notes form, and Williams thereafter agreed to answer Blice's interview questions. Blice testified that he typed responses into the form as Williams answered his questions. Blice asked Williams whether he was operating a vehicle, where he was headed, whether and how much he had been drinking, and whether he was ill or had any injuries. Williams answered that he was driving north to his home and that he had ingested "too many beers," that being six between 3 p.m. and 6:45 p.m. He also stated that he was feeling the effects of alcohol less at the time of the interview than at the time he was first contacted by police. He denied that he had taken any medications and stated that he did believe his drinking had affected his ability to drive safely. The interview concluded at 8:39 p.m.

Although during the pre-*Miranda* interrogation, Williams admitted to being the driver of the pickup truck that struck and injured the victims in this matter, he did not at that time mention drinking any alcohol. He merely stated the direction he was driving and that he could not stop before impact. Blice's pre-warning questions did not go to many of the key points of the investigation. Accordingly, while some of Williams' statements do overlap the two interrogations, they are not the sort of overlapping and inculpatory statements that the court in *State v. Clifton, supra*, found was necessary for a *Miranda* violation under *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004).

Moreover, upon evaluation of the *Seibert* factors, most of them fall in favor of admissibility in this instance. Although there was continuity of police personnel throughout Williams' pre- and post-*Miranda* warning interrogations, the interrogations took place roughly an hour apart and were conducted in different locations. Additionally, Williams' prewarning answers were cursory and devoid of detail, and the postwarning questions did not act as a mere continuation of the prewarning interrogation. While some topics were addressed during both interrogations, the postwarning questions were more detailed and focused more on Williams' alcohol consumption, which was not covered in the prewarning questions. Accordingly, under *Missouri v. Seibert, supra*, Williams' two-step interrogation did not violate *Miranda* principles. Thus, we find no error in the district court's denial of Williams' motion to suppress his post-*Miranda* statements.

V. CONCLUSION

Having found no error or, alternatively, only harmless error in the orders and rulings challenged by Williams herein, we hereby affirm Williams' convictions.

Affirmed.

In re Interest of J'Endlessly F. et al., children under 18 years of age. State of Nebraska, appellee, v. Julia M., appellant.

920 N.W.2d 858

Filed October 30, 2018. No. A-17-1156.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings.
2. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
3. **Appeal and Error.** On a question of law, an appellate court reaches a conclusion independently of the court below.
4. **Parental Rights: Proof.** Under Neb. Rev. Stat. § 43-292 (Reissue 2016), in order to terminate parental rights, the State must prove, by clear and convincing evidence, that one or more of the statutory grounds listed in this section have been satisfied and that termination is in the child's best interests.
5. **Constitutional Law: Parental Rights.** The proper starting point for legal analysis when the State involves itself in family relations is always the fundamental constitutional rights of a parent.
6. **Parental Rights: Proof.** Before the State attempts to force a breakup of a natural family, over the objections of the parents and their children, the State must prove parental unfitness.
7. ____: ____. A court may not properly deprive a parent of the custody of his or her minor child unless the State affirmatively establishes that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right.
8. ____: ____. It is always the State's burden to prove by clear and convincing evidence that the parent is unfit and that the child's best interests are served by his or her continued removal from parental custody.

9. **Parental Rights: Statutes: Words and Phrases.** The term "unfitness" is not expressly used in Neb. Rev. Stat. § 43-292 (Reissue 2016), but the concept is generally encompassed by the fault and neglect subsections of that statute, and also through a determination of the child's best interests.
10. **Parental Rights: Evidence: Proof.** Generally, when termination of parental rights is sought, the evidence adduced to prove the statutory grounds for termination will also be highly relevant to the best interests of the juvenile, as it would show abandonment, neglect, unfitness, or abuse.
11. **Parental Rights: Parent and Child.** In proceedings to terminate parental rights, 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.
12. **Parental Rights.** Although incarceration alone cannot be the sole basis for terminating parental rights, it is a factor to be considered.
13. ____. Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.
14. **Constitutional Law: Due Process.** Procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; 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.

Appeal from the Separate Juvenile Court of Douglas County: Douglas F. Johnson, Judge. Affirmed.

Judith A. Wells, of Law Office of Judith A. Wells, for appellant.

Donald W. Kleine, Douglas County Attorney, Jennifer C. Clark, Natalie J. Killion, and Joseph Fabian, Senior Certified Law Student, for appellee.

Pirtle, Riedmann, and Welch, Judges.

Riedmann, Judge.

INTRODUCTION

Julia M. appeals the order of the separate juvenile court of Douglas County which terminated her parental rights to

her minor children. Upon our de novo review of the record, we affirm.

BACKGROUND

Julia is the mother of four children: J'Loyal P., born in September 2008; J'Ahnesti M., born in August 2009; J'Endlessly F., born in November 2014; and J'Legacy S., born in November 2016. Some of the children's fathers were made part of the case before the juvenile court, but because none of them have appealed their respective outcomes, we do not address them further.

The family came to the attention of the Nebraska Department of Health and Human Services on January 11, 2016, when police were dispatched to a hospital to investigate potential child abuse. The responding officers learned that Julia had asked her sister, Jamie M., to pick up J'Endlessly from the child's paternal grandmother, and Jamie later observed an injury to the child's groin area that resembled a burn and took her to the hospital. The officers discovered that Julia had given temporary custody of J'Endlessly to her other sister, Virginia M., at some point in 2015, but became upset with Virginia, picked up J'Endlessly in September, and did not contact anyone until asking Jamie to pick up the child the previous day. The officers also learned that Julia left J'Loyal and J'Ahnesti in Jamie's custody in September 2015. Jamie and Virginia informed the officers that Julia was addicted to methamphetamine, and they were concerned for the children's safety if they were returned to Julia's care.

The officers observed the injury to J'Endlessly's groin that appeared to be a burn and also observed bruising to her lower back area and the back of both of her shoulders. Doctors at the hospital also discovered that she had a healed fracture to her "left pinky finger." All three children were removed from Julia at that time and placed in foster care with Virginia.

The following day, the State filed a petition alleging that J'Loyal, J'Ahnesti, and J'Endlessly were children within the

meaning of Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2015) due to the faults or habits of Julia. Specifically, the petition alleged that J'Endlessly had been observed with an unaccounted for injury; Julia used "drugs, alcohol, and/or controlled substances"; Julia failed to provide proper care, support, and supervision for the children; Julia failed to provide safe, stable, and appropriate housing for the children; and due to the foregoing allegations, the children were at risk of harm.

Counsel was appointed for Julia on January 15, 2016, but counsel moved to withdraw in March due to a conflict of interest. The juvenile court permitted her to withdraw and appointed substitute counsel for Julia. The State was unable to locate Julia to personally serve her with the petition and notice of hearing, so she was ultimately served by publication in March.

On April 20, 2016, the juvenile court held a "first appearance, protective custody, adjudication, and disposition hearing" as to Julia. Julia did not attend. At the outset of the hearing, Julia's substitute counsel indicated to the court that neither she nor the original counsel appointed to represent Julia had ever spoken with Julia, and Julia had never appeared in court. Thus, based on the lack of communication with Julia, the court discharged counsel and excused her from the hearing.

In support of the adjudication petition, the State offered into evidence proof of service by publication and the affidavit for removal of the children from January 11, 2016. The caseworker also explained that she had not spoken with Julia in approximately 2 months, and Julia had had only one visit with the children. Based on a preponderance of the evidence presented by the State, the court adjudicated the children under § 43-247(3)(a). At that time, the juvenile court also ordered that Julia refrain from alcohol and controlled substances; undergo random drug testing; participate in Alcoholics Anonymous and/or Narcotics Anonymous, provide proof of attendance, and obtain a sponsor; undergo an initial diagnostic interview and chemical dependency evaluation;

obtain and maintain a legal source of income and safe, stable, and appropriate housing; and participate in visitation with the children.

Although not transcribed and included in the record before us, a hearing was held on May 17, 2016, at which Julia did not appear. The evidence established that there had been no contact with Julia and that she had not visited the children or participated in services; thus, the caseworker recommended that no further reasonable efforts be required to work toward reunifying the children with Julia. In a written order, the juvenile court ordered that no further reasonable effort services were required with respect to Julia.

A review hearing was held on July 25, 2016, and Julia, who was incarcerated at the time, personally appeared. The juvenile court adopted a concurrent permanency objective of adoption at that time and reappointed counsel for Julia. Julia was represented by counsel throughout the remainder of the case.

After J'Legacy was born, the State filed a second amended third supplemental petition alleging that she was a child within the meaning of § 43-247(3)(a) (Reissue 2016) as to Julia due to the ongoing case with the older children and Julia's lack of participation in services designed to rehabilitate her. Julia was served with the petition by publication in March 2017. An adjudication hearing with respect to J'Legacy was held on April 21; Julia did not appear. In its order, the juvenile court found that Julia's whereabouts were unknown and the caseworker had been unable to contact her and that Julia had offered no support for J'Legacy and had not seen her since December 2016. The court therefore found the allegations in the second amended third supplemental petition to be true and adjudicated J'Legacy under § 43-247(3)(a).

On May 15, 2017, the State filed a motion to terminate Julia's parental rights to J'Loyal, J'Ahnesti, and J'Endlessly under Neb. Rev. Stat. § 43-292(1), (2), (6), (7), and (9) (Reissue 2016). The State additionally moved to terminate

Julia's parental rights to J'Legacy pursuant to § 43-292(2) and (6). The motion also alleged that terminating Julia's parental rights was in the children's best interests. Julia was served with the motion by publication in July 2017.

A hearing on the termination motion was held on September 29, 2017. As of that time, the three older children had been in foster care since January 2016, and J'Legacy had been in foster care since December 2016. The caseworker was assigned to the case when it began in January 2016 but was unable to make contact with Julia until April. At that time, Julia agreed to participate in visitation, but throughout the entirety of the case, she attended only three visits with the three older children and five visits with J'Legacy, all of which occurred in December 2016. She was offered three visits in January 2017 but canceled all of them. As of September 2017, she had not seen any of the children since the prior December.

At the time of the termination hearing, J'Loyal was in third grade. He was continuing to struggle with some "behavioral concerns" and had been "caught stealing fireworks over the [F]ourth of July, attempting to feed the foster parent's dog chocolate stating that he wanted to kill the puppy, and [throwing] sand in another peer's face during a baseball game." He was diagnosed with "Other Specified Disruptive Impulse Control and Conduct Disorder" and was continuing to participate in therapy. Despite all of this, he gets along well with his sisters and was doing well in school with no concerns about his grades.

J'Ahnesti was in second grade, and there were no concerns about her grades or ability to do her schoolwork. Her negative behaviors had recently decreased, and she had been observed walking away from her brother when he began to act out and helping her foster mother with laundry and cooking, and her overall listening had improved. She has a good bond with her siblings. She has been diagnosed with "Adjustment Disorder with Mixed Disturbance of Emotions and Conduct" and was

continuing to participate in therapy to work on her anger outbursts and coping skills.

J'Endlessly was almost 3 years old and had no behavioral or developmental concerns. She was walking, running, climbing, and holding conversations, and she was fully toilet trained. She has a bond with her foster mother and siblings.

J'Legacy was 9 months old and placed in a separate foster home. Other than having a milk protein intolerance, she was healthy and developmentally on track.

Throughout the duration of the case, the Department of Health and Human Services had difficulty setting up any of the court-ordered services for Julia because it never had valid contact information for her and was never able to regularly communicate with her. She never completed any of the required services and made no progress during the case. Between January and September 2017, the caseworker had contact with Julia on just one occasion. In addition, Julia was incarcerated several times throughout the pendency of the case. Although the dates of Julia's incarcerations are somewhat unclear from the record, we understand that she was incarcerated from June through December 2016 and was reincarcerated in July 2017 and remained so at the time of the termination hearing in September.

Julia testified in her own behalf at the hearing and admitted that she had previously served an 8- to 12-year prison term. Despite this, she asserted that she had attempted to rehabilitate herself by completing multiple parenting classes and other courses, as well as "complet[ing her] GED." The caseworker, however, opined that terminating Julia's parental rights was in the best interests of the children because of the history of the case, the lack of the children's relationship with Julia, and their need for permanency, which did not appear to be an option with Julia.

In a subsequent written order, the juvenile court found all of the allegations of the termination motion were true by clear and convincing evidence and that it was in the best interests

of the children to terminate Julia's parental rights. It therefore terminated Julia's parental rights to all four children. Julia appeals.

ASSIGNMENTS OF ERROR

Julia assigns, restated, that the juvenile court erred in terminating her parental rights because the State failed to adduce clear and convincing evidence that termination was in the children's best interests and that her right to due process was violated when she was denied her right to counsel.

STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings. *In re Interest of Carmelo G.*, 296 Neb. 805, 896 N.W.2d 902 (2017).

[2,3] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *Id*. On a question of law, an appellate court reaches a conclusion independently of the court below. *Id*.

ANALYSIS

Termination of Parental Rights.

[4-6] Julia argues that the juvenile court erred in finding that terminating her parental rights was in the children's best interests. Under § 43-292, in order to terminate parental rights, the State must prove, by clear and convincing evidence, that one or more of the statutory grounds listed in this section have been satisfied and that termination is in the child's best interests. *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009). The proper starting point for legal analysis when the State involves itself in family relations is always the fundamental constitutional rights of a parent. *Id.* The interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests

recognized by the U.S. Supreme Court. *Id*. Accordingly, before the State attempts to force a breakup of a natural family, over the objections of the parents and their children, the State must prove parental unfitness. *Id*.

[7-9] A court may not properly deprive a parent of the custody of his or her minor child unless the State affirmatively establishes that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right. *Id*. It is always the State's burden to prove by clear and convincing evidence that the parent is unfit and that the child's best interests are served by his or her continued removal from parental custody. *Id*. The term "unfitness" is not expressly used in § 43-292, but the concept is generally encompassed by the fault and neglect subsections of that statute, and also through a determination of the child's best interests. *In re Interest of Hope L. et al., supra*.

In the present case, the juvenile court found sufficient evidence to support terminating Julia's parental rights under § 43-292(1), (2), (6), (7), and (9). In relevant part, § 43-292 provides:

> The court may terminate all parental rights between the parents or the mother of a juvenile born out of wedlock and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> (1) The parents have abandoned the juvenile for six months or more immediately prior to the filing of the petition;
>
> (2) The parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection;
>
> . . . .
>
> (6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247,

> reasonable efforts to preserve and reunify the family if required under section 43-283.01, under the direction of the court, have failed to correct the conditions leading to the determination;
>
> (7) The juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months;
>
> . . . .
>
> (9) The parent of the juvenile has subjected the juvenile or another minor child to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse.

Subsections (1) through (6) of § 43-292 have been referred to as the fault and neglect subsections. See *In re Interest of Nicole M.*, 287 Neb. 685, 844 N.W.2d 65 (2014). Julia does not challenge the juvenile court's findings with respect to statutory grounds to support termination. Upon our de novo review of the record, we conclude that the State established by clear and convincing evidence the statutory grounds for termination along with Julia's unfitness. We therefore turn to Julia's argument that the evidence was insufficient to prove that terminating her parental rights was in the best interests of the children.

[10,11] Generally, when termination of parental rights is sought, the evidence adduced to prove the statutory grounds for termination will also be highly relevant to the best interests of the juvenile, as it would show abandonment, neglect, unfitness, or abuse. See *In re Interest of Joseph S. et al.*, 291 Neb. 953, 870 N.W.2d 141 (2015). In proceedings to terminate parental rights, 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*.

During the present case, Julia showed no improvement, and it was difficult to see a beneficial relationship between her and the children when she attended so few visits with them.

Throughout the entirety of the case, Julia never maintained consistent contact with anyone or participated in any services. There were concerns that she was using methamphetamine, but those concerns could never be addressed because she never completed a chemical dependency evaluation or any random drug testing, nor did she communicate with the caseworker such that any services could even begin. She participated in very few visits, and as of the termination hearing, she had not seen any of the children in 9 months.

[12] In addition, Julia's repeated incarcerations also hindered her ability to make any progress in order to achieve reunification. Although incarceration alone cannot be the sole basis for terminating parental rights, it is a factor to be considered. *In re Interest of Jahon S.*, 291 Neb. 97, 864 N.W.2d 228 (2015). Because Julia was incarcerated off and on since the case began in January 2016, she has not been able to provide the children with consistent necessary parental care and protection. As a result, she simply has been unable to provide the children with such basic necessities as housing and food. She has additionally been unable to tend to the children's daily needs or to provide them with any emotional support because she never consistently attended visitation with the children or was unable to attend due to incarceration. And during the 7-month period in which she was not incarcerated, she made no effort at all to work toward reunification with the children.

[13] In the approximately 21 months between the time the children were removed from Julia's care until the termination hearing, Julia was never able to overcome her personal deficiencies in order to place herself in the position to independently parent her children. Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *In re Interest of Jahon S., supra*. The caseworker assigned to the case opined that terminating Julia's parental rights was in the children's best interests in order to allow the children the permanency they need. We

therefore conclude that based on the record before us, the State established by clear and convincing evidence that it was in the best interests of the children that Julia's parental rights be terminated.

Procedural Due Process.

Julia also argues that her procedural due process rights were violated when the juvenile court discharged her counsel and she was unrepresented "during the entirety of these proceedings." Brief for appellant at 10. We disagree with Julia's characterization of the facts. She was without counsel only from April 20 until July 25, 2016. We recognize that during that timeframe, the older three children were adjudicated, and the court ordered that no further reasonable efforts were required to work toward reunifying the children with Julia. Nevertheless, Julia does not specifically allege how she was prejudiced by the procedures followed in this case, nor does she direct our attention to any applicable case law to support her argument.

[14] State intervention to terminate the parent-child relationship must be accomplished by procedures meeting the requisites of the Due Process Clause. *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003). Procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; 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 Ty M. & Devon M., supra*.

Julia was appointed counsel at the outset of the case. She was served with the petition by publication after the State was unable to locate her for personal service, and she had the opportunity to attend the adjudication hearing or, at a

minimum, make contact with either attorney that had been appointed for her during the 3-month period between the filing of the petition and the adjudication hearing. She elected not to communicate with counsel or attend the hearing. Thus, the juvenile court subsequently discharged her counsel pursuant to its authority set forth in Neb. Rev. Stat. § 43-279.01(2) (Reissue 2016). Despite this, Julia continued to be personally notified of all hearings scheduled thereafter, affording her the opportunity to be heard, but she elected not to participate in the matter. Accordingly, the court had the discretion to discharge court-appointed counsel based on Julia's failure to maintain communication, counsel was reappointed once Julia appeared in court, and Julia was afforded notice and the opportunity to be heard. We therefore find that the procedure followed in this case comports with due process.

We also observe that the State sought termination of Julia's parental rights to the children under several subsections of § 43-292, including § 43-292(2). No prior adjudication is required to terminate a parent's rights under this subsection. See *In re Interest of Joshua M. et al.*, 256 Neb. 596, 591 N.W.2d 557 (1999). Upon our de novo review of the record, we find that the evidence was sufficient to support termination pursuant to this subsection. Specifically, the evidence presented at the termination hearing established that Julia had substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection. Therefore, even if there had been a defect at the adjudication phase, the juvenile court was not precluded from considering the termination of Julia's parental rights under § 43-292(2). See *In re Interest of Isabel P. et al.*, 293 Neb. 62, 875 N.W.2d 848 (2016).

Counsel was reappointed for Julia more than a year prior to the termination hearing. The record reflects that she was advised of her rights under § 43-279.01(1) at more than one hearing, and she personally appeared and was represented by counsel at the termination hearing. As a result, we conclude

that the procedures followed in the present case did not violate Julia's right to due process.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the separate juvenile court terminating Julia's parental rights to J'Loyal, J'Ahnesti, J'Endlessly, and J'Legacy.

Affirmed.

Samantha L. Kashyap, appellant, v. Shaan S. Kashyap, appellee.

921 N.W.2d 835

Filed November 6, 2018. No. A-17-906.

1. **Divorce: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
2. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees de novo on the record to determine whether there has been 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: Appeal and Error.** In child custody cases, where the credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
5. **Child Custody.** When deciding custody issues, the court's paramount concern is the child's best interests.
6. ____. In determining the best interests of a child in a custody determination, a court must consider pertinent factors, such as 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 parental capacity to provide physical care and satisfy educational needs of the child.

7. ____. The fact that one parent might interfere with the other's relationship with the child is a factor the trial court may consider in granting custody, but it is not a determinative factor.
8. ____. A court must determine that joint custody (legal or physical) is in a minor child's best interests regardless of any parental agreement or consent.
9. ____. 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.
10. **Child Custody: Visitation.** In determining whether removal to another jurisdiction is in the child's best interests, the trial court considers (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, when viewed in the light of reasonable visitation.
11. **Child Custody.** In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the child, a court should consider the following factors: (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; (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties; and (9) the living conditions and employment opportunities for the custodial parent because the best interests of the child are interwoven with the well-being of the custodial parent.
12. ____. The list of factors to be considered in determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children 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.
13. **Child Custody: Visitation.** Consideration of the impact of removal of children to another jurisdiction on the noncustodial parent's visitation focuses on the ability of the noncustodial parent to maintain a meaningful parent-child relationship.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Affirmed.

Andrew M. Ferguson, of Carlson & Burnett, L.L.P., for appellant.

Kelly T. Shattuck, of Vacanti Shattuck, for appellee.

Moore, Chief Judge, and Bishop and Arterburn, Judges.

Bishop, Judge.

I. INTRODUCTION

The Douglas County District Court dissolved the marriage between Samantha L. Kashyap and Shaan S. Kashyap. Although Samantha was initially granted the temporary care, custody, and control of the parties' minor child, and the parties subsequently agreed to joint legal custody in a mediated partial parenting plan, the district court ultimately awarded the legal and physical custody of the child to Shaan. In doing so, the district court expressed concern about Samantha's interference with Shaan's parenting time, along with other issues. The district court also granted Shaan's request to remove the child from Nebraska to Arizona, where Shaan was stationed in the military. Samantha was ordered to pay child support. Samantha appeals, challenging the district court's decision on custody, removal, and child support. We affirm.

II. BACKGROUND

The parties were married on February 8, 2012, in Omaha, Nebraska, and their daughter, Liliana Kashyap (Lily), was born in August 2013. (We note that the parties' testimony suggests the marriage was in 2013, but documents in the transcript indicate otherwise. Also, the parties' testimony conflicts with documents in the transcript regarding Lily's birth year being 2012 or 2013. Therefore, we have relied on the dates provided in the decree dissolving the parties' marriage.) In August 2015, Shaan, a staff sergeant in the U.S. Air Force, was stationed in England when Samantha decided to leave England

and return to Omaha, taking Lily with her. Samantha then moved from Omaha to an apartment in Ashland, Nebraska, in February or March 2016. Samantha filed a complaint for dissolution of marriage on June 23 in the Saunders County District Court; Shaan filed an answer and counterclaim shortly thereafter, and it indicated he was still stationed in England. He requested "large blocks" of parenting time, since Lily was not yet of school age.

An order filed on August 8, 2016, placed temporary custody with Samantha and granted Shaan "FaceTime" with Lily three times per week. Any other parenting time was to be by agreement when Shaan was in the United States. Shaan was ordered to pay $521 per month in temporary child support commencing August 1, and the parties were ordered to equally share day-care costs. The divorce action was transferred to the Douglas County District Court in December, because Samantha moved from Ashland back to Omaha in September.

On February 17, 2017, Shaan filed a motion for further temporary orders. He claimed that Samantha had two other children with different fathers and had lost custody "due to her instability and inability to cooperate." He stated that he had not been allowed to exercise parenting time with Lily, that Samantha refused to communicate in any meaningful way, and that she had denied him "all access" to Lily.

A hearing took place on March 8, 2017, although the order setting forth the court's orally pronounced decision was not formally filed until July 10. The court awarded Shaan parenting time with Lily while he was in Omaha from March 8 to 14. The March 8 parenting time was to take place from noon until 8 p.m., and the parties were to meet at the "Omaha Zoo"; Samantha was permitted to be present for this parenting time. The parties were ordered to mediate a parenting plan, including a parenting schedule for the upcoming summer, since Shaan would be at a military base in Arizona by May. The parties were ordered to exchange and keep current their addresses and contact information.

The next day, March 9, 2017, Shaan filed a "Motion to Compel Parental Visits." It indicated that based on the parenting schedule set out by the court at the hearing on March 8, the parties were to have met at the zoo for Shaan's parenting time with Lily. However, Samantha sent a text message claiming an emergency and altered the meeting time and place to 4:30 p.m. at a shopping mall. The motion alleged that Samantha showed up with a boyfriend (and his child) and that they stayed until only 7:15 p.m., despite the court's order that parenting time was to last until 8 p.m. Shaan alleged he had been in town nearly a week and was refused parenting time until the court-ordered March 8 time, which Samantha altered. Shaan requested an order compelling Samantha to abide by the court's terms as set out at the March 8 hearing. A hearing took place on March 10. When the court asked Samantha why she had not complied with its order, Samantha replied she had to get her medication and "needed the forms filled out on base . . . because our ID's expired" and so she had to get that done. She also claimed to have "female issues" that necessitated her returning home. After confirming what the parenting time arrangements were going to be, the court advised the parties, "When I issue an order, I expect the order to be complied with," and "[i]f there's a problem, then the parties all need to know what the problem is and they have to resolve it mutually." The court further cautioned that it would "look and see how the parties act during this period of time" because it helps the court "make a good decision as to what's in the best interest of the child long term."

A mediated partial parenting plan was filed May 15, 2017. The parties agreed to joint legal custody and holiday parenting time, but could not agree on physical custody or regular parenting time.

Trial took place on July 18, 2017, and the district court orally pronounced its decision the next day. A decree dissolving the marriage was entered July 26; it awarded legal and physical custody of Lily to Shaan, granted Shaan's request to remove Lily to Arizona, and ordered Samantha to pay child

support. The evidence from trial and the court's findings will be set forth as relevant below.

III. ASSIGNMENTS OF ERROR

Samantha assigns that the district court abused its discretion by (1) granting Shaan sole legal and physical custody of the parties' minor child, (2) granting Shaan permission to remove the child from Nebraska to Arizona, and (3) ordering Samantha to pay child support.

IV. STANDARD OF REVIEW

[1,2] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Coufal v. Coufal*, 291 Neb. 378, 866 N.W.2d 74 (2015). This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees. *Id.*

[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. *Flores v. Flores-Guerrero*, 290 Neb. 248, 859 N.W.2d 578 (2015).

[4] In child custody cases, where the credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015).

V. ANALYSIS

1. Custody

Samantha claims the district court abused its discretion by awarding legal and physical custody of Lily solely to Shaan. She argues, "It was an abuse of discretion for the court to award legal custody to Shaan alone." Brief for appellant at 12. And she argues that "sole physical custody should have been

granted to [her] because Shaan moved to another jurisdiction." *Id*. at 13. These arguments indicate that Samantha is not opposed to joint legal custody of Lily, but that physical custody should have been awarded to her.

[5] When deciding custody issues, the court's paramount concern is the child's best interests. *Citta v. Facka*, 19 Neb. App. 736, 812 N.W.2d 917 (2012). Neb. Rev. Stat. § 43-2923(6) (Reissue 2016) states, in pertinent part:

> 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.

[6] 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 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).

(a) District Court's Decision

Following trial on July 18, 2017, the district court directed the parties to return the next day for the court's oral pronouncement

of its decision. On July 19, the court stated to the parties, in relevant part:

> The Court finds that [Shaan] is a fit and proper parent to be awarded [Lily's] custody, and as such the Court awards the sole legal and physical custody of [Lily] to [Shaan]. The Court finds that [Samantha] is not a fit and proper person to have custody of [Lily].
>
> The Court notes that the parties have agreed to joint legal custody. The Court is rejecting their stipulation . . . . And the reason for the Court's rejection of this is the parties do not communicate. [Samantha] has done whatever she can to thwart any type of meaningful and appropriate contact between [Lily] and [Shaan].
>
> [Samantha,] I'm finding that you are not [a fit and] proper person to be awarded custody of this child, number one, you have thwarted . . . all reasonable efforts by [Shaan], the father, to have appropriate contact with [Lily]. You have prevented that, which is absolutely inappropriate. You have a huge problem with veracity. You don't tell the truth very well. You're not stable. You're going from house to house. You do not make good decisions for [Lily]. You've introduced some other man, stranger, to [her] when you're still married, and [she] has been living on and off with your boyfriend now for the last year, which is inappropriate. You also have some morality issues that are a concern for the Court.
>
> As to [Shaan], the Court finds that he is the best parent in this case and it's in the best interest of [Lily] to be placed with him.
>
> The Court never likes to split up the geographical locations of the parties and the Court understands that that sometimes is necessary. The best interest of the child is . . . for the parents to remain married and have a stable environment. You people chose not to do that. The next thing for the best interest of the child is [for] the parents

to get along. You people can't do that. The next best interest for the child is that the parent[s] live in the same city. That can't be done in this matter.

And, [Samantha], you chose not to do that when you decided to move from England when you were still married to [Shaan].

The Court's also concerned, [Samantha], as to your lack of parental time with your other two children that are your daughter and your son. The excuse that you . . . may have cervical cancer, the doctor thinks you had that in May, it just doesn't hold any water, it doesn't hold any weight, it doesn't hold any logic. Assuming you even do have that condition, you still have an obligation to have appropriate contact with your children.

You also haven't paid your child support obligation for those children and there was no reason, good reason shown, why that was not the case.

Also, one of the things I look at is the parent that receives the custody, which parent is more likely to make sure the child has an appropriate relationship with the other parent. In this case, it's a given that it's the father, [Shaan], and you, [Samantha], because you've had the opportunity for the last two years and you've done whatever you can to thwart that.

Even if I assumed you were a fit and proper parent, I would still grant the custody to [Shaan] and allow him to move to Arizona. The legitimate reason for him to move there is . . . his position with the Air Force. . . .

The quality of life that [Lily] will have, she'll be with the parent that I believe will foster a good relationship with the other parent. It's in the best interest for her emotionally, physical[ly], to be with [Shaan].

The housing she'll have there is better than here in Omaha . . . you go between two and three houses. If I left [Lily] here, all it's going to do is cause more court battles because . . . I believe that you're a creature of habit and

> . . . you'll continue to act as you have preventing any type of meaningful contact between [Shaan] and [Lily].

The July 26, 2017, decree set forth, in part, the above findings.

(b) Samantha's Argument

Samantha initially argues that the district court abused its discretion by finding her unfit to have custody. We find it unnecessary to address Samantha's parental unfitness argument, because the court specifically held that it would have made the same decision even if it concluded Samantha was a fit and proper parent. Therefore, in our de novo review of the record, we will similarly assume parental fitness and focus only on whether the district court abused its discretion by awarding Shaan sole legal and physical custody based on the evidence presented.

Samantha contends it was an abuse of discretion for the court "to consider Samantha's relationship outside her marriage because the court made no finding that it negatively impacted [Lily]." Brief for appellant at 9. She argues that the court "cabined [its] finding as one solely of 'morality.'" *Id.* Samantha further argues that she "had been making most, if not all, major decisions" relating to Lily and that there was no evidence showing any negative impact on Lily. *Id.* at 11. Therefore, Samantha challenges the court's finding that she did not make good decisions for Lily, arguing that the court recited "what it perceives as Samantha's personal shortcomings," rather than stating how Lily has been negatively impacted by Samantha's actions. *Id.*

Samantha claims the court "wholly failed to recognize that Samantha had been the primary caregiver for [Lily] for her entire life" and that Shaan "had not cared for [Lily] overnight since August 2015." *Id.* She states that "Shaan's relationship with [Lily] was essentially limited to phone calls and FaceTime" and that "[t]hese are not [the] proper foundations upon which a grant of custody should be supported." *Id.*

Finally, Samantha contends that Shaan's "ability to parent and care for [Lily] full time was speculative at best." *Id*. at 12. As for Shaan's assertion that his parents would be helping him care for Lily, Samantha says this was only speculation, since neither of Shaan's parents testified. Samantha claims Shaan's ability to parent is speculative, whereas "[t]here is no speculation needed regarding Samantha's ability to care for [Lily], because she [has] been the sole provider for all [her] needs for the past two (2) years." *Id*.

(c) Evidence

Samantha testified that she was 28 years old and was residing half the time in her parents' home in Omaha and half the time at her boyfriend's apartment in Gretna, Nebraska. Lily shares a room with Samantha when staying at Samantha's parents' home, but has her own bed. Lily has her own room when staying at Samantha's boyfriend's apartment, unless the boyfriend's 6-year-old daughter is also present, then the children share a room. Samantha had graduated from a cosmetology school in January 2017 and was about to start a new, full-time job as a hairstylist.

Shaan testified that he was 36 years old and was a jet engine mechanic, with about 6 years left before he planned to retire from the Air Force with 20 years of service. He said he will be finishing his military service at his current assignment in Arizona, with no risk of any temporary deployments. Shaan was renting a three-bedroom house in a neighborhood near the military base; Lily would have her own bedroom and bathroom there.

(i) Other Children

Shaan and Samantha each have children from past relationships. Shaan testified that he has an 11-year-old son; the son's mother is also in the Air Force and has physical custody of their son. Samantha has two other children; each has a different father. Samantha testified that she has an 8-year-old daughter (older daughter) and a 6-year-old son. At the time of trial in

July 2017, Samantha was restricted to supervised parenting time with her older daughter as a result of sexual contact allegations involving Samantha's teenage brother (who was also living in her parents' home) and Samantha's older daughter. Her last supervised parenting time with her older daughter took place in May 2017. Samantha explained she had been "extremely busy with work" and not able "to have times that cooperate with each other."

The father of Samantha's 6-year-old son testified that he had sole custody of their son. Samantha was provided alternating weekend parenting time and one evening per week; however, she had not exercised any parenting time with their son since April 2017. According to Samantha, this was because she was "dealing with some health issues and was not wanting to bring it to [her son's] attention." When pressed by the court's questions for more of an explanation on this, Samantha said that her doctor told her in May 2017 there was a "good chance [she] had cervical cancer" and that she was still undergoing testing and had not yet had a biopsy done. The court expressed concern that 2 months had passed from when the doctor thought she might have cervical cancer and that no biopsy had been done yet. Samantha responded there was a scan that had to be done 2 weeks ago, "and they were trying to determine if it was bad enough to have to get a biopsy done" or if it "[wasn't] as serious as what they were thinking." Although she did not know whether she had cervical cancer, she did not spend time with her son because when he was between the ages of 2 and 4, "he watched his grandmother go through it and I don't want him to watch me go through it . . . and I'm just having a really hard time dealing with it." When asked how her son knew about his grandmother's cancer, Samantha said, "Because she talked about it constantly . . . I feel like she showed it off. I mean, she still walks around with her monitor on her." Upon this questioning from the court, Samantha said this was the same reason she had not seen her older daughter since May. When asked why she would not see her children

before knowing if she had cancer or starting any cancer treatments, Samantha replied, "I don't know. I've just been trying to push it away . . . ."

The father of Samantha's 6-year-old son also testified that Samantha was ordered to pay $200 per month in child support and that he thought she was about $8,000 behind in child support. The father also said that Samantha asked him "to write a letter to help her out in court," which would say that she was paying her child support and was current. According to the father, Samantha wanted him to lie because "it would help her out." Samantha testified otherwise. She claimed that she was talking with her son's father about how to pay her back child support and that she asked if he would write a letter about why Samantha is "a good enough parent for Lily and [Lily] shouldn't go overseas, but that was it." Samantha testified it had nothing to do with lying about paying off child support.

(ii) Past Criminal Matters

Samantha testified about a couple past criminal charges. On December 31, 2016, Samantha hit her current boyfriend in the face. Samantha was charged with assault, but ended up pleading to disorderly conduct. Samantha explained that at the time, she had recently had a miscarriage so her "hormones were a little bit out of whack to say the least because I was upset." She was taking painkillers, and she and her boyfriend argued and she hit him in the face. She served 2 days in jail. And then in 2012, Samantha was charged with assault and negligent care of a minor; the negligent care of a minor charge was dismissed, and she pled to disturbing the peace. Samantha said that charge arose when her older daughter acted out and said hateful things to Shaan. "[S]he got out of control and started throwing a fit and so I spanked her," and the older daughter's father claimed a bruise on the older daughter's "bottom" was from being spanked by Samantha. Samantha said the bruise was from when the older daughter had previously fallen in the bathtub.

(iii) Time in England and Parties' Separation in August 2015

While in England, Shaan volunteered at a hospital 1 day per month, teaching "a new dads class"; he received a letter of appreciation from the commander of that hospital. Shaan said he was actively involved in raising Lily when the parties were together. Shaan testified that Samantha would stay up until 3 or 4 a.m. "watching shows downstairs or on her iPad and then she wouldn't wake up the next day until . . . maybe about noon." According to Shaan, Samantha would then sit with Lily in bed and watch shows and go back to sleep. When asked how he would know this since he was at work, Shaan stated that since Samantha went to sleep so late, he would ask Samantha what time she woke up. Samantha would tell him that "she woke up and just gave the kids Pop-Tarts and went back to sleep on the couch and just turned on a kids' movie so she could go back to sleep." Shaan also claimed Samantha drank excessively when she was in England. She would drink and not "know that point where she needed to stop . . . there was a lot of points I was cleaning vomit off of the sofa or she would be passed out in the bathroom."

Shaan testified that prior to when Samantha left England, there were times when Samantha's son or Shaan's son would be at home, along with Lily, and Samantha would go on walks. When Shaan would suggest she take any of the children with her, they would get into an argument and she would tell him she just wanted to be alone. Samantha would tell him that "she doesn't have to say where she's going and she would just take off and go." Shaan believed she "was meeting with people" during these times. Also, Samantha would say she was going out for a few drinks with "other guys" and would not return until 4 a.m. or so, "with excuses that they were waiting on trains or missed trains." According to Shaan, "She was always very standoffish and angry that I was asking her questions."

With regard to the parties' separation in August 2015, Samantha said she left England at that time and moved back to Omaha because she was "sick of the instability." She claimed "there were times where we'd literally run out of money and couldn't go to the grocery store or get Lily diapers. I just couldn't deal with it anymore." She explained that being in a foreign country, she could not work, "couldn't do anything," and "[w]e couldn't provide the daycare." Also, "money was getting spent on things that I didn't know where it was going," and "I was just getting sick of running into the same issues."

However, Shaan shed a different light on the cause of Samantha's departure from England. Shaan disagreed that they had insufficient funds to buy things like diapers; rather, he testified there were other issues that arose which resulted in her leaving England. Shortly before she left, Shaan had found messages on Samantha's telephone which suggested she was soliciting sex to make money. When Shaan confronted Samantha about it, she "broke down crying," and "[f]ace to face she admitted that she did do it twice in England." Evidence was received purporting to be photographs of text messages contained on Samantha's cell phone which suggested she was doing this. According to Shaan, "She said she made an account online to meet gentlemen to do this, and she admits doing it two times. She felt that she needed to make some money somehow, someway. I didn't understand why she felt that way because we were never in a financially bad situation." Shaan testified this was the primary cause of the breakup of their marriage and why Samantha returned to Nebraska.

(iv) Interference With Shaan's Parenting Time

Samantha's primary argument for custody of Lily was that she had been Lily's caregiver for the past 2 years and Shaan had not participated in things like "[d]octors, school, [and] daycare." She claimed that since she moved back to Nebraska

in August 2015, Shaan had only seen Lily one time, in March 2017, and then shortly before trial. She acknowledged that Shaan had asked for parenting time, but she denied his requests because she did not "feel comfortable taking Lily overseas and leaving her there." Plus, she "can't afford to take that time off of work to fly her back and forth." And when Shaan has been "here" and asked for weekend visits or weeklong visits, Samantha also denied him parenting time because "[t]he only relationship they have is over a telephone . . . and . . . I was always the one taking care of her." Shaan testified that prior to when Samantha filed for divorce, he asked if he could come and get Lily and bring her back with him, but she would refuse, saying she was breastfeeding or giving some other excuse that "she couldn't come and drop Lily off or have me pick her up or she couldn't leave Lily." Shaan said he never asked for Lily to travel alone. Rather, he offered to come and pick Lily up and take her back with him.

Samantha acknowledged that Lily was supposed to have regular telephone contact or FaceTime with Shaan three times per week at 7 p.m., "but there's been times where we haven't been able to do all three." She explained that sometimes it was her work schedule or that "sometimes I just lose track of the days that I'm working late and I forget to tell him until right before," or she claimed that sometimes Shaan would forget.

When Shaan attempted to have parenting time with Lily in Virginia in June 2016, Samantha agreed and then canceled at the last minute. Samantha testified that she had agreed to bring Lily to Virginia and that she asked Shaan "for the money to get us down there." Shaan testified that he was going to be in Virginia to pick up his son and return to England and that Shaan's mother, his brother, and his brother's children were going to be there. Shaan wanted Lily to be there "so she could see more of my family." Shaan said that Samantha asked for $1,000 to drive there; he gave her $500 and told her he would give her the other half after they arrived. Samantha acknowledged that Shaan had volunteered to pay for airplane tickets for

Samantha and Lily to fly to Virginia, but Samantha declined "because it's easier for me to drive with Lily than fly. She hates being in planes." Samantha claimed, however, that at the "last minute," she could not go "because of work." She said that two or three employees quit at the gym she worked at in Lincoln the day before she was scheduled to leave and that she could not get anyone to cover their shifts. Shaan believed Samantha had no intention of coming to Virginia because just 3 days after she was supposed to meet him in Virginia, Samantha signed the divorce complaint instead.

Further parenting interference occurred in March 2017. On March 8, a hearing took place in order for Shaan to secure parenting time with Lily. The court ordered what that parenting time would be, but Samantha immediately failed to comply, altering the time and place for Shaan's parenting time. Appearing before the judge 2 days later on March 10, as discussed earlier, she gave the excuse that she had to go to the military base because "ID's" had expired, plus she had "some female issues." The court cautioned her that it expected compliance with its orders and that it would "look and see how the parties act during this period of time" when making a decision "as to what's in the best interest of the child long term." It was confirmed at the March 10 hearing that Shaan was to be picking up and dropping off Lily at Samantha's parents' home. Shaan testified that despite these very clear directives and the warning from the court, Samantha "would still change the locations of where I would pick [Lily] up, drop her off. It was never at a house. It was always at different establishments, a Walmart, a gas station, or a nail salon." Further, Samantha would not give him more than 5 minutes' notice before the scheduled meeting time, so Shaan had no idea where he was supposed to be. He said, "So usually I would be late because I wouldn't have any idea where I was going to be picking her up or dropping her off."

Then, in advance of the July 18, 2017, trial, Shaan sent Samantha several text messages informing her of his arrival in

Omaha on July 10 (although he testified to flying into Omaha the "Sunday before last," which was July 9) and requesting time with Lily. Shaan's schedule and request for parenting time was also communicated by his attorney to Samantha's attorney. Shaan tried every day to get time with Lily, but he was denied. Shaan testified:

> [Samantha] said Lily was in school and had a routine. I would ask if I could have her for the week or overnights and she would say no, or if I could have her for the day, she would say no, if I could pick her up from daycare, she would say no.

Samantha finally agreed to 4 hours of visitation with Lily on the Sunday preceding trial. Shaan testified:

> I originally asked if I could take [Lily] to the lake with my friends I've known for about 10 to 14 years with their children and she said no. She said that she had every right to dictate what I can and can't do with Lily. And then . . . basically, it was just a negotiation, and it was a long process where I said, well, can I have her from 9:00 to 4:00? And she said no. And then she said noon to 4:00. And we just kind of went back and forth until we agreed on the time and a place where she agreed that we could go.

Shaan said that Samantha's reason for not letting him have Lily as requested on that Sunday was because "[t]hey had family plans."

Samantha acknowledged that although Shaan and his son had arrived in Omaha on July 9 or 10, 2017, she did not allow Shaan to have parenting time with Lily until she gave him 4 hours on the Sunday (July 16) preceding trial (July 18). Samantha claimed that every time Shaan asked to see Lily, "it's already after I've dropped her off at daycare." Shaan would ask to pick Lily up at daycare, but Samantha said, "He's not allowed to do that." Samantha claimed that since the current court order says she has sole custody of Lily, the daycare is "not to release [Lily] to Shaan unless it changes." She

acknowledged she could have called the daycare and released Lily to Shaan, but she chose not to do so because she wanted to maintain Lily's routine and she did not want to disrupt Lily's education to see Shaan. She also testified that Shaan asked for overnights, "but he knows that I'm not comfortable with overnights."

Shaan testified about his concerns that Samantha would be unreasonable in the future if she were awarded custody. He noted the circumstances precipitating the need for a second hearing in March 2017. Even though the court had ordered certain parenting time,

> [w]e had to come back a second day for a hearing because she couldn't follow the orders, the very next day, and still after that I couldn't see [Lily] or pick her up, drop her off at the correct places. And I've already been here for over a week and only seen Lily for a day for a few hours, I don't think it will change anything in the future with her.

(v) Communication Issues

From the March 2017 hearing until trial, Shaan said Samantha would never give him her address; she would tell him that he "should have paid attention in court or [he] should ask [his] lawyer." The only address Shaan had for Samantha was her parents' house; he did not know Samantha's boyfriend's address or that he had moved and was at a different address. During Shaan's FaceTime with Lily, which was scheduled for three times per week at about 7 p.m., Shaan said Lily was never at Samantha's house. "They were either at [the boyfriend's] house . . . eating dinner, or in a car. Never once was she at her parents' house." Shaan said it was difficult to know what was going on with Samantha and Lily because any question he would ask Samantha would be met with "attitude" and with her accusing him of not caring.

An example of Samantha's unwillingness to communicate occurred when Shaan tried to get records from "Lily's ER

visit." According to Shaan, Samantha told him that he could call and "figure out where she went" and that he could "call the hospitals and get the records [him]self." Samantha would not even tell Shaan which hospital or doctors; according to Shaan, Samantha would not give him any of that information "[b]ecause I can do it myself." Shaan also testified that "about a year ago," Samantha "totalled her vehicle when Lily was in the car and she never told [him] about it." When Shaan confronted Samantha about it later, she told him "it was none of [his] business and [he] didn't need to know because Lily was fine." Additionally, Shaan said he asked Samantha repeatedly for pictures of Lily or has asked about Lily's routine. "She says no. I didn't even get a phone call or anything for Father's Day."

Shaan anticipated Samantha's behavior would be worse when there was no pending case. As a recent example, Shaan received a text message from Samantha the week of trial when he was trying to take Lily to the lake. According to Shaan, Samantha said that "she has a hundred percent custody and she can dictate what I can and can't do with Lily."

(d) No Abuse of Discretion

In this case, Samantha was awarded the temporary care, custody, and control of Lily pursuant to the temporary order entered on August 8, 2016. Samantha claims that the court's final decision awarding custody to Shaan "wholly failed to recognize that Samantha had been the primary caregiver for [Lily] for her entire life" and that Shaan "had not cared for [Lily] overnight since August 2015." Brief for appellant at 11. She contends that Shaan's relationship with Lily was limited to telephone calls and FaceTime and that "[t]hese are not [the] proper foundations upon which a grant of custody should be supported." *Id*. Samantha testified, however, that she did not worry about Shaan as a parent "except for a concern about him drinking, but I feel like he could do it." (There was no evidence to support that Shaan had a "drinking" problem.)

Samantha testified that she did not think Shaan "knows what it takes because he hasn't been around [Lily]. He doesn't know her habits and every little tiny thing like I do." However, Samantha also testified she had no reason to believe Shaan could not properly care for Lily.

Thus, Samantha's primary argument is that Shaan should not have been awarded custody due to his lack of parenting time with Lily since August 2015, when she and Lily returned to Nebraska. However, Samantha was the main reason Shaan had been unable to have parenting time with Lily during that period of time. A parent cannot take a child across an ocean away from the other parent, deny that parent's every request to have parenting time with the child, and then claim priority to custody because the other parent had not spent sufficient time with the child. The evidence fully supports the district court's finding that Samantha intentionally "thwarted" Shaan's efforts to have parenting time with Lily. Given Shaan's active duty status in the military, and his need to coordinate parenting time to include his son, it was critical for Samantha to cooperate as best possible to promote parenting time between Lily and Shaan. It is in Lily's best interests to maintain and develop relationships with both her parents. However, rather than putting Lily's best interests first and foremost, Samantha did the opposite. She intentionally left England with Lily knowing Shaan was obligated to stay given his job with the Air Force. And then when Shaan attempted to arrange times for him to bring Lily back to England with him, Samantha refused to allow it for the various reasons set forth earlier. Further, when Shaan was stateside and sought cooperation with Samantha to spend parenting time with Lily in Virginia with his extended family, Samantha turned down the airplane tickets Shaan was willing to buy for her and Lily, and instead asked for money to drive there. After receiving $500, Samantha canceled the trip the day before she and Lily were scheduled to leave for Virginia, claiming it was a work issue. Within days, she filed for divorce.

The same pattern of parenting time interference followed by excuses occurred again when Shaan was in Omaha in March 2017, and again at the time of trial in July. Even when parenting time was ordered by the district court in March, Samantha failed to comply. Again, there were excuses. And when Shaan sought parenting time while in Omaha for an extended period preceding trial, Samantha denied his requests, claiming she did not want to disrupt Lily's daycare schedule. She also testified that while Shaan asked for overnights, "he knows that I'm not comfortable with overnights." Shaan was in Omaha for a week before Samantha finally permitted 4 hours of parenting time, and Samantha dictated what Shaan could and could not do with Lily that day. According to Shaan, she told him "she has a hundred percent custody and she can dictate what I can and can't do with Lily." The evidence was clear that Samantha would not foster a healthy parent-child relationship between Shaan and Lily.

On the other hand, Shaan testified that if he was granted custody, he would "100 percent" ensure that Samantha received regular and frequent access to Lily through parenting time and FaceTime. Shaan also talked about a program called "Our Family Wizard," stating that it is

> used in other courts in different states where all communications would go through this website with both parties and it would also include the visitation calendars, school schedules, medical documents, 100 percent of everything with . . . all the child's information. That way either of us can look at that information. Also, if we have to go back to court another time, all communications, all documents, would be there for the attorneys and for the judge to look at.

Shaan said that the program is at no cost to the families wanting to use it and that he believed it "would be a great tool to help both of us coparent." The evidence demonstrated that Shaan knew it was important to promote Lily's ongoing relationship with her mother and to help Samantha coparent with him.

[7] While the promotion and facilitation of a relationship by one parent with the other parent is a factor that may be considered when awarding custody, it is not the only factor, nor is it a completely determinative factor. See *Maska v. Maska*, 274 Neb. 629, 742 N.W.2d 492 (2007) (both parties tried to cut each other off from children and both parties had anger and resentment issues, but neither parent was unfit, and father promoted best interests of children). Also, "The fact that one parent might interfere with the other's relationship with the child is a factor the trial court may consider in granting custody, but it is not a determinative factor." *Kamal v. Imroz*, 277 Neb. 116, 122, 759 N.W.2d 914, 918 (2009).

While the facts of the present case suggest there should be circumstances in which a parent's interference with a child's relationship with the other parent is so substantial that it could by itself be a determinative factor, we are guided by the case law set forth above. Therefore, like the district court, we also consider other custody factors as applied to the evidence in this case to determine whether the district court abused its discretion by awarding legal and physical custody of Lily solely to Shaan.

In addition to finding that Samantha "thwarted" Shaan's efforts to maintain contact with Lily and that Samantha was the "least likely" parent to encourage a relationship between Lily and Shaan, the district court also had concerns about Samantha's lack of time spent with her other children, her dishonesty, her failure to maintain a stable home and lifestyle, her failure to pay child support, and her poor decisions (noting specifically that it was inappropriate for Lily to be living in a home with Samantha's boyfriend while Samantha was still married to Shaan). The court also believed there were "morality issues associated with [Samantha's] conduct"; this could encompass a number of matters raised by the evidence, and it was certainly appropriate for the district court to consider matters of moral fitness. The evidence supports the court's findings as to these various factors.

Although Samantha takes issue with some of the court's findings, we reiterate the standard set forth earlier. In child custody cases, where the credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015).

[8] The district court did not abuse its discretion by rejecting the parties' agreement on joint legal custody. A court must determine that joint custody (legal or physical) is in a minor child's best interests regardless of any parental agreement or consent. See Neb. Rev. Stat. § 42-364(3) (Reissue 2016). The district court rejected joint legal custody in this case because the "parties do not communicate" and Samantha "has done whatever she can to thwart any type of meaningful and appropriate contact" between Lily and Shaan. We agree with the district court that joint legal custody was not feasible given the evidence in this case. We also conclude the district court did not abuse its discretion by awarding Shaan the legal and physical custody of Lily.

2. Removal From Nebraska to Arizona

Samantha claims the district court abused its discretion by granting Shaan permission to remove Lily from Nebraska to live with him in Arizona. The July 26, 2017, decree states:

> [Shaan] has a legitimate reason to leave the State of Nebraska with [Lily]. He has been in the Air Force for fourteen years and has only six years remaining for retirement. Further, it is in the best interests of [Lily] that she resides with [Shaan] as he has appropriate motives, [she] will have a better quality of life, and it is in [her] best interests both emotionally and physically to reside permanently with him in Arizona.

[9] Samantha argues that the district court failed to consider and apply the factors set forth in *Farnsworth v. Farnsworth*,

257 Neb. 242, 597 N.W.2d 592 (1999). In *Farnsworth*, the Nebraska Supreme Court stated:

> To prevail on a motion to remove a minor child, 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. . . . Of course, whether a proposed move is in the best interests of the child is the paramount consideration.

257 Neb. at 249, 597 N.W.2d at 598.

Therefore, we will first consider whether Shaan had a legitimate reason for his request to move Lily from Nebraska to Arizona. We will then consider whether the district court abused its discretion by concluding it was in Lily's best interests to allow the move to Arizona. The paramount consideration is whether the proposed move is in Lily's best interests. See *id*.

(a) Legitimate Reason to Leave State

Samantha does not challenge the district court's finding that Shaan had a legitimate basis for seeking removal due to his career in the Air Force. There is no question that Shaan was asking to move Lily to Arizona because of his military orders and his current active duty assignment there. Shaan had tried to get orders to an Air Force base in Nebraska, but it was not an available option. The evidence supports that Shaan had a legitimate basis for seeking removal.

(b) Child's Best Interests

[10] In determining whether removal to another jurisdiction is in the child's best interests, the trial court considers (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, when viewed in the light of reasonable visitation. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002). See, also, *Farnsworth, supra*.

(i) Each Parent's Motives

The first consideration is each parent's motives for seeking or opposing the move. Samantha claims that although the district court noted Shaan's career as the motive for seeking removal, the court did not address her motive for opposing removal. Samantha states, however, that because her "motive to oppose removal was only to maintain custody of [Lily], this prong neither weighs in support or against removal." Brief for appellant at 14. We agree this is not a particularly influential consideration; we nevertheless note that both parties had reasonable and good faith motives to support or oppose the move.

(ii) Quality of Life

[11,12] For the second consideration, the Supreme Court has set forth a number of factors to assist trial courts in assessing whether the proposed move will enhance the quality of life for the child and the custodial parent. See *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). Factors to be considered include: (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 custodial 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; (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parents; and (9) the living conditions and employment opportunities for the custodial parent because the best interests of the child are interwoven with the well-being of the custodial parent. *Id.* 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*.

Since considerable evidence pertinent to these best interests and quality of life factors has already been set forth in our discussion on custody, we will not separately discuss each factor and repeat that evidence here. However, we provide some additional evidence related to Shaan's living situation in Arizona to provide further context for the court's determination that Lily's moving to Arizona to live with Shaan would enhance her quality of life.

Shaan testified that he rented a 1,500-square-foot, three-bedroom home in Arizona, where Lily would have her own bedroom and bathroom. He said the military base in Arizona is a "training base and education base," so "there's no deployments or temporary assignments." Shaan would be there the entire time. Shaan has been in the Air Force for a little over 14 years, working the same job as a jet engine mechanic, and has about 6 years until retirement. Shaan testified that he talked with his "chain of command" and his "supervision" and that his schedule "would 100 percent rotate around [Lily] and her needs." Also, Shaan's current plan following retirement is to stay in Arizona. He said that there are "a lot of [job] openings at the airport" and that the military base also hires civilians back after retirement "into the shops and the flight lines on base" if they have proper degrees and certifications.

According to Shaan, Lily would go to preschool at a child development center on the military base, which center is about 15 minutes from Shaan's home. Shaan said it "won for 2016 the number one child development center in the Air Force." He testified that there are two teachers in each room with no more than 15 or 16 students and that one teacher would either have a teaching degree or be working on one. When Lily starts elementary school, there is a school "right around the corner" from Shaan's house, which he estimated was a 3- to 5-minute drive. Shaan met with the school's principal and teachers.

Shaan testified that Lily's daycare in Omaha had a high turnover rate with its employees. However, Samantha testified that "the daycare that [Lily's] in now is probably better because it has cameras so we can watch her or check up on her throughout the day."

As for extended family, Shaan testified that his father was moving to Arizona from India at the end of July and that his mother would arrive later to "come live with me to help take care of Lily." His mother was living in Connecticut, but "[s]he's willing to uproot everything to help me and Lily out." In Omaha, Lily had been living with Samantha's extended family half the time, including Samantha's mother and Samantha's teenage brother (who was alleged to have engaged in inappropriate sexual contact with Samantha's older daughter). Lily had also been living half the time with Samantha's boyfriend at his apartment. Shaan testified that he was concerned about the possibility of "more physical violence" between Samantha and her boyfriend. He believed "that's just something that [Samantha] learned in her personal home life." Shaan explained that Samantha's mother "has been so mad that she's broken two televisions and put[] a bar through their back glass sliding door." From what Samantha had told him and what he had seen firsthand, Shaan said that "it's not a great relationship" between Samantha and her mother. Shaan added, "[T]hey're always yelling, always screaming." They might have "good times" for 15 or 20 minutes in a day, he said, "But the rest of it is just arguing amongst everybody in that household, her little brother, her mother, her father, and her grandmother."

At trial, Samantha testified she did not think it would be in Lily's best interests to move to Arizona because "I've been her primary caregiver for the last two years, she doesn't have family out there. She has family here." Samantha added, "I feel like if she goes to Arizona she doesn't have anybody except for, like, his military buddies, and . . . I think she'd be better staying here with her actual blood family."

On appeal, she reiterates that she has been Lily's primary caregiver and that "Samantha's family is the only family [Lily] has really ever known." Brief for appellant at 15. She claims that Lily has only had interaction with Shaan's family through FaceTime and that Lily does not have a relationship with Shaan's parents to the same degree she has with Samantha's family. However, as we already discussed, when Shaan arranged for Samantha and Lily to meet him in Virginia in June 2016 when some of his family would be present, Samantha canceled the trip. This obviously hindered Lily's ability to become more familiar with extended family on her paternal side. Further, Shaan testified that the last time his mother saw Lily was in England in 2014 and that there was "a big strain between my mother and Samantha." Shaan said that Samantha would stay in her room and would not talk to his mother: "[Samantha] would keep Lily locked in her room with her. She'd come downstairs and get food and go back upstairs." Therefore, with regard to extended family, it is true that Lily would be more familiar with Samantha's extended family in Omaha due to the circumstances we have described. However, given her young age, the lack of opportunity to become more familiar with extended family on her paternal side cannot be viewed as a factor weighing against removal, especially in light of her paternal grandparents' move to Arizona. Having less time with extended family on her maternal side, however, can be viewed as a factor weighing against removal.

Samantha argues that "more factors weighed against removal than for removal." Brief for appellant at 21. Samantha claims that Lily's emotional, physical, and developmental needs are best met by her, since she has been the primary caregiver, and that Shaan failed to prove the move to Arizona "would significantly improve" Lily's living conditions. Brief for appellant at 17 (emphasis omitted). Samantha further argues that Shaan failed to prove Lily's educational opportunities would be better in Arizona than in Nebraska. Samantha also contends that

she has "a much stronger" relationship with Lily and that her "hesitation in permitting Shaan to care for [Lily] overnight or through the weekend" should not be viewed as obstructing parenting time, but was "merely an effort by Samantha to keep [Lily] in the safest environment possible." *Id*. at 19-20. Samantha claims that her stronger relationship with Lily, plus Lily's relationships with extended family in Nebraska, weighed against removal. Further, Samantha argues that allowing Shaan to remove Lily to Arizona "will only make matters worse," because the "great distance the court put between [Lily] and her primary caregiver is only going to cause more hostility," and therefore the likelihood of increased hostilities between the parents weighs against removal. *Id*. at 21.

We are mindful that Samantha's role as the primary caregiver of Lily while residing in Nebraska is of consequence and that Lily's ties to Samantha, the community, and other family members weigh against removal. However, as described above, there were also factors favoring removal. And regardless of the number of factors weighing one way or the other, it bears repeating that the quality of life factors should not be misconstrued as setting out a hierarchy of factors. See *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). Depending on the circumstances of a particular case, any one factor or combination of factors may be variously weighted. *Id*. Thus, the weight of one or two highly significant factors in a particular case may outweigh multiple other factors of less significance, depending on the facts of the case. Further, the list of criteria is not meant to be exhaustive, nor will every factor be present in each case. See *id*. However, these considerations and factors serve as appropriate guideposts to trial courts in determining what is in the child's best interests. *Id*.

In our de novo review of the evidence related to the quality of life factors, the evidence supports the district court's finding that Lily would "have a better quality of life" if she lived with Shaan in Arizona.

(iii) Impact on Noncustodial Parent's Visitation

[13] Consideration of the impact of removal of children to another jurisdiction on the noncustodial parent's visitation "focuses on the ability of the noncustodial parent to maintain a meaningful parent-child relationship." *Farnsworth*, 257 Neb. at 251, 597 N.W.2d at 599. And "[w]hen looking at this consideration, courts typically view it in the light of the potential to establish and maintain a reasonable visitation schedule." *Id*.

The district court adopted the mediated parenting plan with a few revisions, including the provision that Samantha receive up to 6 weeks of parenting time with Lily each summer. Samantha was also allowed to "Skype" with Lily three times per week at "reasonable hours," and various holidays and school breaks were to be alternated between the parties. Samantha was responsible for arranging transportation for her parenting time; however, Shaan was ordered to reimburse one-half of Lily's cost for two trips to Omaha and back to Arizona for Samantha's parenting time. Shaan testified that at the time of trial, a "last minute one-way flight" between Phoenix and Omaha was $130. Samantha argues that given her limited resources, "this effectively eliminates [her] ability to see [Lily]." Brief for appellant at 22. She contends, therefore, that this would reduce her "visitation with [Lily] to FaceTime." *Id*. She acknowledges this was the same situation Shaan had previously, but now that Shaan was living in the United States, "the court had the opportunity to craft a means of custody and visitation that would greatly benefit both parents." *Id*. She suggests that if the court had refused removal (and presumably granted her custody), the "impact on visitation between [Lily] and Shaan still would have improved." *Id*. at 22-23. She claims that since Shaan now lives closer, he could fly to Omaha "whenever a seat is open on an Air Force plane." *Id*. at 23. She admits that it would have still been difficult for Shaan to have parenting time

with Lily from Arizona, but argues "it would have been much easier when compared to the burden that has been placed on Samantha." *Id*.

There is no question that any time substantial distance exists between the parents' residences, there will be a greater burden placed on the noncustodial parent when exercising parenting time, including the increased cost of transportation. In order to address such costs in this case, the district court gave Samantha a slight break on child support by using an hourly rate of $9 per hour for Samantha's income instead of the $12 per hour she would be earning at her new job. Additionally, as noted, the court ordered Shaan to pay certain transportation costs as well. Although certainly not ideal, the parenting plan provides Samantha with reasonable parenting time. The distance and costs will be a burden, but not a barrier, to Samantha's ability to maintain her relationship with Lily.

(c) Summary

The district court did not abuse its discretion in finding that Shaan had a legitimate basis for seeking removal of Lily from Nebraska to Arizona due to his military orders that assigned him there. Further, in reviewing the best interests considerations set forth in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), as applied to the evidence in this case, we cannot say that the district court abused its discretion by granting Shaan's request to remove Lily from Nebraska to Arizona.

3. Child Support

Samantha assigns as error that the district court abused its discretion by ordering her to pay child support. She acknowledges that a "custodial parent is entitled to child support." Brief for appellant at 23. She argues only that "[i]t was an abuse of discretion for the court to order [her to] pay child support to Shaan, because the court abused its discretion in

granting sole physical custody to Shaan, and permitting Shaan to remove [Lily] from the jurisdiction." *Id*. She makes no argument related to the income or deductions used in calculating child support; rather, she argues only that she should not have been ordered to pay child support because, essentially, she should have been awarded custody. We have already found no abuse of discretion by the district court in awarding Shaan custody of Lily; therefore, we need not address this assigned error further.

VI. CONCLUSION

For the reasons set forth above, we affirm the district court's July 26, 2017, decree of dissolution.

Affirmed.

State of Nebraska, appellee, v. Kirk A. Botts, appellant.

921 N.W.2d 151

Filed November 13, 2018. No. A-16-985.

1. **Jury Instructions.** Whether jury instructions are correct is a question of law.
2. **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.
3. **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.
4. **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.
5. **Rules of Evidence: Appeal and Error.** Where 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.
6. **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.
7. **Criminal Law: Evidence: Appeal and Error.** The relevant question in 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.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Affirmed.

Matthew K. Kosmicki, of Kosmicki Law, L.L.C., for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Pirtle, Riedmann, and Welch, Judges.

Pirtle, Judge.

INTRODUCTION

Kirk A. Botts appeals from his conviction in the district court for Lancaster County for possession of a knife by a felon. He challenges the court's use of a specific jury instruction, its overruling of objections to certain testimony at trial, and its failure to find the evidence insufficient to find him guilty. Based on the reasons that follow, we affirm.

BACKGROUND

This is the second time this appeal is before this court. The first time Botts' appeal was before us, we concluded that his arrest was made without probable cause and that the resulting inventory search was invalid. We reversed Botts' conviction and remanded the matter to the trial court with directions to vacate Botts' conviction and dismiss the charge against him. We did not address Botts' other assignments of error. See *State v. Botts*, 25 Neb. App. 372, 905 N.W.2d 704 (2017), *reversed* 299 Neb. 806, 910 N.W.2d 779 (2018). The Nebraska Supreme Court subsequently granted the State's petition for further review, reversed our decision, and "remand[ed] this appeal" back to us "to consider Botts' other assignments of error." See *State v. Botts*, 299 Neb. at 818, 910 N.W.2d at 789.

The following facts were set forth in our first opinion: The State filed an amended information charging Botts with possession of a knife by a felon, a Class III felony. Botts entered a plea of not guilty. He later filed a motion to suppress evidence and statements, and a hearing was held on the motion.

At the motion to suppress hearing, Lincoln police officer Jason Drager testified that on March 10, 2016, around 2:30 a.m., he was driving back to his police station in his police cruiser. While driving, he saw a vehicle on a side street that was not moving and was partially blocking the roadway. The vehicle was situated at an angle, with the front end by the curb and the back end blocking part of the street. Drager thought maybe there had been an accident. He turned down the street and saw an individual standing by the driver's side of the vehicle. Drager turned on his cruiser's overhead lights, parked his cruiser behind the vehicle, and contacted the individual, later identified as Botts. He asked Botts what was going on, and Botts initially told Drager "to mind [his] own business." When Drager asked Botts again about what had happened, Botts told Drager that Botts' vehicle was out of gas and that he was trying to push it to the side of the road. Drager testified that he did not recall Botts' saying that he drove the vehicle there. Botts asked Drager if he could help him, and Drager told him he could not help based on Lincoln Police Department policy.

Drager testified that he decided he should remain at the location because Botts' vehicle was blocking the roadway and could cause an accident. Drager then stood back by his cruiser and watched Botts push the vehicle back and forth. Drager stated that Botts became "verbally abusive" toward him after he said he could not help him, so Drager decided to ask other officers to come to the location for safety purposes. Three other officers responded.

One of the officers who responded, Officer Phillip Tran, advised Drager that he had stopped Botts a couple hours earlier that night for traffic violations. Drager testified that Tran told

him he had detected an odor of alcohol on Botts at the time of the earlier stop. Based on the information from Tran, Drager decided to approach Botts and ask him if he had been drinking. Drager testified that when he asked Botts if he had been drinking, Botts became angry, started yelling, and started backing up away from him.

Drager testified that Botts' demeanor led him to believe he was under the influence of "some kind of alcohol or drug." However, Drager testified that he did not believe alcohol or drugs were affecting Botts' ability to answer questions. Drager did not recall Botts' stating that he had been drinking.

Drager testified that Botts backed up to the other side of the street and ended up with his back against a light pole. When he was backing up, he was not coming at the officers and was not making threats. The four officers surrounded Botts by the light pole. Botts started yelling "something along the line of shoot me, shoot me." Drager testified that Officer David Lopez, one of the officers at the scene, pulled out his Taser for safety purposes and to try to get Botts to comply with their request to put his hands behind his back. He eventually did so and was handcuffed and placed in the back of Drager's cruiser.

Drager testified that the officers were telling Botts to put his hands behind his back for their safety and Botts' safety. Drager stated that he was concerned for his safety because Botts was being verbally abusive.

Drager testified that after Botts was arrested, the officers decided to tow Botts' vehicle because it was blocking the road. He stated that it is Lincoln Police Department policy to search vehicles that are going to be towed. Tran began to search the vehicle and saw the handle of a machete sticking out from underneath the driver's seat. Drager testified that after Tran discovered the machete, Botts was under arrest for being in possession of a concealed weapon.

Tran also testified at the hearing on the motion to suppress. He testified that he had contact with Botts around midnight

on March 10, 2016, a couple hours before Drager made contact with him. He testified that he stopped Botts for not having his headlights on and for driving erratically. Tran testified that during that contact, he noticed a "slight odor of alcohol," and that there was recently-purchased alcohol in the vehicle. Botts was the driver of the vehicle, and there was more than one passenger. Tran testified that he did not initiate a driving under the influence investigation because he did not see enough signs to believe that Botts was intoxicated.

Tran testified that he and another officer responded to Drager's call for assistance and that when they arrived, he told Drager about his previous contact with Botts. Tran testified that Drager and Lopez then made contact with Botts at his vehicle, at which time his statements and demeanor became erratic. Tran stated Botts backed away from the two officers and was making statements such as "shoot me, kill me, things like that." He also heard Botts make statements indicating the police were harassing him and treating him differently than they would if he were "a white man." Tran testified that Botts backed up to a light pole and that the four officers were around Botts. One of the officers asked Botts to put his hands behind his back, and Botts responded that he was not doing anything wrong. Tran testified that during that time, Lopez had his Taser out. Botts eventually put his hands behind his back and was handcuffed.

Tran testified that as soon as Botts was handcuffed, he walked over to Botts' vehicle and looked inside the driver's side front window, which was rolled down. He then saw the handle of a machete sticking out from under the driver's seat. He retrieved the machete out of the vehicle after it was decided that the vehicle would be towed. He testified that the officers were required to do an inventory search every time a vehicle is towed.

The State offered into evidence three exhibits, which were DVD's each containing a video recording from the encounter with Botts: one from Drager's cruiser, one from Drager's body

camera, and one from Tran's cruiser. The exhibits showed the interaction between Botts and the officers, including Botts' transport to jail. The video recording from Drager's cruiser showed that when Botts was sitting in Drager's cruiser, Botts saw Tran remove the machete from Botts' vehicle. Botts then began making statements indicating that the machete was his and that he knew it was in his vehicle. Specifically, he stated multiple times that he used the machete for his business, which involved cutting weeds. Botts also made statements indicating that the vehicle where the machete was found was his vehicle. Botts was never read his *Miranda* rights.

Following the hearing, the trial court overruled the motion to suppress.

A jury trial was subsequently held on the charge. During the trial, Botts renewed his motion to suppress, which was again overruled. Drager and Tran both testified, and their testimony was consistent with that set forth above.

Lopez also testified at trial. He testified that based on information provided by Tran about the earlier stop, the officers thought Botts' vehicle was possibly positioned as it was because he had an alcohol-related accident. Lopez testified that when he and Drager approached Botts and asked if he had been drinking, he became very agitated. He was not acting very rational and was yelling. Lopez testified that during the encounter, he drew his Taser because of Botts' agitated behavior. He stated the Taser was displayed as a deescalation tactic and as a means to get Botts to comply with the officers' directions. He testified that he did not deploy the Taser and that Botts was eventually handcuffed.

The State also offered into evidence an edited version of Drager's cruiser video recording, a photograph of the machete found in Botts' vehicle, and an edited version of Tran's cruiser video recording. Also, the parties stipulated that Botts had a previous felony conviction. Botts did not present any evidence. The jury returned a verdict of guilty, and the court accepted the jury's verdict.

The trial court sentenced Botts to 1 year's imprisonment and 1 year's postrelease supervision.

ASSIGNMENTS OF ERROR

Botts assigns that the trial court erred in (1) giving an erroneous and prejudicial jury instruction, (2) failing to sustain his objections to certain testimony, and (3) finding that the evidence was sufficient to support a guilty verdict.

STANDARD OF REVIEW

[1-3] Whether jury instructions are correct is a question of law. *State v. Hinrichsen*, 292 Neb. 611, 877 N.W.2d 211 (2016). 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. *Id.* 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.*

[4,5] 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. Henry*, 292 Neb. 834, 875 N.W.2d 374 (2016). Where 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. *Id.*

[6,7] 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. Samayoa*, 292 Neb. 334, 873 N.W.2d 449 (2015). 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.*

ANALYSIS

Jury Instruction.

Botts first assigns that the trial court erred in giving the jury an erroneous and prejudicial instruction, specifically jury instruction No. 4. The instruction stated:

> The presence in a motor vehicle of a knife shall be prima facie evidence that it is in the possession of all persons occupying such motor vehicle.
>
> Prima facie evidence means you may regard the basic fact as sufficient evidence of possession, but does not require you to do so. The evidence of the possession of a knife in the vehicle must be shown beyond a reasonable doubt.

The instruction was based on Neb. Rev. Stat. § 28-1212 (Reissue 2016), which provides:

> The presence in a motor vehicle other than a public vehicle of any firearm or instrument referred to in section 28-1203, 28-1206, 28-1207, or 28-1212.03 shall be prima facie evidence that it is in the possession of and is carried by all persons occupying such motor vehicle at the time such firearm or instrument is found, except that this section shall not be applicable if such firearm or instrument is found upon the person of one of the occupants therein.

At the jury instruction conference, Botts objected to the instruction, arguing that the purpose of § 28-1212 is to establish a benchmark for the State to overcome a motion for directed verdict and that the use of jury instruction No. 4 would violate Botts' right to the presumption of innocence and right to due process. The trial court overruled Botts' objection to the instruction, stating that based on case law, the jury should be given an instruction based on

§ 28-1212 as long as the instruction does not shift the burden of proof.

There have been several cases that have examined jury instructions based on § 28-1212. First, in *State v. Stalder*, 231 Neb. 896, 438 N.W.2d 498 (1989), the defendant was charged with and convicted of being a felon in possession of a firearm with a barrel less than 18 inches in length. At trial, the court gave a jury instruction based upon § 28-1212 which stated: "'The presence in a motor vehicle other than a public vehicle of any firearm or instrument . . . shall be prima facie evidence that it is in the possession of, and is carried by, all persons occupying such motor vehicle at the time such firearm or instrument is found . . . .'" *State v. Stalder*, 231 Neb. at 904, 438 N.W.2d at 504. The defendant argued on appeal that the trial court erred in giving the jury instruction because it was unconstitutional in that it forced him to establish his innocence. *State v. Stalder, supra*.

The *Stalder* court stated that when instructions are given as to presumptions in a criminal case, those instructions must conform to the requirements of Neb. Rev. Stat. § 27-303(3) (Reissue 1985), which provided, as it now provides:

> Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.

The *Stalder* court found the trial court's failure to follow the requirements of § 27-303(3) to be error, reversed the conviction, and remanded the cause for a new trial.

The Nebraska Supreme Court again examined a jury instruction based upon § 28-1212 in *State v. Jasper*, 237 Neb. 754, 467 N.W.2d 855 (1991). In *Jasper*, the defendant was

charged with and convicted of possession of a short shotgun. At trial, the jury was given an instruction based on § 28-1212 which stated:

> "The presence in a motor vehicle of any firearm shall be prima facie evidence that it is in the possession of, and is carried by, all persons occupying such motor vehicle at the time such firearm is found, unless such firearm is found upon the person of one of the occupants.
>
> "Prima facie evidence is evidence sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted.
>
> "You may accept any presumption raised by prima facie evidence, but you are not required to do so. The evidence of presence of the firearm in the vehicle must be shown beyond a reasonable doubt."

State v. Jasper, 237 Neb. at 756, 467 N.W.2d at 858.

On appeal, the defendant argued that the jury instruction based on § 28-1212 deprived him of due process by relieving the State of its burden to prove beyond a reasonable doubt each element of the crime charged and by shifting to the defendant the burden to disprove possession of the shotgun.

The court ruled that the instruction improperly shifted the burden of persuasion to the defendant concerning the elements of the crime, relieving the State of its burden. The court held that the instruction deprived the defendant of a fair trial, as required under the constitutional guarantee of due process, and the conviction was set aside and the cause remanded for a new trial.

The *Jasper* court stated that a jury instruction founded on a presumption created by a statute was constitutionally impermissible because such instruction deprived a defendant of the due process right requiring the State to prove beyond a reasonable doubt each element of the crime charged and that such instruction shifted the burden to the defendant to disprove the element of intent in the offense charged. The court stated that the defendant was not charged with "'presence in a vehicle

containing a short shotgun'" but was charged with actual possession. *State v. Jasper*, 237 Neb. at 763, 467 N.W.2d at 861. The court stated that based on mere presence of the firearm, there could be no constitutionally permissible instruction that the jury must infer the defendant's commission of the crime charged or any element of the crime charged. The defendant's due process right to a fair trial was violated by an instruction which required that the jury draw an inference adverse to the defendant. *State v. Jasper, supra.*

The *Jasper* court further stated that even if there had been a recognizable and constitutionally acceptable presumption available in the defendant's case, the trial court failed to specifically instruct the jury that possession, which was the presumed fact, "'must, on all the evidence, be proved beyond a reasonable doubt,'" as expressly required by § 27-303(3). 237 Neb. at 766, 467 N.W.2d at 863.

The third case that has examined a jury instruction based upon § 28-1212 is *State v. Blackson*, 1 Neb. App. 94, 487 N.W.2d 580 (1992). In *Blackson*, the defendant was charged with carrying a concealed weapon after officers found two guns in a car where the defendant had been a passenger. The jury was instructed:

> "The presence in a motor vehicle of any firearm shall be prima facie evidence that it is in the possession of, and is carried by, all persons occupying such motor vehicle at the time such firearm is found, unless such firearm is found upon the person of one of the occupants.
>
> "You may regard the basic facts as sufficient evidence of the presumed fact, but you are not required to do so. The presumed fact must, on all the evidence, be proved beyond a reasonable doubt."

Id. at 96, 487 N.W.2d at 582.

The *Blackson* court determined that the instruction, which created the presumption the concealed weapon "'is carried by'" a defendant, was similar to the instruction in *State v. Jasper*, 237 Neb. 754, 467 N.W.2d 855 (1991), and that the

holding in *Jasper* should be applied. 1 Neb. App. at 98, 487 N.W.2d at 583. It reversed the defendant's conviction and remanded the cause for a new trial.

The court in *Blackson* concluded that by giving the instruction on the presumption of § 28-1212 that all individuals in a motor vehicle are in possession of or are carrying any firearm found in that vehicle, the trial court in effect directed a verdict against the defendant. The court recognized that in giving the instruction, the trial court was quoting § 27-303(3), but concluded that in light of the Nebraska Supreme Court's decision in *Jasper*, it had to find that the instruction adversely affected a substantial right of the defendant. The court held that the instruction deprived the defendant of a due process right that the State must prove beyond a reasonable doubt each element of the crime charged and that the instruction shifted the burden to the defendant to disprove the element of the offense charged that the defendant was carrying a concealed weapon.

In summary, the Nebraska Supreme Court and this court have held that a jury instruction based on § 28-1212, that shifts the burden of proof to a defendant on any essential element of a crime charged, violates a defendant's due process right to a fair trial.

The trial court may have erred in giving jury instruction No. 4 in the present case as well. However, assuming without deciding that the trial court did err in giving jury instruction No. 4, we determine that it was harmless error based on the facts of this case. The evidence showed that after Botts was placed in Drager's cruiser, Botts made statements indicating that the machete belonged to him and that he knew it was in his vehicle. Specifically, he stated multiple times that he used the machete for his business. Botts also made statements indicating that the vehicle where the machete was found was his vehicle. Further, Botts was the only person with the vehicle, which the officers knew he had been driving earlier, and the machete was found under the driver's seat. We conclude that

if it was error to give jury instruction No. 4, which we do not decide here, the error was harmless based on the evidence presented in this case.

Objections to Certain Testimony.

Botts next assigns that the court erred by failing to sustain his objections to certain prejudicial and nonrelevant testimony presented by the State. Specifically, Botts takes issue with testimony by police officers about Botts' demeanor during the encounter and comments he made while the officers were trying to place him in handcuffs. Botts also takes issue with testimony that Botts had been stopped for a traffic stop earlier that evening by Tran and that he suspected Botts had been drinking alcohol. Three officers testified to Tran's suspicion during the earlier contact that Botts had been drinking as the reason the officers approached Botts a second time, and that is when Botts became upset. Botts objected to the testimony about the earlier traffic stop based on relevancy and to the testimony about his demeanor based on relevancy and unfair prejudice. The court overruled the objections.

The general rule is that only relevant evidence is admissible. See Neb. Rev. Stat. § 27-402 (Reissue 2016). 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 2016).

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Neb. Rev. Stat. § 27-403 (Reissue 2016).

Botts argues that the only relevant matter for the jury's consideration was whether Botts had been convicted of a felony and whether he possessed a knife on the date in question. He

contends that how he reacted, his demeanor, and statements he made to the officers, as well as information regarding the earlier traffic stop, did not make the existence of any fact that is of consequence to the determination of whether he was a convicted felon that possessed a knife more probable or less probable than it would be without the evidence. He contends the testimony did not help the jury determine the elements of the crime charged, but, rather, was prejudicial and was an attempt to place Botts in a negative light.

We determine that the trial court did not err in overruling Botts' objections on relevance and unfair prejudice grounds. Evidence regarding the earlier traffic stop was relevant to establishing Botts as the driver and person in control of the vehicle, making it more likely that he possessed the machete found under the driver's seat. Also, such evidence provided context for why the officers made the decision to approach Botts. Evidence regarding Botts' demeanor was relevant in that it also provided context and a complete picture of the circumstances at the time. Further, the probative value of the complained of testimony was not substantially outweighed by the danger of unfair prejudice. This assignment of error is without merit.

Sufficiency of Evidence.

Botts asserts there was insufficient evidence to support his conviction for possession of a knife by a felon. Neb. Rev. Stat. § 28-1206 (Reissue 2016) provides that any person who possesses a knife and who has been previously convicted of a felony commits the offense of possession of a deadly weapon by a prohibited person. First, the parties stipulated that Botts had a prior felony conviction. Second, the machete qualified as a "[k]nife" under Neb. Rev. Stat. § 28-1201(5) (Reissue 2016). Third, there was evidence that Botts possessed the machete. After being placed in the cruiser, Botts repeatedly claimed that the machete was his and that he used it for his business. In addition, Botts was the only person with the vehicle, which the

officers knew he had been driving earlier, and the machete was found under the driver's seat.

We conclude that there was sufficient evidence adduced at trial to sustain Botts' conviction for possession of a knife by a felon.

CONCLUSION

We conclude that if there was any error by the court in giving jury instruction No. 4, it was harmless error. We further conclude that the court did not err in overruling objections to certain testimony raised by Botts and that the evidence was sufficient to support a guilty verdict. Accordingly, Botts' conviction and sentence are affirmed.

Affirmed.

State of Nebraska, appellant, v. Jason T. Gibson, appellee.

921 N.W.2d 161

Filed November 13, 2018. No. A-17-1272.

1. **Sentences: Appeal and Error.** When reviewing a sentence within the statutory limits, whether for leniency or excessiveness, an appellate court reviews for an abuse of discretion.
2. **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.
3. **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.
4. **Sentences: Judgments.** If an oral pronouncement of sentence is invalid but the written judgment imposing sentence is valid, the written judgment is looked to and considered controlling.
5. **Sentences: Appeal and Error.** Neb. Rev. Stat. § 29-2322 (Reissue 2016) sets forth the factors that an appellate court is to consider when reviewing a sentence alleged to be excessively lenient.
6. **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.
7. **Sentences: Probation and Parole.** Where no mandatory minimum term of imprisonment is statutorily required, a term of probation is a viable alternative, unless, having regard to the nature and circumstances of the crime and the history, character, and condition of the defendant,

the court finds imprisonment is necessary for protection of the public because the defendant is likely to reoffend, the defendant is in need of correctional treatment most effectively provided through commitment to a correctional facility, or the seriousness of the crime would be depreciated by a lesser sentence.

8. **Sentences.** To issue a lesser sentence upon a conviction because another person may be more culpable detracts from the requirement that the sentencing court consider the nature and circumstances of the present crime and the characteristics of the offender before it.

Appeal from the District Court for Sarpy County: Stefanie A. Martinez, Judge. Sentence vacated, and cause remanded with directions.

Phil Kleine, Deputy Sarpy County Attorney, for appellant.

Donald L. Schense, of Law Office of Donald L. Schense, for appellee.

Pirtle, Riedmann, and Bishop, Judges.

Riedmann, Judge.

INTRODUCTION

Jason T. Gibson was sentenced to 180 days' incarceration and 5 years' probation on his conviction for attempted first degree sexual assault of a child, a Class II felony. The State of Nebraska has appealed the sentence, claiming that the district court for Sarpy County abused its discretion in imposing an excessively lenient sentence. Because we agree, we vacate the sentence, and remand the cause with directions.

BACKGROUND

Gibson was initially charged with first degree sexual assault of a child, a Class IB felony which carries a mandatory minimum sentence of 15 years in prison for the first offense. See Neb. Rev. Stat. § 28-319.01 (Reissue 2016). In exchange for Gibson's agreement to plead no contest, the State amended the charge to attempted first degree sexual assault of a child, a Class II felony.

At the plea hearing, the State set forth the factual basis as follows:

> [B]etween December 1st of 2016, and January 31st of 2017, DeArch Stubblefield was prostituting out an individual by the name of E.L., [born in June 2001]. E.L. stated that between December 1st, 2016, and January 31st, 2017, . . . Stubblefield and her were picked up by a male party later identified as . . . Gibson. That male then drove them to his house . . . in Sarpy County, Nebraska.
>
> . . . .
>
> [T]here all three parties involved engaged in intercourse, which happened on the couch. During this meeting, money was exchanged after the sexual intercourse. The intercourse would include sexual penetration or penile penetration of . . . Gibson of E.L.
>
> E.L. was later, during an investigation, shown a photo lineup and identified the Defendant, . . . Gibson. . . . Gibson was later interviewed and he further admitted to having sexual intercourse with E.L. on the couch at [this location].

Based upon the above factual basis and a finding that the plea was made knowingly, intelligently, and voluntarily, the court accepted the plea and found Gibson guilty of attempted first degree sexual assault of a child. Gibson agreed to the plea despite being incorrectly advised by the district court that a Class II felony carried a maximum minimum sentence of 1 year's incarceration. A presentence investigation (PSI) was ordered.

The PSI revealed that the present offense was Gibson's first criminal activity for which he was charged. All testing and assessments placed him in the low risk to reoffend category. He had been a member of the U.S. Air Force for 16 years, receiving commendable reviews and numerous honors. Upon contact from the police, he immediately admitted his acts, although he continually denied that he was aware of

the victim's true age, claiming that both she and Stubblefield admitted to misrepresenting her age.

According to the PSI, Gibson became involved in this incident by responding to a "Craigslist" posting that advertised an opportunity to join two other people for a sexual encounter. Gibson admitted that he made all arrangements through Dearch Stubblefield, the individual who posted the advertisement, and that he paid Stubblefield $40 after the sexual encounter. Gibson's description of the encounter discloses that after arriving at Gibson's house, Stubblefield directed E.L. to take off her clothes and that E.L. did not engage in any discussion with Gibson during the encounter. The PSI also includes a "Memorandum" authored by Gibson and directed to the sentencing court. In it, Gibson points out that he was misled by both Stubblefield and E.L. as to their ages and he describes what he has lost as a result of this incident, but mentions nowhere the effects on the victim, E.L.

At the sentencing hearing, the court stated:

> I can hope that the system does what it is designed to do, and in my reading of the [PSI], it indicates to me that . . . Stubblefield has, in large part, the majority of the responsibility, from the materials I've received. And my hope is that [E.L.] is given some sort of justice in that sentence, most significantly.

The court proceeded to sentence Gibson, stating:

> There is [sic] a number of issues that I believe your attorney has addressed that qualifies mitigating circumstances in your circumstance in this case. I also agree that there is an element of punishment as well for your choice in this matter. I do think that you have accepted responsibility. I think you appreciate the seriousness of your actions, although most probably because you've now suffered consequences that were not contemplated at the time that you made this choice.

The court concluded, "[I]t's going to be the order and judgment of the Court that you serve a term of incarceration at the

Sarpy County Jail for 180 days. There will be a term of probation for five years to be served upon completion of that jail time." A written "Order of Probation (Jail confinement)" was entered the same day, sentencing Gibson to 5 years of "[t]raditional" supervised probation, subject to numerous conditions, including a 180-day term in the Sarpy County jail. Gibson was also ordered to comply with the Sex Offender Registration Act. The State timely filed this appeal.

ASSIGNMENTS OF ERROR

The State assigns that the sentence imposed was excessively lenient because the district court (1) failed to appropriately apply Neb. Rev. Stat. § 29-2322 (Reissue 2016) and (2) based its sentence upon improper, impermissible, and nonrelevant considerations.

STANDARD OF REVIEW

[1,2] When reviewing a sentence within the statutory limits, whether for leniency or excessiveness, an appellate court reviews for an abuse of discretion. *State v. Parminter*, 283 Neb. 754, 811 N.W.2d 694 (2012). 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. *Id*.

ANALYSIS

Before addressing the merits of the State's appeal, we address two separate issues: the sentence actually imposed and the appropriate statutory provisions to be considered.

Sentence Imposed.

Pursuant to a plea agreement, Gibson was convicted of attempted first degree sexual assault of a child, a Class II felony. See Neb. Rev. Stat. § 28-201 (Supp. 2017) and § 28-319.01(1). In its oral pronouncement at sentencing, the court sentenced Gibson to 180 days in jail, to be followed by

5 years of probation. However, Class II felonies are punishable by 1 to 50 years' imprisonment. Neb. Rev. Stat. § 28-105 (Supp. 2017). Therefore, if the court intended to sentence Gibson to incarceration, it was plain error to do so for less than 1 year, nor could it sentence him to incarceration and impose a subsequent term of probation. See Neb. Rev. Stat. § 29-2260 (Reissue 2016) (allowing court to impose period of probation in lieu of incarceration in certain situations).

[3] 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. Vanness*, 300 Neb. 159, 912 N.W.2d 736 (2018). Because the sentence pronounced was statutorily unauthorized, it was invalid and constitutes plain error.

[4] Despite its oral pronouncement, the court subsequently entered an "Order of Probation (Jail confinement)" on the day of sentencing. In that order, the court imposed a 5-year probation period and included incarceration for 180 days in the Sarpy County jail as a condition of the probation. Such a sentence is valid. See § 29-2260. If an oral pronouncement of sentence is invalid but the written judgment imposing sentence is valid, the written judgment is looked to and considered controlling. *State v. Brauer*, 16 Neb. App. 257, 743 N.W.2d 655 (2007). Because the written order is a valid sentence, we determine that Gibson was sentenced to probation that included 180 days' incarceration as a condition thereof.

Applicable Statutory Provisions.

[5] The State assigns that "the sentence imposed was excessively lenient because the Court failed to appropriately apply . . . §29-2322." However, § 29-2322 sets forth the factors that an *appellate court* is to consider when reviewing a sentence alleged to be excessively lenient. Those factors include (1) the nature and circumstances of the offense; (2) the history and

characteristics of the defendant; (3) the need for the sentence imposed to afford deterrence; (4) the need for the sentence to protect the public from further crimes of the defendant; (5) the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (6) the need for the sentence to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (7) any other matters appearing in the record that the appellate court deems pertinent.

[6] Section 29-2322 does not govern what factors the sentencing court is to consider, although many of the factors overlap. 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. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

In the context of this appeal in which the court sentenced Gibson to probation, the statute governing a sentencing court's decision to withhold incarceration is also implicated. Section 29-2260 states:

> (2) Whenever a court considers sentence for an offender convicted of either a misdemeanor or a felony for which mandatory or mandatory minimum imprisonment is not specifically required, the court may withhold sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character, and condition of the offender, the court finds that imprisonment of the offender is necessary for protection of the public because:
>
> (a) The risk is substantial that during the period of probation the offender will engage in additional criminal conduct;

(b) The offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility; or

(c) A lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for law.

(3) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of withholding sentence of imprisonment:

(a) The crime neither caused nor threatened serious harm;

(b) The offender did not contemplate that his or her crime would cause or threaten serious harm;

(c) The offender acted under strong provocation;

(d) Substantial grounds were present tending to excuse or justify the crime, though failing to establish a defense;

(e) The victim of the crime induced or facilitated commission of the crime;

(f) The offender has compensated or will compensate the victim of his or her crime for the damage or injury the victim sustained;

(g) The offender has no history of prior delinquency or criminal activity and has led a law-abiding life for a substantial period of time before the commission of the crime;

(h) The crime was the result of circumstances unlikely to recur;

(i) The character and attitudes of the offender indicate that he or she is unlikely to commit another crime;

(j) The offender is likely to respond affirmatively to probationary treatment; and

(k) Imprisonment of the offender would entail excessive hardship to his or her dependents.

The question before us then becomes whether the sentencing court abused its discretion in imposing probation instead of sentencing Gibson to incarceration. See *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

Adequacy of Sentence Imposed.

[7] A Class II felony carries a possible sentence of 1 to 50 years' imprisonment, but no mandatory minimum is required, although Gibson was erroneously advised during the plea hearing that a mandatory minimum of 1 year existed. Because no mandatory minimum was required, a term of probation was a viable alternative, unless, having regard to the nature and circumstances of the crime and the history, character, and condition of Gibson, the court found imprisonment was necessary for protection of the public because Gibson was likely to reoffend, he was in need of correctional treatment most effectively provided through commitment to a correctional facility, or the seriousness of the crime would be depreciated by a lesser sentence. See § 29-2260(2).

The record supports the sentencing court's decision to impose probation in lieu of incarceration based upon Gibson's unlikelihood to reoffend and the availability of treatment; however, § 29-2260 requires an additional consideration, that being the nature of the crime and whether probation would depreciate its seriousness or promote a disrespect of the law.

It is clear from both the factual basis offered in support of the plea and the information contained within the PSI that E.L. was the victim of sex trafficking, as described by the State, with Stubblefield as her "pimp" and Gibson as one of her customers. The dissent attempts to diminish Gibson's culpability by describing the incident as "a case of a sexually active high school couple who made an irresponsible decision," but that description perpetuates the antiquated misperception that persons who are held out for sexual pleasure by third parties are not victims. And it disregards the conviction and sentence of Stubblefield for attempted human trafficking that was recently summarily affirmed by this court on September 11, 2018, in case No. A-18-159.

As admitted to by Gibson, Gibson responded to a Craigslist posting made by Stubblefield, Gibson made all arrangements

through Stubblefield, Stubblefield was the one who directed E.L. to remove her clothing, and it was Stubblefield whom Gibson paid. The reality of the situation is that Gibson, age 40 at the time, engaged in first degree sexual assault of a child facilitated online, through a third party, and then sought leniency for having been mistaken as to her age. While we recognize the attributes of Gibson and his lack of a prior criminal history, the seriousness of the offense leads us to conclude that a term of probation depreciates the seriousness of the offense and promotes disrespect of the law.

As set forth above, the factors we consider in determining whether a sentence is excessively lenient include: (1) the nature and circumstances of the offense; (2) the history and characteristics of the defendant; (3) the need for the sentence imposed to afford deterrence; (4) the need for the sentence to protect the public from further crimes of the defendant; (5) the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (6) the need for the sentence to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (7) any other matters appearing in the record that the appellate court deems pertinent. See § 29-2322.

Taking the above factors into consideration—particularly the nature and circumstances of the offense; the need to afford deterrence for this type of crime; and the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment—we conclude that a term of probation was excessively lenient.

Consideration of Improper, Impermissible, and Irrelevant Factors.

The sentencing court's decision was based in part upon Stubblefield's involvement and culpability in the crime. The

State claims this was improper, and we agree. Before sentencing Gibson, the court stated:

> I can hope that the system does what it is designed to do, and in my reading of the [PSI], it indicates to me that . . . Stubblefield has, in large part, the majority of the responsibility, from the materials I've received. And my hope is that [E.L.] is given some sort of justice in that sentence, most significantly.

Nowhere in our statutes, nor in our case law, is a sentencing judge instructed to consider whether the victim will be "given some sort of justice" in the sentence of another wrongdoer when crafting a sentence for the particular defendant before the court. We recognize that where two or more defendants are convicted for the same offense and different penalties are inflicted, it is appropriate for an appellate court to examine the evidence to determine whether there are justifiable reasons for differences in sentences rendered. See *State v. Morrow*, 220 Neb. 247, 369 N.W.2d 89 (1985). However, Gibson is the sole defendant in this matter, and at the time of sentencing, there was no evidence presented regarding the nature of the charge against Stubblefield, whether he had been convicted or sentenced, or the nature of the sentence if one had been imposed.

[8] The court's focus should have been on Gibson and his conviction for attempted first degree sexual assault of a child, taking into consideration all the circumstances of this case. To issue a lesser sentence because another person may be more culpable detracts from the requirement that the sentencing court consider the nature and circumstances of the present crime and the characteristics of the offender before it. Consideration of whether E.L. will be "given some sort of justice" through the sentencing of Stubblefield was not an appropriate factor to consider and appears to have resulted in a more lenient sentence for Gibson. We find that the sentencing court abused its discretion when it considered this factor.

CONCLUSION

We conclude that the district court abused its discretion by imposing an excessively lenient sentence and considering an irrelevant factor when imposing sentence upon Gibson. We vacate the sentence and remand the cause to the district court with directions to impose a greater sentence. The sentence should be imposed by a different district court judge than the original sentencing judge.

Sentence vacated, and cause remanded with directions.

Bishop, Judge, dissenting.

In my review of the record, this case seems less a "sex trafficking" case (as characterized by the State and the majority opinion), and more a case of a sexually active high school couple who made an irresponsible decision to experiment with their sexuality by engaging in two "threesome" sexual encounters which Stubblefield arranged through Craigslist. One of those two encounters included Gibson. Stubblefield, age 18 at the time, attended the same high school as E.L., and the two had been sexually active with each other for about 6 months when Stubblefield proposed the threesome sexual encounters, to which E.L. agreed. Because E.L. was about 5 months shy of turning 16, she could not legally consent to those encounters. According to E.L., Stubblefield wanted to "explore his sexuality." Contrary to the majority's assertion, my description above does not attempt to diminish Gibson's culpability, nor is it based on an antiquated misperception. Rather, it simply sets forth information contained in the record before us. But no matter how we might frame the facts, my dissent is driven by our standard of review. When reviewing a trial court's imposition of a sentence, this court's review must be constrained to determining only whether the trial court abused its discretion. 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 the matters submitted for disposition. *State v. Parminter*, 283 Neb. 754, 811 N.W.2d 694 (2012). The record in this case supports the district court's decision to impose probation; accordingly, its decision is not "clearly untenable," meaning it is not clearly indefensible, unsound, or flawed. See *id.* at 257, 811 N.W.2d at 697.

Most notably, at the sentencing hearing, the district court referred to the "number of issues" Gibson's attorney addressed at the hearing which qualified as "mitigating circumstances" for Gibson. These remarks included the attorney's statement that he had "helped [Gibson] in his divorce" years ago, so he had known Gibson for a number of years. Gibson's attorney then pointed out the following: Gibson had given "16 honorable years of service" in the U.S. Air Force; the courtroom was "full of people" supporting Gibson; there were "in excess of 30 letters [written] attesting to [Gibson's] good character and reputation"; Gibson was honest and cooperative when contacted by the police—he accepted responsibility "from day one"; Gibson was "extremely embarrassed, ashamed, and remorseful for his actions"; the PSI shows "an individual who has exemplified what is the best of people" but also that "we are all prone to make mistakes, some more serious than others"; there were "pages of [Gibson's] awards, his decorations, his performance reports, all showing what a valued, trusted airman he was" in the Air Force; the clinical psychologist's letter noted Gibson was "not classif[ied] as a pedophile under DSM-5"; Gibson had no criminal history; Gibson had "very low risk assessment totals" under the categories of education, employment, family, companions, alcohol, drugs, criminal attitude, and antisocial; the administrative discharge proceedings that will take place will result in the forfeiture of Gibson's career in the Air Force after 16 years; all of Gibson's sex offender risk assessment totals were very low; Gibson would have to register as a sex offender; and Gibson posed little, if any, risk to society in the future.

Gibson's attorney acknowledged that Gibson had "a great lapse in judgment" when he went to Craigslist and responded to "an ad with some people who purportedly were representing themselves to be of a certain age." Gibson's attorney pointed out that subjecting Gibson to the terms and conditions required under probation would not show disrespect for the law or diminish the severity of the crime and that Gibson and society would be better served by placing him on probation and giving him an opportunity to better himself and be a productive member of society. Gibson personally informed the court that he was "extremely remorseful," not just for what he was going to lose, or for letting down his coworkers, but also for E.L. and her family.

The PSI states that Gibson "has a spotless criminal record other than his current legal situation" and that "[i]t appears that his behavior in this offense would be out of character for . . . Gibson."

The district court found that Gibson had accepted responsibility for and appreciated the seriousness of his actions. In addition to the 180 days in jail, the 5 years of probation will require Gibson to comply with numerous conditions. These include the following: obey all laws and report any violation by the next business day; avoid social contact with persons having criminal records or who are currently on probation or parole; report to probation when directed and permit the probation officer to visit at all times and places; reside within the state unless otherwise authorized by the probation officer; obtain permission before changing address or employment; cooperate in all matters which might affect probation and truthfully answer all inquiries from the probation officer; maintain suitable employment; abstain from the use of alcohol or controlled substances (unless prescribed by a physician); cannot be present in any location where the primary business is to serve alcohol or attend any social function at which alcoholic beverages are served without permission

from the probation officer; submit to random chemical testing of blood, breath, or urine; submit to random searches and seizures of the person, premises, or vehicle without a warrant and whether or not probable cause exists upon the request of a probation officer or law enforcement officer when authorized by the probation officer; pay all fines, court costs, and fees; complete a psychosexual evaluation and follow all recommendations; continue therapy and medication management; attend any support group if deemed necessary by the probation officer; have no contact with the victim during the life of the probation; participate in "moral reconation" therapy; have no unfiltered access to the internet or to any social media sites; have no contact with children under the age of 18; have no relationships with any individuals who have children under the age of 18; and submit to regular search and seizure of the person, property, or vehicle, to include electronic devices.

Despite these numerous requirements and restrictions on Gibson's life for the duration of his probation, the majority nevertheless concludes the district court abused its discretion by failing to impose incarceration instead of probation. The majority acknowledges that "[t]he record supports the sentencing court's decision to impose probation in lieu of incarceration based upon Gibson's unlikelihood to reoffend and the availability of treatment . . . ." However, the majority then focuses on "the nature of the crime and whether probation would depreciate its seriousness or promote disrespect of the law." It is difficult to imagine that the district court saw the crime as any less serious than this court, and it is not clear why a 5-year probation sentence on this record promotes disrespect for the law. To the contrary, the record before us fully supports the district court's decision to order probation when considering all sentencing factors, as well as those specific factors favoring withholding a sentence of imprisonment as set forth in § 29-2260(3).

The majority also states that the district court's decision was improperly "based in part upon Stubblefield's involvement and culpability in the crime" and that this "was not an appropriate factor to consider and appears to have resulted in a more lenient sentence for Gibson." I do not read the district court's comment that it hoped E.L. "is given some sort of justice in [Stubblefield's] sentence, most significantly" to suggest that this was a factor the court relied upon when sentencing Gibson to probation. That comment could certainly mean that the district court expected Stubblefield to be more significantly sentenced than Gibson and that this would result in a greater impact in terms of justice for E.L. However, that does not necessarily mean the court allowed consideration of Stubblefield's potential sentence to influence its decision when sentencing Gibson. And given the abundance of favorable information presented to the district court to support a sentence of probation, the district court's comment hardly rises to an abuse of discretion.

As noted in Gibson's brief, "While there is a temptation on a visceral level to conclude that anything less than incarceration depreciates the seriousness of crimes of this sort, it is the function of the sentencing judge, in the first instance to evaluate the crime and the offender." Brief for appellee at 13. 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. *State v. Brown*, 300 Neb. 57, 912 N.W.2d 241 (2018). And as this court recently stated when denying relief in an excessively lenient sentence appeal involving a 4-year combined sentence for a defendant convicted of two drug offenses and three firearm offenses:

> Although [the defendant's] history [three prior felony convictions] and the nature and circumstances of the present offenses certainly could have supported a longer term of incarceration [the defendant faced up to

> 250 years' imprisonment], when reviewing sentences for excessive leniency, we do not review the sentence de novo and the standard is not what sentence we would have imposed.

State v. Felix, 26 Neb. App. 53, 60, 916 N.W.2d 604, 609 (2018) (noting abuse of discretion standard of review applies whether reviewing sentence for leniency or excessiveness). Accordingly, adhering to the abuse of discretion standard of review applicable to this court's review of Gibson's sentence, and finding no abuse of discretion by the district court, I would affirm Gibson's conviction and sentence.

Farm and Garden Center, L.L.C., appellee, v. Jim Kennedy, appellant.

921 N.W.2d 615

Filed November 20, 2018. No. A-17-834.

1. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
2. **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.
3. **Prejudgment Interest: Appeal and Error.** Whether prejudgment interest should be awarded is reviewed de novo on appeal.
4. **Verdicts: Juries: Appeal and Error.** A jury verdict may not be set aside unless clearly wrong, and a jury verdict is sufficient if there is competent evidence presented to the jury upon which it could find for the successful party.
5. **Damages: Appeal and Error.** On appeal, the fact finder's determination of damages is given great deference.
6. **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 that discretion.
7. ____: ____. A motion for new trial should be granted only where there is error prejudicial to the rights of the unsuccessful party.
8. **Rules of Evidence: Expert Witnesses.** The admissibility of expert opinion testimony under the Nebraska rules of evidence should be determined based upon the standards first set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).
9. **Courts: Expert Witnesses.** Under the *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), framework, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion.

10. **Courts: Rules of Evidence: Expert Witnesses.** Before admitting expert opinion testimony under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 2016), a trial court must determine whether the expert's knowledge, skill, experience, training, and education qualify the witness as an expert. If the opinion involves scientific or specialized knowledge, trial courts must also determine whether the reasoning or methodology underlying the expert's opinion is scientifically valid.
11. **Courts: Expert Witnesses.** Normally, after a court finds that an expert's methodology is valid, it must also determine whether the expert reliably applied the methodology.
12. ____: ____. In determining the admissibility of an expert's opinion, the court must focus on the validity of the underlying principles and methodology—not the conclusions that they generate. Reasonable differences in scientific evaluation should not exclude an expert witness' opinion.
13. **Trial: Expert Witnesses: Proof.** Once the validity of an expert witness' reasoning or methodology has been satisfactorily established, any remaining questions regarding the manner in which that methodology was applied in a particular case will generally go to the weight of such evidence; vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof remain the traditional and appropriate means of attacking evidence that is admissible, but subject to debate.
14. **Courts: Expert Witnesses.** An expert's opinion must be based on good grounds, not mere subjective belief or unsupported speculation.
15. **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 words which are plain, direct, and unambiguous.
16. **Prejudgment Interest: Claims.** When considering prejudgment interest under Neb. Rev. Stat. § 45-103.02(2) (Reissue 2010), a two-pronged inquiry is required to determine whether a claim is liquidated. There must be no dispute either as to the amount due or as to the plaintiff's right to recover.
17. **Prejudgment Interest.** A claim for prejudgment interest must be fixed and determined or readily determinable; but it is sufficient for this purpose if it is ascertainable by computation or a recognized standard.
18. **Claims.** One has a liquidated claim only when there is no reasonable controversy as to both the plaintiff's right to recover and the amount of such recovery.
19. **Jury Instructions: Appeal and Error.** Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.

20. **Jury Instructions: Presumptions.** It is presumed a jury followed the instructions given in arriving at its verdict, and unless it affirmatively appears to the contrary, it cannot be said that such instructions were disregarded.
21. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.

Appeal from the District Court for Madison County: James G. Kube, Judge. Affirmed.

George H. Moyer and Jack W. Lafleur, of Moyer & Moyer, for appellant.

Sean A. Minahan, of Lamson, Dugan & Murray, L.L.P., and Frederick T. Bartell, of Fitzgerald, Vetter, Temple & Bartell, for appellee.

Moore, Chief Judge, and Bishop and Arterburn, Judges.

Bishop, Judge.

I. INTRODUCTION

Farm and Garden Center, L.L.C. (Farm & Garden), brought an action against Jim Kennedy on an unpaid balance for goods and services provided to him. Kennedy filed a counterclaim against Farm & Garden for damages based on "lost forage/bales for the 2012 crop season," which he claimed was the result of an improper application of chemicals and fertilizers by Farm & Garden. A jury returned a verdict of $104,180.27 in favor of Farm & Garden and a verdict of $7,511.20 in favor of Kennedy on his counterclaim. Kennedy filed a motion for new trial on his counterclaim, and Farm & Garden filed a motion for prejudgment interest. The trial court denied Kennedy's motion for new trial and ordered Kennedy to pay Farm & Garden an additional $46,089.27 in prejudgment interest.

On appeal, Kennedy challenges the admission of Farm & Garden's expert's opinion, the award of prejudgment interest,

the jury's verdict on his counterclaim, and the denial of his motion for new trial. We affirm.

II. BACKGROUND

In 2012, Kennedy, a farmer at the time, resided on land he referred to as his "home place" (Home Place). That year, he also rented land from the "Leuthold family" (collectively, the Leuthold Fields, or separately, Leuthold North or Leuthold South). Leuthold North (130 acres) was located directly west of the Home Place; Leuthold South (26.32 acres and 53 acres) was directly south of Leuthold North. The Leuthold Fields and the Home Place are located in Stanton County, Nebraska. During 2011, the Leuthold Fields were part of the Conservation Reserve Program (CRP), meaning it was not in row crop production. According to Farm & Garden's owner (at the time), Delwin Herbolsheimer, ground that has been in CRP "has been neglected for ten plus years, so it's going to be dead," and will need fertilizer and preemergent herbicide after the ground has been prepared for planting. A Farm & Garden employee said the Leuthold Fields were "in CRP for a reason . . . [i]t was poor ground."

Kennedy brought the Leuthold Fields back into row crop production by "using an implement to cut up residue or disk the soil." This was done multiple times and in multiple directions, between four and five times prior to planting in 2012. A Farm & Garden manager visited Kennedy's farm to discuss the type of fertilizer and chemical program to be applied to the Leuthold Fields and the Home Place, and the manager made recommendations regarding both the fertilizer and chemical program. Farm & Garden agreed to sell goods and services on account to Kennedy for the agricultural property he actively farmed. The services consisted of applying liquid and dry fertilizer and chemicals.

In 2012, Kennedy farmed 870 acres of row crops in Stanton County, of which 460 acres were planted to corn. Farm & Garden applied fertilizers and pesticides to all of the acres

Kennedy farmed. As relevant here, Kennedy planted corn on 209.32 acres of the Leuthold Fields and on 75.89 acres of the Home Place. In April, a Farm & Garden employee contacted Kennedy to notify him that dry fertilizer was applied to an incorrect field. Farm & Garden subsequently applied fertilizer and pesticides to all the acres of row crops that Kennedy farmed that year. Farm & Garden sent Kennedy 39 invoices with dates ranging from March through July, documenting the sale of chemicals and fertilizer and the application charges for Kennedy's purchases. Farm & Garden issued a credit for the application to the incorrect field that Kennedy did not order.

In the 2012 crop season, Stanton County experienced a drought. Kennedy testified that the corn crop on the Home Place rose to an even height and was a "healthy green" color. However, on the Leuthold Fields, there were strips of corn that were shorter compared to other strips of corn in the same field and some rows were yellow. According to Kennedy, there was "[b]arely any green to them." This effect was described by witnesses as "striping" or "streaking" in the corn.

After making observations of the fields in mid- to late May 2012, Kennedy contacted Farm & Garden, stating there was a problem with the variance in the height and coloration of crops on the Leuthold Fields. Herbolsheimer visited with Kennedy after looking at the Leuthold Fields and acknowledged there was a problem. Although Kennedy thought it was too late, Herbolsheimer planned to get more fertilizer and "top-dress" it on the Leuthold Fields. Kennedy called a Farm & Garden employee who said he thought applying more product would not be useful unless it rained, but Kennedy replied that Farm & Garden had to follow the steps Herbolsheimer ordered. Herbolsheimer sent someone with product to attempt to remediate the condition of the Leuthold Fields on June 26. According to Kennedy, he never agreed to the further application of fertilizer on the Leuthold Fields. Farm & Garden sent an invoice billing Kennedy a total of $7,511.20 for the

remedial application of fertilizer on the Leuthold Fields; this invoice was received as exhibit 75 at trial.

In the last few days of July 2012, Kennedy started to cut and lay down the cornstalks on the Leuthold Fields into a "windrow," with plans to use it for cattlefeed. He left some strips for checking the yield, and these were later harvested with a combine. He had windrowed 41.51 acres on the Home Place in mid-July; the other 34.38 Home Place acres were chopped for silage, and some strips were left for checking the yield (also later harvested). Kennedy let the windrowed corn material dry to approximately 20-percent moisture before baling; Kennedy had purchased a new baler "for the specific purpose of baling this type of material." He baled the corn material, making 6-foot diameter "cornstalk bales," and each bale "should have weighed a minimum of 1400 pounds." (The terms "cornstalk bales" and "stover bales" were used interchangeably at trial; however, Kennedy viewed "stover" as "what is left over after you've harvested a corn crop.") Brandon Nathan, Kennedy's full-time farmhand at the time, recorded in a notepad that he gathered 156 cornstalk bales on the Home Place and 153 bales on the Leuthold Fields; however, Nathan could not remember whether Kennedy baled Leuthold South in 2012, he could not remember pulling any bales off of Leuthold South, nor could he remember noticing any of the striping effect on Leuthold South. Kennedy testified that the electronic bale counter on his equipment produced the same counts as Nathan's recorded counts. Kennedy sold approximately 65 stover bales at $150 each, and he kept some bales to feed his livestock.

According to Herbolsheimer, the products sold to Kennedy were "on account" and the sale of chemicals, fertilizer, and application services were invoiced from May 4 through July 16, 2012. Statements which show the balance of the account indicate the new balance is due on the "10th of each month" and that a finance charge is computed "at the rate of 1.33 percent per month which is an annual percentage of 16 percent applied to the previous balance end of the month." The

total invoice amount for all chemicals, fertilizers, and application costs, excluding finance charges reflected in individual invoices, was $104,180.27. The district court received exhibit 83 showing this total invoice amount.

Despite receiving statements which included finance charges on overdue balances from Farm & Garden in October and November 2012, Kennedy did not make payments on his past due account until he made two separate payments of $2,500 in April 2013. These were the only payments made by Kennedy. Farm & Garden sent Kennedy a statement of the balance due on May 1 totaling $120,892.23.

In June 2013, Farm & Garden filed a complaint against Kennedy to recover $120,892.23, the amount claimed as Kennedy's unpaid account for goods and services provided during the 2012 crop year, plus interest, as of May 1. It stated that "the account accrues interest at the rate of 1.33% per month pursuant to contract and Neb. Rev. Stat. §45-101.04," and prayed for a judgment of $120,892.23 as of May 1, "together with interest thereafter." Kennedy asserted in his amended answer that Farm & Garden negligently and carelessly applied fertilizer to his farm ground and therefore breached the implied warranty of good workmanship. As a result, Kennedy claimed Farm & Garden "conferred no benefit upon [Kennedy] in the 2012 crop season and wasted the fertilizer that was applied," and therefore its complaint should be dismissed. Kennedy's amended answer included a counterclaim, which alleged that Farm & Garden breached its agreement to apply chemical and fertilizer in a workmanlike manner and that by failing to do so, this caused an irregular growth pattern of the corn crop planted. Kennedy claimed damages of $99,990 for "lost forage/bales for the 2012 crop season" and $7,600 to subsequently plant rye seed as a "cover crop," which also either did not grow "in any capacity" or grew "in an irregular pattern." Additionally, Kennedy alleged that Farm & Garden applied chemical and fertilizer to "32 acres of standing CRP" without his authorization and that such charges should be deducted from Farm &

Garden's claimed damages. Kennedy also asserted that Farm & Garden's failure to apply the fertilizer and chemical in a proper and workmanlike manner would cause carryover losses for the 2013 crop (this claim was not pursued at trial). Further amended pleadings were filed, but none of the amendments materially impact the issues on appeal.

At trial, Kennedy and his farmhand, Nathan, testified about the striping on the Leuthold Fields and claimed that those 209.32 acres produced only 153 bales of stover. On the other hand, they claimed the acres baled on the Home Place (which had no striping) produced 156 bales of stover. The number of acres baled on the Home Place was alleged to be 39 acres during some testimony and 41.51 acres in other testimony; the difference is insignificant to any issue on appeal. The explanation for the alleged disparity in stover bales produced per acre between the Leuthold Fields and the Home Place was the primary point of contention between the agronomy experts that Kennedy and Farm & Garden each had testify.

Kennedy's expert, Regan Kucera, opined that the cause of striping on the Leuthold Fields was due to the phosphorous application being inaccurately applied. Kucera concluded that 68 percent of the field was underapplied and that 32 percent of the field was overapplied. As to the 41.51 acres on the Home Place which Kennedy claimed produced 156 bales of stover at 1,400 pounds per bale, Kucera calculated that would be 3.76 bales per acre. Kucera compared this to the 209.32 acres on the Leuthold Fields, where the production of 153 bales of stover calculated to only .73 bales per acre. Kucera testified that environmental factors such as lack of moisture or too much heat could keep a corn plant from reaching full maturity, as well as "[m]an-made or man-managed factors" such as "inappropriate fertility, poor soil structure or just lack of nutrients applied."

Farm & Garden's expert, Michael Goedeken, agreed the fertilizer was not applied correctly; Goedeken said this was because the "spinner was not throwing the fertilizer" the correct

distance, which resulted in a striping effect. Goedeken testified the misapplication was noted on the invoice dated April 23, 2012, found in exhibit 71. However, Goedeken stated that the lesser amount of residue produced on the Leuthold Fields in comparison to the Home Place might be attributable to the increased drying out of the Leuthold Fields when Kennedy disked it three to four times (before planting). According to Goedeken, "the USDA states that each tillage pass takes out .25 inches of water" and "[i]n 2012 in this area, we were . . . [s]even to ten inches below normal rainfall . . . during the growing season." Goedeken stated that taking another "three-quarter to an inch away from that, we're going to cause some damage to those plants for lack of moisture when we're already in a deficit situation."

Goedeken also opined that the number of stover bales per acre reportedly harvested on either the Leuthold Fields or the Home Place was misstated. Farm & Garden called an appraiser to testify about yield estimates. The appraiser said many appraisals were done in 2012 "because it was such a dry year" and "[m]any people either abandoned fields or chopped fields. . . . that was a very common occurrence." The appraiser performed a yield estimate on Kennedy's corn crop in 2012. The appraiser estimated 4.3 bushels per acre on a 57-acre portion of Leuthold South and 5.7 bushels per acre on a 3.3-acre area also in Leuthold South. The appraiser testified that 19 acres on Leuthold South were harvested by a combine for grain. The appraiser also performed estimates on "Section 34" which was composed of Leuthold North and the Home Place. He estimated 1.7 bushels per acre for Leuthold North and 2.6 bushels per acre for the Home Place. Section 34 included 16 harvested acres. Yield estimate reports are signed by the appraiser and the farmer, and the appraiser testified that Kennedy signed the yield estimate reports he was describing.

According to Goedeken, since grain yields can be used to predict "residue or cornstalk yields," and the Leuthold Fields

and the Home Place had yields estimated to be below 5 bushels per acre, then Kennedy's claims related to the number of stover bales produced on each property did not add up. For example, Goedeken calculated that to achieve the 156 stover bales that Kennedy claimed was produced on 39 acres of the Home Place, the grain yield average for those 39 acres would be 88 bushels per acre. However, in 2012 in Stanton County, "the average yield according to USDA on dryland was . . . 31.3 bushel[s] per acre." And even Kennedy agreed that his grain yield per acre was under 5 bushels for the corn crop planted on the Leuthold Fields and the Home Place. Goedeken testified that the average cornstalk yield for dryland corn in Stanton County in 2012 was 1 ton or less of crop residue per acre. He calculated the 153 stover bales from the Leuthold Fields to come out "to about a half a ton per acre" and "[t]hat's pretty consistent with what I would have expected in 2012."

Kucera agreed that with drought-stressed corn, about 1 ton of silage per acre can be harvested for each 5 bushels of corn grain per acre that could have been harvested. He acknowledged that typically silage is around 70-percent moisture, so when calculating for 20-percent moisture (as in Kennedy's stover bales), Kucera stated that 5 bushels of grain yields for corn would produce about ".8 tons [of stover] per acre."

The jury returned a verdict of $104,180.27 in favor of Farm & Garden and a verdict of $7,511.20 in favor of Kennedy on his counterclaim. The district court entered judgment on the jury verdicts on March 24, 2017. On March 29, Kennedy filed a motion for new trial on his counterclaim, and on April 3, Farm & Garden filed a motion for an award of prejudgment interest on the judgment. The district court entered an order on July 12 denying Kennedy's motion for new trial and sustaining Farm & Garden's motion; the court awarded prejudgment interest in the amount of $46,089.27 in accordance with Neb. Rev. Stat. § 45-104 (Reissue 2010). Kennedy timely filed a notice of appeal.

III. ASSIGNMENTS OF ERROR

Kennedy assigns, restated and reordered, that the district court erred (1) by allowing the testimony of Farm & Garden's expert witness and (2) by awarding prejudgment interest. Kennedy also claims (3) the verdict on Kennedy's counterclaim does not respond to issues submitted to the jury for decision because it is contrary to law and to the evidence of Kennedy's damages and (4) the district court erred by denying his motion for new trial on his counterclaim.

IV. STANDARD OF REVIEW

[1,2] The standard for reviewing the admissibility of expert testimony is abuse of discretion. *Hemsley v. Langdon*, 299 Neb. 464, 909 N.W.2d 59 (2018). 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. *Lombardo v. Sedlacek*, 299 Neb. 400, 908 N.W.2d 630 (2018).

[3] Whether prejudgment interest should be awarded is reviewed de novo on appeal. *Roskop Dairy v. GEA Farm Tech.*, 292 Neb. 148, 871 N.W.2d 776 (2015).

[4,5] A jury verdict may not be set aside unless clearly wrong, and a jury verdict is sufficient if there is competent evidence presented to the jury upon which it could find for the successful party. *Lowman v. State Farm Mut. Auto. Ins. Co.*, 292 Neb. 882, 874 N.W.2d 470 (2016). On appeal, the fact finder's determination of damages is given great deference. *Id.*

[6,7] 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 that discretion. *Robinson v. Dustrol, Inc.*, 281 Neb. 45, 793 N.W.2d 338 (2011). A motion for new trial should be granted only where there is error prejudicial to the rights of the unsuccessful party. *Hegarty v. Campbell Soup Co.*, 214 Neb. 716, 335 N.W.2d 758 (1983).

V. ANALYSIS

1. Expert Testimony

Kennedy argues that the district court erred by allowing the testimony of Farm & Garden's expert witness, Goedeken. Kennedy's counterclaim sought damages for "lost forage/bales" in the 2012 crop season; therefore, his claim for damages was premised on the alleged disparity in cornstalk or stover bales produced per acre between the Leuthold Fields (which had the striping effect) and the Home Place (no striping effect). Kennedy contends, "There is absolutely no foundation for [Goedeken] to say that to produce the number of bales of stover that . . . Kennedy reported would have required a corn yield of 25.7 bushels per acre from the Leuthold farm or 88 bushels per acre from his home place." Brief for appellant at 20. Before reaching the specifics of Kennedy's challenge to Goedeken's opinion, it is helpful to further set out the position taken by Kennedy's expert, Kucera.

(a) Kennedy's Expert Witness

Kucera knew Kennedy because Kucera had been working as Kennedy's corn and soybean seed supplier. Kucera took "stover samples" from Leuthold North and the Home Place in mid-July 2012 to test for nitrates to make sure the stover would be safe to feed to livestock. He did not take samples from Leuthold South. He first sampled Leuthold North, where the stover had "already been cut and laid down into a windrow." He noticed some windrows were larger, "meaning there were more stalks in it," and some were not as large. At that time, Kennedy had not yet windrowed at the Home Place, "the stalks were still standing," and the plants "were more consistent across the field." Kucera concluded fertilizer had been inaccurately applied in 2012—specifically, that phosphorous levels were different and that the less productive plants were "in areas of the field that had low soil test values for phosphorous." Kucera stated that incorrectly applying the

phosphorous nutrient "early on is setting that field and those strips up for failure for multiple years."

Kucera also testified that the average yield per acre for the Leuthold Fields was less than 5 bushels per acre. The average yield per acre for the Home Place was also less than 5 bushels per acre. Kennedy testified to these same yields as well. Kucera acknowledged that Kennedy generally practiced "no-till farming," meaning a minimum amount of tillage would be done prior or during the raising of the crop. "Tillage would be turning the soil over, burying residue, those types of thing[s]." Kucera was aware that Kennedy disked (a type of tillage) the Leuthold Fields four to five times, and Kucera agreed that when a field is disked, the moisture content of the soil is decreased. He also agreed that moisture content is important because "[t]hat basically starts the whole germination and growing process." Kucera did not take soil samples from the Leuthold Fields, and he did not know whether Kennedy disked the Home Place, but agreed that under a no-till practice, "you would not do tillage."

Kucera acknowledged that the University of Nebraska Extension Service "NebGuide, Number G1846" (Nebraska Guide) tells "you that if you harvest a certain number of bushels, you can expect a certain amount of stover." But his position was that while "you cannot have grain without stover, stalks, leaves, . . . [y]ou can, however, have stover, stalks, leaves . . . and have very little grain." He testified that Kennedy's farms had very little grain, but still had stover. Kucera claimed there was no formula available to determine how much crop residue could be produced from a given yield of corn.

(b) Farm & Garden's Expert Witness

Goedeken was expected to testify about Kennedy's cornstalk bale harvest in 2012, including (1) the alleged number of bales harvested from the Home Place in contrast to the alleged number of bales harvested from the Leuthold Fields,

(2) the amount of yield necessary to produce 1 ton of residue, (3) Kennedy's 2012 yield records for the Leuthold Fields and the Home Place, and (4) Goedeken's experience and knowledge of 2012 yields for dryland farms in Stanton County. During discovery, Goedeken opined that the number of bales per acre reportedly harvested on either the Leuthold Fields or the Home Place was misstated by Kennedy and his farmhand, Nathan.

Kennedy filed a motion in limine to exclude Goedeken's testimony on the first day of trial, March 13, 2017. The motion alleged that Goedeken's reasoning and methodology used to reach his conclusion was "flawed and faulty." Specifically at issue was Goedeken's reliance on an article designated in the Nebraska Guide, which included a formula for estimating the number of tons of crop residue that will be produced by a certain corn yield. Kennedy's motion asserted that the Nebraska Guide provided "a formula for estimating the number of tons of crop residue that will be produced by a certain corn yield," but that it did "not offer any information about drought stressed crops or the residue produced by drought stressed crops." Kennedy claimed that Goedeken's opinion "assumes that corn plants which fail to produce an ear of corn also do not produce a stalk or leaves. He opines that to produce stover in the quantities claimed by [Kennedy], there must be corn."

Before the jury was brought in on the second day of trial, the court heard arguments on Kennedy's motion in limine. Kennedy's counsel argued it is illogical to say that "since we didn't raise any corn, we didn't have any stalks," so it cannot be said that "you have to have 'X' number of bushels of corn in order to have 'X' number of tons of silage." He concluded, "It's just not scientifically true or accurate," and he informed the court it was "not supposed to allow junk science to get to the jury, and this is pretty junkie." Following a brief recess, the district court stated from the bench that it did not think Goedeken's opinion was that since the crop did not produce

any grain, then it could not have produced any stover. Rather, the court stated it understood the opinion to say that "to produce that much stover would have required a yield of 88 bushels per acre and that nowhere in Stanton County did any one producer produce that much dryland corn." The court found that Goedeken's methodology could be applied to the facts at issue and overruled Kennedy's motion in limine.

[8,9] The Nebraska Evidence Rules provide: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 2016). The Nebraska Supreme Court held in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), that the admissibility of expert opinion testimony under the Nebraska rules of evidence should be determined based upon the standards first set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Under the *Daubert*/*Schafersman* framework, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. *Hemsley v. Langdon*, 299 Neb. 464, 909 N.W.2d 59 (2018).

[10,11] As the Nebraska Supreme Court stated in *King v. Burlington Northern Santa Fe Ry. Co.*, 277 Neb. 203, 225-26, 762 N.W.2d 24, 42 (2009):

> Before admitting expert opinion testimony under Neb. Evid. R. 702, a trial court must determine whether the expert's knowledge, skill, experience, training, and education qualify the witness as an expert. If the opinion involves scientific or specialized knowledge, trial courts must also determine whether the reasoning or methodology underlying the expert's opinion is scientifically valid. Under *Daubert*, evidentiary reliability depends on scientific validity. Normally, after a court finds that the

> expert's methodology is valid, it must also determine whether the expert reliably applied the methodology.

Based on the record and briefs on appeal, Goedeken's qualifications as an expert are not in dispute. Therefore, we first evaluate the scientific validity of his methodology and then consider Goedeken's application of that methodology.

(b) Scientific Validity of Methodology

In evaluating the validity of scientific testimony, a trial court considers a number of factors. These include (1) whether the theory or technique can be, and has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error, and the existence and maintenance of standards controlling the technique's operation; and (4) the "'"general acceptance"'" of the theory or technique. See *Hemsley*, 299 Neb. at 474, 909 N.W.2d at 68 (setting out *Daubert* reliability factors). The U.S. Supreme Court noted that this reliability test is "'flexible'" and that the district court is given "the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination." See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) (discussing *Daubert* factors).

[12] In determining the admissibility of an expert's opinion, the court must focus on the validity of the underlying principles and methodology—not the conclusions that they generate. *Burlington Northern Santa Fe Ry. Co., supra*. Reasonable differences in scientific evaluation should not exclude an expert witness' opinion. *Id.*

Noting these principles, we consider the methodology used by Goedeken to form his opinion. At the hearing on Kennedy's motion in limine, the district court received into evidence exhibit 104, Farm & Garden's third supplemental answers to interrogatories. Exhibit 104 included the subject matter of

Goedeken's testimony, facts he relied upon, opinions he was expected to give, and grounds for his opinions.

Exhibit 104 states:

> It is expected that . . . Goedeken will testify that according to the deposition, . . . Kennedy stated the home farm yielded 4 cornstalk bales an acre. Notes provided by . . . Nathan indicate the Home Place yielded 156 bales on approximately 39 acres. . . .
>
> . . . [T]the Leuthold fields allegedy produced 153 cornstalk bales on a total of 211.2 acres or .72 bales per acre.

Exhibit 104 further indicates that Goedeken calculated the Home Place would have had to produce 88 bushels per acre to achieve the number of stover bales claimed for the 39 acres. Further, Goedeken calculated the Leuthold Fields would have averaged 25.7 bushels per acre, yet appraisals indicated the Leuthold Fields averaged 3.6 bushels per acre. Goedeken's conclusion, as stated in exhibit 104, is that because of the 2012 drought, Goedeken was not aware of any dryland corn in Stanton County that produced 88 bushels of corn per acre, and that therefore, the number of stover bales claimed to have been produced on the Leuthold Fields or the Home Place was misstated. Also, because of the proximity of the fields, Goedeken did not think the grain yields and residue would have been "dramatically different."

To reach his opinion, Goedeken relied on his experience and knowledge of 2012 yields for dryland corn in Stanton County, Kennedy's deposition testimony, Nathan's notes, photographs of the Leuthold Fields and the Home Place, and Kennedy's crop insurance records. In performing calculations regarding the Leuthold Fields and the Home Place, Goedeken used a formula from the Nebraska Guide. Goedeken assumed the cornstalk bale weight, noting that bale weights can differ. Goedeken then compared his calculation of what he would expect the bales per acre to have been in 2012 for the Leuthold Fields and the Home Place with information in Kennedy's deposition, Nathan's notes, and crop insurance records. Goedeken's

calculation using the Nebraska Guide is a mathematical formula to which he simply inputted numbers based on the information noted.

At the hearing on Kennedy's motion in limine, both parties referred to the Nebraska Guide as a "peer-reviewed" publication, which is a factor that goes to the reliability of Goedeken's opinion. Farm & Garden claimed both Goedeken and Kucera used the same peer-reviewed articles, including the Nebraska Guide. (Later during trial, Kucera did in fact testify that he relied on the same Nebraska Guide as Goedeken.) Farm & Garden also argued Kucera was relying on "Iowa State articles" that said "basically . . . the same thing. You can expect a certain amount of dry corn stover from a certain amount of bushels produced." Goedeken's and Kucera's use of the Nebraska Guide supports the reliability factor that the methodology within the Nebraska Guide is generally accepted within the field of agronomy. Although Kennedy argued Kucera used the publication only to analyze and contradict Goedeken's opinion, we note that Kucera testified that the Nebraska Guide is commonly used in reference by people he knows and by his customers.

The district court took a brief recess to review the information, and then it overruled the motion in limine from the bench. The court found that Goedeken's methodology could be applied to the facts at issue in the case. The district court disagreed with Kennedy's characterization of Goedeken's opinion; the court stated, "I don't think that the opinion is that since the crop didn't produce any grain, that, therefore, it couldn't have produced any stover." The court understood Goedeken's opinion to be that to produce the amount of stover claimed by Kennedy "would have required a yield of 88-bushels per acre and that nowhere in Stanton County did any one producer produce that much dryland corn."

When making the determination of admissibility of Goedeken's opinion, the district court had access to exhibit 104 which showed Goedeken's methodology and how he applied

the methodology to the facts of the case. It also had access to the Nebraska Guide that Goedeken relied upon, as it was attached to Kennedy's motion in limine for reference, and Goedeken later testified to the words of the paragraph he relied upon as a "rule of thumb." Under *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 139, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), the district court is entitled to a "broad latitude" on the issue of reliability where it received information regarding the peer-reviewed nature of the Nebraska Guide publication and reliance on the publication by both agronomist experts in the case.

The validity of Goedeken's methodology was properly established.

(c) Application of Methodology

[13] Once a methodology has been established, the court must then determine whether the reasoning or methodology can be properly applied to the facts in issue. See *McNeel v. Union Pacific RR. Co.*, 276 Neb. 143, 753 N.W.2d 321 (2008). This second inquiry, sometimes referred to as "'"fit,"'" assesses whether the scientific evidence will assist the trier of fact to understand the evidence or to determine a fact in issue by providing a "'valid scientific connection to the pertinent inquiry as a precondition to admissibility.'" *McNeel*, 276 Neb. at 153, 753 N.W.2d at 330 (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)). Once the validity of an expert witness' reasoning or methodology has been satisfactorily established, any remaining questions regarding the manner in which that methodology was applied in a particular case will generally go to the weight of such evidence. *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof remain the traditional and appropriate means of attacking evidence that is admissible, but subject to debate. *Id.*

At issue here was whether Goedeken's methodology using grain yields to estimate stover yields could be properly applied to explain the difference between the stover bale production on the Leuthold Fields and the Home Place in 2012. It was Goedeken's opinion that the number of stover bales per acre reportedly harvested on either the Leuthold Fields or the Home Place was misstated. As to that conclusion, Kennedy's counsel specifically challenged Goedeken during cross-examination, as set forth in the following colloquy:

> Q: Okay. Now, the paragraph that you relied upon says, "The amount of crop residue produced is related to grain production. Approximately one ton of crop residue at 10 percent moisture is produced with 40 bushels of corn or grain sorghum, 30 bushels of soybeans and 20 bushels of wheat."
>
> A: Correct.
>
> Q: That's a rule of thumb?
>
> A: Rule of thumb.
>
> Q: Okay. But it doesn't say that if there is no corn that there will be no residue, does it?
>
> A: No, it does not.
>
> Q: So what you're telling the ladies and gentlemen of the jury here is that you think the amount of crop residue that . . . Kennedy reported from his acres, 40.51, is too high?
>
> A: From my experiences in 2012, that's quite a bit of residue.
>
> Q: Quite a bit. Impossible?
>
> A: Improbable.

To determine the cornstalk or stover yield per acre based on grain yield, Goedeken used data collected from the U.S. Department of Agriculture that reported the 10-year average dryland yield for Stanton County was 136.8 bushels per acre and that the average yield in 2012 was 31.3 bushels per acre. Goedeken's reliance on this information was not challenged.

Goedeken then divided the 10-year average dryland yield (136.8 bushels per acre) by 40 bushels (amount of bushels of corn in Nebraska Guide formula to produce 1 ton of stover) to get an average of 3.42 tons of residue produced per acre in Stanton County for dryland corn based on the 10-year average. However, in 2012, Stanton County's average yield for dryland corn was only 31.3 bushels per acre. Since the average corn crop yield in 2012 was only about 23 percent of the 10-year average, then the estimated stover yield would be similarly reduced (based on our calculations, this results in a stover yield of approximately .78 of a ton per acre). This is consistent with Goedeken's testimony that the average cornstalk yield for dryland corn in Stanton County in 2012 was 1 ton or less of crop residue per acre. He then calculated the 153 stover bales from the Leuthold Fields to come out "to about a half a ton per acre" and "[t]hat's pretty consistent with what I would have expected in 2012." Goedeken's application of the Nebraska Guide formula to Stanton County and more specifically to the yield estimates for the properties at issue was simply a matter of mathematics. His testimony at trial regarding his yield estimates under the Nebraska Guide matched the same calculations contained in exhibit 104 and considered at the motion in limine. Accordingly, the district court did not abuse its discretion by allowing this testimony.

Further, as to whether the Nebraska Guide formula could be properly applied to the facts involving Kennedy's drought-stressed crops, the district court determined that the issue of applicability could be addressed through cross-examination and challenging the credibility of the witness. As indicated in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 682 (2001), the weight to be given Goedeken's testimony by the jury could be impacted by vigorous cross-examination and the presentation of contrary evidence. In this case, Kennedy had ample opportunity to challenge Goedeken's testimony regarding the Nebraska Guide articles, as noted in the example above.

The record shows Goedeken was sufficiently questioned not only through cross-examination, but also through a developed direct examination regarding his application of the Nebraska Guide formula to the facts of this case.

(d) Summary

[14] Goedeken's opinion was based on more than mere subjective belief or unsupported speculation, even if, as the record revealed, some numbers Goedeken used were not precise. The numbers Goedeken used in forming his opinion—from the variety of sources he consulted, as well as his personal knowledge—were acceptable to rely upon under Neb. Evid. R. 703, Neb. Rev. Stat. § 27-703 (Reissue 2016) (facts or data expert relies upon may be "perceived by or made known to him at or before the hearing" and "need not be admissible in evidence" if experts in field reasonably rely on such facts or data in forming opinions or inferences). An expert's opinion must be based on good grounds, not mere subjective belief or unsupported speculation. *King v. Burlington Northern Santa Fe Ry. Co.*, 277 Neb. 203, 762 N.W.2d 24 (2009). However, courts should not require absolute certainty. *Id.*

The formula Goedeken relied upon to perform his calculations challenging Kennedy's claimed stover yield production came from the Nebraska Guide, a peer-reviewed source recognized as generally accepted within the agronomy field. Even Kucera referred to the Nebraska Guide; he simply disagreed with the conclusions reached by Goedeken. However, we note that even Kucera agreed that 5 bushels of grain yields for corn would produce about ".8 tons [of stover] per acre."

In determining admissibility of an expert's opinion, the court must focus on the validity of the underlying principles and methodology—not the conclusions that they generate. *Burlington Northern Santa Fe Ry. Co., supra*. Reasonable differences in scientific evaluation should not exclude an expert witness' opinion. *Id.* We conclude the district court did not abuse its discretion in admitting Goedeken's testimony.

2. Prejudgment Interest

Following the jury's verdict in its favor, Farm & Garden filed a "Motion to Award Interest on Judgment," in which it claimed entitlement to prejudgment interest pursuant to § 45-104. The district court entered an order on July 12, 2017, awarding prejudgment interest of $46,089.27. We note that although the July 12 order indicates that Farm & Garden's motion for interest (and Kennedy's motion for new trial) were heard on May 5, the bill of exceptions for that hearing is not contained in our record. Nevertheless, the July 12 order informs us of the arguments made at that hearing. The order initially states:

> [Kennedy] first argues that [Farm & Garden] had initially requested interest pursuant to Neb. Rev. Stat. §45-101.04, but that since the verdict, [Farm & Garden's] statutory basis for interest has changed, implying that [Farm & Garden] cannot change the statutory basis for its request. The Court disagrees. [Kennedy] has provided no case precedent for this proposition, nor does the statutory language impart such a restriction. On the contrary, the statutory language "shall be allowed" mandates the payment of interest in the event that the facts of the case comport with the opportunity to allow interest. Such is the situation in the present case.

We first take up Kennedy's argument about Farm & Garden changing its statutory basis for interest. It is true that Farm & Garden's operative pleading stated that Kennedy had "an unpaid account for goods, services, and interest in the sum of $120,892.23, and the account accrues interest at the rate of 1.33% per month pursuant to contract and Neb. Rev. Stat. §45-101.04." Kennedy asserts that Farm & Garden "abandoned §45-101.04." Reply brief for appellant at 4. This would appear to be true. Neb. Rev. Stat. § 45-101.04 (Reissue 2010) provides a basis for Farm & Garden's initial claim of 1.33-percent interest per month on unpaid balances after 30 days; it states, in relevant part:

> The limitation on the rate of interest provided in section 45-101.03 [any rate of interest may be agreed upon, not exceeding 16 percent on an unpaid principal balance] shall not apply [in a number of circumstances, including]:
>
> . . . .
>
> (7) Interest charges made on open credit accounts by a person who sells goods or services on credit when the interest charges do not exceed one and one-third percent per month for any charges which remain unpaid for more than thirty days following rendition of the statement of account.

At trial, Herbolsheimer testified that his financial arrangement with customers did not involve a "formal credit app," but, rather, customers, like Kennedy, were allowed to maintain open accounts for goods and services. Herbolsheimer stated that open accounts bear an interest rate or finance charge of 1.33 percent per month, "which is an annual percentage of 16 percent applied to the previous balance end of the month." Kennedy challenged Farm & Garden's attempt to collect its 1.33-percent monthly finance charge, claiming that there had been no agreement between Farm & Garden and Kennedy as to a finance charge. In response to questions asked by Kennedy's attorney during cross-examination, Herbolsheimer admitted that Kennedy never signed "any kind of a paper" with him, nor did Herbolsheimer have a conversation with Kennedy about paying "1.33 percent per month." Further, on appeal, Kennedy reiterates that there was never an agreement with Farm & Garden that he "would pay any rate of interest on his account." Brief for appellant at 12. Kennedy contends that § 45-101.04 "allows the parties to agree on one and one third percent per month but if there is no agreement, this statute does not apply." Brief for appellant at 12.

Ultimately, rather than seeking the 16 percent per annum interest to which it may have been entitled under § 45-101.04, Farm & Garden instead sought the 12 percent per annum

interest available under § 45-104. Kennedy contends that Farm & Garden could not change the statutory basis for its request for interest. Like the district court, we disagree. We note that Farm & Garden did state in its operative pleading that it was seeking interest; specifically, it prayed for a judgment of $120,892.23 (for amounts accrued, including finance charges, as of May 1, 2013), "together with interest thereafter." There was no question that Farm & Garden was seeking interest on unpaid balances preceding the entry of a final judgment. Therefore, there was no surprise or prejudice to Kennedy on this issue, nor is there any authority suggesting Farm & Garden was precluded from requesting prejudgment interest under § 45-104 rather than under § 45-101.04 once a judgment was obtained. Further, if a statutory basis exists for an award of interest, the Nebraska Supreme Court has held that interest can be awarded even if the petition is silent as to a request for interest. See *Thacker v. State*, 193 Neb. 817, 229 N.W.2d 197 (1975), *overruled in part on other grounds, Langfeld v. Department of Roads*, 213 Neb. 15, 328 N.W.2d 452 (1982) (although petition did not pray for interest, party's right to interest rested upon statutory grounds and not upon prayer).

We next consider the district court's determination that the language "interest shall be allowed" as set forth in § 45-104 "mandates the payment of interest in the event that the facts of the case comport with the opportunity to allow interest." Section 45-104 states:

> *Unless otherwise agreed, interest shall be allowed at the rate of twelve percent per annum on money due on any instrument in writing*, or on settlement of the account from the day the balance shall be agreed upon, on money received to the use of another and retained without the owner's consent, express or implied, from the receipt thereof, and on money loaned or due and withheld by unreasonable delay of payment. *Unless otherwise agreed or provided by law, each charge with respect to unsettled*

> *accounts between parties shall bear interest from the date of billing unless paid within thirty days from the date of billing.*

(Emphasis supplied.)

Section 45-104 applies to four types of judgments: (1) money due on any instrument in writing; (2) settlement of the account from the day the balance shall be agreed upon; (3) money received to the use of another and retained without the owner's consent, express or implied, from the receipt thereof; and (4) money loaned or due and withheld by unreasonable delay of payment. *Fitzgerald v. Community Redevelopment Corp.*, 283 Neb. 428, 811 N.W.2d 178 (2012). Section 45-104 allows an interest rate of 12 percent in the four circumstances enumerated when an interest rate has not otherwise been agreed upon. Further, that interest shall accrue from the date of billing when amounts due are not paid within 30 days of billing, unless otherwise agreed or provided by law. Unlike Neb. Rev. Stat. § 45-103 (Reissue 2010), which provides for postjudgment interest, § 45-104 allows for prejudgment interest. See *BSB Constr. v. Pinnacle Bank*, 278 Neb. 1027, 776 N.W.2d 188 (2009) (§ 45-104 provides interest rate for prejudgment interest upon happening of events outlined in statute). Of the four types of possible judgments set forth in § 45-104 which would allow for prejudgment interest, the only one applicable here relates to "money due on any instrument in writing."

Although not argued in the brief to this court, Kennedy's counsel asserted at oral argument that § 45-104 does not apply here because on "money due on instruments in writing" there has "to be a note." However, the Nebraska Supreme Court and this court have applied § 45-104 to different types of instruments in writing. See, e.g., *In re Estate of Peterson*, 230 Neb. 744, 433 N.W.2d 500 (1988) (will is instrument in writing; therefore, when interest is required to be paid on pecuniary devise, legal rate of interest is 12 percent per annum, as required by § 45-104); *Valley Cty. Sch. Dist. 88-0005 v.*

Ericson State Bank, 18 Neb. App. 624, 627, 790 N.W.2d 462, 465 (2010) (§ 45-104 applied to funds held under escrow agreement; "prejudgment interest accrues on the unpaid balance of liquidated claims arising from an instrument in writing from the date the cause of action arose until the entry of judgment, pursuant to Neb. Rev. Stat. §§ 45-103.02(2) (Reissue 2004) and 45-104").

[15] In determining whether the invoices and statements setting forth the amounts due from Kennedy and payable to Farm & Garden constitute "money due on any instrument in writing," we apply a basic legal principle, namely, that 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 words which are plain, direct, and unambiguous. *Heiden v. Norris*, 300 Neb. 171, 912 N.W.2d 758 (2018). We conclude that the plain and ordinary meaning of "money due on any instrument in writing" under § 45-104 includes written invoices and billing statements sent by a business to a customer for products and services sold, and unless otherwise agreed or provided by law, such unsettled accounts between the parties shall bear interest from the date of billing unless paid within 30 days from the date of billing. Accordingly, Farm & Garden's invoices and statements constitute "money due on any instrument in writing" under § 45-104.

With regard to Neb. Rev. Stat. § 45-103.02 (Reissue 2010), the district court's July 12, 2017, order states:

> Next, [Kennedy] argues that statutory interest should not be allowed because [Farm & Garden's] claim is not "liquidated." . . . In this case, the total amount of the unpaid invoices totaling $104,180.27 was not in controversy. However, [Kennedy] argues that no interest should be allowed because the litigation put into question [Farm & Garden's] right to recover on these invoices, as addressed in [Kennedy's] counterclaim of negligent application and subsequent damages. When a reasonable controversy exists concerning the claimant's right

> to recover or the amount of such recovery, the claim is unliquidated, and prejudgment interest is not allowed. [Citation omitted.]
>
> . . . [T]he dispute addressed in the litigation was specifically directed at [Farm & Garden's] alleged misapplication of phosphorous on the Leuthold field, along with the attempted "rescue" application on the same field in June, 2012. There was no evidence submitted during the trial or argued before the jury which called into question [Farm & Garden's] attempt to recover the money owed for all the other chemicals on [Kennedy's] other lands during 2012. These invoices were not part of the litigated controversy, nor was [Farm & Garden's] right to recover those amounts.

Although the district court did not specifically refer to § 45-103.02 in its order, it is evident that it considered the requirements for prejudgment interest under that statute based on its discussion of liquidated and unliquidated claims. Both parties make arguments on appeal specific to § 45-103.02, which states, in relevant part:

> (1) Except as provided in section 45-103.04 [exceptions not applicable here], interest as provided in section 45-103 shall accrue on the unpaid balance of *unliquidated claims* from the date of the plaintiff's first offer of settlement which is exceeded by the judgment until the entry of judgment if all of the following conditions are met:
>
> . . . .
>
> (2) Except as provided in section 45-103.04 [exceptions not applicable here], interest as provided in section 45-104 shall accrue on the unpaid balance of *liquidated claims* from the date the cause of action arose until the entry of judgment.

(Emphasis supplied.) Section 45-103.02(1) is not applicable here. That subsection provides for prejudgment interest (calculated under § 45-103) on the unpaid balance of *unliquidated*

claims in those circumstances where an offer to settle by the plaintiff has been refused and a judgment is awarded which exceeds the offer. See *Martensen v. Rejda Bros.*, 283 Neb. 279, 808 N.W.2d 855 (2012). However, § 45-103.02(2) provides for prejudgment interest (determined under § 45-104) on the unpaid balance of *liquidated claims*. Prejudgment interest under § 45-103.02(2) is "recoverable only when the claim is liquidated, that is, when there is no reasonable controversy as to either the plaintiff's right to recover or the amount of such recovery." *Fitzgerald v. Community Redevelopment Corp.*, 283 Neb. 428, 461, 811 N.W.2d 178, 203 (2012).

We pause here to note that it has previously been argued that §§ 45-103.02 and 45-104 are "alternate routes to recover prejudgment interest and that if the case is a type enumerated in § 45-104," then whether there is a reasonable controversy is irrelevant. *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 285 Neb. 157, 171, 825 N.W.2d 779, 791 (2013). In other words, if interest is authorized under § 45-104, then prejudgment interest can be awarded without regard for the prejudgment interest requirements under § 45-103.02(2). The Nebraska Supreme Court opted to not resolve that issue in *Brook Valley Ltd. Part.*, since it concluded that the facts in that case did not fall under any of the enumerated categories of § 45-104, "[s]o regardless which approach is correct, whether prejudgment interest is proper depends on whether this case presented a reasonable controversy." 285 Neb. at 171, 825 N.W.2d at 791. See, also, *BSB Constr. v. Pinnacle Bank*, 278 Neb. 1027, 1043, 776 N.W.2d 188, 200 (2009) (party claimed entitlement to prejudgment interest based on two distinct theories, either under § 45-103.02 or § 45-104; facts failed to support prejudgment interest "under either theory"). But see *Records v. Christensen*, 246 Neb. 912, 918, 524 N.W.2d 757, 762 (1994) (rejection of plaintiff's argument that § 45-104 provides an alternative to § 45-103.02 under which to award prejudgment interest; "even if a litigant's action is one of those actions listed in § 45-104, that party first must comply

with the requirements of § 45-103.02 to be entitled to prejudgment interest at that rate"). Since the parties and the district court in the present matter considered prejudgment interest under the requirements of both §§ 45-103.02 and 45-104, we will do the same here.

[16] When considering prejudgment interest under § 45-103.02(2), a two-pronged inquiry is required to determine whether a claim is liquidated. See *BSB Constr., supra*. There must be no dispute either as to the amount due or as to the plaintiff's right to recover. *Id*. When damages are liquidated and no reasonable controversy exists, the plaintiff is "entitled to prejudgment interest as a matter of law on that amount." *Cheloha v. Cheloha*, 255 Neb. 32, 44, 582 N.W.2d 291, 301 (1998). See, also, *Abbott v. Abbott*, 188 Neb. 61, 195 N.W.2d 204 (1972) (where amount of claim is liquidated, compensation in form of prejudgment interest is allowed as matter of right).

[17] A claim for prejudgment interest must be fixed and determined or readily determinable; but it is sufficient for this purpose if it is ascertainable by computation or a recognized standard. See *Schmidt v. Knox*, 191 Neb. 302, 215 N.W.2d 77 (1974). If there is a dispute as to either the amount due or the plaintiff's right to recover, the Nebraska Supreme Court has stated "'the claim is generally considered to be unliquidated and prejudgment interest is not allowed.'" *Graff v. Burnett*, 226 Neb. 710, 718, 414 N.W.2d 271, 277 (1987).

The district court awarded Farm & Garden $46,089.27 in prejudgment interest, which was calculated on only part of the $104,180.27 judgment the jury awarded to Farm & Garden. The court deemed $81,933.48 of the judgment to be liquidated and subject to prejudgment interest under § 45-104 at a rate of 12 percent per annum from the date of the last billing. To reach the $81,933.48 figure, the district court subtracted from the total judgment amount the sums it deemed to be in controversy. The court found $22,246.79 in controverted charges; these included $13,985.59 and $750 for the phosphorous

application on the Leuthold Fields noted in exhibit 71, as well as the $7,511.20 charge for the remedial application to the Leuthold Fields noted in exhibit 75. The court subtracted $22,246.79 from the jury's verdict of $104,180.27 to arrive at $81,933.48, "which the Court finds to be liquidated and subject to prejudgment interest pursuant to Neb. Rev. Stat. §45-104." It then performed the following mathematical calculation:

> Accordingly, 12% prejudgment interest began to accrue against $81,933.49 on July 16, 2012, the date of the last billing as shown on Exhibit 83. This interest does not compound. . . . 12% interest on $81,933.48 equals $9,832.02 per year, or $26.94 per day [for] 1,711 days. . . . [P]rejudgment interest amounts to $46,089.27.

Kennedy contends that Farm & Garden's claim was not liquidated because his counterclaim for damages resulting from the misapplication of fertilizer created a dispute as to both Farm & Garden's right to recover and the amount owed. He also claims that Farm & Garden's "claim was disputed in part because it included prejudgment interest." Brief for appellant at 12. At oral argument, Kennedy's counsel argued that every Farm & Garden invoice had the 16-percent interest included and that therefore, all the invoices were in dispute because the parties had not agreed upon the interest.

Farm & Garden argues there was no reasonable controversy because "Kennedy offered no evidence or expert testimony to contend that the amount set forth in Farm [&] Garden's invoices and bills was unfair, unreasonable, or the charges for chemical and fertilizer were excessive." Brief for appellee at 20. "Instead, the only controversy that existed was the amount, if any, that Kennedy was entitled to receive relating to his allegations of improper application of chemical and fertilizer. However, those are two separate issues." *Id.* "No reasonable controversy existed that Farm [&] Garden was entitled to the fair and reasonable value of the chemical and fertilizer it applied to Kennedy's fields." *Id.*

Both parties acknowledged at oral argument that the $104,180.27 awarded to Farm & Garden represented the charges for products and services Farm & Garden supplied to all of Kennedy's fields, not just the contested Leuthold Fields. Farm & Garden points out that the district court subtracted the billings reflected in exhibits 71 and 75, since these were the only charges it deemed to be in dispute. Therefore, Farm & Garden argues that its claim was liquidated because there was evidence making it possible to compute the amount of recovery with exactness (i.e., the invoices showing amounts owed).

We agree with Farm & Garden and the district court that $81,933.48 of the $104,180.27 jury verdict in favor of Farm & Garden was not in controversy and could be readily determined. The amounts reflected in exhibits 71 and 75 were the only amounts disputed in the course of trial, and these were the amounts the district court subtracted from the total judgment to determine the prejudgment interest owed. There was no testimony or other evidence to suggest Kennedy did not wish to receive the other products and application services provided by Farm & Garden, and as asserted by Farm & Garden, there was no evidence that those products and services were charged at an unfair or unreasonable amount. Herbolsheimer attested that the invoice charges for various products and application services were for a fair and reasonable price. Kennedy's counterclaim sought separate damages based on his claim that his cornstalk or stover production was less than it should have been. His counterclaim did not change the fact that the charges were incurred and owed to Farm & Garden. Exhibit 83 is a chart that lists all the chemicals, fertilizer, and application costs in each invoice, totaling $104,180.27. Even if Kennedy disputed the 1.33-percent monthly finance charge noted on the invoices for payments not made in 30 days, he offered no evidence to dispute that he owed the $104,180.27 in product and services he received from Farm & Garden, nor that the charges were erroneous or unreasonable.

Farm & Garden's uncontroverted amounts were readily determinable by computation; all that was required was addition of the total amount of the invoice charges. Herbolsheimer testified the total amount on exhibit 83 shows just the invoice amounts due on Kennedy's account; they did not include finance charges. Also, exhibit 83 reflects the credit issued for Farm & Garden's erroneous application of product to a field which Kennedy did not order, meaning this amount was not factored into the $104,180.27 total.

The district court concluded that the invoices totaling this amount "were not part of the litigated controversy, nor was [Farm & Garden's] right to recover those amounts." Further, the court stated that "the refusal of [Kennedy] to pay those additional invoices . . . did not place those additional invoices into controversy."

[18] The Nebraska Supreme Court has made it clear that one has a liquidated claim only when there is no reasonable controversy as to both the plaintiff's right to recover and the amount of such recovery. See *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010). Farm & Garden's claim qualified as a liquidated claim because there was an undisputed amount due which was readily determinable and there was no dispute as to Farm & Garden's right to recover that amount. The district court did not err in allowing prejudgment interest at the statutory rate prescribed under § 45-104 on the liquidated portion of the judgment in favor of Farm & Garden.

3. Verdict on Counterclaim

Kennedy asserts that the verdict on his counterclaim is contrary to the law and to the evidence. The jury returned a verdict of $7,511.20 in favor of Kennedy on his counterclaim. The amount of $7,511.20 is equal to the cost billed to Kennedy for the remedial application of chemicals to Kennedy's corn crop in the Leuthold Fields. Kennedy claims that the verdict for this amount does not appropriately assess his damages,

which he contends should have been for the loss of stover, not for the amount of an invoice. While it is true that the verdict in Kennedy's favor perfectly matches the invoice amount, we cannot say the jury's decision to award this particular amount was clearly wrong. See *Lowman v. State Farm Mut. Auto. Ins. Co.*, 292 Neb. 882, 874 N.W.2d 470 (2016) (jury verdict may not be set aside unless clearly wrong; jury verdict is sufficient if there is competent evidence presented to jury upon which it could find for successful party).

[19] Jury instruction No. 2 set forth that Kennedy's counterclaim alleged that Farm & Garden's application of fertilizer was negligent and resulted in an irregular growth pattern "and resulted in damages to [Kennedy] in the form of lost forage/bales causing him damages." Further, Kennedy had to prove, by a greater weight of the evidence, (1) that Farm & Garden was negligent, (2) that the negligence was the proximate cause of the alleged damage, and (3) the nature and extent of "plaintiff's" damages, if any. We note the reference to "plaintiff's" damages should say "defendant's" damages. Neither party's brief directs us to this error; regardless, we consider the error harmless in light of the totality of the instructions given to the jury. See *Bunnell v. Burlington Northern RR. Co.*, 247 Neb. 743, 745, 530 N.W.2d 230, 231 (1995) (stating that "[j]ury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party").

Jury instruction No. 6 stated that if the jury found Farm & Garden was negligent and that negligence was the proximate cause of damage to Kennedy's crops, then the jury "must decide how much money it will take to compensate [Kennedy] for that damage." If the jury found Kennedy's crop was injured, but not destroyed, Kennedy was "entitled to recover the market value the crop would have[,] had it had not been injured, minus any market value of the injured crop, and minus any savings to [Kennedy] in the cost of production."

As Farm & Garden noted in its brief, market value was not defined.

Finally, jury instruction No. 13 told the jury to consider Farm & Garden's claim for payment of the value of the bills and invoices separately from Kennedy's claim for damages relating to the alleged negligent application of fertilizer. The jury was instructed to first determine the amount of money to which Farm & Garden was entitled for the fair and reasonable value of its products and services; Farm & Garden "is then entitled to a judgment against [Kennedy] in that amount." The jury was to then determine "the amount of money to which [Kennedy was] entitled for any lost forage/stover bales resulting from any negligent application of fertilizer for the 2012 crop season"; Kennedy "is then entitled to a judgment against [Farm & Garden] in that amount."

[20,21] Viewing the totality of the instructions, it was made clear to the jury that it was to determine any damages owed to Farm & Garden and, then separately, any damages owed to Kennedy. It is presumed a jury followed the instructions given in arriving at its verdict, and unless it affirmatively appears to the contrary, it cannot be said that such instructions were disregarded. *In re Estate of Clinger*, 292 Neb. 237, 872 N.W.2d 37 (2015). The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *World Radio Labs. v. Coopers & Lybrand*, 251 Neb. 261, 557 N.W.2d 1 (1996).

Kennedy's argument that damages should have been for loss of stover, not for the amount of an invoice, interprets the jury instructions and the jury's verdict too narrowly. We agree with Farm & Garden's explanation that "the jury had sufficient evidence to find Kennedy suffered no loss of cornstalk yield, or a reduction in the number of bales, but suffered damages in the amount of the additional inputs that he was obligated to pay; the 'fix' in the amount of $7,511.20." Brief for appellee at

27. Thus, "the jury awarded Kennedy the only damage proximately caused by the misapplication that Kennedy was able to prove at trial." *Id*. In that way, based on competent evidence presented to the jury, the damages amount was effectively the same as the amount of the invoice corresponding with the remedial "top-dress" of fertilizer.

The damages amount of $7,511.20 is supported by the evidence and bears a reasonable relationship to the elements of damages proved. Under the limited standard of review for jury verdicts, we cannot conclude that the jury verdict was clearly wrong, since there is competent evidence on which the jury could have reached this specific amount of damages for Kennedy. Because the fact finder's determination of damages is given great deference, and for reasons stated above, we find the jury verdict on Kennedy's counterclaim for damages was not contrary to the evidence or the law.

4. Motion for New Trial

Kennedy argues his motion for new trial should have been sustained, since there was prejudicial error to him as a result of the court's admission of Goedeken's opinion and as a result of the jury's alleged error in the assessment of damages. In light of our discussion on these two issues as set forth above, we conclude the district court did not abuse its discretion by denying Kennedy's motion for new trial on these grounds.

VI. CONCLUSION

For the reasons stated above, we affirm the judgment of the district court.

Affirmed.

In re Interest of Aly T. and Kazlynn T., children under 18 years of age. State of Nebraska, appellee, v. Tiffany S., appellant.

921 N.W.2d 856

Filed November 27, 2018. No. A-17-1237.

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. 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: Proof.** In Nebraska statutes, the bases for termination of parental rights are codified in Neb. Rev. Stat. § 43-292 (Reissue 2016). 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.
3. ____: ____. The State must prove the facts by clear and convincing evidence when showing a factual basis exists under any of the 11 subsections of Neb. Rev. Stat. § 43-292 (Reissue 2016).
4. **Evidence: Proof: Words and Phrases.** Clear and convincing evidence is the amount of evidence that produces a firm belief or conviction about the existence of a fact to be proved.
5. **Parental Rights: Evidence: Proof.** In order to terminate parental rights under Neb. Rev. Stat. § 43-292(6) (Reissue 2016), the State must prove by clear and convincing evidence that (1) the parent has failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the plan and (2) in addition to the parent's noncompliance with the rehabilitative plan, termination of parental rights is in the best interests of the child. The State is required to prove that the parents have been provided with a reasonable opportunity to rehabilitate themselves according to a court-ordered plan and have failed to do so.

6. **Parental Rights: Evidence: Appeal and Error.** If an appellate court determines that a lower court correctly found that termination of parental rights is appropriate under one of the statutory grounds set forth in Neb. Rev. Stat. § 43-292 (Reissue 2016), the appellate court need not further address the sufficiency of the evidence to support termination under any other statutory ground.
7. **Rules of Evidence: Expert Witnesses.** An expert's opinion is ordinarily admissible under Neb. Rev. Stat. § 27-702 (Reissue 2016) if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination.
8. **Parental Rights: Rules of Evidence: Due Process.** The Nebraska Evidence Rules do not apply in cases involving the termination of parental rights. Instead, due process controls and requires that the State use fundamentally fair procedures before a court terminates parental rights.
9. ____: ____: ____. In determining whether admission or exclusion of particular evidence would violate fundamental due process, the Nebraska Evidence Rules serve as a guidepost.
10. **Parental Rights: Proof.** In addition to proving a statutory ground, the State must show that termination of parental rights is in the best interests of the child.
11. **Constitutional Law: Parental Rights: Proof.** A parent's right to raise his or her child is constitutionally protected; so before a court may terminate parental rights, the State must also show that the parent is unfit.
12. **Parental Rights: Presumptions: Proof.** There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that the parent is unfit.
13. **Parental Rights: Words and Phrases.** The term "unfitness" is not expressly used in Neb. Rev. Stat. § 43-292 (Reissue 2016), but the concept is generally encompassed by the fault and neglect subsections of that statute, and also through a determination of the child's best interests.
14. ____: ____. Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.
15. **Parental Rights.** The best interests analysis and the parental fitness analysis are fact-intensive inquiries. And while both are separate inquiries, each examines essentially the same underlying facts as the other.

Appeal from the Separate Juvenile Court of Douglas County: Christopher E. Kelly, Judge. Affirmed.

Charles M. Bressman, Jr., and Megan E. Lutz-Priefert, of Anderson, Bressman, Hoffman & Jacobs, P.C., L.L.O., for appellant.

Donald W. Kleine, Douglas County Attorney, Sarah Schaerrer, and Laura Elise Lemoine, Senior Certified Law Student, for appellee.

Pirtle, Riedmann, and Welch, Judges.

Pirtle, Judge.

INTRODUCTION

Tiffany S. appeals the order of the separate juvenile court of Douglas County terminating her parental rights to her two children Aly T. and Kazlynn T. She contends that she was not given a sufficient amount of time to rehabilitate herself and comply with the case plan, the caseworker was not qualified to give an expert opinion as to the children's best interests, and the court erred in finding that terminating her parental rights was in the children's best interests. Following our de novo review of the record, we affirm.

BACKGROUND

Aly, born in January 2010, and Kazlynn, born in June 2008, were initially brought to the attention of the Nebraska Department of Health and Human Services (Department) in October 2016 after being involved in a car accident in which their father was driving while under the influence of alcohol. As a result of the car accident, Aly suffered a traumatic brain injury, from which she has significantly recovered but requires ongoing monitoring. Kazlynn suffered more severe injuries and remains in a vegetative state at a long-term care facility. Aly and Kazlynn were in the custody of their father at the time of the accident. His parental rights have since been terminated. See *In re Interest of Jade H. et al.*, 25 Neb. App. 678, 911 N.W.2d 276 (2018).

On October 25, 2016, the State filed a petition alleging Aly and Kazlynn were within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016), because they lacked proper parental care by reason of the fault or habits of Tiffany in that Tiffany's whereabouts were unknown; she failed to provide the juveniles with safe, stable, and/or appropriate housing; she failed to provide proper parental care, support, supervision and/or protection for the juveniles; and the juveniles were at risk for harm.

On November 18, 2016, the State filed a second supplemental petition alleging Aly and Kazlynn were within the meaning of § 43-247(3)(a), because they lacked proper parental care by reason of the fault or habits of Tiffany in that Tiffany's use of alcohol and/or controlled substances places the juveniles at risk for harm; she tested positive for methamphetamine on November 17; she failed to provide the juveniles with safe, stable, and/or appropriate housing; she failed to provide the juveniles with proper parental care, support, and/or supervision; and the juveniles were at risk for harm.

An adjudication hearing was held on April 19, 2017, and with the exception of the use of alcohol and/or controlled substances allegation, the court found the allegations in the second supplemental petition were true by a preponderance of the evidence. The court found that Aly and Kazlynn came within the meaning of § 43-247(3)(a) as far as Tiffany was concerned.

A disposition hearing was held on June 6, 2017, at which time the court ordered Tiffany to participate in intensive outpatient treatment, undergo a psychiatric evaluation, participate in medication management, submit to frequent and random drug testing to include testing for alcohol, abstain from the use of all "mood altering chemicals" and illegal drugs, and be allowed reasonable rights of supervised visitation with Aly and Kazlynn.

On August 2, 2017, the State filed a motion to terminate Tiffany's parental rights. The State alleged that termination

of her parental rights was warranted pursuant to Neb. Rev. Stat. § 43-292(2) (Reissue 2016), because she has substantially and continuously or repeatedly neglected and refused to give her children necessary parental care and protection, and pursuant to § 43-292(6), because reasonable efforts to preserve and reunify the family failed to correct the conditions that led to the determination that the children were within the meaning of § 43-247(3)(a). The motion specifically alleged that Tiffany had failed to participate in outpatient treatment, failed to undergo a psychiatric evaluation, failed to submit to urinalysis (UA) testing as requested, and failed to consistently or regularly participate in visitation with Aly and Kazlynn. In addition, the State alleged that termination of Tiffany's parental rights was in the best interests of the children.

Trial was held on the motion to terminate on October 31, 2017. Tiffany did not appear for the trial, and her attorney had no explanation as to why she was not present.

The State's first witness was Wendy Stevenson, a child and family permanency specialist with the Department. She had been Aly and Kazlynn's case manager since October 2016.

Stevenson testified that she had a bachelor's degree in education, had been a child and family permanency specialist for 7 years, received training on when it is appropriate to recommend termination of parental rights, and received ongoing training from the Department. Stevenson testified that in determining whether termination of parental rights is in a child's best interests, she considers the following:

> [t]he amount of participation a parent is putting forth in a case, whether they're trying to meet any of the goals that are set forth in the case plan, if they're seeing their child on a regular basis, the type of interactions they have with their child, what's in the best interest of the child, and how the child is reacting to what is occurring during visitation . . . .

Stevenson testified about what the court had ordered Tiffany to do to work toward reuniting with her children and about

Tiffany's compliance with those orders. She testified that Tiffany had been ordered to undergo a chemical evaluation and follow through with the recommendations of that evaluation. Tiffany underwent a chemical evaluation in February 2017, but had not followed through with the recommendations which included a psychiatric evaluation and outpatient treatment. In June, the court also ordered her to undergo a psychiatric evaluation and to participate in outpatient treatment. In regard to the psychiatric evaluation, Stevenson stated she set up a "Letter of Agreement" with a behavioral health services agency, which agreement was in effect from March to May, but Tiffany did not contact the agency to set up an appointment. Stevenson also testified that to her knowledge Tiffany had not attended any outpatient sessions. She testified that she sent Tiffany text messages and called her, trying to get her to comply with the psychiatric evaluation and the outpatient treatment, but she did not comply.

Stevenson testified that since November 2016, Tiffany has been ordered to participate in UA testing. Stevenson testified that the first agency doing the testing discharged Tiffany in June 2017 because she was not complying. Tiffany did not complete any UA testing between February 22 and June 6, resulting in 28 missed tests. An exhibit was entered into evidence showing that a total of 77 tests were requested with the first agency and 42 of those were unsuccessful.

In June 2017, Stevenson referred Tiffany to another agency for UA testing. Stevenson testified that the second agency would go to Tiffany's house to do the UA testing, but that Tiffany never would answer her door. On two occasions, Stevenson had the agency locate Tiffany during her visitation time with Kazlynn. Tiffany "caused [a] scene" both times and refused to do the UA testing on both occasions. Tiffany has indicated to Stevenson that she does not want to do the UA testing and is not going to do it.

As for Tiffany's visitation with Aly and Kazlynn, Stevenson testified that initially after the car accident, Tiffany could

come to see the children in the hospital unsupervised. In mid-November 2016, the visits were changed to supervised visits based on a statement Tiffany made to Stevenson. Visitation has remained supervised since that time.

When the first visitation schedule was established, Tiffany was offered two or three visits per week with Aly and two or three separate visits per week with Kazlynn. Stevenson testified that in August 2017, the number of Tiffany's visits was reduced because Tiffany was not regularly attending visits. At the time of trial, Tiffany was allowed only one visit per week with each child—a 2-hour visit with Aly and a 1-hour visit with Kazlynn. Beginning in March or April 2017, Tiffany was also required to call and confirm each visit because she was not showing up for visits, which Stevenson stated was "devastat[ing]" for Aly.

Stevenson testified that at a family team meeting on August 29, 2017, she talked with Tiffany about her noncompliance with the court orders and asked what the Department could do to help her. She said that Tiffany would not talk to her about why she had not complied with the court orders.

Stevenson also testified that at the time of the team meeting, Tiffany's chemical evaluation was "out of date," so she told Tiffany how to contact a behavioral health agency for another chemical evaluation. Tiffany called the agency, but when she reached an answering machine, she became aggravated, said she was not going to leave a message, and hung up. Stevenson testified that after the day of the family team meeting, she sent Tiffany text messages several times asking if she had made contact with the agency about her chemical evaluation. Tiffany responded on one occasion, indicating that she called the agency, but reached the answering machine and did not leave a message.

Stevenson testified that she has attempted to meet with Tiffany on a monthly basis and to have a family team meeting on a monthly basis as well, but has been unsuccessful. The family team meeting that Tiffany attended in August 2017

was held the same day the parties had been in court, when it was decided to have a meeting because the parties were already present.

Stevenson testified that she cannot get Tiffany to have contact with her; the only time Tiffany has any contact with her is when Tiffany "wants something." She also testified that Tiffany has been noncompliant with her and the Department and does not want to do anything to comply with the court orders, which Stevenson finds concerning.

After Tiffany was served with the motion to terminate her parental rights, filed on August 2, 2017, she contacted Stevenson and indicated she wanted to comply with the court orders because she did not want to "lose her children." Stevenson and Tiffany texted back and forth for about 40 minutes discussing what Tiffany needed to do. Stevenson testified that after that communication, she did not hear anything further from Tiffany until August 29, 2017.

Stevenson testified that in her opinion, it was in Aly's and Kazlynn's best interests to terminate Tiffany's parental rights. She stated that her opinion was based on "[t]he fact that [Tiffany] has not done anything in a year's time to try to even get to a point where we could even look at going to monitored visits, let alone moving her child in with her . . . ." She further stated:

> [Tiffany] has done nothing in the last year to prove that she can parent either one of these children, and it's just in the children's best interest at this point in time to not continue to put them through the visits and the visits not happening and those type[s] of things.

Carolyn Brandau, a family support specialist and visitation worker, also testified on behalf of the State. She had been the visitation worker for Aly and Kazlynn since April or May 2017. Brandau testified that Tiffany had missed a lot of visits since Brandau became the visitation worker. She also testified that there have been times when she has picked up Aly to go to a visit and when they get to the visitation location, Tiffany

does not show up. Brandau testified that when this happens, it is "heartbreaking" for Aly. Brandau stated, "[Aly] cries and cries . . . I want my mommy. I want my mommy. Why does my mommy not want to see me? And it's just — it's very heartbreaking to hear." Brandau stated that on the visits that Tiffany does attend, Brandau has to redirect Tiffany at times and she does not react favorably to the redirection. She testified that Tiffany does not always display good parenting skills and judgment during visits.

Brandau also testified that due to Aly's brain injury, Aly has some physical limitations and needs to be monitored. She is not supposed to run, jump, or do any strenuous activity. She testified that Tiffany is not good at monitoring Aly's activity and encourages her to go against the limitations. Tiffany tells Brandau that she is Aly's mother and knows what is best for her.

Brandau testified that she agreed with Stevenson's testimony that Tiffany had not done anything in the past year to help her reunite with her children.

Following trial, in an order dated October 31, 2017, the juvenile court found the allegations in the State's motion to be true by clear and convincing evidence. The court determined that Tiffany's parental rights should be terminated pursuant to § 43-292(2) and (6) and that termination was in the children's best interests.

ASSIGNMENTS OF ERROR

Tiffany assigns that the juvenile court erred in (1) allowing her only 7 months to complete the rehabilitation plan, (2) finding that Stevenson had the foundational requisites to give an expert opinion, and (3) determining that it was in the children's best interests to terminate her parental rights.

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 LeVanta S.*, 295 Neb.

151, 887 N.W.2d 502 (2016). 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.*

ANALYSIS

Statutory Grounds for Termination.

Tiffany first assigns that the juvenile court erred in allowing her only 7 months—the time between adjudication and the termination of her parental rights—to complete the rehabilitation plan. She argues that she was not given enough time to comply with the court's orders and that therefore, the court erred in finding that grounds to terminate existed under § 43-292(2) and (6).

[2] In Nebraska statutes, 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).

[3,4] The State must prove the facts by clear and convincing evidence when showing a factual basis exists under any of the 11 subsections of § 43-292. See *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). Clear and convincing evidence is the amount of evidence that produces a firm belief or conviction about the existence of a fact to be proved. See *id.*

In its order terminating Tiffany's parental rights to her children, the juvenile court found that the State had presented clear and convincing evidence to satisfy § 43-292, which provides in relevant part:

> The court may terminate all parental rights . . . when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:

> . . . .
>
> (2) The parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection;
>
> . . . .
>
> (6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts to preserve and reunify the family if required under section 43-283.01, under the direction of the court, have failed to correct the conditions leading to the determination.

[5] In order to terminate parental rights under § 43-292(6), the State must prove by clear and convincing evidence that (1) the parent has failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the plan and (2) in addition to the parent's noncompliance with the rehabilitative plan, termination of parental rights is in the best interests of the child. *In re Interest of Kassara M.*, 258 Neb. 90, 601 N.W.2d 917 (1999). The State is required to prove that the parents have been provided with a reasonable opportunity to rehabilitate themselves according to a court-ordered plan and have failed to do so. *Id.*

As previously stated, Tiffany contends that she was not given enough time to comply with the rehabilitation plan. She also argues that Stevenson did not do enough to help her meet the court's requirements. Although Tiffany was not given as much time to rehabilitate herself as we have seen in some other cases, the evidence shows that she was given adequate time to comply in whole or in part with many of the provisions ordered by the court and that she chose not to comply.

The motion to terminate specifically alleged, in regard to § 43-292(6), that Tiffany had failed to participate in outpatient treatment, failed to undergo a psychiatric evaluation, failed to submit to UA testing as requested, and failed to consistently or regularly participate in visitation with Aly and Kazlynn. The

testimony of Stevenson and Brandau clearly and convincingly established that Tiffany has failed to comply with the provisions set forth in the motion to terminate, as well as other provisions.

Tiffany submitted to a chemical evaluation in February 2017, but she failed to follow through with the recommendations, which included a psychiatric evaluation and outpatient treatment. She was also court ordered to undergo a psychiatric evaluation and participate in outpatient treatment in June. Stevenson testified that she tried to help Tiffany get both set up, but Tiffany did not follow through. Stevenson told Tiffany the agency to contact to get another chemical evaluation when the first one was "out of date." Tiffany called the agency but would not leave a message. Consequently, Tiffany has not submitted to another chemical evaluation, nor has she undergone a psychiatric evaluation.

In regard to UA testing, Stevenson testified that Tiffany was discharged by the first agency based on her failure to comply. Tiffany did not submit to any UA testing between February 22 and June 6, 2017, resulting in 28 missed tests. A total of 77 tests were requested with the first agency and 42 of those were unsuccessful. In June, Stevenson referred Tiffany to another agency for UA testing, and Tiffany continued to be noncompliant. The new agency would go to Tiffany's house to do the UA testing and she would not answer the door. Tiffany has indicated that she does not want to do the UA testing and is not going to do it.

As to visitation, Tiffany's visits became supervised in November 2016 and have remained supervised since then. In March or April 2017, Tiffany was required to call and confirm each visit because she was often not showing up for visits without any notice, which was "devastat[ing]" for Aly. The number of weekly visits were reduced in August because Tiffany was not consistently attending visits.

Brandau testified that Tiffany has missed a number of visits since Brandau became the visitation worker in April or May 2017. Brandau stated that during the visits Tiffany attends, she

has to redirect Tiffany at times and she does not react favorably to the redirection. Brandau also testified that Tiffany does not always display good parenting skills and judgment during visits. Brandau further testified that Tiffany does not monitor Aly's activity level and encourages her to go against the physical limitations she is supposed to adhere to because of her head injury. Tiffany tells Brandau that she is Aly's mother and that she knows what is best for her.

Stevenson testified that she has made attempts to meet with Tiffany on a monthly basis and to have family team meetings on a monthly basis as well. Stevenson testified that Tiffany has been noncompliant with the Department and will not have contact with her, unless Tiffany wants something.

We conclude that the evidence clearly and convincingly established that Tiffany has failed to comply, in whole or in part, with reasonable provisions of the rehabilitation plan and that she had adequate time to do so. The evidence also shows that Stevenson has tried to meet with Tiffany, to communicate with her, and to help her set up services, but that Tiffany refuses to accept Stevenson's assistance and to comply with the court orders. Therefore, the statutory ground for termination of Tiffany's parental rights under § 43-292(6) is satisfied.

[6] If an appellate court determines that a lower court correctly found that termination of parental rights is appropriate under one of the statutory grounds set forth in § 43-292, the appellate court need not further address the sufficiency of the evidence to support termination under any other statutory ground. *In re Interest of Chloe C.,* 20 Neb. App. 787, 835 N.W.2d 758 (2013). Thus, we do not address the sufficiency of the evidence to support termination under § 43-292(2). The next inquiry is whether termination of Tiffany's parental rights is in the children's best interests.

Best Interests and Parental Fitness.

[7] In addressing the juvenile court's finding that termination was in the children's best interests, Tiffany argues that

the court erred in allowing Stevenson to give an opinion on the best interests of the children because she was not qualified to give an expert opinion. Neb. Rev. Stat. § 27-702 (Reissue 2016) 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." An expert's opinion is ordinarily admissible under § 27-702 if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination. *In re Interest of Kindra S.*, 14 Neb. App. 202, 705 N.W.2d 792 (2005).

[8,9] We have previously recognized that the Nebraska Evidence Rules do not apply in cases involving the termination of parental rights. See *In re Interest of Destiny A. et al.*, 274 Neb. 713, 742 N.W.2d 758 (2007). Instead, due process controls and requires that the State use fundamentally fair procedures before a court terminates parental rights. *Id.* In determining whether admission or exclusion of particular evidence would violate fundamental due process, the Nebraska Evidence Rules serve as a guidepost. *Id.*

Stevenson's best interests opinion was based on her own observations and interactions with Tiffany as the caseworker for Tiffany and her children. Stevenson had been the only caseworker. Before giving her best interests opinion, Stevenson had given specific testimony as to how Tiffany had failed to comply with the court's orders and refused to cooperate with her and the Department. Tiffany cross-examined Stevenson and did not put on any of her own evidence to contradict Stevenson's testimony.

We conclude that the juvenile court did not err in allowing Stevenson to give an opinion in regard to the best interests of the children.

[10-15] Tiffany next asserts the juvenile court erred in finding that there was clear and convincing evidence to establish that termination of her parental rights was in the children's best interests. In addition to proving a statutory ground, the State must show that termination is in the best interests of the child. *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012). A parent's right to raise his or her child is constitutionally protected; so before a court may terminate parental rights, the State must also show that the parent is unfit. *Id.* There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that the parent is unfit. *Id.* The term "unfitness" is not expressly used in § 43-292, but the concept is generally encompassed by the fault and neglect subsections of that statute, and also through a determination of the child's best interests. *In re Interest of Kendra M. et al., supra*. In discussing the constitutionally protected relationship between a parent and a child, the Nebraska Supreme Court has stated: "'"Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being."'" *Id.* at 1033-34, 814 N.W.2d at 761. The best interests analysis and the parental fitness analysis are fact-intensive inquiries. And while both are separate inquiries, each examines essentially the same underlying facts as the other. *In re Interest of Kendra M. et al., supra*.

When the initial petition to adjudicate was filed on October 25, 2016, Tiffany's whereabouts were unknown and Aly and Kazlynn's father had custody of them. Since that time, Tiffany has been noncompliant with the court's orders and has put forth little effort toward reuniting with her children. Even after being served with the motion to terminate her parental rights, she initially indicated she wanted to comply with the

case plan, but her interest quickly waned, and Stevenson had no contact with her for several weeks. Stevenson testified that throughout the case, Tiffany would not communicate with her or have any contact with her.

Stevenson testified that in her opinion, it was in the best interests of Aly and Kazlynn to terminate Tiffany's parental rights. She stated that her opinion was based on the fact that Tiffany had not done anything in the last year to rehabilitate herself. She indicated that Tiffany had not even done enough to get her visits changed from being supervised. She further indicated that Tiffany had not done anything in the past year to prove she can parent her children and that it was not in the children's best interests to continue to schedule visits and have them not occur. Brandau testified that she agreed with Stevenson's testimony that Tiffany had made little effort in the past year to help her reunite with her children. Brandau also testified that it is "heartbreaking" for Aly when Tiffany does not show up for visits. Brandau stated that Aly cries and asks why Tiffany does not want to see her.

Tiffany has not complied with the court orders, and her lack of involvement shows that she does not plan to comply. She has not demonstrated a willingness or a desire to parent Aly and Kazlynn. Based upon our de novo review of the record, we find clear and convincing evidence that Tiffany is unfit. We also find that it was shown by clear and convincing evidence that termination of Tiffany's parental rights would be in the children's best interests.

CONCLUSION

Based on our de novo review, we conclude that the juvenile court did not err in terminating Tiffany's parental rights to Aly and Kazlynn. Accordingly, the court's order is affirmed.

Affirmed.

State of Nebraska, appellee, v.
John J. Howard, appellant.
921 N.W.2d 869

Filed December 4, 2018. No. A-17-543.

1. **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.
2. **Trial: Motions for Mistrial.** When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial.
3. **Motions for Mistrial: Prosecuting Attorneys: Waiver: Appeal and Error.** A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct.
4. **Trial: Juries: Evidence.** Trial courts have broad discretion in allowing the jury to have unlimited access to properly received exhibits that constitute substantive evidence of a defendant's guilt.
5. **Trial: Juries: Evidence: Appeal and Error.** A trial court's decision to allow a jury during deliberations to rehear or review evidence, whether such evidence is testimonial or nontestimonial, is reviewed by an appellate court for an abuse of discretion.
6. **Trial: Testimony: Evidence: Words and Phrases.** Testimonial evidence refers to trial evidence, including live oral examinations, affidavits and depositions in lieu of live testimony, and tapes of examinations conducted prior to the time of trial for use at trial in accordance with procedures provided by law.
7. **Records: Appeal and Error.** It is incumbent upon an appellant to supply a record which supports his or her appeal.
8. **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 such discretion a factor in determining admissibility.

9. **Trial: Waiver: Appeal and Error.** A party may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.
10. **Effectiveness of Counsel: Appeal and Error.** When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record; otherwise, the issue will be procedurally barred.
11. **Effectiveness of Counsel: Proof.** 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. **Trial: Effectiveness of Counsel: Prosecuting Attorneys: Appeal and Error.** Determining whether defense counsel was ineffective in failing to object to prosecutorial misconduct requires an appellate court to first determine whether the petitioner has alleged any action or remarks that constituted prosecutorial misconduct.
13. **Trial: Prosecuting Attorneys.** A prosecutor is entitled to draw inferences from the evidence in presenting his or her case, and such inferences generally do not amount to prosecutorial misconduct.
14. **Pretrial Procedure: Prosecuting Attorneys: Evidence.** A prosecutor has a duty to disclose all favorable evidence to a criminal defendant prior to trial.

Appeal from the District Court for Douglas County: Thomas A. Otepka, Judge. Affirmed.

Michael J. Wilson, of Schaefer Shapiro, L.L.P., for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Pirtle, Riedmann, and Welch, Judges.

Riedmann, Judge.

I. INTRODUCTION

John J. Howard appeals his convictions and sentences in the district court for Douglas County of first degree sexual assault,

sexual assault of a child, and first degree sexual assault of a child. We find that the record is insufficient to address several of his ineffective assistance of counsel claims but otherwise find no merit to the arguments raised on appeal. We therefore affirm.

II. BACKGROUND

Howard was charged with first degree sexual assault, count 1; sexual assault of a child, count 2; and first degree sexual assault of a child, count 3. The charges were based on allegations made by two of his daughters, M.H. and S.H., ages 22 and 16 respectively at the time of trial. Both daughters claimed that when they were around the ages of 4 or 5, Howard would digitally penetrate them when giving them baths. S.H. also described incidents, prior to the time she was in third grade, where Howard would force her to perform oral sex on him and would touch her vagina or force her to touch his penis.

During the investigation of the matter, M.H. made a "one-party consent phone call" (phone call) to Howard, which was recorded by police. The recording was received into evidence at trial and played for the jury. During the call, M.H. repeatedly attempted to get Howard to admit that he had intentionally digitally penetrated her while bathing her when she was younger, and Howard's standard response was that he was just bathing her how her mother had shown him.

The matter proceeded to a jury trial. During deliberations, the jury asked to rehear the recorded phone call, but the district court denied the jury's request. The jury ultimately found Howard guilty of the charges. He was sentenced to imprisonment for 30 to 50 years on count 1, 2 to 3 years on count 2, and 45 to 60 years on count 3, with all sentences to run consecutively. Howard now appeals to this court. Additional facts will be provided below as necessary to address Howard's assigned errors.

III. ASSIGNMENTS OF ERROR

Howard assigns that the district court erred in (1) permitting the prosecutor to repeatedly misstate evidence during closing arguments, (2) denying the jury's request to rehear the recorded phone call during deliberations, (3) overruling his objection to a police detective's testimony that Howard apologized during the recorded call for digitally penetrating M.H., and (4) denying his motion for mistrial with respect to the victims' mother's testimony and the State's failure to disclose all impeachment evidence. He also claims that he received ineffective assistance of trial counsel in numerous respects.

IV. ANALYSIS

1. Prosecutorial Misconduct During Closing Arguments

Howard assigns and argues that the district court erred in denying his motion for mistrial after the prosecutor committed misconduct by repeatedly misstating evidence during closing arguments. At trial, however, Howard did not object to the prosecutor's statements. Shortly after closing arguments began, Howard interrupted and asked if the parties could approach the bench. He asserted that there was a graphic displayed for the jury indicating that during the recorded phone call, Howard admitted to digital penetration, which he alleged was a mischaracterization of the evidence. He therefore objected and moved for mistrial. The motion was denied. The State then completed its closing argument, including making several statements Howard challenges on appeal, with no further objection from Howard.

[1-3] 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. *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013). Likewise, when a party has knowledge during trial of irregularity or misconduct, the party must timely

assert his or her right to a mistrial. *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015). A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct. *Id*.

Because Howard did not object at trial to the statements he now challenges or move for a mistrial on that basis, this issue has not been properly preserved for appeal. Howard relies upon Neb. Rev. Stat. § 25-1141 (Reissue 2016) to argue that his initial objection was sufficient to challenge all of the prosecutor's statements and that he was not required to repeatedly object to every statement he now challenges. We first note that Howard never objected to any statements made during closing arguments; rather, he objected only to the graphic that was displayed for the jury. His objection to the graphic does not encompass the prosecutor's statements as well.

Additionally, § 25-1141 provides that where an objection has once been made to the admission of testimony and overruled by the court, it is unnecessary to repeat the same objection to further testimony of the same nature by the same witness in order to save the error, if any, in the ruling of the court whereby such testimony was received. By its plain language, § 25-1141 applies to objections made to the testimony of the same nature by the same witness. Here, Howard's objections were not to the testimony of a witness, but to a demonstrative exhibit and/or statements made by the prosecutor during closing arguments. We therefore find this statute inapplicable in the instant case.

To the extent Howard challenges the denial of his motion for mistrial based on the graphic displayed for the jury, the graphic is not contained in the record before us, and we therefore cannot conclude that the district court abused its discretion in denying the motion for mistrial. See *State v. Ramirez*, 287 Neb. 356, 842 N.W.2d 694 (2014) (whether to grant mistrial is within trial court's discretion, and appellate court will not disturb its ruling unless court abused its discretion).

2. Allowing Jury to Rehear Recorded Phone Call During Deliberations

During deliberations, the jury asked the court if it could rehear the recorded phone call between Howard and M.H. The court denied the jury's request. On appeal, Howard argues that the district court erred in doing so, because it was clear that the jury was confused by statements the prosecutor made during closing arguments, which he claims mischaracterized the evidence. He argues that allowing the jury to rehear the recording for itself would have provided an opportunity to mitigate some of the prejudice caused by the prosecutor's statements. We find no abuse of discretion in the trial court's ruling.

[4,5] Under Nebraska case law, the trial judge has discretion to allow the jury to reexamine evidence during deliberations. *State v. Pangborn*, 286 Neb. 363, 836 N.W.2d 790 (2013). Under this rule, trial courts have broad discretion in allowing the jury to have unlimited access to properly received exhibits that constitute substantive evidence of the defendant's guilt. *Id.* A trial court's decision to allow a jury during deliberations to rehear or review evidence, whether such evidence is testimonial or nontestimonial, is reviewed by an appellate court for an abuse of discretion. *State v. Vandever*, 287 Neb. 807, 844 N.W.2d 783 (2014).

[6] In the present case, the parties agree, as do we, that the recorded phone call is properly characterized as substantive, nontestimonial evidence. As explained in *State v. Vandever, supra*, testimonial evidence refers to trial evidence, including live oral examinations, affidavits and depositions in lieu of live testimony, and tapes of examinations conducted prior to the time of trial for use at trial in accordance with procedures provided by law. Here, although verbal in nature, the recording was not prepared as or admitted into evidence as a substitute for live testimony at trial. Therefore, the trial court had broad discretion in allowing or disallowing the jury to rehear the recording during deliberations.

The record before us includes a copy of the jury's question and the judge's notes, which report that Howard asked that the jury be permitted to rehear the recording, but the State objected to the request. If the parties discussed the issue with the court prior to the court's responding to the jury's question, a transcription of their discussion is not contained in our record. Thus, we are unable to adequately review the court's rationale for denying the jury's request.

[7] It is incumbent upon an appellant to supply a record which supports his or her appeal. *State v. Boche*, 294 Neb. 912, 885 N.W.2d 523 (2016). Absent such a record, as a general rule, the decision of the lower court as to those errors is to be affirmed. *Id*. Given that a trial court has broad discretion to disallow a jury to rehear nontestimonial evidence and based on the record before us, we cannot conclude that the district court's decision in this case was an abuse of its discretion. We therefore find no merit to this assigned error.

3. Objection to Detective's Testimony

During redirect examination of the police detective who investigated the case, the State asked her to confirm that during the recorded phone call Howard had apologized to M.H. for digitally penetrating her, and the detective responded, "Yes." Howard objected, arguing that the question and answer misstated the evidence, but his objection was overruled. On appeal, Howard asserts that the district court erred in overruling his objection.

[8] 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 such discretion a factor in determining admissibility. *State v. Scott*, 284 Neb. 703, 824 N.W.2d 668 (2012). Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *Id*. 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. *Id*.

In the present case, the decision to overrule Howard's objection was not an abuse of discretion. During the recorded phone call, Howard repeatedly apologized to M.H., albeit without directly admitting or denying intentional digital penetration. As discussed in greater detail below, the State's interpretation of the phone call was based on reasonably drawn inferences from Howard's comments during the phone call and therefore did not mischaracterize the evidence. As such, this assigned error lacks merit.

4. Motion for Mistrial Based on Testimony of Howard's Ex-Wife

Howard argues that the district court erred in denying his motion for mistrial with respect to the testimony of his ex-wife. At some point after S.H. disclosed the sexual abuse, she alleged that during one particular incident, Howard made her wear a "sports bra" belonging to her mother, who is Howard's ex-wife. During a deposition of Howard's ex-wife, she apparently denied owning any sports bras. At trial, however, during cross-examination, she testified that she did own a sports bra. She admitted that during her deposition she had denied owning one but said that she subsequently discovered that she did, in fact, have one. During redirect, she said that she raised the issue with the county attorney before trial because she realized that she had not given an honest answer in her deposition.

Howard did not object when his ex-wife was testifying regarding the sports bra issue, nor did he immediately move for a mistrial. After her testimony concluded, the State called one additional witness to testify before it rested. Howard then began presenting his defense by calling his first witness to testify. After that witness' testimony concluded, Howard moved for a mistrial based on his ex-wife's testimony. He claimed

that the State should have disclosed the inaccuracy of her deposition testimony prior to trial. The district court denied the motion for mistrial.

[9] When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial. *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010). A party may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error. See *id*. The Nebraska Supreme Court has held that a motion for mistrial made after the testimony of a witness who followed the witness whose testimony was the basis for the mistrial was not timely. See *State v. Morrow*, 237 Neb. 653, 467 N.W.2d 63 (1991).

In the instant case, Howard did not move for a mistrial based on his ex-wife's testimony until two additional witnesses had testified. His motion was therefore untimely, and the issue has not been preserved for appeal.

5. Ineffective Assistance of Counsel

[10] Howard is represented on direct appeal by different counsel than the counsel who represented him at trial. When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record; otherwise, the issue will be procedurally barred. *State v. Schwaderer*, 296 Neb. 932, 898 N.W.2d 318 (2017). An ineffective assistance of counsel claim is raised on direct appeal when the claim alleges deficient performance with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief will recognize whether the claim was brought before the appellate court. *Id*.

The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can

be resolved. *Id*. The determining factor is whether the record is sufficient to adequately review the question. *Id*.

[11] 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. Wells*, 300 Neb. 296, 912 N.W.2d 896 (2018). 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. *Id*. 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*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. The two prongs of this test may be addressed in either order, and the entire ineffectiveness analysis should be viewed with a strong presumption that counsel's actions were reasonable. *Id*.

Howard asserts that his trial counsel was ineffective in numerous respects. We address his claims below.

(a) Failure to Object During Closing Arguments

Howard asserts that trial counsel was ineffective in failing to object to the prosecutor's statements during closing arguments. Specifically, he contends that the prosecutor committed misconduct when she repeatedly misstated the evidence by claiming that during the recorded phone call he never denied digitally penetrating M.H.

[12,13] Determining whether defense counsel was ineffective in failing to object to prosecutorial misconduct requires an appellate court to first determine whether the petitioner has alleged any action or remarks that constituted prosecutorial misconduct. *State v. Ely*, 295 Neb. 607, 889 N.W.2d 377 (2017). A prosecutor's conduct that does not mislead and

unduly influence the jury does not constitute misconduct. *Id*. A prosecutor is entitled to draw inferences from the evidence in presenting his or her case, and such inferences generally do not amount to prosecutorial misconduct. *Id*.

After reviewing the recorded phone call, we conclude that the prosecutor's statements did not constitute misconduct, because they rested on reasonably drawn inferences from the evidence. The theme of the State's comments with respect to the recorded call was that Howard did not react to M.H.'s allegations with outright denials. Instead, he repeatedly asserted that he was bathing M.H. in the manner in which her mother had taught him. Thus, when M.H. accused him of digitally penetrating her, his response was not that he never did so, but, rather, that he was doing what her mother told him to do.

We recognize that at one point, Howard responded to M.H.'s accusation of digital penetration by saying that "it wasn't in you, it was around the rim, I mean, is how I remember her showing me." The statement that "it wasn't in you" could constitute an outright denial of digital penetration, but when considered in context of the entire sentence, what Howard actually said was that he remembers M.H.'s mother showing him how to bathe M.H. in a manner that did not include putting his fingers in her vagina. That statement is different than Howard's denying that digital penetration ever actually occurred. Howard appeared to make other quasi-denials during the conversation when he made statements such as, "I don't believe I did that," "I don't think I ever did that," or more frequently, "I cleaned you the way your mom showed me to clean you" and other words to that effect. However, the prosecutor's comments were inferences that could reasonably be drawn from what Howard did not say to M.H. Accordingly, because we find that the prosecutor's statements made during closing arguments were reasonably drawn inferences and thus not improper, trial counsel was not ineffective in failing to object and move for mistrial.

(b) Failure to Timely Move for Mistrial

Howard next alleges that his trial counsel was ineffective in failing to timely move for a mistrial on the basis of his ex-wife's testimony. He claims that because the State knew prior to trial that she had testified falsely during her deposition, the State was required under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), to disclose this information to him before trial.

[14] In *Brady v. Maryland*, the U.S. Supreme Court held that a prosecutor has a duty to disclose all favorable evidence to a criminal defendant prior to trial. See *State v. Harris*, 296 Neb. 317, 893 N.W.2d 440 (2017). While the fact that Howard's ex-wife owned a sports bra corroborated S.H.'s testimony, and thus was *unfavorable* to Howard, the record reveals that Howard relied upon his ex-wife's denial in her deposition to prove the improbability of S.H.'s version of the events. He confirmed through several witnesses that S.H. had reported wearing a sports bra belonging to her mother, who is Howard's ex-wife, during one of these incidents, and it is clear that he questioned his ex-wife to prove that S.H.'s memory could not possibly be correct. However, his attempt to negate S.H.'s version of the events was thwarted by his ex-wife's changed testimony.

Because the record on direct appeal contains no information as to why trial counsel did not immediately move for a mistrial, we find the record insufficient to address this claim.

(c) Failure to Properly Cross-Examine M.H.

Howard asserts that trial counsel was ineffective in failing to cross-examine M.H. about allegations that she also had been inappropriately touched by her grandfather. At trial, M.H. testified that she did not tell her mother about the sexual abuse from Howard earlier because of the nature of their relationship. In other words, M.H. asserted that she did not feel

comfortable disclosing the abuse to her mother at the time it occurred.

Howard alleges, however, that his ex-wife testified in her deposition that M.H. immediately reported to her an incident where M.H.'s grandfather had inappropriately touched her when she was approximately 11 years old. Howard attempted to impeach M.H.'s testimony at trial through questioning of his ex-wife rather than by cross-examination of M.H., and the State successfully objected to such questioning of his ex-wife on the grounds of improper impeachment. We find the record is insufficient to address this claim because the deposition of Howard's ex-wife is not in our record, and the record does not contain any information as to why trial counsel elected not to raise this issue during cross-examination of M.H.

(d) Failure to Call Witness

Howard argues that trial counsel was ineffective in failing to call Dr. Kirk Newring as a witness at trial. According to Howard, Newring was hired to evaluate the circumstances of this case and prepared a report of his conclusions. Newring's name was included on Howard's witness list filed with the district court prior to trial. The State filed a motion in limine to exclude Newring's testimony, and the district court reserved ruling on the motion. Newring was not called to testify at trial. The record on direct appeal is insufficient to address this claim because we are unable to ascertain why trial counsel elected not to call Newring to testify.

(e) Failure to Properly Investigate and Present Defense

Finally, Howard claims that trial counsel was ineffective in failing to properly investigate and present several key aspects of his defense. He lists 16 different ways in which he alleges trial counsel's performance in this respect was deficient. Each of these alleged failures involve trial strategy. An evaluation of trial counsel's actions, or inactions as the

case may be, would require an evaluation of trial strategy and of matters not contained in the record. We conclude that the record on direct appeal is not sufficient to adequately review these claims.

V. CONCLUSION

As concluded above, the record on direct appeal is insufficient to address several of the ineffective assistance of counsel claims Howard raises on direct appeal. Otherwise, finding no merit to the arguments raised here, we affirm Howard's convictions and sentences.

Affirmed.

State of Nebraska, appellee, v. Cody Lamberson, appellant.

921 N.W.2d 879

Filed December 4, 2018. No. A-17-857.

1. **Trial: Convictions: Appeal and Error.** An appellate court will sustain a conviction in a bench trial of a criminal case if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.
2. **Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented, which are within a fact finder's province for disposition. Instead, 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.
3. **Effectiveness of Counsel: Appeal and Error.** When a defendant's trial counsel is different from his or her appellate counsel, all issues of ineffective assistance of trial counsel that are known to the defendant or are apparent from the record must be raised on direct appeal. If the issues are not raised, they are procedurally barred.
4. **Effectiveness of Counsel: Constitutional Law: Statutes: Records: Appeal and Error.** Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal presents a question of law, which turns upon the sufficiency of the record to address the claim without an evidentiary hearing or whether the claim rests solely on the interpretation of a statute or constitutional requirement. An appellate court determines as a matter of law whether the record conclusively shows that (1) a defense counsel's performance was deficient or (2) a defendant was or was not prejudiced by a defense counsel's alleged deficient performance.

5. **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.
6. **Due Process: Convictions: Appeal and Error.** Due process does not require an appellate court, upon review of a criminal conviction, to take the inference most favorable to the accused.
7. **Convictions: Evidence: Appeal and Error.** When reviewing a criminal 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. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.
8. **Effectiveness of Counsel: Records: Appeal and Error.** The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. Such a claim may be resolved when the record on direct appeal is sufficient to either affirmatively prove or rebut the merits of the claim. The record is sufficient if it establishes either that trial counsel's performance was not deficient, that the appellant will not be able to establish prejudice, or that trial counsel's actions could not be justified as a part of any plausible trial strategy.
9. **Effectiveness of Counsel: Proof.** 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. **Constitutional Law: Right to Counsel.** The Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings. Interrogation by the State is one of those critical stages.
11. **Constitutional Law: Right to Counsel: Waiver.** The Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent. Further, the defendant may waive the right regardless of whether or not he is already represented by counsel and the decision to waive need not itself be counseled.
12. **Effectiveness of Counsel.** Defense counsel is not ineffective for failing to raise an argument that has no merit.
13. **Miranda Rights: Waiver.** A *Miranda* waiver may be either express or implied.

14. ____: ____. An express waiver of a suspect's *Miranda* rights may be in writing or oral.

Appeal from the District Court for Sarpy County: Stefanie A. Martinez, Judge. Affirmed.

Sean M. Reagan, of Reagan, Melton & Delaney, L.L.P., for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Pirtle, Riedmann, and Welch, Judges.

Welch, Judge.

INTRODUCTION

Cody Lamberson appeals his conviction for child enticement. He contends that the evidence was insufficient to support his conviction and that his trial counsel was ineffective by withdrawing his motion to suppress, failing to renew the motion during trial, and failing to adduce evidence in Lamberson's defense. Finding no merit to the arguments raised by Lamberson on direct appeal, we affirm his conviction and sentence.

STATEMENT OF FACTS

On March 25, 2016, the 15-year-old victim and her foster sister were at an outlet mall in Gretna, Nebraska. Using her cell phone and the outlet mall's Wi-Fi, the victim was having a conversation with her 24-year-old adopted brother Lamberson via "Snapchat," a social media messaging application. The 20-minute conversation consisted of the victim and Lamberson asking each other how they were doing, because they had not seen each other or otherwise communicated in about a year. The victim testified at trial that she and Lamberson did not talk about sex during their Snapchat conversation. Snapchat messages disappear after a short period of time if they are not saved. When the victim was leaving the outlet mall and

would no longer have Wi-Fi available to continue the Snapchat conversation with Lamberson, she asked him to send her text messages instead of using Snapchat.

The following unedited conversation took place, via text message, between the victim and Lamberson:

> [Lamberson:] Would you really hook up with me? 8:49 PM
>
> [The victim:] Idk your drink and I'm got little sister 8:49 PM
>
> [Lamberson:] Its OK I know you wouldn't 8:51 PM
>
> [The victim:] I'm sorry. And you got a wife for that 8:51 PM
>
> [Lamberson:] I know but I want u 8:53 PM
>
> [The victim:] Why 8:53 PM
>
> [The victim:] Text me bc I don't have WiFi 8:55 PM
>
> [Lamberson:] Your super hot and show you how good it feels 8:56 PM
>
> [The victim:] Ohhhhhhhhhhh 8:57 PM
>
> [Lamberson:] Ya and I have been with another woman in five years and really like you 9:08 PM
>
> [Lamberson:] Haven't been with 9:15 PM
>
> [The victim:] Cody I'm your little sister 9:18 PM
>
> [Lamberson:] I know it makes me want it a little more but I'll stop and not bring it up again I'm sorry 9:20 PM
>
> [The victim:] You shouldn't even been asking 9:21 PM
>
> [Lamberson:] It was a joke 9:22 PM
>
> [The victim:] Oh okaii sorry 9:22 PM
>
> [The victim:] Goodnight love you 10:25 PM
>
> [Lamberson:] KNIGHT love Ya too hun 10:26 PM
>
> [The victim:] Talk to you tomorrow?? 10:26 PM
>
> [Lamberson:] Of course boo 10:27 PM

The victim showed the texts to her foster mother, who called police. Lamberson was arrested and charged with child enticement, a Class ID felony. See Neb. Rev. Stat. § 28-320.02 (Reissue 2016).

The trial in this matter was held on June 13, 2017. Although several witnesses testified at trial, the majority of the State's

evidence was adduced through testimony from a Sarpy County sheriff's deputy, Darin Morrissey; through testimony from the victim; through exhibit 1, an audio recording of Lamberson's interview with law enforcement; and through another exhibit that contained screenshots of the text messages exchanged between Lamberson and the victim.

Morrissey is a computer and cell phone forensic examiner who investigates fraud and any cases involving computers and cell phones, which includes child pornography, child enticement, and some child abuse cases. On March 31, 2016, he was assigned a child enticement case involving Lamberson and a cell phone. On cross-examination, Morrissey testified that, during the interview with Lamberson, he asked Lamberson about the text that said, "Your super hot and show you how good it feels." That text concerned Morrissey because it alluded to sexual contact; however, he admitted that there was nothing in the text directly referencing sexual contact.

On redirect examination, Morrissey was asked:

> Q. In dealing with child enticement cases, are you familiar with the term "hook up"?
>
> A. Yes.
>
> . . . .
>
> [Defense counsel]: Objection. Foundation, hearsay.
>
> THE COURT: Sustained.
>
> [The State]: Judge, can I ask on which portion?
>
> THE COURT: Foundation.
>
> [The State]: Thank you.
>
> Q. . . . Sir, in child enticement cases, are you — do you have to be familiar with quote, unquote, lingo of people?
>
> A. Yes.
>
> Q. And what's that mean?

At this point, defense counsel made another foundational objection which was overruled by the district court. Morrissey continued: "There are phrases for all different age groups that I have to be familiar with. Many of the types of cases — child enticement — are started over e-mails, text messages, applications which all deal with - . . . ." Defense counsel again

objected that the witness was reciting a narrative and that the answer was beyond the scope of the question. These objections were overruled, and the witness resumed:

> All over messaging conversations. So I've seen lots of lingo, lots of phrases that — and know what they mean. That's just part of my job.
>
> Q. . . . Is it part of your job, in dealing with child enticement, sexual abuse, things of that nature, to know slang?
>
> A. Yes.
>
> Q. Why is that important?
>
> A. Because that's how they communicate. Shortened words, certain phrases mean certain things. They don't spell it all out.
>
> Q. So in that regard, what does "hook up" mean?

Defense counsel posed a foundational objection based on hearsay which was sustained by the court. The State argued that the defense opened the door for Morrissey's opinion "because that's what he was asking on cross-examination, his opinion as to what these mean. So I think he's allowed to give his opinion to what that means if [defense counsel] already went through that with him." The court repeated that it was sustaining the objection based upon foundation. The State continued its questioning:

> Q. . . . Have you ever used the term "hook up"?
>
> A. Yes.
>
> Q. Have you ever heard other people use the term "hook up"?
>
> A. Yes.
>
> Q. What does it mean?

Defense counsel again posed a foundational objection which was overruled. Morrissey stated, "It's in relation to getting together for sexual contact."

Morrissey interviewed Lamberson on June 22, 2016, at the Sarpy County jail. An audio recording of that interview was received into evidence as exhibit 1. Morrissey was unaware at the time he went to the interview that Lamberson had been

appointed an attorney a few hours before the interview. He became aware that Lamberson had been appointed an attorney near the end of the interview.

The recording included a recitation by Morrissey of Lamberson's *Miranda* rights. After being advised of his rights, Lamberson acknowledged that he understood his rights. Although Morrissey did not ask Lamberson if he was waiving his rights, Lamberson continued talking to Morrissey. During the interview, Lamberson admitted to the text message conversation with the victim but stated that it was "way out of context from what I remember it being" and that it was being "blown way out of proportion." Lamberson told Morrissey that when he asked, "Would you really hook up with me?" in the text message, he did not mean "have sex with"; rather, he meant "link up," which he explained was a meaning from his "military" background. He did not have an explanation for some of the other texts such as "[y]our super hot and show you how good it feels" and "I know it makes me want it a little more but I'll stop and not bring it up again[,] I'm sorry." He stated that he said that he had not been with another woman in 5 years because he had "been with [his] wife the whole time." He stated that when he said, "[I] really like you," it was "cause she's my little sister. Of course I'm going to like her." He further explained when he said, "It was a joke," there were missing texts where he called himself "fat" and stated that the victim "wouldn't want to hang out with [him]."

The victim testified as to the facts previously set forth. She also testified that she did not think Lamberson was joking when he sent the text messages, that the text messages made her feel "weird," and that she was "creeped out" because Lamberson was her adopted brother. The victim also testified that she showed the texts from Lamberson to her foster mother, because her foster mother would regularly look through the victim's cell phone and would have found out and because she "didn't want it to happen again." The victim

admitted that she did not feel threatened, intimidated, or coerced by Lamberson.

The defense did not present any evidence. The court found Lamberson guilty of the charged offense and sentenced him to 3 to 4 years' imprisonment with credit for 2 days served. Lamberson has timely appealed to this court and is represented by different counsel than represented him at trial.

ASSIGNMENTS OF ERROR

Lamberson contends that there was insufficient evidence to support his conviction and that his trial counsel was ineffective by withdrawing his motion to suppress, failing to renew the motion during trial, and failing to adduce certain evidence in Lamberson's defense.

STANDARD OF REVIEW

[1,2] An appellate court will sustain a conviction in a bench trial of a criminal case if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. *State v. Schuller*, 287 Neb. 500, 843 N.W.2d 626 (2014). In making this determination, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented, which are within a fact finder's province for disposition. *Id*. Instead, 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*.

[3] When a defendant's trial counsel is different from his or her appellate counsel, all issues of ineffective assistance of trial counsel that are known to the defendant or are apparent from the record must be raised on direct appeal. *State v. McGuire*, 299 Neb. 762, 910 N.W.2d 144 (2018). If the issues are not raised, they are procedurally barred. *Id*.

[4,5] Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal presents a question of law, which turns upon the sufficiency of the record to address

the claim without an evidentiary hearing or whether the claim rests solely on the interpretation of a statute or constitutional requirement. *State v. Cotton*, 299 Neb. 650, 910 N.W.2d 102 (2018), *disapproved on other grounds, State v. Avina-Murillo*, 301 Neb. 185, 917 N.W.2d 865. An appellate court determines as a matter of law whether the record conclusively shows that (1) a defense counsel's performance was deficient or (2) a defendant was or was not prejudiced by a defense counsel's alleged deficient performance. *Id*. An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing. *State v. Hill*, 298 Neb. 675, 905 N.W.2d 668 (2018).

ANALYSIS

Sufficiency of Evidence

Lamberson was tried and convicted of violating § 28-320.02(1). The State concedes in its brief on appeal that the applicable portion of § 28-320.02(1) provides: "No person shall knowingly solicit, coax, entice, or lure (a) a child sixteen years of age or younger . . . by means of an electronic communication device as that term is defined in section 28-833, to engage in an act which would be in violation of section 28-319 . . . ." The applicable portion of Neb. Rev. Stat § 28-319(1) (Reissue 2016) provides: "Any person who subjects another person to sexual penetration . . . (c) when the actor is nineteen years of age or older and the victim is at least twelve but less than sixteen years of age is guilty of sexual assault in the first degree." Taken together, there would be sufficient evidence to support Lamberson's conviction for enticement if the combined Snapchat and text communications with the 15-year-old victim constituted a knowing solicitation, coaxing, enticement, or luring of the victim to engage with him in an act involving sexual penetration.

Lamberson does not challenge that he is 19 years of age or older, that the victim was at least 12 years of age but less than 16 years of age, or that the medium used for

communication was an electronic device as defined by statute. Instead, Lamberson argues that the substance of his communications with the victim did not amount to a knowing solicitation, coaxing, enticement, or luring of the victim and that the language used by him did not request the victim to engage in an act involving sexual penetration. We will analyze these arguments independently.

The Nebraska Supreme Court had occasion to interpret the language of § 28-320.02(1) in *State v. Knutson*, 288 Neb. 823, 852 N.W.2d 307 (2014). In *Knutson*, the Supreme Court held:

> As relevant here, the conduct prohibited by § 28-320.02(1) is using an electronic communication device to knowingly "solicit, coax, entice, or lure" a child 16 years of age or younger "to engage in an act which would be in violation of" § 28-319.01. The verbs in this sentence all deal with the act of persuading—in this context, persuading someone 16 years of age or younger to perform a sexual act that is illegal under the specified statutes.

288 Neb. at 841, 852 N.W.2d at 322.

In the context of the case presently before this court, in order to constitute a violation of § 28-320.02(1), the language used by Lamberson in his Snapchat and text communications must constitute knowing persuasion by him to have the victim perform a sexual act involving penetration. "Sexual penetration" is defined by Nebraska statute as

> sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes. Sexual penetration shall not require emission of semen.

Neb. Rev. Stat. § 28-318(6) (Reissue 2016).

Applying our standard of review, after viewing the evidence in the light most favorable to the State, we agree that a

reasonable trier of fact could have found that Lamberson's language used in his electronic communications constituted language of persuasion. The more difficult question here involves the proposed act that Lamberson was attempting to persuade the victim to perform.

In this case, Lamberson specifically requested the 15-year-old victim to "hook up" with him. As stated before, in this particular case, in order to be a violation of § 28-320.02(1), a reasonable trier of fact needed to find that the term "hook up" was a solicitation by Lamberson for the 15-year-old victim to engage in an act involving sexual penetration. We acknowledge that the term "hook up" can have multiple meanings; however, we review the meaning of the term in the context of the other evidence in this case.

In analyzing this matter, the primary evidence in this case involved the language of the texts, the victim's testimony, Lamberson's interview with police, and the testimony of computer and cell phone forensic examiner Morrissey, who investigated cases of fraud involving computers and cell phones, which includes child pornography, child enticements, and some child abuse cases. When asked about the meaning of the term "hook up," Morrissey testified that it is a term commonly used in connection with requested "sexual contact." The issue in this case is not whether Lamberson was attempting to persuade the victim to engage in an act involving any sexual contact, but, rather, the issue here is whether Lamberson was attempting to persuade the victim to engage in an act involving sexual penetration.

We next note the remaining language of the text exchange. In addition to asking the victim to "hook up," Lamberson attempted to explain that he had not "been with another woman in five years" and that he wanted to show the victim "how good it feels." The victim responded to Lamberson that "you got a wife for that" and otherwise resisted Lamberson's advances, including reminding him that she was his "little sister."

[6,7] Again, the issue here is whether any reasonable trier of fact would have found that Lamberson used language which demonstrates a knowing attempt to persuade the 15-year-old victim to engage in a sexual act involving penetration. We note that "[d]ue process does not require an appellate court, upon review of a criminal conviction, to take the inference most favorable to the accused." *State v. Pierce*, 248 Neb. 536, 547, 537 N.W.2d 323, 330 (1995), citing *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). "When reviewing a criminal 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.'" *Id.*, quoting *Jackson, supra*. "'This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Id*. at 548, 538 N.W.2d at 330, quoting *Jackson, supra*.

Here, we conclude that a reasonable trier of fact could find the language used by Lamberson in his texts constituted an attempt to persuade the victim to engage in a sexual act involving penetration. Because we find that a reasonable trier of fact could reach that conclusion, we reject his argument that the evidence was insufficient to support his conviction.

Ineffective Assistance of Counsel

Lamberson contends that his trial counsel was ineffective by withdrawing his motion to suppress, failing to renew the motion during trial, and failing to adduce certain evidence in his defense.

[8] 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. Wells*, 300 Neb. 296, 912 N.W.2d 896 (2018). Such a claim may be resolved when the record on

direct appeal is sufficient to either affirmatively prove or rebut the merits of the claim. *Id*. The record is sufficient if it establishes either that trial counsel's performance was not deficient, that the appellant will not be able to establish prejudice, or that trial counsel's actions could not be justified as a part of any plausible trial strategy. *Id*.

[9] 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. McGuire*, 299 Neb. 762, 910 N.W.2d 144 (2018).

Motion to Suppress

Lamberson first claims that trial counsel's withdrawal of the motion to suppress Lamberson's statement to Morrissey and failure to renew the motion during trial erroneously allowed the court to hear Lamberson's statement that was made "after an attorney had been appointed, but without the attorney's knowledge or Lamberson being allowed to speak with [his] attorney." Brief for appellant at 21. The full statement was admitted into evidence, and therefore, the record on appeal is sufficient for us to review this claim.

[10] At the time of Lamberson's custodial interrogation by Morrissey, an attorney had been appointed to represent Lamberson. Thus, we interpret Lamberson's claim as referencing a violation of his Sixth Amendment right to counsel. "[T]he 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, 786, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009). Interrogation by the State is one of those critical stages. *Id*.

[11] Lamberson appears to argue that his rights were violated because Morrissey conducted a custodial interrogation of Lamberson after an attorney had been appointed and did

so without contacting the attorney prior to the interview or allowing Lamberson to speak to him. Contrary to Lamberson's argument, the U.S. Supreme Court has rejected the position that a defendant, who was represented by counsel, cannot be approached by an investigator of the State and asked to consent to interrogation. See *id*. Rather, the Court held that "[w]hat matters for *Miranda* . . . is what happens when the defendant is approached for interrogation, and (if he consents) what happens during the interrogation—not what happened at any preliminary hearing." *Montejo*, 556 U.S. at 797. See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The Court noted that the Sixth Amendment right to counsel "may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent." *Montejo*, 556 U.S. at 786. Further, the defendant may waive the right regardless of whether or not he is already represented by counsel and the decision to waive need not itself be counseled. *Id*.

> [W]hen 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: "'As a general matter . . . an accused who is admonished with the warnings prescribed by the Court 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, 556 U.S. at 786-87 (emphasis in original). Thus, the doctrine established by *Miranda* protects "the right to have counsel present during custodial interrogation—which right happens to be guaranteed (once the adversary judicial process has begun) by *two* sources of law"—the Fifth Amendment and the Sixth Amendment. *Montejo*, 556 U.S. at 795 (emphasis in original). "Since the right under both sources is waived using

the same procedure, . . . doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver." *Montejo*, 556 U.S. at 795.

[12] Pursuant to the U.S. Supreme Court's dictates in *Montejo, supra*, even though an attorney had been appointed, Morrissey had the right to request that Lamberson consent to an interview so long as Lamberson was advised of his *Miranda* rights and waived them. Lamberson's claims to the contrary are without merit, and his claim of ineffectiveness of counsel on this basis must fail. Defense counsel is not ineffective for failing to raise an argument that has no merit. *State v. Burries*, 297 Neb. 367, 900 N.W.2d 483 (2017).

Lamberson also claims that his statements and admissions should have been challenged as being obtained in violation of his *Miranda* rights, his rights under the Fifth and Sixth Amendments to the U.S. Constitution, and his rights under article I, §§ 3 and 12, of the Nebraska Constitution. The record on appeal is likewise sufficient for us to review this claim.

Exhibit 1 consists of an audio recording of Morrissey's interview with Lamberson. At the beginning of the interview, Morrissey read Lamberson his *Miranda* rights and Lamberson stated that he understood them; however, he never expressly waived his *Miranda* rights. A finding that Lamberson voluntarily waived his *Miranda* rights would result in the finding that he waived his right to counsel under both the Fifth and Sixth Amendments. See *Montejo v. Louisiana*, 556 U.S. 778, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009).

[13,14] Although Lamberson never specifically stated that he waived his *Miranda* rights, this is not dispositive. A *Miranda* waiver may be either express or implied. See *State v. Hernandez*, 299 Neb. 896, 911 N.W.2d 524 (2018). An express waiver of a suspect's *Miranda* rights may be in writing or oral. See *Hernandez, supra*. In this case, there was no express waiver of *Miranda* rights by Lamberson.

A *Miranda* waiver may also be implied. See *Hernandez, supra*. See, also, *Berghuis v. Thompkins*, 560 U.S. 370, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010).

> A "defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver," may establish a valid, implied waiver. [*North Carolina v. Butler*, 441 U.S. 369, 373, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979).] Thus, "[w]here the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent. [*Berghuis*, 560 U.S. at 384.]

Hernandez, 299 Neb. at 919, 911 N.W.2d at 544.

The Nebraska Supreme Court considered a comparable factual situation in *Hernandez, supra*, where the defendant was advised of his *Miranda* rights and indicated that he understood them, but the issue remained regarding whether he knowingly and voluntarily waived those rights. The court held that "by voluntarily speaking with the investigators, [the defendant] impliedly waived his rights." *Hernandez*, 299 Neb. at 919, 911 N.W.2d at 544.

Similarly, in *U.S. v. Umana*, 750 F.3d 320 (4th Cir. 2014), a defendant waived his *Miranda* rights when he stated that he understood them and then talked to detectives. The Fourth Circuit Court of Appeals stated:

> "To effectuate a waiver of one's *Miranda* rights, a suspect need not utter any particular words." . . . A suspect impliedly waives his *Miranda* rights when he acknowledges that he understands the *Miranda* warning and then subsequently is willing to answer questions. . . . That is precisely what happened in this case.

Umana, 750 F.3d at 344.

The factual situation presented to this court for determination does not differ in any significant respect. Morrissey informed Lamberson of his *Miranda* rights, and Lamberson expressly stated that he understood those rights. Lamberson

went on to willingly engage in a dialogue with Morrissey in which Lamberson both asked questions and answered questions. Lamberson's actions constitute an implied waiver of his *Miranda* rights. As such, Lamberson's counsel was not ineffective for failing to challenge that Lamberson's statements and admissions were obtained in violation of his *Miranda* rights, his rights under the Fifth and Sixth Amendments to the U.S. Constitution, and his rights under article I, §§ 3 and 12, of the Nebraska Constitution. As we mentioned before, defense counsel is not ineffective for failing to raise an argument that has no merit. *State v. Burries*, 297 Neb. 367, 900 N.W.2d 483 (2017). Thus, we reject Lamberson's claims that his trial counsel was ineffective by withdrawing his motion to suppress, failing to renew the motion during trial, and failing to challenge his statements and admissions as being obtained in violation of his *Miranda* rights, his rights under the Fifth and Sixth Amendments to the U.S. Constitution, and his rights under article I, §§ 3 and 12, of the Nebraska Constitution.

Failure to Adduce Evidence in Lamberson's Defense

Lamberson further contends that his trial counsel was ineffective for failing to adduce evidence in Lamberson's defense. Specifically, he contends that trial counsel failed to adduce any evidence to dispute Morrissey's testimony regarding the definition of the term "hook up," failed to "request the ability to re-cross . . . Morrissey" regarding his testimony or to call Morrissey as a witness, and failed to present any evidence to refute Morrissey's testimony. Brief for appellant at 22.

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. *State v. Hill*, 298 Neb. 675, 905 N.W.2d 668 (2018). An ineffective assistance of counsel claim will not be addressed on direct appeal if it

requires an evidentiary hearing. *Id*. The record before this court is insufficient to address this allegation on direct appeal.

CONCLUSION

Having found that the evidence was sufficient to support Lamberson's conviction, we affirm his conviction and sentence. We find that the record is sufficient to review Lamberson's claim that his trial counsel was ineffective by withdrawing his motion to suppress and failing to renew the motion during trial, which allowed the court to hear Lamberson's statement to Morrissey after an attorney had been appointed, but without the attorney's knowledge or Lamberson's being allowed to speak with his attorney, and we find that this claim is without merit. Likewise, the record is sufficient to review Lamberson's claim that his trial counsel was ineffective by failing to challenge his statements and admissions as being obtained in violation of his *Miranda* rights, his rights under the Fifth and Sixth Amendments to the U.S. Constitution, and his rights under article I, §§ 3 and 12, of the Nebraska Constitution, and we find that this claim is without merit. The record before this court is not sufficient to address Lamberson's claim that his trial counsel was ineffective for failing to adduce any evidence in his defense to dispute Morrissey's testimony regarding the definition of the term "hook up," failing to request the ability to re-cross-examine Morrissey regarding his testimony or call Morrissey as a witness, and failing to present any evidence to refute Morrissey's testimony.

Affirmed.

Graylin Gray, appellant, v. Nebraska Department of Correctional Services, appellee.

922 N.W.2d 234

Filed December 4, 2018. No. A-17-1319.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Administrative Law.** The filing requirements of the Administrative Procedure Act apply to the Department of Correctional Services rules and regulations.
3. **Statutes.** Specific statutory provisions relating to a particular subject control over general statutory provisions.
4. **Administrative Law: Prisoners.** Neb. Rev. Stat. §§ 83-4,109 to 83-4,123 (Reissue 2014 & Cum. Supp. 2016) constitute a special act relating to disciplinary procedures in adult correctional institutions and control over the more general provisions which are found in the Administrative Procedure Act.
5. **Actions: Moot Question.** An action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action.
6. **Motions to Dismiss: Pleadings.** For purposes of a motion to dismiss, a trial court generally must ignore materials outside the pleadings, but it may consider some materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings.
7. **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: Kevin R. McManaman, Judge. Affirmed.

Graylin Gray, pro se.

Douglas J. Peterson, Attorney General, and James D. Smith, Solicitor General, for appellee.

Pirtle, Riedmann, and Welch, Judges.

Riedmann, Judge.

INTRODUCTION

Graylin Gray appeals the order of the district court for Lancaster County which dismissed his declaratory judgment action. Finding no merit to the arguments raised on appeal, we affirm.

BACKGROUND

Gray is an inmate with the Nebraska Department of Correctional Services (Department) housed at the Tecumseh State Correctional Institution. On August 3, 2017, he filed a complaint in the Lancaster County District Court seeking a declaratory judgment that the Department's administrative regulation No. 116.01 (AR 116.01) and No. 217.01 (AR 217.01) were invalid because they were not properly promulgated and filed with the Secretary of State in accordance with the provisions of the Administrative Procedure Act (APA).

Each of the regulations is several pages in length, but in the complaint, Gray specifically cites five subsections. AR 116.01 is entitled "Inmate Rights" and states that its purpose is to provide guidelines that will ensure the individuals who are committed to the Department are accorded and advised of basic rights. Within AR 116.01, Gray refers to those provisions regarding inmate access to mail services, which require that indigent inmates who exhaust their five free mailings per month are required to issue a check to cover postage costs

and that indigent inmates are required to cover their photocopy costs.

AR 217.01 is entitled "Inmate Rules and Discipline" and states that its purpose is to provide a written set of rules governing inmate conduct, establish penalties for violation of such rules, and establish disciplinary procedures. Gray cites to those sections in AR 217.01 that detail infractions committed by inmates and a corresponding loss of good time credit.

The Department filed a motion to dismiss the action, alleging that the complaint failed to state a claim upon which relief could be granted. Gray also filed several discovery motions and a motion seeking reimbursement from the Department for his photocopying and postage expenses, which he estimated totaled $2,500. In response to Gray's discovery motions, which included subpoenas for certain government officials, the Department filed a motion to quash subpoenas and a motion to stay discovery.

After holding a hearing on all of the pending motions, the district court found that the regulations challenged by Gray were not required to be promulgated pursuant to the APA because they fall within the internal document exception of Neb. Rev. Stat. § 84-901(2) (Cum. Supp. 2016). The court therefore granted the Department's motion to dismiss. The court also concluded that as a result of its decision to dismiss the action, the motions to stay discovery and quash subpoenas were moot, and it denied Gray's motion for reimbursement of costs. Gray appeals.

ASSIGNMENTS OF ERROR

Gray assigns that the district court erred in (1) granting the Department's motion to dismiss, (2) finding that the motions to stay discovery and quash subpoenas were moot, and (3) denying his motion for reimbursement of photocopying and postage costs.

STANDARD OF REVIEW

[1] A district court's grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Amend v. Nebraska Pub. Serv. Comm.*, 298 Neb. 617, 905 N.W.2d 551 (2018).

ANALYSIS

Motion to Dismiss.

Gray argues that the district court erred in granting the Department's motion to dismiss because the court erroneously concluded that the regulations at issue did not come within the APA definition of rule or regulation. We find that the district court properly granted the motion to dismiss for the reasons set forth below.

Under the APA, each agency shall file in the office of the Secretary of State a certified copy of the rules and regulations in force and effect in such agency. Neb. Rev. Stat. § 84-902 (Cum. Supp. 2016). No rule or regulation of any agency shall be valid as against any person until 5 days after it has been filed. Neb. Rev. Stat. § 84-906 (Cum. Supp. 2016). Relevant to Gray's argument, the APA provides:

> (2) Rule or regulation shall mean any standard of general application adopted by an agency in accordance with the authority conferred by statute and includes, but is not limited to, the amendment or repeal of a rule or regulation. Rule or regulation shall not include (a) internal procedural documents which provide guidance to staff on agency organization and operations, lacking the force of law, and not relied upon to bind the public . . . . For purposes of the act, every standard which prescribes a penalty shall be presumed to have general applicability.

§ 84-901.

Although Gray identifies five particular subparts contained in AR 116.01 and AR 217.01, the action he sought in the district court was an order declaring both regulations invalid. We therefore do not limit our analysis to the particular subsections Gray identifies, but, rather, address each regulation in its entirety.

Gray argues that AR 116.01 governs basic rights of the inmates and therefore is a regulation within the meaning of § 84-901(2). He further claims AR 116.01 was adopted under the authority granted in Neb. Rev. Stat. § 83-4,111 (Reissue 2014), which authorizes the Department to adopt rules and regulations to establish criteria for determining which rights an inmate forfeits upon commitment and which rights an inmate retains. However, pursuant to § 84-901(2)(a), internal procedural documents which provide guidance to staff on agency organization and operations, lacking the force of law, and not relied upon to bind the public are excluded from the statutory definition of rule or regulation. Our review of AR 116.01 reveals that the regulation articulates the rights of inmates but does not curtail them. Rather, AR 116.01 specifically provides that its purpose is to "provide guidelines that will ensure the individuals who are committed to the [Department] are accorded and advised of basic rights." AR 116.01 then provides guidance to staff as an internal procedural document.

For example, the provisions of AR 116.01 to which Gray directs us require inmates to pay the cost of postage over five pieces of mail per month and the cost of photocopying. We find that no basic right is affected by these provisions and that they merely provide guidance to staff as an internal procedural document. Therefore, the district court was correct in determining that AR 116.01 was not a rule or regulation which was required to be filed.

Gray argues that AR 217.01 comes within the meaning of rule or regulation because it prescribes a penalty. He relies

upon *McAllister v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 910, 573 N.W.2d 143 (1998), where the Nebraska Supreme Court addressed whether a particular departmental regulation fit within the APA definition of rule or regulation. There, the plaintiff was a departmental employee whose employment had been terminated pursuant to a regulation regarding employee discipline. The plaintiff alleged that the regulation prescribed a penalty and was therefore a rule or regulation within the meaning of the APA. And because the regulation had not been filed with the Secretary of State, he claimed that it was invalid. The Supreme Court agreed.

We find that *McAllister* is distinguishable from the case at hand because *McAllister* did not involve disciplinary procedures of inmates. Admittedly, § 83-4,111 requires the Department to adopt certain rules and regulations. Specifically, § 83-4,111 requires:

> (1) The department shall adopt and promulgate rules and regulations to establish criteria for justifiably and reasonably determining which rights and privileges an inmate forfeits upon commitment and which rights and privileges an inmate retains.
>
> (2) Such rules and regulations shall include, but not be limited to, criteria concerning (a) disciplinary procedures and a code of offenses for which discipline may be imposed, (b) disciplinary segregation, (c) grievance procedures, (d) good-time credit, (e) mail and visiting privileges, and (f) rehabilitation opportunities.

[2] Neb. Rev. Stat. § 83-4,112 (Reissue 2014) further requires that "[c]opies of all rules and regulations shall be filed pursuant to the [APA] and shall be distributed to all adult correctional facilities in this state." Thus, the filing requirements of the APA apply to the Department's rules and regulations. However, the Department complied with these statutes as demonstrated by 68 Neb. Admin. Code, ch. 5 (2008), entitled "Code of Offenses," and ch. 6 (2017), entitled "Inmate

Disciplinary Procedures." Specifically, 68 Neb. Admin. Code, ch. 6, § 007 (2017), sets forth the rules and regulations for the establishment of disciplinary committees to hold hearings on inmate misconduct reports.

AR 217.01, on the other hand, provides the specific procedures that are to occur in the handling of misconduct reports, including hearings before the disciplinary committees. The authority of the director of the Department to establish such procedures is found in Neb. Rev. Stat. §§ 83-4,109 to 83-4,123 (Reissue 2014 & Cum. Supp. 2016). Section 83-4,109 provides specifically: "Disciplinary procedures in adult institutions administered by the Department . . . shall be governed by the provisions of sections 83-4,109 to 83-4,123."

[3,4] Addressing the interplay between the APA and §§ 83-4,109 to 83-4,123, the Supreme Court has stated that the general principle that specific statutory provisions relating to a particular subject control over general statutory provisions is applicable. See *Reed v. Parratt*, 207 Neb. 796, 301 N.W.2d 343 (1981). The Supreme Court determined that §§ 83-4,109 to 83-4,123 constitute a special act relating to disciplinary procedures in adult correctional institutions and control over the more general provisions which are found in the APA. *Reed v. Parratt, supra*.

As applicable to Gray's assertion that AR 217.01 was a regulation that required compliance with the APA, we note § 83-4,115, which states that the "director shall establish procedures to review the disciplinary actions of inmates. The director may establish one or more administrative review boards within the department to review disciplinary actions." This is exactly what is accomplished through AR 217.01. Because AR 217.01 establishes the internal procedures applicable to the review of disciplinary actions of inmates, the filing requirements of the APA are inapplicable and the district court correctly granted the Department's motion to dismiss.

Discovery Motions.

Gray also asserts that the district court erroneously concluded that the motions to stay discovery and quash subpoenas were moot. We disagree.

[5] An action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action. *Nesbitt v. Frakes*, 300 Neb. 1, 911 N.W.2d 598 (2018). A moot case is one which seeks to determine a question that no longer rests upon existing facts or rights—i.e., a case in which the issues presented are no longer alive. *Id*. 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. *Id*.

[6] Because a motion pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6) tests the legal sufficiency of the complaint, not the claim's substantive merits, a court may typically look only at the face of the complaint to decide a motion to dismiss. *DMK Biodiesel v. McCoy*, 285 Neb. 974, 830 N.W.2d 490 (2013). For purposes of a motion to dismiss, a trial court generally must ignore materials outside the pleadings, but it may consider some materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings. *Id*. These documents embraced by the complaint are not considered matters outside the pleading. *Id*.

Here, after considering the complaint and the language of AR 116.01 and AR 217.01, the district court granted the motion to dismiss, a decision we have concluded was not in error. Because the court could not consider matters outside of the pleadings, the completion of any discovery regarding the merits of the complaint would not change the outcome. And once the court dismissed the case, any issues that would have been addressed during discovery ceased to exist. Accordingly, the district court did not err in finding that the motions

related to discovery were moot once it granted the motion to dismiss.

Motion for Reimbursement of Costs.

[7] Gray assigns as error the court's denial of his motion for reimbursement of photocopying and postage costs. The alleged error is not argued in his brief, however. 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. *Cain v. Custer Cty. Bd. of Equal.*, 291 Neb. 730, 868 N.W.2d 334 (2015). Accordingly, we do not address this issue.

CONCLUSION

We find no merit to the arguments raised on appeal and therefore affirm the decision of the district court.

Affirmed.

In re Interest of Brooklyn T. and Charlotte T., children under 18 years of age. State of Nebraska, appellee, v. Amanda T., appellant.

922 N.W.2d 240

Filed December 11, 2018. No. A-18-518.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings.
2. **Parental Rights: Proof.** Under Neb. Rev. Stat. § 43-292 (Reissue 2016), in order to terminate parental rights, the State must prove, by clear and convincing evidence, that one or more of the statutory grounds listed in this section have been satisfied and that termination is in the child's best interests.
3. ____: ____. When a parent admits to the State's allegations regarding the statutory ground for termination of parental rights and that termination is in the children's best interests, the State does not have to prove those allegations by clear and convincing evidence.
4. **Parental Rights.** Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.
5. ____. Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights.

Appeal from the Separate Juvenile Court of Douglas County: Christopher E. Kelly, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Katie L. Jadlowski for appellant.

Donald W. Kleine, Douglas County Attorney, and Natalie Killion for appellee.

Moore, Chief Judge, and Riedmann and Welch, Judges.

Riedmann, Judge.

INTRODUCTION

Amanda T. appeals from the decision of the separate juvenile court of Douglas County terminating her parental rights to her minor children, Brooklyn T. and Charlotte T. Following our de novo review of the record, we affirm.

BACKGROUND

Amanda is the mother of Brooklyn, born in September 2016, and Charlotte, born in February 2018. Daniel T. is the father to both children. His parental rights to the children were terminated prior to Amanda's, and he is not a part of this appeal.

In July 2017, the State filed a petition alleging that Brooklyn came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016) due to the fault or habits of Amanda. The State alleged that Amanda had a history with the Nebraska Department of Health and Human Services (DHHS); Amanda used alcohol and drugs, placing Brooklyn at risk of harm; Amanda failed to provide parental care, support, supervision, and protection for Brooklyn; and as a result, Brooklyn was at risk of harm. The State additionally filed a motion for immediate custody of Brooklyn, which the court granted.

The State subsequently filed an amended petition and termination of parental rights (amended petition) against Amanda in August 2017. The amended petition contained three counts. Count I alleged that Brooklyn came under § 43-247(3)(a) by reason of the fault or habits of Amanda. Specifically, count I alleged that Amanda had a history with DHHS; Amanda used alcohol and drugs, placing Brooklyn at risk of harm; Amanda failed to provide parental care, support, supervision, and protection for Brooklyn; and as a result, Brooklyn was at risk of harm. Count II alleged that Amanda substantially and continuously or repeatedly neglected and refused to give Brooklyn necessary parental care and protection, in violation of

Neb. Rev. Stat. § 43-292(2) (Reissue 2016). Count III alleged that terminating Amanda's parental rights was in Brooklyn's best interests.

The juvenile court held an adjudication hearing on the State's amended petition in October 2017. At the adjudication hearing, Amanda admitted the allegations contained in count I of the amended petition and the State withdrew counts II and III, including its motion for termination of Amanda's parental rights. The court accepted Amanda's plea and adjudicated Brooklyn under § 43-247(3)(a). The juvenile court ordered Amanda to work with DHHS and family support services, as well as undergo a chemical dependency evaluation.

In February 2018, the State filed a motion for termination of parental rights (motion for termination) against Amanda. The State moved for termination under § 43-292(2) and (6), alleging that Amanda failed to maintain safe housing and a legal source of income, failed to cooperate with DHHS and visit Brooklyn, and failed to complete a chemical dependency evaluation. The State subsequently filed a second supplemental petition and termination of parental rights (second supplemental petition), seeking termination of Amanda's parental rights to Charlotte, born in February 2018. The second supplemental petition contained three counts: count I alleged that Charlotte lacked proper parental care by reason of the fault or habits of Amanda and therefore fell under § 43-247(3)(a); count II alleged that Amanda substantially and continuously or repeatedly neglected and refused to give Charlotte or a sibling necessary parental care and protection, in violation of § 43-292(2); and count III alleged that it was in Charlotte's best interests to terminate Amanda's parental rights.

As a part of its second supplemental petition, the State produced an affidavit from Ally Chavis, a family permanency specialist, who stated that when Amanda was admitted to the hospital to give birth to Charlotte, Amanda tested positive for amphetamine. Chavis additionally stated that Amanda had been "disengaged" with services after Brooklyn's removal in July

2017. Finally, Chavis indicated that Amanda had an extensive history with DHHS, including previously voluntarily relinquishing custody to her oldest daughter. The State also filed a motion for immediate custody of Charlotte, which was granted by the court.

A hearing was held on the State's motion to terminate Amanda's parental rights. At the hearing, Amanda pled to various portions of the motion for termination and the second supplemental petition. Regarding the motion for termination, Amanda admitted count I, that Brooklyn came under § 43-247(3)(a); count II, that Amanda was ordered to comply with DHHS' services by the court; count IV, that Brooklyn fell under § 43-292(2); and count VI, that it was in Brooklyn's best interests to terminate Amanda's parental rights. Regarding the second supplemental petition, Amanda admitted count I, paragraphs E and F, that she failed to provide proper parental care, support, supervision, and protection of Charlotte, which placed her at risk for harm; count II, that Charlotte fell under § 43-292(2); and count III, that it was in Charlotte's best interests to terminate Amanda's parental rights.

After ascertaining that Amanda's admissions were freely and voluntarily given, the juvenile court asked the State to provide a factual basis. The State offered exhibit 11, which contained all pleadings filed up to that point and Chavis' affidavit. The State then relayed that Brooklyn was removed from Amanda's home in July 2017 and was adjudicated in October. The State informed the court that Amanda was to engage in certain court-ordered services to rectify her parenting issues, which she failed to successfully complete or follow through with, including: chemical and psychological evaluations, family support work, and maintain housing and a legal source of income. The State also indicated that its evidence would show that Amanda had not rectified her drug use at the time Charlotte was born. Finally, the State indicated that Chavis would testify that it was in the children's best interests to terminate Amanda's parental rights. Specifically, the State informed the court:

> [T]he concern for . . . Charlotte . . . is despite the fact that services had been offered to . . . Amanda . . . in regards to her sister, [Brooklyn's] case, that the services had yet to rectify the situation that brought Brooklyn into care, to include allegations of possible drug use and not providing for the minor child.
>
> [Chavis] would testify that due to that history and the services that have been offered to [Amanda], both for Brooklyn and . . . Charlotte . . . , she would testify that it is in the best interest of Brooklyn and . . . Charlotte . . . to terminate [Amanda's] parental rights.

The juvenile court accepted Amanda's admissions and found a factual basis for the respective pleas. The court additionally stated, "The parties have agreed and the Court will adopt their recommendation that this be found to be a voluntary termination of parental rights on the part of the mother." Thus, the juvenile court terminated Amanda's parental rights to both Brooklyn and Charlotte. Amanda timely appealed.

ASSIGNMENT OF ERROR

Amanda assigns that the juvenile court erred in terminating her parental rights because the State failed to adduce clear and convincing evidence that termination was in the children's best interests.

STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings. *In re Interest of Noah B. et al.*, 295 Neb. 764, 891 N.W.2d 109 (2017).

ANALYSIS

[2] Under § 43-292, in order to terminate parental rights, the State must prove, by clear and convincing evidence, that one or more of the statutory grounds listed in this section have been satisfied and that termination is in the child's best interests. *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d

384 (2009). Here, Amanda admitted the State's allegations that Brooklyn and Charlotte fell under § 43-292(2) and that it was in their best interests to terminate Amanda's parental rights. According to Neb. Rev. Stat. § 43-279.01(3) (Reissue 2016), when termination of parental rights is sought, a court may accept an in-court admission as to all or part of the allegations in the petition. See *In re Interest of Zanaya W. et al.*, 291 Neb. 20, 863 N.W.2d 803 (2015). Section 43-279.01(3) then specifically states that the court should ascertain a factual basis for an admission. *In re Interest of Zanaya W. et al., supra*. However, § 43-279.01(3) does not specify precisely what the factual basis must entail. *In re Interest of Zanaya W. et al., supra*.

[3] Because Amanda admitted to the State's allegations regarding the statutory ground for termination and that termination was in the children's best interests, the State did not have to prove those allegations by clear and convincing evidence. See *In re Interest of Zanaya W. et al., supra* (determining that when parent admits bases for termination, State need not independently prove them by clear and convincing evidence). However, the State was required to put forth a factual basis for the allegations contained in the motion for termination and the second supplemental petition. See *id*. We therefore review the factual basis provided by the State.

Statutory Grounds for Termination.

Amanda does not assign as error the factual basis for the statutory grounds upon which termination was based, but because our review is de novo, we have reviewed the factual basis supporting termination under § 43-292(2) and find it sufficient.

Subsection (2) of § 43-292 provides grounds for termination when the parents of children have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental protection. The factual basis to support these allegations was that

Brooklyn was removed from Amanda's care in July 2017 due to Amanda's drug use, Amanda was to engage in certain court-ordered services to rectify the issues that led to Brooklyn's removal, Amanda failed to successfully complete or follow through with those services, and Amanda did not maintain adequate housing and a legal source of income. The factual basis also included evidence that when Charlotte was born, she tested positive for amphetamine.

The State's factual basis showed that Amanda's drug use prevented her from providing adequate parental care to Brooklyn and led to the removal of both Brooklyn and Charlotte from Amanda's home. Further, the State demonstrated that Amanda had not adequately addressed her drug use at the time of the hearing. Therefore, we find the State's factual basis sufficient to show that Amanda substantially and continuously or repeatedly neglected to give Brooklyn and Charlotte necessary parental protection and care.

Best Interests.

We next examine the State's factual basis to support the allegations that it is in the children's best interests to terminate Amanda's parental rights. Although Amanda argues that the State did not prove by clear and convincing evidence that termination of her parental rights was in the children's best interests, as stated above, due to Amanda's admission, the State does not have to prove this by clear and convincing evidence. See *In re Interest of Zanaya W. et al.*, 291 Neb. 20, 863 N.W.2d 803 (2015). The State must only present a sufficient factual basis to support its allegations. *Id*. We determine it to be sufficient.

The factual basis provided by the State was that Chavis would testify that, due to Amanda's history with DHHS and the services that were offered to Amanda which were not utilized, it would be in the children's best interests to terminate Amanda's parental rights. Additionally, exhibit 11, which was offered by the State and received by the court, contains Chavis'

affidavit indicating that Amanda has had over 16 intakes with DHHS, she has previously relinquished her parental rights to her oldest daughter, and she used methamphetamine throughout her pregnancy with Charlotte. Further, Chavis indicated in her affidavit that Amanda has made no effort to regain custody of Brooklyn, that she has been discharged unsuccessfully from family support services and agency supervised visitations, and that she had not participated in court-ordered drug and psychological evaluations.

The State's factual basis is sufficient to support a finding that it is in the children's best interests to terminate Amanda's parental rights. The State's evidence would show that Amanda has struggled with drug use throughout the case and that she was using methamphetamine while pregnant with Charlotte. It is detrimental to the children's best interests to grow up in a home where they would be exposed to drugs. See *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008).

Further, the State's evidence would show that Amanda was not able to complete agency supervised visitations with Brooklyn while she was in the custody of the State. Chavis stated in her affidavit that Amanda was "disengaged" with the services offered by DHHS. Although Amanda argues that it is in the children's best interests to have a relationship with her, the State's factual basis indicates that Amanda has not demonstrated any willingness to develop a healthy relationship with the children.

[4,5] Amanda has a long history with DHHS, and despite the services being offered to her, she has not addressed the concerns that initially led the State to remove Brooklyn from her care—primarily, her drug use. Although the children are still very young, the record does not indicate any likelihood that Amanda's behavior will change. Nebraska courts have recognized that children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *In re Interest of Giavonna G.*, 23 Neb. App. 853, 876 N.W.2d 422 (2016). Where a parent is unable or unwilling to rehabilitate

himself or herself within a reasonable time, the best interests of the child require termination of the parental rights. *In re Interest of Zanaya W. et al., supra*.

Based upon our de novo review of the record, we conclude that the State presented a sufficient factual basis to support a finding that it was in the children's best interests to terminate Amanda's parental rights. This assigned error is without merit.

CONCLUSION

The State presented a sufficient factual basis to establish that terminating Amanda's parental rights to Brooklyn and Charlotte was appropriate under § 43-292(2) and that termination of Amanda's parental rights was in the best interests of the children. We therefore affirm the order of the juvenile court.

Affirmed.

Dean D. and Michelle D., appellants, v. Rachel S., appellee.

923 N.W.2d 87

Filed December 18, 2018. No. A-17-1260.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's grant of a motion to dismiss de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Moot Question: Jurisdiction: Appeal and Error.** Because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, an appellate court reviews mootness determinations under the same standard of review as other jurisdictional questions.
3. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts.
4. **Parties: Standing: Jurisdiction.** A party must have standing before a court can exercise jurisdiction, and either a party or the court can raise a question of standing at any time during the proceeding.
5. **Standing.** Under the doctrine of standing, a court may decline to determine merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination. The focus is on the party, not the claim itself.
6. **Standing: Jurisdiction.** Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf.
7. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of the controversy, which entitles a party to invoke the jurisdiction of the court.
8. **Moot Question.** 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.

9. **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.

Appeal from the District Court for Gage County: Ricky A. Schreiner, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Benjamin H. Murray, of Germer, Murray & Johnson, for appellants.

Dustin A. Garrison, of Garrison Law Firm, and Lyle J. Koenig, of Koenig Law Firm, for appellee.

Moore, Chief Judge, and Bishop and Arterburn, Judges.

Bishop, Judge.

INTRODUCTION

Dean D. and Michelle D. filed an action in the district court for Gage County seeking grandparent visitation with their grandson, Tayvin D. It is undisputed by the parties that subsequent to Dean and Michelle's filing, their son relinquished his parental rights to Tayvin and Tayvin was later adopted by his stepfather. After the adoption, Tayvin's mother moved to dismiss Dean and Michelle's action for grandparent visitation based on standing and mootness principles. Although the district court concluded that Dean and Michelle still had standing, it granted the motion to dismiss because it found that the case had become moot. Dean and Michelle appeal. We affirm in part, and in part reverse and remand for further proceedings.

BACKGROUND

Rachel S. and Taylor D. are the biological parents of Tayvin, born in 2009. Rachel and Taylor divorced in 2013; Rachel subsequently remarried.

On October 17, 2016, Dean and Michelle, who are Taylor's parents, filed an action in the district court seeking grandparent visitation with Tayvin pursuant to Neb. Rev. Stat. § 43-1802 (Reissue 2016). Dean and Michelle acknowledged that Rachel had legal and physical custody of Tayvin. In support of their request for grandparent visitation, Dean and Michelle alleged (1) they had retained significant contact with Tayvin since his birth, including personal contact at least once every month, overnight visitation during some of the months, and extended visitation time of 1 to 2 weeks every summer; (2) they had provided financial support to Tayvin; and (3) they had an existing "close . . . significant beneficial relationship" with Tayvin, which was in his best interests to maintain. Dean and Michelle requested visitation consisting of one weekend per month, weekly contact for a specified time period, alternating holiday visitation, and 2 weeks of summer visitation. An "Amended Application for Grandparent Visitation" was filed in January 2017; it added information about Rachel and Taylor's divorce in February 2013 and sought less visitation time than initially requested.

Rachel answered Dean and Michelle's amended application in February 2017. In August, she filed a motion to dismiss the action, stating that Taylor relinquished his parental rights to Tayvin and that her current husband had adopted Tayvin pursuant to a decree of adoption entered by the county court for Gage County. As a result, Rachel claimed that Dean and Michelle's action was "moot" and that Dean and Michelle "no longer possess standing to request grandparent visitation with Tayvin." A copy of the decree of adoption was attached to and incorporated into the motion to dismiss. In the decree of adoption, the county court made findings, among other things, that (1) Taylor abandoned Tayvin for at least 6 months before the adoption petition was filed, (2) all consents or substitute consents required by law were properly executed and filed, (3) Tayvin resided with Rachel and her current husband for at least

6 months prior to the adoption's filing, and (4) it was in the best interests of Tayvin that the decree of adoption be entered as requested.

Following a hearing on Rachel's motion to dismiss Dean and Michelle's action, the district court entered an order on November 13, 2017, finding that Dean and Michelle had standing to seek grandparent visitation at the time their application was filed. However, the court pointed out that Dean and Michelle "admit that on or about August 10, 2017, [their son] relinquished parental rights to Tayvin . . . , who was subsequently adopted by [Rachel's husband]." Therefore, the court concluded that Dean and Michelle no longer had a legally cognizable interest in the outcome of the litigation, and as such, the matter was moot and their application had to be dismissed. Dean and Michelle timely appealed.

ASSIGNMENT OF ERROR

Dean and Michelle claim the district court erred in finding that their application for grandparent visitation was moot and granting Rachel's motion to dismiss.

STANDARD OF REVIEW

[1] An appellate court reviews a district court's grant of a motion to dismiss de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *McCully, Inc. v. Baccaro Ranch*, 279 Neb. 443, 778 N.W.2d 115 (2010).

[2,3] Because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, an appellate court reviews mootness determinations under the same standard of review as other jurisdictional questions. *Kuhn v. Wells Fargo Bank of Neb.*, 278 Neb. 428, 771 N.W.2d 103 (2009). When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts. *Id.*

ANALYSIS

Dean and Michelle argue the district court erred in finding their application for grandparent visitation was moot. They claim that the time at which they first sought grandparent visitation is controlling and that the district court found Dean and Michelle had standing to seek grandparent visitation under § 43-1802(1)(b) given the facts that existed at the time the application was filed. In response, Rachel argues that Dean and Michelle "confuse standing with the larger issue of justiciability" and that "mootness governs the action after the filing but before an order is entered." Brief for appellee at 2-3. Because standing is a jurisdictional issue, we address that first, followed by a discussion on mootness.

Standing

[4-6] A party must have standing before a court can exercise jurisdiction, and either a party or the court can raise a question of standing at any time during the proceeding. *Frenchman-Cambridge Irr. Dist. v. Dept. of Nat. Res.*, 281 Neb. 992, 801 N.W.2d 253 (2011). Under the doctrine of standing, a court may decline to determine merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination. The focus is on the party, not the claim itself. *Id.* And standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf. *Id.*

In Nebraska, grandparent visitation is a creature of statute. *Pier v. Bolles*, 257 Neb. 120, 596 N.W.2d 1 (1999). See, generally, Neb. Rev. Stat. §§ 43-1801 to 43-1803 (Reissue 2016) (Nebraska's grandparent visitation statutes). In *Pier*, the Nebraska Supreme Court said that "we must look to those statutes to determine the visitation rights of natural grandparents following an adoption of the child," when analyzing a grandparent visitation issue. *Pier*, 257 Neb. at 127, 596 N.W.2d at 6.

Therefore, we first review the pertinent grandparent visitation statutes. The definition of a grandparent under § 43-1801 states:

> As used in sections 43-1801 to 43-1803, unless the context otherwise requires, grandparent shall mean the biological or adoptive parent of a minor child's biological or adoptive parent. Such term shall not include a biological or adoptive parent of any minor child's biological or adoptive parent whose parental rights have been terminated.

Section 43-1802(1) then lists the specific conditions which must exist in order for a grandparent to seek visitation:

> A grandparent may seek visitation with his or her minor grandchild if:
>
> (a) The child's parent or parents are deceased;
>
> (b) The marriage of the child's parents has been dissolved or petition for the dissolution of such marriage has been filed, is still pending, but no decree has been entered; or
>
> (c) The parents of the minor child have never been married but paternity has been legally established.

In *Pier*, the Nebraska Supreme Court found that "[the grandparents'] standing was predicated upon their satisfying the statutory definition of 'grandparent'" at the time they filed their action for grandparent visitation. 257 Neb. at 127, 596 N.W.2d at 6.

Accordingly, the district court was correct in determining that Dean and Michelle had standing to seek grandparent visitation at the commencement of the case. At that time, under § 43-1801, Dean and Michelle met the definition of grandparents, because they are the biological parents of Taylor, who is Tayvin's biological father, and because Taylor's parental rights were still intact. Also, they were allowed to seek visitation based on § 43-1802(1)(b), because the marriage of Rachel and Taylor had been dissolved by a decree of dissolution.

[7] Rachel's motion to dismiss alleged in part that Dean and Michelle "*no longer possess standing* to request grandparent visitation" with Tayvin. (Emphasis supplied.) However, in *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006), the Nebraska Supreme Court rejected the notion that a party can "lose" standing. In that case, the Nebraska Supreme Court defined standing as "the legal or equitable right, title, or interest in the subject matter of the controversy, which entitles a party to invoke the jurisdiction of the court." *Myers*, 272 Neb. at 680, 724 N.W.2d at 791. The court said:

> It is true that the "personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." See *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980) (quoted in *Mullendore v. Nuernberger*, 230 Neb. 921, 434 N.W.2d 511 (1989)). Further, the U.S. Supreme Court has held that a plaintiff bears the burden of establishing standing and that a defendant may "point out a *pre-existing* standing defect late in the day." (Emphasis supplied.) *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n.4, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Yet, in the same case, the Court stated that jurisdiction, including standing, "is to be assessed under the facts existing when the complaint is filed." *Id.* The timing requirement is important because the plaintiff's personal interest "is to be assessed under the rubric of standing at the commencement of the case, and under the rubric of mootness thereafter." *Becker v. Federal Election Com'n*, 230 F.3d 381, 386 n.3 (1st Cir. 2000).

Myers, 272 Neb. at 682-83, 724 N.W.2d at 792. See, also, *Muzzey v. Ragone*, 20 Neb. App. 669, 831 N.W.2d 38 (2013) (differentiating standing and mootness in grandparent visitation case).

We conclude, as did the district court, that standing was properly established when Dean and Michelle filed their application seeking grandparent visitation. As noted above, standing is to be assessed under the facts existing when an action is commenced. We affirm the portion of the district court's order concluding that Dean and Michelle had standing to seek grandparent visitation. However, the district court then concluded that Dean and Michelle's action became moot when Taylor relinquished his parental rights; we address that issue next.

Mootness

[8,9] 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). 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. *Kuhn v. Wells Fargo Bank of Neb.*, 278 Neb. 428, 771 N.W.2d 103 (2009).

Dean and Michelle's application for grandparent visitation was pending in the district court when Taylor relinquished his parental rights to Tayvin and Tayvin was legally adopted by his stepfather. The district court found that as a result of these facts, Dean and Michelle's application was moot.

The district court stated:

> As used in sections 43-1801 to 43-1803, unless the context otherwise requires, grandparent shall mean the biological or adoptive parent of a minor child's biological or adoptive parent. Such term shall not include a biological or adoptive parent of any minor child's biological or adoptive parent whose parental rights have been terminated. *Neb. Rev. Stat.* § 43-1801.

. . . .

> Pursuant to the grandparent visitation statutes, a grandparent's ability to seek visitation in the first instance is premised upon the relationship between the grandchild and his or her parent; once the parental relationship is terminated, the statutory basis on which a grandparent can seek visitation is likewise extinguished. *Pier v. Bolles*, 257 Neb. 120[, 596 N.W.2d 1] (1999).
>
> When Taylor . . . relinquished his parental rights to [the stepfather] terminating the parental relationship, the statutory basis upon which Dean and Michelle . . . could seek visitation was also extinguished. Because the statutory basis upon which [Dean and Michelle] could seek visitation has been extinguished they lack a legally cognizable interest in the outcome of litigation and they seek to determine a question which does not rest upon existing facts or rights. Therefore the matter is moot and their application must be dismissed.

Although the district court cites to *Pier v. Bolles*, 257 Neb. 120, 596 N.W.2d 1 (1999), to determine Dean and Michelle's action was moot, we view *Pier* as being instructive on issues of grandparent standing in light of a parental relinquishment and stepparent adoption. It also addresses a request to modify a grandparent visitation order. In *Pier*, the biological parents had one child during their marriage, but later divorced. Pursuant to their 1992 divorce decree, the mother was awarded custody of the minor child and the paternal grandparents were granted grandparent visitation. The mother later terminated the grandparents' visitation, evidently due to conditions under the decree allowing her to do so. The grandparents then initiated a new action in 1994 to establish grandparent visitation with their grandson, which the district court awarded in May 1995. In October, the father voluntarily relinquished his parental rights to the minor child and consented to the child's adoption by the mother's current husband; the child was subsequently adopted by his stepfather. In June 1997, the mother moved to

modify the May 1995 grandparent visitation order, seeking to terminate the grandparents' visitation due to their son's relinquishment of his parental rights and the subsequent stepparent adoption. The district court determined the grandparent visitation did not automatically terminate because of the adoption of the child by the stepfather, and the district court further found it was in the child's best interests to maintain the grandparent visitation rights. The district court denied the mother's petition for modification, and she appealed.

The Nebraska Supreme Court held the trial court correctly concluded that the grandparent visitation previously granted was not automatically terminated by the biological father's voluntary relinquishment of parental rights and the child's subsequent adoption by his stepfather; it affirmed as a matter of law that portion of the trial court's order. *Pier* stated that the grandparents' standing was predicated upon their satisfying the statutory definition of a grandparent at the time they filed their 1994 action and that subsequent to the 1995 visitation order, the father voluntarily relinquished his parental rights. The court said:

> There is no question that under the grandparent visitation statutes, if [the biological father] had terminated his parental rights and [the child] had been adopted by his stepfather prior to [the grandparents'] seeking grandparent visitation, [the grandparents] would have had no standing under the statutes to seek such visitation. Pursuant to the grandparent visitation statutes, a grandparent's ability to seek visitation in the first instance is premised upon the relationship between the grandchild and his or her parent. Once the parental relationship is terminated, the statutory basis on which a grandparent can seek visitation is likewise extinguished. . . .
>
> . . . Unlike the provisions relative to grandparents seeking visitation in the first instance, nothing contained within the modification provisions of the grandparent visitation statutes makes the modification of previously

> ordered grandparent visitation dependent upon the parent's continued parental relationship with the child. . . . [W]e determine that . . . the Legislature intended that grandparent visitation granted under these statutes not be interrupted by the adoption statutes. . . . Thus, following the adoption of the child, if the evidence shows that there has been a material change in circumstances justifying a change and the best interests of the child would be served, previously granted grandparent visitation can be modified, up to and including termination of grandparent visitation.

Pier v. Bolles, 257 Neb. 120, 127-28, 596 N.W.2d 1, 6-7 (1999). Although the Supreme Court agreed with the trial court that the grandparent visitation did not automatically terminate upon the adoption of the child by the stepparent, it also concluded that because of the "scant record of evidence regarding the child's best interests," the trial court abused its discretion in finding that continued grandparent visitation was in the best interests of the child. *Id*. at 130, 596 N.W.2d at 8.

Pier informs us that if an order for grandparent visitation has already been entered, a subsequent parental relinquishment and stepparent adoption does not automatically terminate the grandparent visitation. However, a modification action can be brought, and if the best interests of the child are not sufficiently proved, then grandparent visitation can be terminated. *Pier* also instructs that if a biological parent relinquishes his or her parental rights *before* a grandparent seeks visitation, the grandparent would have no standing to bring an action under the grandparent visitation statutes.

As we already discussed earlier, because Taylor had not yet relinquished his parental rights before Dean and Michelle filed their action, they had standing to seek grandparent visitation. And although Dean and Michelle did not yet have an order granting them visitation rights before Taylor relinquished his parental rights (like the grandparents in *Pier*), that does not change the fact that they had standing when they filed their

action. Nothing in *Pier* suggests that Dean and Michelle would lose standing to pursue their action because of Taylor's subsequent voluntary parental relinquishment; rather, it clearly holds that grandparent standing is determined at the time a grandparent files an action seeking visitation.

However, the district court also referenced *Muzzey v. Ragone*, 20 Neb. App. 669, 831 N.W.2d 38 (2013), when dismissing the action on the basis of mootness. While it is true this court concluded the grandparents' action in that case was moot, its facts are distinguishable from the present case. In *Muzzey*, the biological parents were not married at the time their minor child was born in 2009. In January 2011, paternity was established, and a couple months later, the maternal grandparents filed a motion for grandparent visitation. In July, the biological parents filed a motion to dismiss, indicating that they had been married in June and that therefore, the case no longer met the statutory requirements for grandparent visitation under § 43-1802. See § 43-1802(1) ("grandparent may seek visitation with his or her minor grandchild if: . . . (c) The parents of the minor child have never been married but paternity has been legally established").

The district court in *Muzzey* found that despite the parents' marriage, the grandparents had standing to seek grandparent visitation, because the marriage happened after the commencement of litigation. The district court also found that the issues were not moot, because the dispute which existed at the beginning of litigation had not been eliminated. After a trial, the district court ordered grandparent visitation with the minor child. The parents appealed, arguing that their marriage resulted in a loss of standing for the grandparents and that they no longer had a right to request visitation.

On appeal, this court then concluded the grandparents had standing to seek grandparent visitation with the minor child under the grandparent visitation statutes because although paternity had been established, the parents were not married at the inception of the proceedings. This court continued, "even

though [the parents] subsequently married, [the grandparents] did not lose standing." *Muzzey*, 20 Neb. App. at 679, 831 N.W.2d at 46. We concluded, however, that the case became moot when circumstances changed during the pendency of the case, stating as follows:

> Section 43-1802(1)(c) allows for grandparent visitation when the parents of the child have never been married and paternity has been legally established. At the inception of the case, these circumstances were true; however, during the pendency of the case [the parents] were legally married. Thus, in accordance with the grandparent visitation statutes, [the grandparents] no longer have the right to request grandparent visitation and the issue is moot.

Muzzey, 20 Neb. App. at 679, 831 N.W.2d at 46.

In *Muzzey*, therefore, the grandparents' action was predicated on § 43-1802(1)(c), which allows for grandparent visitation when the biological parents have never been married, but paternity has been established. The grandparents had a legally cognizable interest under § 43-1802(1)(c) when they filed; however, that interest ceased to exist upon the marriage of the biological parents. In this case, Dean and Michelle sought grandparent visitation under § 43-1802(1)(b), which allows a grandparent to seek visitation if "[t]he marriage of the child's parents has been dissolved or petition for the dissolution of such marriage has been filed, is still pending, but no decree has been entered[.]" Rachel and Taylor divorced in 2013, and Dean and Michelle subsequently filed their application for grandparent visitation. Dean and Michelle's legally cognizable interest was predicated upon the divorce of Tayvin's parents, and nothing in the record shows any change in circumstances in that regard. Therefore, unlike *Muzzey*, where the marriage of the grandchild's biological parents extinguished the legal basis upon which the grandparents sought visitation, in this case, the legal basis for visitation still exists because Rachel and Taylor remain divorced.

Accordingly, Dean and Michelle's application for grandparent visitation did not become moot, because they continue to have a legally cognizable interest in the outcome of litigation, they seek to determine a question upon existing facts and rights, and the issues presented are still alive. Dean and Michelle's application for grandparent visitation was therefore erroneously dismissed. We reverse the district court's decision to dismiss Dean and Michelle's action, and we remand the cause so that the district court can determine the merits of their application for grandparent visitation under § 43-1802(2). When determining whether to award reasonable rights of visitation to a grandparent, § 43-1802(2) requires clear and convincing evidence that there is, or there has been, a significant beneficial relationship between the grandparent and the child, that it is in the best interests of the child that the relationship continue, and that such visitation will not adversely interfere with the parent-child relationship.

CONCLUSION

We affirm the district court's order insofar as it concluded that Dean and Michelle had standing to bring their action seeking grandparent visitation. However, we reverse the district court's order as to its conclusion that Dean and Michelle's action was moot and therefore had to be dismissed. Accordingly, we remand the cause for further proceedings for a determination of the merits of Dean and Michelle's application for grandparent visitation.

Affirmed in part, and in part reversed and remanded for further proceedings.

Randy Weyerman, appellee, v. Freeman Expositions, Inc., employer, and Old Republic Insurance Company, insurance carrier, appellants.

922 N.W.2d 246

Filed December 18, 2018. No. A-18-277.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016), an appellate court may modify, reverse, or set aside a compensation court decision only when (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. ____: ____. Findings of fact made by the compensation court have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous.
3. **Workers' Compensation: Evidence: Appeal and Error.** When testing the sufficiency of the evidence to support findings of fact made by the compensation court trial judge, the evidence must be considered in the light most favorable to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence.
4. **Employer and Employee: Independent Contractor.** There is no single test for determining whether one performs services for another as an employee or as an independent contractor.
5. ____: ____. Ordinarily, when a court is presented with a dispute regarding a party's status as an employee or an independent contractor, the party's status is a question of fact which must be determined after consideration of all the evidence in the case.
6. **Workers' Compensation.** As the trier of fact, the compensation court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.

7. **Workers' Compensation: Insurance: Liability: Time.** When a subsequent injury aggravates a prior injury, the insurer at risk at the time of the subsequent injury is liable. But, if the subsequent injury is a recurrence of the prior injury, the insurer at risk at the time of the prior injury is liable.
8. **Workers' Compensation: Appeal and Error.** A finding in regard to causation of an injury is one for determination by the compensation court as the finder of fact.
9. **Workers' Compensation: Expert Witnesses: Physicians and Surgeons.** Resolving conflicts within a health care provider's opinion rests with the compensation court, as the trier of fact.
10. **Workers' Compensation: Words and Phrases.** Under Neb. Rev. Stat. § 48-121 (Reissue 2010), a workers' compensation claimant may receive permanent or temporary workers' compensation benefits for either partial or total disability. Temporary disability ordinarily continues until the claimant is restored so far as the permanent character of his or her injuries will permit.
11. **Workers' Compensation.** Once a worker has reached maximum medical improvement from a disabling injury and the worker's permanent disability and concomitant decreased earning capacity have been determined, an award of permanent disability is appropriate.
12. ____. Generally, whether a workers' compensation claimant has reached maximum medical improvement is a question of fact.
13. **Workers' Compensation: Appeal and Error.** When the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court.

Appeal from the Workers' Compensation Court: James R. Coe, Judge. Affirmed.

Abigail A. Wenninghoff and Jocelyn J. Brasher, of Larson, Kuper & Wenninghoff, P.C., L.L.O., for appellants.

Jacob M. Steinkemper, of Steinkemper Law, P.C., L.L.O., for appellee.

Riedmann, Bishop, and Arterburn, Judges.

Arterburn, Judge.

INTRODUCTION

Freeman Expositions, Inc., and its insurance carrier, Old Republic Insurance Company (referred to herein individually

and collectively as "Freeman Expositions"), appeal from the Nebraska Workers' Compensation Court's award of benefits to Randy Weyerman. In the award, the compensation court ordered Freeman Expositions to pay to Weyerman temporary total disability payments. In addition, the court ordered Freeman Expositions to "continue to provide and pay for such future medical and hospital services and treatment as may be reasonably necessary as a result of [Weyerman's] accident and injury." On appeal, Freeman Expositions assigns numerous errors, including that the compensation court erred in finding that it was Weyerman's employer on the day of his accident; that Weyerman's injury occurred on September 17, 2015, rather than on October 9; that Weyerman had not yet reached maximum medical improvement (MMI); and that Weyerman is entitled to future medical care. For the reasons set forth herein, we affirm the compensation court's award of benefits to Weyerman.

BACKGROUND

Weyerman's Work as Stagehand

Since 1994, Weyerman has worked as a stagehand. He described his job as "mostly set[ting] up . . . concerts, operas, plays, unload[ing] trucks, set[ting] up the gear. We do the lighting, the sound. We do all the categories. We also do carpentry and we run spotlights for the shows and we also work as a deckhand moving band gear." In order to facilitate job opportunities, Weyerman is a member of the "International Alliance of Theatrical, Stage, and Moving Pictures." This group is also referred to in our record as the "Local 42" or the "union." Local 42 acts as a "referral hall," obtaining and assigning jobs to its members.

In 2015, Local 42 had a collective bargaining agreement with Complete Payroll Services, Inc. (Complete Payroll). Pursuant to that agreement, Complete Payroll was considered the employer of members of Local 42 when the members

worked on Complete Payroll jobs. The president of Complete Payroll confirmed that in 2015, the company was the employer of union members when they worked on Complete Payroll jobs. He explained that Complete Payroll had contracts with various vendors who needed stagehands. Complete Payroll would provide union members to the vendors. In return, the vendors would pay Complete Payroll for the work completed by union members. Complete Payroll would then disburse paychecks directly to union members. In addition, Complete Payroll provided union members with certain employment benefits. The collective bargaining agreement between Local 42 and Complete Payroll provided that Complete Payroll possessed "Management Rights" regarding its workforce:

> Subject to the provisions of this Agreement and applicable state and federal law, the Employer retains the sole right to manage its business and direct the work force including, but without being limited to, the right to establish new tasks, abolish or change existing tasks, increase or decrease the number of tasks, change materials, processes, products, equipment and operations. The Employer shall have the right to schedule and assign work to be performed, establish, maintain and enforce reasonable plant rules and regulations, establish attendance policies and have the right to hire or rehire employees, promote employees, to demote or suspend, discipline or discharge for just cause, and to transfer or layoff employees because of lack of work.

The agreement also delineated a list of "work rules" for union members. These rules addressed such things as the length of the workday and the workweek, overtime and "premium" pay, and expectations during performances or rehearsals.

Members of Local 42 could also obtain work separate and apart from Complete Payroll. In 2015, Local 42 also had a collective bargaining agreement with Freeman Expositions. That agreement referred to Freeman Expositions as the "employer" when union members were working on Freeman Expositions'

jobs. In fact, the first time a union member would work for Freeman Expositions, the member had to fill out "new hire paperwork." Freeman Expositions would assign each union member an employee number and keep a record of each union member who had done work for the company. Freeman Expositions paid union members directly for their work on Freeman Expositions' jobs. In addition, the agreement between Local 42 and Freeman Expositions included a description of the management rights possessed by Freeman Expositions. This description is nearly identical to the description of management rights retained by Complete Payroll in its agreement with Local 42. Robert Lane, the business agent for Local 42, testified that Freeman Expositions managed union workers at the jobsites and controlled the work that the members completed.

Weyerman's Injury and Treatment

On September 17, 2015, Weyerman was working for Freeman Expositions, setting up for a trade show. During the first hour of his workday, Weyerman unloaded a truck full of materials, including heavy carts and "[c]urtain rod carts." While he was still unloading the materials, Weyerman began to feel pain in his back. Despite the pain, Weyerman continued to work, rolling out aisle carpets and hanging curtains for individual booths. As Weyerman worked, the pain worsened. Weyerman described the pain as "sharp" and "pinching." Weyerman finished his workday and had the next day off of work.

When Weyerman returned to work after his day off and began cleaning up after the trade show, he "was hurting horribly." He got through the workday, but was only able to put away folding chairs. He could not do much physical labor. Weyerman's pain did not improve. By 5 days after the accident, Weyerman described the pain as "brutal." He was unable to even "get up off the floor." Weyerman decided that he needed to report his injury and see a doctor. Weyerman informed Lane that he had hurt his back while working for Freeman

Expositions. Lane forwarded Weyerman's accident report to Freeman Expositions. Freeman Expositions then authorized Weyerman to see Dr. Arthur West, who became Weyerman's treating physician.

Medical records indicate that when Weyerman first saw his treating physician on September 22, 2015, he was diagnosed with a lumbar sprain and prescribed pain medication. The treating physician's records indicate that 3 days later, on September 25, during a followup appointment, Weyerman told him that his pain had decreased and that his symptoms were improving. As a result of Weyerman's report, his treating physician told Weyerman that he could return to "modified work/activity." The records further reflect that almost 1 week later, on October 2, Weyerman informed his treating physician that his symptoms had resolved and that he had been performing his regular work duties. The treating physician then released Weyerman from his care.

According to Weyerman and Lane, during the latter part of September 2015, Weyerman did return to work as a stagehand. However, Lane indicated that although Weyerman was working, he continued to complain that his back was hurting. Weyerman indicated to Lane that he really needed to work due to his financial situation, so Lane permitted Weyerman to do less physical jobs, including running a spotlight, handling lighting gear, and setting up for a ballet performance.

On October 9, 2015, a few days after Weyerman was released from his treating physician's care, Weyerman was working for Complete Payroll to set up for a concert. He was assigned to push boxes from a truck to the inside of the venue. Within 2 hours of beginning this work, Weyerman reported that he could not continue because of his back pain. He "couldn't even get up off [a] chair at that point." Weyerman reported his injury and sought medical treatment. October 9 is the last day that Weyerman worked as a stagehand.

On October 12, 2015, Weyerman was seen by a physician's assistant at a health clinic. The notes from this visit indicate

that Weyerman reported that he injured his back 7 days prior to the visit, but he was "not sure" how he sustained the injury. A week later, on October 19, Weyerman saw his treating physician again. Weyerman reported that he was again experiencing back pain and was unable to perform his work duties. Ultimately, the treating physician prescribed pain medication for Weyerman and ordered a magnetic resonance imaging of his lower back. The treating physician indicated that Weyerman was not currently able to work.

The results of the magnetic resonance imaging revealed that Weyerman had multiple "disc bulge[s]" which were collectively referred to as "[m]ild to moderate multilevel lumbar spondylosis." On November 2, 2015, the treating physician released Weyerman to return to work with some restrictions; however, Weyerman did not return to work. In addition, the treating physician referred Weyerman to a spine and pain center and to a physical therapist.

Weyerman began seeing Dr. Liane Donovan at the spine and pain center on November 17, 2015. During Weyerman's treatment with Donovan, he received multiple epidural steroid injections and attended more than 20 physical therapy sessions. Weyerman reported that neither of these treatment options afforded him significant, long-term relief. In February 2016, Weyerman saw a surgeon, who was of the opinion that Weyerman had no "surgical options at this point." The surgeon noted that he was "unable to identify the source of [Weyerman's] symptoms[,] but he may have an annular tear in the lumbar spine."

On June 21, 2016, Donovan indicated her belief that Weyerman had reached MMI because he had "not responded to medication, injection therapy, [physical therapy,] and is not a surgical candidate." Donovan ordered a functional capacity evaluation (FCE) for Weyerman. Weyerman participated in the FCE on July 8, 2016. However, the results of the FCE were deemed "invalid" because the evaluator did not believe that Weyerman was accurately representing his abilities. Based on

the invalid results of this FCE, Donovan released Weyerman from her care and indicated that he was capable of returning to work without any restrictions. Weyerman did not return to work as a stagehand.

Compensation Court Proceedings

Weyerman filed a petition in the compensation court alleging that he was injured on September 17, 2015, in the course of his employment with Freeman Expositions. He also alleged that he was injured on October 9, in the course of his employment with Complete Payroll.

A hearing was held on Weyerman's petition in January 2018. At the hearing, the parties presented evidence, including Weyerman's employment records; the collective bargaining agreements Local 42 had with Freeman Expositions and with Complete Payroll; Weyerman's medical records from his treating physician and Donovan; and depositions from Weyerman and officials from Local 42, Complete Payroll, and Freeman Expositions.

In addition to this evidence, Weyerman offered the results of an independent medical examination conducted on June 30, 2017. Dr. Matthew West, the independent medical examiner, opined that Weyerman had not yet reached MMI. He believed that there were still treatments available that had not been tried and that such treatments may help minimize Weyerman's symptoms and improve his overall function. He stated that it was "reasonable to anticipate future medical care that is related to the work injur[y]," including a referral to a pain clinic for medication management and chiropractic care. Essentially, he believed that Weyerman's condition could improve with continued care.

Weyerman also offered into evidence the results of a second FCE which had been conducted on September 20, 2016. There were no concerns with the validity of this FCE, because it was noted that Weyerman had given "Excellent Effort" during the

evaluation. The results revealed that Weyerman is capable of working at the sedentary-light physical demand level for 8 hours per day.

Also admitted into evidence were multiple letters authored by Donovan, which were all in response to inquiries from the parties. The first letter, dated February 29, 2016, was sent in response to an inquiry of counsel for Freeman Expositions. It stated, in part:

> It is my opinion that . . . Weyerman has not reached [MMI] pending completing of the physical therapy previously ordered. [MMI] will be attained six (6) weeks after completion of the course of physical therapy. Based on his response to that therapy we will make determination[s] regarding permanent impairment and permanent restrictions at that time.

The second letter authored by Donovan is dated a little more than 8 months later, November 16, 2016. In that letter, Donovan answers specific inquiries presented to her by Weyerman's counsel. Specifically, Donovan indicates that the work accident on September 17, 2015, "significantly contributed to . . . Weyerman's injury." She also opines that Weyerman reached MMI on July 19, 2016, and that, based upon the invalid results of the first FCE, Weyerman has not sustained any permanent impairment. Her review of the results of the second FCE did not change her opinion about any permanent impairment. Finally, Donovan indicated her belief that future medical care due to Weyerman's work injury is not expected.

Almost 1 year later, on September 7, 2017, Donovan authored a third letter. This letter is in response to questions posed by counsel for Complete Payroll. In this letter, Donovan opines that when Weyerman reported back pain on October 9, 2015, while working for Complete Payroll, that the pain constituted "a recurrence of his underlying lumbar complaints rather than a new and distinct injury."

Donovan's fourth letter, dated October 18, 2017, contradicts the September 7 letter. In the fourth letter, Donovan indicates

that after authoring the September 7 letter, she was presented with evidence that Weyerman had returned to work without restrictions prior to the October 9, 2015, accident. Based on this evidence, Donovan indicated that she was now "unable, based on a reasonable degree of medical certainty, to opine as to whether . . . Weyerman's injuries and symptoms were caused solely by his September 17, 2015 or his October 9, 2015 accidents."

Donovan's last letter was dated January 15, 2018. In this letter she states:

> After reviewing new information regarding . . . Weyerman's records, including the deposition of . . . Lane, the business agent for the local union, as well as [Weyerman's] wage records, ongoing pain complaints, and work modifications, it is my opinion to a reasonable degree of medical certainty that . . . Weyerman's low back pain complaints in October were a recurrence of his underlying lumbar complaints rather than a new and distinct injury.

Award

Following the January 2018 hearing, the compensation court issued a detailed award. In the award, the court found that Weyerman suffered an injury to his back while working for Freeman Expositions on September 17, 2015. The court further found that Weyerman suffered a recurrence of this injury while working on October 9. The court then specifically found that Freeman Expositions was liable for Weyerman's work-related injuries, because it was Weyerman's employer on September 17.

The court found that Weyerman had not yet reached MMI. As a result, it awarded Weyerman continuing temporary total disability payments in the amount of $376.71 per week. The compensation court also ordered Freeman Expositions to "pay for such future medical and hospital services and treatment as may be reasonably necessary as a result of" Weyerman's accident and the resulting injury.

Freeman Expositions appeals from the compensation court's award.

ASSIGNMENTS OF ERROR

On appeal, Freeman Expositions assigns five errors. Freeman Expositions argues, restated and reordered, that the compensation court erred first in determining that it was Weyerman's employer on September 17, 2015. Second, Freeman Expositions argues that the court erred in determining that Complete Payroll was not Weyerman's employer on October 9. Third, Freeman Expositions argues that the compensation court erred in finding that Weyerman did not suffer a new injury on October 9, but instead suffered a recurrence of his September 17 injury. Fourth, Freeman Expositions argues that the court erred in finding that Weyerman had not yet reached MMI and was, as a result, entitled to continuing temporary total disability payments. Finally, Freeman Expositions asserts that the court erred in ordering it to pay for Weyerman's future medical care.

STANDARD OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016), an appellate court may modify, reverse, or set aside a compensation court decision only when (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. *Hintz v. Farmers Co-op Assn.*, 297 Neb. 903, 902 N.W.2d 131 (2017).

[2,3] Findings of fact made by the compensation court have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous. *Id*. When testing the sufficiency of the evidence to support findings of fact made by the compensation court trial judge, the evidence must be

considered in the light most favorable to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence. *Id*.

ANALYSIS

Weyerman's Employer on September 17, 2015

Freeman Expositions asserts that the compensation court erred in finding that it was Weyerman's employer on September 17, 2015, when he injured his back. Freeman Expositions argues that Weyerman has never been its employee. Instead, it argues that Weyerman is either an employee of Complete Payroll or an independent contractor. Upon our review, we conclude that there is sufficient, competent evidence in the record to support the compensation court's finding that Freeman Expositions was Weyerman's employer on September 17.

[4,5] There is no single test for determining whether one performs services for another as an employee or as an independent contractor, and the following factors must be considered: (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business. *Jacobson v. Shresta*, 21 Neb. App. 102, 838 N.W.2d 19 (2013). Ordinarily, when a court is presented with a dispute regarding a party's status as an employee or an independent

contractor, the party's status is a question of fact which must be determined after consideration of all the evidence in the case. *Id*.

In the compensation court's analysis of whether Weyerman was an employee of Freeman Expositions, it focused first on the collective bargaining agreement entered into by Local 42 and Freeman Expositions. The court noted that in the agreement, Freeman Expositions is clearly referred to as the "employer." In addition, the compensation court found that pursuant to the terms of the agreement, Freeman Expositions retained a great deal of control over the work completed by union members. In fact, as we discussed in the background section of this opinion, the collective bargaining agreement includes the following provision regarding Freeman Expositions' "Management Rights":

> Subject to the provisions of this Agreement and applicable state and federal law, the Employer retains the sole right to manage its business and direct the working force including, but without being limited to, the right to establish new tasks, abolish or change existing tasks, increase or decrease the number of tasks, change materials, processes, products, equipment and operations. The Employer shall have the right to schedule and assign work to be performed, . . . establish, maintain and enforce reasonable plant rules and regulations, establish attendance policies and have the right to hire or rehire employees, promote employees, to demote or suspend, discipline or discharge for just cause, and to transfer or layoff employees because of lack of work.

Also during the course of its analysis about Weyerman's employment status, the compensation court discussed the deposition testimony of James Brackett, the director of operations for Freeman Expositions. In his testimony, Brackett indicated that Freeman Expositions supplies all of the work supplies, including tables, chairs, pipes, and drapes that union members use to set up the trade shows that they manage. Brackett also

indicated during his testimony that a large part of Freeman Expositions' business involves coordinating trade shows.

In addition, the record reflects that Freeman Expositions pays union members directly for their work. Freeman Expositions also requires each union member to fill out new employee paperwork prior to beginning work for it and assigns each union member a unique employee number. Lane confirmed that Freeman Expositions manages union members who are working on Freeman Expositions' jobsites and controls the work that members complete. Both Lane and Weyerman testified that they considered Freeman Expositions to be the employer when union members worked on Freeman Expositions' jobsites.

We recognize that there is conflicting evidence in the record regarding Freeman Expositions' status as Weyerman's employer. The majority of this conflicting evidence comes from the deposition testimony of Brackett. Brackett testified that Freeman Expositions does not consider union members to be its employees. Instead, it considers union members to be employees of Local 42. Brackett also testified that the union maintained control over which workers were assigned to which task and supervised workers who were completing specific tasks. However, Brackett also indicated that the instructions for what tasks needed to be completed came directly from Freeman Expositions' employees.

[6] Because the compensation court explicitly found Freeman Expositions to be Weyerman's employer on September 17, 2015, it clearly found the evidence of Freeman Expositions' status as the employer to be more credible than Brackett's testimony to the contrary. And, as the trier of fact, the compensation court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. See *Swanson v. Park Place Automotive*, 267 Neb. 133, 672 N.W.2d 405 (2003). Given all of the evidence presented regarding Weyerman's employment status and given the compensation court's determination of credibility, we cannot say that

the court erred in concluding that Freeman Expositions was Weyerman's employer on September 17. There was evidence that Freeman Expositions referred to itself as the "Employer" of union members in the collective bargaining agreement it signed with Local 42. Freeman Expositions required union members to fill out employment paperwork and chose to pay union members directly. In addition, there was evidence that Freeman Expositions supplied the necessary tools for union members to set up trade shows and also controlled the work of union members as they completed such work.

Weyerman's Employer on October 9, 2015

Freeman Expositions also challenges the compensation court's determination that Complete Payroll was not Weyerman's employer on October 9, 2015, and the court's decision to dismiss Complete Payroll from the case. Upon our review, we agree with Freeman Expositions that the compensation court incorrectly determined that Complete Payroll was not Weyerman's employer on October 9. However, we also determine that the court's error is harmless.

In the award, the compensation court specifically found that "Complete Payroll Services was not [Weyerman's] employer on October 9, 2015, but, rather, an accounting service." This finding is not supported by the evidence presented at the hearing. At the hearing, the president of Complete Payroll specifically testified that in 2015, union members were considered the employees of Complete Payroll when members were working on Complete Payroll projects. Everyone who testified agreed that when Weyerman was working on October 9, he was working a Complete Payroll job, setting up for a concert. In fact, the president of Complete Payroll testified that Weyerman was a Complete Payroll employee on October 9. We further note that Complete Payroll has admitted in its brief on appeal that it was Weyerman's employer on October 9. Based on the evidence admitted at trial, the compensation court erred in

finding that Complete Payroll was not Weyerman's employer on October 9.

However, the court's finding that Complete Payroll was not Weyerman's employer on October 9, 2015, constitutes harmless error. As we discuss in detail in the next section, the compensation court found that Weyerman's October 9 injury was a recurrence of the September 17 injury and that, as a result, Freeman Expositions was liable for the injury. We affirm the compensation court's finding. Because we affirm this finding, the identity of Weyerman's employer on October 9 is irrelevant to his workers' compensation claim. Furthermore, because Complete Payroll was not Weyerman's employer on the date of his injury, the compensation court did not err in dismissing Complete Payroll from the case.

Injury on October 9, 2015, Was Recurrence of September 17 Injury

Freeman Expositions asserts that the compensation court erred in determining that Weyerman's back pain on October 9, 2015, was a recurrence of the September 17 back injury, rather than a new and distinct injury. Freeman Expositions' argument appears to be based on its contention that if the October 9 injury was a new and distinct injury, then Complete Payroll, as Weyerman's employer on that day, would be liable to Weyerman instead of Freeman Expositions. Upon our review, we conclude that there is sufficient, competent evidence in the record to support the compensation court's finding that the October 9 injury was a recurrence of the September 17 injury.

[7,8] When a subsequent injury aggravates a prior injury, the insurer at risk at the time of the subsequent injury is liable. *Miller v. Commercial Contractors Equip.*, 14 Neb. App. 606, 711 N.W.2d 893 (2006). But, if the subsequent injury is a recurrence of the prior injury, the insurer at risk at the time of the prior injury is liable. *Id*. A finding in regard to causation

of an injury is one for determination by the compensation court as the finder of fact. *Id*.

In its award, the compensation court specifically found that Weyerman's accident on September 17, 2015, was the cause of his back injury and that Weyerman's back pain on October 9 was a recurrence of the original injury suffered on September 17. In making this finding, the court cited to evidence in the record which indicated that Weyerman did not ever fully recover from the back injury he suffered on September 17. Such evidence included Weyerman's testimony that he never improved after the September 17 injury and Lane's testimony that even though Weyerman returned to work as a stagehand after September 17, he continued to complain about back pain and continued to only be able to complete tasks that were considered light duty. Lane testified that Weyerman told him that he needed to work, despite his back pain, due to financial reasons and that Local 42 accommodated Weyerman's request.

There was conflicting evidence presented which suggested that Weyerman had fully recovered from the September 17, 2015, injury. This evidence included medical records from his treating physician, which indicated that Weyerman reported that about 1 week after the September 17 injury, his symptoms were improving, and that 2 weeks after the injury, his symptoms had completely resolved and he was completing his regular duties at work. As a result of Weyerman's reports, the treating physician believed that Weyerman had reached MMI by October 2. The treating physician released Weyerman to return to work. In addition, in medical records from a health clinic where Weyerman was seen after experiencing increased back pain on October 9, it is indicated that Weyerman reported that he injured his back 7 days prior to his appointment and that he was "not sure" how he injured himself.

In the award, the compensation court specifically found that Weyerman's testimony regarding the continuing pain caused

by the September 17, 2015, injury was credible. The court indicated that it did not believe that Weyerman was fully healed by October 2 and ready to return to work. As we stated above, as the trier of fact, the compensation court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Swanson v. Park Place Automotive*, 267 Neb. 133, 672 N.W.2d 405 (2003).

[9] We also note that Donovan provided multiple opinions regarding whether the October 9, 2015, injury was a recurrence of the September 17 injury or a new injury. However, the compensation court ultimately adopted "Donovan's medical opinion that the accident of September 17, 2015, was the cause of [Weyerman's] complaints and the Court finds anything after that date was recurrent to September 17, 2015." Resolving conflicts within a health care provider's opinion rests with the compensation court, as the trier of fact. *Damme v. Pike Enters.*, 289 Neb. 620, 856 N.W.2d 422 (2014).

Given the compensation court's determinations about credibility and given that there was competent evidence to support the court's decision that the October 9, 2015, injury was a recurrence of the September 17 injury, we must affirm the decision of the compensation court.

MMI

Freeman Expositions also asserts that the compensation court erred in determining that Weyerman has not yet reached MMI and that, as a result, he is entitled to continuing temporary disability payments. Specifically, Freeman Expositions argues that there was no medical opinion to support the compensation court's finding regarding MMI and that the majority of the evidence, including Weyerman's own testimony, supports a determination that Weyerman has reached MMI. Upon our review, we conclude that there is sufficient, competent evidence in the record to support the compensation court's finding that Weyerman had not reached MMI by the time of the hearing.

[10] Under Neb. Rev. Stat. § 48-121 (Reissue 2010), a workers' compensation claimant may receive permanent or temporary workers' compensation benefits for either partial or total disability. "Temporary" and "permanent" refer to the duration of disability, while "total" and "partial" refer to the degree or extent of the diminished employability or loss of earning capacity. *Rodriguez v. Hirschbach Motor Lines*, 270 Neb. 757, 707 N.W.2d 232 (2005). Temporary disability ordinarily continues until the claimant is restored so far as the permanent character of his or her injuries will permit. *Id*. Compensation for temporary disability ceases as soon as the extent of the claimant's permanent disability is ascertained. *Id*. In other words, temporary disability should be paid only to the time when it becomes apparent that the employee will get no better or no worse because of the injury. *Id*.

[11,12] The term "maximum medical improvement" has been used to describe the point of transition from temporary to permanent disability. See *id*. Once a worker has reached MMI from a disabling injury and the worker's permanent disability and concomitant decreased earning capacity have been determined, an award of permanent disability is appropriate. *Id*. Generally, whether a workers' compensation claimant has reached MMI is a question of fact. *Id*.

Contrary to Freeman Expositions' assertions on appeal, there is medical evidence to support the compensation court's finding that Weyerman has not yet reached MMI. The independent medical examiner conducted an evaluation of Weyerman in June 2017, about 6 months prior to the hearing. After the evaluation, he authored a report which reflected his opinion that Weyerman had not yet reached MMI. The independent medical examiner believed that there were still treatments available to try which may help minimize Weyerman's pain and improve his overall function. Such treatments included referrals to a pain management clinic and to a chiropractor. There is nothing in our record to indicate that Weyerman was able to try these treatments prior to the hearing date.

We recognize that Donovan provided conflicting medical opinions about MMI. Donovan opined that Weyerman had reached MMI in June 2016, 1 year prior to Weyerman's evaluation with the independent medical examiner. Donovan based her medical opinion on Weyerman's failure to improve after receiving pain medication, injection therapy, and physical therapy. In addition, Donovan noted that Weyerman was not a good candidate for surgery.

[13] However, as we stated above, the compensation court is the sole judge of the credibility and weight to be given medical opinions, even when the health care providers do not give live testimony. *Damme v. Pike Enters.*, 289 Neb. 620, 856 N.W.2d 422 (2014). When the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court. *Id.*

Because the compensation court determined that Weyerman had not yet reached MMI, it clearly found the independent medical examiner's medical opinion to be more credible than Donovan's opinion. And, because the compensation court is the sole judge of the credibility of medical opinions and there was sufficient, competent evidence to support the compensation court's finding, we cannot find clear error in the court's determination that Weyerman had not reached MMI at the time of the hearing.

Future Medical Care

Freeman Expositions asserts that the compensation court erred in awarding Weyerman future medical expenses. Specifically, Freeman Expositions argues that none of the medical providers who examined Weyerman recommended future medical care. Upon our review, we conclude that there is sufficient, competent evidence in the record to support the compensation court's award of future medical expenses.

In the award, the compensation court stated:

> The medical evidence from the physicians in this case are that [Weyerman] will require future medical and

> hospital services and that [Freeman Expositions] should continue to provide and pay for such future medical and hospital services and treatment as may be reasonably necessary as a result of the said accident and injury of September 17, 2015.

The report authored by the independent medical examiner supports the compensation court's award of future medical expenses. He opined that Weyerman had not reached MMI yet because there were still treatments available to try which may help to improve Weyerman's pain and overall functioning. In addition, he opined that it is "reasonable to anticipate future medical care that is related to the work injur[y]." Such medical care was to include medication management through a pain clinic and chiropractic care. Essentially, he expressed optimism that, with additional medical treatment, Weyerman's condition would improve.

Given the independent medical examiner's opinion that Weyerman's condition could improve with further medical treatment, the compensation court did not err in ordering Freeman Expositions to pay for any future medical treatment related to Weyerman's back injury.

CONCLUSION

We affirm the award entered by the compensation court which found that Weyerman had not yet reached MMI and which ordered Freeman Expositions, as Weyerman's employer on September 17, 2015, to pay to Weyerman temporary total disability payments and future medical expenses.

Affirmed.

In re Guardianship of K.R., a minor child. Heather R., appellant, v. Mark R. and Cynthia R., Guardians, appellees.

923 N.W.2d 435

Filed December 31, 2018. No. A-17-846.

1. **Guardians and Conservators: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code are reviewed for error 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. ____: ____. An appellate court, in reviewing a judgment for errors appearing on the record, will not substitute its factual findings for those of the lower court where competent evidence supports those findings.
4. **Child Custody: Parental Rights.** There are two competing principles in the area of child custody jurisprudence: the parental preference principle and the best interests of the child principle.
5. **Child Custody.** Courts have long considered the best interests of the child to be of paramount concern in child custody disputes.
6. **Child Custody: Parental Rights.** The principle of parental preference provides that a court may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the parent-child relationship or has forfeited that right.
7. **Parental Rights: Guardians and Conservators: Presumptions.** In guardianship termination proceedings involving a biological or adoptive parent, the parental preference principle serves to establish a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent.
8. **Child Custody: Parental Rights.** Under the parental preference principle, a parent's natural right to the custody of his or her child trumps

the interest of strangers to the parent-child relationship and the preferences of the child.

9. **Child Custody: Parental Rights: Proof.** For a court to deny a parent the custody of his or her minor child, it must be affirmatively shown that such parent is unfit to perform parental duties or that he or she has forfeited that right.
10. **Parental Rights: Guardians and Conservators: Proof.** An individual who opposes the termination of a guardianship bears the burden of proving by clear and convincing evidence that the biological or adoptive parent either is unfit or has forfeited his or her right to custody. Absent such proof, the constitutional dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent.
11. **Child Custody: Parental Rights.** While preference must be given to a biological or adoptive parent's superior right to custody where the parent is not unfit and has not forfeited his or her parental rights, a court also considers the child's best interests in making its custody determination.
12. **Child Custody: Parental Rights: Proof.** The parental preference doctrine, by definition, is a preference, and it will be applied to a child custody determination unless it is shown that the lawful parent is unfit or has forfeited his or her superior right or the preference is negated by a demonstration that the best interests of the child lie elsewhere.

Appeal from the County Court for Douglas County: Marcela A. Keim, Judge. Affirmed.

Julie A. Frank for appellant.

Patrick A. Campagna, of Campagna Law, P.C., L.L.O., for appellees.

Pirtle, Riedmann, and Welch, Judges.

Pirtle, Judge.

INTRODUCTION

Heather R. appeals from an order of the Douglas County Court where the court refused to terminate the guardianship over her daughter K.R. and refused to reinstate visitation between Heather and K.R. Based on the reasons that follow, we affirm.

BACKGROUND

Heather is the biological mother of K.R., born in 2007. K.R.'s biological father is unknown. Appellees, Mark R. and Cynthia R., are Heather's parents and K.R.'s grandparents.

On June 27, 2014, appellees filed a petition for appointment of a guardian for a minor, seeking coguardianship of K.R. They also filed a motion for ex parte appointment of guardian, seeking the immediate appointment of guardianship over K.R. The court granted the ex parte motion. Heather filed an answer and an ex parte motion to set aside the ex parte appointment of temporary coguardians.

On August 4, 2014, the court overruled Heather's motion to set aside the ex parte appointment of temporary coguardians. The court also appointed a guardian ad litem for K.R.

On October 29, 2014, an order appointing appellees as coguardians was entered, based on a stipulated agreement between Heather and appellees. The agreement, adopted by the court in its order, required Heather to complete certain requirements. It required her to submit to a psychological evaluation, a chemical dependency evaluation, and a parenting education course. The order also provided a specific parenting time schedule for Heather, with increasing parenting time. The order further required that Heather was not to leave K.R. alone, without proper adult supervision, and that she was to allow K.R. unrestricted access to use a cell phone provided by appellees to call the guardian ad litem or appellees during her visits with Heather.

On March 17, 2015, Heather filed a motion to dismiss the guardianship. A trial date was set for May 6.

On May 4, 2015, the guardian ad litem filed an ex parte motion to suspend visitation between Heather and K.R. because K.R. had disclosed to her therapist that she had been the victim of sexual abuse while in the care of Heather. The trial court entered an order on May 5, suspending visits and canceling the May 6 trial date set for Heather's motion to dismiss the guardianship.

On August 4, 2015, the State filed an information charging Heather with Class IIIA felony child abuse committed from May 1, 2013, through May 14, 2015, for failing to protect K.R. K.R. had identified two minor boys as the sexual perpetrators. The two boys and their family had lived in Heather's apartment for a short period of time. A trial was held on the criminal charge against Heather, and she was found guilty of child abuse. She was sentenced on December 29, 2016, to 18 months' probation.

On April 3, 2017, Heather filed a motion to terminate the guardianship and a motion to reinstate visitation. These are the motions that are the subject of this appeal.

Trial was held on both motions in May and June 2017. Cynthia was the first witness to testify for appellees. Cynthia testified that she does not want the guardianship terminated. She testified that since Heather was sentenced in December 2016, the only communication from Heather has been one email to her husband, Mark, requesting visitation with K.R. Heather had failed to send any other communication, updates, cards, gifts, or letters to K.R. Cynthia also testified that Heather has failed to acknowledge any responsibility, apologize, or express remorse for the sexual abuse K.R. suffered. Cynthia also testified that Heather had failed to provide any documentation, other than her own self-representations, that she had complied with any of the probationary orders of the court.

Cynthia testified that certain things seem to "trigger [K.R.'s] memories of abuse." Cynthia testified that K.R. refuses to go in a bathroom by herself and that she has had trouble with "wet[ting] her pants" at school for 3 years. Cynthia testified K.R. is fearful, has nightmares, sleepwalks, and sometimes wakes up screaming. Cynthia indicated that K.R.'s symptoms have "ebb[ed] and flow[ed]" over time, but that her symptoms recently increased when she became aware of Heather's motion to dismiss the guardianship. Cynthia testified that K.R. saw a letter from the court in appellees' mail and that after seeing the letter, she started hurting herself. She would hit herself, pull

her own hair, and squeeze her cheeks. Cynthia testified that she believed it was too early in Heather's probationary sentence to trust her to have any contact with K.R.

On cross-examination, Cynthia testified that she had not seen Heather for 3 years and did not know anything about her current fitness as a parent. She also testified that she did not know if Heather had completed some of the items required in the order establishing guardianship and that she did not know if Heather was in compliance with her probation order.

Jeanne Cattau, K.R.'s therapist, also testified. She testified that K.R. has been a patient of hers since January 2015 and was brought into therapy by appellees. Cattau testified that K.R. initially began disclosing instances of biting and hitting. She testified that in May 2015, K.R. began disclosing other physical and sexual abuse that had occurred in her home. K.R. originally identified a minor named "Seth" as the primary perpetrator, and then she began making disclosures regarding his older brother and that the abuse occurred on multiple occasions.

Cattau testified that K.R. disclosed being bitten, hit, choked, and drowned. K.R. also told Cattau she had been locked in a bathroom; had been left home alone to care for her younger sister; had seen one of the boys choke her sister; and had also seen one of them sit on her sister's chest, making it difficult for her to breathe. K.R. also reported "being forced to eat dog poop." These incidents occurred when Heather left K.R. and her younger sister alone with Seth and his brothers. Seth was approximately 12 years of age at the time of these events, and K.R.'s younger sister was 2 or 3 years of age. Cattau reported that K.R. is concerned about her younger sister's safety, is concerned that she is not in the home to watch out for her, and wants to see her.

Cattau testified that K.R. revealed that she had told Heather about the abuse by Seth and that Heather questioned Seth about it, but when Seth gave a different version of what had occurred, Heather believed Seth and ultimately blamed and punished K.R. for the sexual activity with Seth. Cattau

testified that K.R. is still working through the guilt and the blame.

Cattau also testified that she was not in favor of visitation between Heather and K.R. at the time of trial and testified as to what steps would need to be taken and what progress needed to be made before she would recommend visitation, supervised or otherwise. Cattau testified that she did not support termination of the guardianship.

Cattau acknowledged that K.R. had recently started to display additional emotional outbursts, such as hitting herself, out of concern for the current proceedings. Cattau also testified that K.R. has told her there had been more abuse in addition to what she had already disclosed but that she was not ready to talk about it. K.R. told Cattau that she felt Heather did not love her and did not care about her because Heather believed Seth instead of her.

Cattau testified on cross-examination that she believed K.R. was being truthful with respect to her disclosures of abuse in Heather's home. Cattau also testified K.R. recalled that Heather told her during visits not to talk about what had happened in their home, specifically not to talk about Seth, because it would "tear the family apart." Cattau stated that Heather's telling K.R. not to talk about the abuse was very concerning because it could increase K.R.'s fears and continue her "sense of guilt."

Cattau admitted that she had only met Heather one time, had never observed Heather and K.R. together, and had not conducted any therapy or performed any evaluation with Heather.

Appellees also called Heather to testify. She testified that she has been married since November 2014 and has lived with her husband since June 30, 2014. She also testified that she was employed at the time of trial.

She testified that she knew in May 2014 about K.R.'s being physically abused—specifically, she knew that Seth had hit and bit her. K.R. was 6 years old at the time. Heather testified

that when she learned about the abuse, she asked the family living with her to move out. Instead of moving out, the family had Seth go live with an aunt. Heather testified that Seth lived in her home for only 2 weeks and that the rest of the family lived there for about a month. She testified that Seth had no additional contact with K.R. after he moved out.

Heather testified that she learned about the sexual abuse in June 2015 when a police officer called to ask her questions. She testified that although K.R. reported to her therapist that she told Heather about the sexual abuse, Heather denied that K.R. had told her. She admitted that she failed to protect K.R., but not intentionally, and since that time, she has made efforts to address her failure. She also testified that she will "have to live with [failing to protect K.R.] for the rest of [her] life" and that she will "never forgive herself."

Heather testified that in 2014, she did a chemical dependency evaluation, a psychological and parental fitness evaluation, and took a parenting class. In 2015, she started seeing a therapist and continued until December 2016. Her therapist released her from therapy, and her probation officer was satisfied with that and indicated she was not going to require Heather to do additional therapy. In 2017, she took another psychological and parental fitness evaluation, another chemical dependency evaluation, and another parenting course.

Heather testified that she has complied with or is working toward complying with every provision of her probation. She acknowledged that there is a no-contact order between her and K.R. and that she has not attempted to contact K.R. She has not spoken to K.R. since she disclosed the sexual abuse in May 2015, because that is when the no-contact order was implemented. Heather denied telling K.R. during visits prior to May 2015 that she should not talk about the abuse by Seth.

After Heather's testimony, Heather motioned for a directed verdict, which the court denied. Heather then presented her evidence, beginning with her own testimony.

Heather testified that she has lived in the same home since June 30, 2014, and that her name is on the lease for her home. She lives in the home with her husband and K.R.'s younger sister. She also testified that she has worked for the same employer since 2014.

Heather testified about the order that established the guardianship and what it required her to do. She testified that it required her to undergo a psychological parenting evaluation, which she did, and that the evaluation recommended she see a therapist to address her low self-esteem issues. She testified that she has completed therapy and was discharged successfully. She testified that she still maintains contact with her therapist and that she can go see her therapist if she feels she needs to or her probation officer requests that she see her. The order required her to have a chemical dependency evaluation, which she did, and which also recommended counseling. She also completed a parenting class, as required in the order establishing the guardianship.

Heather further testified that on her own, she obtained a second psychological and parental fitness evaluation and took another parenting class that specifically addressed dealing with children who have gone through trauma.

She also explained that she did recall K.R.'s talking about Seth during two different visits and that she told K.R. that she did not need to worry about him anymore because he was not around anymore to hurt her. Heather testified that K.R. may have misunderstood what she said.

Dr. Stephanie Peterson, a clinical psychologist, also testified for Heather. She performed two psychological evaluations and parenting assessments of Heather, one in November 2014 and the other in March 2017. Peterson testified that Heather does not have a personality disorder. Her clinical profile was "within normal limits [and] no psychopathology was indicated by her results." Peterson testified that she interviewed appellees and reviewed the documentation they provided and that she could not support their concerns about Heather with any

data. All the data she collected showed that Heather "had all the qualities of an adequate parent."

Peterson testified that at the time she updated Heather's psychological and parenting evaluation in March 2017, Heather "had grown in her knowledge as a parent and her self-esteem had improved." Peterson further stated that Heather had grown and changed in positive ways, which Heather attributed in part to her work in therapy, among other things. Peterson noted that Heather was still married to the same person she was at the time of the first evaluation, her living situation was stable, and she had stable employment. Peterson further noted that Heather has another child living with her, K.R.'s younger sister, whom she has coparented with the child's father in a stable arrangement and no one has notified her of any issues or bad parenting on Heather's part in regard to that child. She testified that if a parent is competently parenting one child, it indicates the parent should be able to competently parent another child.

Following trial, the court entered an order finding that terminating the guardianship would be a detriment to K.R.'s welfare. It further found:

> [Heather] may certainly place herself in a position in the future to regain custody of [K.R.] after a period of regular visitation and re-establishing a parental relationship. Given the sensitive nature of this case and [K.R.'s] current mental state, this court will entertain reinstating visits, ordering family therapy and terminating the guardianship *if and when* it is recommended by [K.R.'s] therapist. However, until that occurs, the guardianship established on October 28, 2014 shall remain in full force and affect.

(Emphasis in original.)

ASSIGNMENTS OF ERROR

Heather assigns that the trial court erred in (1) failing to terminate the guardianship over K.R.; (2) failing to reinstate

visitation between Heather and K.R.; and (3) improperly delegating authority to K.R.'s therapist regarding "visitation, termination of the guardianship, and family therapy."

STANDARD OF REVIEW

[1-3] Appeals of matters arising under the Nebraska Probate Code are reviewed for error on the record. See, *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004); *In re Guardianship of Elizabeth H.*, 17 Neb. App. 752, 771 N.W.2d 185 (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. *In re Guardianship of D.J., supra*; *In re Guardianship of Elizabeth H., supra*. An appellate court, in reviewing a judgment for errors appearing on the record, will not substitute its factual findings for those of the lower court where competent evidence supports those findings. *In re Guardianship of Elizabeth H., supra*.

ANALYSIS

Motion to Terminate Guardianship.

Heather first assigns that the trial court erred in failing to terminate the guardianship over K.R. Specifically, Heather argues that appellees failed to meet their burden of proving by clear and convincing evidence that Heather either is unfit or has forfeited her right to custody.

[4-6] It is well established that there are two competing principles in the area of child custody jurisprudence: the parental preference principle and the best interests of the child principle. See *In re Guardianship of D.J., supra*. Courts have long considered the best interests of the child to be of paramount concern in child custody disputes. See *id*. Yet, "the principle of parental preference provides that a court 'may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the

[parent-child] relationship or has forfeited that right.'" *Id*. at 244, 682 N.W.2d at 243 (quoting *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996), *disapproved on other grounds, In re Interest of Lilly S. & Vincent S.*, 298 Neb. 306, 903 N.W.2d 651 (2017)).

[7-10] In weighing these two principles, the Nebraska Supreme Court has held that in guardianship termination proceedings involving a biological or adoptive parent, "the parental preference principle serves to establish a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent." *In re Guardianship of D.J.*, 268 Neb. at 244, 682 N.W.2d at 243. Under this principle, a parent's natural right to the custody of his or her child "trumps the interest of strangers to the parent-child relationship and the preferences of the child." *Id*. at 244, 682 N.W.2d at 243-44. Therefore, for a court to deny a parent the custody of his or her minor child, it must be affirmatively shown that such parent is unfit to perform parental duties or that he or she has forfeited that right. See *id*. Thus,

> an individual who opposes the termination of a guardianship bears the burden of proving by clear and convincing evidence that the biological or adoptive parent either is unfit or has forfeited his or her right to custody. Absent such proof, the constitutional dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent.

In re Guardianship of D.J., 268 Neb. 239, 249, 682 N.W.2d 238, 246 (2004).

[11,12] However, the Nebraska Supreme Court has stated that "[w]hile preference must be given to a biological or adoptive parent's superior right to custody where the parent is not unfit and has not forfeited his or her parental rights, a court also considers the child's best interests in making its custody determination." *Windham v. Griffin*, 295 Neb. 279, 290, 887 N.W.2d 710, 718 (2016), citing *In re Guardianship of D.J., supra*. The court in *Windham* further held:

> We continue to adhere to the view that the parental preference doctrine, by definition, is a preference, and it will be applied to a child custody determination unless it is shown that the lawful parent is unfit or has forfeited his or her superior right or the preference is negated by a demonstration that the best interests of the child lie elsewhere.

295 Neb. at 288, 887 N.W.2d at 717, citing *In re Guardianship of D.J., supra*. The court in *Windham* noted that there have been rare instances where courts have determined that the best interests of the child defeated the lawful parent's preference. The court in *Windham* referred to *Gorman v. Gorman*, 400 So. 2d 75 (Fla. App. 1981), as one such case. In *Gorman*, the trial court found both the biological father and the ex-stepmother to be fit and proper parents, but awarded custody of the child to the ex-stepmother. On appeal, the appellate court affirmed the trial court's determination that it was in the child's best interests for the ex-stepmother to have custody rather than the lawful parent.

We determine that like *Gorman*, the present case is one of those rare cases where the best interests of the child defeats the parental preference principle.

The evidence showed that Heather had been convicted of child abuse for failing to protect K.R. and had been sentenced only 3 months earlier at the time she filed her motion to terminate the guardianship. Cynthia testified that K.R. was still dealing with symptoms of the abuse, such as refusing to go into a bathroom by herself, "wet[ting] her pants" at school, and having nightmares. Cynthia testified that K.R.'s symptoms increased when she learned of Heather's motion to dismiss the guardianship, which included K.R.'s hurting herself.

Cattau, who had been K.R.'s therapist since January 2015, testified about the effects of the abuse on K.R. and how she was dealing with the trauma. Cattau testified that K.R. informed her she had told Heather about the sexual abuse and that Heather did not believe her and blamed her for any sexual

activity with Seth. Cattau testified that K.R. is still working through the guilt and blame that she feels from Heather. K.R. also told Cattau that she does not believe Heather cares about her or loves her. Cattau agreed with Cynthia that K.R. had been having additional emotional outbursts, such as hitting herself, because of these proceedings. K.R. has also indicated that she has suffered more abuse than what she has disclosed so far. She stated that it was imperative that K.R.'s emotional state and emotional well-being be taken into consideration. Cattau testified that she did not support termination of the guardianship and was not in support of any type of visitation between Heather and K.R. at the time of trial.

Based on the evidence presented, K.R. is still dealing with the abuse she endured and the role that Heather played in allowing the abuse to occur. As previously stated, at the time of trial, Heather had been convicted of child abuse for failing to protect K.R. and Heather was serving her sentence of 18 months' probation. We conclude that based on the circumstances in this case, the parental preference principle is negated by a demonstration that K.R.'s best interests will be served by keeping the guardianship in place. Therefore, the trial court did not err in failing to terminate the guardianship over K.R.

Motion to Reinstate Visitation.

Heather also assigns that the trial court erred in failing to reinstate visitation between her and K.R. At the time of trial, Cattau testified that she did not believe any type of visitation should take place between Heather and K.R. She also testified about what she believed needed to happen before visitations could take place. We find no error in the court's refusal to reinstate visitation.

Delegation of Decisions to Therapist.

Heather assigns that the trial court erred in improperly delegating decisions regarding visitation, family therapy, and

the guardianship to K.R.'s therapist. Her assignment of error is based on the court's statement that "[g]iven the sensitive nature of this case and [K.R.'s] current mental state, this court will entertain reinstating visits, ordering family therapy and terminating the guardianship[,] *if and when* it is recommended by [K.R.'s] therapist." (Emphasis in original.) Heather argues that allowing Cattau to make these decisions was an improper delegation of the court's authority. We disagree.

The trial court did not delegate decisions to Cattau, but, rather, stated that it would not consider reinstating visits, ordering family therapy, and terminating the guardianship until such time as these things were recommended by K.R.'s therapist. The court retained the authority to make these decisions and only stated that it would need to hear from the therapist that K.R. was ready for such steps to be taken. Heather's final assignment of error is without merit.

CONCLUSION

We conclude that the county court did not err in denying Heather's motion to terminate the guardianship over K.R., did not err in denying her motion to reinstate visitation, and did not improperly delegate any decisions to K.R.'s therapist. Accordingly, the order of the county court is affirmed.

Affirmed.

State of Nebraska, appellee, v. Jahhme D. Jackson, appellant.

923 N.W.2d 97

Filed January 8, 2019. No. A-17-1154.

1. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
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. **Rules of Evidence: Appeal and Error.** Where 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.
4. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction for 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.
5. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
6. **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 instruction.

7. **Self-Defense.** To successfully assert the claim of self-defense, a defendant must have a reasonable and good faith belief in the necessity of using force and the force used in defense must be immediately necessary and justified under the circumstances.
8. **Self-Defense: Proof.** The defendant bears the initial burden to produce evidence which supports a claim of self-defense.
9. **Self-Defense.** Only unlawful force directed at a defendant provides a justifiable basis for self-defense.
10. **Sentences: Appeal and Error.** An appellate court will not disturb sentences that are within statutory limits, unless the district court abused its discretion in establishing the sentence.
11. ____: ____. 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 following factors: the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
12. ____: ____. An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.

Appeal from the District Court for Lancaster County: Darla S. Ideus, Judge. Affirmed.

Joe Nigro, Lancaster County Public Defender, and Yohance Christie for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Pirtle, Bishop, and Arterburn, Judges.

Pirtle, Judge.

INTRODUCTION

Jahhme D. Jackson appeals his conviction and sentence for assault in the second degree in the district court for Lancaster County. He argues that the district court failed to provide proper

jury instructions, that an exhibit was improperly excluded, that the evidence was insufficient to support a guilty verdict on the charge, and that his sentence was excessive. Based on the reasons that follow, we affirm.

BACKGROUND

On May 11, 2017, Jackson was charged by information with assault in the second degree, a Class IIA felony, in violation of Neb. Rev. Stat. § 28-309 (Reissue 2016). The charge arose from an incident on October 18, 2016, at the Nebraska State Penitentiary, where Jackson was incarcerated. Jackson had been placed in the "control unit" approximately 1 month before the incident occurred. On October 17, Jackson indicated to a staff member that he was suicidal. Jackson told the staff member that he was going to jump off the sink in his cell and "crack [his] head open." Jackson was subsequently moved to the skilled nursing facility (SNF). Inmates being taken to or from the control unit must be placed in restraints pursuant to Nebraska Department of Correctional Services procedures. When Jackson was moved from the control unit to the SNF, he was in restraints.

At the SNF, Jackson was placed in a room with a padded bed which was equipped with a five-point restraint system. The five-point restraint system is used to hold a person flat on his or her back by attaching fabric restraints to the person's legs, arms, and chest. Jackson was placed in the five-point restraint system. He remained in the five-point restraint system until dinner on October 18, 2016. Staff members released Jackson's chest and right arm restraints to allow him to eat. After eating, Jackson refused to allow the staff members to reattach the chest and right arm restraints.

At approximately 6 p.m. on October 18, 2016, Sgt. William Hogan was given orders by his lieutenant to move Jackson from the SNF to the control unit. Hogan and another staff member went to Jackson's room. Hogan entered Jackson's room and removed the blanket covering Jackson. He then provided

Jackson with a T-shirt and sweatshirt, because Jackson had been wearing paper garments while in the SNF. Hogan undid the restraint on Jackson's left arm to allow him to put on the clothing. After Jackson put on the clothing, Hogan approached him in order to put restraints on him for the transport to the control unit. Hogan said Jackson "told [him], if you put hands on me, I am going to put hands on you." Hogan attempted to further communicate with Jackson regarding this statement and the situation, but Jackson did not say anything else. Hogan then leaned over Jackson to attempt to put the restraints on him and Jackson jerked his hand away. Hogan called for assistance from the emergency response team (ERT).

Sgt. Jared Hanner was the ERT supervisor at that time. He responded to Hogan's call, along with the other ERT members. Hogan described the situation to Hanner. Hanner then explained to the ERT members that they would act in unison to restrain Jackson's arms if force was necessary. The ERT members entered the room along with Hogan and surrounded the bed that Jackson was on. Hanner asked Jackson "if he was going to fight," to which Jackson did not reply. Hanner then gave a signal to the other ERT members to attempt to restrain Jackson's arms in unison. Hanner restrained Jackson's left arm, but the other ERT members were not able to restrain his right arm and Jackson hit Hanner in the face twice with his right fist. ERT members then restrained Jackson on the bed until his hands were handcuffed behind his back. A member of the medical staff then came and examined Jackson to ensure he was not injured. Jackson was not injured during the incident. He was ultimately transported via a gurney to the control unit. Hanner suffered a black eye and a chipped bone in his nose.

After hearing all of the evidence, the jury convicted Jackson of assault in the second degree. The district court subsequently sentenced Jackson to 2 to 4 years' imprisonment to run consecutively to any other sentence Jackson was serving. Jackson received 2 days of credit for time served.

ASSIGNMENTS OF ERROR

Jackson asserts the district court erred in failing to provide a self-defense instruction to the jury and in excluding exhibit 5 from evidence. He further asserts that there was insufficient evidence to sustain a conviction and that the district court imposed an excessive sentence.

STANDARD OF REVIEW

[1] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision. *State v. Miller*, 281 Neb. 343, 798 N.W.2d 827 (2011).

[2,3] 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. Hill*, 298 Neb. 675, 905 N.W.2d 668 (2018). Where 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. *Id.*

[4] In reviewing a criminal conviction for 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. Cotton*, 299 Neb. 650, 910 N.W.2d 102 (2018), *disapproved on other grounds, State v. Avina-Murillo*, 301 Neb. 185, 917 N.W.2d 865 (2018). 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*.

[5] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Russell*, 299 Neb. 483, 908 N.W.2d 669 (2018).

ANALYSIS

Jury Instruction

At trial, Jackson requested that the court include a jury instruction regarding self-defense. The court determined that Jackson had not presented sufficient evidence to warrant the inclusion of a self-defense instruction.

[6-9] 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 instruction. *State v. McCurry*, 296 Neb. 40, 891 N.W.2d 663 (2017). To successfully assert the claim of self-defense, a defendant must have a reasonable and good faith belief in the necessity of using force and the force used in defense must be immediately necessary and justified under the circumstances. *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999). The defendant bears the initial burden to produce evidence which supports a claim of self-defense. *Id*. To successfully assert the claim of self-defense, a defendant must have a reasonable and good faith belief in the necessity of using force. *Id*. Only unlawful force directed at a defendant provides a justifiable basis for self-defense. *Id*. "Unlawful force" is force "which is employed without the consent of the person against whom it is directed and the employment of which constitutes an offense or actionable tort." Neb. Rev. Stat. § 28-1406(1) (Reissue 2016). The use of force by a warden or other authorized official of a correctional institution is justified if:

> (a) He or she believes that the force used is necessary for the purpose of enforcing the lawful rules or procedures of the institution, unless his or her belief in the lawfulness of the rule or procedure sought to be enforced is erroneous and his or her error is the result of ignorance or mistake as to the provisions of sections 28-1406 to 28-1416, any other provision of the criminal

> law, or the law governing the administration of the institution;
>
> (b) The nature or degree of force used is not forbidden by section 28-1408 or 28-1409; and
>
> (c) If deadly force is used, its use is otherwise justifiable under sections 28-1406 to 28-1416.

Neb. Rev. Stat. § 28-1413(4) (Reissue 2016).

The district court found that Jackson had not presented any evidence that the force used against him was unlawful. Jackson argues that the force was unlawful because the ERT members did not follow proper procedures. Jackson specifically alleges that this was a "planned use of force" which has a set of procedures which were not followed in this case. Brief for appellant at 18. In addition, Jackson alleges that the staff did not follow the guidelines for "levels of use of force." *Id.* at 20. Finally, Jackson alleges that the ERT members were unnecessarily aggressive in their actions.

While the violation of department policy may be evidence that the degree or nature of force used was unlawful, § 28-1413 ultimately requires the court to make a determination that the force used was not forbidden by Neb. Rev. Stat. § 28-1408 (Reissue 2016) or Neb. Rev. Stat. § 28-1409 (Reissue 2016). As such, we need not review whether the ERT members violated department policy but only determine whether the actual force used was appropriate under the statute. Jackson had been instructed to provide his hands to be restrained. He refused and then threatened Hogan. When confronted with additional ERT members, he did not respond to them and then punched Hanner in the face. These actions led up to the use of force against him. Given the amount of force used, and Jackson's own actions leading up to it, the force used does not fall under any of the restrictions of § 28-1408 or § 28-1409. Thus, the force used was justifiable pursuant to § 28-1413 and was therefore lawful force.

Jackson also argues that the force used was excessive and, thus, that he was entitled to a self-defense instruction. While

Nebraska recognizes such instructions where arresting officers use excessive force, see *State v. Yeutter*, 252 Neb. 857, 566 N.W.2d 387 (1997), this same standard has not been applied to staff at a correctional facility. However, the force used in this case would not rise to the level necessary to meet the defendant's initial burden if such standards were applied given the justified and lawful use of force discussed above. As such, we conclude the district court did not err in finding that Jackson failed to produce sufficient evidence to warrant a self-defense jury instruction.

Admission of Evidence

Jackson alleges that the court erred in excluding exhibit 5. Exhibit 5 consists of a video recording from a handheld camera of Jackson being transported from the SNF to his cell while strapped to a gurney. Jackson moved that the video be admitted under the rule of completeness after testimony from Hogan and Hanner regarding the aftermath of the incident. Exhibit 5 picks up recording after the alleged assault when Jackson was restrained and removed from the SNF. Jackson's attorney agreed with the district court that exhibit 5 did not show any events prior to or during the alleged assault.

Neb. Rev. Stat. § 27-106 (Reissue 2016) provides that when part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. In the present case, the act we are concerned with is the alleged assault on Hanner which was entirely captured on another exhibit. Similarly, the events which would have impacted Jackson's claim of self-defense all occurred before or at the time of the alleged assault, thus not triggering the rule of completeness. Therefore, we determine that the district court did not abuse its discretion in excluding exhibit 5.

Sufficiency of Evidence

Jackson argues that there was insufficient evidence to convict him of assault. He specifically argues that at the time

of the assault, he was not in control of his actions and was "reacting" to the staff members' actions, and thus, he did not intentionally or knowingly harm Hanner. Brief for appellant at 24. While Jackson did testify that he was reacting, that his actions were unintentional, and that he did not know Hanner was standing there, he also testified that he purposely swung to defend himself. In addition, Hogan said Jackson made the statement immediately prior to the alleged assault that "if you put hands on me, I am going to put hands on you." Based on this statement of Jackson's intent at the time of the alleged assault along with his later testimony, when viewed in the light most favorable to the prosecution, we conclude that any rational trier of fact could have found that Jackson intentionally or knowingly unlawfully struck or wounded Hanner.

Excessive Sentence

Jackson's final assignment of error is that the sentence imposed by the district court was excessive. Jackson was sentenced to 2 to 4 years' imprisonment to run consecutive to any other sentences he was serving. The statutory sentencing guidelines for a Class IIA felony has no minimum sentence and a maximum of 20 years' imprisonment. Neb. Rev. Stat. § 28-105 (Reissue 2016). Thus, the district court's sentence was within the statutory guidelines.

[10-12] An appellate court will not disturb sentences that are within statutory limits, unless the district court abused its discretion in establishing the sentence. *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001). 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 following factors: the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. See *id*. An abuse of discretion

takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id*.

The district court noted at the sentencing hearing that it considered Jackson's character and condition, as well as the circumstances of the crime and his history of assaults. Reviewing the relevant facts ourselves, we acknowledge Jackson's age and the extensive time that he has been in the justice system. However, we concur with the district court that Jackson's history of assaults and the circumstances surrounding the present crime necessitate a sentence of imprisonment. The district court further balanced the sentence between the seriousness of the crime and the resultant injuries in this case. As such, we determine that the district court did not abuse its discretion in sentencing Jackson to 2 to 4 years' imprisonment.

CONCLUSION

We conclude the district court did not err in denying Jackson's request for a jury instruction on self-defense, in excluding exhibit 5 from evidence, or in the imposition of the sentence. We further conclude that there was sufficient evidence to convict Jackson of the alleged crime. The order of the district court is affirmed.

Affirmed.

In re Interest of Mercedes L. et al., children under 18 years of age. State of Nebraska, appellee, v. Angaline L., appellant, and Oglala Sioux Tribe and Winnebago Tribe of Nebraska, intervenors-appellees.

923 N.W.2d 751

Filed January 15, 2019. Nos. A-17-1281 through A-17-1286.

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. **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.
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.
4. **Juvenile Courts: Parental Rights: Final Orders: Appeal and Error.** Juvenile court proceedings are special proceedings, and an order in a juvenile special proceeding is final and appealable if it affects a parent's substantial right to raise his or her child.
5. **Final Orders: Words and Phrases.** A substantial right is an essential right, not a mere technical right.
6. **Juvenile Courts: Parental Rights: Parent and Child: Time: 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.
7. **Juvenile Courts: Judgments: Parental Rights.** A review order in a juvenile case does not affect a parent's substantial right if the court

adopts a case plan or permanency plan that is almost identical to the plan that the court adopted in a previous disposition or review order.

8. **Juvenile Courts: Judgments: Appeal and Error.** A dispositional order which merely continues a previous determination is not an appealable order.
9. **Juvenile Courts: Appeal and Error.** The appealability of an order changing the permanency objective in a juvenile case is a fact-specific inquiry.
10. **Juvenile Courts: Adoption: Child Custody.** A juvenile court, except where an adjudicated child has been legally adopted, may always order a change in the juvenile's custody or care when the change is in the best interests of the juvenile.
11. **Juvenile Courts: Parental Rights.** The foremost purpose and objective of the Nebraska Juvenile Code is the protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parents where the continuation of such parental relationship is proper under the law. The goal of juvenile proceedings is not to punish parents, but to protect children and promote their best interests.
12. **Juvenile Courts: Jurisdiction: Child Custody.** Once a child has been adjudicated under Neb. Rev. Stat. § 43-247(3) (Reissue 2016), the juvenile court ultimately decides where a child should be placed. Juvenile courts are accorded broad discretion in determining the placement of an adjudicated child and to serve that child's best interests.
13. **Juvenile Courts: Minors: Proof.** The State has the burden of proving that a case plan is in the child's best interests.
14. **Appeal and Error.** Appellate courts will not consider issues on appeal that were not presented to or passed upon by the trial court.
15. **Juvenile Courts: Jurisdiction: Parental Rights: Appeal and Error.** The continuing jurisdiction of a juvenile court pending appeal from adjudication does not include the power to enter a permanent dispositional order.

Appeal from the County Court for Platte County: Frank J. Skorupa, Judge. Affirmed in part, and in part vacated.

Sharon E. Joseph for appellant.

Breanna D. Anderson, Deputy Platte County Attorney, for appellee.

Jacqueline Tessendorf, of Tessendorf & Tessendorf, P.C., guardian ad litem.

Pirtle, Riedmann, and Welch, Judges.

Per Curiam.

I. INTRODUCTION

Angaline L. appeals the orders of the county court for Platte County which approved a change in the permanency objective for Angaline and each of her six minor children from reunification to guardianship. Upon our review, we find the court did not err in ordering a change in the permanency objective. For the reasons that follow, we affirm, but we hold that the court's orders of December 12, 2017, appointing a guardian for each of the children are void for lack of subject matter jurisdiction and vacate those orders.

II. BACKGROUND

In each of these six related cases, consolidated on appeal, Angaline, the mother of the six juveniles involved, appeals from the November 13, 2017, orders of the county court that changed the permanency objective to guardianship. The orders adopted and approved the case plan/court report dated June 13, 2017.

The initial juvenile petitions were filed in July 2015. The petitions alleged that Mercedes L., born in 2000; Makario L., born in 2001; and Geovanny L., born in 2004, had been removed from Angaline's care on three prior occasions and that Ricardo H., born in 2007; Xavier H., born in 2009; and Savannah L., born in 2011, had been removed from Angaline's care on two prior occasions. The petitions further alleged:

> That the reason[s] the children were not safe in Angaline's care in 2012 and 2014 were that Angaline was suspected to be abusing methamphetamine as well as prescription drugs; that Angaline was not taking proper care of her children, especially Xavier and Geovanny, who have special medical needs; that Angaline was not ensuring the children were receiving a proper education by attending school on a regular basis and that Angaline allowed her

> mother . . . to provide care for her children while under the influence of methamphetamine.

The petitions also alleged that Angaline's children "had been in the Oglala Sioux Tribal Court's jurisdiction and custody and that due to Angaline's lack of cooperation with services the Tribal Court . . . terminated their involvement with Angaline and her children."

The children remained in Angaline's care until August 2015, when she was sentenced to a term of incarceration on charges of child abuse and neglect. The children were placed in two separate foster homes.

Amended petitions were filed on November 23, 2015, to add allegations regarding Angaline's incarceration. A "Notification of Termination of Tribal Jurisdiction" was filed for each child on December 7, and they included the tribal court order vacating jurisdiction filed on June 18. The tribal court order stated that, due to Angaline's lack of compliance, the Oglala Sioux Tribe vacated jurisdiction over the minor children and returned jurisdiction to "the State where they can better assist the family."

At a hearing on December 9, 2015, the guardian ad litem presented evidence from a designated federal Indian Child Welfare Act (ICWA) specialist, who is a member of the Oglala Sioux Tribe. He was qualified as an expert witness regarding ICWA and testified without objection from Angaline. The ICWA specialist stated, based on his knowledge of the cases and Angaline's current situation, "I believe at this time that the children would be at risk of harm and further neglect" if returned to Angaline's home. He testified that sibling visits and visits with Angaline at the prison, if allowed by the prison, would be considered active efforts. He also testified that a search for suitable families available for placement had been made based upon the information Angaline had provided to the tribe.

The court found, based upon the ICWA specialist's testimony, that there had been a diligent search for placement with

relatives and that the State had shown by clear and convincing evidence there was good cause to deviate from the placement preference. The court found that active and ongoing efforts for reunification included case management, family support services, foster and kinship placement, a foster care specialist, and clothing vouchers. The court "specifically" found that the Department of Health and Human Services (DHHS) "is making active efforts."

The children were adjudicated as children within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2015). The journal entry and orders of December 9, 2015, reflect an agreement that, should Angaline plead no contest to the amended petitions, the State and the guardian ad litem would not file for termination of parental rights on the basis of out-of-home placement within 10 months of Angaline's sentencing date, as long as Angaline remained eligible for parole on October 5, 2016.

The Winnebago Tribe of Nebraska filed a notice of intervention on December 17, 2015, with regard to Makario. The tribe remained a party to this case, but expressed no desire to transfer jurisdiction. The tribe requested updates from DHHS, and court reports were sent to its office.

At a hearing on February 22, 2016, the court received a case plan/court report prepared on January 25 as exhibit 1. Exhibit 1 contains a recommended permanency objective of reunification. The court adopted the case plan/court report and ordered the parties to comply with the case plan.

At a hearing on July 18, 2016, the court received a case plan/court report prepared on July 11 as exhibit 2. Exhibit 2 contains a recommended permanency objective of reunification, and the plan was adopted. The court specifically found that DHHS "is making active efforts to reach the permanency objective previously ordered by the Court." Active and reasonable efforts included case management, foster and kinship placement, foster care support, family support services, supervised visitation, and therapeutic services.

At a hearing on January 9, 2017, the court received a case plan/court report prepared on December 29, 2016, as exhibit 3. Exhibit 3 contains a recommended permanency objective of reunification with a concurrent plan for guardianship. The court accepted and approved exhibit 3 and specifically found that DHHS "is making active efforts to reach the permanency objective previously ordered by the Court and all parties are ordered to comply with the case plan/court report."

At a hearing on April 10, 2017, the court found that "[a]ctive efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family; those efforts, at this time, have been unsuccessful." Active efforts included home visits, family assessments, case management, family support services, parenting time, therapy, and Medicaid. The guardian ad litem stated that she had seen improvement in Angaline's attitude. She offered an opinion that "a guardianship would be good as long as there's continued relationship with the children, but the kids are old enough that they want to be around their mom and I think that's important."

On June 22, 2017, the Oglala Sioux Tribe filed a motion to transfer jurisdiction and dismiss and a motion to intervene. The court set a hearing on the motions for July 11. At the hearing on July 11, the attorney representing the tribe requested time to confer with the tribe and determine what its position was on the motion to transfer jurisdiction, in light of the evidence that "the children were not in favor of a transfer." The hearing was continued to August 8, at which time the tribe withdrew the motion to transfer jurisdiction.

At the August 8, 2017, hearing, the court received the June 13 case plan/court report as exhibit 4. Exhibit 4 contains a recommended change in the permanency objective from reunification with a concurrent plan for guardianship to a recommendation of guardianship. Angaline objected to the change in the permanency objective. The court ordered placement to continue with DHHS and found that reasonable

and active efforts included case management, family team meetings, home visits, Medicaid, family support, drug testing, parenting time, safety planning, referrals to providers for evaluation, and "contact with the tribe." The court found that DHHS has made reasonable efforts toward the permanency goal.

On August 10, 2017, the guardian ad litem filed petitions for appointment of a permanent guardian for each child. The court set a hearing to take up the petitions for appointment and Angaline's objection to the change in the permanency objective.

Hearings took place on October 24, October 31, and November 8, 2017. An email from a representative of the Oglala Sioux Tribe was offered and received as exhibit 5. The email granted permission for the State to make the affirmation on the record that the tribe supported the State's plan for guardianship.

Lynda McCullough, a child and family services specialist with DHHS, is the case manager for Angaline and the minor children. She testified that the children have continuously been in the custody of DHHS since April 2015. At the time of the hearing, all of the children resided with the same foster family. Three of the children have been placed with the current foster family since 2015, and the other three have been placed with the current family since 2016. She testified that it is the recommendation of DHHS that the children achieve "permanency of guardianship" with the foster family.

McCullough testified that there have been some problems reported to her with regard to Angaline. On one occasion, Angaline told Ricardo to cancel plans to attend a friend's birthday party, because she planned to have a birthday party for Ricardo. Angaline "did not produce the party [as] promised," and the foster family reported that he had been "crushed." He was disappointed that he had missed his friend's birthday party and that he did not have his own. Angaline testified that she did not make Ricardo stay home from the birthday party,

but, rather, Ricardo told her he had not wanted to attend the friend's birthday party and did not know how to tell his foster mother, so Angaline helped him.

McCullough testified that there was some concern that Angaline was not adequately caring for the children's specific medical needs. Xavier has a condition called necrotized enterocolitis that resulted in the removal of part of his intestine. Xavier has a feeding tube, and because of his compromised digestive system, he is unable to process sugars properly. He is limited to 6 grams of sugar per day and can have serious complications if he consumes more than that amount. Xavier has made progress while in the care of the foster family, to the extent that he may be able to have the feeding tube removed.

Concerns were raised by the guardian ad litem and the court at the hearings in January and April 2017 that Angaline was not careful enough with regard to the foods that were provided to Xavier at visits. As a result, Xavier became ill upon his return to his foster home. McCullough testified on October 24 that Angaline texted the foster mother on one occasion to inform her that "Xavier will be having sugar at my home this weekend." McCullough testified that Angaline had said she would let Xavier have sugar "when she got him back." McCullough considered this a safety concern, because it showed a lack of concern for Xavier's health. There were no reports of concerns regarding Xavier's sugar intake after September 2017.

McCullough testified that Angaline participated in therapy "occasionally," until the end of April 2017, then she had stopped attending. The therapist told McCullough that therapy was no longer appropriate because of Angaline's inconsistency in attending. Angaline testified that she spoke to the therapist and that she was under the impression she could return to therapy after "[her] grandma was better." Her grandmother passed away in the end of May 2017, and another grandmother passed away in June 2017. There was no evidence

that Angaline attempted to return to therapy after April 2017. Angaline testified that she enrolled in some outpatient classes to work on parenting skills and anger management. She completed counseling services, but the counselor was no longer approved by DHHS.

Angaline worked at a fast-food restaurant for 6 or 7 months, and McCullough confirmed her employment. Since then, Angaline has reported doing work for various employers, but she has not responded to McCullough's request for a pay stub or a verification from her employer. On November 8, 2017, Angaline testified that she applied for a factory job, but if it did not work out, she has a friend who would give her a job at a gas station.

Angaline tested positive for opiates on August 14, 2017, and she did not report taking a prescription drug that would account for the positive test. Angaline did not participate in drug testing during the month of September 2017. If a parent does not participate in testing, it is considered to be a positive test. Angaline testified that she had missed testing in September because she had been out of town for work. Angaline agreed to drug testing at the October 24 hearing and tested negative for controlled substances. She testified that she has been sober since December 2011.

At the time of the hearing, Angaline was approved and scheduled for visits for 20 hours per week, which took place on Saturdays and Sundays. McCullough testified that there is some "friction" between Mercedes and Angaline at visits. She said Angaline has "had some good days, she's had some bad days" with regard to visits. She said there have been some days when the children do not want to attend visits because they have activities or field trips planned. McCullough said Angaline tells the children, "Remember if you don't want to do the family activities, don't even bother coming." McCullough said that typically during visits, the children watch television, "play[] games on their phones," sleep, and occasionally play outside.

Angaline testified that during visits, Mercedes and Makario like to sleep or spend time by themselves. She asks the younger children to help prepare lunches, and they play sports, build forts, read books, and do other activities. She tries to set aside one-on-one time with the younger children. She testified that her family support worker suggested notifying the children, specifically Mercedes and Makario, when there would be a family activity planned for the next day and that they had the option of doing the planned activity or opting not to come to the visit.

A family support worker testified that on an average day at a visit, the children would come into the house, hug Angaline, and separate and "do their own thing." He said that Angaline spends time with each child and that he has seen her use appropriate discipline and take steps to make sure only appropriate individuals are present during visits.

McCullough testified that the children are involved in a variety of activities with the support of the foster family. Such activities include 4-H, wrestling, football, dance classes, and "circle time" with the Ponca Tribe. Mercedes decided to forgo some of her former activities, because she wanted more free time to focus on her job at a fast-food restaurant. The children all help "gather eggs from the chickens" and "care [for] the animals" at their foster home.

The children's foster mother testified that she and her husband requested appointment as guardian of each of the six children. She stated that they have the means to provide proper housing and food for the children and that the children would be able to regularly attend school and participate in activities. She testified that she would be willing to allow the children to visit with Angaline if a guardianship was established and that she would encourage a relationship between the children and Angaline.

McCullough stated that since she became involved with the family, she has observed "very little" progress, and that she was not in a position to recommend that the children be placed

with Angaline. She stated her belief that the children are in need of permanency and that permanency can be achieved through a guardianship with the foster family.

A representative from the Winnebago Tribe of Nebraska stated that the tribe would stand by the position asserted in an affidavit filed on September 18, 2017. The representative stated the affidavit expressed the tribe's approval of a guardianship for Makario.

Angaline testified that Mercedes had asked her to sign guardianship papers and that Makario had told her at one time to sign and at another time that he did not want her to sign them. She stated that it is not her desire for the children to be in a guardianship, because she believes she is able to care for the children.

The court asked Mercedes and Makario to give their thoughts on a potential guardianship. Mercedes said, "I consent to it; I agree. I think the kids would be better off. I mean I'm graduating this year so it doesn't really affect me that much." When asked, "What do you think about a guardianship?" Makario responded, "I'd like that." Both children expressed a desire to maintain contact with Angaline.

On November 13, 2017, the court filed an order for each child overruling Angaline's objection to the permanency objective of guardianship and finding by clear and convincing evidence that it was in the best interests of each child that the proposed change in the permanency objective be approved. In its orders, the court set a hearing on the guardian ad litem's petitions for appointment of a guardian for each child to take place 2 weeks later on November 27. On November 27, the day of the hearing for appointment of a guardian, Angaline filed in each case an "Objection to Guardianship." The court conducted the hearing on November 27, and the cases were taken under advisement.

Prior to the court ruling on the guardian ad litem's petitions for appointment of a guardian for each child, Angaline filed a notice of appeal in each case on December 11, 2017. Each

notice of appeal stated that she was giving notice "of her intention to appeal the order imposed upon her in this matter, to the Court of Appeals of Nebraska. Final Order in this matter was filed on November 13, 2017."

A hearing was held on December 12, 2017. On that day, the court filed orders specifically appointing an individual, the foster father, as permanent guardian of each of the children. The orders delineated the specific responsibilities of the guardian and relieved DHHS of the responsibility of supervising the placement of the children.

III. ASSIGNMENTS OF ERROR

Angaline asserts the county court erred in changing the permanency objective to guardianship. She also asserts the court erred in appointing a guardian for the children, arguing that the court did not adhere to the requirements of ICWA and the Nebraska Indian Child Welfare Act (NICWA).

IV. 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 Jaydon W. & Ethan W.*, 25 Neb. App. 562, 909 N.W.2d 385 (2018).

V. ANALYSIS

1. Jurisdiction

[2-4] 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. *In re Interest of Jaydon W. & Ethan W., supra*. 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. *Id.* Juvenile court proceedings are special proceedings, and an order in a juvenile special proceeding is final and appealable if it affects a parent's substantial right to raise his or her child. *Id.* Thus, if the juvenile court's orders

changing the permanency objective affected Angaline's substantial right to raise her six children, the orders were final and appealable. But if the orders did not affect a substantial right, we lack jurisdiction and must dismiss the appeals.

[5-8] A substantial right is an essential right, not a mere technical right. *In re Interest of Jaydon W. & Ethan W., supra.* 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. *Id.* A review order in a juvenile case does not affect a parent's substantial right if the court adopts a case plan or permanency plan that is almost identical to the plan that the court adopted in a previous disposition or review order. *Id.* Thus, a dispositional order which merely continues a previous determination is not an appealable order. *Id.*

On January 18, 2018, this court issued an order to show cause because it was not clear whether the November 13, 2017, orders were final and appealable. In her response, Angaline argued that a substantial right was affected because the November 13 orders did not contain a plan to assist in her rehabilitation or to reunite her with her children and because the December 12, 2017, orders established a guardianship. On February 9, 2018, we ordered the case to proceed, reserving the issue of jurisdiction for later determination.

The parties addressed the issue of whether the juvenile court's November 13, 2017, orders changing the permanency objective to guardianship were final, appealable orders. The State and the guardian ad litem contend that the orders did not affect a substantial right and, as such, they are not final, appealable orders and that this court lacks jurisdiction over this appeal. Conversely, Angaline contends:

> Additionally, there was no continuing plan to allow or assist [Angaline] in rehabilitation to reunite with her children in the case plan of June 13, 2017, in the order of November 13, 2017 changing the permanency goal

> to guardianship with no concurrent goal for reunification, or in the order of December 12, 2017 granting the guardianship. Thus, the substantial right of [Angaline] to parent her children is affected and is a final appealable order.

Brief for appellant at 5.

We note that in Angaline's statement of jurisdiction in her brief, she asserts she "filed a timely Notice of Appeal on December 13, 2017." Brief for appellant at 5. However, in each case the file stamp indicates that the notice of appeal and motion and affidavit to proceed in forma pauperis were efiled in the Platte County Court on the afternoon of December 11. The notices of appeal state, "Final Order in this matter was filed on November 13, 2017."

At oral argument, the parties indicated that the notices of appeal were filed December 12, 2017. The court asked the parties if they would be willing to enter into a stipulation agreeing to such, and they indicated that they would. A stipulation was subsequently filed with this court; however, after reviewing the record, we find in each case that the notice of appeal and motion and affidavit to proceed in forma pauperis were efiled by Angaline on December 11.

Angaline encourages this court to consider the county court's orders of December 12, 2017, in determining that the November 13 orders are final. The December 12 orders were issued after the notices of appeal were filed, and therefore, they do not control the jurisdictional question in these cases, which is whether the November 13 orders are final. See, generally, *Tilson v. Tilson*, 299 Neb. 64, 907 N.W.2d 31 (2018). Upon our review, we find Angaline appealed from the orders of November 13, not the orders of December 12. For the sake of completeness, we note that the December 12 orders were issued after Angaline filed her notices of appeal. If the November 13 orders were not final orders, then Angaline failed to perfect appeals from the December 12 orders within 30 days as required by Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

If the November 13 orders were final orders, then we must address whether the court had jurisdiction to appoint a guardian as it did in its December 12 orders.

We must first determine whether the November 13, 2017, orders, standing alone, are final and appealable. The appealability of an order changing the permanency goal is not always clear. In *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009), the mother appealed from a review order in which the permanency objective had changed from reunification to adoption. This court stated that, in determining whether this provision affected a substantial right of the mother, a pertinent inquiry was whether there was still a plan allowing her to take steps to reunite with the children. We also observed that the new order contained the same services as the previous order, it did not change the mother's visitation or status, and it implicitly provided the mother an opportunity for reunification by complying with the terms of the rehabilitation plan. We found the order did not affect a substantial right, and the appeal was dismissed for lack of a final, appealable order.

In *In re Interest of Diana M. et al.*, 20 Neb. App. 472, 825 N.W.2d 811 (2013), the order modifying the permanency plan objective was coupled with an order ceasing further reasonable efforts to bring about reunification. Thus, the court found the order was appealable.

The Nebraska Supreme Court has also based its analysis of appealability, not just on the language of the order, but also on an examination of the colloquy between counsel and the trial judge at the hearing. See *In re Interest of Octavio B. et al.*, 290 Neb. 589, 861 N.W.2d 415 (2015). In *In re Interest of Octavio B. et al.*, the Supreme Court found the "juvenile court's statements from the bench essentially eviscerated the opportunity to achieve reunification." 290 Neb. at 598, 861 N.W.2d at 423. The Supreme Court was swayed by the court's statement relieving DHHS from providing services to the mother that were inconsistent with the new permanency goals.

[9] Nebraska case law demonstrates that the appealability of an order changing the permanency objective in a juvenile case is a fact-specific inquiry. Accordingly, we have reviewed the case plans, proceedings, and orders of the county court to determine whether the November 13, 2017, orders affect a substantial right in a special proceeding.

The case plan dated December 29, 2016, includes a "Caregiver Plan," which includes listed priorities based upon the identified needs of the family. Each priority listed includes a goal, strategies by which the parent will achieve the goal, services which will be provided, and a summary of the parent's progress toward the goal. The goals identified for Angaline include providing a safe and stable living environment and learning to effectively parent her children based upon their developmental and emotional needs. The June 13, 2017, case plan, which was adopted by the court in its November 13 orders, does not include a similar "Caregiver Plan."

The June 13, 2017, court report/case plan states that Angaline is authorized 20 hours of visitation per week. The report states, "It is respectfully recommended that supervised visitations be ended upon completion of the Guardianship and that [the proposed guardians] monitor and agree to visitations with [Angaline] as they deem appropriate and at the recommendation of the children's therapists." It is not clear in the June 13 plan what, if any, additional services are being provided or will continue to be provided upon adoption of the plan. However, the absence of a clear plan for Angaline weighs in favor of a finding that the adoption of this case plan affects a substantial right. The case plan also includes a section titled "Additional Recommendations," which states, "[DHHS] respectfully recommends to the Juvenile Court of Platte County the establishment of the Guardianship and dismissal of DHHS from the case."

In adopting the June 13, 2017, case plan in its November 13 orders, the court found, "The evidence is clear and convincing that it is in the best interest of the minor child that

the permanency goal of guardianship should be approved." There was no order ceasing further reasonable efforts at that time and no specific finding at the hearing or in the orders that DHHS was being dismissed from the cases at that time. However, the November 13 orders set a hearing on the guardian ad litem's petitions for appointment of a guardian for each child for November 27, approximately 2 weeks later. Therefore, Angaline was provided very little time for rehabilitation if she hoped to avoid the appointment of a guardian for her children.

Upon our de novo review of the record, we find the November 13, 2017, orders essentially eviscerated Angaline's opportunity to achieve reunification and, therefore, affected a substantial right. Thus, we hold that the court's November 13 orders were final and appealable.

2. Change of Permanency Plan

Angaline first asserts the court erred by finding in its November 13, 2017, orders that it was in the children's best interests to change the permanency plan from reunification with a concurrent plan for guardianship to guardianship only. Specifically, Angaline asserts the State failed to provide that she is unfit and unable to rehabilitate herself such that active efforts toward reunification are not needed and a guardianship is appropriate.

[10-13] Our Supreme Court has held that "[a] juvenile court, except where an adjudicated child has been legally adopted, may always order a change in the juvenile's custody or care when the change is in the best interests of the juvenile." *In re Interest of Samantha L. & Jasmine L.*, 286 Neb. 778, 786, 839 N.W.2d 265, 271 (2013). Further, the Supreme Court has stated:

> The foremost purpose and objective of the Nebraska Juvenile Code is the protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parents where the continuation of

> such parental relationship is proper under the law. The goal of juvenile proceedings is not to punish parents, but to protect children and promote their best interests. Once a child has been adjudicated under § 43-247(3), the juvenile court ultimately decides where a child should be placed. Juvenile courts are accorded broad discretion in determining the placement of an adjudicated child and to serve that child's best interests. The State has the burden of proving that a case plan is in the child's best interests.

In re Interest of Octavio B. et al., 290 Neb. 589, 599-600, 861 N.W.2d 415, 424 (2015).

In the November 13, 2017, orders, the county court noted that poor progress was being made to alleviate the causes of the out-of-home placements and listed factors which weighed in favor of a change in the permanency objective. The court mentioned instability in Angaline's life, specifically the fact that since Angaline's release from incarceration, she has not demonstrated that she can maintain employment or a stable home for the children. The court also considered the length of time the children had been in foster care and their successes in school and extracurricular activities while living in a stable environment. The court considered the stated desire of the oldest two children for guardianship and the Oglala Sioux Tribe's agreement with the permanency goal of guardianship. The Winnebago Tribe of Nebraska approved of a goal of guardianship for Makario, the only child in this case who is an enrolled member.

The record shows that DHHS became involved with Angaline and the children in July 2015 and that the children have been in out-of-home placement since August 2015, when Angaline became incarcerated for child abuse and neglect. Since then, DHHS has provided the family with services, including family support, parenting time, foster care, family team meetings, safety planning, Medicaid, family therapy and counseling, case management, and referrals to providers

for evaluations. Angaline's goals included: (1) providing a safe and stable living environment; (2) maintaining a home residence and full-time employment; (3) providing for the children's basic daily needs, as well as Xavier's and Geovanny's special needs; (4) caring for her own mental health needs; (5) refraining from the use of drugs and alcohol; (5) not allowing illegal activity or drug users in the home; and (6) learning to effectively parent her children based on their developmental and emotional needs.

Angaline has not demonstrated sufficient progress toward the goal of reunification. The record shows that Angaline has struggled with caring for the specific medical needs of at least one child and that family therapy has been discontinued due to Angaline's lack of consistency in attending the sessions. Despite Angaline's participation in some court-ordered services, she has demonstrated she is either unwilling or unable to make the necessary changes in her life. Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *In re Interest of Octavio B. et al., supra.* Upon our de novo review, we find it was in the children's best interests to change the permanency objective to guardianship. Thus, the county court did not err in changing the permanency objective to a plan for guardianship after over 2 years of reasonable and active efforts yielded little progress.

3. Compliance With ICWA and NICWA

(a) Appointment of Guardian Without Expert Testimony

Angaline next asserts the court failed to comply with ICWA and NICWA by finding that there had been active efforts toward reunification despite the lack of testimony by a qualified expert witness. Specifically, Angaline asserts the court erred in appointing a guardian for each child despite the lack of expert witness testimony, as required by ICWA and NICWA.

[14] Angaline appealed from the November 13, 2017, orders that changed the permanency objective from reunification to guardianship. She did not appeal from the December 12 orders where the court appointed the guardian. To the extent that Angaline argues that appointment of a guardian was in error, we decline to address this issue because it does not relate to the November 13 orders, from which she appealed. See *In re Interest of Paxton H.*, 300 Neb. 446, 915 N.W.2d 45 (2018) (appellate courts will not consider issues on appeal that were not presented to or passed upon by trial court). That said, as noted above, the court's December 12 orders were issued after Angaline perfected her appeals from final orders rendering those orders null.

(b) Active Efforts

Angaline next argues that the court erred when "the lower court relieved the State of the responsibility to provide active efforts to reunify the family." Brief for appellant at 27-28. We understand this argument as being in reference to the change in permanency objective and not in reference to the appointments of guardian on December 12, 2017. Angaline argues that the State failed to prove that she was unfit and unable to rehabilitate herself such that active efforts toward reunification were not needed and guardianships were appropriate and in the best interests of the minor children. Angaline further argues that the State "failed to make active efforts to reunify the Indian Family throughout the entire case." *Id.* at 28.

Neb. Rev. Stat. § 43-1505(4) (Reissue 2016) 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.

We first note that the November 13, 2017, orders neither sought to effect the foster care placement of or termination

of parental rights of Angaline. Her children were already placed with foster parents, and the orders dealt only with the change in permanency objective. Assuming without deciding that § 43-1505(4) applies to a change in permanency objective, upon our de novo review of the record, we find that active efforts had been made but that Angaline did not demonstrate sufficient progress toward a goal of reunification. Throughout the pendency of this matter, the court routinely reviewed the case plan/court reports prepared by DHHS, which were offered and received at the review hearings. Angaline did not object at any point to contest the State's position that active efforts were being made. The court specifically found on December 9, 2015, and July 18, 2016, as well as January 9, April 10, and August 8, 2017, that active efforts were, in fact, being made. The court often listed the efforts that were provided, which included family support, parenting time, foster care, family team meetings, safety planning, Medicaid, family therapy and counseling, case management, and referrals to providers for evaluations.

Angaline argues that the State ceased to provide active efforts "by April, 2017, if not before." Brief for appellant at 34. She argues that, although she was approved for approximately 20 hours of visitation each week, McCullough did not "enforce visitation" and allowed the children to attend other activities during the time designated for visits. Brief for appellant at 34. The record shows that the children were not forced to attend visits, but, rather, the foster family encouraged a relationship between the children and Angaline. The record shows the children are active in school, church activities, and sports, so they were not always able to attend visits. Angaline was asked, "And you completely understand if they have sporting events that they might miss the visits?" She responded "Yeah. I normally try to attend those things." Further, Angaline acknowledged that she told the children that if they did not want to participate in family activities which would take place during visits, they could opt out of attending. Visits and family

support services were still being provided at the time of the hearing on Angaline's objection to the change in the permanency objective.

Angaline also argues that DHHS "refused her a gas voucher for counseling." Brief for appellant at 35. The evidence shows that Angaline requested a gas voucher from the caseworker, but it was not requested far enough in advance to comply with DHHS rules. The record shows that Angaline was told that the caseworker could make arrangements for transportation, but there was not enough time to generate a gas voucher. The caseworker stated that Angaline was aware that requesting a gas voucher 48 hours in advance was a requirement. On that occasion, the gas voucher was not approved, and Angaline never asked for one again. To the extent that Angaline's argument is predicated upon the one incident that a gas voucher was refused, this argument is without merit.

The evidence shows that Angaline stopped attending counseling regularly in April 2017, at which time the therapist recommended that therapy be discontinued. Angaline testified that she stopped attending due to conflicts with her employment, which was unconfirmed, or due to her grandmother's failing health. There is no evidence that Angaline attempted to return to therapy after April 2017. Angaline did not regularly comply with drug testing, although the services were being provided. There is no evidence that the State "ceased providing active efforts by April, 2017," as alleged by Angaline. Brief for appellant at 34. We find this assignment of error to be without merit.

(c) December 12, 2017, Orders

[15] As stated earlier in this opinion, the court entered its orders appointing a guardian for each child on December 12, 2017, which was 1 day after Angaline appealed from the court's November 13 orders which we have held to be final orders. Because the court was divested of jurisdiction by those appeals, its orders dated December 12, 2017, are null and void.

See *In re Interest of Becka P. et al.*, 296 Neb. 365, 894 N.W.2d 247 (2017) (continuing jurisdiction of juvenile court pending appeal from adjudication does not include power to enter permanent dispositional order).

VI. CONCLUSION

Because the county court's orders affected Angaline's substantial right to raise her children, the November 13, 2017, orders were final and appealable. Upon our de novo review, we find the evidence supports the change in the permanency objective from a primary plan of reunification with Angaline, with a concurrent plan of guardianship, to a plan for guardianship only. Because the guardianships were not established until after Angaline's appeals from these orders, we cannot review her assignments of error with regard to the appointment of a guardian for each child; however, we hold that the court's orders of December 12 were null and void and vacate those orders. The November 13 orders of the county court are affirmed.

Affirmed in part, and in part vacated.

Pirtle, Judge, dissenting.

Assuming, for purposes of discussion, that the majority is correct in concluding that the orders appealed from, dated November 13, 2017, were "final, appealable order[s]" as is needed for us to acquire jurisdiction over these appeals, then to that extent, I agree with the analysis of the remaining issues and the result reached by the majority opinion.

However, I believe there is a very serious question under our existing case law and the facts herein whether the November 13, 2017, orders were final orders which affected a substantial right of Angaline. These appeals are somewhat unique because we are dealing with not a termination of parental rights or an adoption, but, rather, issues related to the preparation for and establishment of a guardianship. The November 13 orders approved a change in the permanency objective to guardianship. In the December 12 orders, the court established

a guardianship for each of these six children and appointed a guardian.

Angaline filed her notices of appeal on December 11, 2017, which was 1 day before the orders in which the court established a guardianship for each child and appointed a guardian. That was 28 days after the entry of the November 13 orders. The county court then held an additional hearing and entered additional orders on December 12. No appeals were taken by Angaline following the December 12 orders, yet as the majority points out, Angaline "encourages this court to consider the county court's orders of December 12, 2017, in determining that the November 13 orders are final." As stated by the majority, the December 12 orders "do not control the jurisdictional question in these cases, which is whether the November 13 orders are final."

I agree with the majority that if the November 13, 2017, orders were final, appealable orders, then the hearing and the orders on December 12 would be both null and void, as the county court would have been without jurisdiction following the notices of appeal, which were filed on December 11. This supports the assertion that the December 12 orders cannot be used to determine the finality of the November 13 orders. For the sake of completeness, I would also note that if the November 13 orders were not final, the December 12 orders are not rendered void. See, *Anderson v. Finkle*, 296 Neb. 797, 896 N.W.2d 606 (2017); *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006) (notice of appeal from nonappealable order does not render void for lack of jurisdiction acts of trial court taken in interval between filing of notice and dismissal of appeal by appellate court).

Had Angaline waited until the 30th day to file her appeals, on December 13, 2017, instead of December 11, she could have challenged the change in the permanency objective, as well as the establishment of a guardianship and the appointment of a guardian. She also could have filed separate notices of appeal from the December 12 orders up until January 11,

2018, the 30th day following those orders. If so, assuming the December 12, 2017, orders were final, appealable orders, we could have decided those appeals on the merits, with regard to the establishment of a guardianship and appointment of a guardian.

Because Angaline appealed before the court's December 12, 2017, orders, we cannot reach any issue with regard to the establishment of a guardianship or the appointment of a guardian. Upon a de novo review of the record, I come to a different conclusion than the majority with regard to the finality of the November 13 orders.

This court is often faced with an appeal of an order in a juvenile case in which the court is modifying to some degree the permanency objective for the child prior to actually terminating parental rights or appointing a guardian, as in this case. I agree with the majority that the appealability of such an order is not always clear. See *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009). See, also, *In re Interest of Octavio B. et al.*, 290 Neb. 589, 861 N.W.2d 415 (2015).

The transcripts in the instant cases show that on December 12, 2017, the day after Angaline filed her appeals, the county court held another hearing and entered orders explaining some of the rights and duties of the guardian. These orders state that "the guardianship placement shall be considered permanent for the child." Other terms of the guardianship also appear to assume a permanent change in the children's status, such as a provision that the guardianship shall terminate on the child's 19th birthday. In other words, it certainly appears that the juvenile court is not anticipating steps that Angaline could take that would allow her to reunite with the children, and thus, the December 12 orders might be appealable as affecting her substantial rights.

My jurisdiction question stems from whether the terms of the November 13, 2017, orders, in and of themselves, are sufficient to permit this court to find that they are final and appealable. In those orders, the court recounts Angaline's

unsatisfactory history and states that "it is in the best interest of the minor child that the permanency goal of guardianship should be approved." I believe it is at least questionable whether this court could determine, solely from the language in the orders, whether Angaline's substantial rights are affected. However, once the terms of the December 12 orders are reviewed, which, unfortunately, we are not allowed to do, they more clearly could have been final, appealable orders.

I believe these cases are similar to the facts in *In re Interest of Kenneth B. et al.*, 25 Neb. App. 578, 909 N.W.2d 658 (2018). In that case, the separate juvenile court changed the permanency objective from reunification to guardianship. The March 2017 order was silent on services available to the father, but in October 2016, he had been ordered to participate in supervised visitation and family therapy as recommended by the children's therapists, obtain safe and adequate housing, and follow the rules and regulations of his parole. The March order did not explicitly cease services and obligations from the October order. At the March hearing, the juvenile court stated that it was adopting DHHS' recommendations, including that the father continue to receive services and perform his obligations. The court stated, "It is evident that the services, visitation, and obligations the juvenile court previously ordered concerning [the father] were to continue after the March order." *In re Interest of Kenneth B. et al.*, 25 Neb. App. at 586, 909 N.W.2d at 664. We also noted that the juvenile court included "qualifying language during its oral pronouncement at the March 2017 hearing of the permanency objective, saying that '[t]he singular permanency plan in this case *at this time* is one of guardianship.'" *Id.* (emphasis in original). This court found that the use of qualifying language, taken together with the juvenile court's ordering that a further review hearing be held in 5 months, implies rehabilitation and reunification remained a possibility. We found we were without jurisdiction to review the father's appeal of the March order, and the appeal was dismissed.

In *In re Interest of Diana M. et al.*, 20 Neb. App. 472, 825 N.W.2d 811 (2013), the order modifying the permanency plan objective was coupled with an order ceasing further reasonable efforts to bring about reunification. Thus, the court found the order was appealable. The November 13, 2017, orders contained no such provision. Further, in *In re Interest of Octavio B. et al.*, 290 Neb. 589, 598, 861 N.W.2d 415, 423 (2015), the Nebraska Supreme Court found the court's statements from the bench "essentially eviscerated the opportunity to achieve reunification." Upon our review of the bill of exceptions, there does not appear to be any colloquy between Angaline and the court to the same effect, and there was no specific finding that DHHS was being dismissed at that time.

The Supreme Court has found that orders which do not constitute an adjudicative or dispositive action in the proceedings are not final orders. See *In re Interest of Ezra C.*, 25 Neb. App. 588, 910 N.W.2d 810 (2018), citing *In re Interest of Jassenia H.*, 291 Neb. 107, 864 N.W.2d 242 (2015). In such cases, the court has found that it is without jurisdiction on appeal as no substantial right had been affected.

So here, for the reasons stated above, I seriously question whether the orders entered on November 13, 2017, in and of themselves, affected a substantial right of Angaline, and therefore, I would find that they were not final and appealable orders. On that issue only, I disagree with the majority opinion and I would have concluded we were without jurisdiction to consider these appeals, thus dismissing them. As a result, I respectfully dissent.

Rosa Gonzales and Javier Rojas, individually and as parents and next friends of Joaquin Rojas, a minor, appellants, v. Nebraska Pediatric Practice, Inc., et al., appellees.

923 N.W.2d 445

Filed January 29, 2019. No. A-17-350.

1. **Expert Witnesses: Appeal and Error.** Abuse of discretion is the proper standard of review of a district court's evidentiary ruling on the admission of expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **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.
4. **Evidence: Expert Witnesses.** Expert medical testimony must be based on a reasonable degree of medical certainty or a reasonable probability.
5. **Trial: Expert Witnesses.** An objection to the opinion of an expert based upon the lack of certainty in the opinion is an objection based upon relevance.
6. **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 or less probable than it would be without the evidence.
7. **Expert Witnesses: Physicians and Surgeons: Words and Phrases.** "Magic words" indicating that an expert's opinion is based on a reasonable degree of medical certainty or probability are not necessary.

8. **Expert Witnesses: Words and Phrases.** An expert opinion is to be judged in view of the entirety of the expert's opinion and is not validated or invalidated solely on the basis of the presence or lack of the magic words "reasonable medical certainty."
9. **Expert Witnesses: Physicians and Surgeons.** The requirement that expert medical testimony be based on a reasonable degree of medical certainty or reasonable probability requires that causation testimony move beyond a mere loss of chance—or a diminished likelihood of achieving a more favorable medical outcome.
10. ____: ____. Loss of chance, in Nebraska, is insufficient to establish causation.
11. **Trial: Expert Witnesses.** Whether a witness is qualified as an expert is a preliminary question for the trial court.
12. **Courts: Expert Witnesses.** Under the evaluation of expert opinion testimony, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion.
13. **Trial: Expert Witnesses: Intent.** The purpose of the gatekeeping function is to ensure that the courtroom door remains closed to "junk science" that might unduly influence the jury, while admitting reliable expert testimony that will assist the trier of fact.
14. **Trial: Expert Witnesses.** Before admitting expert opinion testimony, the trial court must (1) determine whether the expert's knowledge, skill, experience, training, and education qualify the witness as an expert; (2) if an expert's opinion involves scientific or specialized knowledge, determine whether the reasoning or methodology underlying the testimony is valid; (3) determine whether that reasoning or methodology can be properly applied to the facts in issue; and (4) determine whether the expert evidence and the opinions related thereto are more probative than prejudicial.
15. **Trial: Expert Witnesses: Pretrial Procedure.** A challenge 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), should take the form of a concise pretrial motion and should identify which of these factors—the expert's qualification, the validity/reliability of the expert's reasoning or methodology, the application of the reasoning or methodology to the facts, and/or the probative or prejudicial nature of the testimony—is believed to be lacking.
16. **Trial: Expert Witnesses: Physicians and Surgeons.** Testimony of qualified medical doctors cannot be excluded simply because they are not specialists in a particular school of medical practice.
17. **Rules of Evidence: Expert Witnesses.** Whether a witness is an expert under Neb. Rev. Stat. § 27-702 (Reissue 2016) depends on the factual

basis or reality behind a witness' title or underlying a witness' claim to expertise.

18. **Trial: Expert Witnesses.** Experts or skilled witnesses will be considered qualified if, and only if, they possess special skill or knowledge respecting the subject matter involved so superior to that of persons in general as to make the expert's formation of a judgment a fact of probative value.
19. **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.
20. **Trial: Expert Witnesses.** A trial court, when faced with an objection 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), must adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper.
21. **Trial: Expert Witnesses: Records: Appeal and Error.** After an objection 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), has been made, the losing party is entitled to know that the trial court has engaged in the heavy cognitive burden of determining whether the challenged testimony was relevant and reliable, as well as a record that allows for meaningful appellate review.
22. **Trial: Expert Witnesses: Appeal and Error.** Without specific findings or discussion on the record, it is impossible to determine whether the trial court carefully and meticulously reviewed the proffered scientific evidence or simply made an off-the-cuff decision to admit expert testimony. The trial court must explain its choices so that the appellate court has an adequate basis to determine whether the analytical path taken by the trial court was within the range of reasonable methods for distinguishing reliable expert testimony from false expertise.

Appeal from the District Court for Douglas County: James T. Gleason, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Greg Garland, of Greg Garland Law, Tara DeCamp, of DeCamp Law, P.C., L.L.O., and Kathy Pate Knickrehm for appellants.

Patrick G. Vipond, Sarah M. Dempsey, and William R. Settles, of Lamson, Dugan & Murray, L.L.P., for appellees.

Riedmann, Bishop, and Welch, Judges.

Welch, Judge.

I. INTRODUCTION

Rosa Gonzales and Javier Rojas (Appellants), individually and as parents and next friends of Joaquin Rojas, appeal the district court's order denying the motion to admit expert testimony filed by Appellants and granting the motion to strike expert testimony filed by Nebraska Pediatric Practice, Inc.; Corey S. Joekel, M.D.; and Children's Hospital and Medical Center (Children's) (collectively Appellees). Appellants also appeal the district court's order granting Appellees' motion for summary judgment. For the reasons set forth herein, we affirm in part, and in part reverse and remand for further proceedings consistent with this opinion.

II. STATEMENT OF FACTS

1. Appellants' Complaint

In August 2014, Appellants sued Appellees for malpractice or professional negligence under Neb. Rev. Stat. § 44-2822 (Reissue 2010). Specifically, Appellants allege Rosa brought her son Joaquin to the emergency department at Children's on August 5, 2012, with symptoms consistent with mononucleosis, which is also known as the Epstein-Barr virus (EBV). The examining physician diagnosed Joaquin with mononucleosis and discharged him. On August 7, Rosa brought Joaquin back to the emergency department at Children's because Joaquin's symptoms were not improving and some of his symptoms seemed to be getting worse. Appellants allege that at that time, some of Joaquin's symptoms were consistent with mononucleosis and EBV meningoencephalitis. Encephalitis is an inflammation of the brain, and meningitis is an inflammation of the protective membranes covering the brain. Dr. Joekel, the treating emergency department physician, diagnosed Joaquin with mononucleosis and discharged him.

Three and a half hours after being discharged, Joaquin had a seizure requiring fire department emergency personnel to

transport him from his home to the University of Nebraska Medical Center (UNMC) emergency department, where he was subsequently admitted. During the seizure, medical personnel administered antiepileptic drugs and performed a tracheostomy due to a lack of oxygen during the seizure. At UNMC, Joaquin was diagnosed with EBV meningoencephalitis, which is a combination of encephalitis and meningitis, and on August 10, 2012, Joaquin underwent a decompressive craniectomy to remove sections of his skull to relieve pressure on his brain. About a month later, Joaquin underwent a cranioplasty to replace the skull sections. Joaquin was discharged from UNMC to a rehabilitation hospital, where he spent about a month receiving physical and speech therapy. Appellants allege that since returning home, Joaquin has displayed effects of brain injury caused by the August 7 seizure, including learning deficits and placement in special education classes. Appellants' complaint alleges Dr. Joekel was professionally negligent in failing to diagnose Joaquin's EBV meningoencephalitis and failing to admit Joaquin to Children's for further supportive treatment and evaluation. On the dates at issue, Dr. Joekel was a pediatric emergency department physician employed with Nebraska Pediatric Practice, which had a contract with Children's to provide emergency department services at its facility.

2. Pretrial Motions

In February 2017, Appellants filed a motion under Neb. Rev. Stat. § 27-104 (Reissue 2016) to qualify Dr. Todd Lawrence as an expert witness on all elements of proof required for this medical malpractice claim, including standard of care, breach, causation, and damages. Appellees filed a motion to strike Dr. Lawrence as an expert witness, arguing that his proposed causation testimony amounted to speculative loss-of-chance testimony and was inadmissible under the requirements 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) (*Daubert*/*Schafersman*). Appellees also filed a motion for summary judgment on the issue of causation, asserting Appellants could not prove causation and had not presented any evidence that Joaquin's outcome would have been different if he had been admitted to Children's and treated on August 7, 2012, rather than being discharged.

During a hearing on the motions, the court first heard argument and received exhibits on Appellants' motion to qualify their expert and Appellees' motion to strike Appellants' expert. Appellants offered the following exhibits which were received without objection: Dr. Lawrence's curriculum vitae, Appellants' designation of Dr. Lawrence as an expert witness, Dr. Lawrence's deposition, and Dr. Joekel's deposition. Appellees offered Dr. Ivan Pavkovic's deposition, Dr. Pavkovic's affidavit, Dr. Archana Chatterjee's affidavit, and various published medical literature explaining EBV, encephalitis, meningitis, and seizures. Appellants objected to Appellees' exhibits, with the exception of the deposition of Dr. Pavkovic. Specifically, Appellants' counsel stated:

> [Counsel]: . . . We object to [the affidavits of Drs. Pavkovic and Chatterjee] on 402, 403, 702, Schafersman 1 and 2, Kuhmo Tire, and . . . the reason for [the objections to the affidavits of Drs. Pavkovic and Chatterjee] —
>
> THE COURT: . . . [I]f you have an objection, make it. . . . I don't need argument.
>
> [Counsel]: Those are the numbers. And on [the published medical literature], we object on 402, 403 and 803.17. As there's been no showing that those are reliable documents by any medical witness since they're going to be used in a dispositive motion . . . .
>
> . . . .
>
> [Counsel]: . . . Would the court entertain a comment on [the objections to the affidavits of Drs. Pavkovic and Chatterjee]?
>
> THE COURT: No. For the purposes of this hearing, the exhibits will be received.

After discussion on the motions concerning Dr. Lawrence's testimony, the court then moved to the motion for summary judgment and asked for argument and additional exhibits other than what had already been received. Neither party offered any additional exhibits. Appellees noted that the motion for summary judgment turned on the question of whether Dr. Lawrence's testimony on causation would be permitted. Appellees argued that Dr. Pavkovic indicated, in his opinion, that nothing could have been done to prevent the outcome in this case and that without Dr. Lawrence's testimony, Appellants have no causation opinion. Appellants conceded Appellees' argument and stated: "If you determine that we don't have causation, then [Appellees' motion for summary judgment] needs to be granted."

3. Exhibits Received During Hearing

(a) "Designation" of Dr. Lawrence

Appellants' "[d]esignation" of Dr. Lawrence provided that Dr. Lawrence specialized in family and emergency medicine. The designation indicated that, in preparation for this case, Dr. Lawrence reviewed Joaquin's medical records from a health clinic, the fire department transport, Children's, UNMC, and an eye consultant, as well as the complaint, answers, and depositions in this case. The designation listed various methodologies which Dr. Lawrence used in his analysis, including the "Case Study Method," the "SOAP Process," the "Differential Diagnosis Method," and the "Differential Etiology Method."

The designation offered Dr. Lawrence's opinion that Dr. Joekel was required by the applicable standard of care to properly monitor, treat, and diagnose Joaquin during his emergency department visit to Children's on August 7, 2012, including putting EBV encephalitis and meningitis on the differential diagnosis; ordering laboratory work, including a complete blood count test, a white blood count test, a C-reactive protein test, and a urine test; ordering a lumbar puncture; diagnosing

and treating EBV encephalitis or meningitis; ordering intravenous (IV) fluids, IV antivirals, and aggressive fever medications; and admitting Joaquin to the hospital to provide supportive care, treatment, and monitoring, including, but not limited to, providing care, treatment, and monitoring of Joaquin's EBV meningoencephalitis. The designation provided Dr. Lawrence's opinion that Dr. Joekel breached this standard of care in failing to perform these functions and that this failure directly caused Joaquin's injuries.

(b) Dr. Lawrence's Deposition

In Dr. Lawrence's deposition, he testified he has been employed with a medical center in Waterloo, Iowa, since 2003, where he has served as a medical director and staff physician for the emergency department. Dr. Lawrence is board certified in family practice, but he is not board certified in pediatrics, pediatric neurology, or pediatric infectious disease. Although he serves as an administrator, the majority of his time was spent working as an emergency department physician. In this role, Dr. Lawrence testified that 30 to 40 percent of his patients are pediatric patients; he treats an average of two patients per month with mononucleosis; and of those individuals, he has performed probably four to five total spinal taps and hospitalized an average of two or three of the diagnosed patients each year. Although he has not diagnosed a patient with EBV encephalitis or meningitis, he has treated patients with viral meningitis. As to seizures and their link to brain injury, Dr. Lawrence testified that he has "seen plenty of patients in [his] career with brain injuries related to seizures not related to infections."

Dr. Lawrence testified he was not sure when Joaquin's mononucleosis turned into EBV meningoencephalitis, but that he believes Joaquin had EBV meningoencephalitis when he was treated by Dr. Joekel on August 7, 2012. In general, Dr. Lawrence provided that the treatment for EBV meningoencephalitis "is supportive care typically, so IV fluids, aggressive fever medications, [and] aggressive hydration." He

testified that hospitalization is appropriate if a patient with mononucleosis is "quite ill, not able to keep their fever under control, [and] not able to eat or drink appropriately." He testified that "along with the constellation of other symptoms, the decision to admit a patient, you take all of what's going on and how the child is responding and make a determination if they're sick enough where they need to be admitted or not. It's a clinical judgment."

Dr. Lawrence testified to areas in which he believes Dr. Joekel deviated from the standard of care; specifically, he testified that Dr. Joekel should have had encephalitis and meningitis higher on his differential diagnosis and performed further tests to rule them out, including a complete blood count test, a white blood count test, a C-reactive protein test, and a lumbar puncture. Dr. Lawrence testified the results of these tests would have indicated a need to hospitalize Joaquin. He also testified that Dr. Joekel should have started Joaquin on IV fluids to ensure hydration. He said that once Joaquin was hospitalized, Joaquin should have received IV fluids, IV antibiotics, and IV acyclovir (which is an antiviral medication), as well as received more monitoring and management of his fever through more aggressive fever medications. These treatments, Dr. Lawrence acknowledged, would not have addressed the EBV infection directly, but instead would have addressed some of the EBV symptoms to assist Joaquin's body in fighting the infection itself. Dr. Lawrence indicated that hydration, both orally and through IV fluids, assists the patient's body in addressing the symptoms of EBV and, perhaps, in fighting the virus itself. As such, Dr. Lawrence testified that doing so may have reduced Joaquin's fever and the risk of seizure. As to acyclovir, Dr. Lawrence provided: "[W]hile it is not a specific treatment for [suspected mononucleosis that has turned into encephalitis,]" there are "some anecdotal studies that it does help and helps reduce the shedding of the virus." However, Dr. Lawrence acknowledged acyclovir is typically "more for the herpes viral type" and "no studied evidence . . . proves"

that acyclovir can treat EBV or prevent its further progression. Dr. Lawrence testified that if he had a child present with viral meningitis, he would "start them an IV of acyclovir with the hopes [that it would] decrease the viral shedding." As to the fever monitoring and medicating, Dr. Lawrence opined that the hospital would have monitored Joaquin's fever and would have better managed it by "giving him Tylenol and/or ibuprofen."

Dr. Lawrence opined that Joaquin's lack of treatment and hospitalization contributed to his injuries, claiming that Joaquin's brain injury was caused by both the EBV meningoencephalitis and the seizure. Dr. Lawrence provided that the seizure contributed to Joaquin's brain injury in two possible ways, or in some combination thereof: First, the length and severity of the seizure could have, itself, resulted in brain injury. Second, the lack of oxygen caused by the seizure could have resulted in brain injury. Although he could not specifically attribute what percentage of Joaquin's brain injury was caused by the EBV meningoencephalitis and what percentage was caused by the failure to control Joaquin's seizure, he stated that the seizure, through these pathways and in combination with the EBV meningoencephalitis, resulted in brain swelling which, in turn, resulted in brain injury. When asked whether the seizure or the EBV meningoencephalitis was more responsible for the brain injury, Dr. Lawrence stated:

> I'd have to defer that off to your pediatric neurologist that you referenced. But I think . . . clearly, it was both.
>
> And to give a number on there, I don't know how you could assign a number. But I've seen plenty of patients in my career with brain injuries related to seizures not related to infections.

Dr. Lawrence opined that if Joaquin was adequately treated, his fever and hydration would have improved, which would have helped his body fight the infection which caused the brain injury. Dr. Lawrence specifically testified that "it may have decreased his chance of actually developing the encephalitis that triggered the seizure" or reduced or prevented the

seizure. Specifically, he addressed how taking steps to hospitalize, treat, and monitor Joaquin would have diminished the seizure, stating:

> My opinion is that had they identified the meningitis, encephalitis sooner, he would have been admitted to the hospital. He may or may not have had the seizure. Had he had the seizure, it would have been not as severe because he was in the hospital. And they could have used abortive seizure, epileptic medicines sooner.
>
> And then his outcome would have been not as severe requiring all the constellation of problems that he's had following that, between the craniotomy, the surgeries, the G-tube, the tracheostomy, the long hospitalization, the admission to the rehab unit, et cetera.

Dr. Lawrence further explained the seizure would have been better managed and possibly prevented if Joaquin had been in the hospital, because his hospitalization would have allowed for the management of his fever and hydration, use of antiepileptic drugs, and the ability to address his deficiency in oxygen as it arose. Dr. Lawrence stated that Joaquin "would have had a decreased length of hypoxia, decreased length of the seizure, and would have had a better outcome, which, with the reasonable degree of certainty, [Joaquin would then] not have had the craniotomy and all the procedures that followed that."

Responding to a question of whether a pediatric neurologist or a pediatric infectious disease expert would have much more knowledge concerning the effect of hydration and fever medication on preventing seizures, Dr. Lawrence agreed. However, Dr. Lawrence explained:

> I never said [the seizure could have been totally prevented]. I said his chance of seizure would have been less. I can't give you the number, . . . and, yes, a pediatric neurologist or pediatric [infectious disease] person would be able to better tell you that.
>
> But my opinion is that [Joaquin's] chance of having a seizure would have been less. The seizure caused hypoxia

> . . . which could have caused some of the brain damage also.

(c) Dr. Joekel's Deposition

In Dr. Joekel's deposition, he testified concerning his treatment of Joaquin on August 7, 2012. Specifically, he opined:

> It was a tragic outcome, a very rare complication of a fairly common viral infection that we see in children. At the time I saw Joaquin, he didn't have clinical signs or symptoms of meningitis or encephalitis, and despite my meeting the standard of care and providing expert care, sometimes there [are] bad outcomes and I feel bad about that for them.

Dr. Joekel additionally addressed Joaquin's seizure, possible treatment, and its effect on brain swelling. On treatment of seizures generally, Dr. Joekel provided:

> If [a patient that had similar symptoms to Joaquin] was currently having a seizure, we would evaluate to determine if it was a seizure. . . . If we determine that it is indeed a seizure and we want to stop it, then we have many medications that we would or could give. I mean, it depends on the individual patient.

On having a seizure at home or at the hospital, Dr. Joekel responded to questioning:

> Q. Would you prefer a patient if they're going to have a seizure to have it in the hospital or at home?
>
> . . . .
>
> A. That's a question I can't answer. It depends on the seizure. It depends on the patient. It depends on the circumstances. There are some very well-qualified families that take care of seizures in their kids at home all the time.
>
> Q. . . . All right. But for the most part, wouldn't it be better to have the patient in the hands of trained professionals who have access to medicines and machines who can help treat them better?

. . . .
A. Yes.

With respect to whether the seizure could have caused the need for the decompressive craniotomy or resulting brain injury, Dr. Joekel stated: "Seizures typically don't cause brain swelling or injuries like that," but he admitted that he would typically defer to a neurologist or a neurosurgeon on such a question.

(d) Dr. Pavkovic's Deposition

In Dr. Pavkovic's deposition, he testified that he is employed by "Children's Specialty Physicians, which is the academic practice at Children's," and is board certified in sleep medicine, epilepsy, and neurology, with special qualifications in pediatric neurology. Dr. Pavkovic was Joaquin's pediatric neurologist, beginning August 7, 2012, after Joaquin experienced his seizure. At that point, Dr. Pavkovic first noted that the seizure was likely a result of an infectious or inflammatory cause and later confirmed that it was a result of Joaquin's EBV meningoencephalitis. Dr. Pavkovic diagnosed Joaquin with "mild static encephalopathy"—a mild, unchanging "brain disorder"—and continued treatment of Joaquin with his last visit occurring in September 2015. Dr. Pavkovic testified regarding various conditions he observed in Joaquin and whether they were a result of brain injury suffered as a result of Joaquin's EBV meningoencephalitis. He testified that although brain injury occurs due to EBV meningoencephalitis, it is unclear how the injury occurs. Specifically, Dr. Pavkovic stated, "There may be a direct effect of the virus to actually kill brain cells or it may be an immune response to the virus, but something about that virus's presence is what leads to the brain injury."

Regarding Joaquin's brain swelling, the subsequent need for a craniotomy, and the possibility of a brain injury, Dr. Pavkovic testified: "[T]here's no preventative treatment that I know of [to treat patients with EBV encephalitis in a way to prevent the brain from swelling to the point where the patient would need a craniotomy]." He further explained:

> The brain swelling is a manifestation of the brain injury. I guess the analogy would be you . . . bump your knee and then the joint wells up kind of a thing. So it's a similar phenomenon. The injury — the cell death is there and then there's swelling as a consequence of that.
>
> Q. . . . So does the swelling occur after the brain is injured?
>
> A. Yes.

Dr. Pavkovic also testified concerning Joaquin's seizure and stated that he has not "treat[ed] patients who have EBV encephalitis but who have not had a seizure," because "[t]here is no treatment for EBV encephalitis." Dr. Pavkovic testified that he did not know how long Joaquin had EBV meningoencephalitis prior to the seizure and that it was "probably unknowable." He further testified that although Joaquin is at an increased risk for future seizures due to his condition, he does not receive continuing treatment for seizures because there is no such treatment and he will receive treatment for any future seizures as they occur.

(e) Dr. Pavkovic's Affidavit

In Dr. Pavkovic's affidavit, he provided further opinion on the issue of causation of Joaquin's injuries, stating:

> 6. Based upon my treatment of Joaquin . . . , my review of his medical records, and my education, training, and experience, it is my opinion, to a reasonable degree of medical certainty, that even if Dr. . . . Joekel had hospitalized Joaquin . . . on August 7, 2012, there is nothing that could have been done to prevent Joaquin's mononucleosis infection from spreading to his brain and developing into [EBV] encephalitis. Treating Joaquin's fever and providing Joaquin with fluids and antibiotics would not have stopped the progression of the infection. There is also no evidence that providing this treatment would have prevented Joaquin from having a seizure or reduced his chance of having a seizure.

7. Although the medication acyclovir can be given to patients suffering from EBV encephalitis, there is no medical proof that it works to stop the progression of this illness. There is no treatment for EBV encephalitis. There is also no scientific evidence supporting the notion that giving Joaquin acyclovir would have prevented his seizure.

8. Joaquin suffered mild brain damage as a result of the EBV encephalitis. There is no evidence that the seizure Joaquin suffered contributed to any brain injury. Even if Joaquin had been hospitalized at the time he had the seizure, it would not have changed the outcome. There is nothing that Dr. Joekel or any other physician could have done to improve Joaquin's outcome. Joaquin's brain damage is due to the EBV encephalitis and was not caused by any delay in treatment.

(f) Dr. Chatterjee's Affidavit

In Dr. Chatterjee's affidavit, she testified she is a pediatric infectious disease physician who is board certified in general pediatrics and pediatric infectious disease and serves as a professor and "the Chair of the Department of Pediatrics at the University of South Dakota Sanford School of Medicine." Dr. Chatterjee provided her opinion regarding causation of Joaquin's medical conditions, stating:

6. Based on my review of Joaquin's medical records, the above mentioned depositions, and my education, training, and experience, it is my opinion, to a reasonable degree of medical certainty, that even if Dr. Joekel had admitted Joaquin to the hospital on August 7, 2012, Joaquin's outcome would not have been any different.

7. There was no clinical evidence that Joaquin had EBV encephalitis when he presented to the emergency department in the morning on August 7, 2012. His symptoms were consistent with mononucleosis. . . . There is no treatment for mononucleosis. It is not possible to know when Joaquin's mononucleosis infection developed into

EBV encephalitis. Dr. Joekel acted within the standard of care by discharging Joaquin from the emergency department and sending him home. Based on the child's presenting symptoms, Dr. Joekel could not have anticipated the very rare complication that Joaquin's mononucleosis would develop into [EBV encephalitis] and spread to his brain.

8. Dr. Lawrence suggests that Dr. Joekel should have admitted Joaquin to the hospital. He also opines that blood tests should have been done and a lumbar puncture should have been done on Joaquin. . . . Even if the tests had been done, the results would not have been immediately available, and even if the lumbar puncture results had come back showing EBV encephalitis, there is no specific treatment for EBV encephalitis. There is nothing that could have been done for Joaquin in the hospital that would have prevented the virus from spreading to his brain.

9. Dr. Lawrence further suggests that Joaquin should have been given the medication acyclovir as treatment for EBV encephalitis. However, there is no scientific evidence that acyclovir works to treat EBV encephalitis or to stop the spread of the virus. There is no scientific evidence that administering IV fluids or antibiotics stops the spread of this virus. Further, there is no scientific evidence supporting Dr. Lawrence's opinion that providing this type of supportive care would have prevented Joaquin from having a seizure or reduced Joaquin's chance of having a seizure.

10. The viral infection EBV encephalitis caused Joaquin's brain injury. There is no evidence that a delay in treatment caused or contributed to Joaquin's brain injury. Whether or not Joaquin was in the hospital at the time he had a seizure would not have changed the ultimate outcome and would not have prevented the brain damage he suffered.

(g) Medical Literature

In the medical literature excerpts received by the court, Appellees provided various sections of books, articles, and reviews on the subjects of EBV, encephalitis, meningitis, and seizures.

First, in an article from the New England Journal of Medicine, the authors identify that "[i]nfectious mononucleosis is a clinical syndrome that is most commonly associated with primary [EBV] infection." Katherine Luzuriaga, M.D., & John L. Sullivan, M.D., *Infectious Mononucleosis*, 362 New Eng. J. Med. 1993, 1993 (2010). For the management of infectious mononucleosis, the authors provide:

> On the basis of clinical experience, supportive care is recommended for patients with infectious mononucleosis. Acetaminophen or nonsteroidal antiinflammatory agents are recommended to manage fever, throat discomfort, and malaise. Adequate fluid intake and nutrition should also be encouraged. Although getting adequate rest is prudent, bed rest is unnecessary.

Id. at 1996-97. On the issue of utilizing antiviral treatment of infectious mononucleosis, the authors stated that "[l]arger randomized, blinded, placebo-controlled trials are necessary," *id.* at 1997, concluding "[t]reatment is largely supportive; antiviral therapy is not recommended, and corticosteroids are not indicated for uncomplicated cases," *id.* at 1998.

Another article explores treatment for EBV and describes that "[a]lthough there are no definitive effective treatments in many cases of encephalitis, identification of a specific agent may be important for prognosis, potential prophylaxis, counseling of patients and family members, and public health interventions." Allen R. Tunkel et al., *The Management of Encephalitis: Clinical Practice Guidelines by the Infectious Diseases Society of America*, 47 Clinical Infectious Diseases 303, 303 (2008). Specifically, as to acyclovir's possible use for EBV treatment, the authors write:

> Acyclovir inhibits replication of [EBV] in vitro, but a meta-analysis of 5 clinical trials did not show benefit in

> the treatment of infectious mononucleosis . . . . Although acyclovir has been used in some cases of [a central nervous system] disease . . . , it probably provides little or no benefit and is not recommended.

Id. at 323.

One textbook discusses the use of acyclovir to treat EBV and specifically provides that "[a]cyclovir should be used to treat herpes simplex and [varicella zoster virus] encephalitis and perhaps encephalitis caused by [EBV]." 1 Ralph D. Feigin, M.D., et al., Feigin & Cherry's Textbook of Pediatric Infectious Diseases 511 (6th ed. 2009) (quoting chapter 42 entitled "Encephalitis and Meningoencephalitis"). The textbook, however, also provides that "[t]he effectiveness of various recommended regimens in most instances has not been evaluated objectively." *Id.*

Similarly, in a review, the authors discuss possible treatment for infectious mononucleosis, but find "[t]here is no approved treatment." Henry H. Balfour, Jr., et al., *Infectious Mononucleosis*, 4 Clinical & Translational Immunology 1, 5 (2015). Although the authors mention "valacyclovir" as a possible antiviral drug to help treat EBV, they conclude: "As our study contained few subjects and was not placebo controlled, these results must be confirmed in a larger, placebo-controlled trial." *Id.*

The authors of another review looked at trials from the use of antiviral agents on infectious mononucleosis and concluded:

> The effectiveness of antiviral agents (acyclovir, valomaciclovir and valacyclovir) in acute [infectious mononucleosis] is uncertain. The quality of the evidence is very low. . . . Alongside the lack of evidence of effectiveness, decision makers need to consider the potential adverse events and possible associated costs, and antiviral resistance. Further research in this area is warranted.

M. De Paor et al., *Antiviral Agents for Infectious Mononucleosis (Glandular Fever)*, Cochrane Database of Systematic Reviews, Issue 12, Art. No.: CD011487 (2016).

In a report, the authors discuss possible treatments for infectious mononucleosis, stating:

> Patients suspected to have infectious mononucleosis should not be given ampicillin or amoxicillin, which cause nonallergic morbilliform rashes in a high proportion of patients with active EBV infection. Although therapy with short-course corticosteroids may have a beneficial effect on acute symptoms, because of potential adverse effects, their use should be considered only for patients with marked tonsillar inflammation with impending airway obstruction, massive splenomegaly, myocarditis, hemolytic anemia, or HLH. . . . Although acyclovir has in vitro antiviral activity against EBV, therapy is of no proven value in infectious mononucleosis . . . .

American Academy of Pediatrics, Red Book: Report of the Committee on Infectious Diseases 321 (29th ed. 2012).

Finally, another review discusses the use of antiepileptic drugs for the treatment of seizures due to viral encephalitis, in which review the authors conclude:

> It remains unclear whether antiepileptic drugs reduce the risk of seizures during the acute phase of the illness or decrease morbidity and mortality when used as primary prophylaxis. It is also unclear whether antiepileptic drugs reduce the risk of further seizures when used as secondary prophylaxis. Use of antiepileptic drugs carries an inherent risk of adverse events. In the absence of any evidence from randomized or quasi-randomized controlled trials, no recommendations can be made regarding the use of antiepileptic drugs as primary or secondary prophylaxis for seizures in patients with viral encephalitis.

S. Pandey et al., *Antiepileptic Drugs for the Primary and Secondary Prevention of Seizures in Viral Encephalitis*, Cochrane Database of Systematic Reviews, Issue 5, Art. No.: CD010247 (2016).

4. Orders on Motions

In March 2017, the court entered orders on these motions. On Appellants' motion to qualify their expert and Appellees' motion to strike the testimony of Dr. Lawrence, the court entered an order precluding testimony by Dr. Lawrence on the issue of causation, stating:

> Based on the evidence before the Court, the Court determines that Dr. Todd Lawrence M.D. is a qualified expert in the field of emergency room medicine. The Court finds that based on the deposition of Dr. Lawrence, he is not qualified by virtue of training, expertise or experience to render any opinions on the progress or causation of this child's condition. Such opinions would require expertise and qualification in the specialty of neurology and specifically child neurology. As a result of this failure of qualifications, Dr. Todd Lawrence's opinions cannot be allowed. The Court also notes that Dr. Lawrence's opinion[s] are also inadmissible because they are all opinions of the "loss of chance" of the child to obtain a better result.

Because of this preclusion and because Appellants offered no other proposed evidence on the issue of causation, the court granted summary judgment in favor of Appellees in a separate order. The court also stated that summary judgment was appropriate because the evidence submitted by Appellees in support of their motion for summary judgment precluded the existence of any issue of material fact and showed Appellees were entitled to a judgment as a matter of law. Appellants filed an appeal of these rulings.

III. ASSIGNMENTS OF ERROR

Appellants assign, restated, that the district court erred by (1) excluding the opinions of Dr. Lawrence on the subject of causation of Joaquin's injuries, (2) denying Appellants' objection to the affidavits of Drs. Pavkovic and Chatterjee in support of Appellees' motion for summary judgment, and (3) granting Appellees' motion for summary judgment.

IV. STANDARD OF REVIEW

[1-3] Abuse of discretion is the proper standard of review of a district court's evidentiary ruling on the admission of expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). *State v. Hill*, 288 Neb. 767, 851 N.W.2d 670 (2014). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id.* 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. *Richardson v. Children's Hosp.*, 280 Neb. 396, 787 N.W.2d 235 (2010).

V. ANALYSIS

1. Dr. Lawrence's Causation Testimony

Appellants first assign the district court erred in denying their motion to qualify Dr. Lawrence's expert testimony and granting Appellees' motion to strike Dr. Lawrence's expert testimony on causation. Specifically, Appellants argue Dr. Lawrence's testimony on causation of Joaquin's injuries did not amount to loss-of-chance testimony and that Dr. Lawrence was qualified to testify regarding causation.

(a) Loss-of-Chance Testimony

Appellants claim the district court erred in finding Dr. Lawrence's opinions inadmissible as opinions of the loss of chance of Joaquin to obtain a better result. Appellees argue the court did not err because Dr. Lawrence's testimony was speculative, lacked certainty, and amounted to loss-of-chance testimony.

[4-8] Expert medical testimony must be based on a reasonable degree of medical certainty or a reasonable probability. *Edmonds v. IBP, inc.*, 239 Neb. 899, 479 N.W.2d 754 (1992).

An objection to the opinion of an expert based upon the lack of certainty in the opinion is an objection based upon relevance. *Richardson, supra*. 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 or less probable than it would be without the evidence. *Id*. "Magic words" indicating that an expert's opinion is based on a reasonable degree of medical certainty or probability are not necessary. *Id*. An expert opinion is to be judged in view of the entirety of the expert's opinion and is not validated or invalidated solely on the basis of the presence or lack of the magic words "reasonable medical certainty." *Id*.

[9,10] The requirement that expert medical testimony be based on a reasonable degree of medical certainty or reasonable probability requires that causation testimony move beyond a mere loss of chance—or a "diminished likelihood of achieving a more favorable medical outcome." See *Cohan v. Medical Imaging Consultants*, 297 Neb. 111, 122, 900 N.W.2d 732, 740 (2017), *modified on denial of rehearing* 297 Neb. 568, 902 N.W.2d 98. As the Nebraska Supreme Court provided in *Richardson*, 280 Neb. at 405, 787 N.W.2d at 243, "'[L]oss of chance,' . . . in Nebraska, is insufficient to establish causation."

The Nebraska Supreme Court discussed loss-of-chance testimony in *Rankin v. Stetson*, 275 Neb. 775, 749 N.W.2d 460 (2008). In *Rankin*, the plaintiff offered expert testimony that stated "it was more likely than not" that the plaintiff would have recovered from her spinal cord injury had surgery been performed within the first 72 hours. 275 Neb. at 779, 749 N.W.2d at 464. The Nebraska Supreme Court stated that an opinion that a plaintiff would have had a "'better prognosis'" and a "'chance of avoiding permanent neurological injury'" did not establish the certainty of proof that was required. *Id*. at 787, 749 N.W.2d at 469. Nevertheless, because the doctor's opinion also stated that early surgical decompression of the spinal cord more likely than not would have led to

an improved outcome, the evidence was sufficient to establish causation. *Id*. See, also, *Richardson v. Children's Hosp.*, 280 Neb. 396, 406, 787 N.W.2d 235, 243 (2010) (finding that expert's opinion that patient "could have recovered" had patient, who died of necrotizing hemorrhagic pancreatitis, earlier received IV fluids was given with sufficient degree of medical certainty and was sufficient to establish causation for purposes of patient's mother's medical malpractice case against physician and hospital).

Here, we note that Dr. Lawrence's testimony governing causation differed in relation to Dr. Joekel's failure to admit Joaquin to the hospital for supportive care to treat EBV meningoencephalitis and in relation to Dr. Joekel's failure to admit Joaquin to the hospital and monitor and implement treatment to control Joaquin's seizure. We will address those matters separately.

Regarding supportive care to treat EBV meningoencephalitis, Dr. Lawrence opined that Dr. Joekel should have admitted Joaquin, ordered IV fluids, antivirals, and more aggressive fever medications. That said, in testimony governing the issue of supportive treatment, Dr. Lawrence conceded that the offered treatment would not directly treat Joaquin's underlying illness, the EBV meningoencephalitis. Instead, Dr. Lawrence contends hydration and IV fluids, antiviral medications, monitoring, and more aggressive fever medications would have put Joaquin's body in a better state to fight the infection itself. Although Dr. Lawrence acknowledged he was not certain it would have changed the result, he opined that "[the supportive treatment] may have decreased [Joaquin's] chance of actually developing the encephalitis that triggered the seizure" and "would have decreased the chance of having the seizure." This acknowledged lack of certainty together with the language of "decreased the chance" provided the district court a sufficient basis to find this amounted to loss-of-chance testimony which, in Nebraska, is insufficient to establish causation. Accordingly, we affirm that portion of the court's order

striking Dr. Lawrence's opinions governing the failure to treat Joaquin as it relates to the progression of the EBV or the decreased chance of having a seizure.

Regarding Dr. Joekel's failure to admit Joaquin and provide supportive care to control Joaquin's seizure once it occurred, Dr. Lawrence's testimony is different. Dr. Lawrence testified that monitoring Joaquin in the hospital and supplying him with medical treatment would have mitigated the effects of his seizure. He testified that the seizure could have been better managed if Joaquin had been in the hospital to better control his fever and hydration, to employ the use of antiepileptic drugs, and to more rapidly address his lack of oxygen issues as they arose. Specifically, he provided: "[Joaquin] would have had a decreased length of hypoxia, decreased length of the seizure, and would have had a better outcome, which, with the reasonable degree of certainty, [Joaquin would then] not have had the craniotomy and all the procedures that followed that."

Unlike his testimony concerning the utility of supportive treatments to address the progression of Joaquin's underlying viral infection and seizure avoidance, the above-quoted testimony provides greater certainty and moves beyond a mere loss of chance—or a "diminished likelihood of achieving a more favored medical outcome." See *Cohan v. Medical Imaging Consultants*, 297 Neb. 111, 122, 900 N.W.2d 732, 740 (2017), *modified on denial of rehearing* 297 Neb. 568, 902 N.W.2d 98. Dr. Lawrence did not testify that hospitalizing and treating Joaquin for his seizure would have increased his chance of a better outcome. He explicitly testified that proper medical treatment of the seizure at the hospital would have, to a reasonable degree of certainty, resulted in a better outcome. Such certainty is in line with the accepted language outlined in *Richardson v. Children's Hosp.*, 280 Neb. 396, 787 N.W.2d 235 (2010), and *Rankin v. Stetson*, 275 Neb. 775, 749 N.W.2d 460 (2008), and does not amount to loss-of-chance testimony. Therefore, the district court erred in determining

Dr. Lawrence's specific line of causation testimony linking Joaquin's injuries to Dr. Joekel's failure to admit Joaquin and monitor and implement treatment to control Joaquin's seizure amounted to loss-of-chance opinion testimony and lacked relevancy. This leads to Appellants' second assigned error that the district court erred in finding Dr. Lawrence was not qualified to render his causation opinion.

(b) Professional Qualifications of Expert Witnesses

Appellants claim the district court erred in determining Dr. Lawrence was not qualified to testify on the subject of causation of Joaquin's injuries. In its order denying Appellants' motion to qualify its expert and granting Appellees' motion to strike Dr. Lawrence's expert testimony, the district court stated that "he is not qualified by virtue of training, expertise or experience to render any opinions on the progress or causation of [Joaquin's] condition."

[11-13] Under Neb. Rev. Stat. § 27-702 (Reissue 2016), a witness can testify concerning scientific, technical, or other specialized knowledge only if the witness is qualified as an expert. *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004). Whether a witness is qualified as an expert is a preliminary question for the trial court. *Id.* In *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), the Nebraska Supreme Court adopted the test set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), for the evaluation of expert opinion testimony. Under this evaluation, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. See, *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009); *Schafersman, supra*. The purpose of the gatekeeping function is to ensure that the courtroom door remains closed to "junk science" that might unduly influence the jury, while admitting reliable expert testimony that will assist the trier of fact. *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010).

[14,15] Under § 27-702 and *Daubert*/*Schafersman* jurisprudence, before admitting expert opinion testimony, the trial court must (1) determine whether the expert's knowledge, skill, experience, training, and education qualify the witness as an expert; (2) if an expert's opinion involves scientific or specialized knowledge, determine whether the reasoning or methodology underlying the testimony is valid; (3) determine whether that reasoning or methodology can be properly applied to the facts in issue; and (4) determine whether the expert evidence and the opinions related thereto are more probative than prejudicial. See *State v. Tolliver*, 268 Neb. 920, 689 N.W.2d 567 (2004). See, also, *State v. Braesch*, 292 Neb. 930, 874 N.W.2d 874 (2016). A *Daubert*/*Schafersman* challenge should take the form of a concise pretrial motion and should identify which of these factors—the expert's qualifications, the validity/reliability of the expert's reasoning or methodology, the application of the reasoning or methodology to the facts, and/or the probative or prejudicial nature of the testimony—is believed to be lacking. See *Casillas, supra*.

Here, the district court excluded Dr. Lawrence's causation testimony solely on the basis of his qualification to give such opinion. It is unclear from the record whether Appellees' challenge to Dr. Lawrence was limited to his qualifications to testify or whether Appellees were extending their challenge to his theory or methodology and/or his application of the facts to his theory or methodology. See brief for appellees at 28 (arguing that Dr. Lawrence's opinions "were not sufficiently reliable"). We note the Nebraska Supreme Court's admonition that a *Daubert*/*Shafersman* challenge should specifically identify which of the factors is believed to be lacking. We also note this record is somewhat devoid of analysis as it relates to those other specific factors. Because the district court's order was limited to striking Dr. Lawrence on the sole issue of his qualifications to testify, we now examine that specific factor.

[16] We first note that testimony of qualified medical doctors cannot be excluded simply because they are not specialists in

a particular school of medical practice. *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004). Thus, Dr. Lawrence's testimony is not unqualified merely because he is not board certified in pediatrics, neurology, or infectious disease.

[17,18] Whether a witness is an expert under § 27-702 depends on the factual basis or reality behind a witness' title or underlying a witness' claim to expertise. *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990). Experts or skilled witnesses will be considered qualified if, and only if, they possess special skill or knowledge respecting the subject matter involved so superior to that of persons in general as to make the expert's formation of a judgment a fact of probative value. *Carlson, supra*.

Here, Dr. Lawrence's deposition and curriculum vitae provide that he is employed as the medical director and a staff physician of the emergency department at an Iowa medical center where he has worked since 2003. Although he is also an administrator, he spends the majority of his time working as an emergency department physician. He is board certified in family practice, but his practice is entirely with the emergency department and 30 to 40 percent of his patients are pediatric patients. Although he has never diagnosed a patient with EBV encephalitis or meningitis, he has treated patients with viral meningitis and has an average of two patients per month who present with mononucleosis. Of those patients with mononucleosis, he has hospitalized patients showing significant illness at a rate of two or three per year. As to seizures and their relation to brain injury, Dr. Lawrence testified that he has "seen plenty of patients in [his] career with brain injuries related to seizures." Although Dr. Lawrence is not board certified in pediatric neurology, he has experience in the treatment of pediatric patients, viral infections, and neurologic conditions related to seizures.

Additionally, Dr. Lawrence's answers during his deposition to questioning about EBV, mononucleosis, encephalitis, and meningitis correlate with the information on treatment

contained in the medical literature and expert depositions and affidavits offered by Appellees on these subjects. The medical literature and Appellees' expert witnesses explained that there is no treatment for EBV specifically and that any treatment for EBV and EBV encephalitis is supportive in nature. Dr. Lawrence acknowledged this fact and indicated his offered treatment for Joaquin was directed at this supportive care. According to Dr. Lawrence, the suggested IV fluids, fever monitoring and responsive medication, and antiviral medications would have been implemented in order to assist Joaquin's body in fighting the virus and addressing the symptoms of EBV meningoencephalitis. Although Appellees, through their offered exhibits, argued such treatment would likely have not changed the end result, the offered exhibits do not contest that such treatment is typical for this medical condition.

Notwithstanding the above, Dr. Lawrence's testimony diverts from the testimony of Drs. Pavkovic and Chatterjee in his opinion about linking Joaquin's brain injury to his uncontrolled seizure. In short, Dr. Lawrence claims Dr. Joekel failed to hospitalize, treat, and control Joaquin's seizure which then contributed to Joaquin's brain injury while Drs. Pavkovic and Chatterjee relate Joaquin's brain injury solely as a manifestation of the untreatable EBV meningoencephalitis.

In support of his opinion, Dr. Lawrence testified that Dr. Joekel deviated from the standard of care by failing to hospitalize Joaquin. He stated that Joaquin, once hospitalized, would have had his hydration monitored, been started on IV fluids, been provided antivirals, and had his fever more effectively managed through monitoring and responsive medication. By hospitalizing and implementing monitoring and supportive treatment, his body would have been better prepared to lessen his seizure and he would have had the seizure in the hospital where its staff would be able to immediately diagnose the seizure, limit the extent and duration of his seizure through the use of antiepileptic medication, and immediately address any lack of oxygen issues as they arose.

With Dr. Jockel's having failed to provide that supportive care, Dr. Lawrence testified with reasonable medical certainty that Joaquin's uncontrolled seizure contributed, along with his EBV meningoencephalitis, to his brain injury in two ways: First, Joaquin's seizure was long in duration and long seizures can produce brain injuries on their own. Second, Joaquin's seizure resulted in his having to get a tracheostomy due to lack of oxygen. Dr. Lawrence testified that lack of oxygen may lead to lack of oxygen to the brain and result in brain injury. In sum, Dr. Lawrence testified with a reasonable degree of medical certainty that had Joaquin been in the hospital and received treatment and monitoring as required by Dr. Lawrence's offered standard of care, the medical attendants would have been able to mitigate these issues deriving from the seizure and limited the duration and extent of the seizure. Dr. Lawrence also testified with a reasonable degree of medical certainty that the need for Joaquin's tracheostomy would have been diminished if Joaquin had the seizure at the hospital and the staff was monitoring his oxygen levels and responding appropriately during the seizure. As such, the monitoring and treatment for the lack of oxygen would have prevented the tracheostomy and resulting scarring.

Conversely, the medical literature and expert affidavits offered by Appellees did not specifically address the ability of hospital staff to mitigate the effects of the seizure. Instead, the literature addressed only whether antiepileptic drugs reduce the initial or secondary risk of having seizures. Appellees' experts' affidavits stated only that there is no scientific evidence that supportive treatment would have prevented the seizure and that the treatment for the seizures would not have prevented Joaquin's brain injury. To the extent that the literature and affidavits conflict with Dr. Lawrence's testimony on the treatment of seizures and their effect on Joaquin's brain injury, this presents a question of fact. See *Hawkins v. City of Omaha*, 261 Neb. 943, 627 N.W.2d 118 (2001) (explaining that question of whether one expert and his conclusions is more qualified than

another expert and his conclusions goes only to weight of testimony and that determining weight that should be given expert testimony is uniquely province of fact finder).

Dr. Lawrence's testimony was that Dr. Joekel's failure to hospitalize and control the seizure contributed to Joaquin's brain injury. Although Dr. Lawrence testified he would defer to a pediatric neurologist on the precise amount each factor contributed to Joaquin's brain injury, he is not required to be able to testify on the percentage of the brain injury caused by the lack of treatment compared to that caused by Joaquin's EBV meningoencephalitis. See *Thone v. Regional West Med. Ctr.*, 275 Neb. 238, 250, 745 N.W.2d 898, 908 (2008) (in medical malpractice context, "the element of proximate causation requires proof that the physician's deviation from the standard of care caused *or contributed to* the injury or damage to the plaintiff") (emphasis supplied). See, also, *Microfinancial, Inc. v. Premier Holidays Intern.*, 385 F.3d 72, 80 (1st Cir. 2004) (describing that federal counterpart to § 27-702 "is not so wooden as to demand an intimate level of familiarity with every component of a transaction or device as a prerequisite to offering expert testimony" when considering qualifications of any expert as applied to specific issue in case).

Dr. Lawrence is an experienced emergency room doctor who has experience treating pediatric patients, mononucleosis viral encephalitis and meningitis, and seizures. His deposition testimony largely coincides with the medical information supplied by Appellees' experts' affidavits and depositions, as well as medical literature. When offering his medical opinions on the causation of Joaquin's brain injury and scarring, Dr. Lawrence testified with a reasonable degree of medical certainty, utilizing his training and experience as an emergency department doctor, that proper care by Dr. Joekel would have decreased, if not eliminated, Joaquin's injuries.

During oral argument, Appellants' counsel argued that

> as [the judge] said in his order that it would have required a pediatric neurologist to opine on this [and] if that's

> where we're going, I just need to know we're moving into the world of specialty medicine and we're kind of abandoning the old concept that a medical doctor can testify in an area of specialization even if he is a generalist.

Dr. Lawrence clearly possesses special knowledge respecting the causation of brain injury and scarring from seizures superior to that of persons in general as to make his formation of a judgment a fact of probative value. See *State v. Herrera*, 289 Neb. 575, 856 N.W.2d 310 (2014) (explaining that court should not require absolute certainty, but should admit expert testimony if there are good grounds for expert's conclusion, even if there could possibly be better grounds for some alternative conclusion). If Appellees have more specialized experts and evidence to attack Dr. Lawrence's conclusions, Appellees remain capable of cross-examining Dr. Lawrence and bringing their own experts and evidence to counter his opinions. However, this becomes a question of fact for the fact finder. See, generally, *Pineda v. Ford Motor Co.*, 520 F.3d 237 (3d Cir. 2008) (it is abuse of discretion to exclude testimony simply because trial court does not deem proposed expert to be best qualified or because proposed expert does not have specialization that court considers most appropriate); *U.S. v. Sandoval-Mendoza*, 472 F.3d 645, 655 (9th Cir. 2006) (because medical expert opinion testimony is based on specialized, as distinguished from scientific, knowledge, "'*Daubert* factors are not intended to be exhaustive or unduly restrictive'"); *Robinson v. GEICO General Ins. Co.*, 447 F.3d 1096 (8th Cir. 2006) (most courts have held that physician with general knowledge may testify regarding medical issues that specialist might treat in clinical setting); R. Collin Mangrum, Mangrum on Nebraska Evidence 690 (2018) (more accurate or complete statement would be that physicians are competent in great number of cases by education, training, and experience to testify about both matters observed as physicians and opinions based upon reasonably relied upon medical experts).

We hold that, on this record, the district court abused its discretion in determining that Dr. Lawrence was unqualified under § 27-702 to testify on causation as to the injuries Joaquin suffered due to Dr. Joekel's failure to hospitalize, treat, and control Joaquin's seizure, the sole causation opinion offered by Dr. Lawrence which was stated with the degree of certainty or probability necessary to make it relevant. In finding that Dr. Lawrence is qualified by his education, training, and background to render this opinion, we express no opinion as to whether his theory or methodology supporting the opinion are valid, whether the theory or methodology were properly applied to the facts in this case, or whether Dr. Lawrence's testimony is more probative or prejudicial. To the extent Appellees were challenging those factors, those components of the *Daubert*/*Schafersman* analysis were not addressed by the district court in its order. See *Zimmerman v. Powell*, 268 Neb. 422, 430, 684 N.W.2d 1, 9 (2004) (holding "the trial court 'must explain its choices' so that the appellate court has an adequate basis to determine whether the analytical path taken by the trial court was within the range of reasonable methods for distinguishing reliable expert testimony from false expertise"). We recognize the court likely did not address those factors either because it did not believe they were being challenged or because its ruling made it unnecessary to address the remaining factors.

Either way, because the trial court did not address those factors, we are unable to review the court's analysis governing these factors. This results in prejudice to Appellants whose case has been dismissed due to the striking of Dr. Lawrence's testimony. Some courts have held that when a trial court fails to make required findings, the appellate court should conduct the *Daubert*/*Schafersman* analysis on the appellate record. See, *Kinser v. Gehl Co.*, 184 F.3d 1259 (10th Cir. 1999), *abrogated on other grounds, Weisgram v. Marley Co.*, 528 U.S. 440, 120 S. Ct. 1011, 145 L. Ed. 2d 958 (2000); *Tanner v. Westbrook*, 174 F.3d 542 (5th Cir. 1999), *superseded on other*

grounds, Fed. R. Evid. 103(a). But our Supreme Court has held that this improperly shifts the gatekeeping duty from the trial courts to the appellate courts. *Zimmerman, supra*.

The dissent agrees that Dr. Lawrence was qualified to testify as an expert, but determined that the district court did not exclude Dr. Lawrence based upon his credentials. The dissent states the district court's ruling goes further and reaches an analysis of Dr. Lawrence's "reasoning or methodology to reach his opinions." The dissent then analyzes the record as it relates to Dr. Lawrence's methodology and application of the facts to the methodology. This court's differing interpretations of the district court's order here underscore the importance of the Nebraska Supreme Court's admonition to counsel in *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010), that a *Daubert*/*Schafersman* challenge should take the form of a concise pretrial motion and should identify which of these factors—the expert's qualifications, the validity/reliability of the expert's reasoning or methodology, the application of the reasoning or methodology to the facts, and/or the probative or prejudicial nature of the testimony—is believed to be lacking. It further underscores the importance of the Supreme Court's admonition to the trial court in *Zimmerman v. Powell*, 268 Neb. 422, 430, 684 N.W.2d 1, 9 (2004), that the trial court

> "must explain its choices" so that the appellate court has an adequate basis to determine whether the analytical path taken by the trial court was within the range of reasonable methods for distinguishing reliable expert testimony from false expertise. Margaret A. Berger, *The Supreme Court's Trilogy on the Admissibility of Expert Testimony*, in Reference Manual on Scientific Evidence 29 (Federal Judicial Center 2d ed. 2000).

Assuming that Appellees were challenging the validity/reliability of the expert's reasoning or methodology here, or Dr. Lawrence's application of the facts to that reasoning/methodology, the majority finds no analytical path in the trial

court's order sufficient to review those elements. The trial court's order held that Dr. Lawrence "is not qualified by virtue of training, expertise or experience to render any opinions on the progress or causation of this child's condition." We interpret the court's order as finding that Dr. Lawrence was not qualified to issue any opinion here on causation, not that his opinion was unreliable and should be excluded. Nor do we find any explanation of the trial court's choices here as they relate to Dr. Lawrence's methodology or application of fact to methodology so as to review the analytical path taken by the trial court as it relates to those elements. Accordingly, we remand this matter for further proceedings.

2. Affidavits of Drs. Pavkovic and Chatterjee

[19] Appellants next assign the district court erred in overruling their objection to the affidavits of Drs. Pavkovic and Chatterjee. At the hearing, Appellants orally objected to the affidavits, stating: "We object . . . on 402, 403, 702, Schafersman 1 and 2, [and] Kuhmo Tire." Denying Appellants' request for further argument and overruling the objection, the court stated: "For the purposes of this hearing, the exhibits will be received." Although this issue is no longer essential to the disposition of this appeal, 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. *Nebraska Account. & Disclosure Comm. v. Skinner*, 288 Neb. 804, 853 N.W.2d 1 (2014).

[20-22] As we previously noted, a trial court, when faced with a *Daubert*/*Schafersman* objection, "'must adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper.'" *Zimmerman v. Powell*, 268 Neb. 422, 430, 684 N.W.2d 1, 9 (2004). After such a *Daubert*/*Schafersman* objection has been made, "the losing party is entitled to know that the trial court has engaged in the '"'heavy cognitive burden'"' of determining whether the challenged testimony was relevant and reliable, as well

as a record that allows for meaningful appellate review." *Zimmerman*, 268 Neb. at 430, 684 N.W.2d at 9, quoting *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). "'Without specific findings or discussion on the record, it is impossible . . . to determine whether the [trial] court "'carefully and meticulously' review[ed] the proffered scientific evidence" or simply made an off-the-cuff decision to admit expert testimony.'" *Zimmerman v. Powell*, 268 Neb. 422, 430, 684 N.W.2d 1, 9 (2004). This means that the trial court must explain its choices so that the appellate court has an adequate basis to determine whether the analytical path taken by the trial court was within the range of reasonable methods for distinguishing reliable expert testimony from false expertise. *Id.*

Here, the court did not allow Appellants to provide their reasons for the objections, but Appellants did make it clear they were challenging the affidavits on *Daubert*/*Schafersman* grounds. The court summarily overruled Appellants' objections and failed to provide its reasoning. As such, the court erred in failing to supply such reasoning and abdicated its gatekeeping function under *Daubert*/*Schafersman* jurisprudence.

3. Appellees' Motion for Summary Judgment

Lastly, Appellants assign the district court erred in granting summary judgment in favor of Appellees. The district court entered its order after precluding Dr. Lawrence's testimony on causation. Because we determined the court erred in determining Dr. Lawrence was unqualified to testify as to causation on the sole issue of Joaquin's injuries suffered as a consequence of Dr. Joekel's failure to admit, monitor, and treat Joaquin for his seizure and because this testimony did not amount to loss-of-chance testimony, the court erred in not considering Dr. Lawrence's causation testimony on the motion for summary judgment. Therefore, we reverse the court's order on Appellees' motion for summary judgment and remand the matter for further proceedings consistent with this opinion.

VI. CONCLUSION

We conclude the district court erred in determining that Dr. Lawrence was unqualified under § 27-702 to testify on causation as to the injuries Joaquin suffered due to Dr. Joekel's failure to hospitalize and treat Joaquin for his seizure, the sole causation opinion offered by Dr. Lawrence which was stated with the degree of certainty or probability necessary to make it relevant. We affirm the district court's order as to all other testimony on causation as being irrelevant loss-of-chance testimony. We additionally conclude the district court erred in failing to provide its reasoning for overruling Appellants' objections to the affidavits of Drs. Pavkovic and Chatterjee. Because the court erred in precluding Dr. Lawrence's testimony on causation as provided above, the court erred in granting Appellees' motion for summary judgment. Accordingly, we affirm in part, and in part reverse and remand for further proceedings in compliance with this opinion.

Affirmed in part, and in part reversed and remanded for further proceedings.

Bishop, Judge, concurring in part, and in part dissenting.

I would affirm the district court's decision to exclude the testimony of Dr. Lawrence and thus would affirm the summary judgment order in favor of the appellees. Under the *Daubert*/*Schafersman* framework, a trial court must ultimately determine whether the expert has presented enough rational explanation and empirical support to justify admitting his or her opinion into evidence. See *Zimmerman v. Powell*, 268 Neb. 422, 684 N.W.2d 1 (2004). The district court performed its *Daubert*/*Schafersman* gatekeeping function; therefore, this court reviews the district court's decision to admit or exclude expert testimony for an abuse of discretion. See *Hemsley v. Langdon*, 299 Neb. 464, 909 N.W.2d 59 (2018). This dissent addresses only those portions of the majority opinion related to Dr. Lawrence's causation opinion on the appellees' failure to hospitalize, treat, and control Joaquin's seizure; I find no abuse

of discretion by the district court in excluding this testimony. I concur with the remainder of the majority opinion.

The district court determined that Dr. Lawrence was a qualified expert in the field of emergency room medicine, but that he was not qualified to render any opinions on the progress or causation of Joaquin's condition. The district court stated that such opinions would require expertise and qualification in the specialty of neurology and, specifically, child neurology. As noted in the majority opinion, and as acknowledged by the appellees, medical expert witnesses cannot be excluded simply because they are not specialists in a particular school of medical practice. See *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004). Rather, experts are considered qualified if they possess special skill or knowledge respecting the subject matter involved so superior to that of persons in general as to make the expert's formation of a judgment a fact of probative value. See *id*.

There is no question that Dr. Lawrence was qualified to testify as an expert. However, I agree with the appellees that the district court did not exclude Dr. Lawrence's testimony based upon his credentials (which is what the majority concludes); rather, the district court determined Dr. Lawrence was not qualified to render any opinions on the progress or causation of Joaquin's condition. This necessarily goes to the reliability or validity of Dr. Lawrence's reasoning or methodology to reach his opinions, and the underlying facts or data to support them. Although it would have been helpful for the district court to more specifically explain the reason it found Dr. Lawrence was not qualified to render a causation opinion, the court's order nevertheless sets forth an adequate basis to inform this court as to its reason. See *Zimmerman v. Powell, supra* (trial court need not recite *Daubert* standard, but must explain its decision so that appellate court has adequate basis to determine whether analytical path taken by trial court was within range of reasonable methods for distinguishing reliable expert testimony from false expertise).

Notably, the district court's determination that opinions on the progress or causation of Joaquin's condition would require expertise and qualification in the specialty of neurology and, specifically, child neurology is supported by Dr. Lawrence's own testimony. Although Dr. Lawrence is certainly qualified to testify about emergency room care, including the treatment of seizures, he had not treated a patient with EBV meningoencephalitis before and he repeatedly deferred to specialists in pediatric neurology and pediatric infectious diseases for answers to questions related to Joaquin's seizure and brain injury. Those experts opined that Joaquin "suffered mild brain damage as a result of the EBV encephalitis," "something about that virus's presence is what leads to the brain injury," there was "no evidence that the seizure . . . contributed to any brain injury," "[t]he viral infection . . . caused Joaquin's brain injury," and "[w]hether or not Joaquin was in the hospital at the time he had a seizure would not have changed the ultimate outcome and would not have prevented the brain damage he suffered."

Examples of Dr. Lawrence's deference to those experts follow: According to Dr. Joekel, EBV meningoencephalitis is a "very rare complication of a fairly common viral infection." Dr. Lawrence agreed that having mononucleosis develop or progress into encephalitis or meningitis is a "very uncommon" condition. When Dr. Lawrence was asked if he had ever treated a patient with mononucleosis that developed into encephalitis or meningitis, he was "not certain if [he had] or not." After agreeing that Joaquin had a seizure because of the "virus around his brain and in his spinal fluid" and that "IV hydration and medicine" would not have prevented the seizure, Dr. Lawrence testified that such treatment may have decreased his chance of having it. However, Dr. Lawrence also agreed that a pediatric neurologist or pediatric infectious disease expert would have more knowledge "about this area" than he would. Dr. Lawrence also deferred to the pediatric neurologist specialist for an opinion on whether Joaquin's seizure or

infection was more responsible for Joaquin's brain injury. Dr. Lawrence opined that both the seizure and the infection caused Joaquin's brain injury, but he was unable to render an opinion as to which was more responsible. He testified, "I'd have to defer that off to your pediatric neurologist that you referenced. But I think it's — clearly, it was both." When asked if Joaquin's seizure could have been totally prevented, Dr. Lawrence responded, "No. I never said that. I said his chance of seizure would have been less. I can't give you the number, but — and, yes, a pediatric neurologist or pediatric ID person would be able to better tell you that." Additionally, after stating that the "long seizure that [Joaquin] had [could] cause some of the brain damage," Dr. Lawrence was asked whether that opinion was based on any literature or science. He responded, "Nothing specific that I've looked at. But based on my training, expertise, and years of working." Dr. Lawrence testified that "50 different journals" are sent to his office which he reviews, but he did not review "any articles, textbooks, or anything else" to come up with his opinions.

At the hearing on the admissibility of Dr. Lawrence's opinions, the appellees argued that his opinions were unreliable. They asserted:

> As set forth in our brief, Dr. Lawrence is not giving a reliable opinion. And . . . that's distinguishable from . . . weight and credibility . . . . But the Court has a gatekeeping function to not allow an unreliable opinion to come before the jury. . . .
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> . . . .
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> . . . So Dr. Lawrence testified that the child may not have had as serious or as severe of a seizure if he had been in the hospital . . . at the time. . . . [I]nstead of sending him home . . . he would have had a seizure in the hospital and it may or may not have been so severe as it was. And our position in the briefing . . . is that that is an unreliable opinion under Nebraska law, a loss of chance, because he can't say what the chance is of whether the seizure would

> have happened, he can't say what the chance is of how serious it would have been, he just thinks that it may have been less severe. And our position is that is not sufficient to state a causation opinion under Nebraska law.
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> . . . .
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> At the core, our motion is that [Dr. Lawrence] is not giving a sufficiently reliable opinion that any of these things would have made a difference in the outcome that this child ultimately suffered in this case.
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> . . . .
>
> . . . Dr. Lawrence . . . says that the child may have had a decreased chance of having a seizure or may have had a less severe seizure. Saying it in that terminology we're saying is [an] unreliable opinion.

It is evident that the appellees did in fact challenge the reliability of Dr. Lawrence's opinions, which necessarily goes to his underlying reasoning or methodology. See *McNeel v. Union Pacific RR. Co.*, 276 Neb. 143, 753 N.W.2d 321 (2008) (preliminary assessment of whether reasoning or methodology underlying testimony is valid and can be properly applied to facts in issue establishes standard of evidentiary reliability). The essence of Dr. Lawrence's opinions is that Dr. Joekel should have somehow anticipated Joaquin might have a seizure 3 hours later and that therefore, Dr. Joekel should have admitted Joaquin to the hospital so the anticipated seizure could have been better controlled in a hospital environment. However, Dr. Lawrence admitted that even if Joaquin had been in the hospital, it may not have prevented him from having a seizure; rather, he broadly asserts that the seizure could have been treated "more quickly" which would have resulted in a "decreased length of hypoxia" and a "decreased length of the seizure," which he claimed would have resulted in "a better outcome." However, he never explains how or why that would have been the case given Joaquin's "rare" or "very uncommon" condition, and given his agreement that the seizure was not a "febrile seizure," but was instead caused by "this virus

around [Joaquin's] brain and in his spinal fluid." Nor does he ever actually testify as to the duration of Joaquin's seizure or hypoxia, or what impact the infection itself may have had on the duration of Joaquin's seizure versus any delayed seizure treatment. Nor does Dr. Lawrence explain why the professional medical care Joaquin received from the emergency paramedics or in the UNMC emergency room was any different in terms of impact on the seizure as compared to the treatment Joaquin would have received if he had been admitted earlier under Dr. Joekel's care. Further, Dr. Lawrence agreed patients could have seizures without brain injury. Yet, he provided no authoritative source or supporting data to support how, in this particular instance, Joaquin's seizure contributed to his brain injury other than to say it was a "long seizure" and if he had been in the hospital and had his seizure treated sooner, he would have had a better outcome.

In *Rankin v. Stetson*, 275 Neb. 775, 749 N.W.2d 460 (2008), a trial court excluded a neurosurgeon's testimony who had opined that the plaintiff would have recovered if surgical repair had occurred within the first 72 hours after her injury and that her chance of avoiding permanent injury decreased each day after the 72-hour period. The trial court excluded the opinion because the doctor failed to disclose the underlying facts or data for his opinions and, further, because the doctor did not qualify to give his opinion because he failed to set forth any methodology from which it could be determined that his opinions arose from facts or procedures that could be tested. In the doctor's deposition, he was asked for the basis of his opinion concerning the 72-hour timeframe; the doctor was unable to identify any specific article or peer-reviewed literature that would support his opinion concerning the 72-hour period. The Nebraska Supreme Court affirmed the trial court's decision to exclude the doctor's testimony, pointing out that the doctor was unable to say that his theory concerning the timeframe had been tested in any way, he was unable to provide a basis for his 72-hour theory, he could not cite any peer-reviewed literature

to support his theory, and he did not provide any testimony to suggest the 72-hour theory is generally accepted. Recently, the Nebraska Supreme Court referred to *Rankin v. Stetson, supra*, stating:

> We held that it was not an abuse of discretion for the district court to reject the expert's testimony, reasoning that the district court acted as a gatekeeper to ensure that the reasoning or methodology underlying the expert testimony was valid and properly applied. We explained that because the expert witness failed to disclose the underlying facts or data for his opinions, he was not qualified to testify to his opinion under § 27-702.

Hemsley v. Langdon, 299 Neb. 464, 475, 909 N.W.2d 59, 69 (2018).

Similarly here, as determined by the district court, Dr. Lawrence was not qualified to give an opinion on the progress or causation of Joaquin's condition. He was unable to provide a tested basis for how a "long seizure" occurring in a patient with EBV meningoencephalitis caused or contributed to the brain injury, he did not review or otherwise rely upon any peer-reviewed literature or other medical data to support his theory, and he did not provide any testimony to suggest his theory is generally accepted. Rather, in Dr. Lawrence's deposition, he asserted that Joaquin had "a long seizure . . . what they call status epilepticus, so his seizure was persistent" and that if he had been in the hospital, he "would have been treated sooner." He went on to state:

> But my opinion is that his chance of having a seizure would have been less. The seizure caused hypoxia, which caused a combination of — which, you know, he had to be put on a tube. . . . [H]is pH was low, which related to his lack of breathing, which could have caused some of the brain damage also.

Although Dr. Lawrence states that Joaquin's "lack of breathing . . . could have caused some of the brain damage," he acknowledged that Joaquin was breathing on his way to UNMC

with the fire department paramedics and that Joaquin was in the UNMC emergency room when he had "decreased respirations" which necessitated him being intubated. Dr. Lawrence was not critical of how the paramedics treated Joaquin on the way to UNMC, stating that "they did everything appropriate as far as giving medications and rushing him . . . to the hospital quickly." Nor was Dr. Lawrence critical of Joaquin's treatment in the UNMC emergency room. When asked if the UNMC emergency room staff "acted very promptly when [Joaquin] had respiratory issues, intubated him," and so "it's very unlikely he had any damage from their quick reaction to [Joaquin's] respiratory dysfunction," Dr. Lawrence responded, "I think they did a good job. I'm not critical of their care at all."

Also, although Dr. Lawrence claimed that the hypoxia began "from the time [Joaquin] started his seizure," he admitted that he had seen plenty of patients who have ongoing seizures who do not end up with a brain injury. He appeared to distinguish Joaquin's situation by saying that Joaquin "had a long extrapolated seizure." When asked how long the seizure was, Dr. Lawrence said, "Well, it started at home. We could pull the records and give it." However, there was never a response regarding the length of Joaquin's seizure, nor how the length of Joaquin's seizure may have compared to other patients with EBV meningoencephalitis who also suffered a seizure. When asked if admitting Joaquin to the hospital 3 hours prior to the seizure would have prevented the seizure, Dr. Lawrence responded:

> I didn't say that. I said his chance of having a seizure was less. I can't tell you that number. But if he did have a seizure, the seizure would more than likely, because he was in the hospital . . . then they could have more quickly treated his seizure with medications 20 to 30 minutes sooner in his seizure.
>
> . . . .
>
> . . . My opinion would be that he — his seizure — they would have decreased the chance of having

> the seizure. He would have had a decreased length of hypoxia, decreased length of the seizure, and would have had a better outcome, which, with the reasonable degree of medical certainty, that he would not have had the craniotomy and all the procedures that followed that.

While this reads like loss-of-chance testimony to me, it also provides no foundational basis for how a decreased length of seizure would have resulted in a better outcome in a situation where Dr. Lawrence agreed the seizure was caused by a "virus around [Joaquin's] brain and in his spinal fluid," and he agreed the EBV meningoencephalitis was a cause of the brain injury. Although Dr. Lawrence alludes to Joaquin being treated with medications "20 to 30 minutes sooner" if he had been in the hospital, Dr. Lawrence provides no foundational basis for his reference to "20 to 30 minutes" or how earlier medication would have decreased the length of hypoxia or decreased the length of the seizure. Based upon Dr. Lawrence's testimony that the paramedics transporting Joaquin from his home "did everything appropriate as far as giving medications and rushing him . . . to the hospital," and further, that the UNMC emergency room staff "did a good job" and he was "not critical of their care at all," this leaves only the time from when Joaquin started having a seizure at home until the paramedics arrived as the period of time during which Joaquin was not being treated by medical professionals. Dr. Lawrence did not testify as to how long a period of time that was, nor did he opine that this initial period of seizure activity was the cause of Joaquin's brain injury. Rather, his focus was on the duration of the seizure and the hypoxia.

However, Dr. Lawrence fails to account for why Joaquin's seizure persisted despite being under professional medical care from the time the paramedics arrived through his care in the UNMC emergency room and thereafter. Dr. Lawrence fails to distinguish Joaquin's emergency medical care from the medical care Joaquin would have received if he had been admitted 3 hours earlier and how that distinction would have

impacted the duration of Joaquin's seizure and/or the hypoxia. Dr. Lawrence was unable to provide any authoritative source or supporting data for his opinions; rather, it was simply his subjective belief that the duration of the seizure and hypoxia contributed to Joaquin's brain injury and that if he had been in the hospital at the onset of the seizure, he would have had a better outcome. An expert's opinion must be based on good grounds, not mere subjective belief or unsupported speculation. *King v. Burlington Northern Santa Fe Ry. Co.*, 277 Neb. 203, 762 N.W.2d 24 (2009). Dr. Lawrence failed to present enough rational explanation and empirical support to justify admitting his opinion into evidence. See *Zimmerman v. Powell*, 268 Neb. 422, 684 N.W.2d 1 (2004). The district court did not abuse its discretion by excluding Dr. Lawrence's causation testimony, and therefore, its summary judgment order should be affirmed.

Tara and James Woodcock, husband and wife, and Gary and Martha Ellen Dimmitt, husband and wife, appellants, v. Anthony Navarrete-James, appellee.

923 N.W.2d 769

Filed January 29, 2019. No. A-17-722.

1. **Trial: Pleadings: Pretrial Procedure.** A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only questions of law are presented.
2. **Motions to Vacate: Appeal and Error.** In reviewing a trial court's action in vacating or refusing to vacate a judgment or order, an appellate court will uphold and affirm the trial court's action in the absence of an abuse of discretion.
3. **Pleadings: Proof: Dismissal and Nonsuit.** A motion seeking dismissal of a complaint for failure to state a cause of action should be granted only if it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief.
4. **Courts: Judgments: Time.** After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate or modify the judgment except for the reasons stated and within the time limited in Neb. Rev. Stat. § 25-2001 (Reissue 2016).
5. **Attorney and Client: Negligence: Judgments: Time.** Lack of diligence or negligence of counsel is not an unavoidable casualty or misfortune in the context of Neb. Rev. Stat. § 25-2001(4)(f) (Reissue 2016) entitling the applicant to vacation of judgment after adjournment of term at which judgment has been rendered.
6. **Trial: Pleadings: Pretrial Procedure.** A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only questions of law are presented.
7. **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 Lincoln County: Donald E. Rowlands, Judge. Reversed and remanded for further proceedings.

James C. Bocott, of Law Office of James C. Bocott, P.C., L.L.O., for appellants.

Stephen L. Ahl and Krista M. Carlson, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee.

Pirtle, Riedmann, and Bishop, Judges.

Per Curiam.

INTRODUCTION

Tara and James Woodcock, husband and wife, and Gary and Martha Ellen Dimmitt, husband and wife (collectively appellants), appeal from an order of the district court for Lincoln County dismissing their amended complaint seeking to vacate or modify a prior order that dismissed appellants' personal injury case against Anthony Navarrete-James and Yolanda Sanchez. Based on the reasons that follow, we reverse, and remand for further proceedings.

BACKGROUND

On June 20, 2009, appellants were injured as a result of a motor vehicle accident caused by Navarrete-James' negligence in failing to stop at a red light. Appellants hired an attorney and filed a lawsuit in the district court for Lincoln County, case No. CI 13-349, against Navarrete-James and Sanchez. Appellants believed their attorney was doing what was necessary to pursue the matter and represent their interests. In November 2015, appellants learned that their lawsuit had been dismissed on September 3 for failure of their attorney to follow the court's orders on various motions to compel discovery requests. On December 31, appellants' attorney filed a motion to reinstate the dismissed lawsuit, and on March 17, 2016, the district court denied the motion. On March 25, appellants filed a motion to alter or amend the judgment or, alternatively, to

vacate and set aside the March 17 order. On April 27, the court entered an order reinstating appellants' case.

Navarrete-James and Sanchez filed a motion to vacate the court's April 27, 2016, order, which had reinstated the case. Upon further consideration, the court decided that its September 3, 2015, order (dismissing appellants' personal injury action) was final and disposed of all issues in the case. The court further determined that because it was a final order, and because the term of the court had already ended before appellants filed their March 25, 2016, motion to alter or amend the judgment, the court had no authority or power to vacate or modify the judgment except for the reasons stated in Neb. Rev. Stat. § 25-2001 (Reissue 2016). The court found that none of the statutory reasons for allowing a modification beyond the term identified in § 25-2001 were present, and on August 1, the court ordered that its April 27 order was null and void, and dismissed case No. CI 13-349 without prejudice. Appellants appealed the August 1 order, but dismissed the appeal before it was submitted to this court.

Appellants then filed a new action in the district court for Lincoln County, case No. CI 16-648, pursuant to Neb. Rev. Stat. § 25-2002 (Reissue 2016), which provides in relevant part: "The proceedings to vacate or modify the judgment or order on the grounds mentioned in subsection (4) of section 25-2001 shall be by complaint, setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant." The amended complaint alleged two "causes of action." The first alleged that their personal injury case should be reinstated based on § 25-2001(4)(f), and the second alleged that they were entitled to equitable relief. Appellants claimed they were unaware their attorney had failed to comply with discovery, they were repeatedly reassured that their case was progressing satisfactorily, they were completely unaware their lawsuit was in jeopardy of being dismissed, and they were never advised of any problems or impending deadlines. Appellants also stated that

their attorney suffered multiple health and family problems in 2014 and 2015, which he claimed impacted his ability to diligently pursue appellants' personal injury lawsuit.

With regard to the second "cause of action," the amended complaint stated that if the court determined appellants had no remedy under § 25-2001(4)(f), they had no adequate remedy at law and it would be necessary for the court to use its independent and concurrent equitable jurisdiction to vacate the court's March 17, 2016, order.

Navarrete-James filed a motion for judgment on the pleadings. At the hearing on the motion, appellants acknowledged that Sanchez had not been served within 6 months of the filing of the complaint as required by Neb. Rev. Stat. § 25-517.02 (Reissue 2016). Accordingly, the district court dismissed Sanchez from the case and dismissed the case against her without prejudice. Appellants do not contest this decision in their appeal.

Following the hearing, the trial court found that appellants' amended complaint was properly before it pursuant to § 25-2002, but that appellants had failed to state a claim. The court granted Navarrete-James' motion for judgment on the pleadings and dismissed the case with prejudice as to Navarrete-James. The court found, as it had already held in case No. CI 13-349, that none of the statutory reasons for allowing a modification or vacation beyond the term identified in § 25-2001 were present. It specifically found that appellants did not meet the statutory condition for reinstatement under § 25-2001(4)(f), as they alleged. The court also concluded that it could not apply its equity powers to reinstate case No. CI 13-349 because "[appellants] have tried to avail themselves of the statutory remedy, and . . . equity will not lie where there is a statutory remedy."

ASSIGNMENTS OF ERROR

Appellants assign that the trial court erred by (1) dismissing their amended complaint for failure to state a cause of action

and (2) concluding there was no equitable basis for relief because they had an adequate remedy at law.

STANDARD OF REVIEW

[1] A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only questions of law are presented. *In re Trust Created by Hansen*, 274 Neb. 199, 739 N.W.2d 170 (2007).

[2] In reviewing a trial court's action in vacating or refusing to vacate a judgment or order, an appellate court will uphold and affirm the trial court's action in the absence of an abuse of discretion. See *In re Estate of West*, 226 Neb. 813, 415 N.W.2d 769 (1987).

ANALYSIS

[3] Appellants contend the district court erred by dismissing their amended complaint on the pleadings because there were issues of fact which required resolution. A motion seeking dismissal of a complaint for failure to state a cause of action should be granted only if it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief. *Dennes v. Dunning*, 14 Neb. App. 934, 719 N.W.2d 737 (2006). The trial court found that appellants could prove no set of facts under § 25-2001(4)(f) which would allow the court to vacate its March 17, 2016, order in case No. CI 13-349 and reinstate their personal injury action. However, we conclude there are issues of fact yet to be determined under the applicable legal principles, as discussed next.

[4] Our law is well settled that after the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate or modify the judgment except for the reasons stated and within the time limited in § 25-2001. See *Emry v. American Honda Motor Co.*, 214 Neb. 435, 334 N.W.2d 786 (1983). Appellants' first "cause of action" in their amended complaint sought reinstatement of their personal injury case based on § 25-2001, specifically subsection (4)(f). Section 25-2001(4) provides: "A district court

may vacate or modify its own judgments or orders after the term at which such judgments or orders were made . . . (f) for unavoidable casualty or misfortune, preventing the party from prosecuting or defending . . . .”

The unavoidable casualty or misfortune appellants allege is based on the actions of their former attorney who failed to respond to discovery even after being warned that the case would be dismissed if appellants did not respond to the discovery. Appellants claim that their former attorney did not forward copies of pleadings to them, but repeatedly reassured them that their case was progressing satisfactorily. And despite being in contact with their attorney, the attorney never advised them of any problems or impending deadlines; they were completely unaware their lawsuit was in jeopardy of being dismissed.

[5] The rule is well-established in Nebraska that lack of diligence or negligence of counsel is not an unavoidable casualty or misfortune in the context of § 25-2001(4)(f) entitling the applicant to vacation of judgment after adjournment of term at which judgment has been rendered. See, *Emry v. American Honda Motor Co., supra*; *Shipley v. McNeel*, 149 Neb. 793, 32 N.W.2d 636 (1948); *Lyman v. Dunn*, 125 Neb. 770, 252 N.W. 197 (1934). Relying on *Emry v. American Honda Motor Co., supra*, the trial court held that “[a]lthough the negligence of counsel was a misfortune, it was not necessarily unavoidable, and . . . it did not prevent the [appellants] from prosecuting their case so as to come under § 25-2001(4)(f).” Appellants argue that the court’s reliance on *Emry* was misplaced because it can be distinguished from the present case. We agree.

In *Emry*, plaintiff was represented by an attorney in Omaha, Nebraska, and two partners from a law firm in Minnesota. Plaintiff’s attorney did not respond to defendants’ discovery requests, and the court issued a second order to show cause why the case should not be dismissed. During the period of inaction that led to the second show cause order, plaintiff’s

principal attorney in Minnesota died in July 1978 and his partner began to distribute some of his cases to other attorneys and asked an Omaha attorney to handle plaintiff's case. The partner forwarded plaintiff's file to the Omaha attorney in August 1979. The Omaha attorney did not accept representation until July 1980, and at that time, he found out the case had been dismissed in May. He then filed a petition to vacate the dismissal based upon § 25-2001, which the trial court granted, thereby reinstating plaintiff's products liability case. Defendants appealed.

On appeal, the Nebraska Supreme Court noted that there was confusion as a result of the Minnesota attorney's death, but that nothing was done to move the case forward from the time of his death in 1978 until the second order to show cause was entered in 1980. The court held that the attorney's death probably was an unavoidable casualty or misfortune, but the death did not prevent plaintiff from prosecuting his claim. The court further stated:

> It would seem that 2 years was certainly a long enough time for the confusion resulting from [the attorney's] death to subside. Even if there were lingering confusion as to who was handling the case, the respective attorneys might have at least recognized that there was confusion and governed themselves accordingly. We believe that this appeal could have easily been avoided; for example, if there had been formal appearances and withdrawals of the attorneys *of record*.

Emry v. American Honda Motor Co., 214 Neb. 435, 444, 334 N.W.2d 786, 792 (1983) (emphasis in original). The court then cited the rule that lack of diligence or negligence of counsel is not an unavoidable casualty or misfortune. Certainly, the record before us would indicate that some of appellants' former attorney's actions may be characterized as lack of diligence or negligence. However, other actions by the attorney may rise to the level of intentional misstatements or misrepresentations or dishonesty; such actions have been

viewed differently when considering unavoidable casualty or misfortune.

Appellants cite us to the case of *Anthony & Co. v. Karbach*, 64 Neb. 509, 90 N.W. 243 (1902), which we find more applicable to the present situation than the case of *Emry v. American Honda Motor Co., supra*. In *Anthony & Co.*, plaintiff filed suit against two defendants, seeking a judgment for monetary damages. Defendants retained an attorney to represent them in the litigation. The attorney informed defendants several times that he had done certain things, but defendants later learned the attorney had taken no action to protect their interests and that a default judgment in the amount of $2,211.25 plus costs had been entered against them several months earlier. Now outside the previous court term, they sought to vacate the default judgment and requested a new trial. The district court agreed and vacated the judgment. Plaintiff appealed; one argument on appeal was that the facts were not such to bring the case within any of the grounds specified by statute "for the vacation of judgments after the term at which they have been rendered." *Anthony & Co. v. Karbach*, 64 Neb. at 512, 90 N.W. at 244. The Nebraska Supreme Court affirmed the decision of the district court, and as relevant here, stated:

> One of the grounds specified . . . is unavoidable casualty or misfortune, preventing the party from prosecuting or defending. The word "casualty" means accident; that which comes by chance, or without design, or without being a foreseen contingency. The word "misfortune" means ill-luck; ill-fortune; calamity; evil or cross accident. We do not believe it requires any stretch of language to hold that one who has suffered by the dishonesty of his attorney, an officer of the court, as shown by the record in this case, is a victim of casualty and misfortune, as above defined. Where any injury or mishap befalls one, through unforeseen circumstances, which can not ordinarily be guarded against, it is misfortune.

Id.

We conclude the present case is distinguishable from *Emry* and is more akin to the *Anthony & Co.* case. In the amended complaint at issue, appellants alleged that they understood that their attorney was doing what was necessary to diligently pursue their claim and competently represent their interests; they were unaware that their attorney had not responded to discovery requests; they were led to believe and did believe that their interests were being adequately represented; and at all times, appellants were compliant and responsive to any requests or demands made by their attorney for information necessary to respond to discovery requests. Most important, appellants alleged that they were "1) repeated[ly] reassured that their case was progressing satisfactorily; 2) completely unaware that their lawsuit was in jeopardy of being dismissed; and, 3) never advised of any problems or impending deadlines, despite being in contact with their attorney."

In *Emry v. American Honda Motor Co.*, 214 Neb. 435, 334 N.W.2d 786 (1983), in contrast to the present case, there is no indication of any communication between plaintiff and counsel between the time the attorney died and the case was dismissed. There was confusion created after the death of counsel, but no indication that plaintiff was misled into believing that the case was progressing satisfactorily. In the present case, unlike *Emry*, appellants allege that they had no reason to believe their case was in jeopardy of being dismissed as a result of their attorney's failure to comply with discovery; their attorney did not provide them copies of pleadings, including motions to compel or motions to dismiss. Appellants were in contact with their attorney, provided information to the attorney when asked, and were reassured by the attorney that the case was progressing forward. The attorney's reassurances to appellants in the instant case, as alleged in the amended complaint, amount to more than a lack of diligence or negligence. The attorney's actions appear to have been dishonest, with the intention of misleading appellants; these are behaviors which the Nebraska Supreme Court has determined

may constitute unavoidable casualty or misfortune, as discussed above.

The dissent concludes that a recent decision by the Nebraska Supreme Court resolves any possible factual issues and controls the outcome of this appeal. The Supreme Court reviewed the attorney disciplinary proceeding brought against appellants' former attorney, Martin Troshynski, and the opinion was released following oral argument in this case. See *State ex rel. Counsel for Dis. v. Troshynski*, 300 Neb. 763, 916 N.W.2d 57 (2018). In the disciplinary case, the grievance filed by appellants herein and another former client was based primarily upon omissions by the attorney, whereas in the present case, appellants alleged they were "repeated[ly] reassured that their case was progressing satisfactorily." The latter is a claim of dishonesty which is not mentioned in the Supreme Court's opinion. Also, Neb. Ct. R. § 3-320 states:

> The acquittal of the member on criminal charges or a verdict or judgment in the member's favor in civil litigation involving material allegations similar in substance to a Grievance, Complaint, or Formal Charge shall not in and of itself justify termination of disciplinary proceedings predicated upon the same or substantially the same material allegations.

This would appear to create a divide between attorney discipline and the underlying case upon which the disciplinary action is based. Grounds for discipline include violation of an attorney's oath or of the Nebraska Rules of Professional Conduct. See Neb. Ct. R. § 3-303. And that violation can be either negligent or intentional. We conclude the attorney discipline case does not control the outcome of the present appeal because an attorney disciplinary action is based upon a violation of the oath of office or the Nebraska Rules of Professional Conduct, which can be either negligent or intentional, and the rules do not require proof of which theory underlies the grievance. In the appeal before us, there are allegations of affirmative statements by the attorney which were

dishonest and appear to have been made with the intention of misleading appellants. Whether such facts can be proved remain the burden of appellants; however, because questions of fact remain, judgment and dismissal on the pleadings was not appropriate.

[6] A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only questions of law are presented. *In re Trust Created by Hansen*, 274 Neb. 199, 739 N.W.2d 170 (2007). As already noted, appellants' amended complaint raises more than questions of law. Appellants alleged that their attorney misled them and repeatedly reassured them that their case was progressing satisfactorily. We conclude that appellants' amended complaint raises questions of fact as to whether the actions of their attorney amount to an unavoidable casualty or misfortune which prevented them from prosecuting their case, in the context of § 25-2001(4)(f). The motion for judgment on the pleadings should have been denied.

[7] Because we conclude that the motion for judgment on the pleadings should have been denied based on § 25-2001(4)(f), we need not address appellants' argument that the trial court erred in concluding that there was no equitable basis for relief. See *Nesbitt v. Frakes*, 300 Neb. 1, 911 N.W.2d 598 (2018) (appellate court not obligated to engage in analysis not necessary to adjudicate case and controversy before it).

CONCLUSION

The district court erred by granting Navarrete-James' motion for judgment on the pleadings and dismissing appellants' case with prejudice.

Reversed and remanded for further proceedings.

Pirtle, Judge, dissenting.

While I am sympathetic to the plight of appellants, and I fully appreciate that the result reached previously by the district court may appear harsh and unfair, I respectfully dissent

from the majority's conclusion that the district court erred in granting Navarrete-James' motion for judgment on the pleadings. I disagree with the majority's determination that the amended complaint raises questions of fact as to whether counsel's actions amounted to unavoidable casualty or misfortune which prevented appellants from prosecuting their personal injury case.

As stated in the majority opinion, the lack of diligence or negligence of counsel is not unavoidable casualty or misfortune in the context of § 25-2001(4)(f) entitling the applicant to vacation of judgment after adjournment of term at which judgment has been rendered. *Emry v. American Honda Motor Co.*, 214 Neb. 435, 334 N.W.2d 786 (1983). I would conclude that appellants' counsel's actions as alleged in the amended complaint were clearly due to lack of diligence or negligence of counsel and that therefore, there is no question of fact.

My conclusion that there is no question of fact that counsel's actions were due to lack of diligence or negligence of counsel, such that § 25-2001(4)(f) does not apply, is based on the allegations contained within the amended complaint itself filed by appellants in the district court and the Nebraska Supreme Court's recent decision in *State ex rel. Counsel for Dis. v. Troshynski*, 300 Neb. 763, 916 N.W.2d 57 (2018). The court discusses counsel's failure to comply with discovery requests in appellants' personal injury lawsuit against appellees, resulting in the dismissal of appellants' case. The court noted that the referee determined that the evidence showed that "the clients . . . suffered greatly from [counsel's] *negligence*." *Id*. at 767-68, 916 N.W.2d at 60 (emphasis supplied). The court found that the facts were undisputed and were established by clear and convincing evidence. It concluded that counsel violated several provisions of the Nebraska Rules of Professional Conduct and violated his oath of office as a licensed attorney during the time he represented appellants.

In the amended complaint before us now, appellants alleged that they were unaware that their attorney had failed to comply

with discovery, that they were repeatedly reassured that their case was progressing satisfactorily, that they were completely unaware their lawsuit was in jeopardy of being dismissed, and that they were never advised of any problems or impending deadlines. Appellants also stated that their counsel suffered multiple health and family problems in 2014 and 2015 that he now claims impacted his ability to diligently pursue appellants' personal injury lawsuit. Appellants made no allegations that their counsel hid information or prevented them from following the progress of their case, or lack thereof, nor did they allege that he committed any fraud or deceit or that any of his actions were intentional.

Because the Supreme Court has found that counsel's actions were negligent, there can be no question of fact as to whether counsel's actions amounted to unavoidable casualty or misfortune which prevented appellants from prosecuting their personal injury case. I believe the district court correctly found that appellants were not entitled to relief pursuant to § 25-2001(4)(f) and did not err in granting Navarrete-James' motion for judgment on the pleadings.

I would conclude, therefore, that the district court did not err in refusing to vacate the March 17, 2016, order and reinstate their case.

In re Interest of Audrey T., a child under 18 years of age. State v. Nebraska, appellee, v. Sabra T., appellant.

924 N.W.2d 72

Filed January 29, 2019. No. A-17-1308.

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. **Parental Rights: Proof.** The bases for termination of parental rights are codified in Neb. Rev. Stat. § 43-292 (Reissue 2016). 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.
3. **Parental Rights: Evidence: Appeal and Error.** If an appellate court determines that the lower court correctly found that termination of parental rights is appropriate under one of the statutory grounds set forth in Neb. Rev. Stat. § 43-292 (Reissue 2016), the appellate court need not further address the sufficiency of the evidence to support termination under any other statutory ground.
4. **Indian Child Welfare Act: Parental Rights: Proof: Expert Witnesses.** To terminate parental rights, the State must prove by clear and convincing evidence that one or more of the statutory grounds listed in Neb. Rev. Stat. § 43-292 (Reissue 2016) have been satisfied and that termination is in the child's best interests. The Nebraska Indian Child Welfare Act adds two additional elements the State must prove before terminating parental rights in cases involving Indian children. First, the State must prove by clear and convincing evidence that active efforts have been made to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. Second, the State must prove by evidence beyond a reasonable doubt, 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.

5. ____: ____: ____: ____. Pursuant to the Nebraska Indian Child Welfare Act, before a court may terminate a parent's rights to their child or children, the State must prove by evidence, beyond a reasonable doubt, 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. This evidence must be established by qualified expert testimony provided by a professional person having substantial education and experience in the area of his or her specialty.
6. ____: ____: ____: ____. Neb. Rev. Stat. § 43-1505(6) (Reissue 2016) requires that the qualified expert's opinion must support the ultimate finding of the court, i.e., that continued custody by the parent will likely result in serious emotional or physical damage to the child.
7. **Parental Rights: Proof.** Once a statutory basis for termination has been proved, the next inquiry is whether termination is in the child's best interests.
8. **Parental Rights.** When a parent is unable or unwilling to rehabilitate himself or herself within a reasonable period of time, the child's best interests require termination of parental rights.
9. ____. Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.
10. **Indian Child Welfare Act: Parental Rights: Proof: Notice.** The stated purposes of the Nebraska Indian Child Welfare Act are best served by allowing parents to raise, in their direct appeal from a termination of parental rights, the issue of the State's failure to notify the child's Indian tribe of the termination of parental rights proceedings.

Appeal from the County Court for Scotts Bluff County: James M. Worden, Judge. Affirmed.

Bernard J. Straetker, Scotts Bluff County Public Defender, for appellant.

Danielle Larson, Deputy Scotts Bluff County Attorney, for appellee.

Pirtle, Riedmann, and Welch, Judges.

Welch, Judge.

INTRODUCTION

Sabra T., the biological mother of Audrey T., appeals the termination of her parental rights. She contends that the Scotts Bluff County Court, sitting in its capacity as a juvenile court, erred in terminating her parental rights pursuant to Neb. Rev. Stat. § 43-292(2), (5), (6), and (7) (Reissue 2016) and finding that termination was in Audrey's best interests. Sabra further contends that the State failed to prove beyond a reasonable doubt, as required by the Nebraska Indian Child Welfare Act (NICWA), Neb. Rev. Stat. §§ 43-1501 to 43-1517 (Reissue 2016), through qualified expert witness testimony, that the continued custody of Audrey by Sabra was likely to result in serious emotional or physical damage to Audrey. Finally, Sabra contends that the State failed to provide proper notice to the Oglala Sioux Tribe in violation of NICWA. For the reasons set forth herein, we affirm the order terminating Sabra's parental rights.

STATEMENT OF FACTS

Sabra is the biological mother of Audrey, who was born in August 2013. Because Audrey is an enrolled member of the Oglala Sioux Tribe, NICWA applies to this case.

On January 5, 2016, the State filed an adjudication petition alleging that Audrey was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2015) for the reason that she lacked proper parental care by reason of the fault or habits of Sabra. Specifically, the State alleged Sabra was unable to meet Audrey's basic needs for care and protection, Sabra uses inappropriate discipline, and Sabra's mental health issues put Audrey at risk of abuse and/or neglect. The petition further alleged that NICWA was applicable because Audrey was of Native American heritage. That same day, the court entered an order placing temporary custody of Audrey with Nebraska's Department of Health and Human Services (DHHS), and Audrey was removed from Sabra's home. Audrey has consistently been a ward of the State since that time.

On March 11, 2016, the court entered an order adjudicating Audrey as a child within the meaning of § 43-247(3)(a). The court found the State had met its burden, by a preponderance of the evidence, that Sabra was unable to meet Audrey's basic needs for care and protection and that her mental health issues put Audrey at risk of harm. The court further found that active efforts had been made by the State to "prevent the breakup of the Native American family," including family support, food vouchers, transportation, parenting classes, and case management; that the child would experience serious emotional or physical damage if left in the family home; that court placement was with a family member and was "ICWA compliant"; and that the court's "findings related to ICWA are supported by the testimony of an ICWA expert."

The State filed a motion to terminate Sabra's parental rights on July 31, 2017, alleging that termination was appropriate pursuant to § 43-292(2), (5), (6), and (7) and that termination was in Audrey's best interests. The termination motion also again set forth that NICWA was applicable to this case. The termination hearing was held on September 27 and concluded on October 27. The State adduced testimony from psychologist Dr. Gage Stermensky, mental health therapist Sarah Bernhardt, a youth transition support worker, Audrey's aunt, DHHS child and family service specialist Cassie Beasant, and Theresa Stands. Sabra testified in her own behalf.

The youth transition support worker testified that Sabra, who was born in 1994, has been in the youth transition support program since March 2016. The youth transition support program assists youth from 16 to 25 years old that have been diagnosed with mental illness and/or substance abuse to transition into adulthood by providing assistance in various areas such as housing, transportation, budgeting, finances, employment, vocational rehabilitation, and education. While in the program, Sabra has been receiving services specific to budgeting, forming healthy relationships, parenting techniques, and vocational rehabilitation. According to

the support worker, Sabra, who suffers from mental illness, struggles primarily in the areas of scheduling and engaging in healthy relationships.

In April 2016, Audrey and Sabra were referred to Bernhardt for child-parent psychotherapy. Bernhardt explained that child-parent psychotherapy is for children up to age 5 and "is an attachment-focused intervention, a therapy that is intended to treat a relationship between a caregiver and a child, particularly when there's been a trauma that has been experienced that has impacted their relationship." Bernhardt testified that Sabra's attendance at therapy was inconsistent: Bernhardt had a total of 25 visits with Sabra, 19 of which included Audrey, with 16 missed visits. Bernhardt testified that Audrey "knows her mother," they have a positive relationship, and there is a connection between them.

Beasant testified that she became the caseworker for this case at the end of November 2016 and that she remained the caseworker at the time of the termination hearing. When Beasant was assigned the case, Sabra was living in an apartment and was working at a bakery. Beasant testified that for a period of time, Sabra was having some unsupervised visits with Audrey in her apartment, but that ended in December 2016 after family support workers found unsafe individuals present with Audrey and Sabra during a drop-in visit. These "unsafe individuals" were people known to Beasant as methamphetamine users, individuals who were in treatment for alcoholism, or individuals who had their parental rights terminated to their own children. Sabra regained unsupervised visits between March and April 2017, but these unsupervised visits ended in August 2017 after Audrey alleged that an individual who lived at her foster home had sexually abused her. Audrey later recanted this accusation and said that Sabra had told her to make the accusation. Sabra had not regained unsupervised visits since that time. Further, to Beasant's knowledge, Sabra's visits with Audrey never included overnight visits.

Beasant testified that none of Sabra's goals have changed in any of the case plans prepared by DHHS. She clarified this testimony by stating that in the original case plan, the priority goals for Sabra were for safe and stable housing, a legal means of income, and safe parenting. According to Beasant, although Sabra has had the same original goals throughout the entire case, there have been periods of time where Sabra does very well with her goals, but "it doesn't last long and we're backsliding again." Some examples of this "backsliding" were that there were periods of time, from a couple of weeks to a month at a time, where Sabra would not miss work; would attend all of her visits; would make nutritious, homemade meals for Audrey; and would do activities with Audrey; however, Sabra would not sustain that progress, and during unsupervised visits, she would have unsafe individuals around Audrey.

Beasant explained that the permanency plan was changed to a goal of guardianship in April 2017. This change in the permanency goal was made, in part, at Sabra's request, so she would have more time to become "a more suitable parent" and gain more skills, including recognizing "red flags" in relationships and having appropriate "informal supports." Sabra wanted "to slow down the pace so that she wasn't overwhelmed." Even after Sabra had asked for more time to work on her case plan goals, she failed to make progress on them. Beasant explained, "It seemed to be at a standstill, plateaued, if you will, as to our progress that was being made. There was no consistency in therapy with Audrey, building those relationships, working on her parenting skills."

In part due to Sabra's lack of progress, in July 2017, the permanency plan goal was changed to adoption. The reasons for DHHS' recommendation that the goal be changed to adoption included Sabra's lack of progress during the 22 months the case had been open, the length of time the case had been open, and Sabra's failure to show any sustainable progress. Beasant further testified that DHHS' view is that it is in Audrey's best interests for Sabra's parental rights to be

terminated, because "Audrey is doing very well where she's at and excelling . . . ."

Stermensky testified that at DHHS' request, he completed a parental capacity evaluation of Sabra in 2016, which evaluation was received into evidence as an exhibit. According to Stermensky:

> The main goal for any child welfare capacity evaluation is to determine the ability for a parent to meet their child's welfare needs. And if they have displayed they can't meet those needs, why, [and are] there any types of processes or treatment we can find to help get them to a point where they're able to fulfill those needs.

His diagnostic impressions for Sabra included schizophrenia and post-traumatic stress disorder. Further, he testified that within a reasonable degree of "psychologic certainty," Sabra did not appear to have the capacity to meet Audrey's health and welfare needs; however, he opined that if Sabra was able to get longer-term treatment with medication compliance, the issue could be revisited. Stermensky based his opinion on Sabra's denial and minimization of her severe psychotic disorder and noncompliance with medications which placed her "at risk for decompensation," as well as placing Audrey at risk. Stermensky explained that decompensation, as it pertained to Sabra, meant "[s]ymptom amplification," including disorganized behavior, hallucinations, and delusions. Stermensky's recommendation for Sabra was for long-term treatment and medication management.

The State's evidence from Stands was admitted via deposition testimony received into evidence as an exhibit. Stands has been an enrolled member of the Oglala Sioux Tribe since she was born and has raised her children in the tribal traditions. Additionally, for 36 years, Stands worked for the Scottsbluff Public Schools in the "Title 7, Indian education" program. Stands testified she worked for the parent committee and her job was "to be advocate for Native American students and their families between the home and the school" and she "was also

an advocate for the schools to try to help them culturally with the Native American families." Stands also worked with native dance groups, set up a Lakota language class, and assisted with powwows. Stands testified that based upon her training, work experience, and her tribal membership, she is familiar with the values the Oglala Sioux Tribe places on its children. According to Stands, the tribe places a very high value on its children, stating that the children are provided "respect, generosity, our children are always considered sacred. So we take care of them and try to raise them by not just verbally but by living our lives so that they can do the right things."

Stands familiarized herself with Audrey's case by reviewing the case file, which included the DHHS case plan and court reports, as well as the court's journal entries and orders and documentation sent to the Oglala Sioux Tribe, guardian ad litem reports, and evaluations. Stands testified that based on her knowledge as an "expert witness in an ICWA case," the State had made the following active efforts in this case: providing support for Audrey and Sabra, including physical support, housing, food, therapy, counseling, and transportation. Further, based upon Stand's review of the file in this case, it was her understanding that Audrey had ended up in the State's care and custody because Sabra "was not mentally and emotionally able to care for her and Audrey may have been put in a place where she could have been neglected." Specifically, she identified Sabra's lack of knowledge of how to cook for Audrey, how to take care of her, or how to discipline her, as evidenced by one report that Sabra had disciplined Audrey by "duct tap[ing] her in a car seat." Stands opined that Sabra would make improvements in the case, but that she was not emotionally or mentally stable enough to maintain those improvements. She further testified that if the State "were to just walk away" from the case, it "was a possibility" that Audrey "would face emotional or physical damage" if left with Sabra due to Sabra's mental state, which had been described as "being depressed [and] overwhelmed,

having anxiety, [and] not being able to really provide for [Sabra's] own needs."

Sabra testified that she had been living in a two-bedroom apartment since the end of July 2017 and that she had been working part time at a fast-food restaurant for a little over 2 months. Sabra also receives Social Security benefits for mental health illness and has someone to help her manage her money. She testified that she is not a "bad parent," but, rather, she is just a "first-time parent," and that Audrey benefits from having a continued relationship with her.

In an order filed on December 8, 2017, the court terminated Sabra's parental rights pursuant to § 43-292(2), (5), (6), and (7) and found that termination was in Audrey's best interests. The court further found, by clear and convincing evidence, that active efforts had been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts were unsuccessful as to Sabra. The court further found, beyond a reasonable doubt, based upon the evidence at trial, including Stands' opinion testimony, that Audrey's continued custody or placement with Sabra was likely to result in serious emotional or physical damage. The court specifically found that Sabra's "mental health, parenting style, dangerous associations, and inconsistency would place Audrey in great danger if Sabra was the custodial parent and the case closed."

ASSIGNMENTS OF ERROR

Sabra assigns as error that the court erred in terminating her parental rights pursuant to § 43-292(2), (5), (6), and (7). Sabra further contends that the State failed to prove beyond a reasonable doubt, as required by NICWA, through qualified expert witness testimony, that the continued custody of Audrey by Sabra was likely to result in serious emotional or physical damage to Audrey. She also contends that the court erred in finding that termination was in Audrey's best interests. Finally, Sabra contends that the State failed to provide proper notice to the Oglala Sioux Tribe in violation of NICWA.

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 Giavonna G.*, 23 Neb. App. 853, 876 N.W.2d 422 (2016).

ANALYSIS

Statutory Grounds for Termination

Sabra first contends that the court erred in terminating her parental rights based upon its findings that the State had established by clear and convincing evidence that she had substantially and continuously neglected to give Audrey necessary parental care and protection (§ 43-292(2)), that Sabra was unable to discharge parental responsibilities because of mental illness or mental deficiency and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period (§ 43-292(5)), that reasonable efforts failed to correct the condition which led to the adjudication (§ 43-292(6)), and that Audrey had been in an out-of-home placement for 15 or more of the most recent 22 months (§ 43-292(7)).

[2] 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). Under § 43-292(7), grounds exist to terminate parental rights if a "juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months."

The record establishes that Audrey was removed from parental care on January 5, 2016, and has not been returned to parental care since that time. As such, at the time the State filed its motion to terminate Sabra's parental rights on July 31, 2017, Audrey had been in an out-of-home placement for 18 months. By the time the termination hearing began in

September, Audrey had been in an out-of-home placement for 20 months. Thus, our de novo review of the record clearly and convincingly shows that Audrey had been in an out-of-home placement for 15 of the most recent 22 months and that grounds for termination of Sabra's parental rights under § 43-292(7) were proved by sufficient evidence.

[3] If an appellate court determines that the lower court correctly found that termination of parental rights is appropriate under one of the statutory grounds set forth in § 43-292, the appellate court need not further address the sufficiency of the evidence to support termination under any other statutory ground. *In re Interest of Chloe C.*, 20 Neb. App. 787, 835 N.W.2d 758 (2013). Having determined that termination of Sabra's parental rights was proper pursuant to § 43-292(7), we need not consider whether termination was also appropriate under § 43-292(2), (5), or (6).

Qualified Expert Testimony

[4] To terminate parental rights, the State must prove by clear and convincing evidence that one or more of the statutory grounds listed in § 43-292 have been satisfied and that termination is in the child's best interests. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). NICWA adds two additional elements the State must prove before terminating parental rights in cases involving Indian children. *Id.* First, the State must prove by clear and convincing evidence that active efforts have been made to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. See § 43-1505(4). See, also, *In re Interest of Walter W., supra*. Second, the State must prove by evidence beyond a reasonable doubt, "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." See § 43-1505(6).

We note that although Sabra has not assigned any error with respect to the court's findings that the State proved by clear and convincing evidence that active efforts had been made

to prevent the breakup of the Indian family and that those efforts were unsuccessful, we have reviewed the record and find no plain error as it relates to that element. Thus, we turn to Sabra's specific alleged error that the State failed to prove beyond a reasonable doubt, as required by NICWA, through qualified expert witness testimony, that the continued custody of Audrey by Sabra was likely to result in "serious emotional or physical damage" to Audrey.

[5] Pursuant to NICWA, before a court may terminate a parent's rights to their child or children, the State must prove by evidence, beyond a reasonable doubt, "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." § 43-1505(6). This evidence must be established by qualified expert testimony provided by a professional person having substantial education and experience in the area of his or her specialty. *In re Interest of Shayla H. et al.*, 17 Neb. App. 436, 764 N.W.2d 119 (2009).

In this case, Sabra does not argue that Stands was not a qualified expert; she argues only that Stands' opinion—that there "was a possibility" that Audrey would face emotional or physical damage if left with Sabra—did not meet the State's burden of proving this issue beyond a reasonable doubt. Sabra's argument calls into question what testimony is required from a qualified expert as mandated by § 43-1505(6). We construe Sabra's argument to be that the qualified expert's testimony must establish that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child beyond a reasonable doubt.

A similar argument was propounded in *In re M.F.*, 290 Kan. 142, 225 P.3d 1177 (2010). In reviewing a federal statute which contains language identical to § 43-1505(6), the Kansas Supreme Court wrote:

> The GAL also takes issue with the Court of Appeals' statement that the qualified expert must "testify that

> evidence existed to support the State's burden under the ICWA." *In re M.F.*, 41 Kan.App.2d at 935, 206 P.3d 57. The GAL interprets this statement to mean that a qualified expert must offer a specific opinion as to whether or not the State's evidence meets the burden of proof. It seems, rather, that the Court of Appeals' statement is merely a reiteration of the ICWA standard that a decision to terminate parental rights must be based on "evidence beyond a reasonable doubt, 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." 25 U.S.C. § 1912(f). The expert need not opine on the ultimate issue of whether the State met its burden of proof. But the expert's opinion must support the ultimate finding of the district court that continued custody by the parent will result in serious emotional or physical damage to the child. See, *e.g.*, *Marcia V.*, 201 P.3d at 506; *Steven H. v. DES*, 218 Ariz. 566, 572, 190 P.3d 180 (2008); *State ex rel. SOSCF v. Lucas*, 177 Or.App. 318, 326, 33 P.3d 1001 (2001), *rev. denied* 333 Or. 567, 42 P.3d 1245 (2002).

In re M.F., 290 Kan. at 155-56, 225 P.3d at 1186. See 25 U.S.C. § 1912(f) (2012).

[6] We, likewise, construe § 43-1505(6) to require that the qualified expert's opinion must support the ultimate finding of the court, i.e., that continued custody by the parent will likely result in serious emotional or physical damage to the child. This is consistent with the Nebraska Supreme Court's holding in *In re Interest of C.W. et al.*, 239 Neb. 817, 823-24, 479 N.W.2d 105, 111 (1992), *overruled on other grounds*, *In re Interest of Zylena R. & Adrionna R.*, 284 Neb. 834, 825 N.W.2d 173 (2012), wherein the Nebraska Supreme Court set forth the standard for qualified expert testimony in ICWA cases:

> Pursuant to the ICWA, qualified expert testimony is required in a parental rights termination case on the issue

> of whether serious harm to the Indian child is likely to occur if the child is not removed from the home. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,593 (1979) (not codified).

To the extent Sabra is arguing there was inadequate opinion testimony from a qualified expert to support the ultimate finding of the county court that continued custody by Sabra is likely to result in serious emotional or physical damage to the child, we disagree.

Sabra argues that Stands' opinion—that there "was a possibility" that Audrey would face emotional or physical damage if left with Sabra—did not provide adequate support for the county court's finding here, which was, that beyond a reasonable doubt, Sabra's "mental health, parenting style, dangerous associations, and inconsistency would place Audrey in great danger if Sabra was the custodial parent and the case closed." In addition to opining that physical and emotional damage to Audrey was possible, Stands also testified that although Sabra at times made some improvements, Sabra was not emotionally or mentally stable enough to maintain those improvements and expressed concern for Sabra's reported conditions, which included being depressed, overwhelmed, having anxiety, and not being able to provide for Sabra's own needs, much less those of Audrey.

But this was not the only testimony from a qualified expert in this case. As the Nebraska Supreme Court noted:

> The Bureau of Indian Affairs sets forth guidelines under which expert witnesses most likely will meet the requirements of the ICWA:
>
> "(i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
>
> "(ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians,

> and extensive knowledge of prevailing social and cultural standards in childrearing practices within the Indian child's tribe.
>
> "(iii) A professional person having substantial education and experience in the area of his or her specialty."

In re Interest of C.W. et al., 239 Neb. at 824, 479 N.W.2d at 111.

We also note that in its more recent guidelines, the Bureau of Indian Affairs provides, in part:

> The rule does not, however, strictly limit who may serve as a qualified expert witness to only those individuals who have particular Tribal social and cultural knowledge. The rule recognizes that there may be certain circumstances where a qualified expert witness need not have specific knowledge of the prevailing social and cultural standards of the Indian child's Tribe in order to meet the statutory standard.

U.S. Dept. of Interior, Bureau of Indian Affairs, Guidelines for Implementing the Indian Child Welfare Act G.2 at 54 (Dec. 30, 2016) (providing minimum federal standards regarding compliance with 25 C.F.R. § 23.122 (2018) governing who may serve as qualified expert witness).

Stermensky, a psychologist, performed a parental capacity examination of Sabra. Stermensky testified that the main goal of this evaluation is to determine whether the parent can meet a child's welfare needs. In performing the examination, Stermensky opined that Sabra suffered from schizophrenia and post-traumatic stress disorder and that to a reasonable degree of "psychologic certainty," Sabra did not appear to have the capacity to meet Aubrey's health and welfare needs. Although he opined that with long-term treatment and medication compliance the issue could be revisited, the overwhelming evidence in this case demonstrates that little or no progress has been made by Sabra to manage her condition as it relates to the future care of Audrey. Stemernsky further testified that Sabra's denial and minimization of her severe psychotic

disorder and noncompliance with medication placed her "at risk of decompensation," meaning "[s]ymptom amplification," including disorganized behavior, hallucinations, and delusions, which placed Audrey at risk. This record adequately demonstrates that both Strands and Stermensky were qualified expert witnesses as required by ICWA, and taken together, their testimony adequately supports the ultimate finding by the county court.

Moreover, other evidence presented at the termination hearing supports the ultimate finding here—that Audrey was likely to suffer serious emotional or physical damage if left with Sabra. Sabra has been inconsistent in attending child-parent therapy, her visitation has never progressed to overnight visits, and she has failed to make progress on her case plan goals even after requesting additional time to do so. Whenever Sabra's visits with Audrey were changed to unsupervised visits, they did not remain that way for long due to Sabra's allowing unsafe individuals around Audrey or coaching Audrey to make untrue allegations of sexual abuse. Taken together, this evidence and the expert testimony established, beyond a reasonable doubt, that Sabra's continued custody of Audrey was likely to result in serious emotional or physical damage to Audrey. Sabra's claim is without merit.

Best Interests

[7] Sabra also contends that the court erred in finding that termination was in Audrey's best interests. Once a statutory basis for termination has been proved, the next inquiry is whether termination is in the child's best interests. *In re Interest of Giavonna G.*, 23 Neb. App. 853, 876 N.W.2d 422 (2016).

> A parent's right to raise his or her child is constitutionally protected. Therefore, before a court may terminate parental rights, the State must show that the parent is unfit. . . . There is a rebuttable presumption that the best interests of the child are served by having a relationship with his

> or her parent. Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that the parent is unfit. . . . In the context of the constitutionally protected relationship between a parent and a child, parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which caused, or probably will result in, detriment to a child's well-being. . . . The best interests analysis and the parental fitness analysis are fact-intensive inquiries, and while they are separate, each examines essentially the same underlying facts.

In re Interest of Lizabella R., 25 Neb. App. 421, 436-37, 907 N.W.2d 745, 756 (2018).

[8,9] Sabra contends that the State did not prove by clear and convincing evidence that termination was in Audrey's best interests. She argues that she has obtained an apartment and employment, has made improvements in her parenting skills, and has a bond with Audrey. This court has no doubt of Sabra's love for her daughter. Despite this, Sabra has been inconsistent in attending child-parent therapy, her visitation has never progressed to overnight visits, the case has been open over 22 months, and Sabra has failed to make progress even after requesting additional time to do so. The evidence further established that Audrey was "excelling" in her current placement. Sabra has been diagnosed with schizophrenia and post-traumatic stress disorder, and in Stermensky's opinion, she does not have the capacity to meet Audrey's health and welfare needs. Due to her denial of her severe psychotic disorder, Stermensky opined, she is at risk of "[s]ymptom amplification," including hallucinations and delusions, which could place Audrey at risk of harm. The evidence outlined in the previous section further establishes that Sabra is an unfit parent and that termination of Sabra's parental rights is in Audrey's best interests. When a parent is unable or unwilling

to rehabilitate himself or herself within a reasonable period of time, the child's best interests require termination of parental rights. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). Further, children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *In re Interest of Alec S.*, 294 Neb. 784, 884 N.W.2d 701 (2016).

Failure to Give Proper Notice to Tribe

[10] Sabra contends that the State failed to provide proper notice to the Oglala Sioux Tribe in violation of NICWA. We note that the State argues as follows in its brief:

> Allowing represented parties to wait until after the conclusion of the case on the merits to raise issue with the beginning of the case is against public policy, ideas about judicial efficiency, and case law. The State would respectfully request this Court hold by failing to timely and appropriately plea or motion their objection to the mailing of notice [to the tribe], [Sabra] has waived any defect in the notice.

Brief for appellee at 20. We reject this argument based upon our holding in *In re Interest of Walter W.*, 14 Neb. App. 891, 899, 719 N.W.2d 304, 310 (2006), which stated:

> Because in many, if not most, instances, tribes depend upon parents to notify the State of known or potential Indian ancestry, and because Indian tribes cannot intervene in cases of which they have received no notification, logic dictates that parents may often be best situated to raise claims of inadequate notice to tribes. Therefore, we believe the stated purposes of the ICWA are best served by allowing parents to raise, in their direct appeal from a termination of parental rights, the issue of the State's failure to notify the child's Indian tribe of the termination of parental rights proceedings as required by § 43-1505(1).

Thus, we determine that Sabra's assigned error is properly before this court.

Sabra acknowledges that notices were provided to the Oglala Sioux Tribe, but she claims that the addresses used by the State were incorrect. Her brief states that "[t]he Oglala Sioux Tribe's website currently lists the Tribe's ICWA Director as Shirley Blackstone-Weston, P.O. Box 604, Pine Ridge, SD 57770" and argues that the notices sent by the State to the Tribe at other "P.O. Box[es] . . . would not have gone to the designated ICWA directors." Brief for appellant at 28. We agree with the State's argument that any current address identified on the Oglala Sioux Tribe's website is "irrelevant" to the address in effect in August 2017 when notice was sent to the tribe. Brief for appellee at 18.

Section 43-1505(1) requires that to be proper, notice be sent (1) to the "Indian child's tribe," (2) by certified or registered mail with return receipt requested, (3) with notice of the pending proceedings, (4) with notice of the tribe's right of intervention, and (5) that no termination of parental rights proceeding shall be held until at least 10 days after receipt of notice by the tribe and that the tribe may have an additional 20 days to prepare for the proceeding if requested. See *In re Interest of Dakota L. et al.*, 14 Neb. App. 559, 712 N.W.2d 583 (2006).

In the case before this court, the termination of parental rights notice provided to the Oglala Sioux Tribe is not part of our record; however, there is an "Affidavit of Mailing Notice" from a legal secretary in the Scotts Bluff County Attorney's office regarding the mailing of the ICWA notice to the tribe. The affidavit of mailing notice provides that the termination notice to the Oglala Sioux Tribe was mailed, by certified mail, return receipt requested, to the "Oglala Sioux Tribe, P. O. Box 2070, Pine Ridge, SD, 57770" on August 28, 2017. We note that "P. O. Box 2070" is the same address listed on the "Certificate of Indian Blood" submitted by the State and which certified that Audrey was an enrolled member of the Oglala

Sioux Tribe. This certificate was received into evidence in a prior hearing in this case as an exhibit. Further, the record reflects that two notices were mailed to the Oglala Sioux Tribe at the "P.O. Box 2070" address (in February 2016 and February 2017) and that the return receipt was signed and returned in both instances from that address. Thus, the notice regarding the hearing on the termination of parental rights was sent, by certified mail, return receipt requested, to the Oglala Sioux Tribe at the address listed on the "Certificate of Indian Blood" and to the same address where previous notices were sent and received by the tribe. In this case, the affidavit provided by the State establishes that the State provided notice to the tribe at the address where it had been providing notice throughout this case. We decline to reverse the order of termination on the grounds that Sabra now deems that the address used was insufficient.

CONCLUSION

The county court, sitting in its capacity as a juvenile court, properly found that evidence supported termination of Sabra's parental rights pursuant to § 43-292(7) and that termination of parental rights was in Audrey's best interests. The State established through evidence, including testimony of qualified expert witnesses, beyond a reasonable doubt, that the continued custody of Audrey by Sabra was likely to result in serious emotional or physical damage to Audrey. We further reject Sabra's claim that the State failed to provide proper notice to the Oglala Sioux Tribe.

Affirmed.

State of Nebraska, appellee, v. William E. Howell, Jr., appellant.

924 N.W.2d 349

Filed February 5, 2019. No. A-17-1186.

1. **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.
2. **Warrantless Searches.** The warrantless search exceptions recognized by the Nebraska Supreme Court include: (1) searches undertaken with consent, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest.
3. **Constitutional Law: Search and Seizure: Duress.** To be effective under the Fourth Amendment, consent to a search must be a free and unconstrained choice, and not the product of a will overborne. Consent must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological.
4. **Search and Seizure.** The determination of whether a consent to a search is voluntarily given is a question of fact to be determined from the totality of the circumstances.
5. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a suppression motion, an appellate court will accept the factual determinations and credibility choices made by the trial court unless, in light of all the circumstances, such findings are clearly erroneous.
6. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay

ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection.

7. **Evidence: Appeal and Error.** Error can be based on a ruling that admits evidence only if the specific ground of objection is apparent either from a timely objection or from the context.
8. **Trial: Pretrial Procedure: Evidence: Appeal and Error.** When a motion in limine to exclude evidence is overruled, the movant must object when the particular evidence which was sought to be excluded by the motion is offered during trial to preserve error for appeal.
9. **Hearsay.** If an out-of-court statement is not offered for the purpose of proving the truth of the facts asserted, it is not hearsay.
10. **Trial: Hearsay: Proof.** When overruling a hearsay objection on the ground that testimony about an out-of-court statement is received not for its truth but only to prove that the statement was made, a trial court should identify the specific nonhearsay purpose for which the making of the statement is relevant and probative.
11. **Trial: Evidence: Appeal and Error.** Erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.
12. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict. The inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered was surely unattributable to the error.
13. **Motions for Mistrial: Appeal and Error.** Whether to grant a mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion.
14. **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.
15. **Rules of Evidence: Appeal and Error.** Where 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.
16. **Trial: Waiver.** A party who fails to insist upon a ruling to a proffered objection waives that objection.
17. **Criminal Law: Witnesses: Testimony: Rules of Evidence.** When a defendant in a criminal case testifies in his own behalf, he is subject to the same rules of cross-examination as any other witness, including Neb. Evid. R. 609, Neb. Rev. Stat. § 27-609 (Reissue 2016).

18. **Criminal Law: Witnesses: Testimony: Juries: Rules of Evidence.** The purpose of Neb. Evid. R. 609, Neb. Rev. Stat. § 27-609 (Reissue 2016), is to allow the prosecution to attack the credibility of a testifying defendant, not to retry him for a separate crime or prejudice the jury by allowing unlimited access to the facts of an unrelated crime.
19. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2016), does not apply to evidence of a defendant's other crimes or bad acts if the evidence is inextricably intertwined with the charged crime.
20. ____: ____. Inextricably intertwined evidence includes evidence that forms part of the factual setting of the crime, or evidence that is so blended or connected to the charged crime that proof of the charged crime will necessarily require proof of the other crimes or bad acts, or if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime.
21. **Other Acts.** The State will not be prohibited from presenting a portion of its case merely because the actions of the defendant proving the State's case were criminal in nature.
22. **Jury Instructions: Judgments: Appeal and Error.** Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
23. **Jury Instructions: Proof: Appeal and Error.** 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.
24. **Appeal and Error.** For an alleged error to be considered by an appellate court, an appellant must both assign and specifically argue the alleged error.
25. ____. An argument that does little more than restate an assignment of error does not support the assignment, and an appellate court will not address it.
26. **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.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Affirmed.

Matt Catlett, of Law Office of Matt Catlett, for appellant.

Douglas J. Peterson, Attorney General, and Joe Meyer for appellee.

Pirtle, Bishop, and Arterburn, Judges.

Arterburn, Judge.

I. INTRODUCTION

William E. Howell, Jr., was convicted by a jury of theft by unlawful taking. The district court subsequently sentenced him to 20 months' imprisonment and 12 months' postrelease supervision. Howell appeals from his conviction. On appeal, Howell assigns numerous errors, including that the district court erred in overruling his motion to suppress evidence obtained as a result of a warrantless search, in admitting hearsay into evidence, in denying his motions for mistrial made during the State's opening statement and closing argument, in not permitting him to explain the nature of his prior felony conviction, in admitting into evidence details about uncharged offenses, and in failing to properly instruct the jury.

Upon our review, we find no merit to Howell's assertions on appeal. Accordingly, we affirm his conviction for theft by unlawful taking.

II. BACKGROUND

On December 2, 2016, the State filed an information charging Howell with three separate counts of theft by unlawful taking, pursuant to Neb. Rev. Stat. § 28-511 (Reissue 2016). The first count, a Class IV felony, alleged that Howell had exercised control over movable property of another, which property was valued at more than $1,500, but less than $5,000. See Neb. Rev. Stat. § 28-518(2) (Reissue 2016). The second count, a Class II misdemeanor, alleged that Howell had exercised control over movable property of another, a bicycle, which property was valued at less than $500. See § 28-518(4). The third count, a Class I misdemeanor, alleged that Howell

had exercised control over movable property of another, a second bicycle, which property was valued at more than $500, but less than $1,500. See § 28-518(3). Prior to trial, the second and third counts alleged in the information were dismissed because the district court granted Howell's motion for absolute discharge on speedy trial grounds.

The remaining charge against Howell stems from events which occurred in August and September 2016. Evidence adduced at trial revealed that on August 16, 2016, Shawn Fleischman discovered that his 2009 black Kawasaki Ninja 250R motorcycle had been stolen from in front of his residence near 42d and Adams Streets in Lincoln, Nebraska. Fleischman reported the theft to the Lincoln Police Department. He informed the officer who took the theft report that the motorcycle was valued at $2,500. Fleischman testified similarly at trial.

Approximately 1 month later, on September 23, 2016, Officer Anthony Gratz, who at the time was an officer with the Lincoln Police Department, was investigating a string of motorcycle thefts which had been occurring in Lincoln. As a part of Gratz' investigation, he spoke with a confidential informant who had knowledge about the motorcycle which had been stolen from Fleischman. Specifically, the confidential informant told Gratz that Howell had taken a motorcycle from the area of 42d and Adams Streets in Lincoln to "a garage on North 27th Street, directly across from the Salvation Army." The confidential informant also told Gratz that Howell had "cut that motorcycle into pieces." Through further investigation, Gratz learned that the confidential informant was referring to a residence with a detached garage located on North 27th Street. Gratz learned from other officers that Howell "frequent[ed]" the area near that residence.

Just after midnight on September 24, 2016, Gratz drove by the residence on North 27th Street. When he drove by, he observed a black motorcycle parked in the driveway. The motorcycle appeared to have been painted "with a thick bed

liner." Gratz indicated that in his experience, that type of paint is "very common" on stolen motorcycles. Gratz suspected that the motorcycle parked in the driveway might be Fleischman's stolen motorcycle. Gratz waited for another uniformed officer to arrive and then approached the front door of the residence. Gratz knocked on the front door, but nobody answered. Gratz observed someone, who he believed to be Howell, walking through the living room of the residence. Soon, Howell appeared in the driveway from the back yard of the residence.

When talking with the officers, Howell indicated that the black motorcycle in the driveway was his. He told Gratz that he had purchased the motorcycle about a year ago. When Gratz pointed out that the motorcycle still had a "dealer style in-transit" on the back of it, Howell indicated that he had actually purchased the motorcycle within the past year. Howell was unable to provide Gratz with any specific information about where he purchased the motorcycle or provide any paperwork to demonstrate his ownership. Howell simply indicated that he had purchased the motorcycle from someone in Colorado.

Ultimately, Gratz determined that the motorcycle in the driveway was not Fleischman's stolen motorcycle because it was a 1989 model, rather than a 2009 model like Fleischman's motorcycle. However, Gratz continued to speak with Howell about the possibility of the stolen motorcycle being in the detached garage. Howell immediately told Gratz that there was not a stolen motorcycle in the garage. And, although Howell had been calm throughout the conversation with Gratz, when Gratz told Howell that he "had very specific information that the motorcycle . . . was currently in the garage [and] had been cut into pieces," Howell began to breathe heavily and pace. Howell admitted to Gratz that he did have property in the garage, including another motorcycle and a large quantity of tools. He then indicated that if there was a stolen motorcycle in the garage, he did not know anything about it.

At some point during the conversation, Howell offered to go into the garage himself to see if the stolen motorcycle was there. Howell paused for a while before entering the garage and then changed his mind. He told Gratz that he was concerned that if he turned over the stolen motorcycle, Gratz would arrest him. Howell then asked if he was free to leave. When Gratz answered affirmatively, Howell went inside the residence through the front door. While Gratz was still standing in the driveway, he observed Howell exit the rear of the residence and slowly walk over to the side door of the garage. Gratz informed Howell that he did not want Howell to enter the garage and try to remove or destroy evidence. Howell then left the residence on foot.

Police officers eventually searched the garage. Inside the garage, they found Fleischman's stolen motorcycle broken down into pieces and parts. In addition, they found two bicycles that had been reported as stolen. Gratz testified that he smelled "a very strong odor of what I would describe as . . . vehicle paint" in the garage.

Howell testified in his own defense. During his testimony, he contradicted much of Gratz' testimony about their conversation. Specifically, Howell testified that he told Gratz "no" when Gratz asked to look in the garage. Howell testified that he "wasn't the only one that had access to the garage[,] nor is it even technically [his] residence." Howell explained that although he had stayed at the residence "regularly" in the months leading up to September 24, 2016, his friends were the only two people on the lease. Howell admitted that he had been in the garage prior to September 24. In addition, he admitted that he had a key to the garage. However, contrary to Gratz' testimony, Howell indicated that the only two things he knew to be in the garage were a Honda motorcycle and tools. He denied that either one of these belonged to him. Howell also denied attempting to enter the garage after speaking with Gratz.

After hearing all of the evidence, the jury convicted Howell of theft by unlawful taking. It also found that the value of the

stolen motorcycle was $2,000. The district court subsequently sentenced Howell to 20 months' imprisonment, 12 months' postrelease supervision, and a $1,000 fine.

Howell appeals his conviction here.

III. ASSIGNMENTS OF ERROR

On appeal, Howell assigns eight errors. Howell asserts that the district court erred in (1) denying his motion to suppress evidence obtained during the warrantless search of the garage, (2) admitting into evidence out-of-court statements made by the confidential informant and by police officers who did not testify, (3) denying his motions for mistrial which were made during the State's opening statement and closing argument, (4) allowing a police officer to testify about the value of the stolen motorcycle, (5) not permitting Howell to testify regarding the nature of his prior felony conviction, (6) admitting into evidence details about two stolen bicycles which were also located in the garage, (7) failing to properly instruct the jury, and (8) denying his motion for a new trial.

IV. ANALYSIS

1. Motion to Suppress

(a) Standard of Review

[1] 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. *State v. Wells*, 290 Neb. 186, 859 N.W.2d 316 (2015). Regarding historical facts, we review the trial court's findings for clear error. *Id*. 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. *Id*.

(b) Additional Background

Prior to trial, Howell filed a motion to suppress the evidence obtained during the warrantless search of the detached garage. A suppression hearing was held. At the hearing, Howell argued to the district court that the search did not fall under

any recognized exception to the warrant requirement, because he never provided police with consent to search the garage and because the consent provided by the two people leasing the residence, Jason Mayr and Amanda Vocasek, was not voluntarily given. The State called Gratz to testify that Mayr's and Vocasek's consent to search was, in fact, voluntarily given.

Gratz testified that after Howell left the residence, he decided to speak with the residents, Mayr and his girlfriend, Vocasek. Both Mayr and Vocasek came onto the front porch to speak with Gratz. During the conversation, both Mayr and Vocasek indicated that they had access to the detached garage and so did Howell. They explained that Howell paid them rent so that he could store property in the garage. Mayr indicated that only he and Howell had keys to the garage. He also indicated that he was unsure about where his garage key was located. When police indicated that it was possible to pick the lock of the garage without damaging anything, both Mayr and Vocasek expressed discomfort about police entering the garage without a key.

Ultimately, Gratz left the residence so that he could work on obtaining a search warrant. While Gratz was drafting his affidavit in support of a search warrant, he was informed that Mayr and Vocasek had located Mayr's key to the garage and that they had consented to the search by each signing a form labeled "Consent to Search Premises Without a Search Warrant." Gratz estimated that police entered the garage approximately 45 minutes to 1 hour after Howell had left the residence.

During his testimony at the motion to suppress hearing, Gratz explicitly denied that he ever threatened to arrest either Mayr or Vocasek if they did not consent to a search of the garage. He also denied that either Mayr or Vocasek expressed a desire to leave the residence.

Officer Quenton Smith also testified at the suppression hearing and generally corroborated Gratz' account of his interaction with Mayr and Vocasek. Smith testified that Mayr and

Vocasek stated that "they would love to be cooperative with officers," but that they simply did not know where Mayr's garage key was located. In addition, they stated that they did not want officers to damage the garage by attempting to gain access without a key. Smith stayed behind to secure the garage while Gratz left to work on obtaining a search warrant. Smith testified that while he was waiting, Mayr and Vocasek indicated that they had found the key and were willing to consent to the search.

Smith testified that no promises or threats were made to either Mayr or Vocasek in order to gain their consent to the search. Specifically, no one threatened to arrest either of them if they did not sign the consent form. Smith described Mayr and Vocasek as acting "normal" and indicated that they both "appeared to be extremely cooperative." Smith indicated that from the time he arrived on the scene, which was prior to Howell's leaving the residence, to the time of the search was "a little over an hour."

Mayr also testified at the suppression hearing and contradicted the officers' accounts of their interaction. Mayr indicated that Howell has been his "good friend[]" since the two were 18 or 19 years old. He also confirmed that in September 2016, Howell had a key to the residence and a key to the garage. Mayr explained that Howell rented space in the garage and stayed at the residence "more than half" of the time.

Mayr testified that when officers initially asked to search the garage, he told them "no." Mayr indicated that he told the officers that he and Vocasek wanted to leave the residence to go to the grocery store. He testified that officers told them they could not leave and that in fact, a police vehicle was used to block them from leaving. Mayr described how during the next couple hours, a spotlight shined directly into the residence. Police officers repeatedly came to the door attempting to obtain his and Vocasek's consent to search the garage. When he told police that he did not know where the key was and that he did not want them to pick the lock, police threatened to use a

battering ram and "destroy[] the garage." In addition, police told him that if a subsequent search revealed stolen property in the garage, Mayr and Vocasek would be arrested and jailed. Mayr stated that eventually, police told him if he did not sign the consent form, he would go to jail.

Mayr testified that ultimately, he signed the consent form "solely to avoid . . . being charged and arrested and taken to jail." He also wanted the police to leave his residence and turn off the spotlight. During the State's cross-examination of Mayr, he altered his rationale for signing the consent form. He stated that he and Vocasek consented to the search because they did not want police to obtain a search warrant and then possibly damage the garage while attempting to gain access.

At the suppression hearing, Howell offered into evidence the deposition of Vocasek. During her testimony, Vocasek confirmed that in September 2016, Howell lived in the residence about half of every week. She also confirmed that Howell had his own key to the residence and to the garage. Vocasek then described the events that took place after Howell left the residence on September 24, 2016. Vocasek described that two police officers knocked on the front door and asked for permission to search the garage. When she told them "no," police continued to ask for her consent to the search at least four more times. Vocasek indicated that she told police that she did not have a key to the garage and that she did not want them to "break[]" into the garage. Vocasek testified that during her conversation with police, Gratz indicated he could obtain a search warrant and then threatened to charge her with a crime if any stolen property was found in the garage and she had not consented to the search. When she and Mayr told police they wanted to leave the residence in order to go to the grocery store, she was told that they could not leave. Vocasek also described how her dog would not stop barking due to the police presence at the residence.

Vocasek testified that, ultimately, she gave the garage key to police and consented to the search because she did not want

to "be in trouble" if they obtained a search warrant and found stolen property and because she wanted the police to leave. Vocasek testified that police did not threaten to arrest her if she did not sign the form.

Howell also testified at the suppression hearing. He indicated that he considered Mayr's residence to also be his residence in September 2016. He explained that he had his own key and his own space within the residence. In addition, he paid Mayr $200 per month in rent. Howell indicated that he was in and out of the garage very frequently, but not all of the property in the garage was his.

After the suppression hearing, the district court entered a detailed order denying Howell's motion to suppress the evidence obtained during the search of the garage. In the order, the court found, "[T]he totality of the circumstances surrounding the consent by Vocasek and Mayr demonstrate that consent was given voluntarily." Specifically, the court found that police did not "over-step[] their boundary in describing the consequences that could unfold" if Vocasek and Mayr did not cooperate with police:

> They both were aware that the officers wanted to search the garage. In fact, they knew the officers were, in fact, going to search the garage whether Vocasek and Mayr consented to the search or not. The fact that the officer suggested they might be implicated if stolen property was found in the garage does not invalidate the verbal and written consents offered by Vocasek and Mayr.

The district court also explicitly stated that it did not find Mayr or Vocasek to be credible witnesses. The court stated, "The *after the fact* protestation of Vocasek and Mayr, while considered, ring[s] hollow." (Emphasis in original.)

(c) Analysis

On appeal, Howell challenges the district court's decision to deny his motion to suppress the evidence found as a result of the search of the garage. Specifically, he asserts that the

evidence presented at the suppression hearing clearly demonstrated that Vocasek and Mayr did not voluntarily consent to the search of the garage. Instead, Howell asserts that their consent was coerced by the police officers' actions. Upon our review, we affirm the decision of the district court.

[2] It is well settled under the Fourth Amendment that warrantless searches and seizures are per se unreasonable, subject to a few specifically established and well-delineated exceptions. *State v. Tucker*, 262 Neb. 940, 636 N.W.2d 853 (2001). The warrantless search exceptions recognized by the Nebraska Supreme Court include: (1) searches undertaken with consent, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest. *State v. Wells*, 290 Neb. 186, 859 N.W.2d 316 (2015).

[3,4] To be effective under the Fourth Amendment, consent to a search must be a free and unconstrained choice, and not the product of a will overborne. *State v. Tucker, supra.* Consent must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological. *Id.* In determining whether consent was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. See *State v. Prahin*, 235 Neb. 409, 455 N.W.2d 554 (1990). Mere submission to authority is insufficient to establish consent to a search. *State v. Tucker, supra.* The determination of whether a consent to search is voluntarily given is a question of fact to be determined from the totality of the circumstances. See *State v. Ready*, 252 Neb. 816, 565 N.W.2d 728 (1997). The burden is on the State to prove that consent to search was voluntarily given. See *State v. Prahin, supra.*

[5] In his brief on appeal, Howell relies on the testimonies of Mayr and Vocasek to demonstrate that their consent to search the garage was not voluntarily given. However, as we noted above, the district court did not find Mayr or Vocasek

to be credible witnesses. As such, the court relied on the testimonies of Gratz and Smith when ruling on the motion to suppress. In determining the correctness of a trial court's ruling on a suppression motion, an appellate court will accept the factual determinations and credibility choices made by the trial court unless, in light of all the circumstances, such findings are clearly erroneous. *State v. DeGroat*, 244 Neb. 764, 508 N.W.2d 861 (1993).

Upon our review of the record, we cannot say that the district court clearly erred in determining that Mayr and Vocasek did not provide credible testimony about the events which led up to their consent to search the garage. Evidence presented at the suppression hearing supported the district court's credibility finding. In particular, we note there was evidence that Mayr had suffered a brain injury and that as a result of this injury, he had problems with his memory. In addition, there were inconsistencies between Mayr's testimony and Vocasek's testimony. Although Mayr insisted that law enforcement threatened to arrest him if he did not sign the consent to search form, Vocasek testified that no such threat was made. Because the district court did not clearly err in its credibility finding, we, like the district court, rely on the testimonies of Gratz and Smith in analyzing the district court's decision to deny the motion to suppress.

Both Gratz and Smith testified that when they spoke with Mayr and Vocasek, both appeared to want to cooperate. In addition, Smith testified that both appeared to be acting "normal." Mayr's and Vocasek's only apparent hesitancy with allowing police to search the garage was that they did not know where Mayr's key was and that they did not want the garage damaged in any way by the police entering without a key. Once Mayr and Vocasek located the key, they brought it outside and gave it to Smith. They then signed the necessary consent forms.

Gratz explicitly denied that he ever threatened to arrest either Mayr or Vocasek. In addition, he denied telling Mayr

and Vocasek that they were not allowed to leave the residence. Gratz did admit that he explained to Mayr and Vocasek that if they did not consent to the search, he could obtain a search warrant. In fact, Gratz left the residence in order to start the process of obtaining a search warrant. However, a statement of a law enforcement agent that, absent a consent to search, a warrant can be obtained does not constitute coercion. See *State v. Tucker*, 262 Neb. 940, 636 N.W.2d 853 (2001).

Smith also denied that any promises or threats were made to Mayr and Vocasek to obtain their consent. Specifically, he testified that no one threatened to arrest either one of them if someone did not sign the consent form. Both Gratz and Smith indicated that their interactions with Mayr and Vocasek lasted approximately an hour.

Based on the totality of the facts and circumstances present, we cannot say that the district court erred in denying Howell's motion to suppress. The testimony of Gratz and Smith establishes that Mayr and Vocasek were cooperative and wanted to help police. Although Mayr and Vocasek initially denied police access to the garage because they could not find the key, once they did find the key, they readily provided police with such access. Moreover, the totality of the evidence indicates that Mayr's and Vocasek's consent to search was voluntarily given and not the result of coercion or duress. We affirm the decision of the district court.

2. Hearsay Evidence Admitted During Gratz' Trial Testimony

(a) Standard of Review

[6] Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection. *State v. Schwaderer*, 296 Neb. 932, 898 N.W.2d 318 (2017).

(b) Additional Background

During Gratz' testimony at trial, he indicated that he had received information regarding his investigation of the stolen motorcycle from a confidential informant. Prior to Gratz' testifying to what this information entailed, Howell objected to the testimony. The court overruled the objection and permitted Howell to have a standing objection "as to that issue." Gratz then testified as follows:

> This confidential informant informed myself and my partner . . . at the time, I specifically asked about stolen motorcycles in the Lincoln area as there had been an increase in those occurring. The confidential informant . . . informed myself and [my partner] that . . . Howell had taken a motorcycle from the area of 42nd and Adams Street, and had taken it to a garage on North 27th Street, directly across from the Salvation Army, where at that location the [confidential informant] reported that . . . Howell had cut that motorcycle into pieces.

In the jury instructions, the district court addressed Gratz' testimony about what he learned from the confidential informant. Jury instruction No. 12 provides:

> During this trial there was evidence that was received for specified limited purposes.
>
> . . . .
>
> 2. Any evidence relating to statements made by a confidential informant to Officer Gratz were only offered by the state for the limited purpose of showing how and why Officer Gratz came to be at [the residence on] N. 27th on September 24, 2016. You must consider that evidence only for that limited purpose and for no other.

Later on in Gratz' trial testimony, the State asked whether he was able to determine whether Howell had any connection to the residence on North 27th Street, which was described by the confidential informant. Gratz responded to the question, stating, "I was already familiar with . . . Howell from prior investigations and had been in communication with other

officers about [him] frequenting that area. But besides the information received from those officers . . . I hadn't located any specific information [connecting] Howell to that address." Howell objected to Gratz' testimony. He argued that Gratz' statement that he learned from other officers that Howell "frequent[ed]" the area was cumulative evidence and was hearsay. The court overruled Howell's objections.

(c) Analysis

On appeal, Howell challenges the district court's decision to overrule the objections he made to Gratz' testimony about what the confidential informant told him and about what he learned from other officers. He asserts that Gratz' testimony included hearsay and that such hearsay was prejudicial.

(i) Information Received From Confidential Informant

Before we reach the merits of Howell's assertion on appeal that the district court erred in overruling his hearsay objection to Gratz' testimony about what the confidential informant told him, we must determine if Howell has preserved this issue for appellate review.

Prior to trial, Howell made a motion in limine to preclude Gratz from testifying about what the confidential informant told him. Howell argued that such testimony was hearsay and not relevant. The court overruled the motion in limine, stating:

> The motion in limine is a preliminary motion and is done in anticipation of certain things. It does not preclude the court from sustaining objections at trial but is appreciated by the court because it gives the court a little heads up as to what motions might be coming and gives the court some ability to think about those in advance.
>
> Having said that, the motion in limine is overruled in its entirety. . . .
>
> . . . .

> As to why Officer Gratz was present, again, I think that's part of the whole res justa of the crime and the events leading up to it and why he's there. I think he gets to testify as to why he was there and that the State shouldn't have to have an open ended, officer just showing up without a particular reason given, or the circumstances that underpin that event.

At trial, when the State asked Gratz about how he came into information about the stolen motorcycle, Howell objected, stating, "Your Honor, may I approach? I'm going to object to the question. I think it's going to call for an answer that is objectionable . . . ." During a conversation between Howell's counsel, the State, and the court, outside the presence of the jury, Howell's counsel informed the court that he was objecting to the form of the State's question. He also asserted that how Gratz received the knowledge was not relevant. When the State offered to rephrase the question, Howell's counsel stated:

> You guys all know what I'm trying to do here. So that's the issue, is how he came into the information. I think it's such a loaded, broad question that it invites him to give an answer about what somebody told him. And I've made that clear before and I'm going to make that — jump up and down on that issue.

The court did not specifically rule on Howell's objections, but did give the State the opportunity to rephrase the question.

Later, the State asked Gratz "what specific information did you receive with regard to a stolen motorcycle?" Howell's counsel told the court, "I'm going to object." The court overruled the objection and indicated that Howell could "have a standing objection as to that issue."

[7,8] Although it is clear that prior to trial, Howell objected to Gratz' testimony about what the confidential informant told him on the basis that such testimony was hearsay, a careful reading of the record reveals that he did not specifically renew his hearsay objection at trial. Error can be based on a ruling

that admits evidence only if the specific ground of objection is apparent either from a timely objection or from the context. *State v. Herrera*, 289 Neb. 575, 856 N.W.2d 310 (2014). The Supreme Court has interpreted this rule to mean that where there has been a pretrial ruling regarding the admissibility of evidence, a party must make a timely and specific objection to the evidence when it is offered at trial in order to preserve any error for appellate review. *Id*. Thus, when a motion in limine to exclude evidence is overruled, the movant must object when the particular evidence which was sought to be excluded by the motion is offered during trial to preserve error for appeal. *Id*. Similarly, the failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal. *Id*.

Howell has failed to make a clear record of the basis for his objections to Gratz' testimony at trial. At trial, Howell failed to explicitly indicate that he was objecting to Gratz' testimony about what the confidential informant told him on the basis that the testimony was hearsay. He did assert a foundational objection and a relevance objection. In addition, he made a generalized objection to the line of questioning by the State. The closest Howell came to making a hearsay objection was during his conversation with the State and the district court outside the jury's presence. At one point during that conversation, Howell's counsel indicated that he was objecting to the State's question because the question "invites [Gratz] to give an answer about what somebody told him."

Ultimately, we need not decide if counsel's assertion that he was objecting to Gratz' testimony "about what somebody told him" is adequate to preserve his pretrial hearsay objection, because even if we consider him to have validly preserved this issue, his assertion is without merit.

[9,10] 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.

Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3) (Reissue 2016). Stated another way, if an out-of-court statement is not offered for the purpose of proving the truth of the facts asserted, it is not hearsay. *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010). When overruling a hearsay objection on the ground that testimony about an out-of-court statement is received not for its truth but only to prove that the statement was made, a trial court should identify the specific nonhearsay purpose for which the making of the statement is relevant and probative. *Id*.

Here, the State argued that Gratz' testimony about what the confidential informant told him was not offered to prove the truth of the confidential informant's statements, but was instead offered to demonstrate why Gratz went to the residence on North 27th Street on September 24, 2016. The court did not explain the limited purpose of this testimony contemporaneously with Gratz' testimony, but within the jury instructions, the district court specifically informed the jury that it was only to consider what the confidential informant said to Gratz "for the limited purpose of showing how and why Officer Gratz came to be at [the residence on] N. 27th on September 24, 2016." In the instruction, the court then reiterated that the jury was only to consider the testimony "for that limited purpose and for no other."

The record reveals that the State offered Gratz' testimony about what the confidential informant told him not to prove the truth of the confidential informant's statements, but instead to demonstrate why Gratz went to the residence on North 27th Street on September 24, 2016. Although it would have been helpful for the district court to advise the jury about the limited purpose for which the evidence was received at the time the jury heard that evidence, we conclude that the district court's instruction to the jury at the end of trial was sufficient to inform the jury of the limited purpose of the testimony. Because the State did not offer the testimony to prove the truth of the confidential informant's statements and because

the district court explicitly instructed the jury about the limited purpose of that evidence, we conclude that Howell's assertions on appeal which relate to this issue are without merit.

(ii) Information Received From Other Officers

[11,12] We find it unnecessary to address the admissibility of Gratz' testimony that he learned from other officers that Howell "frequent[ed]" the area of the pertinent residence on North 27th Street. Even if Gratz' testimony included inadmissible hearsay, we conclude the admission of such testimony was harmless. Generally, an "'erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.'" *State v. Ildefonso*, 262 Neb. 672, 686, 634 N.W.2d 252, 265 (2001) (quoting *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001)). Harmless error review looks to the basis on which the jury actually rested its verdict. The inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered was surely unattributable to the error. *State v. Burries*, 297 Neb. 367, 900 N.W.2d 483 (2017).

The admission of Gratz' testimony that other officers told him that Howell frequented the area of the pertinent residence on North 27th Street was harmless because there was other, admissible, evidence which demonstrated that Howell was frequently in the area of that residence in the months leading up to September 24, 2016. Howell, himself, testified that he was at the residence "regularly" in the months preceding September 24. He admitted that he had a key and uncontrolled access to the residence's detached garage. In addition, when Gratz arrived at the residence on September 24, Howell was inside the residence. Howell then left the residence to come outside to speak with police. This evidence, which was properly admitted and not objected to, demonstrates that Howell "frequent[ed]"

the area of the residence on North 27th Street. As a result, even if we were to assume Gratz' testimony included inadmissible hearsay, the admission of the testimony does not constitute reversible error.

3. Motions for Mistrial

(a) Standard of Review

[13] Whether to grant a mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion. *State v. Ramirez*, 287 Neb. 356, 842 N.W.2d 694 (2014).

(b) Additional Background

After the State completed its opening statement, Howell's counsel asked to approach the bench. In a conversation between Howell's counsel, the State, and the district court, Howell's counsel moved for a mistrial based on the State's reference during its opening statement to "what the confidential informant told . . . Gratz what Howell stole and that he has it sitting in his garage." Howell's counsel referenced his pretrial motion in limine on that subject. The district court overruled the motion for mistrial.

During the State's closing arguments, Howell's counsel again made a motion for mistrial when the State referenced what the confidential informant told Gratz. The court again overruled the motion.

(c) Analysis

On appeal, Howell asserts that the district court abused its discretion in overruling his motions for mistrial. We find his assertion to be without merit. In our analysis above, we found that the district court did not err in allowing Gratz to testify about what the confidential informant told him, given that the court instructed the jury to consider such evidence only for the limited purpose of why Gratz went to the residence on North 27th Street on September 24, 2016. Because this testimony was

admissible, the State was permitted to reference the evidence in its opening statement and closing argument in order to explain how Gratz' investigation unfolded. We note that in the jury instructions, the district court explicitly informed the jury that the statements and arguments by the lawyers are not to be considered as evidence. The district court did not abuse its discretion in overruling Howell's motions for mistrial.

4. Evidence of Value During Officer Scott Chandler's Testimony

(a) Standard of Review

[14,15] 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). Where 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. *State v. Russell*, 292 Neb. 501, 874 N.W.2d 8 (2016).

(b) Additional Background

During the trial, the State called Officer Scott Chandler to testify. Chandler testified that he took a report from Fleischman immediately after Fleischman discovered his motorcycle had been stolen. The State asked Chandler if Fleischman reported the value of the motorcycle. Chandler testified that Fleischman reported the value of the motorcycle to be $2,500. Howell moved to strike Chandler's testimony about value. He argued, "That is hearsay. That's an element of the crime, something the state would have to prove beyond a reasonable doubt. And I think that is not something this officer can testify to. That's a statement made out of court." The district court did not rule on Howell's objection. Instead, the State offered to ask a different question of Chandler. The State then proceeded to have the following exchange with Chandler: "Q. So . . .

Fleischman gave you an idea as to the value of that motorcycle, correct? A. Yes. Q. And you documented that in your report; is that correct? A. Yes." These were the last questions asked of Chandler.

(c) Analysis

On appeal, Howell argues that the district court erred in not granting his motion to strike Chandler's testimony regarding the value of the motorcycle. Howell asserts that the testimony was inadmissible hearsay. Upon our review, we find Howell's assertion has no merit.

Our review of the record reveals that Howell has waived his right to appeal this issue. The record indicates that the district court did not specifically rule on Howell's motion to strike Chandler's testimony and that Howell did not request the district court to make such a ruling. Instead, it appears that Howell was satisfied with the State's decision to ask less direct questions about value.

[16] It is well established that a party who fails to insist upon a ruling to a proffered objection waives that objection. *State v. Daly, supra*. The Supreme Court has explained that

> "'[i]f when inadmissible evidence is offered the party against whom such evidence is offered consents to its introduction, or fails to object, or to insist upon a ruling on an objection to the introduction of the evidence, and otherwise fails to raise the question as to its admissibility, he is considered to have waived whatever objection he may have had thereto, and the evidence is in the record for consideration the same as other evidence.'"

Id. at 928, 775 N.W.2d at 68-69 (quoting *State v. Nowicki*, 239 Neb. 130, 474 N.W.2d 478 (1991)). Because the district court did not rule on the motion to strike Chandler's testimony about value and Howell did not request such a ruling, he has waived his objections to the testimony.

We note that even if Howell did not waive his objection to Chandler's testimony about value and even if such testimony

was inadmissible hearsay, Howell's argument on appeal would still be without merit. Chandler's testimony about the value of the motorcycle was cumulative to Fleischman's trial testimony about the value of his stolen motorcycle. Chandler testified that Fleischman reported the value of the motorcycle to be $2,500. Fleischman testified at trial that the value of the motorcycle when it was stolen was $2,500. Keeping in mind the principles governing the erroneous admission of evidence and harmless error discussed earlier in this opinion, it is clear that even if we assume that Chandler's testimony about the value of the motorcycle was inadmissible hearsay, the admission of the testimony into evidence would not require reversal, because there is other evidence to establish the value of the stolen motorcycle.

5. Testimony Regarding Howell's Prior Felony Conviction

(a) Additional Background

At trial, Howell testified in his own defense. The first question Howell's counsel asked during the direct examination was whether Howell had previously been convicted of a felony. Howell answered affirmatively. Counsel then asked Howell "what exactly was" the nature of his prior felony conviction. The State objected. The State argued:

> That's an improper question . . . the only thing that can be asked is whether [Howell] — or the prosecution can ask is have you been convicted of a felony offense in the past ten years, yes or no. There cannot be any inquiry whatsoever into the nature of the offense.

The district court sustained the State's objection, and Howell was not permitted to explain the particulars of his prior felony conviction.

(b) Analysis

On appeal, Howell challenges the district court's decision to prohibit him from testifying about the particulars of his prior

felony conviction. Specifically, he argues that he should have been allowed to testify as to the nature of his felony conviction because the evidentiary rule which precludes questions about the particulars of a prior felony conviction "is intended to protect criminal defendants, not the State." Brief for appellant at 35. Upon our review, we affirm the decision of the district court to prohibit Howell's testimony about the specifics of his prior felony conviction.

[17,18] Neb. Evid. R. 609, Neb. Rev. Stat. § 27-609 (Reissue 2016), provides in part:

> (1) For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination, but only if the crime (a) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (b) involved dishonesty or false statement regardless of the punishment.

The Supreme Court has previously held that when a defendant in a criminal case testifies in his own behalf, he is subject to the same rules of cross-examination as any other witness, including rule 609. See *State v. Pitts*, 212 Neb. 295, 322 N.W.2d 443 (1982). The Supreme Court has also provided specific instructions about the proper use of prior felony convictions during a defendant's testimony: "The purpose of Rule 609 is to allow the prosecution to attack the credibility of a testifying defendant, not to retry him for a separate crime or prejudice the jury by allowing unlimited access to the facts of an unrelated crime . . . ." *State v. Daugherty*, 215 Neb. 45, 47, 337 N.W.2d 128, 129 (1983). Once having established the conviction, the inquiry must end there, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof. *State v. Johnson*, 226 Neb. 618, 413 N.W.2d 897 (1987).

The Supreme Court has previously noted that its interpretation of rule 609 provides a more limited cross-examination

regarding felony convictions than is provided for by other jurisdictions with a similarly worded rule. The Supreme Court has stated:

> While current construction of Neb. Evid. R. 609 prohibits mention of the name or identity of the crime in the conviction used for impeachment of a witness, by far the greater number of jurisdictions allow reference to the particular criminal offense underlying the conviction offered for a witness' impeachment in accordance with rules of evidence substantially similar to Neb. Evid. R. 609.

State v. Olsan, 231 Neb. 214, 222-23, 436 N.W.2d 128, 134 (1989).

The strict application of rule 609 has been discussed more recently in *State v. Castillo-Zamora*, 289 Neb. 382, 855 N.W.2d 14 (2014). In that case, the State properly impeached a defense witness during cross-examination by asking whether the witness had previously been convicted of a felony or crime of dishonesty. On redirect examination, defense counsel asked the witness if he had "'been convicted of a felony,'" to which the State objected. *Id.* at 388, 855 N.W.2d at 22. The trial court sustained the objection on the ground that rule 609 does not draw a distinction between felonies and crimes involving dishonesty and, therefore, does not permit counsel to question whether a witness was convicted of a felony or crime involving dishonesty. On appeal, the Supreme Court affirmed the decision of the district court to prohibit the defense witness from testifying regarding the specifics of his prior conviction. The Supreme Court explained:

> The inquiry is restricted, because a witness' conviction of a crime is meant to be used for whatever effect it has on only the credibility of the witness, and it is not meant to otherwise impact the jury's view of the character of the witness. Nebraska is among a small number of jurisdictions that has adopted this view. The vast majority of jurisdictions allow inquiry into the nature of the underlying conviction. But a long history of case law in

> Nebraska strictly construing [rule 609] establishes that the nature of the underlying conviction does not matter for impeachment purposes. We see no reason to reconsider our prior [rule 609] jurisprudence and no reason why the rule should not be extended to redirect examination as well.

State v. Castillo-Zamora, 289 Neb. at 389, 855 N.W.2d at 22.

We recognize that the present case presents a unique factual scenario that has not yet been addressed in Nebraska. Here, it is the defendant, Howell, who desired to offer details of his prior felony conviction during his direct examination, apparently in an attempt to prevent the State from asking about the prior conviction during its cross-examination. When Howell attempted to provide further information about his prior conviction, the State objected to such testimony, relying on rule 609. At trial and on appeal, Howell has failed to provide any authority to support his proposition that this unique factual scenario should lead us to find an exception to the Supreme Court's strict application of rule 609, and we have been unable to find any such authority upon our own review. However, we are cognizant of the concern that the application of rule 609 in this instance could conflict with the rule prohibiting infringement of the defendant's right to testify in his own defense. See, e.g., *Rock v. Arkansas*, 483 U.S. 44, 55-56, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) ("[b]ut restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve").

In light of our review of the precedent established by the Supreme Court as it relates to a strict application of rule 609, we are constrained to find that the district court did not err in prohibiting Howell from testifying as to the specifics of his prior felony conviction. Pursuant to rule 609, Howell was permitted to testify that he had previously been convicted of a felony or a crime involving dishonesty. He was not permitted to divulge the specifics of his prior conviction, as such information was not relevant to his credibility.

6. Evidence Regarding Stolen Bicycles

(a) Additional Background

Both prior to and during the trial, Howell objected to the admission of evidence that two stolen bicycles were found in the garage along with Fleischman's stolen motorcycle. Two hearings were held in conjunction with Howell's objections. At the first hearing, Gratz testified that police found two stolen, "high end" bicycles in the garage during their search. During the second hearing, the owner of one of the stolen bicycles testified about when and where his bicycle was stolen and about modifications that were made to the bicycle after it was stolen. At these hearings, the State argued that the evidence was admissible to prove its theory that Howell was operating a "chop shop" out of the garage where he was taking apart stolen motorcycles and bicycles.

Ultimately, the district court overruled Howell's objections to evidence regarding the stolen bicycles. The court found that such evidence was inextricably intertwined with the criminal charge which resulted from the stolen motorcycle. In the alternative, the court found that the evidence was admissible pursuant to Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 2016). Prior to the jury's hearing the testimony about the bicycles, and prior to deliberations, the court instructed the jury as follows:

> Any evidence relating to any bicycle found in the garage, was only offered by the state for specified limited purposes which is to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. It is for these limited purposes that the court allows evidence of other crimes not charged in the Information. You must consider that evidence only for those limited purposes and for no other.

(b) Analysis

On appeal, Howell argues that the district court erred in admitting evidence of the stolen bicycles found in the garage.

Howell asserts that such evidence is not relevant and that pursuant to rule 404, the State "failed to prove by clear and convincing and admissible evidence . . . that Howell had anything at all to do with the bicycles." Brief for appellant at 35 (emphasis omitted). We note Howell's argument in support of his contention focuses primarily on his belief that the Nebraska Evidence Rules apply at a pretrial 404 hearing and that as a result, the State could not offer hearsay evidence at such a hearing. Ultimately, we conclude that the district court did not err in determining that evidence of the stolen bicycles was inextricably intertwined with evidence of the stolen motorcycle so as to exclude such evidence from the parameters of rule 404(2). Because we find that evidence of the stolen bicycles did not constitute rule 404 evidence, it is not necessary for us to address Howell's assertion about whether the Nebraska Evidence Rules apply at a pretrial rule 404 hearing.

[19,20] Rule 404(2) provides the following:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(2) does not apply to evidence of a defendant's other crimes or bad acts if the evidence is inextricably intertwined with the charged crime. *State v. Burries*, 297 Neb. 367, 900 N.W.2d 483 (2017). Inextricably intertwined evidence includes evidence that forms part of the factual setting of the crime, or evidence that is so blended or connected to the charged crime that proof of the charged crime will necessarily require proof of the other crimes or bad acts, or if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime. *Id*. We find that the evidence presented regarding the stolen bicycles was necessary for the prosecution to present a coherent picture of the charged crime.

Evidence of the stolen bicycles was part of the factual setting surrounding law enforcement's search of the garage where the stolen motorcycle was located. At trial, Gratz testified about his observations of the garage on the night of the search. In addition, the State offered into evidence photographs of the garage. Gratz indicated that there were tools positioned throughout the garage. In particular, he noted that there were two air compressors in the garage which were "hooked up to an air brush for painting motorcycles." Gratz testified that once he was in the garage, he smelled "a very strong odor of what I would describe as paint or specifically vehicle paint." In addition, Gratz described how parts and pieces of the stolen motorcycle were dispersed throughout the garage. Gratz indicated that officers also found two bicycles in the garage. Later, the owner of one of the stolen bicycles testified that one of the bicycles found in the garage was his and explained how the bicycle had been modified after it was stolen from him.

[21] The record supports the district court's conclusion that evidence of the stolen bicycles was inextricably intertwined with evidence of the stolen motorcycle. Evidence of the stolen bicycles was instrumental in the State's ability to present a coherent picture of where the stolen motorcycle was located and what was going on at that location. We have previously stated that the State will not be prohibited from presenting a portion of its case merely because the actions of the defendant proving the State's case were criminal in nature. *State v. Wisinski*, 12 Neb. App. 549, 680 N.W.2d 205 (2004) (finding evidence that defendant was driving stolen truck when he was found to be in possession of stolen property was admissible, even though defendant had not been charged with stealing truck). See, also, *State v. Castellanos, ante* p. 310, 918 N.W.2d 345 (2018) (finding evidence that defendant was in possession of stolen firearm was inextricably intertwined with charged crime of possession of firearm by prohibited person).

The State's theory of the case was that Howell was operating a "chop shop" out of the garage where he was modifying stolen goods. Evidence which supported the State's theory was relevant to demonstrate an element of the charged crime—that Howell took or exercised control over the motorcycle with the intent to permanently deprive the owner of possession. The fact that the stolen motorcycle was found in pieces in a garage with a number of tools and with at least one bicycle which had also been modified from its original form provides a complete picture of the circumstances surrounding Howell's possession of the stolen motorcycle. Accordingly, we find that the district court did not err in admitting evidence of the stolen bicycles found in the garage during law enforcement's search.

7. Jury Instructions

(a) Standard of Review

[22] Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006).

[23] 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. *Id.*

(b) Background

During the jury instruction conference, Howell objected to two of the district court's proposed jury instructions: instruction No. 7 and instruction No. 12. Jury instruction No. 7 provided to the jury a definition of multiple terms associated with the elements of theft by unlawful taking, including, "'[o]n, about, or between'"; "'[m]ovable property'"; "'[d]eprive'";

"'[p]roperty of another'"; and "'[i]ntentionally.'" Howell requested that the district court also include a definition of the term "exercise control." Specifically, Howell proposed that the court should define "exercise control" for the jury as "the power and . . . intent to exercise control." The district court overruled Howell's request to alter proposed jury instruction No. 7.

The district court's proposed jury instruction No. 12 provided the jury with an explanation of evidence that was received for only a specified limited purpose. Ultimately, the court altered this instruction somewhat in accordance with the requests of Howell. Jury instruction No. 12, as read to the jury, provided as follows:

> During this trial there was evidence that was received for specified limited purposes.
>
> 1. Any evidence relating to any bicycle found in the garage, was only offered by the state for specified limited purposes which is to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. It is for these limited purposes that the court allows evidence of other crimes not charged in the Information. You must consider that evidence only for those limited purposes and for no other.
>
> 2. Any evidence relating to statements made by a confidential informant to Officer Gratz were only offered by the state for the limited purpose of showing how and why Officer Gratz came to be at [the residence on] N. 27th on September 24, 2016. You must consider that evidence only for that limited purpose and for no other.

Although the district court did make some alterations to the jury instruction pursuant to Howell's requests, the district court declined to grant Howell's request to also include the specific purpose of the "statements made by the persons Officer Gratz testified were law enforcement officers that [Howell] frequented the residence located [on] N. 27th Street."

(c) Analysis

In his brief on appeal, Howell assigns as error the district court's refusal to give his proposed jury instructions and in overruling his objections to jury instructions Nos. 7 and 12, which were read to the jury prior to deliberations. In the argument section of his brief, Howell restates the language contained in his proposed jury instructions Nos. 7 and 12. He then states, "The district judge refused these proposed instructions. . . . Instead, the district judge gave Jury Instruction[s] Nos. 7 and 12, over Howell's objections." Brief for appellant at 39. Howell does not provide any explanation as to his specific argument about why the given jury instructions were incorrect or why those instructions should have been replaced by his proposed instructions.

[24,25] For an alleged error to be considered by an appellate court, an appellant must both assign and specifically argue the alleged error. *State v. Smith*, 292 Neb. 434, 873 N.W.2d 169 (2016). An argument that does little more than restate an assignment of error does not support the assignment, and an appellate court will not address it. *Id*. Because Howell's argument simply restates the language of his proposed jury instruction and then restates his assigned error, the argument is not sufficient and we decline to consider this assigned error any further.

8. Motion for New Trial

(a) Standard of Review

[26] 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. Hairston*, 298 Neb. 251, 904 N.W.2d 1 (2017).

(b) Additional Background

After the jury found Howell guilty, he filed a timely motion for new trial pursuant to Neb. Rev. Stat. § 29-2101 (Reissue

2016). In the motion, he alleged that irregularity in the proceedings prevented him from having a fair trial; that there was misconduct by the jury, the State, or the witnesses for the State; that the verdict was not sustained by sufficient evidence; and that an error of law occurred at the trial.

At the hearing on his motion for new trial, Howell indicated he was abandoning his assertion that a new trial was warranted due to misconduct by the jury, the State, or the witnesses for the State. He did argue that a new trial was warranted because the district court admitted evidence of the stolen bicycles and allowed Gratz to testify about what a confidential informant told him. In addition, he argued that the district court erred in prohibiting him from testifying as to the nature of his felony conviction and in overruling his motion to suppress. Finally, Howell asserted that the State failed to sufficiently prove the value of the stolen motorcycle. The district court overruled the motion for new trial.

(c) Analysis

Given our analyses regarding these issues raised in Howell's motion for new trial, we do not find that the district court abused its discretion in overruling the motion for new trial.

V. CONCLUSION

Having found no error or, alternatively, only harmless error in the orders and rulings challenged by Howell herein, we hereby affirm Howell's conviction.

Affirmed.

Jennifer Jo Hall, now known as Jennifer Jo Johnson, appellant, v. Kevin James Hall, appellee.

924 N.W.2d 733

Filed February 5, 2019. No. A-17-1328.

1. **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 by the trial court.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Child Custody: Modification of Decree: Proof.** 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. 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.
4. **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.
5. **Modification of Decree.** Changes in circumstances which were within the contemplation of the parties at the time of the decree are not material changes in circumstances for purposes of modifying a divorce decree.
6. **Motions to Dismiss: Directed Verdict.** A motion for directed verdict in a jury trial is equivalent to a motion to dismiss in a nonjury trial.
7. **Motions to Dismiss: Proof.** In a court's review of evidence on a motion to dismiss, the nonmoving party is entitled to have every controverted

fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn therefrom, and where the moving party's evidence meets the burden of proof required and the moving party has made a prima facie case, the motion to dismiss should be overruled.

8. **Child Support: Rules of the Supreme Court.** As a general matter, child support obligations should be set according to the provisions of the Nebraska Child Support Guidelines.
9. ____: ____. A court may deviate from the Nebraska Child Support Guidelines, but only if it specifically finds that a deviation is warranted based on the evidence.
10. ____: ____. Absent a clearly articulated justification, any deviation from the Nebraska Child Support Guidelines is an abuse of discretion.
11. **Child Support.** Child support may be based on a parent's earning capacity when a parent voluntarily leaves employment and a reduction in that parent's support obligation would seriously impair the needs of the children.

Appeal from the District Court for Nemaha County: Julie D. Smith, Judge. Affirmed in part, and in part reversed and remanded with directions.

Adam R. Little, of Ballew Hazen, P.C., L.L.O., for appellant.

Allen Fankhauser, of Fankhauser, Nelsen, Werts, Ziskey & Merwin, P.C., L.L.O., for appellee.

Pirtle, Bishop, and Arterburn, Judges.

Pirtle, Judge.

INTRODUCTION

Jennifer Jo Hall, now known as Jennifer Jo Johnson, appeals from the order of the Nemaha County District Court granting the complaint to modify decree filed by Kevin James Hall regarding child support and the district court's granting of a "motion for a directed verdict" which dismissed Jennifer's "[c]ounter-[c]omplaint" regarding child custody. She claims the district court erred when it found that she had not presented evidence of a material change in circumstances regarding child custody and in its calculation of child support. For the reasons

that follow, we affirm in part, and in part reverse and remand with directions.

BACKGROUND

The parties were married and had one minor child as a result of the marriage, Cameron T. Hall, born in October 2012. The parties divorced by a decree of dissolution entered on January 21, 2016. Kevin was granted sole physical custody of Cameron with at least 150 days of parenting time reserved for Jennifer. Jennifer has since remarried.

Jennifer has worked for a hospital since the decree of dissolution was entered. At the time of the decree, she earned $21 per hour and worked a schedule that was composed of three 12-hour shifts each week on a 3-week rotation with 2 of those weeks consisting of overnight shifts and 1 week consisting of day shifts. At the time of the trial on the complaint and counter-complaint, Jennifer had gained seniority in her position, allowing her more flexibility in choosing her shifts. She now has a husband and two nearby friends who are able to assist her with childcare. Her wages also have increased to an average of approximately $5,452.35 per month.

Kevin was earning $3,200 a month, or approximately $18.46 per hour, at the time of the decree. Kevin now earns $17 per hour. Kevin testified that he could earn up to $22 per hour if he commuted to Omaha or Lincoln, Nebraska, but that in order to care for Cameron, he chose not to commute.

The decree called for Jennifer to have parenting time with Cameron every other week from Thursday in the morning to Sunday at 7 p.m. She would also have Cameron 1 day a week during the weeks she did not have weekend parenting time with him. Jennifer could also take 2 weeks of vacation per year with Cameron, and the parties rotated various holidays on even and odd years. However, the parties have often modified this plan to accommodate Jennifer's work schedule. Jennifer will send her work schedule to Kevin to let him know what days she will be able to have Cameron. She is also able to occasionally have

Cameron after school for a couple of hours. Jennifer testified that during the transitions between the parties, Cameron questions, resists, and is sometimes anxious about them. She also testified that the transitions have caused strained communication between her and Kevin, as well as miscommunication as to when and where Cameron should be picked up.

The district court granted a "directed verdict" in favor of Kevin with regard to modification of custody, finding that there had been no material change in circumstances which would warrant modification. In determining child support, the district court found that Kevin's reduction in income was not voluntary for the purposes of changing the child support calculations. The district court used the parties' new income levels and adjusted their deductions. In the decree for dissolution, the district court called for a deviation in the child support and used worksheet 3 of the Nebraska Child Support Guidelines to calculate the child support given the 150 days of parenting time that Jennifer would have. The district court found that a continuation of the deviation and the use of worksheet 3 was appropriate. However, the district court reduced the number of days that Jennifer was given credit for from 150 to 115. The final child support calculation changed Jennifer's payment from $350 to $451 per month. The district court found that this change was a change of more than 10 percent and, thus, constituted a material change which required modification.

ASSIGNMENTS OF ERROR

Jennifer alleges that the district court abused its discretion in failing to find that a material change in circumstances had occurred since the decree was entered, in failing to find that it was in the child's best interests to modify the decree, and in entering a child support calculation inconsistent with the Nebraska Child Support Guidelines.

STANDARD OF REVIEW

[1,2] 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 by the trial court. *Hopkins v. Hopkins*, 294 Neb. 417, 883 N.W.2d 363 (2016). 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. *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015).

ANALYSIS

Modification of Custody.

[3-5] 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. *Whilde v. Whilde*, 298 Neb. 473, 904 N.W.2d 695 (2017). 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. *Id.* Next, the party seeking modification must prove that changing the child's custody is in the child's best interests. *Id.* 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). Changes in circumstances which were within the contemplation of the parties at the time of the decree are not material changes in circumstances for purposes of modifying a divorce decree. *McDonald v. McDonald*, 21 Neb. App. 535, 840 N.W.2d 573 (2013), citing *Desjardins v. Desjardins*, 239 Neb. 878, 479 N.W.2d 451 (1992).

[6,7] The district court disposed of the "[c]ounter-[c]omplaint" for modification of custody by granting Kevin's oral "motion for a directed verdict" at the end of all the evidence. A motion for directed verdict in a jury trial is equivalent to a motion to dismiss in a nonjury trial. See *Kreus v. Stiles Service Ctr.*, 250 Neb. 526, 550 N.W.2d 320 (1996). This was a nonjury trial. In a court's review of evidence on

a motion to dismiss, the nonmoving party is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn therefrom, and where the moving party's evidence meets the burden of proof required and the moving party has made a prima facie case, the motion to dismiss should be overruled. See *id.* For the reasons stated below, we cannot say the district court erred in granting the motion.

First, Jennifer argues that the district court improperly excluded evidence regarding the material change in circumstances. Jennifer specifically notes that the district court sustained several objections to testimony related to the decree and the understanding each party had of the decree and that the district court did not allow testimony regarding the fitness of the parents. With regard to the objections, any error alleged is harmless error because the district court allowed Jennifer to recall the impacted witness to ask the questions that she believed were improperly excluded a second time. During the additional direct examination, Kevin had only two objections which were sustained: one for speculation on an allegedly overbroad question and one for leading the witness. As such, it is unclear what additional evidence was excluded, as Jennifer alleges, that was not later introduced in the additional direct examination.

Similarly, it is not clear how the exclusion of evidence regarding the fitness of the parents harmed Jennifer's case. Neither party had alleged that the other was an unfit parent. Jennifer testified that she thought Kevin was a good parent. This fact has not changed since the original entry of the decree, and thus, it is not a material change. As such, additional testimony as to the fitness of the parents, without some correlation to an allegation of a material change, would not be relevant to the issue at hand. Therefore, we determine that the district court did not err in excluding this evidence.

Jennifer next argues that there are three material changes in circumstances that are grounds for a modification: (1) changes

in Jennifer's work schedule, including flexibility in setting her work schedule and the availability of a stronger support system; (2) the number of transitions required in order for Jennifer to exercise her parenting time is having a negative effect on Cameron's behavior; and (3) the number of transitions and Jennifer's varying work schedule create opportunities for ongoing conflict and negatively impacts the parties' ability to communicate effectively.

The evidence shows that at the dissolution hearing in 2016, the parties had agreed to custody, visitation, and child support resulting in a parenting plan the parties provided to the court. At that time, the parties contemplated that Jennifer's schedule would require significant flexibility from the parenting plan in order to have adequate parenting time. Since the time of the decree, Jennifer has remained with the same employer, keeping a relatively similar schedule in terms of hours and shifts she must work, and she works with Kevin to schedule her parenting time. The schedule of visitation has not changed and continues as contemplated by the parties. However, Jennifer argues that now that she has seniority, she is better able to move her schedule around so that it fits her parenting time and thus would be able to have more parenting time. She concedes that this increase in seniority was foreseeable at the time of the decree, indicating that she took it into consideration when creating the parenting plan and that it is only the fact that it occurred so quickly which was not anticipated and is at issue. The implication of this line of argument is that if the gain in seniority had occurred at the expected pace, then it would not have been a material change in circumstances—even though the impact of that change, the ability to dictate a schedule, is the same whether it occurred quickly or at an expected pace. Further, although Jennifer testified that she currently has seniority and is able to make these adjustments to her schedule, the evidence of her schedule in the months prior to the trial show that she was not able to maintain the current parenting plan's scheduled visits without accommodations. As

such, it appears that Jennifer's schedule is not quite as flexible as she represented in her testimony. Thus, we cannot say that the change in seniority would constitute a material change in circumstances.

Jennifer further asserts that her friends and her new husband represent a support network that did not exist at the time of the decree. She alleges they would assist her by watching Cameron if she did need to work during her parenting time. However, Jennifer indicated that at the time the parties entered into the decree, they had specifically contemplated whether she would be able to have someone other than herself watch Cameron while she was working. This consideration is included in the parenting agreement, because Kevin has the right of first refusal to care for Cameron if Jennifer is working on her weekends. Although the parties did not contemplate the specific individuals now identified by Jennifer, it was clear that they considered and rejected allowing others to care for Cameron if they were available to do so. Therefore, the addition of these new individuals has not impacted the considerations in the decree and do not constitute a material change in circumstances.

The second alleged material change is how the transitions are impacting Cameron. Jennifer testified that Cameron often did not want to leave the parent he was with at the time. It is to be expected that children will have some difficulty with transitions. However, the number of transitions were considered at the time of the decree. The parenting plan allows for two transitions each week for the specified parenting time, as well as whatever transitions are necessary when the parties exercise their right of first refusal to care for Cameron. As such, the number of transitions and their impact on Cameron were not material changes in circumstances because the parties contemplated the number of transitions at the time of the original decree.

Finally, Jennifer alleges that the contentious communications between her and Kevin are a material change in circumstances.

Although this court has previously recognized that conflict between parties can constitute a material change in circumstances, see, *Schriner v. Schriner*, 25 Neb. App. 165, 903 N.W.2d 691 (2017), and *State on behalf of Maddox S. v. Matthew E.*, 23 Neb. App. 500, 873 N.W.2d 208 (2016), it does not appear that the alleged conflict rises to the level present in those other cases. Much of the communication revolved around the present litigation or around the activities that Cameron participated in that the parties desired to attend. As such, the evidence represents communication that either was atypical or would continue even if Jennifer's proposed parenting plan was put into action. Therefore, this conflict did not constitute a material change in circumstances.

Individually and collectively, the alleged changes do not rise to the level of a material change in circumstances. However, Jennifer also alleges that the district court failed to properly consider the best interests of the child. Because we have determined that there was no material change in circumstances, there is no need to go to this second step of the analysis. See *Whilde v. Whilde*, 298 Neb. 473, 904 N.W.2d 695 (2017). Therefore, the district court did not abuse its discretion in rejecting the complaint to modify child custody.

Modification of Child Support.

[8-10] As a general matter, child support obligations should be set according to the provisions of the Nebraska Child Support Guidelines. *Gress v. Gress*, 274 Neb. 686, 743 N.W.2d 67 (2007). A court may deviate from the Nebraska Child Support Guidelines, but only if it specifically finds that a deviation is warranted based on the evidence. *Id.* Absent a clearly articulated justification, any deviation from the Nebraska Child Support Guidelines is an abuse of discretion. *Id.*

Jennifer alleges that the district court erred in failing to calculate Kevin's income at a higher level, in failing to properly calculate Kevin's deduction for retirement, and in failing to use the correct division of days on worksheet 3.

[11] In determining income, the court may use earning capacity in lieu of a parent's actual, present income. See Neb. Ct. R. § 4-204 (rev. 2016). Child support may be based on a parent's earning capacity when a parent voluntarily leaves employment and a reduction in that parent's support obligation would seriously impair the needs of the children. *Claborn v. Claborn*, 267 Neb. 201, 673 N.W.2d 533 (2004). Jennifer argues that Kevin should be credited with a higher income because he could commute to Omaha or Lincoln and earn a larger income and because his present earnings were not in evidence beyond his own testimony. It is undisputed in this case that Kevin reduced his income by deciding to no longer commute to Lincoln or Omaha where he would be able to garner higher wages. However, as noted in Kevin's brief, the parties had previously agreed that Cameron would attend the public schools in Johnson, Nebraska, thus requiring Kevin to reside nearby. He lives and works a few miles away in Auburn, Nebraska. As such, using the actual income of Kevin was appropriate.

We also find the argument that Kevin's income was not in evidence to be unpersuasive. First, Kevin testified that his income was $17 per hour. Second, exhibit 14, the child support calculation prepared by Kevin and offered as an "aid to the [c]ourt," contains a copy of one of Kevin's current pay stubs which lists his income as $17 per hour. Thus, it aids us in confirming Kevin's testimony regarding his income. Finally, we would also note that both exhibit 14 and exhibit 34, Jennifer's proposed child support calculation offered as an "aid to the [c]ourt," used the same figure for Kevin's monthly income which is derived from the $17 per hour wage. Because the parties both put forward the same figure to be relied upon by the district court, we find it was sufficiently proved that Kevin's income was $17 per hour. Therefore, using $17 per hour as the basis to calculate his monthly income was appropriate.

Jennifer next argues that the district court improperly included a deduction of $117.87 per month for retirement as

part of Kevin's child support calculation. The child support guidelines allow a deduction equal to the minimum amount of contribution in a mandatory plan or a continuation of the actual amount of voluntary contributions not to exceed 4 percent of gross employment income. See Neb. Ct. R. § 4-205 (rev. 2016). The district court came to the amount of $117.87 because it is 4 percent of Kevin's gross income. Jennifer is correct in stating that there was no testimony regarding retirement deductions and that the only evidence entered was exhibit 16, Kevin's 2016 tax returns, which do not show retirement savings of the level ordered. However, the pay stub in exhibit 14 shows that Kevin was making contributions to a 401K retirement plan. Further, Jennifer and Kevin, again, each used the same number that the district court did in their proposed child support calculations. Aside from Jennifer's supplying this number to the district court to use in the calculation, there was no testimony elicited by Jennifer that this number was incorrect. As such, we cannot say that allowing Kevin a deduction of $117.87 where such amount was within the bounds dictated by the child support guidelines was inappropriate.

Finally, Jennifer argues that the district court abused its discretion by using an incorrect division of days on the child support worksheet. The original child support calculation used worksheet 3 and put the division of time as 150 days for Jennifer and 215 days for Kevin. When the district court calculated the child support for the modification, it used worksheet 3 and determined the division of time as 115 days for Jennifer and 250 days for Kevin. However, the district court found no material change in circumstances to exist warranting a change in custody or an adjustment to the division of parenting time prescribed in the original, agreed-upon parenting plan. As such, there is no basis for the district court to adjust the days attributed to each party on the child support calculation. We note that the evidence demonstrates that the parties have adhered to the original parenting plan but have also been flexible in allowing Jennifer additional time due to the differences

in the parties' work schedules. Accordingly, we find the district court abused its discretion by departing from the agreed-upon parenting time provided for in the parenting plan for purposes of calculating child support.

Because we have determined that the child support calculation did not use the original division of days, we reverse the order as to this issue only and remand the cause to the district court to recalculate the child support using the division of 150 and 215 days of parenting time. The use of the incomes and deductions in the calculation of child support is otherwise affirmed.

CONCLUSION

We conclude the district court did not abuse its discretion in finding there had been no material change in circumstances as to warrant a change of custody or the visitation schedule in the parenting plan. We further conclude the district court did not abuse its discretion in using the parties' current income and deductions in its child support calculation. However, the district court, in its child support calculation, did abuse its discretion by altering the division of parenting days prescribed by the parenting plan. Thus, the order of the district court is affirmed in part, and in part reversed and remanded with directions to recompute child support in accordance with this opinion.

Affirmed in part, and in part reversed and remanded with directions.

Brandon G. Speers, appellant, v. Natalie Johns, now known as Natalie Daniel, appellee.

923 N.W.2d 777

Filed February 12, 2019. No. A-17-1189.

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. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **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.
4. **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.
5. **Child Custody: Proof: Intent.** Once the party seeking modification has met the threshold burden of showing an expressed intention to leave the state, the separate analyses of whether custody should be modified and whether removal should be permitted necessarily become intertwined.
6. **Child Custody.** A court evaluates 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.

7. ____. 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.
8. **Modification of Decree.** Changes in circumstances which were in the contemplation of the parties at the time the prior decree or order was entered do not qualify as material changes in circumstances for purposes of modifying a decree.
9. **Modification of Decree: Child Custody.** If the alleged reason for a custodial parent to leave a state was contemplated at the time of the entry of the prior order, such reason to leave cannot be considered legitimate.
10. **Child Custody.** A move to reside with a custodial parent's new spouse who is employed and resides in another state may constitute a legitimate reason for removal.
11. **Child Custody: Visitation.** There are three broad considerations ordinarily to be employed in determining whether removal to another jurisdiction is in a child'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 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 the light of reasonable visitation arrangements.
12. **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.
13. ____. The list of factors to be considered in determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children 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.** Consideration of the impact of removal of a child to another jurisdiction on the contact between a child and the noncustodial parent, when viewed in light of reasonable visitation arrangements, focuses on the ability of the court to fashion a reasonable visitation schedule that will allow the noncustodial parent to maintain a meaningful parent-child relationship.
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, which necessitates considering the frequency and total number of days of visitation and the distance traveled and expense incurred.

16. ____: ____. Indications of a custodial parent's willingness to comply with a modified visitation schedule have a place in analyzing the reasonableness of a visitation schedule.

Appeal from the District Court for Lancaster County: Susan I. Strong, Judge. Affirmed.

Eddy M. Rodell for appellant.

Kelly T. Shattuck, of Vacanti Shattuck, for appellee.

Moore, Chief Judge, and Bishop and Arterburn, Judges.

Arterburn, Judge.

I. INTRODUCTION

Brandon G. Speers appeals from an order of modification entered in the district court for Lancaster County. On appeal, he assigns as error the district court's decision to modify the prior order granting the parties joint physical custody by granting sole physical custody of the minor child to Natalie Johns, now known as Natalie Daniel, and granting Natalie's request to remove the minor child to the State of Iowa. He argues that Natalie failed to prove that a material change of circumstances existed since the entry of the prior order. He further argues that Natalie did not have a legitimate reason to remove their child from the state and that removal is not in her best interests. For the reasons set forth below, we affirm.

II. BACKGROUND

Brandon and Natalie are the biological parents of Paisley S., a daughter born out of wedlock in December 2012. Following a brief hearing on August 23, 2016, at which both parties and no other witnesses testified, the court approved a stipulated paternity order and parenting plan. Pursuant to the parties' joint stipulation and parenting plan, they shared joint legal and physical custody of Paisley. Although Paisley's primary residence was Natalie's home, the parties shared physical placement of Paisley on an "8-6 basis." This meant that Natalie had

physical placement and parenting time with Paisley for 8 days during every 14-day period while Brandon had physical placement and parenting time for the remaining 6 days, an arrangement the parties had followed since separating in 2014. During the summer, the parties agreed to alternate care of Paisley on a "week on - week off" basis. The parties agreed to an upward deviation in child support whereby Brandon would pay to Natalie $450 per month in exchange for not sharing in a full range of Paisley's expenses. The division of holidays and other financial obligations were also set forth in detail in the joint stipulation and parenting plan.

Natalie filed a complaint to modify on June 15, 2017. In her complaint, Natalie stated that a material change warranted modifying the original decree and parenting plan because she had married a man who lived in Glidden, Iowa. She contended modification was in Paisley's best interests and requested that she be granted primary physical custody and the ability to remove Paisley to live in Glidden. A trial on Natalie's complaint was held on November 1.

At trial, Natalie testified in her own behalf and her husband testified on her behalf, while Brandon testified in his own behalf and his neighbor-landlord and his sister testified on his behalf. At the time of trial, Paisley was enrolled in preschool in Waverly, Nebraska, and during her parenting time with Natalie, lived in a two-bedroom apartment in Lincoln, Nebraska. Natalie married Gregory Daniel in May 2017. Gregory lives outside of Glidden, which is approximately 168 miles from Waverly, where Brandon lives. Gregory works as a diesel mechanic for a tractor company and anticipated taking over his family's 1,500-acre farm near Glidden within the year following trial due to his father's impending retirement. At the time of the hearing, Natalie was pregnant and was due to give birth on Christmas Eve 2017. When Natalie and Gregory found out she was pregnant, they married in May 2017.

Natalie testified that allowing her to remove Paisley to Glidden would be beneficial, because Natalie would no

longer need to work and would have more time with Paisley. Moreover, instead of living in a two-bedroom apartment, they would be living on an acreage in a 2,800-square-foot house. Gregory confirmed that he would support Natalie being a stay-at-home mother and that he had sufficient income for them particularly once he took over the farm. Gregory anticipated that his income would double once he took over his father's farming operation. Natalie testified that her and Gregory's overall expenses would be greatly reduced by allowing removal in that they would no longer have two households to support and there would be no childcare expenses. Natalie noted that throughout Paisley's life, Natalie has been her primary caretaker and provided her primary residence. Natalie has been the primary parent to take Paisley to her medical appointments and has more flexibility to miss work when Paisley is ill. Natalie has worked as a hair stylist.

Natalie acknowledged that her family and Brandon's family all live in Nebraska and see Paisley on a regular basis. She noted, however, that Gregory's parents live within 8 miles of Glidden and that his extended family also lives nearby. Paisley would also benefit from slightly smaller class sizes in the Glidden schools as compared to the Waverly schools. As compared to Natalie's apartment in Lincoln, Gregory's home in Glidden provides more space for Paisley to play and "run around." Gregory also mentioned having pets, which Paisley enjoys playing with. As of the time of trial, Gregory had not explored employment opportunities in Nebraska. He testified that he could not move due to his current and future work on the family farm.

Evidence was produced during trial that showed Natalie and Gregory started dating in May 2015. Natalie had considered the possibility of marrying Gregory and moving to Glidden prior to the court's order dated August 23, 2016. In particular, Natalie sent Brandon a letter stating that Gregory would be unable to move to Waverly and that her hope was to marry him and start a family with him. At the time the letter was written,

Natalie said the idea of marriage was a possibility that was in her mind but was not yet a firm plan. She further clarified that Gregory had not at that time asked her to marry him, and she only contemplated moving away from Lancaster County if some sort of material change occurred, specifically an engagement to be married. Gregory noted that they did not discuss marriage until the spring of 2017.

Natalie acknowledged that Brandon also lives on an acreage outside of Waverly where the parties lived together for a period of time. She described Brandon as a "great dad" and noted that they communicate well. She testified that if the court denied removal, she would remain in Lincoln and would want the then-existing paternity order and parenting plan to remain in effect.

Brandon also testified about the letter received from Natalie prior to the August 2016 settlement. He acknowledged that shortly before the letter was written, he was in a long-term dating relationship with a woman who lived in Seward, Nebraska. He had told Natalie of the possibility that he might move there. However, before the parties reached their settlement agreement, he had ended that relationship in part because he did not want Paisley to have to move. Brandon understood the letter as relaying a conversation Natalie and Gregory had regarding Gregory's inability to move to Nebraska and Natalie's desire to marry him in the future. Later, in January 2017, Brandon and Natalie discussed her possible move, and Brandon said he wanted to stay involved in Paisley's daily life and "was absolutely not okay" with her relocation to Iowa. On cross-examination, Brandon acknowledged that neither Natalie nor he knew what the future held at the time the letter was written and that he understood the letter to be dependent on future events.

Brandon testified that he lives in a 1,100-square-foot house located on 6 acres outside of Waverly and is employed as a diesel mechanic. When Paisley is with Brandon, they often do chores related to raising a few calves. For recreation, they

often play outside and go fishing. On his weekends, Brandon always takes Paisley to church. With family nearby, Brandon rarely utilizes a babysitter. Brandon testified that his family lives near enough to Waverly that they usually get together to see Paisley on the weekends he has parenting time. Additionally, Brandon noted that Natalie's family lives near the Waverly area as well.

Brandon stated his concerns that there would be no way for him to remain an involved parent if Paisley were removed to Glidden, some 2½ hours away from Waverly. Accordingly, Brandon requested custody of Paisley if Natalie were to move to Iowa. Nonetheless, Brandon acknowledged his belief that Paisley's care would not suffer if she relocated to Glidden, and he confirmed that Natalie has never tried to keep Paisley from him or harm their relationship. Both witnesses called by Brandon testified to both parties' capable and qualified parenting abilities.

While acknowledging that Natalie was a good mother, Brandon expressed concerns for Paisley if removal was granted. He noted that at times, Paisley can be "a hard one to handle" and that Natalie has called him for help to calm Paisley down. He noted that Paisley was comfortable with the current living arrangement and had friends and extended family in Nebraska. If removal was allowed, Brandon would not be able to be involved in Paisley's day-to-day activities but would be relegated to being a "weekend dad." He believed that it would be impossible to maintain the level of relationship he now enjoyed with Paisley.

Following trial, the court entered its order on November 9, 2017. The court granted Natalie's complaint to modify custody and to remove Paisley to Glidden. Joint legal custody was maintained, but Natalie was granted sole physical custody. The court awarded Brandon parenting time on alternating weekends during the school year. In the summer, the court established a "2 weeks on and 1 week off" schedule, with Brandon having the 2-week periods. Regarding holidays, the

court's previous order was modified to award Brandon parenting time every year for the Thanksgiving holiday weekend and spring break. Exchanges of Paisley were ordered to take place in Shelby, Iowa.

Finally, the court modified the amount of child support to be paid by Brandon based on the transition from joint to sole physical custody, which included a downward deviation based on travel expenses. No separate error was assigned to the child support determination outside of Brandon's claim that no modification of parenting time should occur.

Brandon now appeals.

III. ASSIGNMENTS OF ERROR

Brandon assigns the district court erred in finding that a material change of circumstance existed which justified modification of the stipulated order of paternity to sole custody, determining that Natalie had a legitimate reason to seek removal of Paisley to Iowa, and finding that removal was in Paisley's best interests.

IV. STANDARD OF REVIEW

[1,2] 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. *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015). 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. *Id.*

V. ANALYSIS

[3,4] 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. *Bird v.*

Bird, 22 Neb. App. 334, 853 N.W.2d 16 (2014). 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. *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000).

[5-7] 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. *Bird v. Bird, supra*. 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*.

1. Material Change of Circumstances

Brandon argues that Natalie has failed to demonstrate a material change of circumstances not contemplated at the time the stipulated decree of paternity was entered. In oral argument, counsel for Natalie conceded that the evidence, particularly Natalie's letter, establishes that Natalie had contemplated "in the abstract" the possibility of marrying Gregory prior to reaching agreement on the 2016 stipulated order, but that marriage was only a possibility at that time and was not part of any firm plan. Natalie notes that Gregory did not ask her to marry him until her pregnancy was discovered in the spring of 2017.

[8,9] Our analysis of this issue is complicated by the tension between separate lines of cases. On one hand is *Brown v. Brown, supra*, which holds that a parent sharing joint legal and physical custody proves a material change of circumstances affecting the best interests of a child by presenting evidence of a legitimate reason to leave the state, together

with an expressed intention to do so. Under this analysis, the material change of circumstances is basically subsumed in the analysis of whether there is a legitimate reason to leave the state and an expressed intent to do so, an issue which in this case is fairly clear cut. However, changes in circumstances which were in the contemplation of the parties at the time the prior decree or order was entered do not qualify as material changes in circumstances for purposes of modifying a decree. *Desjardins v. Desjardins*, 239 Neb. 878, 479 N.W.2d 451 (1992); *McDonald v. McDonald*, 21 Neb. App. 535, 840 N.W.2d 573 (2013). In this case, it can be argued that the reason for leaving is not legitimate in that it was contemplated at the time the 2016 order granting joint legal and physical custody was entered. Under these circumstances, we find that an analysis must first be performed as to whether the stated reason for leaving was contemplated at the time the 2016 stipulated order was entered in order to then determine whether that reason is indeed a legitimate reason to leave. Stated another way, we find that if the alleged reason for a custodial parent to leave was contemplated at the time of the entry of the prior order, such reason to leave cannot be considered legitimate.

The district court in this case did not perform an analysis of this issue in the foregoing context. However, the district court squarely addressed this issue in the context of assessing the parties' motives for seeking and opposing removal. See *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). The district court found that Natalie's "marriage and pregnancy constitute a material change of circumstances which were not fully contemplated at the time of the original decree." As such, we find that the record on this point is sufficient for our review.

It is clear from the evidence that the possibility of Natalie and Gregory at some point becoming engaged and married was well known to the parties prior to the entry of the August 2016 stipulated order. Natalie's letter to Brandon also demonstrates

that at the time of its writing, both parties were involved in relationships that could lead to each of them wanting to move from Lancaster County. In particular, Natalie informed Brandon that due to Gregory's employment and his assumption of responsibility for operating his parents' farm, Gregory would not be able to leave Iowa. Therefore, if Natalie and Gregory were married at some future time, Natalie would want to move to Iowa with Paisley.

However, the evidence also demonstrates that at the time these issues were discussed, they constituted possibilities as opposed to expectations. Indeed, Brandon's relationship with his girlfriend ended. Natalie's relationship with Gregory continued, however, eventually resulting in pregnancy, a marriage proposal, and a wedding. Natalie testified that at the time the parties negotiated the stipulated order, she had to do so based on conditions as they existed at the time, since she did not know if Gregory would ever propose marriage to her. Brandon acknowledged that Natalie wrote the letter to him in response to his statements that he may be moving to Seward to be closer to his girlfriend. In his testimony, he agreed that the possibility of both parties moving in the future was hypothetical and depended on whether their current relationships developed further. He agreed that neither of them knew what the future held at the time they entered into the stipulated order of paternity.

On this record, we cannot say that the district court abused its discretion in finding that Natalie's marriage to Gregory was not fully contemplated at the time of the prior order. While the possibility of marriage existed, it was not planned or even proposed at that point in time. Consequently, Natalie negotiated with Brandon based on conditions as they stood at the time as opposed to uncertain future possibilities. As such, we cannot find that her reason to leave was contemplated to a sufficient degree to find that there was no material change of circumstances from the conditions that existed at the time the August 2016 order was entered.

2. Legitimate Reason for Removal

[10] 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. *Daniels v. Maldonado-Morin*, 288 Neb. 240, 847 N.W.2d 79 (2014). The Nebraska Supreme Court has determined that a move to reside with a custodial parent's new spouse who is employed and resides in another state may constitute a legitimate reason for removal. *Colling v. Colling*, 20 Neb. App. 98, 818 N.W.2d 637 (2012). Having found that the marriage to Gregory was not sufficiently contemplated at the time the August 2016 paternity order was entered, Natalie has demonstrated a legitimate reason for leaving the state.

3. Best Interests of Child

[11] After demonstrating a legitimate reason for leaving the state exists, the custodial parent must next show that it is in the child's best interests to continue living with him or her. *Daniels v. Maldonado-Morin, supra*. The paramount consideration is whether the proposed move is in the best interests of the child. *Id*. There are three broad considerations ordinarily to be employed in determining whether removal to another jurisdiction is in a child'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 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 the light of reasonable visitation arrangements. *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000).

(a) 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. *McLaughlin*

v. McLaughlin, 264 Neb. 232, 647 N.W.2d 577 (2002). In this case, we find no evidence that either party has acted in bad faith.

Natalie's primary motive in seeking removal is her desire to live with her husband, who cannot move due to his work on his family's farm. She notes that in Iowa, she would not have to work outside the home and could devote more time to Paisley and her newborn child.

Brandon opposes removal based on the close relationship he has developed with Paisley. Prior to trial, Paisley spent nearly half of her time with Brandon. Brandon wishes to maintain this level of involvement with her. He wants to remain a part of her daily life and be able to be present for her activities. This level of involvement would be impossible if removal was granted.

We find that both parents have valid reasons for and against removal of their child to Iowa. Their motives being equal, this factor does not weigh for or against removal.

(b) Quality of Life

[13] In determining the potential that the 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; (8) the likelihood that allowing or denying the removal would antagonize hostilities between the two parties; and (9) the living conditions and employment opportunities for the custodial parent because the best interests of the child are interwoven with the well-being of

the custodial parent. *Boyer v. Boyer*, 24 Neb. App. 434, 889 N.W.2d 832 (2017). The list of factors to be considered in determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children should not be misconstrued as setting out a hierarchy of factors. *McLaughlin v. McLaughlin, supra*. Depending on the circumstances of a particular case, any one factor or combination of factors may be variously weighted. *Id.*

(i) Factors Favoring Removal

Both parents have been closely involved in meeting Paisley's emotional, physical, and developmental needs. Natalie has in some areas been the primary caregiver. For example, she has taken Paisley to the majority of her medical appointments. If removal were granted, Natalie would have a greater ability to meet Paisley's needs, since she would not have to work while providing care for Paisley and her younger sibling.

The third and ninth factors in the best interests determination are best examined together. Given Natalie's intention to be a stay-at-home mother, her own income will not be enhanced by the move. However, the income of the household in which she is living will be substantially higher, particularly when Gregory takes over responsibility for the family farm. Natalie will no longer have to pay rent and daycare expenses and would not have to commute between her apartment in Lincoln and her husband's residence in Iowa. However, it does appear that she could resume her career as a hair stylist in Iowa if she chose to do so or conditions demanded it.

If removal was denied, Paisley would split her time between three residences. During Natalie's parenting time, she would live in a two-bedroom apartment primarily, but would regularly go to Iowa during weekends, holidays, and summer vacation. The remainder of her time would be spent with Brandon. If removal was granted, the apartment would be eliminated and she would primarily live in the house

owned by Gregory in Iowa. As a result, she would spend 100 percent of her time living in single family residences located on acreages.

(ii) Neutral Factors

Paisley is of a young age and did not testify as to her preference. Although there was some general testimony regarding smaller class sizes in the Glidden schools, there was no significant testimony demonstrating one location to have an educational advantage over the other. Finally, regardless of outcome, there are likely to be hard feelings between the parties. However, the evidence in this trial demonstrated that despite their differences, the parties have maintained an amicable relationship. Both parties were very complimentary of each other's parenting skills. Natalie demonstrated a strong desire to nurture and encourage a strong bond between Paisley and Brandon even with the distance that would exist between them.

(iii) Factors Against Removal

The evidence establishes that all of Paisley's extended family lives in Nebraska and that she sees those family members on a regular basis. In addition, it is likely that the quality of relationship currently enjoyed by Brandon and Paisley will suffer given the loss of frequent contact that would be occasioned by a move to Iowa. While the parenting plan attempts to restore time lost during the school year with extra time in the summer, the bottom line is that the day-to-day ability of Brandon to remain involved and active in Paisley's life is diminished.

(iv) Quality of Life Conclusion

The district court concluded that as a whole, the quality of life factors weighed heavily in favor of removal. In our view, these factors are very close. However, based on our standard of review, we cannot say that the district court abused its discretion in reaching its conclusion.

(c) Impact on Noncustodial Parent's Contact With Child

[14-16] The third factor in the best interests determination is the impact of the move on the contact between the child and the noncustodial parent, when viewed in light of reasonable visitation arrangements. *Maranville v. Dworak*, 17 Neb. App. 245, 758 N.W.2d 70 (2008). This consideration focuses on the ability of the court to fashion a reasonable visitation schedule that will allow the noncustodial parent to maintain a meaningful parent-child relationship. *Id*. Generally, a reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent. *Id*. 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*. Indications of the custodial parent's willingness to comply with a modified visitation schedule also have a place in this analysis. *Id*.

There will be an impact from the move on the contact between Brandon and Paisley. Brandon will no longer enjoy the frequent in-person contact that he has enjoyed to this point in Paisley's life. He will not be able to share in her day-to-day life to the extent that would be possible if removal was denied. The district court noted in its analysis that Paisley would have to travel to and from Iowa frequently, regardless of the decision on removal. The court further noted that Brandon would receive significant parenting time in the summer and on holidays. The court also noted Natalie's intent to allow extra time to Brandon when she travels to Nebraska to see family.

We agree with the district court's confidence that the parties will both strive to preserve and develop the relationship between father and daughter despite the distance between them. However, we must conclude that this relationship will not be of the same quality and depth that could occur were removal denied.

(d) Best Interests Conclusion

Removal cases rank among the most difficult decisions that a district court or a reviewing court is required to make. In this case, both parents have demonstrated their dedication to Paisley both in their testimony and their cooperative effort to provide her a safe and secure childhood. The district court concluded overall that Paisley's interests would be best served by allowing removal. Reasonable minds may differ with the court's conclusion. However, we are constrained by our standard of review. We recognize that the district court had the opportunity to see and hear the testimony of the parties. As such, we cannot find that the district court abused its discretion in concluding that Natalie's request for removal should be granted. We therefore affirm the decision of the district court.

VI. CONCLUSION

The district court did not abuse its discretion in granting Natalie's request to modify physical custody and remove Paisley to Iowa.

Affirmed.

Applied Underwriters Captive Risk Assurance Company, Inc., an Iowa corporation, appellant, v. E.M. Pizza, Inc., a California corporation, appellee.

923 N.W.2d 789

Filed February 12, 2019. No. A-17-1301.

1. **Jurisdiction: Rules of the Supreme Court: Pleadings: Appeal and Error.** When reviewing an order dismissing a party from a case for lack of personal jurisdiction under Neb. Ct. R. Pldg. § 6-1112(b)(2), an appellate court examines the question of whether the nonmoving party has established a prima facie case of personal jurisdiction de novo.
2. **Motions to Dismiss: Appeal and Error.** In reviewing the grant of a motion to dismiss, an appellate court must look at the facts in the light most favorable to the nonmoving party and resolve all factual conflicts in favor of that party.
3. **Due Process: Jurisdiction: States.** When determining whether a court has personal jurisdiction over a party, it must first determine whether a state's long-arm statute is satisfied, and if the long-arm statute is satisfied, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.
4. **Constitutional Law: Jurisdiction: States.** Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 2016), provides that a court may exercise personal jurisdiction over a person who has any contact with or maintains any relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States.
5. **Due Process: Jurisdiction: States.** The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he or she has established no meaningful contacts, ties, or relations.
6. ____: ____: ____. Due process is satisfied where the nonresident defendant's minimum contacts are such that the defendant should reasonably anticipate being haled into court there.

7. **Jurisdiction: States.** A court exercises two types of personal jurisdiction depending upon the facts and circumstances of the case: general personal jurisdiction and specific personal jurisdiction.
8. ____: ____. A court has general personal jurisdiction over a nonresident defendant if the defendant has engaged in continuous and systematic business connections with the forum state.
9. ____: ____. Specific personal jurisdiction arises where the nonresident defendant's contacts with the forum state are neither continuous nor systematic, but the plaintiff's claim arises from the defendant's minimum contacts with the forum.
10. ____: ____. If a court determines that a defendant has sufficient minimum contacts with the forum state, the court must then weigh the facts of the case to determine whether exercising personal jurisdiction would comport with fair play and substantial justice.
11. ____: ____. When determining whether exercising personal jurisdiction over a nonresident defendant would be fair and reasonable, a court may consider the burden on the defendant, the interest of the forum state, the plaintiff's interest in obtaining relief, the judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies.
12. **Jurisdiction: States: Contracts.** Where a choice-of-forum clause is a necessary component of the court's exercise of personal jurisdiction, then the court would have no jurisdiction but for the fact that the parties have consented to its exercise by the choice-of-forum agreement, and the standards contained in the Model Uniform Choice of Forum Act, Neb. Rev. Stat. § 25-413 et seq. (Reissue 2016), apply.
13. **Jurisdiction: States.** A plaintiff's choice of a forum should not be overturned except for weighty reasons, and only when trial in the chosen forum would establish oppressiveness and vexation to the defendant out of all proportion to the plaintiff's convenience, or when the forum is inappropriate because of considerations affecting the court's own administrative and legal problems.
14. ____: ____. In determining whether a state is a reasonably convenient place for the trial of an action under Neb. Rev. Stat. § 25-414(1)(b) (Reissue 2016), courts are required to consider both private and public interest factors.
15. **Appeal and Error.** Errors must be both assigned and argued to be addressed by an appellate court.

Appeal from the District Court for Douglas County: Duane C. Dougherty, Judge. Affirmed.

Jeffrey A. Silver for appellant.

Kristopher J. Covi, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellee.

Moore, Chief Judge, and Riedmann and Welch, Judges.

Riedmann, Judge.

I. INTRODUCTION

This appeal requires us to determine whether an Iowa corporation made a prima facie case to establish that the Nebraska courts have personal jurisdiction over a California corporation under either Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 2016), or the Model Uniform Choice of Forum Act (Choice of Forum Act), Neb. Rev. Stat. § 25-413 et seq. (Reissue 2016). The district court for Douglas County determined personal jurisdiction was lacking and sustained a motion to dismiss. For the following reasons, we affirm.

II. BACKGROUND

Applied Underwriters Captive Risk Assurance Company, Inc. (AUCRA), brought suit against E.M. Pizza, Inc., to recover $483,000.88 that AUCRA claimed it was owed under the parties' "Reinsurance Participation Agreement" (RPA). AUCRA is an Iowa corporation with its principal place of business in Omaha, Nebraska. E.M. Pizza is a California corporation with its principal place of business in California. AUCRA is an indirect subsidiary of Applied Underwriters, Inc. (Applied), a Nebraska corporation with its principal place of business in Omaha.

Applied offers workers' compensation insurance programs nationwide, one of which is "EquityComp." EquityComp provides workers' compensation insurance "with a risk retention component through Applied's captive, AUCRA." The risk retention component is effected through an RPA. E.M. Pizza, through its insurance agent, submitted a workers' compensation application to Applied in Omaha. In response to the application, Applied generated an EquityComp workers' compensation

program proposal and rate quotation, as well as a compensation program summary and scenarios, which were sent by Applied to E.M. Pizza.

E.M. Pizza's president executed a request for service, allowing Applied to debit E.M. Pizza's bank accounts for payments due under the EquityComp program, and additionally executed an executive officer exclusion form and sent the form to Applied in Omaha. Subsequently, California Insurance Company, an indirect subsidiary of Applied, issued workers' compensation and employer's liability insurance policies to E.M. Pizza for the period of July 1, 2013, through July 1, 2014. The policies were renewed annually through July 1, 2017. The policies were underwritten and issued from Applied's office in Omaha. Each month, E.M. Pizza reported its payroll to Applied in Omaha so that workers' compensation premiums could be calculated. Further, all customer service questions from E.M. Pizza were directed to Applied's office in Omaha and responded to by customer service representatives in Omaha.

The reinsurance/risk sharing component of the EquityComp program was executed by the RPA. Paragraph 13(B) of the RPA contained a forum selection clause stating:

> Any legal suit, action or proceeding arising out of, related to or based upon this agreement, or the transactions contemplated hereby or thereby must only be instituted in the federal courts of the United States of America or the courts of the State of Nebraska, in each case located in Omaha and the county of Douglas, and each party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action or proceeding. Service of process, summons, notice or other document by mail to such party's address set forth herein shall be effective service of process for any suit, action or other proceeding brought in any such court. The parties irrevocably and unconditionally waive any objection to the laying of venue of any suit, action or any proceeding in such courts

> and irrevocably waive and agree not to plead or claim in any such court that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum.

AUCRA alleges that E.M. Pizza owes $483,000.88 under the RPA, and it brought suit to collect the funds. E.M. Pizza filed a motion to dismiss the action for lack of personal jurisdiction, pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(2). E.M. Pizza asserted that it does not currently, nor has it ever, transacted any business within the State of Nebraska; had any officers, directors, employees, sales people, or property located in Nebraska; contracted to supply services or things within Nebraska; caused any tortious injury by any act or omission in Nebraska; or contracted to insure any person, property, or risk within Nebraska. Further, E.M. Pizza asserted that the workers' compensation policy and ancillary documents at issue in this case were all purchased through an agent in California and that the policies at issue are all for workers' compensation coverage for employees solely in California.

Following a hearing on the motion to dismiss at which the only evidence submitted by the parties was in the form of affidavits with accompanying exhibits, the district court entered an order dismissing the suit for lack of personal jurisdiction. It found that the court did not have jurisdiction under Nebraska's long-arm statute or the Choice of Forum Act. Specifically, as to the Choice of Forum Act, the district court found that although E.M. Pizza failed to present a compelling case that jurisdiction in the Nebraska courts would be so burdensomely inconvenient to deny it due process, subjecting E.M. Pizza to this court's jurisdiction would not comport with "'fair play and substantial justice.'" AUCRA timely appealed.

III. ASSIGNMENTS OF ERROR

AUCRA asserts, restated and renumbered, that the district court erred in finding that (1) it lacked personal jurisdiction over E.M. Pizza under Nebraska's long-arm statute and (2) it

lacked personal jurisdiction over E.M. Pizza under the Choice of Forum Act.

IV. STANDARD OF REVIEW

[1] When reviewing an order dismissing a party from a case for lack of personal jurisdiction under § 6-1112(b)(2), an appellate court examines the question of whether the nonmoving party has established a prima facie case of personal jurisdiction de novo. *Nimmer v. Giga Entertainment Media*, 298 Neb. 630, 905 N.W.2d 523 (2018).

[2] In reviewing the grant of a motion to dismiss, an appellate court must look at the facts in the light most favorable to the nonmoving party and resolve all factual conflicts in favor of that party. *Id*.

V. ANALYSIS

AUCRA asserts that the Nebraska courts can exercise personal jurisdiction over E.M. Pizza under both the long-arm statute and the Choice of Forum Act. We analyze each of these in turn starting with the long-arm statute, because the Choice of Forum Act, by its terms, applies only when Nebraska courts would have no jurisdiction but for the fact that the parties have consented to its exercise by the choice-of-forum agreement. See, § 25-414; *Ameritas Invest. Corp. v. McKinney*, 269 Neb. 564, 694 N.W.2d 191 (2005).

1. Nebraska's Long-Arm Statute

[3,4] When determining whether a court has personal jurisdiction over a party, it must first determine whether a state's long-arm statute is satisfied, and if the long-arm statute is satisfied, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process. See *RFD-TV v. WildOpenWest Finance*, 288 Neb. 318, 849 N.W.2d 107 (2014). Nebraska's long-arm statute, § 25-536, provides that a court may exercise personal jurisdiction over a person who has any contact with or maintains any relation to this state to afford a basis

for the exercise of personal jurisdiction consistent with the Constitution of the United States. *VKGS v. Planet Bingo*, 285 Neb. 599, 828 N.W.2d 168 (2013). It was the intention of the Legislature to provide for the broadest allowable jurisdiction over nonresidents under Nebraska's long-arm statute. *Id.* Thus, when a state construes its long-arm statute to confer jurisdiction to the fullest extent permitted by the Due Process Clause, the inquiry collapses into the single question of whether exercise of personal jurisdiction comports with due process. *VKGS v. Planet Bingo, supra*.

[5,6] The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he or she has established no meaningful contacts, ties, or relations. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). To subject an out-of-state defendant to personal jurisdiction in the forum court, due process requires the defendant to have minimum contacts with the forum state so as not to offend traditional notions of fair play and substantial justice. *VKGS v. Planet Bingo, supra.* Due process is satisfied where the nonresident defendant's minimum contacts are such that the defendant should reasonably anticipate being haled into court there. See *id*. Further, whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether the defendant's actions created substantial connections with the forum state, resulting in the defendant's purposeful availment of the forum state's benefits and protections. *Id*.

[7,8] A court exercises two types of personal jurisdiction depending upon the facts and circumstances of the case: general personal jurisdiction and specific personal jurisdiction. *Nimmer v. Giga Entertainment Media*, 298 Neb. 630, 905 N.W.2d 523 (2018). A court has general personal jurisdiction over a nonresident defendant if the defendant has engaged in continuous and systematic business connections with the forum state. See *id*. When a court is exercising general personal jurisdiction, the plaintiff's claim does not have to arise directly

from the defendant's conduct in the forum state. See *id*. In the present case, E.M. Pizza did not engage in continuous and systematic business connections in Nebraska, and AUCRA does not appear to assert otherwise. Thus, if the court has personal jurisdiction over E.M. Pizza, it can be only under specific personal jurisdiction.

[9] Specific personal jurisdiction arises where the nonresident defendant's contacts with the forum state are neither continuous nor systematic, but the plaintiff's claim arises from the defendant's minimum contacts with the forum. See *id*. Whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether the defendant's contacts with the forum state are the result of unilateral acts performed by someone other than the defendant, or whether the defendant acted in a manner which creates substantial connections with the forum state. *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 675 N.W.2d 642 (2004).

[10] If a court determines that a defendant has sufficient minimum contacts with the forum state, the court must then weigh the facts of the case to determine whether exercising personal jurisdiction would comport with fair play and substantial justice. See *VKGS v. Planet Bingo*, 285 Neb. 599, 828 N.W.2d 168 (2013).

(a) Evaluation of Minimum Contacts

Here, the district court found that E.M. Pizza had sufficient minimum contacts with Nebraska; however, it found that it was not fair and reasonable to exercise personal jurisdiction over E.M. Pizza. We agree.

E.M. Pizza has sufficient minimum contacts with Nebraska. It is undisputed that E.M. Pizza is not a Nebraska corporation and does not have a principal place of business in Nebraska. It is also undisputed that no representative of E.M. Pizza ever entered Nebraska for the purpose of negotiating the RPA or any other related agreement between the parties. However, E.M. Pizza did, through an agent, submit an application for

insurance to Applied at its office in Omaha. Further, E.M. Pizza, through its president, executed and faxed a request for service to Applied in Omaha, allowing Applied to debit E.M. Pizza's bank accounts for amounts due under the insurance program. On behalf of E.M. Pizza, its president additionally executed and faxed to Applied an executive officer exclusion form. Moreover, E.M. Pizza submitted monthly payroll reports to Applied in Omaha and directed all of its customer service questions to Applied's office in Omaha.

These contacts are sufficient to satisfy the due process requirement that a nonresident defendant have minimum contacts with the forum state. E.M. Pizza reached out to Nebraska to receive workers' compensation insurance from Applied, thus purposefully availing itself to the Nebraska courts. E.M. Pizza's contacts with Nebraska were not the result of unilateral acts by anyone other than itself. E.M. Pizza argues that the minimum contacts found by the district court were not sufficient, primarily because such contacts were not directed at AUCRA, the plaintiff in this action, but at Applied, AUCRA's parent company. However, the fact remains that E.M. Pizza directed its conduct and contacts to an entity within the state. The law does not require that a defendant's conduct be directed to a specific plaintiff in the forum state; it just requires the defendant to have such minimum contacts with the forum that the defendant could reasonably expect to be haled to court in the forum. See *Quality Pork Internat. v. Rupari Food Servs., supra* (finding that nonresident corporation that transacts business with Nebraska corporation through nonresident third party is subject to personal jurisdiction).

The RPA is an integral part of the workers' compensation policy that E.M. Pizza obtained through Applied. As stated by AUCRA, "[t]his case involves a workers' compensation program under the name and style [EquityComp] offered through Applied. The [p]rogram provides workers' compensation insurance with a risk retention component through Applied's captive, AUCRA. The risk retention component is effected

through [an RPA].” Brief for appellant at 7. In order to “effect the reinsurance/risk sharing component of the [p]rogram,” E.M. Pizza was required to execute the RPA. *Id*. at 8. See, also, *Citizens of Humanity v. Applied Underwriters*, 299 Neb. 545, 570, 909 N.W.2d 614, 632 (2018) (identifying RPA as “mandatory component of a program of workers’ compensation insurance”). Because the RPA was a requirement to obtain the insurance requested through Applied, it is proper to consider E.M.’s contacts with Applied in determining whether it could reasonably expect to be haled into court in Nebraska for an alleged breach of the RPA. Consequently, the district court was correct in finding that E.M. Pizza had sufficient minimum contacts with the forum state.

(b) Evaluation of Reasonableness

Having determined that E.M. Pizza has sufficient minimum contacts with the forum, we next must determine whether it is fair and reasonable for the forum court to exercise personal jurisdiction over the nonresident defendant. See *VKGS v. Planet Bingo*, 285 Neb. 599, 828 N.W.2d 168 (2013). The district court determined that it was not fair and reasonable to exercise personal jurisdiction over E.M. Pizza, and we agree.

[11] When determining whether exercising personal jurisdiction over a nonresident defendant would be fair and reasonable, a court may consider the burden on the defendant, the interest of the forum state, the plaintiff’s interest in obtaining relief, the judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies. See *id.* These other considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. *Id*.

Here, the district court determined it would not be fair and reasonable for a Nebraska court to exercise jurisdiction over E.M. Pizza. First, a Nebraska court exercising jurisdiction over

E.M. Pizza would be required to make a choice of law determination between Nebraska law and California law. Despite AUCRA's arguments to the contrary, a Nebraska court would likely apply California law to the dispute. It has been held by courts in both Nebraska and California that the RPA is inextricably intertwined with the underlying insurance contract; thus, California's workers' compensation laws will likely govern the RPA. See *Citizens of Humanity v. Applied Underwriters, supra*. See, also, *Citizens of Humanity v. Applied Underwriters*, 17 Cal. App. 5th 806, 226 Cal. Rptr. 3d 1 (2017). A California court is better positioned than a Nebraska court to apply California's complex workers' compensation laws. Moreover, the RPA or portions thereof have been found invalid by the California appellate courts and the California Insurance Commissioner for several reasons, including the failure to file it and have it approved by the California Insurance Department before it was issued. See *Nielsen Contracting v. Applied Underwriters*, 22 Cal. App. 5th 1096, 232 Cal. Rptr. 3d 282 (2018) (identifying Insurance Commissioner's administrative decision *Shasta Linen Supply, Inc. v. California Insurance Commission*, file No. AHB-WCA-14-13 (Cal. Ins. Commr. June 22, 2016), finding RPA invalid), and *Citizens of Humanity v. Applied Underwriters*, 17 Cal. App. 5th 806, 226 Cal. Rptr. 3d 1 (2017). Thus, California has a significant interest in continuing to oversee cases involving this RPA. While the California decisions are not binding on this court, they are persuasive. A Nebraska court exercising jurisdiction under a similar RPA would not further fundamental substantive social policies, nor would it further the judicial system's interest in obtaining the most efficient resolution of the controversy.

Second, California has a substantially greater interest in handling the dispute than does Nebraska. The underlying contract provides workers' compensation insurance for a California employer to be provided to California employees. California courts certainly have a strong interest in hearing disputes concerning California employers and California employees. The

affidavit of E.M. Pizza's president stated that E.M. Pizza purchased the workers' compensation policy and ancillary documents through a broker in California. At no time did anyone associated with E.M. Pizza speak or communicate with anyone in Nebraska. While obtaining insurance through a California agent from a Nebraska corporation was sufficient to create minimum contacts with Nebraska, it is not enough to make it fair and reasonable for a Nebraska court to exercise personal jurisdiction over E.M. Pizza. Moreover, E.M. Pizza has no employees or offices in Nebraska and is not authorized to conduct business in Nebraska; nor has it caused any tortious injury in Nebraska. Although Nebraska does have an interest in providing a forum for Nebraska corporations to seek redress, the judicial system's interest in obtaining the most efficient resolution of the controversy and the shared interest of the several states in furthering fundamental substantive social policies both strongly favor California as the appropriate forum for this action.

The district court was correct in determining that it did not have personal jurisdiction over E.M. Pizza, because despite E.M. Pizza's sufficient minimum contacts with Nebraska, it would not be fair and reasonable to exercise personal jurisdiction under Nebraska's long-arm statute.

2. Choice of Forum Act

We turn next to the question of whether the facts establish a prima facie showing that the forum selection clause confers personal jurisdiction over E.M. Pizza in Nebraska. We conclude that they do not.

Paragraph 13(B) of the RPA states:

> Any legal suit . . . must only be instituted in the federal courts of the United States of America or the courts of the State of Nebraska, in each case located in Omaha and the county of Douglas, and each party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action or proceeding.

[12] Whether the above clause provides a Nebraska court with jurisdiction is analyzed under the Choice of Forum Act, specifically § 25-414, which states in part:

> (1) If the parties have agreed in writing that an action on a controversy may be brought in this state and the agreement provides the *only* basis for the exercise of jurisdiction, a court of this state will entertain the action if (a) the court has power under the law of this state to entertain the action; (b) this state is a reasonably convenient place for the trial of the action; (c) the agreement as to the place of the action was not obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; and (d) the defendant, if within the state, was served as required by law of this state in the case of persons within the state or, if without the state, was served either personally or by certified mail directed to his last-known address.

(Emphasis supplied.) Where a choice-of-forum clause is a necessary component of the court's exercise of personal jurisdiction, then the court would have no jurisdiction but for the fact that the parties have consented to its exercise by the choice-of-forum agreement, and the standards contained in the Choice of Forum Act apply. *Ameritas Invest. Corp. v. McKinney*, 269 Neb. 564, 694 N.W.2d 191 (2005).

Here, because a Nebraska court does not have jurisdiction over E.M. Pizza under Nebraska's long-arm statute, the only basis for jurisdiction is the forum selection clause, which must be valid under § 25-414. The district court found, and the parties agree, that subsections (a), (c), or (d) of § 25-414(1) were not in dispute. The dispute involved § 25-414(1)(b), which requires a finding that "this state is a reasonably convenient place for the trial of the action." Our Supreme Court has held that considerations relevant to the forum non conveniens doctrine are appropriate to aid in the construction of this section. See *Ameritas Invest. Corp. v. McKinney, supra*.

[13] A plaintiff's choice of a forum should not be overturned except for "'weighty reasons,'" and only when trial in the chosen forum would establish oppressiveness and vexation to the defendant out of all proportion to the plaintiff's convenience, or when the forum is inappropriate because of considerations affecting the court's own administrative and legal problems. *Id*. at 574, 694 N.W.2d at 202. When determining whether to disrupt a plaintiff's choice of forum, a trial court should consider practical factors that make trial of the case easy, expeditious, and inexpensive, such as the relative ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the ability to secure attendance of witnesses through compulsory process. *Ameritas Invest. Corp. v. McKinney, supra*. However, it is also appropriate for a court to consider the advantages of having trial in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself. *Id*.

The U.S. Supreme Court recently addressed the issue of whether a plaintiff's choice-of-forum clause could be set aside under the doctrine of forum non conveniens when seeking a dismissal or transfer under 28 U.S.C. § 1406(a) (2012). See *Atlantic Marine Constr. Co. v. United States Dist. Court for Western Dist. of Tex.*, 571 U.S. 49, 134 S. Ct. 568, 187 L. Ed. 2d 487 (2013). In doing so, the Court identified both private interest factors and public interest factors. The Court stated that when parties agree to a forum selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation. *Id*. In essence, they waive the right to challenge the private interest factors. However, a trial court may consider arguments about public interest factors. *Id*. These public interest factors include the administrative difficulties flowing from court congestion, the local interest in having localized controversies decided at home, and the interest in having the trial of a diversity case in a forum that

is at home with the law. *Id.* These public interest factors are consistent with the factors the Nebraska Supreme Court identified in *Ameritas Invest. Corp. v. McKinney*, 269 Neb. 564, 694 N.W.2d 191 (2005).

Here, the district court applied the standard set forth in *Ameritas Invest. Corp. v. McKinney, supra*, and stated that it did "not see that there would be any greater disadvantage or substantially more inconvenience for [E.M. Pizza] to have to defend this case in Nebraska than there would be for [AUCRA] to have to pursue its cause of action against [E.M. Pizza] in the State of California." This is a correct analysis of the private factors to be weighed in determining whether this state is a reasonably convenient place for the trial of the action. AUCRA argues that once the court made this determination, it should have found personal jurisdiction under the forum selection clause. We disagree.

[14] We read *Ameritas Invest. Corp. v. McKinney, supra*, and *Atlantic Marine Constr. Co. v. United States Dist. Court for Western Dist. of Tex., supra*, to require courts to consider both private and public interest factors when determining whether this state is a reasonably convenient place for the trial of the action under § 25-414(1)(b). This is what the district court did, albeit under the verbiage of "'fair play and substantial justice.'" In doing so, the district court concluded that California has a significantly greater interest in the issues in this case than does Nebraska and that California's judicial system in interpreting its own workers' compensation laws clearly would provide a more efficient resolution of the controversies within this case. We agree.

As set out above, a Nebraska court would likely have to apply California's complex workers' compensation laws to this dispute. We find that this factor weighs heavily against a finding that this state is a reasonably convenient place for the trial of this action as required under § 25-414(1)(b). As stated by Professor Larson in his treatise on workers' compensation law, due to the complexity of workers' compensation

laws, cases in which they are involved are best administered by the individual state's agencies or courts. See 13 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 140.02[4] (2017). Therefore, a California court would be in the best position to interpret and apply its own workers' compensation laws to this dispute which affects primarily California workers.

Finally, the judicial system's interest in obtaining the most efficient resolution of this controversy lies in having this case tried in the California courts. As stated by counsel during oral arguments, there are numerous other cases stemming from similar RPA's that are pending in the Nebraska courts, which consume this state's judicial resources.

We find, on our de novo review of the record, that AUCRA did not make a prima facie showing of jurisdiction and that the district court did not err in granting E.M Pizza's motion to dismiss. Although each party would be equally burdened regardless of the forum chosen, the fact that a Nebraska court would be required to apply California workers' compensation laws to a dispute that primarily affects California workers necessitates that AUCRA's forum selection clause be disregarded. Under § 25-414, Nebraska does not have to be the most convenient forum, but it must be a reasonably convenient forum, and we determine that it is not.

Although E.M. Pizza argues that the entire RPA is void and unenforceable, the Nebraska Supreme Court recently examined an arbitration provision found in a similar RPA involving AUCRA. See *Citizens of Humanity v. Applied Underwriters*, 299 Neb. 545, 909 N.W.2d 614 (2018). The Supreme Court found that the arbitration provision was unenforceable under Nebraska insurance law; however, it did not strike down the RPA as a whole. *Id*. Thus, we confine our analysis to the validity of the forum selection clause and leave the validity of the RPA for another day.

[15] Finally, AUCRA argues that if we find the district court did not err in dismissing the complaint, it should have

done so without prejudice. However, AUCRA did not assign this as error. Errors must be both assigned and argued to be addressed by an appellate court. See *Priesner v. Starry*, 300 Neb. 81, 912 N.W.2d 249 (2018). Therefore, we do not address this argument.

VI. CONCLUSION

The district court did not err in granting E.M. Pizza's motion to dismiss, because the Nebraska courts do not have jurisdiction under Nebraska's long-arm statute and AUCRA did not present a prima facie basis for personal jurisdiction under the Choice of Forum Act. We therefore affirm the order of the district court.

Affirmed.

State of Nebraska on behalf of Lilliana L., a minor child, appellee, v. Hugo C., appellant, and Theresa L., intervenor-appellee.

924 N.W.2d 743

Filed February 12, 2019. No. A-17-1316.

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. **Parent and Child: Words and Phrases.** A person standing in loco parentis to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption.
3. ____: ____. The term "in loco parentis" refers to a person who has fully put himself or herself in the situation of a lawful parent by assuming all the obligations incident to the parental relationship and who actually discharges those obligations.
4. **Parent and Child: Intent.** The assumption of the parental relationship is largely a question of intention which should not lightly or hastily be inferred.
5. **Parent and Child.** The parental relationship should be found to exist only if the facts and circumstances show that the individual means to take the place of the lawful father or mother not only in providing support but also with reference to the natural parent's office of educating and instructing and caring for the general welfare of the child.
6. **Appeal and Error.** Appellate courts will not consider issues on appeal that were not presented to or passed upon by the trial court.
7. **Child Custody: Parental Rights.** The parental preference doctrine provides that in the absence of a statutory provision otherwise, in a child custody controversy between a biological or adoptive parent and one who is neither a biological nor an adoptive parent of the child involved

in the controversy, a fit biological or adoptive parent has a superior right to custody of the child.

8. ____: ____. The right of a parent to the custody of his or her minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties, and the courts may not deprive a parent of such custody unless he or she is shown to be unfit or to have forfeited his or her superior right to such custody.
9. ____: ____. The best interests of the child are important in resolving a child custody dispute, but a parent's superior right to custody must be given its due regard, and absent its negation, a parent retains the right to custody over his or her child.
10. **Child Custody: Parental Rights: Presumptions.** Parental preference creates a presumption in favor of parental custody.
11. **Child Custody: Parental Rights: Proof.** The parental preference doctrine, by definition, is a preference, and it will be applied to a child custody determination unless it is shown that the lawful parent is unfit or has forfeited his or her superior right or the preference is negated by a demonstration that the best interests of the child lie elsewhere.
12. **Child Custody: Words and Phrases.** Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing which has caused, or probably will result in, detriment to a child's well-being.
13. **Child Custody.** Evidence of unfitness should be focused upon a parent's ability to care for a child, and not any other moral failings a parent may have.
14. ____. Evidence of unfitness should be focused upon a parent's present ability to care for a child, and evidence of a parent's past failings is pertinent only insofar as it suggests present or future faults.
15. **Child Custody: Parental Rights.** The quantum of proof necessary to prove unfitness is analogous to the proof necessary to terminate parental rights.
16. ____: ____. While preference must be given to a biological or adoptive parent's superior right to custody where the parent is not unfit and has not forfeited his or her parental rights, a court also considers the child's best interests in making its custody determination.

Appeal from the District Court for Burt County: John E. Samson, Judge. Affirmed.

Ryan D. Caldwell, of Caldwell Law, L.L.C., for appellant.

Michael J. Tasset and Denise E. Frost, of Johnson & Mock, P.C., L.L.O., for intervenor-appellee.

Pirtle, Bishop, and Arterburn, Judges.

Pirtle, Judge.

INTRODUCTION

Hugo C., the biological father of Lilliana L. (Lilli), born in April 2012, appeals from an order of the district court for Burt County awarding custody of Lilli to Theresa L., Lilli's maternal aunt. Hugo challenges the court's determining that Theresa had standing to seek custody based on the in loco parentis doctrine, allowing Theresa to intervene when she had "unclean hands," and awarding her custody of Lilli. Based on the reasons that follow, we affirm.

BACKGROUND

This case is the third case filed regarding custody and support for Lilli. The first case was filed by the State on January 23, 2014, against Hugo for child support because Melanie L., Lilli's biological mother, had applied for medical assistance benefits for Lilli. Hugo denied that he was Lilli's father at that time. Court-ordered genetic testing was ordered, and on August 4, the results showed that Hugo was Lilli's biological father.

The second case was filed by Melanie in September 2014. She filed a separate action for sole legal and physical custody of Lilli. The first case was dismissed as a result. Melanie then dismissed her case on August 13, 2015, the same day trial was to begin.

The third and present case was commenced on August 27, 2015, when the State filed a second complaint to establish support against Hugo. Hugo was ordered to pay child support in March 2016. On March 16, Hugo filed a "Petition for Custody" of Lilli. Melanie died suddenly 2 months later on June 12. The cause of her death is not clear from the record. Theresa testified that Melanie was born with a heart defect and was on

heart medication at the time of her death. One of Melanie's brothers testified that based on the autopsy, the cause of her death was inconclusive. Following Melanie's death, Lilli began living with Theresa at her home in Colorado.

On August 29, 2016, after learning that Lilli was living in Colorado with Theresa, Hugo filed a motion for "Emergency Custody Determination" seeking temporary custody of Lilli. Theresa filed a complaint to intervene and a motion for temporary custody. The trial court sustained Theresa's motion to intervene. The court overruled Hugo's motion for emergency custody and allowed Lilli to continue living with Theresa. The court also ordered therapeutic counseling sessions and parenting sessions between Hugo and Lilli. Hugo met Lilli for the first time in September 2016, when she was 4½ years old, which was 2 years after he knew that he was Lilli's biological father.

On May 12, 2017, Theresa filed an answer and cross-claim alleging that Hugo was not a fit and proper person to have custody of Lilli and that an award of custody to Hugo was not in Lilli's best interests. Theresa sought legal and physical custody of Lilli and permission for Lilli to reside in Colorado.

Trial was held in July and September 2017. The evidence showed that after Melanie died, her family discussed who would be in the best position to care for Lilli. The family decided that Lilli should live with Theresa. Theresa testified that Hugo was never considered as a potential caregiver for Lilli because he had never met her. Theresa testified that neither she nor her family tried to hide the fact from anyone that Lilli was going to live with Theresa in Colorado. Theresa took Lilli to her home in Colorado on July 1, 2016, where she continued to live at the time of trial.

There was evidence that Theresa had a relationship with Lilli before Melanie died. After moving to Colorado in 2013, Theresa made multiple trips per year to Nebraska to visit family, which trips would include spending time with Lilli. Theresa testified that Lilli knew who she was when she came

to Nebraska for Melanie's funeral. There was also testimony by Theresa and her two brothers that Melanie wanted Theresa to care for Lilli if Melanie ever became unable to care for her.

When Theresa returned to Colorado with Lilli, Theresa's main focus was to get Lilli to a doctor. Lilli suffers from chronic gastrointestinal issues, and at that time, Lilli was bloated, had dark circles under her eyes, and was experiencing severe digestive problems. Theresa testified that she could not get Lilli in to see a doctor without Hugo's consent to obtain medical treatment for Lilli. Theresa called Hugo and told him she was caring for Lilli and needed his consent for medical treatment. Hugo did not express concern that Lilli was in Colorado with Theresa. The next contact Theresa had with Hugo was in early August 2016, when Hugo called and accused Theresa of kidnapping Lilli and wanted her to drop off Lilli in a parking lot in Omaha, Nebraska, so he could pick her up.

There was much evidence presented in regard to Hugo's past, including his criminal history. The evidence showed that Hugo was charged with a felony drug crime in 2004 as a result of law enforcement officers' seizing methamphetamine, cocaine, and marijuana from his house. He was allowed to participate in a drug court program, which he successfully completed, and the charge was dismissed. He was also investigated for dealing drugs in 2011, but no charges were filed. In 2007, Hugo pled guilty to assaulting his son, who was 7 years old at the time, as a result of "spank[ing] him with a belt" which left bruises on his buttocks and thighs. Hugo also had multiple convictions for driving offenses, including driving with a suspended license and reckless driving.

Hugo had been married and divorced four times and three of his ex-wives had sought and received domestic violence protection orders against him at various times. Hugo testified that he thought he and Melanie started dating in 2010 and that she moved in with him 8 or 9 months later. At some point, Melanie

moved out, but she and Hugo continued to see each other on occasion. Hugo's last contact with Melanie was on August 23, 2011, when she sent him an email stating that she was pregnant and claiming that he was not the baby's father.

Dr. Carol Lay, a psychologist who began having therapy sessions with Lilli in September 2016, testified that Lilli first met Hugo through "Skype" in October 2016 and that in-person visits started in November 2016. She testified that she observed a marked shift in Lilli's demeanor and play themes when she began having in-person contact with Hugo: Lilli became more aggressive, fearful, angry, and resentful. She testified that Lilli was "attached" to Theresa and Theresa's fiance and that Lilli did not know how to "process" Hugo's appearance in her life. Lay testified that Lilli was concerned that Hugo would "take her away" from Theresa and Theresa's fiance.

In June 2017, Hugo had an 8-hour visit on two consecutive days, the longest visits that had taken place. Lay testified that after these visits, Lilli "was more agitated and . . . disorganized" and Lilli feared that she was going to lose Theresa and Theresa's fiance, as well as her home.

According to Lay, if Lilli's bond with Theresa and Theresa's fiance is broken, Lilli will be "exceedingly vulnerable to physical and mental health problems in adulthood, not to mention a compromised development in many areas of [her] life; learning, behaviors, school achievement, at not just an emotional level, but also at a biological level." She further testified that based on Lilli's exposure to adverse childhood events, she is "a highly vulnerable child in terms of trusting [others], in terms of believing that the world is a safe place and that she will be taken care of and protected." Lilli's anxiety and exposure to adverse childhood events had already caused developmental delay in her fine motor skills.

Lay testified that if Lilli is going to develop "a solid relationship [with Hugo] based on attachment," it needs to progress at Lilli's rate, and not based upon the wishes or demands of adults. She testified that "days-long overnight" parenting

time with Hugo was "risky" at that time and could be damaging to Lilli, because Lilli is afraid that Hugo will be angry with her if she misses Theresa, and Lay did not believe that Hugo had the capacity to comfort Lilli if she is in distress and she is still somewhat fearful at times. Lay testified that maintaining this state of fear increases anxiety in a way that is not good for Lilli emotionally or physically. Lay further testified that awarding Hugo custody at the time of trial would traumatize Lilli and was not in her best interests. She stated that Lilli was "a vulnerable child who should be protected from being retraumatized."

At the time of trial, Hugo had never contacted Lay to ask about Lilli's progress in therapy or to ask what he could do to help Lilli. Lay found this concerning.

Terry James-Banks, a psychotherapist, supervised several visits between Lilli and Hugo in 2017. She testified that it was not in Lilli's best interests to have overnight visits with Hugo at that time. Her opinion was based on the fact that at the end of the 8-hour parenting time she observed in June 2017, Lilli was ready and anxious to go back to Theresa's home. Lilli also showed insecurity in her relationship with Hugo. James-Banks stated that building a relationship with Lilli would take time and patience and that forcing her into overnight visits before she was ready would increase her distress and her tendency to resist it. James-Banks testified that Lilli is very vulnerable and that disruption of "a second primary attachment relationship" would create a sense of loss, further grief, and potential mental health issues. She further testified that another adverse childhood experience could cause Lilli to suffer permanent or long-term emotional damage.

Following trial, the trial court entered an order on November 22, 2017. The trial court stated that it did not find Hugo's testimony credible, because there were "numerous occasions where [he] minimized, could not remember, or his in-court testimony was contradicted by his previous statements or other credible witnesses." The trial court awarded Theresa sole legal and

physical custody of Lilli, subject to parenting time with Hugo, and allowed her to permanently remove Lilli to Colorado. The court found that it was in Lilli's best interests to remain in Theresa's sole legal and physical custody notwithstanding the parental preference principle and that "it would be harmful to [Lilli's] physical and mental health if the legal custody and possession of the minor child is awarded to [Hugo]." The trial court also established a parenting plan awarding Hugo parenting time with Lilli. Hugo does not challenge the terms of the parenting plan.

ASSIGNMENTS OF ERROR

Hugo assigns that the trial court erred in (1) finding that Theresa stood in loco parentis and had standing to seek custody of Lilli, (2) allowing Theresa to intervene in the action despite evidence of her "unclean hands," and (3) awarding Theresa custody.

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. *Windham v. Griffin*, 295 Neb. 279, 887 N.W.2d 710 (2016).

ANALYSIS

In Loco Parentis.

Hugo first argues the trial court erred in finding that Theresa stood in loco parentis to Lilli and that therefore, she had standing to bring an action for custody of Lilli.

[2] A person standing in loco parentis to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption. *Weinand v. Weinand*, 260 Neb. 146, 616 N.W.2d 1 (2000), *disapproved on other grounds, Windham v. Griffin, supra*.

[3-5] The term "in loco parentis" refers to a person who has fully put himself or herself in the situation of a lawful parent by assuming all the obligations incident to the parental relationship and who actually discharges those obligations. *Weinand v. Weinand, supra*. The assumption of the parental relationship is largely a question of intention which should not lightly or hastily be inferred. *Id.* The parental relationship should be found to exist only if the facts and circumstances show that the individual means to take the place of the lawful father or mother not only in providing support but also with reference to the natural parent's office of educating and instructing and caring for the general welfare of the child. See *id.*

The Parenting Act, Neb. Rev. Stat. § 43-2920 et seq. (Reissue 2016 & Cum. Supp. 2018), defines parenting functions. Specifically, § 43-2922 states:

> For purposes of the Parenting Act:
>
> . . . .
>
> (17) Parenting functions mean those aspects of the relationship in which a parent or person in the parenting role makes fundamental decisions and performs fundamental functions necessary for the care and development of a child. Parenting functions include, but are not limited to:
>
> (a) Maintaining a safe, stable, consistent, and nurturing relationship with the child;
>
> (b) Attending to the ongoing developmental needs of the child, including feeding, clothing, physical care and grooming, health and medical needs, emotional stability, supervision, and appropriate conflict resolution skills and engaging in other activities appropriate to the healthy development of the child within the social and economic circumstances of the family;
>
> (c) Attending to adequate education for the child, including remedial or other special education essential to the best interests of the child;
>
> . . . .

(f) Assisting the child in developing skills to maintain safe, positive, and appropriate interpersonal relationships; and

(g) Exercising appropriate support for social, academic, athletic, or other special interests and abilities of the child within the social and economic circumstances of the family.

The evidence established that Theresa fulfilled all of these functions for Lilli after Melanie died. Theresa brought Lilli into her home a few weeks after Melanie's death in June 2016, and Theresa continued to care for Lilli at the time of trial, 1 year later. She has provided Lilli with a nurturing and stable living environment. Theresa had been caring for Lilli's day-to-day physical needs, was getting her the medical care she needs and having her follow a restricted diet due to her gastrointestinal problems, and meeting her emotional needs. She also found a therapist for Lilli to help her deal with Melanie's death. Theresa and Lilli have a close relationship, and Lilli has an "attachment bond" with Theresa. Further, Theresa is a maternal aunt to Lilli and had a familial relationship with her prior to the death of Melanie. We conclude that the trial court did not err in finding that Theresa stood in loco parentis to Lilli and had standing to seek custody of Lilli.

Unclean Hands.

Hugo next assigns that the court erred in allowing Theresa to intervene in the action despite evidence of her "unclean hands." He alleges that the doctrine of unclean hands applies because Theresa removed Lilli from her home and family in Nebraska and failed to provide adequate notice to the court or Hugo.

[6] This is the first time Hugo has raised an "unclean hands" argument; the argument was not raised to the trial court. Appellate courts will not consider issues on appeal that were not presented to or passed upon by the trial court. *In re Interest of Paxton H.*, 300 Neb. 446, 915 N.W.2d 45

(2018). Accordingly, we do not address this assignment of error further.

Awarding Theresa Custody.

Lastly, Hugo assigns that the trial court erred in awarding Theresa custody of Lilli. He specifically takes issue with the court's finding that the presumption of parental preference was negated based on "'some showing of unfitness'" and the best interests of Lilli. Brief for appellant at 14.

[7-10] The parental preference doctrine provides that in the absence of a statutory provision otherwise, in a child custody controversy between a biological or adoptive parent and one who is neither a biological nor an adoptive parent of the child involved in the controversy, a fit biological or adoptive parent has a superior right to custody of the child. *Windham v. Griffin*, 295 Neb. 279, 887 N.W.2d 710 (2016). The right of a parent to the custody of his or her minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties, and the courts may not deprive a parent of such custody unless he or she is shown to be unfit or to have forfeited his or her superior right to such custody. *Id*. The Nebraska Supreme Court has acknowledged the importance of the best interests of the child in resolving a child custody dispute, but "'a parent's superior right to custody must be given its due regard, and absent its negation, a parent retains the right to custody over his or her child.'" *Id.* at 287, 887 N.W.2d at 716, quoting *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004). The Supreme Court has referred to parental preference as a presumption in favor of parental custody. *Windham v. Griffin, supra.*

[11] The parental preference doctrine, by definition, is a preference, and it will be applied to a child custody determination unless it is shown that the lawful parent is unfit or has forfeited his or her superior right or the preference is negated by a demonstration that the best interests of the child lie elsewhere. *Id.*

[12-15] In support of his assignment that the trial court erred in awarding Theresa custody, Hugo first claims that the trial court impermissibly "broaden[ed] the standard" of unfitness previously stated by the Supreme Court. Brief for appellant at 23. Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing which has caused, or probably will result in, detriment to a child's well-being. *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012). Evidence of unfitness should be focused upon a parent's ability to care for a child, and not any other moral failings a parent may have. See *In re Interest of Lakota Z. & Jacob H.*, 282 Neb. 584, 804 N.W.2d 174 (2011). Further, evidence of unfitness should be focused upon a parent's present ability to care for a child, and evidence of a parent's past failings is pertinent only insofar as it suggests present or future faults. *Id.* The Supreme Court has analogized the quantum of proof necessary to prove unfitness to the proof necessary to terminate parental rights. *Id.*

The trial court found that some of Hugo's past behavior and his "minimization and inconsistent testimony" was concerning, but that it could not conclude that Theresa met her burden of proof that Hugo was unfit to parent Lilli. The trial court went on to note that the U.S. Supreme Court has stated:

> "We have little doubt that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without *some showing of unfitness* and for the sole reason that to do so was thought to be in the children's best interest."

Quoting *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978) (emphasis supplied). The trial court then stated that "if the proper standard is 'some showing of unfitness,' then [Theresa had] met her burden of proof." Hugo contends that based on this statement, the trial court used a standard different from that set out by the U.S.

Supreme Court and erred in finding there was any showing of unfitness.

We determine that the trial court simply noted that there was some evidence of unfitness based on Hugo's past and his testimony at trial, but ultimately concluded that under Nebraska case law, Theresa had not proved that Hugo was unfit to the extent necessary to negate the preference given to Hugo as Lilli's lawful parent. Further, if the trial court had concluded that "'some showing of unfitness'" was sufficient to defeat the parental preference, it would have found it unnecessary to address whether Lilli's best interests defeated the parental preference doctrine. It is clear from the trial court's order that the court based its decision to award Theresa custody on Lilli's best interests, and not on a finding that Hugo was unfit or had forfeited his rights.

In regard to best interests, the court found that it was in Lilli's best interests to remain in Theresa's sole legal and physical custody notwithstanding the parental preference principal and that "it would be harmful to [Lilli's] physical and mental health if the legal custody and possession of the minor child is awarded to [Hugo]." Hugo takes issue with this finding.

[16] While preference must be given to a biological or adoptive parent's superior right to custody where the parent is not unfit and has not forfeited his or her parental rights, a court also considers the child's best interests in making its custody determination. *Windham v. Griffin*, 295 Neb. 279, 887 N.W.2d 710 (2016), citing *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004).

As previously stated, the parental preference doctrine, by definition, is a preference, and it will be applied to a child custody determination unless it is shown that the lawful parent is unfit or has forfeited his or her superior right or the preference is negated by a demonstration that the best interests of the child lie elsewhere. *Windham v. Griffin, supra.*

The evidence showed that Hugo did not have any relationship with Lilli before Melanie died. He met Lilli for the

first time in September 2016, when Lilli was 4½ years old, which was 2 years after he knew that he was Lilli's biological father. Theresa, in contrast, had a relationship with Lilli before Melanie died. Lilli started living with Theresa in July 2016, and she continued to live with her at the time of trial. Lilli has an "attachment bond" with Theresa, and there was evidence that breaking that bond would be detrimental to Lilli.

According to Lay, if Lilli's bond with Theresa and Theresa's fiance is broken, Lilli would be vulnerable to physical and mental health problems in adulthood, as well as compromised development in many areas of her life on emotional and physical levels. Lay testified that if Lilli is going to develop "a solid relationship [with Hugo] based on attachment," it needs to progress at Lilli's rate, and not based upon the wishes or demands of adults. Lay further testified that awarding Hugo custody at the time of trial would traumatize Lilli and was not in her best interests. Lay stated that Lilli was "a vulnerable child who should be protected from being retraumatized."

James-Banks testified that at the end of the 8-hour parenting time she observed, Lilli was ready and anxious to go back to Theresa's home. She also testified that Lilli was insecure in her relationship with Hugo. James-Banks stated that building a relationship with Lilli would take time and patience and that forcing her into overnight visits before she was ready would increase her distress and her tendency to resist it. James-Banks testified that Lilli was very vulnerable and that disruption of "a second primary attachment relationship" would create a sense of loss, further grief, and potential mental health issues. She further testified that another adverse childhood experience could cause Lilli to suffer permanent or long-term emotional damage.

While neither we nor the district court found Hugo to be unfit, it is nonetheless appropriate to consider, in conjunction with this testimony, Hugo's prior conviction for child abuse and his history of having protection orders entered against him

by former spouses. This evidence, coupled with Hugo's past lack of interest in maintaining a relationship with Lilli, gives us concern that a grant of custody to Hugo would place Lilli at an even higher risk for experiencing the type of adverse childhood experience that the mental health providers fear would cause permanent or long-term emotional damage.

We conclude that the trial court did not err in finding that the parental preference in favor of Hugo was negated by Lilli's best interests and in awarding Theresa custody. We further note that the trial court's award of custody to Theresa does not terminate Hugo's parental rights to Lilli. The trial court implemented a parenting plan awarding Hugo parenting time with Lilli.

CONCLUSION

We conclude that the trial court did not err in finding that Theresa had standing to seek custody based on the in loco parentis doctrine and did not err in awarding Theresa custody of Lilli.

Affirmed.

Richard Muller, appellee, v. John Weeder, appellant.

924 N.W.2d 754

Filed February 26, 2019. No. A-17-803.

1. **Contempt: Appeal and Error.** 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 are reviewed for abuse of discretion.
2. **Appeal and Error: Words and Phrases.** An appellate court may, at its option, notice plain error. Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
3. **Constitutional Law: Courts: Jurisdiction: Contempt.** A court can issue orders that are necessary to carry its judgment or decree into effect. The power to punish for contempt is incident to every judicial tribune. It is derived from a court's constitutional power, without any expressed statutory aid, and is inherent in all courts of record.
4. **Contempt: Proof.** Outside of statutory procedures imposing a different standard, it is the complainant's burden to prove civil contempt by clear and convincing evidence.

Appeal from the District Court for Boyd County, Mark D. Kozisek, Judge, on appeal thereto from the County Court for Boyd County, Alan L. Brodbeck, Judge. Judgment of District Court reversed and remanded with directions.

Lyle J. Koenig, of Koenig Law Firm, for appellant.

Ryan D. Cwach, of Birmingham & Cwach Law Offices, P.L.L.C., for appellee.

Moore, Chief Judge, and Riedmann and Welch, Judges.

Welch, Judge.

INTRODUCTION

John Weeder appeals from the decision of the Boyd County District Court affirming the county court's order finding that he had not complied with a mediation agreement, which was entered as a judgment, requiring him to repair his half of a boundary fence and awarding Richard Muller $4,998.30. He also appeals the district court's order granting Muller's cross-appeal and awarding Muller an additional $1,417.50 for the cost of tree and brush removal. Having determined, based upon plain error review, that the county court applied the wrong standard of proof in connection with the evidentiary hearing, placing the burden of proof on Weeder, we reverse the district court's order and remand the cause with directions.

STATEMENT OF FACTS

In 2013, Muller obtained real property in Boyd County, Nebraska, which property shares a fence line with property owned by Weeder. In 2014, both Muller and his brother determined that the fence "was beyond repair," leading Muller to replace his half of the fence. After Weeder refused to replace his part of the fence, Muller filed a fence dispute complaint in the Boyd County Court requesting that Weeder be ordered to pay him $5,959.34 "and costs of this action for construction, repair or maintenance of a division fence between adjoining properties." The parties agreed to attend mediation and reached an agreement on May 26, 2015. The mediation agreement provided, in relevant part:

> (1) The right hand rule is agreed to as [delineating] the fence responsibility for each party.

> . . . .
>
> (3) Weeder will clear trees, shrubs[,] etc[.] that could damage the fence from his portion of the fence. Weeder will repair or replace his portion of the fence such that the fence will be a 4 wire fence complying with current state statutes.
>
> . . . .
>
> (6) If Weeder fails to complete the actions described in paragraph 3 by October 15, 2015, Muller may complete those actions. In the event that Muller complete[s] the actions required in paragraph 3[,] Muller shall be entitled to the entry of a judgement against Weeder in an amount equal to the reasonable expenses incurred by Muller in completing that work.

They also agreed that Muller had "repaired or replaced his portion of the fence," had cleared trees and shrubs from his portion of the fence, and had installed a four-wire fence which complied with the current state statute on his portion of the fence.

Pursuant to Nebraska state statute, a lawful wire fence

> shall consist of at least four wires, of a size not less than number nine fencing wire, to be well secured to posts, the posts to be at no greater distance than one rod from each other; and there shall be placed between every two of the posts one stake or post to which the wire shall be attached. Any of such wires may be a barbed wire composed of two or more single wire strands twisted into a cable wire with metal barbs thereon averaging not more than five inches apart, each of such single wire strands to be of a size not less than number twelve and one-half gauge fencing wire.

Neb. Rev. Stat. § 34-115(5) (Reissue 2016). Further, "[t]he fences described in section 34-115 shall be at least four and one-half feet in height; and in the construction of such fences the spaces between the boards, rails, poles, and wires shall not exceed one foot each, measuring from the top." Neb. Rev. Stat.

§ 34-116 (Reissue 2016). On December 14, 2015, pursuant to Neb. Rev. Stat. § 34-112.02 (Reissue 2016), the county court entered judgment in conformity with the settlement agreement. In that same order, the court ordered that Weeder had 7 days to comply with the settlement agreement and that if Weeder failed to comply within 7 days, Muller "may proceed under paragraph 6 of the [mediation] agreement to repair the fence, [and] submit a bill showing costs necessary to comply with the agreement." Two days after the court ordered Weeder to fix the fence, Tim Nolan, Raymond Wade, Michael Wade, and Aaron Holz worked to repair Weeder's portion of the fence, working 12 hours over a 3-day period. The men trimmed trees, added a fourth wire to the fence, stretched and spaced wires out, added posts "so the posts were the right distance apart," and set a cornerpost.

In early January 2016, Muller viewed the fence repairs and determined that the repairs were not in compliance with the mediation agreement or state statute. On February 10, Muller contracted with Preferred Fencing & Cedar Removal (Preferred Fencing) to remove and replace Weeder's side of the fence. Muller then provided notice to Weeder, by certified letter to Weeder's attorney, that he was going to have the fence replaced, the estimated cost of the replacement, and the additional estimated cost for removal of trees and wooded plants in the fence line. Muller testified that neither Weeder, nor his counsel, told him not to go forward with the fence repair or replacement; however, he admitted that Weeder filed a motion for hearing based upon the documents that he had provided him. The fence removal and replacement occurred on or about March 10 and cost $4,998.30. This amount included charges for 18 hours spent on removing cedar trees that were along the fence line. Additionally, Muller hired Kevin Thomson to clear trees and brush out of the fence line. Thomson submitted an invoice detailing 21 hours of work at $75 per hour less a 10-percent discount, for a total of $1,417.50.

Over 2 days in September and November 2016, a show cause hearing was held as to why Weeder should not have to reimburse Muller $6,415.80 for the costs of the tree and brush removal and the cost of the fence removal and replacement. In his defense of the order to show cause, Weeder called Albert Lee, Nolan, Raymond Wade, Michael Wade, and Holz.

Lee testified that he was familiar with the fence line and that at Weeder's request, he inspected the fence after the repairs had been made. He did so by walking the complete fence line. He testified that the repaired fence was a four-wire barbed wire fence with about 8 inches between the wires. He also testified that the posts on Weeder's portion of the fence were placed approximately every 16 feet, which was approximately the same distance between the posts on Muller's portion of the fence. Lee testified that Weeder's fence was a mixture of old and new wire, and when asked about the size of the wire's gauge, he replied that it "appeared to be standard red brand wire." He further testified that both Weeder's and Muller's portions of the fence appeared to be of the same or a similar size gauge. Lee testified that he has been building and maintaining fences for almost 50 years and that in his opinion, Weeder's fence was repaired in accordance with state statute "[a]s [he] knew it to be" and "[a]s it was explained here [in court]"; however, he admitted that prior to this case, he was not aware what was required in order to make a legal fence, and he stated, "I might add, mine isn't." He further admitted that he did not know required spacing between fencing wires. Photographs that Lee took of the repaired fence were admitted into evidence as exhibits. Lee further admitted that one such exhibit depicted a split cedar post and that he did not know if it was a legal fencepost. Lee admitted that another such exhibit showed a portion of Weeder's fence where a "wire [was] growing into a live tree." Lee admitted that the tree is not a legal post.

Nolan testified that he rents the property on both sides of the fence. Nolan provided materials to fix Weeder's fence. He

estimated the materials were worth a little over $200, and he estimated the value of the labor at $20 per hour. According to Nolan, he and the others assisting placed posts about 15 feet apart and added a new top wire which was either 14 or 16 gauge "[r]egular barbed wire." They then took the other three wires off and spaced them out based on "whatever looks right by eyesight" which he estimated was a "foot apart." He admitted that he did not check to see if the barbs were more than 5 inches apart. Nolan admitted that the site depicted in the exhibit which showed a tree with a wire growing through it "could sure be on [Weeder's] half [of the fence], because there's one tree that had wire growing through it like that."

Nolan testified the fence he repaired met the code requirements that he was "familiar with." Similarly, Raymond Wade testified of Weeder's repaired fence, "It's a lot better fence than I see on some of the others." Michael Wade also testified that in his opinion, the repaired fenceposts were compliant with state statute. Michael Wade further testified that he did not notice any difference between the gauge of the new wire and that of the old wires and that they were placed about 10 to 12 inches apart.

Raymond Wade, Michael Wade, and Holz all corroborated Nolan's testimony that they worked for 12 hours over a 3-day period repairing Weeder's fence. Additionally, the three men estimated the value of the labor at between $15 and $20 per hour.

Muller called three witnesses on his behalf: Thomson, Muller himself, and Muller's brother. Muller testified that he viewed Weeder's fence in early January 2016, after the repairs had been made. His testimony is consistent with the evidence previously set forth in this opinion. Muller also took some photographs of the repaired fence which were received into evidence, along with the flash drive upon which the photographs were saved. In early February 2016, Muller contracted with Preferred Fencing to repair the fence. After doing so, he notified Weeder, by certified letter sent to Weeder's

attorney, that Muller intended to repair the fence to meet state statutes. Muller testified that he received notification of Weeder's motion for a hearing after the fence had already been repaired.

Muller's brother testified that he is familiar with the partition fence, he has fenced his own property and his parents' property, and "in [his] opinion, [Weeder's repairs] didn't meet the statutes as [he] read them."

Thomson testified that in January or February 2016, Muller hired him to clear out the trees and brush on the south side of Weeder's portion of the fence and hardwood trees in the middle of the fence line. In response to a question about the condition and quantity of brush growing into the fence line, he stated, "There [were] some patches that were really . . . thick. You couldn't even see the fence line."

In rebuttal, Weeder called his former attorney, Steven Brewster, who testified that in early to mid-February 2016, he received a packet from Muller which included documents and photographs. The documents included information that Muller was going to replace the fence. The packet was admitted into evidence. In response, Brewster filed a motion for further hearing for the purpose of presenting to the court the condition of the repaired fence. The court took judicial notice of Brewster's motion for further hearing, which was "dated February 23rd, 2016." Brewster testified that he withdrew the motion prior to the scheduled hearing after learning the repaired fence had been torn out and replaced. Muller responded to Weeder's testimony by testifying that no one contacted him about not removing the fence.

In a journal entry entered on December 22, 2016, the county court found that although Weeder, or his associates, did some work on the fence, the work was neither satisfactory, nor in compliance with state statute, nor in compliance with the tenor of the mediation agreement. Thus, the court found that Muller was entitled, pursuant to the terms of the mediation agreement, to bring the fence into compliance with the state

statute and did so by contracting with Preferred Fencing to perform the fence work. Preferred Fencing performed the work on March 12, 2016. The court found that the cost of the fence work was $4,998.30, which the court found to be a reasonable cost to complete the work. Thus, the court entered judgment in Muller's favor against Weeder in the amount of $4,998.30. Weeder appealed, and Muller cross-appealed, to the district court. The district court affirmed the county court's order, finding that Weeder had not complied with a mediation agreement requiring him to repair his half of a boundary fence and awarding Muller $4,998.30. Further, the district court granted Muller's cross-appeal and found the county court erred in failing to award the cost of tree and brush removal. Thus, the district court modified the decision of the county court by awarding Muller an additional $1,417.50 for the cost of tree and brush removal. Weeder timely appeals.

ASSIGNMENTS OF ERROR

On appeal, Weeder contends that the district court erred in affirming the county court's order on the basis that the county court erred (1) in failing to find that Muller committed spoliation; (2) in finding that the fence, as repaired by Weeder, did not meet the requirements of the mediation agreement and state statutes; and (3) in finding that the fencing contractor's charges were reasonable. Weeder also contends that the district court erred in holding that the county court erred in failing to award Muller the cost of tree and brush removal. Finally, he contends that the district court erred in failing to review his "as applied" constitutional challenge under the plain error doctrine.

STANDARD OF REVIEW

[1] 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 are reviewed for abuse of discretion. *Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012).

ANALYSIS

Before addressing Weeder's assignments of error, we first note the unusual posture of this case. The case began as a claim filed by Muller against Weeder pursuant to Nebraska statutes governing division fences. Prior to trial, the parties mediated their dispute, and as required by § 34-112.02(4), the trial court entered the agreement as the judgment in the action. In summary, the judgment required Weeder to repair his portion of the fence in accordance with applicable statute, or, if he failed to timely repair the fence, Muller was entitled to repair Weeder's portion of the fence and obtain reimbursement of the reasonable cost of repairs from Weeder. Weeder made an attempt to repair the fence; however, Muller deemed the attempt inadequate. In response, Muller had the fence repaired and sought reimbursement of the cost of the fence by filing an application for an order to show cause. Following that application, the court set a hearing on the application.

At that show cause hearing, there was disagreement among the parties on how to proceed with the factual hearing on Muller's application for an order to show cause. Because Muller had filed the application with affidavits stating that he believed Weeder failed to properly repair the fence and that Muller was entitled to reimbursement for his repair of the fence, the court asked Weeder to initiate evidence in opposition to that application. That exchange is captured in the following colloquy:

> THE COURT: And now I'm asking you to call witnesses, and you're telling me you don't want to do that.
>
> [Weeder's counsel]: I'm just saying, I believe it's [Muller's] burden to show cause, to put in enough

evidence that there's any cause to show. I mean, I'm happy to put my witnesses on, Judge, but we need — I'll call the guy that put in his fence first.

. . . .

[Weeder's counsel]: Judge, I need to be clear. Are we allowing these basically hearsay documents to support their case of what they're entitled to? Don't they have to put on a witness to establish the amount?

THE COURT: And you don't believe the affidavit establishes what they're asking for?

[Weeder's counsel]: No, Judge. That's an out[-]of-court statement. That's hearsay. I have no opportunity to cross-examine.

THE COURT: Okay. The order to show cause is issued to [Weeder] to appear before this Court in the Boyd County Courthouse, Butte[,] Nebraska, on the 12th day of September, 2016, at 1:00 p.m. for [Weeder] to show cause why money judgment is requested in [Muller's] application and affidavit for order to show cause in compliance with this Court's order of December 14th, 2015.

[Weeder's counsel]: I'm going to have to ask for a continuance, Judge, and subpoena these witnesses, because we've got somebody saying — offering hearsay evidence to support a money judgment to which they burned down the evidence and then said, okay, we're going to submit an affidavit, and this is what you owe me. I just can't imagine that that passes due process, Judge. If we need to go forward today, I'll call my witnesses, but I need a continuance to get an opportunity to hear the witness testify, I don't know who did this. It's not even signed. They're just two hearsay documents that — I mean, I could print these out on my own computer.

THE COURT: So you're suggesting that [Muller's counsel has] offered forged evidence?

[Weeder's counsel]: I have no way to determine the reliability without cross-examining the witnesses, Judge.

> THE COURT: But nonetheless, the Court's order said that you were to show cause, not for [Muller's counsel] to show cause.

Although the court expressed a willingness to grant a continuance, the hearing proceeded with Weeder producing evidence first, followed by Muller. Following the hearing, the court entered an order in favor of Muller, finding that Weeder's repair work was not performed in accordance with state statute or in accord with the tenor of the mediation agreement. The court further held that Muller was entitled to bring the fence into compliance, proceeded to do so, and was entitled to judgment for the cost of that repair. The matter was then appealed to the district court. The district court found that the trial court's findings were not clearly wrong but found Muller was entitled to an additional $1,417.50 in his cross-appeal.

[2] Although Weeder did not assign error to the trial court's procedural posture of the case, that is, placing the burden of proof on Weeder to show cause why a money judgment should not be entered against him for failing to follow the court's prior judgment, an appellate court may, at its option, notice plain error. *Mays v. Midnite Dreams*, 300 Neb. 485, 915 N.W.2d 71 (2018). Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Id*.

[3] Here, the county court placed the burden of proof on Weeder to demonstrate that he had complied with the court's prior judgment. As the Nebraska Supreme Court explained in *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 675, 782 N.W.2d 848, 862 (2010), *disapproved on other grounds, Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012):

> [A] court that has jurisdiction to issue an order also has the power to enforce it. A court can issue orders that are

> necessary to carry its judgment or decree into effect. Nebraska courts, through their inherent judicial power, have the authority to do all things reasonably necessary for the proper administration of justice. And this authority exists apart from any statutory grant of authority. We have recently explained that the power to punish for contempt is incident to every judicial tribune. It is derived from a court's constitutional power, without any expressed statutory aid, and is inherent in all courts of record.

[4] However, in determining the standard of proof in connection with the court's inherent power to enforce judgments, the Supreme Court held:

> We recognize that many state courts permit parties to prove civil contempt by a preponderance of the evidence. And in some circumstances, Neb. Rev. Stat. § 42-358(3) . . . permits a rebuttable presumption of contempt if a prima facie showing is made that an obligor is delinquent in his or her child or spousal support obligations. But apart from a statutory mandate requiring a different standard, we do not believe presumptions or a preponderance standard is consistent with what we have stated about civil burdens of proof.
>
> . . . .
>
> . . . Accordingly, we overrule all the cases listed in footnote 129 to the extent that these cases hold or imply that proof beyond a reasonable doubt is required for civil contempt proceedings. Outside of statutory procedures imposing a different standard, it is the complainant's burden to prove civil contempt by clear and convincing evidence.

Id. at 706-07, 782 N.W.2d at 881.

The trial court here appears to have shifted the burden onto Weeder once Muller filed an affidavit stating his belief that Weeder was in default of the court's order. The trial court then placed the burden of proof on Weeder to show that he was not in contempt and ultimately granted monetary relief to Muller

following that hearing. Without discussing the applicable burden, the district court affirmed the trial court's decision, in part, and granted an additional judgment in favor of Muller. Because we find that the trial court applied the wrong standard of proof in connection with the evidentiary hearing, we reverse the decision of the district court and remand the cause to the district court with directions to reverse the order of the county court and remand the matter for further proceedings consistent with this opinion. Based upon this determination, we need not consider Weeder's assignments of error raised on appeal. See *Weatherly v. Cochran*, 301 Neb. 426, 918 N.W.2d 868 (2018) (appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

Reversed and remanded with directions.

In re Interest of Cole J., a child under 18 years of age. State of Nebraska, appellee, v. Cole J., appellant.

925 N.W.2d 365

Filed February 26, 2019. No. A-18-260.

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. **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. **Rules of Evidence: Appeal and Error.** Where 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.
4. **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.
5. **Rules of Evidence: Hearsay: Proof.** Hearsay is an out-of-court statement made by a human declarant that is offered in evidence to prove the truth of the matter asserted.
6. **Rules of Evidence: Hearsay.** Generally, hearsay is inadmissible except as provided by a recognized exception to the rule against hearsay.
7. **Rules of Evidence: Hearsay: Proof.** The party seeking to admit a business record under Neb. Rev. Stat. § 27-803(5)(a) (Reissue 2016) bears the burden of establishing foundation under a three-part test. First, the proponent must establish that the activity recorded is of a type that regularly occurs in the course of the business' day-to-day activities.

Second, the proponent must establish that the record was made as part of a regular business practice at or near the time of the event recorded. Third, the proponent must authenticate the record by a custodian or other qualified witness.

8. **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.
9. **Juvenile Courts: Jurisdiction: Proof.** At the adjudication stage, in order for a juvenile court to assume jurisdiction of a minor under Neb. Rev. Stat. § 43-247(3)(b) (Reissue 2016), the State must prove the allegations of the petition beyond a reasonable doubt.
10. **Juvenile Courts: Minors: Jurisdiction.** Under Neb. Rev. Stat. § 43-247(3)(b) (Reissue 2016), when a juvenile is habitually truant, he or she may be adjudicated as such.
11. **Juvenile Courts: Public Officers and Employees: Minors.** Prior to filing a petition alleging a juvenile is habitually truant, the county attorney shall make reasonable efforts to refer the juvenile and his or her family to community-based resources that address the juvenile's behaviors.
12. **Schools and School Districts.** Under Neb. Rev. Stat. § 79-209(2) (Reissue 2014), all schools are required to have a policy that states the number of absences after which the school shall render services to address a student's barriers to attendance.

Appeal from the Separate Juvenile Court of Lancaster County: Linda S. Porter, Judge. Affirmed.

Joe Nigro, Lancaster County Public Defender, and Mark D. Carraher for appellant.

Pat Condon, Lancaster County Attorney, Margeaux K. Fox, and John M. Ward for appellee.

Pirtle, Bishop, and Arterburn, Judges.

Arterburn, Judge.

INTRODUCTION

Cole J. appeals from his adjudication as a juvenile within the meaning of Neb. Rev. Stat. § 43-247(3)(b) (Reissue 2016) following a trial in the separate juvenile court of Lancaster

County. On appeal, Cole alleges the court erred in admitting evidence over his objections and relying on insufficient evidence when it found he was habitually truant. For the reasons that follow, we affirm.

BACKGROUND

On November 29, 2016, the State filed a truancy petition, alleging that Cole was habitually truant from school between August 24 and November 21, 2016. The State sought Cole's adjudication as a juvenile defined by § 43-247(3)(b). Cole, born in January 2001, was 15 years old when the action commenced. He lived with his mother, Laurel J., in Lincoln, Nebraska, where he attended high school.

An adjudication hearing was held on February 9, 2018. The State called two witnesses who both worked at Cole's high school: an attendance technician, Kaley Brewer, and a student advocate and truancy diversion coordinator, Brandon Prater. The court also admitted three exhibits.

According to Brewer, when students at Cole's high school miss a class period without an excuse, their teachers mark them truant and their parents automatically receive a telephone call at the end of the day. The school ordinarily sends notification letters to parents each time a student misses 5, 10, or 15 days. After a student misses 10 days of school, the school attempts to schedule a collaborative plan meeting with the student and his or her parents. When a student misses 20 days of school, the office of the Lancaster County Attorney (County Attorney) is notified.

Cole was enrolled in seven 1-hour periods each school day. From August 24 through November 21, 2016, Cole was truant for 158 1-hour periods, which equates to just over 22 school days. Due to Cole's absences, the school held a collaborative plan meeting on November 11. Brewer, along with a school administrator and a school counselor, attended this meeting with Cole and outlined actions to be taken. Laurel did not attend the meeting. Brewer encouraged Cole to talk with the

person providing him transportation in the morning about getting him to school on time. A collaborative plan document was created in the meeting which identified only the need for the family to work with community services in order to improve attendance. The plan of action devised was for Brewer to work with Prater about enrolling Cole in the truancy diversion program.

Because Laurel did not attend the collaborative plan meeting, Brewer sent home with Cole a letter from the County Attorney. This letter outlined community-based resources that were available to the family. Specifically, the letter referred to the "'Lancaster County Resource Guide'" and provided a web address at which it could be reviewed. The letter also provided contact information for the "Lincoln/Lancaster County Human Services Office." The letter closed by stating the County Attorney's hope that referrals to such programs would assist Cole and his family in addressing his truancy issues. Brewer requested that Cole have his mother, Laurel, initial the collaborative plan document to acknowledge that she had received the letter and return a copy to the school, but this never occurred.

Cole was subsequently referred to the County Attorney for a truancy filing, and the County Attorney determined that Cole should enroll in the school's truancy diversion program. Despite the plan to place Cole in the diversion program, the petition herein was filed on November 29, 2016.

The truancy diversion program met every 2 weeks and connected students with a student advocate such as Prater. Students and parents are made aware of the program's expectations through an initial truancy diversion meeting, and students sign a contract to participate in the program. Following the filing of the petition, Cole and Laurel signed a contract for the program. However, Cole continued to miss classes and was ultimately removed from the truancy diversion program.

Over Cole's objection, the court admitted exhibit 3, which showed that telephone messages were left by Brewer for Laurel

on October 20 and 25, 2016, attempting to schedule the collaborative plan meeting. The exhibit also recites that Laurel did call the school on October 31, seeking to reschedule the meeting. The next day, Brewer called back, but received no answer. Brewer again left a voicemail. Brewer also left Laurel a telephone message after she did not attend the collaborative plan meeting on November 11. The court noted that the evidence showed documented efforts by the school to notify Laurel of the collaborative plan meeting and to follow up with her when she did not show up to the meeting.

The court held that the absence of Laurel at the collaborative plan meeting was not an absolute defense to the truancy filing, especially because the school repeatedly attempted to contact Laurel and notify her of the meeting. Thus, the court held the school's efforts satisfied the requirements of Neb. Rev. Stat. § 79-209 (Reissue 2014) and adjudicated Cole as a juvenile within the meaning of § 43-247(3)(b).

Following the adjudication hearing, the court took the matter under advisement and issued its written decision on February 21, 2018. The court found that Cole had been absent for 22 days during a roughly 3-month period from August 24 through November 21, 2016. Thus, the court held that Cole was a juvenile who was habitually truant as defined by § 43-347(3)(b).

In its order, the court noted that it allowed evidence of Cole's enrollment in a truancy diversion program after November 21, 2016, only insofar as determining whether the court should still exercise jurisdiction since the alleged period of truancy occurred almost 1½ years earlier.

Cole now appeals.

ASSIGNMENTS OF ERROR

Cole assigns the juvenile court erred in (1) receiving exhibit 3 over hearsay and foundation objections, (2) receiving evidence of actions taken outside the time period alleged in the petition, and (3) relying on insufficient evidence to adjudicate him.

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 Samantha C.*, 287 Neb. 644, 843 N.W.2d 665 (2014).

[2-4] 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. Smith*, 286 Neb. 856, 839 N.W.2d 333 (2013). Where 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. *State v. Smith, supra*. 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. *Id*.

ANALYSIS

Admission of Exhibit 3

Cole contends that the juvenile court erred in admitting exhibit 3, a log of communications between the school and Cole or Laurel, over his objections based on hearsay and foundation. In response, the State contends that the communication log was properly admitted under the business records exception to the hearsay rule. We agree that exhibit 3 was properly admitted.

[5,6] Hearsay is an out-of-court statement made by a human declarant that is offered in evidence to prove the truth of the matter asserted. *State v. Williams, ante* p. 459, 920 N.W.2d 868 (2018). See, Neb. Rev. Stat. § 27-801 (Reissue 2016); *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010). Generally, hearsay is inadmissible except as provided by a recognized exception to the rule against hearsay. *State v. Williams, supra*. See Neb. Rev. Stat. §§ 27-802 through 27-804 (Reissue 2016).

One such exception is the business records exception. See § 27-803(5)(b).

[7] The party seeking to admit a business record under § 27-803(5)(a) bears the burden of establishing foundation under a three-part test. *O'Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 903 N.W.2d 432 (2017). First, the proponent must establish that the activity recorded is of a type that regularly occurs in the course of the business' day-to-day activities. *Id*. Second, the proponent must establish that the record was made as part of a regular business practice at or near the time of the event recorded. *Id*. Third, the proponent must authenticate the record by a custodian or other qualified witness. *Id*.

In the present case, the State laid sufficient foundation for the admission of exhibit 3 under the hearsay rule's exception for business records. First, the State showed through Brewer's testimony that Cole's high school regularly maintains similar communication logs for all its students and that these records are updated when school personnel communicate with students or their parents. Second, Brewer testified that the record is updated by school personnel at the time when they make contact. Third, the State authenticated the record through Brewer, who was a custodian or qualified witness because she testified that she was one of a handful of people who had access to the communication log, could edit the log, and could print the log. As such, the State laid a proper foundation for the communication log's admission under the business records exception to the hearsay rule.

The concern underlying Cole's objection seems to be that more than one person could edit the log, thus making it unreliable. We note that such a concern may be considered for purposes of the weight to be accorded the evidence, but this concern does not negate the exhibit's admissibility when proper foundation is laid. We also note that the only entries made on the log that relate to Cole's attendance were made by Brewer. There was no indication in Brewer's testimony that the entries

attributed to her had been altered. As such, we cannot find any error by the juvenile court in receiving exhibit 3.

Evidence Outside Period Alleged in Petition

Cole alleges that the court erred in admitting evidence of the County Attorney's efforts outside the period of August 24 to November 21, 2016, which was alleged in the petition. He contends that such evidence was irrelevant and prejudicial. The State argues in response that evidence of Cole's attending a truancy diversion program after November 21 was relevant and not prejudicial. We agree that the evidence outside the petition's time period was relevant and that its admission did not prejudice Cole.

"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 2016). The juvenile court received evidence of Cole's enrollment in a truancy diversion program after November 21, 2016, solely for the limited purpose of determining whether it was still necessary 15 months after the filing of the petition for the court to exercise jurisdiction over Cole. In addressing this issue, the court stated:

> I agree, and I'm not sure why the County Attorney proceeds in the way they do in these cases when they're filing them — when it's a period of time that's quite some time ago. But I think it goes to the issue of whether the Court should take jurisdiction over a youth on a truancy allegation that's over a year old. So, I'm going to overrule your objection, but I'll indicate I'm aware of what the petition alleges and the State has to prove that — those allegations by proof beyond a reasonable doubt. But, in terms of the issue of whether the Court should take jurisdiction over a youth for truancy, that's, at this point, over a year in the past, I'm going to consider — I'm going

> to allow her to adduce evidence about what's transpired since, on the relevance of whether the Court should exercise jurisdiction, if they have proven the allegations given the time frame that those allegations pertain to.

We agree that the posture of the case was complicated by the State's decision to file the case immediately but then place Cole into a diversion program. The juvenile court recognized that the State had the burden to prove the allegations contained in the petition and clearly did not utilize any postpetition evidence against him in determining that the State had met its burden. In essence, the court found that even if the State met its burden, the court could still refuse to adjudicate Cole if the postpetition evidence demonstrated that Cole had become compliant with attending school. Therefore, it is difficult to ascertain how this additional burden prejudiced Cole. We cannot find that the court abused its discretion in receiving postpetition evidence for the stated limited purpose.

Whether the court should exercise jurisdiction over Cole was the central question of the adjudication proceeding. Thus, the evidence was relevant and properly admitted.

Sufficiency of Evidence

Cole contends that the State failed to meet its burden of proof in two ways. He first argues that there was insufficient evidence to establish that his school documented a true collaborative plan meeting prior to the County Attorney's filing the truancy petition. Second, he claims that there was insufficient evidence to find that the County Attorney had made reasonable efforts to refer the family to community-based resources prior to filing the petition. The bases for his arguments are rooted in the absence of Laurel from the collaborative plan meeting and the school's entrusting Cole to deliver the County Attorney's letter to her. The State argues in response that it introduced evidence upon which the juvenile court could find that the school documented a collaborative plan meeting, that the County Attorney made reasonable efforts to inform Cole

and Laurel of appropriate community resources prior to filing the petition, and that Cole was a habitually truant juvenile. The State also asserted that Laurel's absence at the collaborative plan meeting cannot be a complete defense to Cole's adjudication. For the reasons set forth below, we agree that the State introduced sufficient evidence to support the juvenile court's decision.

[8,9] 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. Draper*, 295 Neb. 88, 886 N.W.2d 266 (2016). At the adjudication stage, in order for a juvenile court to assume jurisdiction of a minor under § 43-247(3)(b), the State must prove the allegations of the petition beyond a reasonable doubt. See *In re Interest of Joseph S.*, 13 Neb. App. 636, 698 N.W.2d 212 (2005).

[10,11] Under § 43-247(3)(b), when a juvenile is habitually truant, he or she may be adjudicated as such. Prior to filing a petition alleging a juvenile is habitually truant, the county attorney shall make reasonable efforts to refer the juvenile and his or her family to community-based resources that address the juvenile's behaviors. See Neb. Rev. Stat. § 43-276(2) (Reissue 2016). Failure to describe the efforts required by § 43-276(2) is a defense to adjudication. See, also, § 79-209(3).

[12] Under § 79-209(2), all schools are required to have a policy that states the number of absences after which the school shall render services to address a student's barriers to attendance. Such services shall include, but not be limited to:

> (a) Verbal or written communication by school officials with the person or persons who have legal or actual charge or control of any child; and
>
> (b) One or more meetings between, at a minimum, a school attendance officer, a school social worker, or a

> school administrator or his or her designee, the person who has legal or actual charge or control of the child, and the child, when appropriate, to attempt to address the barriers to attendance. The result of the meeting or meetings shall be to develop a collaborative plan to reduce barriers identified to improve regular attendance.

Failure by the school to document the efforts required by § 79-209(2) is a defense to prosecution under Neb. Rev. Stat. § 79-201 (Reissue 2014) and adjudication for habitual truancy under § 43-247(3)(b).

The central question is whether there was sufficient evidence that Cole's high school and the County Attorney made the statutorily required efforts to address Cole's attendance issues in spite of Laurel's not attending the collaborative plan meeting. At the adjudication hearing, Brewer testified that the school notifies parents of their child's absence by telephone each day that a student misses a class period. She further testified that letters are sent to parents each time that a student misses the equivalent of 5, 10, or 15 school days. Because Cole missed the equivalent of 22 school days, there was evidence that Laurel would have been notified in writing at least three times of Cole's repeated absences and would have received numerous notifications via telephone as well.

Brewer also testified that the school typically schedules a collaborative plan meeting after a student has missed school for 10 days. On November 11, 2016, the school held a collaborative plan meeting which was attended by Cole, Brewer, a school administrator, and a school counselor. Laurel did not attend the meeting, however. The communication log, exhibit 3, shows that Brewer contacted Laurel twice in October to set up the collaborative plan meeting. Laurel then contacted the school on November 1, seeking to reschedule the meeting. However, when Brewer contacted Laurel to set a new date, Laurel did not answer or respond to the voicemail that Brewer left.

When the collaborative plan meeting concluded, Brewer gave Cole a copy of a letter from the County Attorney and directed him to bring it back after his mother initialed it. No initialed copy of the letter was returned to the school, however. The letter referred to the "'Lancaster County Resource Guide'" and provided a web address at which it could be reviewed. The letter also suggested that parents should work closely with their child's school and further recommended that parents contact the "Lincoln/Lancaster County Human Services Office" and provided that office's telephone number.

Cole's first contention, reduced to its essence, is that because school officials failed to obtain Laurel's presence at the collaborative plan meeting, there was no compliance with § 79-209(2). To accept Cole's contention—namely, that Laurel's absence from the collaborative plan meeting is an absolute defense to his adjudication as a habitually truant minor—would allow students' truancies to continue unchecked if their parents simply refuse to show up for a collaborative plan meeting. This is an unworkable interpretation of our laws. Here, the school made reasonable efforts to obtain Laurel's attendance. An attendance report for Cole demonstrates that he was truant for at least one period of school on 36 different days. This would have triggered 36 calls to Laurel. She also would have received at least two letters from the school prior to the scheduling of the meeting. The testimony of Brewer and exhibit 3 demonstrate that repeated efforts were made to contact Laurel by telephone in order to schedule the collaborative meeting and that she responded to at least one of the calls by asking to reschedule the meeting. She did not continue to follow up, however, when Brewer attempted to return her call. Knowing that the meeting remained scheduled on November 11, 2016, she did not appear or make further efforts to reschedule. In its order of adjudication, the juvenile court notes that although present, Laurel did not testify at the adjudication hearing. The record before the juvenile court was sufficient to support the court's

conclusion that the school made sufficient efforts to comply with § 79-209(2) to negate any claim or defense raised by Cole regarding Laurel's absence from the collaborative plan meeting.

Cole's final contention is that the evidence was insufficient to show that the County Attorney made reasonable efforts to refer the family to community-based resources prior to filing the petition. The record demonstrates that the petition was filed November 29, 2016, just 18 days following the collaborative plan meeting. In his brief, Cole acknowledges that we have held that where a County Attorney's resources letter was provided to the child and a parent at the collaborative plan meeting, such efforts were sufficient to meet the requirement of § 43-276(2). See *In re Interest of Hla H.*, 25 Neb. App. 118, 903 N.W.2d 664 (2017). In *In re Interest of Hla*, the issue addressed centered on whether the provision of the letter was sufficient given that the mother of the juvenile could not read English. We found that the record revealed that the county attorney and the school had engaged in a coordinated effort to refer community-based resources to the student and his family, including the services of an interpreter at the collaborative plan meeting and the contact information for the interpreter if further services were needed.

From our record, it appears that the County Attorney's resources letter utilized is essentially identical to the letter utilized in *In re Interest of Hla*. The issue here is whether the provision of the letter to Laurel by way of sending it home with Cole following the collaborative plan meeting constitutes reasonable efforts to refer the family to community-based resources. Cole essentially argues that entrusting him with the letter was not reasonable. He argues the County Attorney, at a minimum, must ensure that the parents receive the letter before their efforts can be deemed reasonable. We agree that the best course of action would have been for the County Attorney to have attempted to directly provide the letter to Laurel in addition to sending it home with Cole.

However, under the circumstances of this case, we cannot say that the decision to have Cole transport the letter home was not reasonable.

We first note that Cole was also given a copy of the collaborative plan and was given specific instructions to provide all of the documents to Laurel, who was to initial the collaborative plan and check the line at the end acknowledging that the letter had been received. She was then supposed to return the initialed plan to school with Cole. It was reasonable to attempt this approach given Laurel's history of being unresponsive to past telephone calls and letters sent by the school. Moreover, school officials knew that Laurel was aware of the November 11, 2016, collaborative plan meeting, because she at one point sought to reschedule it. We note that when Laurel failed to appear for the meeting, Brewer did call and leave a message for her. Therefore, Laurel had reason to inquire of Cole about the meeting's outcome. Following the November 11 meeting, there is nothing in the record that indicates any further contact between the school and Laurel until after the petition was filed. While the burden is on the State to demonstrate reasonable efforts were made to provide Laurel with the community resources information, we note, as did the juvenile court, that Laurel did not testify either that she was unaware of the meeting or that she did not receive the letter sent home with Cole. Brewer testified that she and Prater did have one followup meeting with Cole to see if he had delivered the materials that were sent home with him to his parent. Cole indicated that he no longer had the letter, which appears to have satisfied Brewer that the letter and plan were delivered. In any event, whether provided the documents by Cole or not, the evidence adduced demonstrates that Laurel continued to be unresponsive to Cole's absences from school and the direct communication from the school in response thereto, including those that occurred after the meeting but before the filing of the petition. We cannot find, given Laurel's general unresponsiveness to the school's

attempts to communicate with her over a period of months, coupled with her knowledge of the collaborative plan meeting, that the efforts of the County Attorney to provide her with the letter to connect her with community resources were not reasonable.

CONCLUSION

Based on our de novo review of the evidence contained in the record, we hold that the County Attorney met the statutory obligation under § 43-276(2) as applied to the habitual truancy provision of § 43-247(3)(b). We further find the juvenile court properly adjudicated Cole as a juvenile within the meaning of § 43-247(3)(b) for being habitually truant from school.

Affirmed.

Ashley Welch, appellee, v.
Preston Peery, appellant.
925 N.W.2d 375

Filed March 5, 2019. No. A-18-236.

1. **Child Custody: Visitation: Child Support: Appeal and Error.** Child custody, visitation, and child support 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. **Judges: Words and Phrases.** 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.
3. **Contempt: Appeal and Error.** 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 the trial court's (1) resolution of issues of law is reviewed de novo, (2) factual findings are reviewed for clear error, and (3) determinations of whether a party is in contempt and of the sanction to be imposed are reviewed for abuse of discretion.
4. **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.
5. ____. Both the desire to form a new family unit through remarriage and the career advancement of the parent have been found to constitute legitimate reasons for leaving the state.
6. **Child Custody: Visitation.** The court examines three broad considerations in determining whether removal to another jurisdiction is in a

child'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 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 the light of reasonable visitation arrangements.

7. **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.
8. ____. In determining the potential that the 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; (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties; and (9) the living conditions and employment opportunities for the custodial parent because the best interests of the child are interwoven with the well-being of the custodial parent.
9. ____. The list of factors to be considered in determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children should not be misconstrued as setting out a hierarchy of factors.
10. **Child Custody: Visitation.** Consideration of the impact of removal of children to another jurisdiction on the contact between the children and the noncustodial parent, when viewed in light of reasonable visitation arrangements, focuses on the ability of the court to fashion a reasonable visitation schedule that will allow the noncustodial parent to maintain a meaningful parent-child relationship.
11. ____: ____. Generally, a reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent.
12. **Modification of Decree: Child Custody: Notice.** A trial court has no authority to modify a prior custody order without notice to the parties and an opportunity to be heard.
13. **Modification of Decree: Child Support.** Among the factors to be considered when contemplating a modification of child support are the changes in the financial position of the parent obligated to pay support,

the needs of the children for whom support is paid, the good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent.

14. **Jurisdiction: Appeal and Error.** Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.
15. **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.
16. **Final Orders.** Final orders must be signed by the judge as well as file stamped and dated by the clerk.
17. **Jurisdiction: Judgments: Appeal and Error.** Neb. Rev. Stat. § 25-1912(2) (Reissue 2016) creates what the appellate courts have called potential jurisdiction or springing jurisdiction, wherein an announced decision creates a situation where the appellate court potentially has jurisdiction that will spring into existence when the announced decision is properly rendered and entered.
18. **Pleadings: Judgments.** If a postjudgment motion seeks a substantive alteration of the judgment—as opposed to the correction of clerical errors or relief wholly collateral to the judgment—a court may treat the motion as one to alter or amend the judgment.

Appeal from the District Court for Lancaster County: Lori A. Maret, Judge. Affirmed in part, affirmed in part as modified, reversed in part, and in part dismissed.

Adam R. Little, of Ballew Hazen, P.C., L.L.O., for appellant.

No appearance for appellee.

Pirtle, Bishop, and Arterburn, Judges.

Arterburn, Judge.

I. INTRODUCTION

Preston Peery (Preston) appeals from an order of the district court for Lancaster County which granted the request of Ashley Welch (Ashley) to remove the parties' minor child, Payton P., from Nebraska to Florida. On appeal, Preston challenges the district court's decision to allow Ashley to move Payton to Florida. In addition, he challenges the court's decisions to

grant Ashley sole legal custody of Payton, to not modify the prior child support order, and to not find Ashley in contempt of a court order. For the reasons set forth herein, we affirm the decision of the district court with regard to removal of Payton to Florida and child support. However, we reverse the court's decision regarding legal custody of Payton and we modify the amount of parenting time awarded to Preston in the parenting plan. We do not have jurisdiction to consider Preston's contempt action against Ashley.

II. BACKGROUND

Preston and Ashley are the biological parents of Payton, a daughter born out of wedlock in May 2008. In April 2014, when Payton was almost 6 years old, a hearing was held where the district court approved a stipulated paternity order and parenting plan. Pursuant to the parties' joint stipulation and parenting plan, they shared joint legal custody of Payton. Ashley was awarded sole physical custody of Payton, and Preston was awarded liberal parenting time. Such parenting time included every other weekend from 5 p.m. on Thursday to Monday morning and every Tuesday from 5 p.m. to Wednesday morning. In addition, the parties divided up Payton's summer vacation from school such that Payton resided with Preston every other week for the first 10 weeks of the vacation. As a part of the parenting plan, Preston agreed to pay child support to Ashley in the amount of $150 per month.

On March 30, 2017, when Payton was almost 9 years old, Ashley filed a complaint to modify the paternity order and parenting plan. In her complaint, Ashley requested that she be permitted to move to Florida with Payton. Ashley asserted that she had a legitimate reason for wanting to move and that the move would be in Payton's best interests. On April 28, Preston filed an answer to Ashley's complaint to modify. He opposed Ashley's request to move to Florida with Payton.

Prior to the hearing on Ashley's complaint to modify, Preston filed a motion asking the court to find Ashley in

contempt. Preston alleged that Ashley had already moved to Florida with Payton in violation of the original paternity order and parenting plan. Preston indicated that he had evidence that Ashley had registered Payton for school in Florida. The district court entered an ex parte order requiring Ashley to return with Payton to Nebraska. A hearing was scheduled to address Preston's motion for contempt for August 7, 2017.

At the hearing on the motion for contempt, Ashley testified that she had returned to Nebraska from Florida the week before so that Payton could start school on August 14, 2017. She explained that she and Payton had not yet moved to Florida, but that they had spent the summer there, visiting Ashley's father and spending time with Ashley's fiance, Justin Abbott (Justin), who had already moved to Florida to accept a job. Ashley testified that she always intended for Payton to return to Nebraska to start school in August. At the time of the contempt hearing, Ashley and Payton were residing with Ashley's sister, because Ashley's previous home in Nebraska was being sold by Ashley's parents, who owned the home.

Ashley explained that her decision to spend the summer in Florida with Payton did not affect Preston's parenting time because Preston was otherwise unable to be present for visits as he had been incarcerated since January 4, 2017. Ashley testified that Preston was aware they were spending time in Florida.

After the hearing, the district court found, "Based on the evidence presented here today, I do not find by clear and convincing evidence that [Ashley] is in willful contempt of the Court . . . ." The court dismissed Preston's contempt action.

A hearing was held on Ashley's complaint to modify on November 1, 2017. At the hearing, both Ashley and Preston testified. In addition, Ashley's father testified on her behalf and Preston's father testified on his behalf.

At the modification hearing, Ashley testified that she had moved to Florida in order to accept an employment opportunity which began on September 5, 2017. Payton was currently

residing in Nebraska with Ashley's sister and attending a "good" school nearby. Ashley indicated that Payton is excelling at her current school. However, Ashley testified that the school Payton would attend in Florida is also a good school with experienced teachers, many extracurricular activities, and relatively new facilities. Ashley testified she has returned to Nebraska to see Payton one time per month since she moved to Florida.

In Florida, Ashley is living at her father's home with her father, her stepmother, and Justin. Also living in the home are the two children Ashley and Justin share. At the time of the hearing, the oldest of these children was 4 years old and the youngest of the children was less than 1 month old. Ashley testified that she and Justin had been in a relationship "off and on" for nearly 6 years. They planned to get married sometime in 2018. Ashley admitted that she and Justin had been involved in an incident of domestic violence in 2013. She explained that both she and Justin had been drinking alcohol and had argued. Justin became angry and hit her with an open hand across her face. Ashley testified that Payton was not present at the time. Since that incident, Justin has gone through counseling. Ashley testified that "he doesn't have a temper anymore." She described Justin as a good provider who enjoys spending time with his family. In addition, Ashley testified that Payton and Justin have a good relationship.

Ashley also testified that the house in Florida was appropriate for Payton. The home was newly remodeled and was nicer than the home where she and Payton had lived in Nebraska. The home also included a great deal of outdoor space and had a number of activities to engage in nearby. Ashley and Justin had an arrangement with Ashley's father that they would not have to pay rent, but would assist financially with some of the utility payments. Ashley testified that eventually, she and Justin planned to acquire their own house in Florida.

Ashley testified that she has been employed as a licensed practical nurse for the past 10 years. Prior to moving to

Florida, Ashley was employed at Madonna Rehabilitation Hospital (Madonna) in Lincoln, Nebraska. As a part of her job, Ashley typically worked night shifts and sometimes had to work on weekends and on holidays. Her schedule changed often, which made it difficult to parent her young children. Ashley left her job at Madonna in May 2017, because she was pregnant, Justin was making enough money to support the family for a while, and she wanted to spend the summer in Florida. She testified that she did look for other nursing jobs in Nebraska, but did not find anything workable or better than her job at Madonna.

Ashley accepted a new job in September 2017. She became the care coordinator for a medical clinic in Florida. At the new job, she works Monday through Friday and has "[f]lexible hours." She does not have to work nights, weekends, or holidays. In addition, she earns a slightly higher salary (from $18.90 per hour at Madonna to $22 per hour at the clinic in Florida). Ashley testified that the total economic benefit for her and Justin to move to Florida is $16,640 per year plus Justin's commissions. Ashley's new job also offers better opportunities for advancement than her job at Madonna.

Ashley acknowledged that the move to Florida would have an effect on Preston's relationship with Payton. Ashley indicated that prior to Preston's incarceration, the original parenting plan was working. Preston regularly attended parenting time with Payton. In fact, Preston sometimes watched Ashley's middle child as well. Ashley testified that she has always encouraged Payton to go to Preston's parenting time. Ashley testified that she knows that Preston loves Payton and that Payton loves Preston. However, she did indicate that, currently, Payton is upset with Preston as a result of his incarceration.

Ashley did testify about her concerns regarding Preston's parenting. Ashley noted that Preston's most recent incarceration was his third period of incarceration during Payton's lifetime. During the most recent incarceration, Payton has

not been able to see Preston for a significant period of time because he was housed at a work ethic camp in McCook, Nebraska. The last time Preston was able to speak with Payton on the telephone was July 2017, approximately 4 months prior to the modification hearing. In addition, Ashley testified that Preston has a problem with both alcohol and illegal drugs. She referred to Preston as a "severe alcoholic" who drinks every day. She also testified that Preston regularly used cocaine when they were in a relationship.

Ashley testified about incidents that have caused a strain in her relationship with Preston. She described an incident prior to Preston's incarceration when he failed to return Payton after his scheduled parenting time. Instead, he filed a protection order against Ashley, claiming that she had threatened him with a knife and that she had attacked him. Ashley testified that these allegations were false. In another incident, Preston "called CPS on Justin claiming that he punched [Payton] in her face." According to Ashley, this allegation was also false. Finally, Ashley indicated that in March 2017, when she first told Preston about her plan to move to Florida, he threatened to take custody from her and to delay the court proceedings until she "r[a]n out of money." In addition, Ashley testified that Preston offered her $10,000 if she would give him full custody of Payton.

Ashley indicated that Preston has not consistently paid child support to her. In 2015, Preston paid her approximately $1,000, instead of the $1,800 that was court ordered. In 2016, Ashley received only $800 in child support payments. In 2017, Ashley did not receive any child support payments because of Preston's incarceration. Ashley testified that Preston's failure to consistently pay his child support obligation caused her financial strain, which ultimately necessitated her seeking out better employment.

Ashley proposed a parenting plan if she was permitted to move to Florida with Payton. In the proposed plan, she would receive sole legal and physical custody of Payton and Preston

would receive 6 weeks of parenting time each summer. In addition, he would receive 2 weeks of parenting time every other Christmas. Ashley testified that Preston could also have parenting time with Payton during the Thanksgiving holiday on years he did not see her for Christmas. However, in the proposed parenting plan she submitted to the district court, Ashley did not mention the Thanksgiving holiday parenting time.

Ashley told the district court that she was willing to forgo receiving any child support from Preston so that he would have additional funds to pay for travel expenses. Ashley testified that in addition to the scheduled parenting time, she was willing to facilitate both telephone conversations and "Skype" conversations between Preston and Payton. Ashley also indicated that because she has extended family in Nebraska, including her mother, her sister, and her stepmother's family, she would probably return to Nebraska three times per year. During those visits, she was willing to provide Preston parenting time with Payton. Ashley also indicated that because Payton is particularly close to Preston's other two children, it would be possible for them to visit Payton in Florida. Ashley stated that if her request to move to Florida with Payton is denied, she will return to Nebraska.

Finally, Ashley testified that during a previous court case involving Preston, she lied to the court. In 2009, Ashley filed a request for a protection order against Preston. In her request, she indicated that Preston had assaulted her. However, shortly after filing her request, she filed a retraction. Ashley testified at the modification hearing that the statements she made in her retraction were not truthful. She explained, "[H]e apologized, and, like an idiot, I always returned. I did that for six and a half years with him . . . ." Ashley testified that the truth was that during her relationship with Preston, he was manipulative, violent, and verbally demeaning. She admitted that she was very immature during the relationship.

Preston also testified at the modification hearing. Preston testified that at the time of the hearing, he remained incarcerated.

He had been placed at a community corrections center in Lincoln for the 2 months prior to the hearing. Before that, he was placed at the work ethic camp in McCook. Preston did not specifically indicate when he expected to be released from prison.

Preston testified that his current incarceration was the result of his convictions for perjury and possession of a controlled substance. There was evidence that Preston's possession conviction was the result of him "planting" cocaine in a car owned by the mother of one of his other children with whom he was involved in a custody dispute. Previously, he has been convicted of a probation violation, possession of a stolen firearm, and, on three different occasions, driving under the influence. His driving privileges have been revoked for 15 years.

Preston testified that he is "currently" employed at a business as a sales manager, project manager, and finance manager. He indicated that he has been employed in this capacity for the last 2 years and earns only the minimum wage. It is not clear whether Preston was testifying about his employment prior to his incarceration, whether he was allowed out of the community corrections center to work during the day, or if Preston will have this job after his release. Preston did testify that he has provided financial support to Payton since her birth. He admitted that in the past, he has paid less than the court-ordered amount of child support to Ashley, but he explained that she has always agreed to the reductions.

Preston testified that prior to his incarceration, the original parenting plan was "working perfectly fine." He saw Payton four or five times per week. Preston noted that at the time Ashley agreed to the parenting plan, he already had a criminal history and she had previously accused him of domestic violence. Yet, she still allowed him to spend time with Payton 12 nights per month. Preston testified that since his incarceration, he has not been able to exercise any of his parenting time with Payton. He indicated that he has tried to set up visits, but Ashley has not permitted him to see Payton.

Preston indicated that he is opposing the move to Florida in order to preserve his relationship with Payton. Although he believes the current arrangement is working "fine," he believes that if Ashley moves to Florida, Payton would be better off in Nebraska in his custody. Preston testified that "[a]ll of [Payton's] family" lives in Nebraska. Preston admitted that he offered to pay Ashley $10,000 if she would stay in Nebraska with Payton. Preston testified that if Payton moves to Florida with Ashley, he will not have a relationship with Payton. He indicated his concern that Ashley will not follow the court's orders regarding whatever parenting time he is permitted.

Preston testified regarding his concerns with Ashley's parenting. Preston spent a great deal of his testimony describing his belief that Ashley was a liar. He indicated his belief that a "[m]ajority" of her testimony at the modification hearing was a lie. Specifically, he indicated that she lied about him being abusive to her during their relationship. Preston testified that, in fact, Ashley was the one who was abusive "[a]t times." He also indicated that Ashley lied when she testified that he was an alcoholic and a drug user. He denied having a problem with alcohol or with drugs. He admitted to using cocaine a total of 15 times during his lifetime, but testified that he never had an addiction problem. Preston indicated that Ashley downplayed the seriousness of the domestic violence incident involving Justin. Preston testified that Ashley told him that Justin was repeatedly physically abusive toward her. Finally, Preston testified that he "doubt[ed]" whether Ashley actually had a new job in Florida because she failed to provide him any documentation about this job during the discovery process.

Preston requested that if Ashley is permitted to move to Florida with Payton, he be permitted to see Payton in Nebraska every other weekend. Preston also requested that his child support be modified.

As we noted above, both Ashley's father and Preston's father also testified at the modification hearing. Ashley's father generally corroborated Ashley's testimony about her living

situation in Florida. He testified that he will permit Ashley, Justin, and the children to reside in his home rent free. He also testified that Ashley and Justin will only be responsible for paying "the electricity bill and the cable." Ashley's father testified that he is employed as the vice president of a water treatment company and that Justin is one of his employees. Justin earns $18 per hour plus $400 to $600 per month in commissions. In addition, there are opportunities for Justin to advance in the company. Ashleys' father generally testified that despite the domestic violence incident in 2013, he has no concerns regarding Justin's living in his home or being in a relationship with Ashley.

Preston's father testified that Preston is "a really good dad" who loves Payton. He described Preston as being patient, active, and involved with his children. Preston's father acknowledged that Preston has made mistakes and that he does have a problem with alcohol. However, he also testified that he does not have any concerns regarding Preston's parenting abilities. Preston's father testified that Ashley is a devoted mother to Payton, but he did not believe that moving to Florida was in Payton's best interests because Payton has "a lot of [extended] family" in Nebraska.

Following the modification hearing, the district court entered its order on February 28, 2018. In the order, the court granted Ashley's complaint to modify custody and to remove Payton to Florida. The court also modified the prior paternity order and parenting plan by awarding Ashley sole legal custody of Payton. The court awarded Preston parenting time for 6 weeks during each summer and for Payton's Christmas break from school every other year. Preston is to be responsible for Payton's travel expenses to and from Nebraska. In addition, the court ordered that Preston be permitted to have "reasonable" telephone contact with Payton. The court declined to modify Preston's child support obligation as "the issue of child support was not raised in [Ashley's] Complaint for Modification."

Preston appeals from the district court's order.

III. ASSIGNMENTS OF ERROR

Preston assigns that the district court erred in (1) finding that permitting Ashley to move to Florida with Payton was in Payton's best interests, (2) awarding Ashley sole legal custody of Payton, (3) failing to modify the prior child support order, and (4) failing to find Ashley in contempt for not complying with the previous parenting plan.

IV. STANDARD OF REVIEW

[1,2] Child custody and visitation 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. *Dragon v. Dragon*, 21 Neb. App. 228, 838 N.W.2d 56 (2013). The same standard applies to the modification of child support. *Armknecht v. Armknecht*, 300 Neb. 870, 916 N.W.2d 581 (2018). 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. *Dragon v. Dragon, supra*.

[3] 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 the trial court's (1) resolution of issues of law is reviewed de novo, (2) factual findings are reviewed for clear error, and (3) determinations of whether a party is in contempt and of the sanction to be imposed are reviewed for abuse of discretion. *Patera v. Patera*, 24 Neb. App. 425, 889 N.W.2d 624 (2017).

V. ANALYSIS

1. Removal to Florida

Preston challenges the district court's decision to allow Ashley to move with Payton to Florida. Specifically, he asserts

that such a move is not in Payton's best interests. Upon our review of the evidence, we cannot say that the district court abused its discretion in permitting Ashley to move to Florida with Payton. As a result, we affirm this portion of the district court's decision.

[4] 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. *Dragon v. Dragon, supra*.

(a) Legitimate Reason for Leaving State

[5] In his brief on appeal, Preston states that although he "disputes Ashley's reason for moving, he concedes that the record does not support an abuse of discretion as to the threshold inquiry of a legitimate reason to move." Brief for appellant at 16. We agree with Preston's concession. The evidence presented at the modification hearing revealed that Ashley offered two reasons for wanting to move to Florida. First, she wants to live with her fiance, Justin. Ashley and Justin have been in a relationship for a significant period of time and share two young children together. They plan to marry sometime in 2018. Justin has found a good job in Florida. Ashley also desires to improve her own employment situation by moving to Florida. There, Ashley found a job which provides her with a slightly higher income, much more room for advancement, and more time to spend with her children. Both the desire to form a new family unit through remarriage and the career advancement of the parent have been found to constitute legitimate reasons for leaving the state. See *Daniels v. Maldonado-Morin*, 288 Neb. 240, 244, 847 N.W.2d 79, 82 (2014) (stating that absent evidence of ulterior motive, courts have held that "career advancement of the parent, career advancement of the new spouse, and the desire to form a new family unit

through remarriage are legitimate reasons to remove a child to another jurisdiction").

Given that Preston does not assign error to the district court's decision that Ashley had a legitimate reason for leaving the state and given the evidence presented at the modification hearing, we find no abuse of discretion in the district court's decision that Ashley "met the threshold requirement of proving a legitimate reason for moving."

(b) Best Interests

[6] After demonstrating a legitimate reason for leaving the state exists, the custodial parent must next show that it is in the child's best interests to continue living with him or her. See *Daniels v. Maldonado-Morin, supra*. The paramount consideration is whether the proposed move is in the best interests of the child. *Id*. We examine three broad considerations in determining whether removal to another jurisdiction is in a child'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 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 the light of reasonable visitation arrangements. See *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000).

(i) Each Parent's Motives

[7] 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. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002). In this case, we agree with the district court that "neither party acted in bad faith or with ill motives in seeking or opposing removal."

The evidence reveals that Ashley's primary motives in seeking removal are her desire to live with Justin, with whom she shares two young children, and her desire to maintain

employment as a licensed practical nurse with a higher rate of pay and a better work schedule. Ashley provided evidence to demonstrate that because of her new employment and Justin's new employment in Florida, her family will be in a better financial position than they were in Nebraska. In addition, she will be able to spend more time with her children due to her new schedule.

Preston testified that he opposes the removal because he wishes to preserve his current relationship with Payton. Prior to Preston's incarceration, he was involved in Payton's activities and saw her four or five times per week. This level of involvement would be impossible if removal was granted.

We find that both parents have valid reasons for and against removal of their child to Florida. Their motives being equal, this factor does not weigh for or against removal.

(ii) Quality of Life

[8,9] In determining the potential that the 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; (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties; and (9) the living conditions and employment opportunities for the custodial parent because the best interests of the child are interwoven with the well-being of the custodial parent. *Boyer v. Boyer*, 24 Neb. App. 434, 889 N.W.2d 832 (2017). This list of factors to be considered in determining the potential that the removal to

another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children should not be misconstrued as setting out a hierarchy of factors. *McLaughlin v. McLaughlin, supra.* Depending on the circumstances of a particular case, any one factor or combination of factors may be variously weighted. *Id.*

a. Factors Favoring Removal

Evidence presented at the modification hearing revealed that, for a majority of Payton's life, both Ashley and Preston have been involved in meeting her needs. However, the evidence also reveals that Ashley has really been Payton's primary caregiver and the parent responsible for her emotional, physical, developmental, and financial needs. Preston did spend time with Payton on a regular basis until his incarceration began in January 2017. Nevertheless, by the time of the hearing, he had not seen Payton in approximately 11 months because of his incarceration. According to Ashley's testimony, this is not the first time that Preston has been incarcerated and unable to see Payton during her lifetime. Ashley indicated that, currently, Payton is upset with Preston because of his extended absence. Ultimately, we agree with the district court that Ashley "has a more stable and constant presence in Payton's life and has been the one historically responsible for her emotional, physical, and developmental needs."

The third, fourth, and ninth factors are best examined together. Ashley testified at the modification hearing that the move to Florida will enhance her income and improve her work schedule. Prior to accepting her new position in Florida, Ashley worked at Madonna in Lincoln. She testified that at Madonna, she was required to work nights, some weekends, and some holidays in order to maintain her annual salary of $45,000. Ashley testified that at her new job in Florida, she would earn approximately $3 more per hour than at her old job, without having to work any nights, weekends, or holidays. In addition, there are opportunities for her to advance.

Ashley also presented evidence that Justin's income would be enhanced by moving to Florida. In Florida, Justin has secured a good job, where he earns approximately $5 more per hour than he was earning at his previous job in Nebraska. In addition, he earns between $400 and $600 in commissions each month and there are opportunities for him to advance and earn even more income.

There was evidence to demonstrate that Ashley, Justin, and their family will reside with Ashley's father in Florida. Ashley testified that her father's house in Florida has been recently remodeled and is in "good condition." She indicated that the house is newer than where she and Payton resided in Nebraska and has a great deal of outdoor space for the children to play. In addition, Ashley testified that the house is near a number of outdoor recreational opportunities. Ashley and Justin will not have to pay rent to Ashley's father while they reside with him in Florida. As such, Ashley and Justin will be able to spend or save more of their enhanced income than would occur if they remained in Nebraska. We do note that there was no evidence presented about Preston's home before he became incarcerated, nor was there any evidence about his plans for obtaining housing after his release.

b. Neutral Factors

Payton did not testify as to her living preference during the modification hearing. However, in a discovery document which was offered into evidence at the hearing by Preston, Ashley indicated that Payton has expressed a strong desire to move to Florida. We do not give this evidence much weight, since the information was not received directly from Payton.

Although Ashley did testify about the high quality of the school that Payton would attend in Florida, she also indicated that Payton's school in Nebraska was good and that Payton was excelling there. Accordingly, there was no significant testimony demonstrating one location to have an educational advantage over the other.

Finally, the evidence shows that there is hostility between the parties, primarily as a result of Ashley's desire to move to Florida. Any decision in this case has the potential to antagonize the hostilities between the parties. Ashley could be hostile toward Preston if she is not allowed to move to Florida to be with Justin, who is the father of her two other children. Similarly, Preston may be hostile if Ashley is allowed to move to Florida with Payton. Therefore, this factor does not weigh in favor of or against removal.

c. Factors Against Removal

Both Ashley and Preston testified that a majority of Payton's family resides in Nebraska, including Preston's entire family, Ashley's mother, Ashley's sister, and Ashley's stepmother's family. The evidence demonstrates that Payton is very close to her extended family and that they are a large part of her life. In addition, Preston's two other children, who Payton is very close to, also reside in Nebraska. If Payton were to move to Florida, she would be living with Ashley's father and stepmother, who she is also very close to. In addition, she would reside with two of her half siblings. Ashley testified that she would bring Payton back to Nebraska a few times per year to visit her family, but even with frequent visits, Payton will not enjoy the same relationship with her Nebraska family members.

Similarly, it is likely that the quality of relationship enjoyed by Preston and Payton will suffer given the loss of frequent contact that would be occasioned by a move to Florida. Notably, however, this factor is tempered by the fact that Preston, through his own misconduct, has already hindered his relationship with Payton.

d. Quality of Life Conclusion

The district court concluded that as a whole the quality of life factors weighed in favor of removal. Given the evidence presented at the modification hearing, we cannot say that the district court abused its discretion in reaching its conclusion.

(iii) Impact on Noncustodial Parent's Contact With Child

[10,11] The third factor in the best interests determination is the impact of the move on the contact between a child and the noncustodial parent, when viewed in light of reasonable visitation arrangements. *Maranville v. Dworak*, 17 Neb. App. 245, 758 N.W.2d 70 (2008). This consideration focuses on the ability of the court to fashion a reasonable visitation schedule that will allow the noncustodial parent to maintain a meaningful parent-child relationship. *Id*. Generally, a reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent. *Id*. 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*. Indications of the custodial parent's willingness to comply with a modified visitation schedule also have a place in this analysis. *Id*.

There will be an impact from the move on the contact between Preston and Payton. Preston testified that prior to his incarceration in January 2017, he saw Payton four or five times per week. There was also evidence that Preston has been involved in Payton's extracurricular activities. Obviously, if Payton moves to Florida, Preston will no longer enjoy the frequent in-person contact that he enjoyed prior to January 2017.

The district court awarded Preston 6 consecutive weeks of parenting time during Payton's summer vacation from school. In addition, Preston was awarded Payton's entire Christmas break every other year. The district court also ordered that Preston was permitted to have reasonable telephone contact with Payton, "taking into account school hours, work hours, time zone changes, expenses, and other relevant factors." Ashley also testified at the hearing that she would facilitate "Skype" conversations between Preston and Payton.

Given the record presented in this case, we must conclude that the district court abused its discretion in fashioning a

reasonable visitation schedule for Preston and Payton. Prior to his incarceration, Preston saw Payton multiple times every week and was, essentially, a part of her daily life. In the district court's order granting Ashley's request to remove Payton to Florida, the court awarded Preston only three blocks of parenting time over a 2-year period. Such a limited amount of time together will not foster Preston's relationship with Payton, especially considering that in the years Preston does not see Payton over her Christmas break, he will go nearly a full year without any in-person contact with her. We note that the parenting time awarded is less than the amount of time Ashley offered in her testimony.

However, we do believe that a parenting plan can be created which would foster Preston and Payton's relationship even while Payton resides in Florida. Accordingly, we modify the district court's parenting plan such that, in addition to the 6 weeks of summer visitation and the alternating year Christmas vacation from school, Preston will also have parenting time during the Thanksgiving holiday on the years he does not see Payton for Christmas. We note that in her trial testimony, Ashley indicated her acquiescence to such an arrangement.

Additionally, if Preston chooses to travel to Florida during Payton's school year, he should be permitted to have parenting time with Payton from Friday after school to Sunday at 5 p.m. during any weekend he is present. Preston must provide Ashley with notice of the weekend he intends to travel to Florida at least 30 days in advance of his weekend parenting time. He shall also be limited to no more than two weekends in any 4-week period.

Finally, Ashley testified that she intends to return to Nebraska at times in order to visit family. She indicated that when she is in Nebraska, she would allow Preston to visit with Payton. However, Ashley's offer was not memorialized in the parenting plan. We find that the parenting plan should be modified to include a provision which permits Preston to have parenting time with Payton when she is in Nebraska with Ashley for not

less than 4 hours for every 2 days Ashley and Payton are visiting Nebraska.

Although we conclude that Preston's relationship with Payton will not be of the same quality that could occur if removal were denied, we also conclude that the parenting plan, as modified above, provides a reasonable visitation schedule that will continue to foster a meaningful relationship between Preston and Payton.

(iv) Best Interests Conclusion

The district court did not abuse its discretion in finding that Ashley had a legitimate basis for seeking removal of Payton from Nebraska to Florida due to her employment opportunity and due to her imminent marriage to Justin, who is currently employed in Florida. Further, in reviewing the best interests considerations set forth in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), as applied to the evidence in this case, we cannot say that the district court abused its discretion by granting Ashley's request to remove Payton from Nebraska to Florida.

2. Legal Custody

The original paternity order and parenting plan provided that Preston and Ashley were to share joint legal custody of Payton. The district court modified the parties' joint legal custody arrangement in the modified parenting plan such that Ashley was awarded sole legal custody of Payton. On appeal, Preston argues that the district court erred in modifying legal custody of Payton when Ashley did not request such relief in her complaint for modification. We find Preston's assertion to have merit.

[12] The Nebraska Supreme Court has previously stated that a trial court has no authority to modify a prior custody order without notice to the parties and an opportunity to be heard. See *Schnell v. Schnell*, 12 Neb. App. 321, 673 N.W.2d 578 (2003). In this case, Ashley did not specifically request in her complaint for modification that the prior custody order

be modified to provide her with sole legal custody, nor did either of the parties specifically testify about the legal custody arrangement. Given that Ashley did not raise the issue of legal custody in her pleading and given that neither party addressed legal custody during their testimonies, we find that the district court did not have the authority to modify legal custody of Payton. There is no indication that either party understood the modification of legal custody to be at issue during the proceedings. Accordingly, there is no indication that either Ashley or Preston had notice that the modification of legal custody should be addressed at trial. We reverse the district court's order to the extent it modified legal custody. The parties will continue to share joint legal custody, as was awarded in the original parenting plan.

3. Child Support

In the district court's order, it declined to modify Preston's child support obligation because "the issue of child support was not raised in the Amended Complaint for Modification of Order." On appeal, Preston asserts that the district court erred in failing to modify his child support. He argues that the issue of child support was sufficiently raised by Ashley's complaint for modification when she asked for "such other relief as may be just and equitable in the premises." He also argues that because Ashley agreed during her testimony at the modification hearing to waive child support in order to provide Preston with more money to pay for travel expenses, such waiver should have been granted.

Assuming without deciding that the issue of child support was properly raised before the district court, we do not find an abuse of discretion in the district court's ultimate decision to not modify the original child support order. In the original paternity order and parenting plan, Preston was obligated to pay $150 per month in child support for the benefit of Payton. Preston admitted that he has not been paying all of his child support obligation. In fact, the evidence presented

at the modification hearing revealed that Preston has not paid any child support to Ashley since his incarceration began in January 2017.

[13] Ashley did testify at the modification hearing that she was willing to waive child support so that Preston would have more funds available to pay for travel expenses. However, there was no other credible evidence presented to demonstrate whether such a waiver was necessary given Preston's financial circumstances or whether such waiver would be in Payton's best interests. Among the factors to be considered when contemplating a modification of child support are the changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, the good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent. See *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994).

Preston did not provide any specific testimony about his current financial situation. He has been incarcerated since January 2017, and he did not provide any information about when he is expected to be released or what his plans were after his release. He provided some vague testimony about a job he claimed to have had for the past 2 years, but it is not clear whether this job existed only prior to his incarceration, whether he was working via work release at the time of the trial, or whether this job will be available to him after his release. Preston also did not provide any information about his financial support of his other two children.

Given the lack of credible evidence about Preston's current financial circumstances and given that the original child support he is obligated to pay is only $150 per month, we do not find that the district court abused its discretion in failing to modify child support. Although Ashley's agreement to waive child support is laudable, there is simply no evidence that such a waiver is in Payton's best interests. The paramount concern and question in determining child support is the best interests

of the child. *Sabatka v. Sabatka, supra*. Moreover, there is simply no evidence that Preston will be unable to afford any travel expenses associated with his parenting time in addition to his $150 per month in child support.

4. Contempt Action

Preston asserts that the district court erred in failing to find Ashley in contempt for violating the original paternity order and parenting plan. Specifically, Preston asserts that evidence presented at the contempt hearing revealed that Ashley violated the original paternity order and parenting plan when she (1) changed addresses without informing Preston, (2) attempted to enroll Payton in school in Florida, and (3) intended to move Payton to Florida prior to the district court's granting her permission to do so. Upon our review, we conclude that we do not have jurisdiction over the district court's decision to deny Preston's motion to hold Ashley in contempt. Accordingly, we do not address the merits of Preston's assertions.

[14,15] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009). Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte. *Id*. 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. *Id*. Here, there is no written order contained within our record which purports to deny Preston's contempt motion. The only disposition of this motion contained in our record is the district court's oral pronouncement in court immediately after the contempt hearing on August 7, 2017.

[16] Neb. Rev. Stat. § 25-1301 (Reissue 2016) sets forth two ministerial requirements for a final judgment. The first is rendition of the judgment, defined as "the act of the court, or a judge thereof, in making and signing a written notation of the

relief granted or denied in an action." § 25-1301(2). The second ministerial step for a final judgment is that entry of a final order occurs when the clerk of the court places the file stamp and date upon the judgment. § 25-1301(3). In sum, final orders must be signed by the judge as well as file stamped and dated by the clerk. *In re Trust Created by Crawford*, 20 Neb. App. 502, 826 N.W.2d 284 (2013).

[17] However, Neb. Rev. Stat. § 25-1912(2) (Reissue 2016) provides:

> A notice of appeal or docket fee filed or deposited after the announcement of a decision or final order but before the entry of the judgment, decree, or final order shall be treated as filed or deposited after the entry of the judgment, decree, or final order and on the date of entry.

In *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004), this court noted that announcement of a decision can come, among other ways, from the bench orally, from trial docket notes, from file-stamped but unsigned journal entries, or from signed journal entries which are not file stamped. Section 25-1912(2) creates what we have called potential jurisdiction or springing jurisdiction, wherein an announced decision creates a situation where the appellate court potentially has jurisdiction that will spring into existence when the announced decision is properly rendered and entered. See *State v. Brown, supra*. In the present case, the district court announced its decision from the bench on August 7, 2017, which announcement created potential jurisdiction, but there is no appealable order until such time as the court renders a final decision that is signed, dated, and file stamped.

We must also note the day after the district court orally indicated that it did not find Ashley to be in contempt and that Preston's motion was dismissed, Preston filed a motion to reconsider. There is nothing in our record which indicates the motion to reconsider was ever ruled on by the district court. As such, even if Preston provides this court with a properly entered decision on his motion for contempt, a

further jurisdictional issue remains with regard to his motion to reconsider.

[18] We review a postjudgment motion based on the relief it seeks, rather than its title. *Clarke v. First Nat. Bank of Omaha*, 296 Neb. 632, 895 N.W.2d 284 (2017). If the postjudgment motion seeks a substantive alteration of the judgment—as opposed to the correction of clerical errors or relief wholly collateral to the judgment—a court may treat the motion as one to alter or amend the judgment. *Id.* Neb. Rev. Stat. § 25-1329 (Reissue 2016) provides:

> A motion to alter or amend a judgment shall be filed no later than ten days after the entry of the judgment. A motion to alter or amend a judgment filed after the announcement of a verdict or decision but before the entry of judgment shall be treated as filed after the entry of judgment and on the day thereof.

Section 25-1912(3) provides that the running for the time for appeal shall be terminated by the filing of a timely motion to alter or amend judgment. Section 25-1912(3) further specifies:

> When any motion terminating the time for filing a notice of appeal is timely filed by any party, a notice of appeal filed before the court announces its decision upon the terminating motion shall have no effect, whether filed before or after the timely filing of the terminating motion. A new notice of appeal shall be filed within the prescribed time after the entry of the order ruling on the motion. No additional fees are required for such filing.

From the record now before us, it appears that Preston's motion to reconsider was timely filed and that there has been no announcement or rendition of a decision on the motion to reconsider. Thus, with regard to the district court's decision to deny his motion for contempt, Preston's notice of appeal is of no effect. A new notice of appeal must be filed within 30 days of entry of an order ruling on his motion to reconsider.

In summary, this court does not have jurisdiction to review Preston's assigned error involving the denial of his contempt

motion until he (1) obtains properly rendered and file-stamped orders denying his motions for contempt and to reconsider and (2) files a new notice of appeal within 30 days of such ruling on his motion to reconsider.

VI. CONCLUSION

For the reasons set forth above, we affirm the district court's order to the extent it permitted Ashley to move to Florida with Payton and declined to modify Preston's child support obligation. We reverse the court's order to the extent it awarded Ashley sole legal custody of Payton. We modify the court's order with regard to the amount of parenting time awarded to Preston. Finally, we conclude that we do not have jurisdiction over Preston's contempt action, as a final order has not been entered.

Affirmed in part, affirmed in part as modified, reversed in part, and in part dismissed.

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