THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

MARCH 12, 2019 and JANUARY 27, 2020

IN THE

# Nebraska Court of Appeals

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# NEBRASKA APPELLATE REPORTS

VOLUME XXVII

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PEGGY POLACEK
OFFICIAL REPORTER

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†No. A-18-625: **In re Interest of Jokin S**. Affirmed in part, and in part reversed and vacated. Welch, Riedmann, and Bishop, Judges.

†No. A-18-634: **Goebel v. Arps Red-E-Mix**. Affirmed in part, and in part reversed and remanded for further proceedings. Welch, Pirtle, and Arterburn, Judges.

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†No. A-18-798: **State v. Harris**. Affirmed. Welch, Riedmann, and Bishop, Judges.

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†No. A-18-808: **In re Interest of Tiedyn M**. Affirmed. Welch, Pirtle, and Arterburn, Judges.

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†No. A-18-1096: **State v. Titus**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

†No. A-18-1098: **State v. Lassiter**. Sentence of restitution vacated, and cause remanded with directions. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-18-1099: **In re Interest of Michael R**. Affirmed. Welch, Judge, and Moore, Chief Judge, and Pirtle, Judge.

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†No. A-18-1102: **State v. Hall**. Affirmed. Arterburn, Riedmann, and Bishop, Judges.

†No. A-18-1114: **State v. Carter**. Affirmed. Moore, Chief Judge, and Riedmann and Welch, Judges.

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†No. A-18-1204: **Barth v. Barth**. Affirmed. Riedmann, Bishop, and Arterburn, Judges.

†No. A-18-1205: **State v. Hoscheit**. Affirmed. Moore, Chief Judge, and Bishop and Arterburn, Judges.

†No. A-18-1208: **State v. Childs**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Welch, Judge.

†No. A-18-1211: **State v. Yost**. Affirmed. Moore, Chief Judge, and Pirtle and Welch, Judges.

†No. A-19-004: **Jordan v. Tyson Fresh Meats**. Affirmed. Bishop, Riedmann, and Arterburn, Judges.

†No. A-19-011: **State v. Charles**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-19-013: **State v. Earith**. Affirmed. Welch, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-19-017: **Klein v. Wergin**. Reversed and remanded with directions to vacate. Pirtle, Judge, and Moore, Chief Judge, and Welch, Judge.

†No. A-19-022: **In re Guardianship & Conservatorship of Bette O**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Welch, Judge.

Nos. A-19-023, A-19-033: **State v. Pollard**. Affirmed. Riedmann, Arterburn, and Welch, Judges.

No. A-19-025: **In re Interest of Delonna B. et al**. Affirmed. Moore, Chief Judge, and Pirtle and Welch, Judges.

†No. A-19-032: **State v. Price**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-19-034: **Holen v. Holen**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Arterburn, Judge.

No. A-19-035: **State v. Locke**. Affirmed. Welch, Riedmann, and Arterburn, Judges.

No. A-19-037: **In re Interest of Azriel V. et al**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Welch, Judge.

†No. A-19-042: **McNish v. Menard, Inc**. Affirmed. Arterburn, Riedmann, and Bishop, Judges.

†No. A-19-062: **In re Interest of Ellena S**. Affirmed. Bishop, Riedmann, and Arterburn, Judges.

No. A-19-080: **State v. Regalado-Mendez**. Affirmed. Riedmann, Arterburn, and Welch, Judges.

†No. A-19-082: **Sellers v. Reefer Systems**. Affirmed. Riedmann, Bishop, and Arterburn, Judges.

†No. A-19-088: **Killinger v. Killinger**. Affirmed. Moore, Chief Judge, and Bishop and Arterburn, Judges.

†No. A-19-089: **Sedam v. Hofacker**. Affirmed. Riedmann, Pirtle, and Welch, Judges.

Nos. A-19-093 through A-19-095: **State v. Pena**. Affirmed in part, and in part vacated and remanded for resentencing. Welch, Riedmann, and Arterburn, Judges.

†No. A-19-096: **State v. Robertson**. Affirmed. Riedmann, Pirtle, and Welch, Judges.

†No. A-19-105: **Donahoe v. Donahoe**. Affirmed. Welch, Pirtle, and Riedmann, Judges.

†No. A-19-108: **Britton v. Simms**. Reversed and remanded with directions. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-19-111: **State v. Davis**. Affirmed. Moore, Chief Judge, and Pirtle and Welch, Judges.

†No. A-19-117: **State v. Staska**. Affirmed. Welch, Pirtle, and Riedmann, Judges.

†No. A-19-151: **State v. Kelley**. Affirmed. Riedmann, Pirtle, and Welch, Judges.

†No. A-19-152: **State v. Batres**. Remanded with directions. Riedmann, Bishop, and Arterburn, Judges.

†No. A-19-153: **State v. Diaz**. Affirmed. Moore, Chief Judge, and Pirtle and Welch, Judges.

No. A-19-154: **State v. Carey**. Affirmed. Riedmann, Arterburn, and Welch, Judges.

†No. A-19-159: **In re Interest of Atticus B**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Welch, Judge.

†No. A-19-162: **Bel Fury Investments Group v. Gonzalez**. Affirmed in part, and in part reversed and remanded with directions. Arterburn, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-19-163: **Geonzon v. Sickmeier**. Affirmed. Arterburn, Judge, and Moore, Chief Judge, and Bishop, Judge.

†Nos. A-19-171 through A-19-174: **In re Interest of Alivia B. et al**. Affirmed. Welch, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-19-175: **State v. Conley**. Affirmed. Welch, Pirtle, and Riedmann, Judges.

†No. A-19-178: **In re Interest of John J. et al**. Affirmed. Pirtle, Riedmann, and Welch, Judges.

†No. A-19-182: **State v. McPeak**. Affirmed. Welch, Riedmann, and Arterburn, Judges.

Nos. A-19-184 through A-19-187: **In re Interest of Keelin C. et al**. Affirmed. Arterburn, Riedmann, and Bishop, Judges.

†No. A-19-190: **Pennington v. SpartanNash Co**. Affirmed. Moore, Chief Judge, and Pirtle and Welch, Judges.

†No. A-19-191: **Homstad v. Block 21**. Affirmed. Welch, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-19-195: **Clark v. Clark**. Affirmed. Pirtle, Riedmann, and Welch, Judges.

No. A-19-197: **In re Interest of Jaya M. et al**. Affirmed. Moore, Chief Judge, and Pirtle and Welch, Judges.

†No. A-19-198: **State v. Gonsalez**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-19-199: **Manka v. Manka**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Arterburn, Judge.

No. A-19-207: **State v. Martinez**. Affirmed. Arterburn, Riedmann, and Bishop, Judges.

†No. A-19-211: **Infante v. City of Hastings**. Affirmed. Arterburn, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-19-212: **State v. Hulme**. Affirmed. Moore, Chief Judge, and Bishop and Arterburn, Judges.

†No. A-19-217: **In re Interest of Latrell K. et al**. Affirmed. Bishop, Riedmann, and Arterburn, Judges.

†Nos. A-19-218, A-19-219: **In re Interest of Brielle T. & Addison T**. Affirmed. Welch, Pirtle, and Riedmann, Judges.

No. A-19-221: **State v. Lastor**. Affirmed. Welch, Riedmann, and Arterburn, Judges.

†No. A-19-224: **Bryant v. Bryant**. Affirmed in part, and in part reversed and remanded with directions. Bishop, Judge, and Moore, Chief Judge, and Arterburn, Judge.

No. A-19-233: **Carter v. Nebraska Dept. of Corr. Servs**. Affirmed. Moore, Chief Judge, and Bishop and Arterburn, Judges.

No. A-19-234: **State v. McCray**. Affirmed. Pirtle, Riedmann, and Welch, Judges.

†Nos. A-19-242, A-19-250: **Harris v. Medics at Home**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Welch, Judge.

No. A-19-244: **State v. Wuowrut**. Sentence vacated, and cause remanded for resentencing. Welch, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-19-247: **In re Interest of A.M. & S.K.S**. Affirmed. Moore, Chief Judge, and Pirtle and Welch, Judges.

No. A-19-251: **In re Interest of Jordan P. et al**. Affirmed. Arterburn, Riedmann, and Bishop, Judges.

No. A-19-254: **Panowicz v. Panowicz**. Affirmed. Moore, Chief Judge, and Bishop and Arterburn, Judges.

†No. A-19-255: **State v. Jimenez-Carmenates**. Conviction affirmed. Sentence vacated, and cause remanded for resentencing. Bishop, Judge, and Moore, Chief Judge, and Arterburn, Judge.

No. A-19-256: **Fritz v. Wente**. Affirmed. Riedmann, Pirtle, and Bishop, Judges.

No. A-19-260: **State v. Willis**. Affirmed. Arterburn, Pirtle, and Welch, Judges.

†No. A-19-266: **State v. Knox**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-19-272: **Prairie Brand Seeds v. Russell**. Affirmed. Arterburn, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-19-273: **State v. Farley**. Affirmed. Bishop, Riedmann, and Arterburn, Judges.

†No. A-19-279: **State v. Vanderheiden**. Affirmed in part, and in part vacated and remanded for resentencing. Arterburn, Riedmann, and Welch, Judges.

No. A-19-280: **Secord v. Kracht**. Affirmed. Moore, Chief Judge, and Bishop and Arterburn, Judges.

†No. A-19-281: **In re Interest of Phoenix M**. Affirmed. Riedmann, Bishop, and Arterburn, Judges.

Nos. A-19-282, A-19-284: **State v. Warren**. Affirmed as modified. Arterburn, Riedmann, and Welch, Judges.

†No. A-19-283: **Grayek v. Anguiano**. Reversed and remanded. Arterburn, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-19-285: **Hodgen v. Hodgen**. Reversed and remanded with directions. Bishop, Pirtle, and Arterburn, Judges.

No. A-19-289: **State v. Delle**. Affirmed. Welch, Judge, and Moore, Chief Judge, and Arterburn, Judge.

No. A-19-292: **State v. Bigfire**. Affirmed. Riedmann, Bishop, and Arterburn, Judges.

No. A-19-302: **In re Interest of Jahmir O**. Affirmed. Riedmann, Pirtle, and Welch, Judges.

†No. A-19-307: **State v. Street**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Welch, Judge.

†No. A-19-308: **Applied Underwriters v. Sky Materials Corp**. Affirmed. Welch, Riedmann, and Arterburn, Judges.

No. A-19-312: **Rood v. Dunker**. Affirmed. Riedmann, Pirtle, and Welch, Judges.

No. A-19-322: **State v. Livingston**. Affirmed. Welch, Pirtle, and Riedmann, Judges.

No. A-19-342: **State v. Schultz**. Affirmed. Arterburn, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-19-349: **Long v. Warneke**. Affirmed. Moore, Chief Judge, and Bishop and Arterburn, Judges.

No. A-19-361: **In re Guardianship of Beverly A**. Affirmed. Riedmann, Pirtle, and Welch, Judges.

†No. A-19-367: **In re Interest of M.J**. Affirmed. Pirtle, Riedmann, and Welch, Judges.

†No. A-19-373: **State v. Boyd**. Affirmed. Arterburn, Riedmann, and Bishop, Judges.

No. A-19-374: **State v. Cheramie**. Affirmed. Welch, Judge, and Moore, Chief Judge, and Pirtle, Judge.

No. A-19-376: **Hamilton v. Hamilton**. Affirmed. Moore, Chief Judge, and Arterburn and Welch, Judges.

No. A-19-390: **Omaha Housing Authority v. Carter**. Affirmed. Moore, Chief Judge, and Arterburn and Welch, Judges.

†No. A-19-395: **State v. Thorne**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-19-402: **State v. Tinlin**. Affirmed. Riedmann, Pirtle, and Bishop, Judges.

†No. A-19-442: **In re Interest of Blessing S. et al**. Affirmed. Welch, Pirtle, and Riedmann, Judges.

No. A-19-443: **Webb v. Johnson**. Affirmed. Riedmann, Pirtle, and Bishop, Judges.

†No. A-19-450: **In re Interest of Grace H**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Arterburn, Judge.

No. A-19-451: **Roby v. Roby**. Reversed. Arterburn, Judge, and Moore, Chief Judge, and Welch, Judge.

No. A-19-452: **State v. Jaramillo-Andrade**. Affirmed. Welch, Riedmann, and Arterburn, Judges.

No. A-19-464: **Applied Underwriters v. Doyle Signs**. Affirmed. Riedmann, Pirtle, and Bishop, Judges.

†No. A-19-492: **State v. Martinez**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

†No. A-19-512: **In re Interest of Faith S**. Affirmed. Welch, Pirtle, and Riedmann, Judges.

No. A-19-527: **Palomo v. Delgado**. Reversed and remanded for further proceedings. Arterburn, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-19-557: **State v. Rico**. Affirmed. Riedmann, Bishop, and Arterburn, Judges.

No. A-19-567: **State v. Grund**. Affirmed in part, and in part vacated and remanded for resentencing. Riedmann, Bishop, and Arterburn, Judges.

No. A-19-658: **State v. Degunia**. Affirmed in part, and in part vacated and remanded for resentencing. Arterburn, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-19-682: **In re Interest of Braelin B**. Affirmed. Riedmann, Pirtle, and Bishop, Judges.

# LIST OF CASES DISPOSED OF WITHOUT OPINION

No. A-18-233: **Applied Underwriters v. HKB, Inc**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(A)(1); *Applied Underwriters v. E.M. Pizza*, 26 Neb. App. 906, 923 N.W.2d 789 (2019).

No. A-18-348: **Applied Underwriters v. RDR Builders**. Motion of appellees for summary affirmance granted; judgment affirmed. See, § 2-107(A)(1); *Applied Underwriters v. E.M. Pizza*, 26 Neb. App. 906, 923 N.W.2d 789 (2019).

No. A-18-429: **Applied Underwriters v. Casings, Inc**. Motion of appellees for summary affirmance granted; judgment affirmed. See, § 2-107(A)(1); *Applied Underwriters v. E.M. Pizza*, 26 Neb. App. 906, 923 N.W.2d 789 (2019).

No. A-18-435: **Anderson v. Anderson**. Motion of appellee for summary dismissal granted; appeal dismissed. See, § 2-107(B)(1); *Sherman v. Neth*, 283 Neb. 895, 813 N.W.2d 501 (2012); *Bullock v. J.B.*, 272 Neb. 738, 724 N.W.2d 401 (2006); *Williams v. Williams*, 146 Neb. 383, 19 N.W.2d 630 (1945).

No. A-18-486: **Friedrichsen v. Gosda**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-523: **Applied Underwriters v. Ramar Production Serv**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-601: **In re Estate of Hunter**. Motion of appellee Donald Hunter to dismiss appeal and cross-appeal sustained; appeal dismissed. See Neb. Rev. Stat. § 30-1601(3) (Cum. Supp. 2018).

No. A-18-641: **Applied Underwriters v. Adco Roofing**. Motion of appellees for summary affirmance granted; judgment affirmed. See, § 2-107(A)(1); *Applied Underwriters v. E.M. Pizza*, 26 Neb. App. 906, 923 N.W.2d 789 (2019).

No. A-18-668: **State v. Jackson**. Motion of appellee for summary affirmance sustained; order denying postconviction relief without evidentiary hearing affirmed. See, § 2-107(B)(2); *State v. Vela*, 297 Neb. 227, 900 N.W.2d 8 (2017). See, also, *State v. Cross*, 297 Neb. 154, 900 N.W.2d 1 (2017).

No. A-18-741: **Pope v. Frakes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Frizzell*, 243 Neb. 103, 497 N.W.2d 391 (1993). See, also, *State v. Pope*, 190 Neb. 689, 211 N.W.2d 923 (1973).

No. A-18-778: **State v. Torres**. 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. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-18-782: **State v. Kincaid**. Appeal dismissed. See, § 2-107(A)(2); *In re Change of Name of Whilde*, 298 Neb. 510, 904 N.W.2d 707 (2017). See, also, *Bryson L. v. Izabella L.*, 302 Neb. 145, 921 N.W.2d 829 (2019).

No. A-18-810: **State v. Smith**. Motion of appellee for summary affirmance granted; judgment affirmed. See, §§ 2-107(B)(2) and 2-114(2); Neb. Rev. Stat. § 29-3001(4) (Reissue 2016); *Walters v. Sporer*, 298 Neb. 536, 905 N.W.2d 70 (2017). See, also, *State v. Huggins*, 291 Neb. 443, 866 N.W.2d 80 (2015).

No. A-18-840: **Nielsen v. State Farm Fire & Cas. Co**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-18-883: **Martinez v. CMR Constr. & Roofing of Texas**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-907: **In re Interest of Issaabela R**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-909: **State v. Castonguay**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *Mumin v. Frakes*, 298 Neb. 381, 904 N.W.2d 667 (2017).

No. A-18-933: **State v. Union**. 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-18-960: **State v. Chavers**. 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-18-972: **State v. Applegate**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Garcia*, 302 Neb. 406, 923 N.W.2d 725 (2019).

No. A-18-983: **Moss v. Thomas Lakes Owners Assn**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-994: **Lovette v. Capps**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016).

No. A-18-1003: **Gomez v. Spartannash**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-1007: **State v. Mumin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-3001 (Reissue 2016); *State v. Davis*, 23 Neb. App. 536, 875 N.W.2d 450 (2016).

No. A-18-1025: **State v. Feldhacker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-2101 (Reissue 2016).

No. A-18-1027: **State v. Dooley**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-18-1031: **Applied Underwriters v. All American School Bus**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 25-516.01(2) (Reissue 2016); *Applied Underwriters v. Oceanside Laundry*, 300 Neb. 333, 912 N.W.2d 912 (2018); *Applied Underwriters v. E.M. Pizza*, 26 Neb. App. 906, 923 N.W.2d 789 (2019).

No. A-18-1044: **State v. Mumin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-2103(3) (Reissue 2016). See, also, *State v. Avina-Murillo*, 301 Neb. 185, 917 N.W.2d 865 (2018).

No. A-18-1053: **Huddleston v. Huddleston**. Appeal dismissed. See, § 2-107(A)(2); *Citta v. Facka*, 19 Neb. App. 736, 812 N.W.2d 917 (2012); *Bhuller v. Bhuller*, 17 Neb. App. 607, 767 N.W.2d 813 (2009).

No. A-18-1054: **State v. Cole**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1912(1) and (3) (Cum. Supp. 2018) and 25-1329 (Reissue 2016).

No. A-18-1062: **State v. Brannan**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-1066: **Pope v. N.P. Dodge Co**. Affirmed. See, § 2-107(A)(1); *State v. Kays*, 289 Neb. 260, 854 N.W.2d 783 (2014).

No. A-18-1077: **Myers v. City of Gordon**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-1080: **State v. Hutchinson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Mrza*, 302 Neb. 931, 926 N.W.2d 79 (2019).

No. A-18-1086: **State on behalf of Treyden A. v. Kristy A**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-1117: **Bouzis v. Bouzis**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-1123: **State v. Scott**. 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-18-1127: **State v. Hatch**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-18-1133: **State v. Green**. 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-18-1134: **Suelter v. Ogden**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-1136: **Green v. Owens**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-1138: **Feller v. City of Wisner**. Stipulation allowed; appeal dismissed.

No. A-18-1140: **State v. Ramirez-Bonilla**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-18-1142: **Nebraska Title Co. v. Cormack Real Estate**. Stipulation allowed; appeal dismissed.

No. A-18-1143: **State v. Clausen**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-101(B)(4); *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-18-1152: **State v. Dunham**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-18-1155: **State v. Helmick**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-18-1159: **In re Estate of Bunger**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-1162: **Gray v. Frakes**. Motion of appellee for summary affirmance sustained; order denying writ of habeas corpus affirmed. See § 2-107(B)(2). See, also, *State v. Avina-Murillo*, 301 Neb. 185, 917 N.W.2d 865 (2018); *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016).

Nos. A-18-1163, A-18-1164: **State v. Gonzalez**. Motions of appellee for summary affirmance sustained; judgments 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-18-1165: **State v. Lockwood**. Appellee's suggestion of remand sustained; restitution portion of sentence vacated, and cause remanded for resentencing. See Neb. Rev. Stat. § 29-2281 (Reissue 2016). See, also, *State v. Holecek*, 260 Neb. 976, 621 N.W.2d 100 (2000); *State v. Wells*, 257 Neb. 332, 598 N.W.2d 30 (1999); *State v. St. Cyr*, 26 Neb. App. 61, 916 N.W.2d 753 (2018).

No. A-18-1166: **State v. Mann**. Stipulation allowed; appeal dismissed.

No. A-18-1170: **Applied Underwriters v. Amazing Home Care Servs**. Motion of appellees for summary affirmance granted; judgment affirmed. See, § 2-107(A)(1); *Applied Underwriters v. E.M. Pizza*, 26 Neb. App. 906, 923 N.W.2d 789 (2019).

No. A-18-1172: **Fulk v. Regional West Med. Ctr**. Motion of appellants to dismiss appeal sustained; appeal dismissed.

No. A-18-1176: **Sampson v. Sampson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-1187: **State v. Davlin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-3001(3) (Reissue 2016); *State v. Marshall*, 272 Neb. 924, 725 N.W.2d 834 (2007).

No. A-18-1188: **State v. Davis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-18-1191, A-18-1194: **State v. Evans**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Mrza*, 302 Neb. 931, 926 N.W.2d 79 (2019); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-1198: **State v. Dangeleo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Mrza*, 302 Neb. 931, 926 N.W.2d 79 (2019); *State v. Byrd*, 231 Neb. 231, 435 N.W.2d 898 (1989); *State v. Carlson*, 227 Neb. 503, 418 N.W.2d 561 (1988).

No. A-18-1199: **Mumin 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).

No. A-18-1202: **State on behalf of Jayden G. v. Justin B**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-1209: **State v. Sidney**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-1217: **State v. Yost**. Stipulation allowed; appeal dismissed.

No. A-18-1218: **State v. Riddle**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-18-1219: **Dinnel Green Valley Farms v. Chase Cty. Bd. of Equal**. Stipulation allowed; appeal dismissed.

No. A-19-001: **State on behalf of Kamora G. v. Brandon G**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-19-002: **State v. Hicks**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-003: **State v. Leiting**. 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-19-007: **State v. Schutz**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-009: **State v. Burrell**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-010: **State v. Kueth**. 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-19-016: **Mariah K. on behalf of Sophia W. v. Brock W**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-19-019: **State v. Buckingham**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-024: **State v. Spicha**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-026: **State on behalf of Ayanna R. et al. v. Enoch R**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-031: **State v. Gardner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Manjikian*, 303 Neb. 100, 927 N.W.2d 48 (2019).

No. A-19-036: **Applied Underwriters v. Steve Wills Trucking & Logging**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(A)(1); *Applied Underwriters v. E.M. Pizza*, 26 Neb. App. 906, 923 N.W.2d 789 (2019).

No. A-19-043: **Puente v. Ressler**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2018); *State v. Hausmann*, 277 Neb. 819, 765 N.W.2d 219 (2009).

No. A-19-044: **State v. Moore**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-046: **State v. Carlson**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-048: **Shanklin v. Bishara**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-049: **State v. Thompson**. Stipulation allowed; appeal dismissed.

No. A-19-050: **Owens v. Owens**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Fedalina G.*, 272 Neb. 314, 721 N.W.2d 638 (2006); *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003).

No. A-19-051: **State v. Brandenburger**. 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-19-057: **In re Interest of Zachary D**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-058: **Spencer v. Coreslab Structures**. Stipulation allowed; appeal dismissed.

No. A-19-063: **State v. Fletcher**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-3001 (Reissue 2016); *State v. Davis*, 23 Neb. App. 536, 875 N.W.2d 450 (2016).

No. A-19-064: **Alameri v. US Foods**. Stipulation allowed; appeal dismissed.

No. A-19-067: **Churchich v. Frakes**. Motion of appellee for summary affirmance sustained; order denying writ of habeas corpus affirmed. See § 2-107(B)(2). See, also, *State v. Avina-Murillo*, 301 Neb. 185, 917 N.W.2d 865 (2018); *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016); *State v. Forbes*, 203 Neb. 349, 278 N.W.2d 615 (1979).

No. A-19-068: **Coleman 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-19-069: **In re Interest of Yasmin T. & Jeremy H**. Motions of appellees for summary dismissal granted; appeal dismissed. See, § 2-107(B); *In re Interest of Anaya*, 276 Neb. 825, 758 N.W.2d 10 (2008).

No. A-19-072: **Applied Underwriters v. Kiessling Transit**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(A)(1); *Applied Underwriters v. E.M. Pizza*, 26 Neb. App. 906, 923 N.W.2d 789 (2019).

No. A-19-074: **Campbell v. Frakes**. Motion of appellee for summary affirmance sustained; order denying writ of habeas corpus affirmed. See § 2-107(B)(2). See, also, *State v. Avina-Murillo*, 301 Neb. 185, 917 N.W.2d 865 (2018); *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016); *Evans v. Frakes*, 293 Neb. 253, 876 N.W.2d 626 (2016).

No. A-19-085: **State v. Francis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-19-086: **Mumin v. Hansen**. Affirmed. See, § 2-107(A)(1); *Carlsen v. State*, 129 Neb. 84, 261 N.W. 339 (1935).

No. A-19-090: **Fletcher v. Frakes**. Motion of appellee for summary affirmance sustained; order denying writ of habeas corpus affirmed. See § 2-107(B)(2). See, also, *State v. Avina-Murillo*, 301 Neb. 185, 917 N.W.2d 865 (2018); *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016); *Evans v. Frakes*, 293 Neb. 253, 876 N.W.2d 626 (2016).

No. A-19-091: **Frazier v. Frakes**. Motion of appellees for summary affirmance sustained; order denying writ of habeas corpus affirmed. See § 2-107(B)(2). See, also, *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016).

No. A-19-092: **Peck v. Peck**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-100: **Yanga v. State**. 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-19-101: **State v. Sanchez**. 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). See, also, *State v. Spang*, 302 Neb. 285, 923 N.W.2d 59 (2019).

No. A-19-102: **Davis 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-19-103: **Yanga v. State**. 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-19-112: **State v. Davis**. Motion of appellant to dismiss appeal sustained; appeal dismissed. See § 2-108(D).

No. A-19-113: **Lanxon v. Lanxon**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-123: **Strawder v. Frakes**. Appellant's "Complaint" and "Motion for Relief" are overruled. See *Qwest Bus. Resources v. Headliners–1299 Farnam*, 15 Neb. App. 405, 727 N.W.2d 724 (2007).

No. A-19-123: **Strawder 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-19-126: **Castonguay v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-19-129: **Omaha Land Holding v. Valley Boys**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-135: **State on behalf of Jadazia C. v. Anthony D**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-136: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Barnes*, 303 Neb. 167, 927 N.W.2d 64 (2019).

No. A-19-137: **State v. Weakly**. Stipulation allowed; appeal dismissed.

No. A-19-141: **Swift v. Nolasco**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-142: **State v. Scott**. 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-19-148: **In re Interest of Hope M. et al**. 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 Danaisha W. et al.*, 287 Neb. 27, 840 N.W.2d 533 (2013); *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009).

No. A-19-149: **State v. Wright**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-150: **State v. Wright**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-158: **State v. Jorgenson**. Stipulation allowed; appeal dismissed.

No. A-19-160: **State v. Osborne**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Mrza*, 302 Neb. 931, 926 N.W.2d 79 (2019).

No. A-19-161: **State v. Boyd**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-165: **Lincoln Homebuyers v. Bacon**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *Shawn E. on behalf of Grace E. v. Diane S.*, 300 Neb. 289, 912 N.W.2d 920 (2018); *E.D. v. Bellevue Pub. Sch. Dist.*, 299 Neb. 621, 909 N.W.2d 652 (2018).

No. A-19-167: **Tremayne v. Collins**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-168: **Snyder v. Paulson**. Appeal dismissed. See § 2-107(A)(2).

No. A-19-169: **Tyler v. Century Link**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-170: **Tyler v. Gregg Young Chevrolet**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-177: **Gray v. Johnson**. Motions of appellees for summary dismissal granted; appeal dismissed. See, § 2-107(A)(2); *Bryson L. v. Izabella L.*, 302 Neb. 145, 921 N.W.2d 829 (2019); *State v. Lotter*, 301 Neb. 125, 917 N.W.2d 850 (2018).

No. A-19-179: **State v. Wynn-Thomas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Manjikian*, 303 Neb. 100, 927 N.W.2d 48 (2019).

No. A-19-183: **State v. Fedde**. 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-19-193: **State v. Broussard**. Affirmed. See, § 2-107(A)(1); *State v. Mrza*, 302 Neb. 931, 926 N.W.2d 79 (2019); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-194: **State v. Seymour**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2729 (Cum. Supp. 2018). See, also, *State v. Schmidt*, 12 Neb. App. 150, 668 N.W.2d 525 (2003).

No. A-19-196: **Mumin v. Brasch**. Appeal dismissed. See, § 2-107(A)(2); *Jill B. & Travis B. v. State*, 297 Neb. 57, 899 N.W.2d 241 (2017); *Mumin v. Dees*, 266 Neb. 201, 663 N.W.2d 125 (2003).

No. A-19-200: **Goodwin v. Goodwin**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-201: **Goodwin v. Lee's Beauty Supply**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-202: **Tyler v. Century Link**. Appeal dismissed. See § 2-107(A)(2).

No. A-19-205: **State v. Dixon**. Stipulation allowed; appeal dismissed.

No. A-19-206: **Sukstorf v. Sunworks, Inc**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-209: **State v. Moore**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Brown*, 302 Neb. 53, 921 N.W.2d 804 (2019).

No. A-19-210: **Valley Boys v. Farmers Mut. Ins. Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-214: **Gage v. Crete Carrier**. Motion of appellee Crete Carrier to dismiss appeal sustained; appeal dismissed.

No. A-19-216: **Yah v. Fontenelle Realty**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-229: **State ex rel. Lambda NU Assn. v. Office of Frat. & Sor. Life**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-19-231: **Wollaeger v. TS Media**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-19-235: **State v. Johnson**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-236: **In re Interest of Christopher S**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 43-274(5) (Cum. Supp. 2018).

No. A-19-237: **State v. Bixby**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-237: **State v. Bixby**. Motion of appellant for rehearing granted. Appeal reinstated.

No. A-19-238: **Nolan v. Fremont Contract Carriers**. Appeal dismissed. See, § 2-107(A)(2); *D.M. v. State*, 25 Neb. App. 596, 911 N.W.2d 621 (2018).

No. A-19-243: **Gray v. Frakes**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 83-1,110 (Reissue 2014); *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013).

No. A-19-245: **Chicoj v. Werner Constr. Co**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-19-246: **Bagley v. Sargent**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-246: **Bagley v. Sargent**. Motion of appellant for rehearing granted. Appeal reinstated.

No. A-19-249: **State v. Hernandez-Rivera**. Stipulation allowed; appeal dismissed.

No. A-19-253: **Alford v. Hansen**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016).

No. A-19-261: **State v. Sieckmeyer**. 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-19-262: **State on behalf of Thomas T. v. Alyssa S**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016); *State on behalf of Marcelo K. & Rycki K. v. Ricky K.*, 300 Neb. 179, 912 N.W.2d 747 (2018).

No. A-19-263: **Gerritsen v. Stamm**. Stipulation allowed; appeal dismissed.

No. A-19-267: **State v. Okeng**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-269: **State v. McGuire**. Appellee's suggestion of remand sustained; order of district court reversed and remanded with directions. See *State v. Myers*, 301 Neb. 756, 919 N.W.2d 893 (2018).

No. A-19-277: **Kadir v. Express Servs**. Appeal dismissed. See, § 2-107(A)(2); *Merrill v. Griswold's, Inc.*, 270 Neb. 458, 703 N.W.2d 893 (2005).

No. A-19-286: **State v. Athey**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-287: **State v. Fieldgrove**. Appeal dismissed. See, § 2-107(A)(2); *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015).

No. A-19-290: **State v. Mabor**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-293: **State v. Holmquist**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018); *State v. Ramirez*, 284 Neb. 697, 823 N.W.2d 193 (2012); *State v. Wabashaw*, 274 Neb. 394, 740 N.W.2d 583 (2007); *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003).

Nos. A-19-294, A-19-295: **State v. Decker**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016). See, also, *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-19-301: **Valley Boys v. Auto-Owners Ins. Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-303: **State on behalf of Kenley S. v. Chase W**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-306: **State v. Harlan**. 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-19-309: **Valley Boys v. Farmers Mut. Ins. Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-314: **State v. Trevino**. 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-19-315: **State v. Thornburg**. 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-19-318: **Myers v. Frakes**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1901 and 25-1903 (Reissue 2016) and 25-1912 (Cum. Supp. 2018); *State v. McGuire*, 301 Neb. 895, 921 N.W.2d 77 (2018).

No. A-19-321: **Lincoln Comm. on Human Rights on behalf of Alvarez v. SBM Site Servs**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-19-324: **State v. Curtis**. Stipulation allowed; appeal dismissed.

No. A-19-332: **State v. Razo**. 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-19-333: **In re Interest of Ivy D**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-334: **In re Interest of Gwen D**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-336: **Houston on behalf of Houston v. Health & Human Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-337: **State v. Eason**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-339: **State v. Long**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-340: **In re Conservatorship of Trobough**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *Waite v. Carpenter*, 1 Neb. App. 321, 496 N.W.2d 1 (1992).

No. A-19-341: **Garza 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).

No. A-19-346: **In re Guardianship & Conservatorship of Brown**. Appeal dismissed. See, § 2-107(A)(2); *In re Estate of Gsantner*, 288 Neb. 222, 846 N.W.2d 646 (2014); *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005); *In re Guardianship & Conservatorship of Forster*, 22 Neb. App. 478, 856 N.W.2d 134 (2014).

No. A-19-347: **Munoz v. Bevans Enterprises**. Stipulation allowed; appeal dismissed.

No. A-19-348: **State v. Curry**. 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-19-350: **State v. Myers**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Luz P. et al.*, 295 Neb. 814, 891 N.W.2d 651 (2017).

No. A-19-352: **Grosskop v. Bright Horizons Children's Centers**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-19-353: **State v. Houston**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2016).

No. A-19-354: **State v. Martin**. Stipulation allowed; appeal dismissed.

No. A-19-356: **State v. Hall**. Appeal dismissed. See, § 2-107(A)(2); *State v. Sports Couriers, Inc.*, 210 Neb. 168, 313 N.W.2d 447 (1981).

No. A-19-358: **Schinco v. Schinco**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016). See, also, *Jacobson v. Jacobson*, 10 Neb. App. 622, 635 N.W.2d 272 (2001).

No. A-19-368: **State v. Mills**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-370: **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-19-372: **In re Estate of Adelung**. Appeal dismissed. See, § 2-107(A)(2); *In re Estate of Seidler*, 241 Neb. 402, 490 N.W.2d 453 (1992); *Belitz v. Belitz*, 21 Neb. App. 716, 842 N.W.2d 613 (2014).

No. A-19-377: **In re Interest of Kyra R**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Octavio B. et al.*, 290 Neb. 589, 861 N.W.2d 415 (2015); *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009).

No. A-19-381: **State v. Osborn**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-382: **In re Interest of Taeson D**. Motion of appellant for rehearing granted. Order summarily affirming appeal vacated. Appeal reinstated.

No. A-19-385: **Hannah v. Gordon**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-386: **Rosberg v. Rosberg**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2018).

No. A-19-389: **State v. Welchert**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-391: **State v. McNeil**. 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-19-392: **State v. Perry**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-396: **Gem City Bone & Joint v. Meister**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

Nos. A-19-397 through A-19-399: **State v. Rogers**. Motions of appellee for summary affirmance granted; judgments affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-401: **Security State Bank v. Bopp**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2018); *Lund v. Holbrook*, 157 Neb. 854, 62 N.W.2d 112 (1954). See, also, *Deines v. Essex Corp.*, 293 Neb. 577, 879 N.W.2d 30 (2016).

No. A-19-404: **In re Interest of Alexandra P**. Summarily affirmed. See §§ 2-107(A)(1) and 2-101(B)(1)(b).

No. A-19-405: **In re Interest of Connor C**. Appeal dismissed. See § 2-107(A)(2).

No. A-19-406: **State v. Brown**. Motion of appellant's counsel to withdraw granted; appellant's conviction and sentence affirmed.

No. A-19-407: **State v. Jones**. 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-19-408: **Dang v. Akins**. Motion of appellee for summary dismissal granted; appeal dismissed.

No. A-19-410: **In re Application of Rainforth**. Affirmed. See § 2-107(A)(1). See, also, *In re Application No. C-4981*, 27 Neb. App. 773, 936 N.W.2d 365 (2019).

No. A-19-411: **In re Application of Rainforth**. Affirmed. See § 2-107(A)(1). See, also, *In re Application No. C-4981*, 27 Neb. App. 773, 936 N.W.2d 365 (2019).

No. A-19-412: **In re Application of Jones**. Affirmed. See § 2-107(A)(1). See, also, *In re Application No. C-4981*, 27 Neb. App. 773, 936 N.W.2d 365 (2019).

No. A-19-413: **In re Application of Reiners**. Affirmed. See § 2-107(A)(1). See, also, *In re Application No. C-4981*, 27 Neb. App. 773, 936 N.W.2d 365 (2019).

No. A-19-414: **In re Application of Haussler**. Affirmed. See § 2-107(A)(1). See, also, *In re Application No. C-4981*, 27 Neb. App. 773, 936 N.W.2d 365 (2019).

No. A-19-419: **Florence Lake Investments v. Berg**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-422: **Murphy v. Grosz**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-424: **Gove v. Kinseth Hotel Corp**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 48-182 and 48-185 (Cum. Supp. 2018).

No. A-19-426: **State v. Prigge**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mrza*, 302 Neb. 931, 926 N.W.2d 79 (2019); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-427: **State on behalf of Andreasen v. Andreasen**. Motion of appellee for summary dismissal sustained; appeal dismissed. See § 2-107(B)(1).

No. A-19-429: **State v. Killough**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-432: **State v. Tate**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-434: **State v. Juilfs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Jenkins*, 303 Neb. 676, 931 N.W.2d 851 (2019); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-19-435: **Daugherty v. Daugherty**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2018); *State v. Lotter*, 301 Neb. 125, 917 N.W.2d 850 (2018).

No. A-19-437: **State v. Garcia**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-439: **Lueking v. Lennemann**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-441: **Applied Underwriters v. O'Connell Landscape Maintenance**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(A)(1); *Applied Underwriters v. E.M. Pizza*, 26 Neb. App. 906, 923 N.W.2d 789 (2019).

No. A-19-444: **State v. Harden**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2016); *Mumin v. Frakes*, 298 Neb. 381, 904 N.W.2d 667 (2017).

No. A-19-445: **In re Interest of Jada K**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-446: **In re Interest of W.S**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2018); *TierOne Bank v. Cup-O-Coa, Inc.*, 15 Neb. App. 648, 734 N.W.2d 763 (2007).

No. A-19-453: **In re Interest of Alexis P**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-454: **Knight v. Westroads Mall**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-19-456, A-19-457: **State v. Rik**. Motions of appellee for summary affirmance granted; judgments affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-460: **State v. Zitterkopf**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Manjikian*, 303 Neb. 100, 927 N.W.2d 48 (2019).

No. A-19-462: **In re Interest of Antonio J. et al**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-463: **Applied Underwriters v. Air-Sea Packing Group**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(A)(1); *Applied Underwriters v. E.M. Pizza*, 26 Neb. App. 906, 923 N.W.2d 789 (2019).

Nos. A-19-465, A-19-466: **State v. Stastny**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-471: **State v. Botts**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Phillips*, 302 Neb. 686, 924 N.W.2d 699 (2019); *State v. Temple*, 195 Neb. 91, 236 N.W.2d 835 (1975).

No. A-19-478: **State v. Shannon**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018); *State v. Lassek*, 272 Neb. 523, 723 N.W.2d 320 (2006).

No. A-19-479: **State v. Shannon**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018); *State v. Lassek*, 272 Neb. 523, 723 N.W.2d 320 (2006).

No. A-19-480: **State v. Brinton**. 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-19-485, A-19-490: **State v. Mitchell**. Motions 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-19-487: **Applied Underwriters v. Capeway Roofing Sys**. 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-19-515: **Gray 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); *State v. Dandridge*, 209 Neb. 885, 312 N.W.2d 286 (1981).

No. A-19-524: **State ex rel. Takako W. v. William W**. Appeal dismissed. See, § 2-107(A)(2); *Tilson v. Tilson*, 299 Neb. 64, 907 N.W.2d 31 (2018).

No. A-19-526: **Goodwin v. Goodwin**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-530: **In re Trust of Cook**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-534: **State v. Hamilton**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2018); *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-19-542: **Parmer v. Carter**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-544: **State v. Crouse**. 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-19-548: **Goodwin v. Goodwin**. Appeal dismissed. See § 2-107(A)(2).

No. A-19-552: **State v. Meyer**. Appeal dismissed. See § 2-107(A)(2).

No. A-19-553: **Pendergras v. City of Lincoln**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-555: **State v. Appley**. 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-19-556: **State v. Anthony**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-559: **Bonnell v. Eisenmenger**. Appeal dismissed. See, § 2-107(A)(2); *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-19-560: **Caudy v. Caudy**. Motion of appellant to dismiss appeal sustained; appeal dismissed. See § 2-108(A).

No. A-19-564: **In re Interest of Michael L**. Affirmed. See §§ 2-107(A)(1) and 2-101(B)(1)(b).

No. A-19-566: **State v. Miller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-3001(4) (Reissue 2016); *State v. Koch*, 304 Neb. 133, 933 N.W.2d 585 (2019); *State v. Hessler*, 288 Neb. 670, 850 N.W.2d 777 (2014).

No. A-19-568: **Mumin v. Wagner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. §§ 25-207 and 25-2301.02(1) (Reissue 2016).

No. A-19-569: **State v. Drees**. 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-19-571: **Johnson v. Johnson**. 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-19-573: **State v. Salyers**. 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. Elliott*, 21 Neb. App. 962, 845 N.W.2d 612 (2014).

No. A-19-574: **State v. Da Silva**. 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-19-575: **Lalich v. Marek**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-576: **Gardner v. International Paper Destr. & Recycl**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2016); *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006).

No. A-19-579: **Knight v. Damme**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1315(1) and 25-1329 (Reissue 2016) and 25-1912 (Cum. Supp. 2018).

No. A-19-580: **State v. Ontiveros**. 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-19-581: **In re Interest of Blain S. et al**. Motion of appellants to dismiss appeal granted; appeal dismissed.

No. A-19-582: **CJLK LLC v. Lockhart**. Appeal dismissed. See, § 2-107(A)(2); *State v. McGuire*, 301 Neb. 895, 921 N.W.2d 77 (2018).

No. A-19-590: **State v. Nunn**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-591: **Rachwalik v. Parks**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-592: **Bonnell v. Tyler**. Appeal dismissed. See, § 2-107(B)(1); *Pantano v. American Blue Ribbon Holdings*, 303 Neb. 156, 927 N.W.2d 357 (2019).

No. A-19-595: **Morris v. Morris**. Appeal dismissed. See, § 2-107(A)(2); *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997).

No. A-19-596: **State v. Jones**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-598: **In re Interest of Clayton D**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-603: **Pearce v. Mutual of Omaha Ins. Co**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2018); *Crawford v. Crawford*, 18 Neb. App. 890, 794 N.W.2d 198 (2011).

No. A-19-610: **State v. Forke**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-611: **State v. O'Brien**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-614: **State v. Valeriano**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

Nos. A-19-615, A-19-616: **State v. Dorsey**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Mrza*, 302 Neb. 931, 926 N.W.2d 79 (2019); *State v. Nelson*, 27 Neb. App. 748, 936 N.W.2d 32 (2019).

No. A-19-617: **Oaten v. Crete Carrier Corp**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 48-170 and 48-180 (Cum. Supp. 2018).

No. A-19-617: **Oaten v. Crete Carrier Corp**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-19-618: **Barrow v. Frakes**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-626: **Castonguay v. Frakes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Nadeem v. State*, 298 Neb. 329, 904 N.W.2d 244 (2017); *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016).

No. A-19-627: **State v. Gonzalez**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-632: **State v. Atkinson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-634: **State v. Seymour**. Appeal dismissed. See, § 2-107(A)(2); *Custom Fabricators v. Lenarduzzi*, 259 Neb. 453, 610 N.W.2d 391 (2000).

No. A-19-640: **State v. Scott**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018). See, also, Neb. Rev. Stat. § 28-932 (Reissue 2016).

No. A-19-648: **State on behalf of Allyson D. v. David D**. 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-19-649: **State v. Valverde**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-650: **State v. Toliver**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-653: **Blueitt v. Frakes**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016).

No. A-19-655: **Garibo 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).

No. A-19-661: **De Leon v. Chavez**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-665: **State v. Campsey**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-666: **State v. Swearingen**. Appeal dismissed. See, § 2-107(A)(2); *State v. Dunlap*, 271 Neb. 314, 710 N.W.2d 873 (2006).

Nos. A-19-670, A-19-671: **State v. Gunnels**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Harms*, 304 Neb. 441, 934 N.W.2d 850 (2019).

No. A-19-676: **Robinson v. State**. Appeal dismissed. See § 2-107(A)(2).

No. A-19-677: **Clayborne v. Hansen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 24-302 (Reissue 2016); *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016); *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

No. A-19-679: **State v. Whelan**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Phillips*, 297 Neb. 469, 900 N.W.2d 522 (2017). See, also, *State v. Campbell*, 24 Neb. App. 861, 900 N.W.2d 556 (2017).

No. A-19-680: **Dion v. City of Omaha**. Appeal dismissed. See, § 2-107(A)(2); *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-19-691: **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). See, also, *Dugan v. State*, 297 Neb. 444, 900 N.W.2d 528 (2017).

No. A-19-694: **Mumin v. Condon**. Motion of appellee for summary dismissal granted; appeal dismissed. See, § 2-107(B)(1); *Martinez v. CMR Constr. & Roofing of Texas*, 302 Neb. 618, 924 N.W.2d 326 (2019); *Bloedorn Lumber Co. v. Nielson*, 300 Neb. 722, 915 N.W.2d 786 (2018).

No. A-19-695: **Smith v. King**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.01 (Reissue 2016).

No. A-19-698: **Barber v. Rickets**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *Peterson v. Houston*, 284 Neb. 861, 824 N.W.2d 26 (2012); *Central Neb. Pub. Power Dist. v. North Platte NRD*, 280 Neb. 533, 788 N.W.2d 252 (2010); *Ritchhart v. Daub*, 256 Neb. 801, 594 N.W.2d 288 (1999).

No. A-19-702: **Lower v. Lower**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-707: **Muhammad v. State**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-708: **State v. Clark**. 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-19-709: **Davis v. Davis**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-710: **In re Guardianship & Conservatorship of Brown**. Appeal dismissed. See § 2-107(A)(2).

No. A-19-711: **In re Interest of Kashtyn L**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of T.W. et al.*, 234 Neb. 966, 453 N.W.2d 436 (1990).

No. A-19-712: **In re Estate of Brader**. Joint motion of appellant and appellee to dismiss appeal sustained; appeal dismissed.

No. A-19-714: **State v. Wolterman**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018); *State v. Baxter*, 295 Neb. 496, 888 N.W.2d 726 (2017).

No. A-19-719: **State v. Robinson**. Appeal dismissed. See § 2-107(A)(2).

No. A-19-721: **Williams v. Frakes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997). See, also, *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016); *Evans v. Frakes*, 293 Neb. 253, 876 N.W.2d 626 (2016).

No. A-19-723: **NRS Properties v. Lakers**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-728: **State v. Fieldgrove**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-733: **State v. Elias**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1241 (Reissue 2016) and § 64-203 (Reissue 2018). See, also, *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-19-737: **Kudlacek v. Saligheh**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-738: **Evasco v. Saligheh**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-739: **State v. Delgado**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

CASES DISPOSED OF WITHOUT OPINION

No. A-19-741: **Polson v. Rudolph**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-744: **State v. Salem**. Motion and stipulation allowed; appeal dismissed.

No. A-19-749: **Martinez v. Martinez**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-750: **Storz v. Storz**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2018); *Welch v. Peery*, 26 Neb. App. 966, 925 N.W.2d 375 (2019).

No. A-19-751: **State v. Janousek**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-754: **State v. Maring**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-756: **Tyler v. Evolution Towing**. Appeal dismissed. See § 2-107(A)(2).

No. A-19-757: **State on behalf of Alayia C. v. Floyd C**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-759: **Mumin v. Frakes**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2016); *Martin v. McGinn*, 265 Neb. 403, 657 N.W.2d 217 (2003).

No. A-19-760: **Abakar v. Tyson Fresh Meats**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-764: **Pearce v. Mutual of Omaha Ins. Co**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2018); *Crawford v. Crawford*, 18 Neb. App. 890, 794 N.W.2d 198 (2011).

No. A-19-766: **Strauch v. Strauch**. Motion of appellant to dismiss appeal sustained; appeal dismissed..

No. A-19-769: **State v. Westerholm**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

Nos. A-19-770 through A-19-772: **State v. Jones**. 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-19-773: **State v. Hargrove**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-775: **State v. Johnson**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-777: **State v. Isom**. 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-19-779: **McCaulley v. C L Enters**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016); *Kilgore v. Nebraska Dept. of Health & Human Servs.*, 277 Neb. 456, 763 N.W.2d 77 (2009).

No. A-19-782: **State v. Lefever**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-785: **State v. Bartlett**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Harms*, 304 Neb. 441, 934 N.W.2d 850 (2019); *State v. Wills*, 285 Neb. 260, 826 N.W.2d 581 (2013).

No. A-19-790: **State v. Olson**. Stipulation allowed; appeal dismissed.

No. A-19-792: **Hochwender v. Johnson-Romero**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-794: **Paronto v. Wilkinson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-795: **State v. Simpson**. Appeal dismissed. See, § 2-107(A)(2); *State v. Barnes*, 303 Neb. 167, 927 N.W.2d 64 (2019).

No. A-19-798: **Shear Country v. Koch**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. §§ 25-1301(1) (Cum. Supp. 2018) and 25-1902 and 25-1911 (Reissue 2016).

No. A-19-799: **Batten v. Sesemann**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-801: **State v. Robertson**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-808: **Valley Boys Inc. v. American Family Ins. Co**. Appeal dismissed. See § 2-107(A)(2). See, also, Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-19-813: **Cook v. Department of Corr. Servs**. Appeal dismissed. See § 2-107(A)(2).

No. A-19-817: **Harris v. State**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-819: **Barber v. Frakes**. Appeal dismissed. See, § 2-107(A)(2); *Robinson v. Houston*, 298 Neb. 746, 905 N.W.2d 636 (2018).

No. A-19-820: **Barber v. Frakes**. Appeal dismissed. See, § 2-107(A)(2); *Robinson v. Houston*, 298 Neb. 746, 905 N.W.2d 636 (2018).

No. A-19-821: **Johnson v. Department of Corr. Servs**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-822: **State v. Pettigrew**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-824: **State v. Rogers**. Motion of appellee for summary affirmance granted; judgment affirmed. See § 2-107(B)(2). See, also, Neb. Rev. Stat. § 29-3001(4)(a) (Reissue 2016); *Gray v. Nebraska Dept. of Corr. Servs.*, 26 Neb. App. 660, 922 N.W.2d 234 (2018).

No. A-19-826: **Stuhr v. Stuhr**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-827: **State v. Devers**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-831: **Lam v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-834: **State v. Zepeda**. Appeal dismissed. See § 2-107(A)(2). See, also, Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

No. A-19-838: **Gardner v. Richard Rensch Law**. Appeal dismissed. See, § 2-107(A)(2); *Mumin v, Frakes*, 298 Neb. 381, 904 N.W.2d 667 (2017).

No. A-19-839: **In re Trust of Hunt**. Appeal dismissed. See, § 2-107(A)(2); *Gernstein v. Lake*, 259 Neb. 479, 610 N.W.2d 714 (2000); *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989).

No. A-19-844: **Ahmed v. Ahmed**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2018); *Clarke v. First Nat. Bank of Omaha*, 296 Neb. 632, 895 N.W.2d 284 (2017).

No. A-19-845: **State v. Moss**. Stipulation allowed; appeal dismissed.

No. A-19-846: **State v. Moss**. Stipulation allowed; appeal dismissed.

No. A-19-855: **State v. Silva**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Harms*, 304 Neb. 441, 934 N.W.2d 850 (2019).

No. A-19-862: **Leonard v. Kane**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-19-863: **Health & Human Servs. v. Omaha Metro Care & Rehab Ctr**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-864: **Bartusek v. Piano Building Managing Member**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-19-865: **State v. Packett**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-870: **State v. Kavan**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-871: **State v. Kavan**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-878: **State v. Iddings**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-885: **Harper v. Harper**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2018); *Clarke v. First Nat. Bank of Omaha*, 296 Neb. 632, 895 N.W.2d 284 (2017).

No. A-19-891: **Wojcinski v. Calabretto**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-895: **Credit Mgmt. Servs. v. Henry**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-896: **Phillips v. Phillips**. Stipulation allowed; appeal dismissed.

No. A-19-902: **State v. Dixon**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-903: **State v. Dixon**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-904: **State v. Harlan**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-907: **Applied Underwriters v. Environmental Concepts Landscape**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-913: **Great Northern Ins. Co. v. Transit Auth. of City of Omaha**. Appeal dismissed. See, § 2-107(A)(2); *State ex rel. Peterson v. Creative Comm. Promotions*, 302 Neb. 606, 924 N.W.2d 664 (2019).

No. A-19-914: **Kegley v. Kegley**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-924: **State on behalf of Takirah C. v. Floyd C**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-935: **Ahmed v. Ahmed**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-941: **State v. Lester**. Motion of appellee for summary affirmance granted; judgment affirmed. See, § 2-107(B)(2); *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

No. A-19-945: **Triple B Inc. v. Stuthman**. By order of the court, appeal dismissed. See *Back Acres Pure Trust v. Fahnlander*, 233 Neb. 28, 443 N.W.2d 604 (1989).

No. A-19-945: **Triple B Inc. v. Stuthman**. Motion of appellant for reconsideration sustained; appeal reinstated.

No. A-19-957: **State v. Baker**. Stipulation allowed; appeal dismissed.

No. A-19-963: **Hohenstein v. Hohenstein**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-19-968: **Abdulkadir v. Dornan**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016); *Boyd v. Cook*, 298 Neb. 819, 906 N.W.2d 31 (2018).

No. A-19-975: **State v. Ezell**. Appeal dismissed. See, § 2-107(A)(2); *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005); *State v. Sklenar*, 269 Neb. 98, 690 N.W.2d 631 (2005).

No. A-19-984: **Shear Country v. Koch**. Motion of appellee for summary dismissal granted; appeal dismissed. See, § 2-107(B)(1); *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

No. A-19-989: **Applied Underwriters v. Personal Touch Cleaning**. Appeal dismissed. See, § 2-107(A)(2); *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002).

No. A-19-997: **State v. Rooks-Byrd**. Appeal dismissed. See, § 2-107(A)(2); *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-19-1005: **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). See, also, *Dugan v. State*, 297 Neb. 444, 900 N.W.2d 528 (2017).

No. A-19-1006: **Schinco v. Schinco**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016); *Cattle Nat. Bank & Trust Co. v. Watson*, 293 Neb. 943, 880 N.W.2d 906 (2016).

No. A-19-1008: **State v. Johnson**. By order of the court, appeal dismissed for failure to file briefs.

CASES DISPOSED OF WITHOUT OPINION

No. A-19-1016: **State ex rel. Takako W. v. William W**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2018); *Clarke v. First Nat. Bank of Omaha*, 296 Neb. 632, 895 N.W.2d 284 (2017).

No. A-19-1019: **In re Interest of Treasean J. et al**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Michael N.*, 302 Neb. 652, 925 N.W.2d 51 (2019).

No. A-19-1022: **State v. Hardy**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-1024: **State v. Polite**. Stipulation allowed; appeal dismissed.

No. A-19-1028: **State v. Rooks-Byrd**. Appeal dismissed. See, § 2-107(A)(2); *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-19-1029: **State v. Rooks-Byrd**. Appeal dismissed. See, § 2-107(A)(2); *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-19-1032: **State v. Webster**. Stipulation allowed; appeal dismissed.

Nos. A-19-1043, A-19-1045: **State v. Buskirk**. Stipulations allowed; appeals dismissed.

No. A-19-1044: **State v. Wallace**. Stipulation allowed; appeal dismissed.

No. A-19-1047: **Priesner v. Starry**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-19-1049: **State v. McGuire**. Appeal dismissed. See § 2-107(A)(2).

No. A-19-1051: **Koch v. Mielak**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-19-1054: **Wheeler v. Stanko**. Appeal dismissed. See, § 2-107(A)(2); *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005); *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004).

No. A-19-1056: **In re Interest of Hope M. et al**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Danaisha W. et al.*, 287 Neb. 27, 840 N.W.2d 533 (2013).

No. A-19-1060: **State v. Rooks-Byrd**. Appeal dismissed. See, § 2-107(A)(2); *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-19-1062: **Rubert v. Davis**. Appeal dismissed. See, § 2-107(A)(2); *Poindexter v. Houston*, 275 Neb. 863, 750 N.W.2d 688 (2008); *Garza v. Kenney*, 264 Neb. 146, 646 N.W.2d 579 (2002).

No. A-19-1067: **State v. Hood**. By order of the court, appeal dismissed for failure to file briefs.

No. A-19-1071: **State v. Gardner**. Appeal dismissed. See § 2-107(A)(2).

No. A-19-1072: **Staska v. Gonzales**. Appeal dismissed. See, § 2-102(A)(2); *State ex rel. Peterson v. Creative Comm. Promotions*, 302 Neb. 606, 924 N.W.2d 664 (2019).

No. A-19-1073: **Fallon v. Gonzales**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-19-1075: **State v. Rooks-Byrd**. Appeal dismissed. See, § 2-107(A)(2); *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-19-1087: **State v. Collier**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-1094: **In re Interest of M'Kyiah W. et al**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Supp. 2019).

No. A-19-1096: **Harper v. Harper**. Stipulation considered; appeal dismissed.

No. A-19-1101: **State v. Nuzum**. Stipulation allowed; appeal dismissed.

No. A-19-1107: **Fischer v. Dennis**. Appeal dismissed. See, § 2-107(A)(2); *Nichols v. Nichols*, 288 Neb. 339, 847 N.W.2d 307 (2014).

No. A-19-1115: **State v. Lowman**. Appeal dismissed. See, § 2-107(A)(2); *State v. Combs*, 297 Neb. 422, 900 N.W.2d 473 (2017).

No. A-19-1117: **State v. Lowe**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-1124: **Pittenger v. Metropolitan Ent. & Con. Auth**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-19-1127: **State v. Forney**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-1128: **State v. Forney**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-1132: **State v. Chuol**. Appeal dismissed. See, § 2-107(A)(2); *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-19-1133: **State v. Chuol**. Appeal dismissed. See, § 2-107(A)(2); *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-19-1134: **State v. Gardner**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2016).

No. A-19-1135: **State v. Gardner**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2016).

No. A-19-1145: **State v. Gregory**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-1147: **Chambers v. Bringenberg**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-19-1148: **White v. Doyle**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-1160: **State v. Anthony**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-19-1161: **In re Interest of Bently C**. 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); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004).

No. A-19-1162: **In re Interest of Alianna C**. 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); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004).

No. A-19-1165: **Mumin v. Frakes**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1329 (Reissue 2016) and 25-1912 (Cum. Supp. 2018).

No. A-19-1167: **State on behalf of Zavier G. v. Daniel G**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2018).

No. A-19-1178: **State on behalf of Michael A. v. Samar A**. Appeal dismissed. See, § 2-107(A)(2); *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003).

No. A-19-1186: **State v. Chuol**. Appeal dismissed. See, § 2-107(A)(2); *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-19-1187: **State v. Chuol**. Appeal dismissed. See, § 2-107(A)(2); *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-19-1217: **State v. Miguel**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. A-20-002: **State v. Liech**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

# LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-17-350: **Gonzales v. Nebraska Pediatric Practice**, 26 Neb. App. 764 (2019). Petition of appellees for further review denied on April 10, 2019.

No. A-17-722: **Woodcock v. Navarrete-James**, 26 Neb. App. 809 (2019). Petition of appellee for further review denied on March 29, 2019.

No. S-17-846: **In re Guardianship of K.R.**, 26 Neb. App. 713 (2018). Petition of appellant for further review sustained on March 12, 2019.

No. A-17-909: **Rosberg v. Rosberg**. Petition of appellant for further review denied on August 5, 2019.

No. A-17-918: **In re Estate of Filsinger**, 27 Neb. App. 142 (2019). Petition of appellants for further review denied on July 1, 2019.

No. A-17-993: **Shriner v. Friedman Law Offices**. Petition of appellees for further review denied on March 21, 2019.

No. A-17-994: **State v. Sims**. Petition of appellant for further review denied on April 3, 2019.

No. A-17-1016: **Jonas v. Willman**, 27 Neb. App. 251 (2019). Petition of appellant for further review denied on July 23, 2019.

No. A-17-1017: **Plautz v. Plautz**. Petition of appellant for further review denied on April 12, 2019.

No. S-17-1024: **Bortolotti v. Universal Terrazzo and Tile Co**. Petition of appellee Bortolotti for further review sustained on April 10, 2019.

No. A-17-1044: **Troester v. Troester**. Petition of appellant for further review denied on August 30, 2019.

No. A-17-1050: **State v. Schaetzle**. Petition of appellant for further review denied on April 3, 2019.

No. A-17-1053: **Yates v. Casto**. Petition of appellant for further review denied on April 2, 2019.

No. A-17-1072: **State v. Martinez**. Petition of appellant for further review denied on March 22, 2019.

No. A-17-1115: **State v. Dunn**. Petition of appellant for further review denied on March 22, 2019.

No. S-17-1116: **Burgardt v. Burgardt**, 27 Neb. App. 57 (2019). Petition of appellee for further review sustained on June 14, 2019.

No. A-17-1131: **State v. Heckard**. Petition of appellant for further review denied on March 21, 2019.

No. A-17-1134: **Jamison v. Jamison**. Petition of appellant for further review denied on May 17, 2019.

No. A-17-1154: **State v. Jackson**, 26 Neb. App. 727 (2019). Petition of appellant for further review denied on March 19, 2019.

No. A-17-1171: **State v. Perry**. Petition of appellant for further review denied on May 1, 2019. See § 2-102(F)(1).

No. A-17-1186: **State v. Howell**, 26 Neb. App. 842 (2019). Petition of appellant for further review denied on April 3, 2019.

No. S-17-1193: **State v. Assad**. Petition of appellant for further review sustained on June 10, 2019.

No. A-17-1219: **Voss v. Brown**. Petition of appellant for further review denied on May 2, 2019.

No. A-17-1229: **Rosberg v. Rosberg**. Petition of appellant for further review denied on July 26, 2019.

No. A-17-1248: **In re Estate of Gabel**. Petition of appellants for further review denied on October 25, 2019.

No. A-17-1254: **Olson v. Koch**. Petition of appellant for further review denied on June 17, 2019. See § 2-102(F)(1).

No. A-17-1257: **Koch v. Lower Loup NRD**, 27 Neb. App. 301 (2019). Petition of appellant for further review summarily denied on July 22, 2019, as being untimely filed.

No. A-17-1275: **Hutchison v. Kula**, 27 Neb. App. 96 (2019). Petition of appellees for further review denied on May 28, 2019.

No. A-17-1301: **Applied Underwriters v. E.M. Pizza**, 26 Neb. App. 906 (2019). Petition of appellant for further review denied on April 10, 2019.

No. A-17-1308: **In re Interest of Audrey T.**, 26 Neb. App. 822 (2019). Petition of appellant for further review denied on April 2, 2019.

No. S-18-006: **State v. Bigelow**. Petition of appellant for further review sustained on March 19, 2019.

No. A-18-020: **Applied Underwriters v. Van De Pol Enters**. Petition of appellant for further review denied on May 17, 2019.

No. A-18-021: **Applied Underwriters v. Warwick Amusements**. Petition of appellant for further review denied on April 18, 2019.

No. A-18-033: **In re Warner Family Trust**. Petition of appellant for further review denied on December 20, 2019.

No. A-18-034: **In re Interest of Michael C**. Petition of appellant for further review denied on April 3, 2019.

PETITIONS FOR FURTHER REVIEW

No. A-18-038: **State v. Wagner**. Petition of appellant pro se for further review denied on March 6, 2019, as untimely.

No. A-18-052: **State v. Alvarado**, 27 Neb. App. 334 (2019). Petition of appellant for further review denied on August 26, 2019.

No. A-18-073: **Gray v. Nebraska Dept. of Corr. Servs**. Petition of appellant for further review denied on May 13, 2019.

No. A-18-081: **State v. Khat**. Petition of appellant for further review denied on March 5, 2019.

No. A-18-083: **Ewing v. Evans**. Petition of appellee for further review denied on July 30, 2019.

No. S-18-093: **Jones v. Jones**. Petition of appellee for further review sustained on May 16, 2019.

No. A-18-186: **Clason v. Clason**. Petition of appellant for further review denied on July 3, 2019.

No. A-18-217: **State v. Lewis**. Petition of appellant for further review denied on March 11, 2019.

No. A-18-223: **State v. Pugmire**. Petition of appellant for further review denied on March 22, 2019.

No. A-18-233: **Applied Underwriters v. HKB, Inc**. Petition of appellant for further review denied on June 14, 2019.

No. A-18-237: **In re Interest of D.I**. Petition of appellant for further review denied on March 19, 2019.

No. A-18-243: **State v. Grasmick**. Petition of appellant for further review denied on April 18, 2019.

No. A-18-249: **Travelers Indem. Co. v. Gonzalez Constr**. Petition of appellant for further review denied on November 12, 2019.

No. A-18-252: **State v. Nash**. Petition of appellant for further review denied on October 15, 2019.

No. A-18-258: **Homebuyers Inc. v. Watkins**. Petition of appellants for further review denied on September 16, 2019.

No. A-18-267: **Wolter v. Fortuna**, 27 Neb. App. 166 (2019). Petition of appellant for further review denied on July 26, 2019.

No. A-18-279: **State v. Lopez**. Petition of appellant for further review denied on April 12, 2019.

No. A-18-284: **ARR Roofing v. Nebraska Furniture Mart**. Petition of appellant for further review denied on August 23, 2019.

No. A-18-285: **State v. Lienemann**. Petition of appellant for further review denied on September 16, 2019.

No. A-18-288: **In re Trust Created by Turner**. Petition of appellant for further review denied on August 23, 2019.

No. A-18-338: **Tierney v. Tierney**. Petition of appellee for further review denied on January 3, 2020.

PETITIONS FOR FURTHER REVIEW

No. A-18-348: **Applied Underwriters v. RDR Builders**. Petition of appellant for further review denied on June 14, 2019.

No. A-18-350: **State v. Carmenates**. Petition of appellant for further review denied on May 2, 2019.

No. A-18-350: **State v. Carmenates**. Petition of appellant pro se for further review denied on May 2, 2019.

No. S-18-352: **State v. Grutell**. Petition of appellant for further review sustained on November 18, 2019.

No. A-18-353: **State v. Meyer**. Petition of appellant for further review denied on April 18, 2019.

No. A-18-403: **Harms v. Harms**. Petition of appellee for further review denied on December 12, 2019.

No. A-18-408: **In re Masek Children's Trust**. Petition of appellants for further review denied on August 5, 2019.

No. A-18-420: **In re Conservatorship & Guardianship of Dolores L**. Petition of appellant for further review denied on April 3, 2019.

No. A-18-435: **Anderson v. Anderson**. Petition of appellant for further review denied on September 30, 2019.

No. A-18-454: **In re Interest of Bior M. et al**. Petition of appellant for further review denied on November 5, 2019.

No. A-18-456: **Coughlin v. County of Colfax**, 27 Neb. App. 41 (2019). Petition of appellants for further review denied on May 23, 2019.

No. A-18-461: **State v. Smith**. Petition of appellant for further review denied on August 23, 2019.

No. A-18-470: **State v. Ewinger**. Petition of appellant for further review denied on December 20, 2019.

No. A-18-478: **State v. Ford**. Petition of appellant for further review denied on April 30, 2019.

No. A-18-479: **State v. Gonzales**. Petition of appellant for further review denied on April 2, 2019.

No. A-18-483: **State v. Weathers**. Petition of appellant for further review denied on May 10, 2019. See § 2-102(F)(1).

No. A-18-487: **Pittack v. Pittack**. Petition of appellee for further review denied on May 28, 2019.

No. A-18-540: **State v. Pelc**. Petition of appellant for further review denied on May 29, 2019.

No. A-18-542: **State v. Kellogg**. Petition of appellant for further review denied on September 23, 2019.

Nos. A-18-544 through A-18-546: **In re Interest of Giani R. et al**. Petitions of appellant for further review denied on November 6, 2019.

PETITIONS FOR FURTHER REVIEW

No. A-18-551: **State v. Bitter**. Petition of appellant for further review denied on April 9, 2019.

No. A-18-558: **State v. Dughman**. Petition of appellant for further review denied on July 26, 2019.

No. A-18-560: **In re Interest of Ivanna E**. Petition of appellant for further review denied on April 10, 2019.

No. A-18-573: **Oswald v. Oswald**. Petition of appellant for further review denied on July 8, 2019, as untimely filed. See § 2-102(F)(1).

No. A-18-573: **Oswald v. Oswald**. Petition of appellant for further review denied on August 20, 2019.

No. A-18-592: **State v. Cardona**. Petition of appellant for further review denied on August 5, 2019.

No. A-18-624: **In re Interest of Louis C**. Petition of appellant for further review denied on April 12, 2019.

No. A-18-638: **In re Interest of Devin M. et al**. Petition of appellee Eugene E. for further review denied on April 10, 2019.

No. A-18-641: **Applied Underwriters v. Adco Roofing**. Petition of appellant for further review denied on June 14, 2019.

No. A-18-655: **Kitt v. Kitt**. Petition of appellee for further review denied on November 8, 2019.

No. S-18-675: **In re Interest of Donald B. & Devin B.**, 27 Neb. App. 126 (2019). Petition of appellant for further review sustained on June 19, 2019.

No. A-18-680: **Williams v. City of Lincoln**, 27 Neb. App. 414 (2019). Petition of appellant for further review denied on September 11, 2019.

No. A-18-693: **Fo Ge Investments v. First American Title**, 27 Neb. App. 671 (2019). Petition of appellant for further review denied on December 13, 2019.

No. A-18-709: **Applied Underwriters v. O'Connell Landscape Maintenance**. Petition of appellant for further review denied on December 12, 2019.

No. A-18-722: **In re Interest of Antonio J. et al**. Petition of appellant for further review denied on September 4, 2019.

No. A-18-723: **State v. Campbell**. Petition of appellant for further review denied on January 3, 2020.

No. A-18-729: **Taylor v. Compass Group USA**. Petition of appellant for further review denied on June 14, 2019.

No. A-18-733: **In re Interest of Payton P**. Petition of appellant for further review denied on July 26, 2019.

No. A-18-738: **State v. Schramm**, 27 Neb. App. 450 (2019). Petition of appellee for further review denied on November 14, 2019.

PETITIONS FOR FURTHER REVIEW

No. A-18-741: **Pope v. Frakes**. Petition of appellant for further review denied on May 28, 2019.

No. A-18-745: **In re Interest of Dreyvin H**. Petition of appellant for further review denied on May 13, 2019.

No. A-18-748: **State v. Cappel**. Petition of appellant for further review denied on August 20, 2019.

No. A-18-754: **Anderson v. Anderson**, 27 Neb. App. 547 (2019). Petition of appellant for further review denied on December 2, 2019.

No. A-18-785: **In re Guardianship of Suzette G.**, 27 Neb. App. 477 (2019). Petition of appellant for further review sustained on October 16, 2019.

No. A-18-797: **State v. McBride**, 27 Neb. App. 219 (2019). Petition of appellant for further review denied on June 28, 2019.

No. A-18-810: **State v. Smith**. Petition of appellant for further review denied on May 3, 2019. See § 2-102(F)(1).

No. A-18-813: **State v. Flores**. Petition of appellant for further review denied on July 26, 2019.

No. A-18-837: **In re Interest of Malcolm S. et al**. Petition of appellant for further review denied on July 12, 2019.

No. A-18-839: **In re Interest of Lilyanna N**. Petition of appellant for further review denied on August 12, 2019.

No. A-18-839: **In re Interest of Lilyanna N**. Petition of appellee Brianna N. for further review denied on August 12, 2019.

No. A-18-846: **In re Guardianship of Hamdan**. Petition of appellant for further review denied on September 19, 2019.

No. A-18-851: **In re Interest of Araceli Q. et al**. Petition of appellant for further review denied on June 10, 2019.

No. A-18-866: **State v. Burhan**. Petition of appellant for further review denied on January 14, 2020.

No. A-18-874: **Rosenfels v. Rosenfels**. Petition of appellant for further review denied on October 28, 2019, as premature. See § 2-102(F)(1).

No. A-18-874: **Rosenfels v. Rosenfels**. Petition of appellant for further review denied on December 31, 2019.

Nos. A-18-884 through A-18-887: **In re Interest of Becka P. et al.**, 27 Neb. App. 489 (2019). Petitions of appellant for further review denied on September 26, 2019.

No. A-18-897: **State v. Strodtman**. Petition of appellant for further review denied on July 3, 2019.

No. A-18-902: **State v. Valentine**, 27 Neb. App. 725 (2019). Petition of appellant for further review denied on December 12, 2019.

PETITIONS FOR FURTHER REVIEW

No. A-18-909: **State v. Castonguay**. Petition of appellant for further review denied on July 3, 2019.

No. A-18-917: **Fischetto v. Fischetto**. Petition of appellant for further review denied on November 22, 2019.

No. A-18-941: **State v. Morton**. Petition of appellant for further review denied on April 5, 2019.

No. A-18-960: **State v. Chavers**. Petition of appellant for further review denied on May 20, 2019.

No. A-18-961: **State v. Longsine**. Petition of appellant for further review denied on March 21, 2019, as untimely.

No. A-18-976: **Cutler v. Frakes**. Petition of appellant pro se for further review denied on March 29, 2019.

No. A-18-982: **In re Interest of Brittney Sue P**. Petition of appellant for further review denied on July 26, 2019.

No. A-18-991: **Harden v. State**. Petition of appellant for further review denied on March 12, 2019.

Nos. A-18-996, A-18-997: **In re Interest of Jacey P. & Skyelynn P**. Petitions of appellant for further review denied on November 14, 2019.

No. A-18-1025: **State v. Feldhacker**. Petition of appellant for further review denied on July 10, 2019.

Nos. A-18-1036 through A-18-1039: **State v. Burger**. Petitions of appellant for further review denied on August 5, 2019.

No. A-18-1054: **State v. Cole**. Petition of appellant for further review denied on August 28, 2019.

No. A-18-1055: **State v. Gomez-Molina**. Petition of appellant for further review denied on April 5, 2019.

No. A-18-1076: **State v. Allen**. Petition of appellant for further review denied on December 13, 2019.

No. A-18-1088: **State v. Dober**. Petition of appellant for further review denied on September 23, 2019.

No. A-18-1134: **Suelter v. Ogden**. Petition of appellant for further review denied on May 31, 2019.

No. A-18-1140: **State v. Ramirez-Bonilla**. Petition of appellant for further review denied on July 10, 2019.

No. A-18-1150: **State on behalf of Anya S. & Jayda S. v. Xavier D**. Petition of appellee Xavier D. for further review denied on November 22, 2019.

No. A-18-1156: **State v. James**. Petition of appellant for further review denied on January 3, 2020.

No. A-18-1157: **State v. Huynh**. Petition of appellant for further review denied on June 28, 2019.

PETITIONS FOR FURTHER REVIEW

No. A-18-1162: **Gray v. Frakes**. Petition of appellant for further review denied on October 9, 2019.

No. A-18-1169: **State v. Wesner**. Petition of appellant for further review denied on March 21, 2019.

No. A-18-1170: **Applied Underwriters v. Amazing Home Care Servs**. Petition of appellant for further review denied on June 14, 2019.

No. A-18-1171: **Priesner v. Starry**. Petition of appellants for further review denied on May 16, 2019.

No. A-18-1188: **State v. Davis**. Petition of appellant for further review denied on October 10, 2019.

No. A-18-1199: **Mumin v. Hansen**. Petition of appellant for further review denied on May 2, 2019.

No. A-18-1218: **State v. Riddle**. Petition of appellant for further review denied on July 31, 2019.

No. A-19-002: **State v. Hicks**. Petition of appellant for further review denied on July 10, 2019.

Nos. A-19-023, A-19-033: **State v. Pollard**. Petitions of appellant for further review denied on July 26, 2019.

No. A-19-036: **Applied Underwriters v. Steve Wills Trucking & Logging**. Petition of appellant for further review denied on June 14, 2019.

No. A-19-046: **State v. Carlson**. Petition of appellant for further review denied on June 7, 2019.

No. A-19-067: **Churchich v. Frakes**. Petition of appellant for further review denied on November 4, 2019.

No. A-19-068: **Coleman v. Frakes**. Petition of appellant for further review denied on June 20, 2019.

No. A-19-072: **Applied Underwriters v. Kiessling Transit**. Petition of appellant for further review denied on June 14, 2019.

No. A-19-074: **Campbell v. Frakes**. Petition of appellant for further review denied on November 7, 2019.

No. A-19-077: **State v. Gardner**. Petition of appellant pro se for further review denied on March 12, 2019, as premature.

No. A-19-080: **State v. Regalado-Mendez**. Petition of appellant for further review denied on September 25, 2019.

No. A-19-086: **Mumin v. Hansen**. Petition of appellant for further review denied on September 27, 2019.

No. A-19-091: **Frazier v. Frakes**. Petition of appellant for further review denied on October 21, 2019.

No. A-19-096: **State v. Robertson**. Petition of appellant for further review denied on January 17, 2020.

PETITIONS FOR FURTHER REVIEW

No. A-19-100: **Yanga v. State**. Petition of appellant for further review denied on May 10, 2019, for lack of jurisdiction. See § 2-102(F)(1).

No. A-19-102: **Davis v. Frakes**. Petition of appellant for further review denied on July 12, 2019.

No. A-19-103: **Yanga v. State**. Petition of appellant for further review denied on May 10, 2019, for lack of jurisdiction. See § 2-102(F)(1).

No. A-19-112: **State v. Davis**. Petition of appellee for further review denied on August 30, 2019.

No. A-19-117: **State v. Staska**. Petition of appellant for further review denied on January 3, 2020.

No. A-19-123: **Strawder v. Frakes**. Petition of appellant pro se for further review denied on August 26, 2019.

No. A-19-148: **In re Interest of Hope M. et al**. Petition of appellant for further review denied on June 25, 2019.

No. A-19-151: **State v. Kelley**. Petition of appellant for further review denied on January 3, 2020.

No. A-19-159: **In re Interest of Atticus B**. Petition of appellant for further review denied on December 17, 2019.

No. A-19-165: **Lincoln Homebuyers v. Bacon**. Petition of appellants for further review denied on August 21, 2019.

No. A-19-177: **Gray v. Johnson**. Petition of appellant for further review denied on October 25, 2019.

No. A-19-183: **State v. Fedde**. Petition of appellant for further review denied on August 23, 2019.

No. A-19-193: **State v. Broussard**. Petition of appellant for further review denied on December 2, 2019.

No. A-19-194: **State v. Seymour**. Petition of appellant for further review denied on May 17, 2019, for lack of jurisdiction.

No. A-19-197: **In re Interest of Jaya M. et al**. Petition of appellant for further review denied on December 2, 2019.

No. A-19-212: **State v. Hulme**. Petition of appellant for further review denied on December 20, 2019.

No. A-19-217: **In re Interest of Latrell K. et al**. Petition of appellant for further review denied on January 3, 2020.

No. A-19-234: **State v. McCray**. Petition of appellant for further review denied on December 20, 2019.

No. A-19-235: **State v. Johnson**. Petition of appellant for further review denied on September 19, 2019.

No. A-19-238: **Nolan v. Fremont Contract Carriers**. Petition of appellant for further review denied on August 23, 2019.

PETITIONS FOR FURTHER REVIEW

No. A-19-243: **Gray v. Frakes**. Petition of appellant for further review denied on November 8, 2019.

No. A-19-247: **In re Interest of A.M. & S.K.S**. Petition of appellant for further review denied on December 17, 2019.

No. A-19-253: **Alford v. Hansen**. Petition of appellant pro se for further review denied on September 13, 2019.

No. A-19-261: **State v. Sieckmeyer**. Petition of appellant for further review denied on October 10, 2019.

Nos. A-19-282, A-19-284: **State v. Warren**. Petitions of appellant for further review denied on October 4, 2019.

No. A-19-308: **Applied Underwriters v. Sky Materials Corp**. Petition of appellant for further review denied on January 16, 2020.

No. A-19-356: **State v. Hall**. Petition of appellant for further review denied on August 12, 2019.

No. A-19-401: **Security State Bank v. Bopp**. Petition of appellants for further review denied on October 3, 2019.

No. A-19-426: **State v. Prigge**. Petition of appellant for further review denied on November 22, 2019.

No. A-19-441: **Applied Underwriters v. O'Connell Landscape Maintenance**. Petition of appellant for further review denied on October 3, 2019.

Nos. A-19-456, A-19-457: **State v. Rik**. Petitions of appellant for further review denied on November 22, 2019.

No. A-19-492: **State v. Martinez**. Petition of appellant for further review denied on November 22, 2019.

No. A-19-515: **Gray v. Frakes**. Petition of appellant for further review denied on October 1, 2019.

No. A-19-559: **Bonnell v. Eisenmenger**. Petition of appellant for further review denied on September 5, 2019.

No. A-19-576: **Gardner v. International Paper Destr. & Recycl**. Petition of appellant pro se for further review denied on October 31, 2019.

No. A-19-653: **Blueitt v. Frakes**. Petition of appellant for further review denied on December 12, 2019.

No. A-19-676: **Robinson v. State**. Petition of appellant for further review denied on September 11, 2019. See § 2-102(F)(1).

No. A-19-677: **Clayborne v. Hansen**. Petition of appellant for further review denied on November 4, 2019.

No. A-19-698: **Barber v. Rickets**. Petition of appellant for further review denied on December 30, 2019, as untimely filed.

No. A-19-707: **Muhammad v. State**. Petition of appellant for further review denied on November 14, 2019.

PETITIONS FOR FURTHER REVIEW

No. A-19-759: **Mumin v. Frakes**. Petition of appellant for further review denied on November 4, 2019.

No. A-19-819: **Barber v. Frakes**. Petition of appellant for further review denied on November 8, 2019.

No. A-19-820: **Barber v. Frakes**. Petition of appellant for further review denied on November 13, 2019.

No. A-19-824: **State v. Rogers**. Petition of appellant for further review denied on December 30, 2019.

No. A-19-839: **In re Trust of Hunt**. Petition of appellant for further review denied on January 16, 2020.

No. S-19-913: **Great Northern Ins. Co. v. Transit Auth. of City of Omaha**. Petition of appellant for further review sustained on December 30, 2019.

No. A-19-975: **State v. Ezell**. Petition of appellant for further review denied on January 17, 2020.

Nebraska Court of Appeals

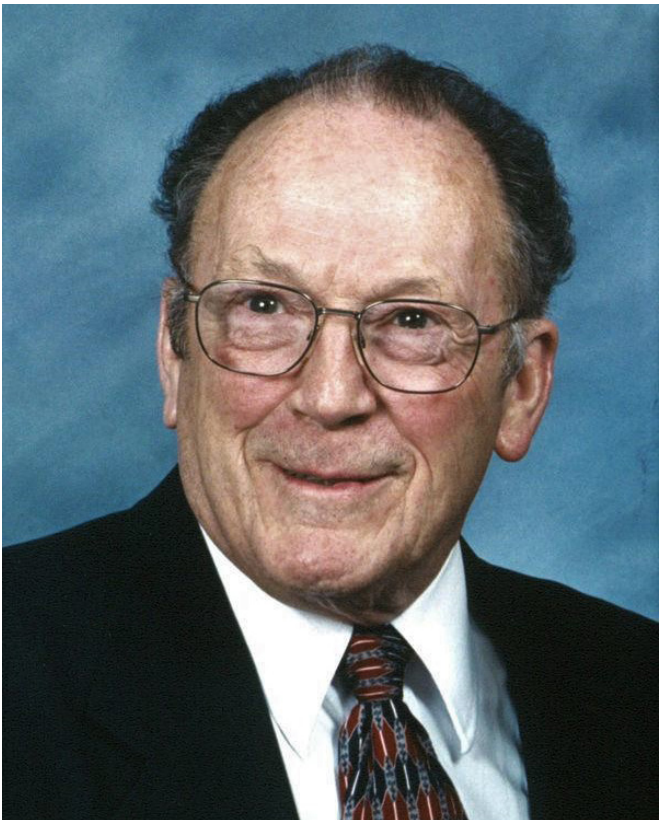
# In Memoriam

## Judge Edward E. Hannon

Nebraska Supreme Court Courtroom
State Capitol
Lincoln, Nebraska
April 15, 2019
3:00 p.m.

Proceedings before:
COURT OF APPEALS
Chief Judge Frankie J. Moore
Judge Michael W. Pirtle
Judge Francie C. Riedmann
Judge Riko Bishop
Judge David K. Arterburn
Judge Lawrence E. Welch, Jr.

In attendance:
SUPREME COURT
Chief Justice Michael G. Heavican
Justice Lindsey Miller-Lerman
Justice William B. Cassel
Justice Jonathan J. Papik
Justice John R. Freudenberg



Judge Edward E. Hannon

# Proceedings

CHIEF JUDGE MOORE: Good afternoon and welcome to you all. The Nebraska Court of Appeals is meeting in special session on this 15th day of April 2019 to honor the life and memory of former Court of Appeals Judge Edward E. Hannon and to note his many contributions to the legal profession. My name is Frankie Moore. I'm currently the Chief Judge of the Nebraska Court of Appeals. And I'd like to start the afternoon by introducing my colleagues here on the bench. To my immediate right is Judge Mike Pirtle of Omaha, and to his right is Judge Riko Bishop from Lincoln, and to her right is Judge Larry Welch from Plattsmouth. To my immediate left is Judge Francie Riedmann from Gretna and, to her left, Judge Dave Arterburn from Papillion.

And it's our special honor to introduce the members of the Nebraska Supreme Court who are with us here today. Please stand when I call your name. Chief Justice Michael Heavican, Justice Lindsey Miller-Lerman, Justice Jonathan Papik, and Justice John Freudenberg. Justices Stephanie Stacy and Jeff Funke were unable to join us today. And, of course, we're most especially privileged to have Justice William Cassel of the Supreme Court serving today as our master of ceremonies. I should note that both Justice Cassel and Justice Miller-Lerman are former members of the Nebraska Court of Appeals, and Justice Miller-Lerman was one of the original members, along with Judge Hannon.

I also would like to introduce to you former members of the Nebraska Supreme Court and Nebraska Court of Appeals who are here with us today. We have Justice Bill Connolly, who will be a speaker this afternoon. And we have Justices Nick Caporale, Justice C. Thomas White, Justice Ken Stephan, and Justice John Gerrard, all former members of the Nebraska Supreme Court, with us. We also have two former members

of the Nebraska Court of Appeals, Judge John Irwin, also an original member of the Nebraska Court of Appeals along with Judge Hannon, and Judge Rett Inbody, who will be a speaker this afternoon.

We're especially pleased to have so many members of the Hannon family with us today. And we would love to start out with Judge Hannon's beloved wife Mary, who's with us today.

Mary, if you're able to stand, would you stand and be recognized? Thank you.

We have all four of Judge Hannon's children with us today. We have his son Michael Hannon.

Michael, if you would please stand?

Came all the way from Pittsburgh, Pennsylvania. We have his son Patrick Hannon of Atlanta. We have daughter Maureen Lamski of Lincoln. And we have daughter Kathleen Hannon of Rochester, Minnesota. So, welcome. We also have two grandchildren with us, I believe, Elizabeth and Sarah.

Would you like to stand up, please? Thank you.

We also have several other members of the Hannon family. We have several nephews and we have, I believe, Mary's cousin. We won't recognize you all by name, but we are so pleased to have you with us.

I'm sure there are other members of the Nebraska judiciary that, if I don't introduce you by name, I apologize. I do know that we have other distinguished guests, including attorneys, here. We have Judge Hannon's and several other judges' former court reporter, Randy Fitch, is in attendance, and many other guests. And we're just very pleased that you are all with us today.

At this time, the Court recognizes Nebraska Supreme Court Justice William Cassel. Justice Cassel is the chairman of the Court of Appeals Memorial Committee today and he will conduct the proceedings for us.

Good afternoon, Justice Cassel.

JUSTICE CASSEL: Good afternoon. May it please the Court, distinguished members of the Court of Appeals, my colleagues on the Nebraska Supreme Court, many other judges,

members of Judge Hannon's family, and distinguished guests. I am especially grateful for the honor of serving as chair for Judge Hannon's memorial. I hope that the Court will indulge a few personal remarks from me before I call upon others.

It is well known that I had the challenge of following Judge Hannon on both the district court bench and on the Nebraska Court of Appeals. Judge Hannon and I were the last survivors of the District Court Judges of the 15th Judicial District which, several months after I took his place on the district court, was merged into the 8th District. But what you may not know is that the law firm of Cronin and Hannon, which Judge Hannon joined in 1959, was, for many years, associated with the firm of Farman and Cassel, which my father had joined in 1950.

Both Julius D. Cronin and George A. Farman, Jr., were local legends, but with very different practices. J.D. was a consummate trial lawyer and had served as the president of the Nebraska State Bar Association. George Farman was an expert in real estate law and had served in the House of Representatives of the Nebraska Legislature before it became a unicameral. J.D. sent real estate work to George, and George sent trial work to J.D.

By the time my father joined George and, later, Judge Hannon joined J.D., J.D. and George were considerably older and somewhat resistant to the technology that both my father and Judge Hannon endeavored to bring to their respective practices. Indeed, Ed and my father had a friendly competition over who had the latest gadget to improve the efficiency of his practice.

By the time that I joined my father's firm, Ed Hannon was well-established as the preeminent lawyer in O'Neill and, over the few years before he moved to the district court bench, I had the pleasure of litigating both on the same side and, occasionally, as an opponent. Every instance was a great learning experience for me as a young lawyer. And that was only enhanced when Judge Hannon served as a district court judge. He led the bar by example, epitomizing fairness, high scholarship, and devotion to the law. So, to those of us in the 15th District when

the Nebraska Court of Appeals was created, it was no great surprise that Judge Hannon was selected as one of the original six members of that Court.

Former Senator Benjamin Nelson who, as Nebraska's governor, appointed all of the original members of the Court had planned to be present to speak today. Unfortunately, he could not be here, but he has sent remarks to be read on his behalf. With the permission of the Court, I will now do so.

Senator Nelson said, "I want to thank Judge Cassel for sharing my remarks with you today. I had planned to be present, but a schedule change requires me to be out of town.

"Other speakers will share Judge Hannon's life and legal career before I met him. When I assumed the governor's office in 1991, one of the first and most important tasks was to interview and appoint all of the judges to the newly authorized Nebraska Court of Appeals, a daunting task. But, during our interview, Judge Hannon made it less so. From the outset, I was impressed with his candor and obvious judicial temperament. I was already aware of his reputation for a solid work ethic and judicial competence. After our discussion and my caution about judicial activism, I was convinced that Judge Hannon would be an excellent appellate judge, and he proved to be.

"Mary and family, you have every right to be proud of your husband and father. He will always be remembered as one of Nebraska's finest jurists."

The first chief judge of the Court of Appeals was Richard D. Sievers who, like Senator Nelson, was unable to be present today but sent remarks from Arizona to be read on his behalf. I move that Judge Sievers' remarks be inserted at this point in the record in their entirety, but that I be permitted to read selected portions thereof today.

CHIEF JUDGE MOORE: That motion will be granted.

(Judge Sievers' letter in its entirety is appended hereto.)

JUSTICE CASSEL: Thank you.

Judge Sievers said, "I want to thank the — for giving me the opportunity to be heard from whence I have escaped to avoid the white stuff that often falls from the sky in Lincoln." He,

perhaps, when he wrote that, didn't realize how recently that would have occurred.

(Laughter.)

"I extend," — this is Judge Sievers talking. "I extend my sympathies to Judge Hannon's wife Mary and his children Michael, Patrick, Maureen, and Kathleen, and my greetings to Ed's judicial colleagues and friends. As many of you know, Judge Hannon was one of the original six judges of the Court of Appeals. None of the six of us really knew each other, as we all came from different parts of the state and from various legal backgrounds. Ed was the only one of us with previous judicial experience. Within days of our joint appointment ceremony in December of 1991, I was named as the first chief judge of the Court, giving me some organizational responsibilities. Ed was a bit older than I and reputed to be an excellent trial judge, so I was a bit leery as to how he would respond to me, a judicial rookie, as the chief judge. As it turned out, Ed was an invaluable resource for me in the early days of the Court and throughout our time together.

"Ed Hannon was a walking library — law library." Excuse me. "I truly believe that he never forgot a Supreme Court opinion that he had read, even if it was 25 years ago. We shared chambers throughout our mutual judicial careers, and he was my go-to guy whenever I was stuck. And he would dredge up from his memory bank a case that I needed to read. Ed always had time to discuss an opinion and was always thoughtful and helpful. I went to him far more often than he came to me for help. His legal reasoning was always sharp and helpful.

"I have many fond memories of Ed, not only his intelligence and hard work, but what a good-hearted, happy man he was. He was a devoted family man, loved his wife and children dearly. He was a devout man. He was a kind man to all others. He treated his clerks and all Court staff with respect.

"He loved his rose garden and his red wine. He was also a fun and interesting dinner companion. As a Court of six, the six of us always went out for dinner one evening during our monthly argument session. He would regale us with his

war stories from his days as a practicing lawyer and a district judge. He was a man who could laugh at himself. Ed was a joy to have as a colleague in so many ways. I cherish my memories of working with him, and it was a privilege to have been his friend."

Another member of the original Court of Appeals was Justice William M. Connolly, then of Hastings, Nebraska. Justice Connolly served with Judge Hannon on the appellate court until Justice Connolly was appointed to the Nebraska Supreme Court in 1994, where he served with great distinction until his retirement from the high court in 2016. Justice Connolly.

JUSTICE CONNOLLY: Thank you, Judge Cassel.

Chief Justice Moore, Judges of the Nebraska Court of Appeals, members of the Supreme Court, retired members of the Supreme Court and Court of Appeals, Mary, family, and friends, I'm pleased to be here today to give a few comments about my friend and colleague Ed Hannon. We served together for about three years on the newly created Court of Appeals and I — it was a delight and I have fond memories of Ed Hannon.

But to tell you the truth, I don't think Ed's first impression of me was all that good. Because, back in the early 80s while I was a practicing lawyer, I appeared to — before him up in O'Neill. I represented a client, KN Energy, and they — that company sold natural gas to most of the cities in greater Nebraska. It was a rate case, which established rates for the city. And it was complex litigation with a lot of economists, accountants, real estate appraisers, different formulas how to figure out rate of return and return on equity, things of that nature. And I'd tried a few of those cases, and my thought was I really have to, you know, repeat a lot of the evidence because is the judge going to understand this, because trial judges, this wasn't their bag. It was the type of case that should have really been before a regulatory body. So, we have the trial scheduled for about four days. And about the second and a half — two and a half days into the trial, I have an economist on the witness stand and I'm plowing old ground. And Ed looks

down at me and he says, “Counsel, I think you think I’m deaf and dumb.”

(Laughter.)

And he said, “I can assure you I’m not deaf. You can draw your own conclusions on the dumb.”

(Laughter.)

He said, “You have been with this witness for three hours. I understand it. I get it. Get moving.” Needless to say, the four-day trial stood in — came to be a two-and-a-half-day trial.

And then, within a week or 10 days, I had the decision. I don’t even remember how — who prevailed, but I do remember this. Ed crafted a finely written six- or seven-page decision. He had the ability to simplify complex issues. He wrote a factual narrative that a layperson could understand. And I don’t know if Ed Hannon was impressed with me, but I certainly was impressed with Ed Hannon because he did a wonderful job.

I really got to know Ed when I came onto the Court of Appeals in 1991. And then, I really became impressed with Ed Hannon. We’ve all heard the term about student of the law. You know, I never quite grasped what a student of the law was. I thought it was kind of like a cliché. Well, his — I think Judge Cassel mentioned Sievers mentioned it — Ed had the uncanny ability to recollect cases — Supreme Court decisions that would go back 20 years. He would remember the result, the issues, and sometimes would even remember who authored the opinion. And so, he was a fountain of knowledge, as Judge Sievers indicated. And, as Judge Sievers indicated, he was the only member of the newly created Court of Appeals that had judicial experience. And, as indicated, we really sought Ed out. Because, when the Court of Appeals was created, there wasn’t any handbook, rules, regulations, procedure, protocol. And so, Dick Sievers — Judge Sievers and Ed, for the most part, was a guiding light in getting the Court of Appeals started and earning, quickly, the respect of the practicing bar.

Ed had a love and a passion for the law. And, as Judge Sievers indicated, if you really had a problem, if I had run into

a bump in writing an opinion, as most of us do, or a substantive issue that I wasn't clear on, I could always go to Ed and he was always open — his door was always open and I had the opportunity to sit down with him. And most — on most occasions, I came out of that discussion with a good feeling because — well, also a bad feeling, because I would say, well, why didn't I think of that.

(Laughter.)

But Ed had — saw the big picture. He — it was like a jigsaw puzzle, and I'm amazed that he could put the pieces together and get the result in a finely crafted opinion.

In closing, I might say I am grateful to have had the opportunity to work with such a fine judge and a fine man, and I will always cherish the memories that I have of Ed Hannon.

CHIEF JUDGE MOORE: Thank you very much, Justice Connolly.

JUSTICE CASSEL: The next speaker needs no introduction to the members of this Court as each of you, other than Judge Welch, served with him on the Court, and Judge Welch was appointed as his replacement. I refer, of course, to Judge Everett O. Inbody who served as a county court judge from 1986 to 1991; a district court judge from 1991 to 1995; and on this Court from 1995, when he replaced Judge Connolly, until his retirement in 2018. Judge Inbody.

JUDGE INBODY: Good afternoon. May it please the Court, Chief Judge Moore, members of the Court of Appeals, Supreme Court members, retired Supreme Court members, friends, colleagues of Honorable Edward E. Hannon. Thank you for giving me this opportunity to appear before this Honorable Court to speak about my colleague and friend Edward E. Hannon.

I had the honor and pleasure to serve with Judge Hannon on this Court from April 20th, 1995, until his retirement on December 31st, 2004. As been indicated, I was not one of the original individuals appointed to the Court of Appeals in December 1991. My term began after Justice Connolly was selected to the Nebraska Supreme Court in November of 1994. I was quite intimidated by going — coming onto the Court

of Appeals with four of the original members still being on the Court. After all, they had started an appellate court from scratch and had done a tremendous job; and now, I was going to get to be a part of this new adventure.

My wife, Patti, and I met Ed and Mary at a district court dinner in the summer of 1991. Ed and I were both from small town Nebraska serving a multi-county district as district court judges. We had a lot in common. Had a lot — a wonderful conversation that evening. But, by the end of that year, Ed had been selected as one of the original members of the six [judges] to the Court of Appeals. As a result, we did not have much interaction for the next few years. But, when I was selected to join the Court in 1995, Ed immediately reached out and made me feel comfortable. We were the only members of the Court that had practiced law in a small community and had been trial court judges. We had many similar experiences and, thus, began a close relationship.

During our time together on the Court, we regularly consulted on various cases. Ed had a wonderful memory and could recall cases from the past that dealt with issues presently before the Court. He always gave freely of his time, often brought to the discussion an angle or thought which the panel had not previously considered.

Shortly after I joined the Court, Chief Judge Sievers told the judges at an administrative meeting that a large-record case was coming through the system and would be the largest case we had seen to date. I referred to it as a coffin case, because it would bury the assigned judge. It turned out to be the World Radio case, and Ed got the assignment.

Now, we each had our own office on the ninth floor of this building, but some of us had our principal office in our hometown. Judge Wesley Mues kept his main office in Kearney. So, Ed asked if he could store the World Radio record in Wes's office on the ninth floor and Wes agreed. The size of the record was unbelievable. Boxes of exhibits and testimony were stacked all over the office. At that time, each judge on the Court was being assigned eight cases per month. But we all

agreed that Ed should be assigned just this one case because the record was so big.

Ed attacked the case just like he would any other. He ended writing a 33-page opinion that was concise, but still went into great detail on every issue that had been presented. It should have been obvious to the parties that Judge Hannon had spent a lot of time reviewing the record, the law, and conscientiously considered the arguments of the parties in rendering the decision for the panel. As a judge, I was amazed that he could reduce such a large and complicated record into such a concise 33-page opinion. The case went on to the Supreme Court for further review, and although that Court made a small modification, it generally affirmed the opinion that Judge Hannon had written on behalf of the panel.

In the 90s, there was a program for appellate court judges known as Spencer-Grimes through the American Bar Association. The program had been co-started by Justice Henry — Harry Spencer of the Nebraska Supreme Court. Members of the Court of Appeals were encouraged to attend these programs. Some of the summer conferences Ed and I would attend with Mary and Patti were in Canada where it was always cooler and a relief from the Nebraska heat was much appreciated. After a conference, we would spend a few extra days in the area taking in a major league baseball game or go to a botanical garden or both. One August, it was especially hot, and Patti said, “Let’s drive straight north until we get out of this heat.” So, I called Ed to see if he and Mary would like to join us, and they immediately said yes. Two days later, we drove north to Winnipeg, Manitoba. We enjoyed several days just visiting the area and, because of the cooler conditions in Canada, the flowers always seemed more colorful.

Ed loved his family and the law. Over the years, we spent many a summer evening talking about family and the law while enjoying a bottle of chardonnay. Ed also loved his garden. When we would go to their home, he wanted to show me all the work he had done to upgrade the backyard. He was always improving it. I think he was most proud of the irrigation

system that he had installed for all of his plants. He could control zones and determine how much water each plant in those areas would get. But none of the flowers he loved as much as the roses. And he had several varieties in his backyard, and he took great delight in explaining the differences to me.

After Ed retired, he volunteered to do legal work for the Society of St. Vincent de Paul. When we would get together, he would explain some of the projects he was working on. You could tell by the tone of his voice how much he truly enjoyed helping people through this program.

This is the third memorial service for a judge who served on the Nebraska Court of Appeals; however, this is the first service for one of the original six members. At our first memorial service, the words of District Court Judge Teresa Luther still rings in my head. She said, "I remember reading a book which attempted to help a person measure how their life was going. The test, it was simple. At the end of each day, you ask yourself two questions: Are you content where you have been, and are you proud of who you are?" At the time of Ed's passing on March 16th, 2017, I know Ed could answer with confidence, I am content with where I have been, and I am proud of who I am. I am proud to call my colleague, the Honorable Edward E. Hannon, my friend. Thank you.

CHIEF JUDGE MOORE: Thank you very much, Judge Inbody.

JUSTICE CASSEL: As the members of this Court know well, the relationship between a judge and his or her law clerk can be quite close. I'm not sure that we have a complete list of Judge Hannon's clerks during his tenure on the Court of Appeals. But, in addition to our next speaker, I am informed that Judge Hannon's clerks included former State Senator Burke Haar, Dan Fischer, Michelle Dreesen [Epstein], Kristin Crawford, Michael Devine, Mike Works, Julie Schultz [Self], Erika Schafer, Lori Helgoth, and Tracy Jamison, the last two of whom then served as clerks for me after I replaced Judge Hannon on the Court of Appeals. Another of Judge Hannon's law clerks was Matthew Acton, who now serves as a County

Court Judge for the Third Judicial District, and I'm pleased to call on Judge Acton.

JUDGE ACTON: May it please the Court, Judge Hannon's family, distinguished guests. I had the privilege of clerking for Judge Hannon back in the mid-90s. It was a busy time then. Court of Appeals was still in its infancy and there was a backload of cases to be dealt with. Judges Hannon, Sievers, and Inbody provided me with an opportunity to serve the entire Court for a year as a shared clerk; and, when I couldn't find a job as a practicing attorney, Judge Hannon graciously allowed me to stay with him for two more years. Judge Hannon was an excellent role model. He was a hardworking, no-nonsense, straight-to-the-point individual with a kind heart and a great laugh.

Justice Cassel asked me to speak about Judge Hannon's recovery from his stroke. He did sustain a stroke while I was working for him that caused him to take some time off and to go through physical rehabilitation. As I recall, Judge Hannon returned quite quickly and with the same dedication and zeal for his work that he exhibited previously. The only difference was that he had a bit of a hitch in his gait. Now, Judge Hannon usually had several coins in his pockets, so I could almost tell when he was approaching my cubicle. If he was deep in thought, the clanging would be a little slower. If he was excited about an opinion he was working on, the clanging of the coins would be quicker. Once in a while, he wouldn't have any coins in his pocket, and he would surprise me in my cubicle. I like to think he did just to check and see if his law clerk was talking baseball again with Judge Inbody.

(Laughter.)

Fridays were Judge Hannon's favorite days, but not for the reason that most of us enjoy Fridays, the brink of the weekend. On Friday mornings, Judge Hannon would race off the elevator, coins a-bouncing in his pocket, and ask loud enough so the entire ninth floor of the Capitol could hear, "What's new from on high?" He so enjoyed reading the Nebraska Supreme Court

opinions that were released first thing on Friday mornings. He was a true scholar of the law.

I am certain that Judge Hannon taught me quite a bit about legal research and writing. I fondly remember sitting across the large table in the Court of Appeals library from Judge Hannon reading and discussing case law or statutes. There is no doubt that he possessed an excellent memory and could recall facts in precedent from cases long past. But that's not what first comes to my mind when reflecting upon my time with him. My favorite memories are of Judge Hannon recounting humorous stories from his days as a practicing attorney or as a district court judge. The content of those stories is gone from my memory. Instead, it is the manner in which he told those stories that remain with me. Judge Hannon could tell a great story, often with such enthusiasm and excitement that he would burst out laughing while telling them. And while — and I, while laughing along with him, couldn't be sure if I had fully understood. I miss those stories.

When I was appointed to the bench in 2013, the Administrative Office of the Courts sent me book, entitled *Handbook for Judges*, which is an anthology of inspirational and educational readings from various judges. In that handbook, Judge Edward Devitt laid out the 10 commandments for a judge, and the first commandment was to be kind. Judge Hannon adhered to that. He was kind to all, whether it was counsel at oral arguments, his fellow judges, his staff, or to his law clerk who didn't know much about the law. There were times that something I had written deserved to be marked up with a red pen, like an overzealous schoolteacher might do. But Judge Hannon would only politely suggest, with a chuckle, "Matt, perhaps we need to look in a different direction." I appreciated his kindness.

I am grateful for my time with Judge Hannon. As is often the case with mentors, Judge Hannon gave me more than I gave him. He provided me with employment when no one else wanted to hire me, he encouraged me to become a trial attorney, he attended my wedding, and he was present when I was

sworn in as a judge. But, most of all, he was kind to me. I miss my mentor, my friend, Judge Hannon.

CHIEF JUDGE MOORE: Thank you very much, Judge Acton.

JUSTICE CASSEL: Our speakers thus far have concentrated on Judge Hannon's service on this Court, and Judge Acton spoke to Judge Hannon's skills as a mentor, skills which I can personally vouch for. He was also a mentor to young lawyers during his time as a practicing lawyer with Cronin and Hannon. One of the young lawyers who came to the firm immediately following his graduation from the Creighton University School of Law later went on to a distinguished career in public service. I refer to former Governor, Senator, and Secretary of Agriculture Mike Johanns, who started his legal career in O'Neill, Nebraska. Although Senator — or Secretary Johanns' schedule did not permit him to be present, he has sent remarks to be read on his behalf. And, with the permission of the Court, I will do so now.

Secretary Johanns says, "I would like to begin by offering my thoughts and condolences to Mary, Michael, Patrick, Maureen, and Kathleen. Ed loved his family, and I can assure you, he is looking out for you, even today.

"I went to work for Ed and J.D. in June of 1975. I was highly educated and knew absolutely nothing about practicing law. And that's where Ed entered my life. His direction was always quick and to the point. He would say, 'Make decisions. Track deadlines. Always put ethics first with no compromise.' He showed that faith fit with a professional life. Over 40 years ago, Ed gave me the signposts to follow. He was an amazing man who lives in all of us who had the good fortune to know him." Secretary Johanns concludes, "I thank God that Ed was a part of my life."

From 1959 to 1992, Judge Hannon's legal career was centered in O'Neill, Nebraska. And I know there are a number of our friends from O'Neill here today, not only the former court reporter who served with me and Judge Hannon and three others, by the way, but many of the members of the bar and

court staff from the O'Neill area. Shortly after the — shortly after Judge Hannon became the district court judge, a relatively — or then, relatively young lawyer was appointed to the County Court bench in the 15th Judicial District, headquartered at the same courthouse in O'Neill. From 1984 to 2017, Judge Alan Brodbeck served the 15th and then the 8th Judicial District with distinction and served on numerous committees and commissions at the state level. I call upon Judge Brodbeck.

JUDGE BRODBECK: Members of the Court of Appeals, members of the Supreme Court, retired members of the Court, Mary, and the Hannon family. Judge Hannon became a district judge in O'Neill in December of 1983. I became a county judge there in March of 1984. So, our judicial careers began at virtually the same time. Judge Hannon loved the law. He loved to research and study the law. Most every night, you could find him in his office in O'Neill working. When I would go down to the courthouse in an evening, I made it a habit to go upstairs, and he was always welcoming to me even though he was very busy. We would just sit and visit. We didn't discuss cases; we just talked about things we had in common as new judges. How things were — that worked how they did or how things didn't work. Occasionally, we talked about some of the lawyers that are here today. And I'm sure they talked about us also.

(Laughter.)

Ed was a long-time resident of O'Neill, while I was new to that city. He gave me information and advice on the area: who were the best doctors, who were the friendly bankers, where to buy whatever was needed. He was a wealth of information on the town and its inhabitants, and he freely shared that with me. In later years, after he became a judge of the Court of Appeals, we saw less of each other due to the distance. But, when our paths crossed at bar meetings or elsewhere, we always took a little bit of time to sit down and talk and get caught up on what was going on in our lives.

One of his keen interests was collegiality in the bar. He firmly believed that the system functions better if lawyers are able to professionally work together and talk with one another

in a friendly manner. Toward that end, he was adamant that we should have a monthly local bar meeting. This took place on the first Monday of every month after his motion day. Out-of-town lawyers were always invited, but frequently it was just the local attorneys that were there. And Junior Young who's — raised his hand — long-time clerk of the district court in O'Neill, he was always in charge of making everyone know we had a bar meeting that night.

Several of us who were there were of the same age bracket, and we have some lawyers —

Let's have — raise your hands if you're here from O'Neill.

Several of us were of the same age bracket, and the Judge enjoyed regaling us with stories of practice from days gone by. Those stories were always entertaining, 'cause Ed was a great storyteller. But they were also educational and informative. And the lawyers always looked forward to those monthly meetings. Those meetings were always held at the old Townhouse Steak House in O'Neill, because that was the only place in town that served frog legs. And Ed loved frog legs and he ordered those, I think, every month that we had a meeting.

Some of you probably know that Judge Hannon, when he was practicing law and early on in his career as a judge, loved to smoke cigarettes. But he decided to quit and he sought help from a hypnotist. He received a post-hypnotic suggestion that, whenever he craved a cigarette, that he would take a piece of Scotch Tape and roll it between his thumb and his index finger. The procedure was very effective. I don't think he ever went back to smoking. And those of us who know him can always agree that we would be better off today, financially, if we'd bought stock in the 3M Scotch Tape company.

(Laughter.)

I think fondly upon those years that Ed and I spent together as judges in O'Neill, the talks we used to have. To me, Judge Hannon was always gracious and welcoming. He was a good judge, he was a mentor, and he was a friend. Thank you.

CHIEF JUDGE MOORE: Thank you very much, Judge Brodbeck.

IN MEMORIAM
JUDGE EDWARD E. HANNON

JUSTICE CASSEL: There have been several references today to Judge Hannon's family. He was very proud. Of course, he loved Mary enormously. But he was very proud of his four children and all of their academic and professional achievements. Two of his children have followed him to a career before the bar.

His daughter, Maureen Lamski, is a member of the Nebraska Bar. And, before I introduce her, it occurs to me that, during — that thinking of her reminds me that, during his district court years, Judge Hannon served as the coordinator for our region of the Nebraska High School Mock Trial Project. His service in that capacity was so well-settled that, when I followed him to the bench, I just understood the coordinator's job went along with the judicial office.

Ms. Lamski, like many other talented youth of our region, gained a great deal from this worthy project that Judge Hannon did so much to advance during his judicial career. She is now a deputy county attorney for Lancaster County, Nebraska. And at this time, I'm pleased to call upon Maureen Lamski.

MS. LAMSKI: May it please the Court, Judge Moore, Justice Cassel, other judges from the Court of — from the Supreme Court and Appeals. I would like to thank everyone for all the time and preparation that went into this special ceremony. It is truly wonderful to see so many of my father's former coworkers, family, and friends here. Our father would have greatly appreciated it, just as he was always grateful that he had the opportunity to work in a profession that usually did not feel like work to him.

I was in grade school when my father was appointed to the district court. And, at that time, I did not understand what it meant to be a judge. My only question to him was if it meant that he would earn more money.

(Laughter.)

With a humor I did not fully appreciate at the time, he told me that a good attorney can always earn more than an honest judge. I did later learn that his judgeship would be a family affair, as he pressed my siblings and I into labor, removing

the old inserts from what seemed like hundreds of law books at the courthouse in O'Neill and then replacing them with the updated inserts. He wanted to make sure everyone, including himself, had the most current opinions.

I was in high school when our parents told us that he was — that my dad had applied for an appointment to the newly created Court of Appeals. I remember the excitement of going to Lincoln for the announcement and the swearing in ceremony. It was so exciting to get to meet Governor Ben Nelson. But it was mostly exciting because my dad was so thrilled. He loved his work as an attorney, and he loved his work as a district judge. And now, he had the opportunity to love his work as an appellate judge. I know he truly enjoyed his time sitting on the Court of Appeals, where he could enjoy both the intellectual rigors, as well as the friendships he made with the fellow judges.

My dad continued his dedication to the profession after retirement through filling in for other judges from time to time and also through his volunteer work. And even towards the end, when he was in no condition to work, he was still driven to want to do more.

Our father was fortunate enough to work in a profession he felt passionate about, and even more fortunate to work with others that shared his passion for the law. I know his legal career would have been less fulfilling if he did not get to spend the journey with his fellow attorneys and judges and law clerks along the way.

So, it is on behalf of my family that I thank you all for making this special setting possible and for practicing alongside our dad. Thank you.

CHIEF JUDGE MOORE: Thank you very much, Maureen.

JUSTICE CASSEL: May it please the Court, that concludes our presentation to you, and I thank you humbly and personally for the honor of serving as the chair for this memorial occasion. Thank you very much.

CHIEF JUDGE MOORE: Thank you very much, Justice Cassel.

IN MEMORIAM
JUDGE EDWARD E. HANNON

Before we conclude today, and I know it's warm in here, so we'll get moving. But I would just like to add a few brief comments as well about Judge Hannon. I was a new lawyer in 1983, having moved from the city of Lincoln, where I grew up, to North Platte, Nebraska, the great frontier. And so, my legal career began just about the same time that Judge Hannon became a district court judge in the, then, 15th Judicial District. And I had the privilege of traveling greater Nebraska and appearing before him from time to time.

Judge Brodbeck, you mentioned his willingness to include out-of-town lawyers when there would be a motion day. And I was the recipient of one of those invitations to have lunch at the — I think it was the Peppermill in Valentine after a motion day.

But my fondest memory was of a time that he taught me about punctuality. I'm thinking maybe his children learned that lesson, too, from their father. Not that I didn't always try to be punctual, but this was back in the day of no cellphones, of course, in the mid-80s. And this city girl was traveling up to Ainsworth for a hearing before Judge Hannon, and it was in the spring. And so, in the spring, sometimes, in the Sandhills, you come upon a cattle drive on the highway, which I did. I wasn't quite sure how to handle it, but I was only maybe five or 10 minutes late. But in his practical way, he begrudgingly forgave me for being a few minutes late and suggested that, in the springtime in Nebraska, you need to start out a little sooner than you might otherwise.

(Laughter.)

But he was a wonderful man, as you have heard about him today. He was always practical, no-nonsense, fair, compassionate. That character was evident in all he did, both publicly and privately. He's left an indelible mark on so many, and he's been a great servant to the state of Nebraska. So, thank you, family, for allowing us to have this session today.

Thank you, again, Justice Cassel, on behalf of our Court. We appreciate that you've chaired this memorial committee today.

And we thank you all for your presentations here.

I take this final opportunity for those present to note that this entire proceeding has been memorialized by this Court. We have been recording the proceedings. They will be preserved in video and written on the Nebraska Judicial Court website.

So, this concludes the special ceremonial session of the Nebraska Court of Appeals.

# IN MEMORIAM
# JUDGE EDWARD E. HANNON

James B. Gessford
Rex R. Schultze***
Daniel F. Kaplan
Gregory H. Perry
Joseph F. Bachmann*
R. J. Shortridge*
Joshua J. Schauer*
Derek A. Aldridge**
Justin J. Knight****
Charles Kaplan
Haleigh B. Carlson
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****Also admitted in Colorado

Ernest B. Perry (1876-1962)
Arthur E. Perry (1910-1982)
R. R. Perry (1917-1999)
Edwin C. Perry (1931-2012)

March 13, 2019

**Via Email: william.cassel@nebraska.gov**
Honorable William B. Cassel
Nebraska Supreme Court
State Capitol #2211
PO Box 98910
Lincoln, NE 68509

RE: *Judge Hannon*

Justice Cassel:

I want to thank Justice Cassel for giving me the opportunity to be heard, from whence I have escaped to avoid the white stuff that often falls from the sky in Lincoln. I extend my sympathies to Judge Hannon's wife Mary, and his children, Michael, Patrick, Maureen, and Kathleen, and my greetings to Ed's judicial colleagues, and friends.

As many of you know, Judge Hannon was one of the six original judges of the Nebraska Court of Appeals appointed at the inception of the Court by then Governor Nelson. None of the six of us really knew each other, as we all came from different parts of the State and from various legal backgrounds. Ed was the only one of us with previous judicial experience. Within days of our joint appointment ceremony in December of 1991 I was named as the first chief judge of the court---giving me some organizational responsibilities. Ed was a bit older than I, and was reputed to be an excellent trial judge, so I was a bit leery as to how he would respond to me, a judicial rookie, as the Chief Judge. As it turned out Ed was an invaluable resource for me in the early days of the Court, and throughout our time together on the Court.

Ed, John Wright and I were initially ensconced on the first floor in the Capitol---I had an actual office, and Ed and John were in a large room, and they had to go through my office to get to their work space. Because John and Ed were together in that hideaway, to this day I believe that Ed was an unindicted co-conspirator in John Wright's pranks that he seemed to relish playing on me. Some of you may remember some of John Wright's tricks—such as John managing to get his hands on my first Judicial Evaluation Poll before I saw it and making some not so flattering edits

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on it before it got to me. The edits made me believe that I had totally failed in my first 2 years on the bench. Although pleading innocence, Ed thought it was very funny; me not so much.

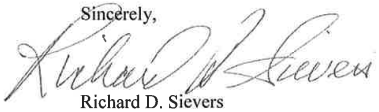
Ed Hannon was a walking law library; I truly believe that he never forgot a Supreme Court opinion that he had read---even if it was 25 years ago. We shared chambers throughout our mutual judicial careers, and he was my go-to guy whenever I was "stuck," and he would dredge up from his memory bank a case that I needed to read. Ed always had time to discuss an opinion with me and was always thoughtful and helpful. I went to him far more often than he came to me for help. His legal reasoning was always sharp, and helpful---with one exception, a product of his slight stubborn streak. I was assigned an opinion on an appeal in which the trial court had granted a summary judgment, which Ed believed with every fiber of his body was wrong---but he was on the wrong side of a 2-1 vote. Ed said he would write a dissent. For at least 2 weeks thereafter, he was fully occupied in looking up and reading virtually every summary judgment opinion ever written by the Nebraska Supreme Court and writing his dissent. I would occasionally during that time stick my head in his office---now littered with open case books and copies of cases---and asked him "what's up" he would say "working on my dissent." My attempts to convince him that he might just be wrong on this one were unavailing. He wrote his dissent, which encouraged the losing party to seek further review from the Supreme Court which they promptly denied. We never discussed that case thereafter.

I have many fond memories of Ed Hannon; not only his intelligence and hard work, but what a good hearted, happy man he was. He was a devoted family man, loved his wife and children dearly. He was a devout man. He was a kind man to all others, he treated his clerks and all court staff with respect. Ed was willing to lend a hand at any task. He loved his rose garden, and his red wine. He was a fun and interesting dinner companion---as a court the six of us always went out for dinner one evening during out monthly argument session. He would regale us with his war stories from his days as a practicing lawyer and a district judge. He was a man who could laugh at himself. In the first year of the Court, Ed, John Irwin, and I did an argument session in Scottsbluff traveling in a state van with a couple of our law clerks. Ed wanted to stop in Oshkosh for ice cream. I naturally left the key in the ignition, and when we returned to the van to leave, we were locked out. Without any real evidence I suggested that Ed had pressed the lock button when he left the van, but he maintained his innocence for years with a grin and a laugh, which I thought made him more guilty. We ended up calling the county sheriff to come break into the van with his "slim-jim." We relived that incident many times, but Ed never could escape blame.

Ed was a joy to have as a colleague in so many ways. I cherish my memories of working with him and it was a privilege to have been his friend. I never heard a negative word said about him as a man, a husband, a father, a boss to his clerks, or as a judge. He was a one of a kind guy. The Nebraska judiciary was incredibly well served by his presence on the bench, and his family can be very proud of the person he was and the contributions he made to the cause of justice.

I regret not being in Lincoln today for this ceremony for Ed, but frankly I was afraid it might still be snowing. Thank you for allowing me to share some thoughts and memories about my dear friend and colleague Ed Hannon. I suspect he now gets all the red wine he wants.

Sincerely,



Richard D. Sievers

RDS/

# Charles Bridwell and Sylvia Bridwell, husband and wife, appellees, v. Brett Walton and Gary Walton, doing business as Walton Contracting, appellants.

925 N.W.2d 94

Filed March 12, 2019. No. A-17-1011.

1. **Pleadings: Appeal and Error.** Permission to amend a pleading is addressed to the discretion of the trial court, and an appellate court will not disturb the trial court's decision absent an abuse of discretion.
2. **Verdicts: Juries: Appeal and Error.** A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party.
3. **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.
4. **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.
5. **Pleadings: Damages: Waiver.** Failure to mitigate damages is an affirmative defense which must be pled or it is waived.
6. **Motions to Dismiss: Directed Verdict.** A motion to dismiss for failure to prove a prima facie case should be treated as a motion for a directed verdict.
7. **Directed Verdict: Waiver: Appeal and Error.** A defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with trial and introduces evidence waives any error in the ruling on the motion for a directed verdict.
8. **Appeal and Error.** A trial court cannot err in failing to decide an issue not raised, and an appellate court will not consider an issue for the first time on appeal.

9. **Verdicts: Appeal and Error.** Passion or prejudice is shown when the verdict shocks the conscience.
10. **Damages: Remittitur.** Generally, where the damages awarded are greater than the amount claimed in the declaration, or, from the facts disclosed by the evidence, are clearly excessive, and the illegal portion is distinguishable from the legal, the defect may usually be remedied by a remittitur of the excess.
11. **Jurors: Verdicts.** A quotient verdict is one in which the jurors, for the purpose of arriving at a verdict, agree that each should write on his or her ballot a sum representing his or her judgment, that the aggregate should be divided by the number of jurors, and that the jurors will be bound by the quotient as their verdict.
12. ____: ____. It is the agreement by the jurors to be bound by the quotient which creates the invalidity of quotient verdicts; the process of arriving at a quotient is valid so long as there is no prior agreement to be bound by the result.

Appeal from the District Court for Nuckolls County: Vicky L. Johnson, Judge. Affirmed.

Robert M. Sullivan, of Sullivan Shoemaker, P.C., L.L.O., for appellants.

Benjamin H. Murray, of Murray Law, P.C., L.L.O., for appellees.

Pirtle, Bishop, and Arterburn, Judges.

Pirtle, Judge.

## INTRODUCTION

Brett Walton and Gary Walton, doing business as Walton Contracting (collectively appellants), appeal from a jury verdict entered in Nuckolls County District Court in favor of Charles Bridwell and Sylvia Bridwell (collectively appellees) for breach of contract regarding appellants' construction of an addition to appellees' home. Appellants also appeal the jury verdict rejecting their counterclaim for unpaid work. Appellants allege that the district court erred in denying their motion to amend pleadings, in failing to dismiss the case for failure to

demonstrate the standard of workmanlike manner, and in denying their motion for new trial and remittitur on the basis of an excessive and unsupported jury verdict. For the reasons that follow, we affirm.

## BACKGROUND

Appellees own a home in Superior, Nebraska. In 2013, they decided to have an addition to the home constructed. To this end, they contacted appellants in order to get an estimate of what such an addition would cost. Gary came to the home and examined the work to be done, including removal of the existing garage and construction of the new addition. Gary later provided a bid to appellees in the amount of $32,182.21 for labor and materials, which bid appellees accepted.

The work began in late September 2013 and included the removal of the existing garage and excavation and grading of some of the yard. The foundation was laid in October, along with the framing and the roof. Installation of windows and doors, as well as additional framing took place in November. In December, appellees met with Gary and Brett to expand the contract to cover finishing the interior of the addition, bringing the total bid to $63,207.46. Sheetrock was installed on the interior from December through March 2014.

Charles had noticed and pointed out to appellants what he believed to be defects over the course of construction, including problems with the concrete, size of the crawlspace, windows, size of the doors, the way sheetrock was hung, a dip in the roof, and the way the roof was completed. Appellees provided a "punch list" to appellants in March 2014 listing the various issues they had with the project, which list was signed by both parties. Throughout March and April, work continued on the addition. Work was stopped during the month of May because appellees were out of state. On June 3, appellants returned to work and Charles had a conversation with Gary. While the parties dispute what was said during that conversation, it is undisputed that following the conversation, appellants

packed up their tools and left the worksite. Appellees had paid appellants $50,400 of the $63,207.46 total contract amount over the course of the construction.

Appellees brought the present action for breach of contract based on the failure to construct the addition in a workmanlike manner, and appellants filed an answer and counterclaim for unpaid work. A jury trial took place from April 25 to 27, 2017, at the conclusion of which the jury returned a verdict in favor of appellees in the amount of $40,000. The jury also found in favor of appellees on appellants' counterclaim. Appellants subsequently filed a motion for new trial and a motion for remittitur, which the district court denied.

## ASSIGNMENTS OF ERROR

Appellants assign the district court erred in (1) denying their motion to amend the pleadings to conform to the evidence, (2) failing to dismiss the case for failure to demonstrate the standard of workmanlike manner, and (3) denying their motions for new trial and remittitur on the basis that the jury's verdict was excessive and unsupported.

## STANDARD OF REVIEW

[1] Permission to amend a pleading is addressed to the discretion of the trial court, and an appellate court will not disturb the trial court's decision absent an abuse of discretion. *United Gen. Title Ins. Co. v. Malone*, 289 Neb. 1006, 858 N.W.2d 196 (2015).

[2] A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005).

[3] 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. *Id.*

## ANALYSIS

*Motion to Amend Pleadings to Conform to Evidence.*

Appellants made a motion to amend the pleadings to conform to the evidence in order to include an affirmative defense of failure to mitigate damages on the basis that the issue of mold and water damage had not been pled, but had been implicitly tried. At trial, it was revealed, based upon photographs of the property, that water was infiltrating the structure. On cross-examination, appellants asked Charles what materials would be required to complete the project, assuming construction had been acceptable to the point appellants left the job, to which he responded that he was not sure, as there could be mold in the walls. Appellants did not object to this mention of mold and then further pressed Charles, asking about water damage inside and outside the walls and whether he had done anything about it.

The next mention of mold was from the testimony of an independent contractor, Randy Schultz. Schultz is a cousin of Charles, but was called by appellants to provide his estimate for completing the project. On cross-examination, Schultz was asked if his estimate would change if water had infiltrated behind the walls. It was at this point that appellants objected to the testimony of water infiltration. The objection was overruled. Schultz stated that if water had infiltrated behind the walls, his opinion would change because that damage, and the possibility of issues with mold, would require that the whole addition be demolished. On redirect, appellants questioned Schultz regarding his experience in mold remediation, which he had none, and whether he had performed testing on the walls for mold, which he had not. Appellants raised their motion to amend the pleadings to conform to the evidence after this testimony. The district court rejected this motion, finding that "this is not a Motion to Amend to conform to the evidence," but, rather, "a motion to raise an affirmative defense" and that the defense had been waived.

[4] As a preliminary matter, appellants argue in their brief that the testimony by Schultz regarding water infiltration and testimony regarding potential mold was speculative and prejudicial and that thus, the district court erred in allowing this evidence in over objection. However, appellants did not specifically assign this alleged 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. *Chafin v. Wisconsin Province Society of Jesus*, 301 Neb. 94, 917 N.W.2d 821 (2018). As such, we will not consider this issue of Schultz' testimony.

[5] Regarding the motion to amend the pleadings, failure to mitigate damages is an affirmative defense which must be pled or it is waived. See *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983). Because appellants did not plead failure to mitigate damages, they have waived the defense. See Neb. Ct. R. Pldg. § 6-1108(c) (parties shall "set forth affirmatively" their affirmative defenses). See, also, *Estermann v. Bose*, 296 Neb. 228, 892 N.W.2d 857 (2017) (because Nebraska's pleading rules are modeled after federal rules, Nebraska looks to federal decisions for guidance); 61A Am. Jur. 2d *Pleading* § 322 (2018) (as general principle under Fed. R. Civ. P. 8(c), affirmative defenses must be pled specifically in first responsive pleading or it is deemed waived). While appellants allege that the defense was brought out through testimony, we concur with the district court that there was not sufficient evidence adduced at trial to justify amending the pleadings to conform to the evidence. There was nothing in the pleadings regarding mold or water infiltration, and no damages were requested based on water infiltration or remediation of mold. The initial mention of mold was made during appellants' cross-examination of Charles, to which appellants did not object or make a motion to strike, followed by additional questions on water infiltration. Therefore, we find no merit to this assigned error.

*Failure to Dismiss Due to Lack of Evidence of Workmanlike Manner.*

Appellants allege that appellees failed to demonstrate what the standard of workmanlike manner was and, thus, could not prove that appellants' work fell below that standard, requiring the district court to dismiss the case. At trial, appellants made a motion to dismiss at the end of appellees' evidence based on an alleged failure to demonstrate the standard of workmanlike manner. The motion was denied.

[6,7] Nebraska has uniformly held that a motion to dismiss for failure to prove a prima facie case should be treated as a motion for a directed verdict. *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 513 N.W.2d 495 (1994). A defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with trial and introduces evidence waives any error in the ruling on the motion for a directed verdict. *Id.* Because appellants proceeded to adduce further evidence after the district court overruled the motion, they have waived any error as to that motion.

[8] In addition, appellants failed to renew their motion for directed verdict at the close of all evidence, raising again the issue of appellees' failing to meet their burden of proof. The motion for new trial did not raise the issue either. A trial court cannot err in failing to decide an issue not raised, and we will not consider an issue for the first time on appeal. *Vande Guchte v. Kort*, 13 Neb. App. 875, 703 N.W.2d 611 (2005). As such, this assigned error fails.

*Jury Award and Motions for New Trial and Remittitur.*

Appellants' third, fourth, and fifth assignments of error, that the jury's award was excessive and unsupported, are consolidated and addressed together. These issues were raised within the motions for new trial and remittitur.

[9] Appellants' first challenge is that the verdict was given under the influence of passion or prejudice, in violation of Neb. Rev. Stat. § 25-1142(4) (Reissue 2016). This is primarily couched around two arguments: first, that the verdict was based on the premise that the entire addition needed to be demolished, and second, that the possibility of mold had been raised. Passion or prejudice is shown when the verdict shocks the conscience. *Crewdson v. Burlington Northern RR. Co.*, 234 Neb. 631, 452 N.W.2d 270 (1990).

Two contractors were called to testify regarding the cost to remedy any defects. Lathan McLaughlin estimated that it would cost $120,014.71 to demolish the addition to the foundation and complete construction. McLaughlin did note that some of the costs he included in his estimate were not included in the original contract or were materials that had already been purchased by appellees. Schultz also testified on this issue, estimating that it would cost $99,400 to demolish the addition to the foundation and complete construction. While both contractors testified that they thought the best approach would be to tear down the current addition and rebuild, they each conceded that many of the issues could be resolved without completely demolishing the addition. They each also testified as to what individual repairs on various items would cost if demolition were determined to not be necessary. The jury ultimately awarded appellees $40,000.

We cannot say in this case that the verdict shocks the conscience. The verdict is significantly less than what appellees requested as relief and is less than either of the bids that were offered for remedial work on the addition. The relatively few mentions of mold in the testimony were brief, and the recommendation of Schultz was that if there were mold, then the entire addition would need to be demolished. Given that the jury's verdict was less than the bids which were based on the demolition of the addition to the foundation, it is clear that they were not influenced by the mere suggestion of mold. As such,

the district court did not err in denying the motion for a new trial on this issue.

[10] Appellants next allege that the jury's award was excessive given the facts revealed during trial. This is based on appellants' examination of each of the contractors where they walked through many of the issues with the addition and asked them how much it would cost to fix individual issues. Appellants allege that the totals were $12,300 from McLaughlin and $9,700 from Schultz. However, these totals assume only some of the remediation would be carried out, and some items were not included in this total. Generally, where the damages awarded are greater than the amount claimed in the declaration, or, from the facts disclosed by the evidence, are clearly excessive, and the illegal portion is distinguishable from the legal, the defect may usually be remedied by a remittitur of the excess. *Barbour v. Jenson Commercial Distributing Co.*, 212 Neb. 512, 323 N.W.2d 824 (1982). The verdict is not in excess of the requested damages by appellees, and such amount is well within the estimated bids of the contractors. Therefore, we find that the verdict is not excessive and that thus, the district court properly denied the motion for new trial and remittitur on this basis.

[11,12] Finally, appellants object to the jury's verdict on the basis that it is not supported by the evidence, in violation of § 25-1142(6), or was a quotient verdict, contrary to NJI2d Civ. 4.02. We have already addressed the issue of the evidence supporting the verdict and found there to be sufficient evidence to support the jury's verdict. A quotient verdict is one in which the jurors, for the purpose of arriving at a verdict, agree that each should write on his or her ballot a sum representing his or her judgment, that the aggregate should be divided by the number of jurors, and that the jurors will be bound by the quotient as their verdict. *Anis v. BryanLGH Health System*, 14 Neb. App. 372, 707 N.W.2d 60 (2005). It is the agreement by the jurors to be bound by the quotient which creates the

invalidity of quotient verdicts; the process of arriving at a quotient is valid so long as there is no prior agreement to be bound by the result. See *id.* Appellants do not point to any evidence in the record which would suggest that the jury used a quotient verdict process or that it was the result of an agreement to be bound by the quotient verdict prior to finding the average. Accordingly, this argument is without merit and the district court did not abuse its discretion in denying the motion for new trial on this basis.

## CONCLUSION

We conclude that the district court did not abuse its discretion in denying appellants' motion to amend to conform to the pleadings and did not abuse its discretion in denying the motion for new trial and remittitur. The jury's verdict and order of the district court is affirmed.

Affirmed.

# In re Interest of Robert W., a child under 18 years of age. State of Nebraska, appellee, v. Robert W., appellant.

925 N.W.2d 714

Filed March 12, 2019. No. A-18-166.

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. **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.
3. **Jurisdiction.** An actual case or controversy is necessary for the exercise of judicial power.
4. **Moot Question: Words and Phrases.** A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
5. **Courts: Judgments.** In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.
6. **Moot Question.** As a general rule, a moot case is subject to summary dismissal.
7. **Moot Question: Appeal and Error.** Under certain circumstances, an appellate court may entertain the issues presented by a moot case when the claims presented involve a matter of great public interest or when other rights or liabilities may be affected by the case's determination.
8. **Moot Question: Words and Phrases.** In determining whether the public interest exception should be invoked, the court considers the public or private nature of the question presented, the desirability of an

authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.

9. **Minors: Proof.** The exhaustion requirement of Neb. Rev. Stat. § 43-251.01(7)(a) (Reissue 2016) demands evidence establishing that no other community-based resources have a reasonable possibility for success or that all options for community-based services have been thoroughly considered and none are feasible.

Appeal from the Separate Juvenile Court of Lancaster County: Toni G. Thorson, Judge. Affirmed.

Joe Nigro, Lancaster County Public Defender, and James G. Sieben for appellant.

Patrick F. Condon, Lancaster County Attorney, and Julie Mruz for appellee.

Pirtle, Bishop, and Arterburn, Judges.

Pirtle, Judge.

## INTRODUCTION

Robert W. appeals from two orders of the separate juvenile court of Lancaster County finding that all community-based resources to assist him and his family in keeping Robert in the family home had been exhausted and ordering him placed outside of the home. Based on the reasons that follow, we affirm.

## BACKGROUND

On November 6, 2017, a petition to adjudicate Robert was filed, alleging that he had committed two felony offenses: terroristic threats and use of a deadly weapon to commit a felony. The charges stemmed from an incident in which Robert pointed a handgun at the back of another juvenile's head. An order for immediate custody was attached to the petition. A supplemental petition was filed on November 9, alleging three additional misdemeanor charges. On November 17, Robert entered a no contest plea to the use of the deadly weapon to commit a felony offense and he was adjudicated under Neb.

Rev. Stat. § 43-247(2) (Reissue 2016). The remaining charges were dismissed.

Following his adjudication, the court ordered him to be "detained at the Lancaster County Juvenile Detention Center [and to] cooperate with a co-occurring evaluation" with psychological testing. Dr. Leland Zlomke, a licensed psychologist, conducted an evaluation on December 4, 2017, and an updated evaluation on December 21.

Four continued disposition hearings were held between December 8, 2017, and February 16, 2018. During this time, Robert remained at the detention center. The evidence presented at the disposition hearings showed that when police officers went to Robert's home on November 3, 2017, to retrieve the gun used in the offense, officers noticed a "strong odor of marijuana" throughout the home, "as if marijuana is smoked within the house on a consistent basis." Robert's mother, Kelley B., had a boyfriend, Jamil W., who lived with Robert and Kelley. Jamil has a criminal history involving marijuana. Probation reports showed that there had been repeated burglaries at Robert's home, and the police indicated that the break-ins were related to the belief that there were large quantities of illegal substances in the home.

At the first disposition hearing on December 8, 2017, Robert's probation officer, Allison Rusler, stated that Robert and Kelley wanted him to return to his home. Rusler discussed the safety plan recommended for Robert if he were to be placed in Kelley's home. Rusler testified that Kelley had indicated she was willing to follow the safety plan. The plan included a requirement that Robert be supervised by an adult at all times. Kelley indicated that Jamil would be one adult that could supervise Robert, and she indicated they coparent together. In addition to Jamil's criminal history of drug use, Jamil has a history of assaultive behavior, including domestic violence against Kelley. Most recently, in October 2017, Jamil was charged with assault in the second degree for "assaulting an individual with a baseball bat."

Kelley also provided the names of other individuals who could assist her in continuously supervising Robert, including Desiree H., who had a criminal history that included citations for marijuana possession as recently as August 2017 and whose own children have been adjudicated and removed from her home. Other names listed as potential supports for Robert's at-home placement included Desiree's mother, who was cited for "child abuse/neglect" in 2001; an individual who lives outside of the state and who could not assist with implementing the safety plan; and an individual who struggles with mental health disorders.

Rusler also discussed the first psychological evaluation performed by Zlomke. In the initial evaluation, Zlomke noted that Robert had a moderate to high risk of recidivism. Zlomke's recommendations included weekly outpatient psychotherapy, cognitive behavioral therapy and "moral decision making" therapy, in-home family therapy and skill building, random drug screenings, and a stable school placement. According to Rusler, Zlomke did "not necessarily recommend[] himself that [Robert] be released" to live in Kelley's home, but did recommend that a "strict safety plan" would need to be put into place if Robert were placed in Kelley's home. Rusler indicated that there would be significantly less risk to the community if Robert were to be placed "in a group home setting" as opposed to in-home placement.

Rusler informed the court that Zlomke did not have important collateral information available at the time he completed the first evaluation. Therefore, the court allowed the probation office to provide Zlomke with supplemental information, which led to an updated evaluation report.

Zlomke's updated evaluation, dated December 21, 2017, was discussed at the continued disposition hearing on December 28. The evaluation stated that Robert has a long-term history of "impulsive, disrespectful and aggressive behavior," starting around age 10. Robert had received special education supports for several years and had been educated in schools with

additional supports for youth with behavioral disturbances on and off over the years.

The updated evaluation noted that Robert's school attendance worsened significantly between 2013 and 2016. In the most recent school year at the time of the evaluation, he was tardy to first period approximately 90 percent of the time. In 2017, Robert was suspended from school three times between September and November. The suspensions resulted from incidents involving disrespect of authority, verbal threats (including threats to bring a weapon to school on September 9), assault of another student on October 4, and actual possession of a gun and threats on November 3. Outside of school, Robert's criminal activity escalated over the course of 2017. The incidents included an assault in April, a minor in possession charge in May, shoplifting and a second assault in October, and finally the incident with the loaded firearm in November.

Zlomke's updated evaluation noted that Robert had participated in a diversion program for the minor in possession charge, but Robert had reoffended before completion of the program. Robert was charged with shoplifting and assault while in the diversion program. Robert was told that if he finished diversion successfully, he would not be referred to the county attorney for the shoplifting and assault charges. However, Robert was subsequently discharged from the diversion program after the November 2017 gun incident in the present case.

Zlomke diagnosed Robert with childhood-onset conduct disorder, a condition that manifests as "defiance, anger and disruptive" behaviors when challenged by authority figures, and "[o]ther specified impulse control problems." Zlomke maintained that Robert posed a "moderate to high" risk for recidivism without appropriate supports, supervision, and treatment.

Zlomke's updated evaluation made several recommendations as to how to handle Robert's case going forward. First, Zlomke recommended that due to Robert's risk level and the

seriousness of his offense, Robert would need "a coordinated nearly continuously supervised safety plan [which] will need outside supports to the family in-home and community with close collaboration between home and school. Outside supports may include evening reporting, tracker/community support and in-home treatment nearly every day initially. Possibly electronic monitoring as well." Zlomke also recommended "[i]ntense special educational supports," including collaboration with parents or trackers to "'pass'" Robert from one adult who is sure he has no weapons to the next adult. He also continued his recommendations from his initial report for individual therapy, "moral decision making" therapy, and random drug screens.

At the December 28, 2017, disposition hearing, Jody Busse, Rusler's supervisor, testified that Yankee Hill School, a highly supervised and highly structured high school in Lincoln, Nebraska, was being considered as the school Robert would attend. She testified that she believed the school would meet Robert's educational needs. She also indicated that Yankee Hill School could at least in part meet the recommendation for intense special education supports. Busse also testified that the probation office was recommending an intensive in-home service such as "Multisystemic Therapy" or "Intensive Family Preservation." Busse also testified that there was difficulty in finding therapy providers to treat Robert in his home, as there were concerns about the severity of his offense and the community safety risk.

Kelley testified that if Robert were to be placed in his home, she would take Robert to school in the morning and pick him up after school and she would take him to work with her during times when school was not in session.

Regarding out-of-home placements, as of the December 28, 2017, hearing, Robert had been accepted by Clarinda Academy in Clarinda, Iowa, and his case was under review by several group homes. The court determined that disposition should be continued because it wanted to hear back from other residential

placements before entering final disposition and because it wanted more information about what type of safety plan could be developed that did not have "gaps."

The next disposition hearing was held on January 16, 2018. Rusler explained the safety plan that was developed by the probation office which included either "Multisystemic Therapy" or "Intensive Family Preservation" services in the home; Robert's attending Yankee Hill School; Kelley's taking him to and from school and taking him with her to work when necessary; an electronic monitor; and individual and family therapy. The safety plan also recommended that Robert have no contact with certain individuals and submit to random drug tests. Rusler testified that a "tracker" could also be used, which is someone who would meet with Robert multiple times per week, as well as day and/or evening reporting if needed. Rusler also testified that the safety plan required that Robert have constant supervision, which involved a risk that there would not be someone available to supervise him 100 percent of the time.

Rusler also testified at the January 16, 2018, hearing that it was unlikely that Yankee Hill School would be able to provide one-on-one monitoring of Robert; rather, supervision would be by teachers that are assigned to classes just like any other school. She further explained that she believed Yankee Hill School would do its best to comply with the safety plan, but she did not believe that there would be someone to walk Robert from classroom to classroom or that the school would provide extra supervision for Robert as compared to other students.

Rusler noted that Robert had been accepted for placement at the Omaha Home for Boys (OHB) and Clarinda Academy, pending an opening. She testified that Robert would be able to immediately begin the therapy services Zlomke recommended at either of these placements. She also stated that OHB and Clarinda Academy both have their own on-campus schools.

At the same hearing, Kelley again testified that she would follow the safety plan and was willing to cooperate with any

services put in place. She also confirmed her intent to rely on help from Desiree, Desiree's mother, and an individual who struggles with mental health disorders during times she was unable to supervise Robert.

On January 24, 2018, the court entered an "Order Continuing Dispositional Hearing on the Second Amended Petition" noting that Zlomke recommended a coordinated "'nearly continuously supervised'" safety plan and the probation office had made an effort to develop such a plan. The court found that the supports and safety plan that could be developed in the community were inadequate to provide the level of supervision that Robert required to be able to remain in the family home. The court stated that Robert presented

> a serious risk to the community and himself. Given the high level of risk and inadequate safety plan available in the home, even with supports provided by probation, the Court finds: all available community-based resources have been exhausted to assist the juvenile and his family; and maintaining the juvenile in the home presents a significant risk of harm to the juvenile and the community.

The court continued the disposition hearing pending an opening at OHB.

Following a disposition hearing on February 16, 2018, the court entered an order titled "Reasonable Effort Determination; Order Continuing Detention; Notice of Review Hearing," finding that reasonable efforts had been made and all available community resources had been exhausted to assist Robert and his family in maintaining him in the family home. The court stated that the efforts considered and attempted included the probation office's efforts to develop an adequate safety plan, contact with in-home therapeutic services, background checks of possible safety monitors, evaluation, and updated evaluation. The court further found that maintaining Robert in the home presented a significant risk of harm to him and the community.

The court also entered an "Agreement and Order of Probation," placing Robert on probation for the duration of his minority, with a review in 6 months, and ordering him to reside at OHB.

Robert filed a timely appeal. Subsequently, the State filed a "Suggestion of Mootness and Motion to Dismiss," along with a motion to file a supplemental transcript. The State alleged that following a probation review hearing in the juvenile court on August 20, 2018, Robert was allowed to transition back to Kelley's home, and that as of August 28, he was residing there full time. As a result, the State alleged Robert's appeal was now moot. Robert filed an objection to the State's "Suggestion of Mootness and Motion to Dismiss." He does not dispute that he is back in Kelley's home, but argues that such fact alone does not make the case moot. We denied the State's motion at the time "with arguments preserved for final submission to the court."

## ASSIGNMENT OF ERROR

Robert assigns that the juvenile court erred in finding that all community-based resources to assist him and his family had been exhausted prior to the court entering an order removing Robert from his family home.

## 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 Dana H.*, 299 Neb. 197, 907 N.W.2d 730 (2018).

## ANALYSIS

*Mootness.*

[2,3] Before reaching the legal issues presented, we must first address the State's argument that this appeal has become moot. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Weatherly v. Cochran*, 301 Neb. 426, 918 N.W.2d

868 (2018). An actual case or controversy is necessary for the exercise of judicial power. *Id.*

[4-6] A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Id.* Usually, in the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory. *Id.* Therefore, as a general rule, a moot case is subject to summary dismissal. *Id.*

In this appeal, Robert challenges his placement outside his home. At this point in time, Robert is no longer in out-of-home placement—he is living with his mother, Kelley. We conclude that this case is moot because the parties no longer have a cognizable interest in the outcome of the determination of whether the court erred in finding that all community-based resources had been exhausted and in placing Robert outside the home as a dispositional order.

[7,8] Nonetheless, under certain circumstances, an appellate court may entertain the issues presented by a moot case when the claims presented involve a matter of great public interest or when other rights or liabilities may be affected by the case's determination. *Weatherly v. Cochran, supra*. In determining whether the public interest exception should be invoked, the court considers the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem. *Id.*

Although the appeal is moot, we choose to address, under the public interest exception, the issue of whether all community-based resources had been exhausted when the court determined to place Robert outside his home. Authoritative guidance on the matter is desirable because it is likely to reoccur in the future. We note, however, that the issue of

whether community-based resources have been exhausted is fact specific and must be determined based on the circumstances of each case. Because we conclude that the public interest exception to the mootness doctrine applies, we next address the merits of the issue presented.

*Out-of-Home Placement.*

Robert assigns that the juvenile court erred in finding that all community-based resources to assist him and his family had been exhausted prior to the court's entering an order placing him out of the home. The controlling statute applicable to this case is Neb. Rev. Stat. § 43-251.01(7) (Reissue 2016), which provides:

> A juvenile alleged to be a juvenile as described in subdivision (1), (2), (3)(b), or (4) of section 43-247 shall not be placed out of his or her home as a dispositional order of the court unless:
>
> (a) All available community-based resources have been exhausted to assist the juvenile and his or her family; and
>
> (b) Maintaining the juvenile in the home presents a significant risk of harm to the juvenile or community.

[9] The exhaustion requirement of § 43-251.01(7)(a) demands evidence establishing that no other community-based resources have a reasonable possibility for success or that all options for community-based services have been thoroughly considered and none are feasible. *In re Interest of Keyanna R.*, 299 Neb. 356, 908 N.W.2d 82 (2018); *In re Interest of Dana H.*, 299 Neb. 197, 907 N.W.2d 730 (2018).

The evidence showed that the probation office tried to develop an adequate safety plan that would allow Robert to stay in his home. However, the plan required that Robert be supervised by an adult at all times. There was obvious risk to this plan in that it would be difficult to enforce 100 percent of the time. The safety plan also included in-home therapy, an electronic monitor, no contact with certain individuals, and random drug tests. Probation also considered use of a tracker,

who could meet with Robert up to five times per week, as well as day and/or evening reporting if needed. The probation office also performed background checks on the individuals Kelley identified as those she would rely on for help in supervising Robert. The individuals included Jamil, Kelley's live-in boyfriend who has a criminal history of assault, including assault of Kelley, as well as a criminal history involving marijuana. The other individuals Kelley identified to help supervise Robert all have various issues making them less than ideal candidates for supervising Robert. Also, Yankee Hill School, the school that Robert was going to attend, could not provide the level of supervision Robert required. The evidence also showed that Robert was unsuccessfully discharged from a diversion program in regard to a previous crime. He also posed a moderate to high risk factor of recidivism without appropriate supports, supervision, and treatment.

The record establishes that other options for community-based resources were thoroughly considered but deemed inappropriate or unnecessary. We conclude that the evidence supports the juvenile court's determination that all available community-based resources had been exhausted to assist Robert and his family in maintaining him in the family home, as required by § 43-251.01(7)(a).

In regard to the risk analysis required under § 43-251.01(7)(b), Robert does not allege error in the court's finding that this requirement was met. He alleges only that the court found that this factor was met and then improperly relied on that finding to conclude all community-based resources were exhausted. We conclude that this factor is clearly met, and we need not address it further.

## CONCLUSION

For the reasons set forth above, we affirm the orders of the juvenile court finding that all community-based resources were exhausted and placing Robert outside his home.

Affirmed.

# Brady Keith, on behalf of himself and all others similarly situated, appellant, v. Data Enterprises, Inc., appellee.

925 N.W.2d 723

Filed March 19, 2019. No. A-17-654.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. ____: ____. When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusions.
3. **Limitations of Actions: Pleadings.** A challenge that a pleading is barred by the statute of limitations is a challenge that the pleading fails to allege sufficient facts to constitute a claim upon which relief can be granted.
4. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.
5. **Limitations of Actions: Pleadings.** If a complaint on its face shows that the cause of action is time barred, the plaintiff must allege facts to avoid the bar of the statute of limitations.
6. **Limitations of Actions: Contracts.** Generally, there is a 5-year statute of limitations on a written contract.
7. ____: ____. An action on an oral contract can only be brought within 4 years.
8. **Actions: Contracts: Time: Damages.** A cause of action in contract accrues at the time of breach or the failure to do the thing agreed to. This is so even though the nature and extent of damages may not be known.
9. **Limitations of Actions: Negligence.** The statute of limitations for negligence and negligent misrepresentation is 4 years.
10. **Limitations of Actions: Negligence: Torts.** In a negligence action, it has generally been stated that a statute of limitations begins to run as

soon as the cause of action accrues, and an action in tort accrues as soon as the act or omission occurs.

11. **Federal Acts: Contribution.** Where a third-party complaint seeks indemnification or contribution for violation of a federal statute, federal law applies.
12. **Federal Acts: Contribution: Liability.** A defendant held liable under a federal statute has a right to indemnification or contribution from another only if such right arises: (1) through the affirmative creation of a right of action by Congress, either expressly or implicitly, or (2) under the federal common law.
13. **Federal Acts: Contribution.** The Fair Credit Reporting Act does not contain any language expressly providing for contribution or indemnity.
14. **Federal Acts: Intent: Appeal and Error.** In determining whether a federal statute that does not expressly provide for a particular private right of action nonetheless implicitly created that right, an appellate court's task is one of statutory construction. The ultimate question in cases such as this is whether Congress intended to create the private remedy that the plaintiff seeks to invoke. Factors relevant to this inquiry are the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing state remedies.
15. **Federal Acts.** The Fair Credit Reporting Act has not been found to support an implied right to indemnity.
16. **Courts.** The U.S. Supreme Court has recognized the need and authority in some limited areas to formulate what has come to be known as federal common law. These instances are few and restricted, and fall into essentially two categories: those in which a federal rule of decision is necessary to protect uniquely federal interests and those in which Congress has given the courts the power to develop substantive law.
17. ____. Absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of states or our relations with foreign nations, and admiralty cases.
18. **Courts: Contribution.** The only federal interest in contribution or indemnification is the vindication of federal statutory rights, but because that interest does not involve the duties of the federal government, the distribution of powers in our federal system, or matters necessarily subject to federal control even in the absence of statutory authority, it is insufficient to ground a federal common law cause of action.

19. **Judgments: Appeal and Error.** If a trial court arrives at the correct result even though it uses a reason different from that expressed by an appellate court, its judgment will still be upheld.
20. **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 Lancaster County: Andrew R. Jacobsen, Judge. Affirmed.

Joshua C. Dickinson, of Spencer Fane, L.L.P., for appellant.

Colin A. Mues and Emily R. Motto, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

Riedmann, Bishop, and Welch, Judges.

Bishop, Judge.

## I. INTRODUCTION

Brady Keith appeals from the decision of the district court for Lancaster County which granted the motion to dismiss of Data Enterprises, Inc., for failure to state a claim upon which relief could be granted. We affirm.

## II. BACKGROUND

### 1. Basis of Case

This case arose from the printing of credit and debit card expiration dates on the printed receipts issued to customers of a Lincoln, Nebraska, restaurant. Showing the expiration date on the receipt was a violation of federal law. The Fair and Accurate Credit Transactions Act of 2003 (FACTA), Pub. L. No. 108-159, 117 Stat. 1952, is an act to amend the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 et seq. (2012), "to prevent identity theft, improve resolution of consumer disputes, improve the accuracy of consumer records, make improvements in the use of, and consumer access to, credit information, and for other purposes." As relevant here, § 113 of FACTA amended 15 U.S.C. § 1681c of FCRA by adding subsection (g). Thus, 15 U.S.C. § 1681c(g) states in part:

> **(g) Truncation of credit card and debit card numbers**
> **(1) In general**
>
> Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.

(Emphasis in original.)

### 2. Factual Background

Because this appeal arises from the district court's order granting a motion to dismiss for failure to state a claim, the facts considered are those alleged in Keith's complaint.

Back Yard Burgers of Nebraska, Inc. (BYBN), owned and operated several food retail locations in several cities in Nebraska, including one on Andermatt Drive in Lincoln.

Data Enterprises is a Tennessee corporation engaged in the business of providing services and equipment for the processing of credit and debit card transactions. Data Cash Register Co. is the predecessor to Data Enterprises. (Data Enterprises will be referred to hereinafter as "DCR," as it was prior to this appeal and in the parties' briefs on appeal.)

Because BYBN lacked the expertise to process credit and debit card transactions, it entered into an agreement with DCR, whereby DCR agreed to process credit card transactions for BYBN and to issue receipts for such transactions. DCR was "fully and solely responsible for establishing a system at BYBN's retail location" to process credit or debit card transactions and to issue receipts for such transactions in compliance with state and federal law.

DCR first installed systems to process credit or debit card transactions at BYBN's locations in June 2005. Thereafter, BYBN entered into yearly support agreements with DCR whereby DCR agreed to provide support and maintenance for the systems installed by DCR. The yearly support agreements were in effect from August 15 of a given year until August 14

of the following year. BYBN entered into yearly support agreements with DCR every year starting on August 15, 2007, until August 15, 2010. Thus, DCR was required to provide support and maintenance to BYBN from August 15, 2007, until August 14, 2011.

The support and maintenance under the yearly support agreements was provided by Merchant Link, a third party, but BYBN contracted with DCR and made all payments to DCR, not to Merchant Link. Merchant Link acted on behalf of DCR in providing support under the yearly support agreements.

Between August 15, 2007, and August 14, 2011, Keith, "and thousands of other customers, used a debit or credit card to make purchases" at BYBN's Andermatt location. In each purchase that occurred between those dates, customers were given a DCR-generated cash register receipt displaying the expiration date of the customer's card.

### 3. Procedural Background

#### (a) Federal Action

On May 25, 2011, Keith filed his "First Amended Complaint" against BYBN in the U.S. District Court for the District of Nebraska, "See Case 8:11-CV-00135, Doc. 15." The federal complaint alleged that BYBN violated FACTA by issuing receipts displaying the last four digits of customers' credit and debit cards, as well as the expiration date for those cards. The federal complaint also sought to certify a "Class" composed of "'all persons who used either a Visa or MasterCard debit or credit card, or American Express credit card at the Andermatt Location, where BYBN provided an electronically printed receipt at the point of sale or transaction that displayed the expiration date of that person's credit or debit card . . . .'"

BYBN sent a demand letter to DCR on July 1, 2011, claiming that DCR was required to indemnify BYBN for any liability attributable to BYBN due to DCR's failure to comply with FACTA, "'and urging DCR to participate in the negotiations

between BYBN and [Keith].'" DCR sent a responsive letter on July 15 denying liability to BYBN and refusing to participate in negotiations. (There is no allegation that any attempt was made to bring DCR in as a party in the federal lawsuit.)

On July 1, 2014, Keith, "on behalf of thousands of customers that were certified as a Class," entered into a settlement agreement with BYBN. In the settlement agreement, BYBN agreed to the "'entry of a Consent Judgment'" against them and in favor of Keith on behalf of the "'Class'" in the amount of $2,792,400. The settlement agreement states, in part:

> "BYBN agrees to fully and unconditionally quitclaim assign to [Keith] any claim it may have against [DCR] based on or arising out of [Keith's] and the Class members' claims against BYBN, including but not limited to any claims it may have for contribution, indemnity, fraud, negligence, breach of contract, any statutory claims under federal, state or local law, and any other claims related in any way to BYBN's violations of FACTA as alleged by [Keith] in this matter."

And Keith agreed that "'as a precondition to any efforts to collect any monies from BYBN under this Agreement, [Keith] shall first exhaust any and all reasonable efforts to collect the judgment against DCR.'"

The settlement agreement, which "was the result of extensive negotiations between [Keith's] counsel, on behalf of the Class, and BYBN" and "involved a neutral mediator," was "carefully . . . reviewed and approved by the United States District Court for the District of Nebraska"; final approval was given on February 20, 2015.

(b) Current Action

On August 31, 2016, Keith, "[o]n behalf of himself and all others similarly situated," filed a complaint against DCR in the district court for Lancaster County. The complaint states the action was brought "to enforce a judgment assigned to [Keith] by [BYBN], meant to redress DCR's wrongful disclosure

of [Keith's] personal financial information." The complaint alleged breach of contract (count I), breach of contract (acts of Merchant Link as agent for DCR) (count II), negligence (count III), indemnity (count IV), negligent misrepresentation (count V), and violation of Nebraska's Uniform Deceptive Trade Practices Act (UDTPA) (count VI). In each count, Keith prayed for judgment against DCR "in the amount of the Consent Judgment, $2,792,400, plus pre-judgment interest, post-judgment interest, for its costs incurred herein, including reasonable attorneys' fees," and for such other relief as the court deemed just and proper.

On November 4, 2016, DCR filed a motion to dismiss each of Keith's claims pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6), for failure to state a claim upon which relief can be granted. DCR specifically alleged that Keith's claims for breach of contract, breach of contract (acts of Merchant Link as agent for DCR), negligence, negligent misrepresentation, and violation of UDTPA were all barred by the applicable statute of limitations. DCR further alleged that as to all claims, "the purported class action does not meet the commonality requirement or show that [Keith] can satisfy any judgment on behalf of the class."

A hearing on the motion to dismiss was held in January 2017. The district court subsequently filed its "Order of Dismissal" on May 24. In its order, the district court found that Keith's claims for breach of contract, breach of contract (acts of Merchant Link as agent for DCR), negligence, negligent misrepresentation, and violation of UDTPA were all barred by the applicable statute of limitations. The court further found that based on the allegations, the settlement, equitable principles, and principles of law, Keith's claim for indemnification failed to state a claim upon which relief could be granted, and that such failure could not be cured by amendment. Finally, the court found the complaint failed to state a claim on behalf of a class. The court dismissed the complaint with prejudice.

Keith appeals.

## III. ASSIGNMENTS OF ERROR

Keith assigns that the district court erred in (1) "determining that there was no genuine issue of material fact despite [Keith's] well-pleaded facts regarding indemnity in each claim causing the court to find that the statute of limitations ran at an earlier, dispositive date" and (2) denying his "overall indemnity claim by making a greater factual determination regarding the parties' relationship that went well beyond a court's role in a motion to dismiss."

## IV. STANDARD OF REVIEW

[1,2] A district court's grant of a motion to dismiss is reviewed de novo. *Tryon v. City of North Platte*, 295 Neb. 706, 890 N.W.2d 784 (2017). When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusions. *Id*.

## V. ANALYSIS

### 1. Statute of Limitations

Keith claims that the district court erred in determining that the statute of limitations had run on counts I, II, III, and V. He does not challenge the district court's determination that count VI (violation of UDTPA) was time barred.

[3-5] DCR raised the statute of limitations issue within its motion to dismiss pursuant to § 6-1112(b)(6) of Nebraska's pleading rules. A challenge that a pleading is barred by the statute of limitations is a challenge that the pleading fails to allege sufficient facts to constitute a claim upon which relief can be granted. *Anthony K. v. Nebraska Dept. of Health & Human Servs.*, 289 Neb. 540, 855 N.W.2d 788 (2014). To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. *Id*. As such, if a complaint on its face shows that the cause of action is time

barred, the plaintiff must allege facts to avoid the bar of the statute of limitations. *Id*.

(a) Breach of Contract—Counts I and II

In count I of his complaint, Keith alleged that DCR breached its contract with BYBN

> for installation of the point of sale system by failing to program the point of sale terminals so that BYBN was not in violation of any federal, state or local law, including that any customer receipt would mask the expiration dates for credit and debit card receipts in order to not violate FACTA.

His complaint alleged that DCR first installed systems to process credit or debit card transactions in June 2005.

In count II of his complaint, Keith alleged that DCR breached the yearly support agreements with BYBN by failing to provide the compliance service offered by Merchant Link (as agent of DCR), which resulted in FACTA violations. His complaint alleged that the FACTA violations occurred between August 15, 2007, and August 14, 2011.

[6-8] Generally, there is a 5-year statute of limitations on a written contract. See Neb. Rev. Stat. § 25-205(1) (Reissue 2016). An action on an oral contract can only be brought within 4 years. See Neb. Rev. Stat. § 25-206 (Reissue 2016). A cause of action in contract accrues at the time of breach or the failure to do the thing agreed to. *Irving F. Jensen Co. v. State*, 272 Neb. 162, 719 N.W.2d 716 (2006). This is so even though the nature and extent of damages may not be known. *Id*.

The district court found that based on the allegations in the complaint, the latest point a breach of contract could have occurred was on August 14, 2011, which means that the 5-year statute of limitations would have run on August 14, 2016. Keith did not file his complaint against DCR until August 31, which was more than 5 years after any alleged breach. The district court noted that the complaint did not include any allegations that the applicable statute of limitations should be tolled. Accordingly, the district court found that counts I and II

were time barred by § 25-205 and failed to state a claim upon which relief could be granted.

(b) Negligence and Negligent Misrepresentation—Counts III and V

In count III of his complaint, Keith alleged that DCR was negligent when it installed the point-of-sale systems for BYBN, which resulted in "the issuance of customer receipts for debit and/or credit card transactions" that were in violation of FACTA. He also alleged that DCR was negligent when it provided deficient support through Merchant Link that resulted in "the issuance of customer receipts for debit and/or credit card transactions" that were in violation of FACTA. And as noted previously, his complaint alleged that DCR first installed systems to process credit or debit card transactions in June 2005 and that the FACTA violations occurred between August 15, 2007, and August 14, 2011.

In count V of his complaint, Keith alleged that DCR negligently misrepresented to BYBN that DCR possessed the knowledge and expertise to install point-of-sale systems for the processing of credit and debit card transactions that would ensure compliance with state and federal laws. Keith further alleged that DCR negligently misrepresented to BYBN that DCR and Merchant Link, its agent, possessed the knowledge and expertise to provide support maintenance that would ensure compliance with state and federal laws. Keith alleged DCR's representations were not true because DCR's installation of the point-of-sale systems and subsequent support maintenance of the systems did not result in compliance with FACTA. Again, his complaint alleged that DCR first installed systems to process credit or debit card transactions in June 2005 and that the FACTA violations occurred between August 15, 2007, and August 14, 2011.

[9,10] The statute of limitations for negligence and negligent misrepresentation is 4 years. See Neb. Rev. Stat. § 25-207(3) (Reissue 2016). In a negligence action, it has generally been stated that a statute of limitations begins to run as soon as the

cause of action accrues, and an action in tort accrues as soon as the act or omission occurs. *Shlien v. Board of Regents*, 263 Neb. 465, 640 N.W.2d 643 (2002).

The district court found that based on the allegations in the complaint, the latest point in which negligence by DCR could have occurred was on August 14, 2011, which means that the 4-year statute of limitations would have run on August 14, 2015. Keith did not file his complaint against DCR until August 31, 2016, which was more than 4 years after any alleged negligence. The district court noted that the complaint did not include any allegations that the applicable statute of limitations should be tolled. Accordingly, the district court found that counts III and V were time barred by § 25-207 and failed to state a claim upon which relief could be granted.

(c) Counts I, II, III, and V
Barred by Statute of Limitations

We agree with the district court that counts I, II, III, and V are barred by their applicable statute of limitations. Keith acknowledges that "the [district] court was correct in its determination of the length of the statute of limitations for breach of contract and tort claims in Counts I, II, III and V," but contends that the district court "did not take into consideration the basis of these Counts are indemnification claims, which control when the statute runs." Brief for appellant at 3. And "'Nebraska has long held that a claim for indemnity accrues at the time the indemnity claimant suffers loss or damage.'" *Id*. at 4 (quoting *Dutton-Lainson Co. v. Continental Ins. Co.*, 271 Neb. 810, 716 N.W.2d 87 (2006)). "The statute of limitations for indemnification claims is extended since indemnity claims are an 'inchoate right which do not arise until one tort feasor has paid more than his share of the damages or judgment.'" Brief for appellant at 4 (quoting *City of Wood River v. Geer-Melkus Constr. Co.*, 233 Neb. 179, 444 N.W.2d 305 (1989)).

Although the holding in *City of Wood River* supports a claim for indemnification filed after the applicable statute of

limitations for the underlying claim, it does not support the preservation of the separate claims alleged here. In *City of Wood River*, the city brought a breach of contract action against the contractor of a wastewater treatment facility after the facility's aeration system broke down and could not be repaired. The contractor filed a third-party complaint against the manufacturer and supplier of an aeration system for the facility. The district court found that the third-party complaint was barred by the statute of limitations. On appeal, the Nebraska Supreme Court said that before it could determine whether the statute of limitations barred the contractor's third-party claim, the court needed to determine whether the contractor sought damages on a breach of warranty or sought indemnification. It determined that even though the third-party claim did not specifically ask for indemnity, and instead asked for damages for breach of warranty, it was evident from the pleading that if the contractor suffered damages because of the manufacturer's failure to fulfill its contractual obligation, it would look to the manufacturer for payment of their loss; thus, the third-party complaint raised an indemnification cause of action. The Supreme Court noted, "A duty to indemnify will always arise out of another more basic obligation whether it arises on contract or tort." *Id.* at 184, 444 N.W.2d at 309.

Keith cannot save any separate causes of action for contract and tort against DCR by trying to retitle them as indemnity claims; the district court properly concluded that these claims were barred by the statute of limitations. However, Keith pled a separate count of indemnity, and his indemnity claim will be addressed in its own right. Notably, the district court did not find that Keith's indemnity claim was time barred.

### 2. Indemnification—Count IV

In count IV of his complaint, specifically referred to as "indemnity," Keith alleged in relevant part:

> 83. Under the terms of the Consent Judgment, BYBN is legally obligated to pay damages to the Class in the amount of $2,792,400.

84. DCR's breach of contract, negligent and/or reckless acts by itself and through its agent Merchant Link were the cause of BYBN's FACTA violations because DCR agreed to assure FACTA compliant receipts for transactions between BYBN and its customers both in installing the point of sale system and through the Yearly Support Agreements.

85. BYBN was unaware that it was not in compliance with FACTA because it relied on the assurance of DCR and DCR's agent.

86. DCR owes a legal duty to indemnify BYBN for any violations of state or federal law.

87. DCR's failure to indemnify BYBN would be unjust.

Keith contends he "alleged two separate bases in Count IV for DCR's duty to indemnify BYBN under Nebraska law: (1) that DCR had an implied contractual duty to indemnify BYBN under its Yearly Support Agreement with BYBN, and (2) DCR had an implied-at-law duty to indemnify BYBN." Brief for appellant at 5. For various reasons, the district court found that Keith failed to state a claim for indemnity upon which relief could be granted.

We need not address the parties' arguments or the district court's analysis on indemnity, because such arguments and analysis were based on state law remedies, and we find that federal law is applicable and dispositive. Although not raised by the parties or by the district court, we conclude federal law does not provide Keith, standing in the place of BYBN, a right of indemnity against DCR under FACTA.

[11,12] Where a third-party complaint seeks indemnification or contribution for violation of a federal statute, federal law applies. *McMillan v. Equifax Credit Information Services*, 153 F. Supp. 2d 129 (D. Conn. 2001). "A defendant held liable under a federal statute has a right to indemnification or contribution from another only if such right arises: (1) through the affirmative creation of a right of action by Congress, either expressly or implicitly, or (2) under the federal common law."

*Doherty v. Wireless Broad. Sys. of Sacramento*, 151 F.3d 1129, 1130-31 (9th Cir. 1998). See, also, *Green v. United States Dept. of Labor*, 775 F.2d 964, 971 (8th Cir. 1985) ("a defendant held liable under a federal statute has no standing to sue others who have also violated the statute unless (1) the federal statute expressly or implicitly provides for such an action, (2) Congress empowered federal courts to develop substantive law under the statute, or (3) a right of contribution or indemnity is necessary to protect a uniquely federal interest").

[13,14] "FCRA [does not] contain any language expressly providing for contribution or indemnity." *McSherry v. Capital One FSB*, 236 F.R.D. 516, 520 (W.D. Wash. 2006). See, also, *In re Ameriquest Mortgage Co. v. Mortg. Lending*, 589 F. Supp. 2d 987, 993 (N.D. Ill. 2008) ("[l]ike FCRA, TILA [Truth in Lending Act] does not expressly authorize Ameriquest to seek indemnification or contribution from Third-Party Defendants"). Thus, the next question is whether Congress implicitly created a right to indemnification in FCRA cases. "In determining whether a federal statute that does not expressly provide for a particular private right of action nonetheless implicitly created that right, our task is one of statutory construction." *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 91, 101 S. Ct. 1571, 67 L. Ed. 2d 750 (1981). The ultimate question in cases such as this is whether Congress intended to create the private remedy that the plaintiff seeks to invoke. *Id*. Factors relevant to this inquiry are the language of the statute itself (e.g., does the language of the statute indicate it was enacted for the special benefit of a class of which petitioner is a member); its legislative history; the underlying purpose and structure of the statutory scheme (comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies); and the likelihood that Congress intended to supersede or to supplement existing state remedies. See *id.*

[15] FCRA has not been found to support an implied right to indemnity. See *Conner v. Howe*, 344 F. Supp. 2d 1164, 1171

(S.D. Ind. 2004) ("neither the FDCPA [Fair Debt Collection Practices Act] nor its sister act, [FCRA], has been found to support an express or implied right to indemnity or contribution"). Congress' intent in enacting FCRA was to protect consumers. *McSherry v. Capital One FSB, supra*. And as relevant to the case before us, § 113 of FACTA amended 15 U.S.C. § 1681c of FCRA by adding subsection (g) to help prevent identity theft of credit and debit cardholders by requiring the truncation of credit and debit card numbers and the elimination of the card's expiration date on electronically printed receipts provided at the point of the sale or transaction; thus, it is clear it was enacted to protect cardholders. BYBN is not the cardholder here; rather, BYBN, the party seeking indemnification (remembering that Keith has stepped into the shoes of BYBN), is a member of the class of entities whose behaviors Congress sought to regulate to protect cardholders. Therefore, it cannot be said that BYBN is a member of the class for whose benefit FACTA was enacted. See, generally, *McSherry v. Capital One FSB, supra*. Courts have also held that indemnity actions are not appropriate under FCRA because the comprehensive statutory scheme provided by FCRA demonstrates that Congress did not intend to provide an indemnification remedy. See *McSherry v. Capital One FSB, supra*.

[16,17] Because Congress neither expressly nor implicitly intended to create a right to indemnification, if any right to indemnification exists, its source must be federal common law.

> There is, of course, "no federal general common law." . . . Nevertheless, the Court has recognized the need and authority in some limited areas to formulate what has come to be known as "federal common law." . . . These instances are "few and restricted," . . . and fall into essentially two categories: those in which a federal rule of decision is "necessary to protect uniquely federal interests," . . . and those in which Congress has given the courts the power to develop substantive law . . . .

*Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981) (citations omitted) (antitrust laws case involving rights of contribution).

> [A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.

*Id.*, 451 U.S. at 641.

> Admittedly, there is a federal interest in the sense that vindication of rights arising out of these congressional enactments [of antitrust laws] supplements federal enforcement and fulfills the objects of the statutory scheme. Notwithstanding that nexus, contribution among antitrust wrongdoers does not involve the duties of the Federal Government, the distribution of powers in our federal system, or matters necessarily subject to federal control even in the absence of statutory authority. . . . In short, contribution does not implicate "uniquely federal interests" of the kind that oblige courts to formulate federal common law.

*Id.*, 451 U.S. at 642.

[18] The reasoning of *Texas Industries, Inc. v. Radcliff Materials, Inc., supra*, also applies to indemnification. See *Meyers v. Freedom Credit Union*, No. CIV.A. 05-3526, 2007 WL 2753172 at *8 (E.D. Pa. Sept. 21, 2007) ("[m]uch as in *Texas Industries,* the only federal interest in contribution or indemnification is the vindication of federal statutory rights, but because that interest 'does not involve the duties of the Federal Government, the distribution of powers in our federal system, or matters necessarily subject to federal control even in the absence of statutory authority,' it is insufficient to ground a federal common law cause of action. . . . Similarly, FCRA contains no delegation to the courts of the power to

create additional or supplementary liabilities"). See, also, *In re Ameriquest Mortgage Co. v. Mortg. Lending*, 589 F. Supp. 2d 987, 994, 994 n.11 (N.D. Ill. 2008) ("[a]s with FCRA, we find no such compelling reason to extend federal common law to allow a claim for equitable indemnity or contribution for alleged TILA violations" and "'[a]lthough the decision in *Texas Industries* only addressed the right of contribution, the legal framework established . . . has been extended to indemnification.' *Kudlicki v. MDMA, Inc.,* No. 05-2589, 2006 WL 1308617, at *3 (N.D.Ill. May 10, 2006)").

[19] In sum, Keith, standing in the place of BYBN, does not have a right to indemnification from DCR under FACTA because such right was neither expressly or implicitly created by Congress, nor was the right one of federal common law. Although our reasoning differs from that of the district court, we agree that Keith failed to state a claim for indemnity upon which relief could be granted. If a trial court arrives at the correct result even though it uses a reason different from that expressed by this court, its judgment will still be upheld. *Logan Ranch v. Farm Credit Bank*, 238 Neb. 814, 472 N.W.2d 704 (1991).

Although Keith, standing in the place of BYBN, did not have a right to indemnification from DCR, federal law does not prohibit a separate breach of contract claim or a separate tort claim, and Keith did in fact bring such claims against DCR. However, as discussed previously in this opinion, Keith did not file his separate contract and tort claims within the applicable statute of limitations.

### 3. Class Action

[20] Keith's final argument relates to the finding by the district court that the complaint failed to state a claim on behalf of a class. However, because we have already determined that Keith has failed to state a claim for relief as to all counts in his complaint, we need not determine whether Keith needed to plead this state court case as a class action. An appellate court

is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Weatherly v. Cochran*, 301 Neb. 426, 918 N.W.2d 868 (2018).

## VI. CONCLUSION

For the reasons stated above, we find that Keith has failed to state a claim upon which relief can be granted and we therefore affirm the district court's order dismissing Keith's complaint with prejudice.

Affirmed.

# Addisen E. Coughlin, a minor child and dependent of Daniel Coughlin, by and through her Conservator, Kyle J. Coughlin, appellant, v. County of Colfax, Nebraska, appellee.

926 N.W.2d 675

Filed April 2, 2019. No. A-18-456.

1. **Workers' Compensation: Appeal and Error.** 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.
2. ____: ____. In reviewing workers' compensation cases, an appellate court is not free to weigh the facts anew; rather, it accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case.
3. **Evidence: 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.
4. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
5. **Workers' Compensation: Proof.** The two phrases "arising out of" and "in the course of" in Neb. Rev. Stat. § 48-101 (Reissue 2010) are conjunctive; in order to recover, a claimant must establish by a preponderance of the evidence that both conditions exist.
6. ____: ____. The phrase "arising out of," as used in Neb. Rev. Stat. § 48-101 (Reissue 2010), describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope of the employee's job; the phrase "in the course of," as used in § 48-101, refers to the time, place, and circumstances surrounding the accident.

7. **Workers' Compensation: Words and Phrases.** The "in the course of" requirement of Neb. Rev. Stat. § 48-101 (Reissue 2010) has been defined as testing the work connection as to time, place, and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment.
8. **Workers' Compensation.** Injuries sustained by an employee while going to and from work at a fixed place of employment do not arise out of and in the course of employment unless a distinct causal connection exists between an employer-created condition and the occurrence of the injury.
9. **Workers' Compensation: Proof.** The employee has the burden to establish the presence of a causal connection between an employer-created condition and his or her injury.
10. **Workers' Compensation.** For the going to and from work rule to apply, an employer must have a fixed place of employment.
11. ____. The recognized exceptions to the going to and from work rule, each of which follow from the rule's requirement that an employee show a causal connection between an employer-created condition and his or her injury, include the employer-supplied transportation exception, the commercial traveler exceptions, and the special errand exception.
12. **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 Workers' Compensation Court: Julie A. Martin, Judge. Affirmed.

Linsey Moran Bryant and Bradley E. Nick, of Sidner Law, for appellant.

David A. Dudley and Eric J. Sutton, of Baylor Evnen, L.L.P., for appellee.

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

Moore, Chief Judge.

## I. INTRODUCTION

This case arises out of the death of Daniel Coughlin, a deputy with the Colfax County Sheriff's Department (the Department). Daniel was survived by his daughter, Addisen E. Coughlin.

Kyle J. Coughlin, Daniel's brother and Addisen's conservator, filed a petition in the Nebraska Workers' Compensation Court seeking benefits for Addisen from the County of Colfax, Nebraska (the County). Finding no causal connection between an employer-created condition and Daniel's death, the compensation court concluded that Daniel's death did not arise out of and in the course of his employment with the County. As a result, the court denied Kyle's petition. Kyle appeals, and for the reasons set forth below, we affirm.

## II. BACKGROUND

While Daniel was driving home from work on the morning of January 12, 2016, he had a cell phone conversation with Deputy Shawn Messerlie, whose shift had just begun. The conversation took place about 5 minutes after Daniel clocked out from his 12-hour shift. During that conversation, the left front side of Daniel's vehicle hit a deer carcass that was lying on the highway. Daniel's vehicle dragged the carcass for about 70 feet before he lost control. Another vehicle driving in the opposite lane of traffic collided with the driver's side of Daniel's vehicle, and the collision caused Daniel's death.

On December 22, 2016, Kyle filed a petition in the Workers' Compensation Court alleging that Daniel's death was a compensable injury under Neb. Rev. Stat. § 48-101 (Reissue 2010) because it occurred in the course and scope of his employment with the County. On account of that injury, Kyle's petition sought benefits for Addisen under Neb. Rev. Stat. §§ 48-122 (Cum. Supp. 2018), 48-124 (Reissue 2010), and 48-125 (Cum. Supp. 2016). In response, the County filed an answer denying that Daniel's death arose out of and in the course of his employment. Prior to trial, the parties filed a joint pretrial memorandum, which provided the following stipulations:

> 1. The date of the death was January 12, 2016[,] and at that time Deputy Daniel Coughlin was an employee at the Colfax County Sheriff's Department, County of Colfax, Nebraska.

2. Daniel Coughlin was talking on his cell phone with Deputy Shawn Messerlie while driving in his own vehicle in Colfax County on or about January 12, 2016.

3. During said phone conversation[,] which lasted from approximately 7:06 a.m. to 7:11 a.m., on that date, he was involved in a motor vehicle accident resulting in his death.

4. Addisen Coughlin was at all time[s] relevant herein, a dependent of Daniel Coughlin as defined by Neb. Rev. Stat[.] §48-124(3).

5. The parties stipulate that the average weekly wage of Daniel Coughlin at the time of the accident and his death was $810.00 per week.

### 1. Trial

Trial was held on February 21, 2018.

#### (a) Deputy Messerlie's Testimony

Messerlie testified that shortly after his January 12, 2016, shift with the Department began and Daniel's shift had ended, he used his cell phone to exchange shift-change information with Daniel. Messerlie could not recall who initiated the call. Although Messerlie remembered some of the information Daniel conveyed to him about his shift, he could not remember all of it. He also did not remember how long they discussed Daniel's shift. The last topic Messerlie remembered discussing with Daniel was that they both had to work expanded shifts because another deputy, Ryan Andel, was on vacation. Messerlie then heard Daniel repeat an expletive three times, and the call ended.

Messerlie was trained by his superiors to exchange shift-change information. Messerlie and Daniel usually used their cell phones to do so. Eighty percent of Messerlie's on-duty cell phone use occurred while he was driving. Messerlie felt that exchanging shift-change information in person would be impractical. In-person exchanges would require a deputy who is coming on duty to travel to the Department's office,

which could be far from the location that deputy was assigned to patrol.

Messerlie admitted that he and Daniel had conversations in the past that were unrelated to work while one or both of them were on duty. He also admitted that he and Daniel sometimes discussed Daniel's feeling that he was being "ridden pretty hard by [Andel]."

(b) Corporal Andel's Testimony

Andel, who by the time of trial had been promoted to corporal within the Department, testified that he trained new recruits as the field training officer. Andel and the new recruits reviewed the Department's policies and procedures, its field training guide, and its field training checklist.

Andel affirmed that the field training checklist was "very important." It contained various headings covering different aspects of the deputies' jobs. The second item under the "Roll Call Procedures" heading stated, "Check with other Deputy/Dispatch," which instructed deputies who were coming on duty to ask the deputy that he or she was replacing for any shift-change information. At the time of the accident, exchanging shift-change information was an important part of every deputy's job. A deputy who was coming on duty usually called the deputy he or she was replacing to receive shift-change information. These calls were to be limited to exchanging "need-to-know" information. Usually, deputies who were coming on duty used their cell phones to make this call from their patrol cars; and although deputies going off duty could have received these calls from their houses, they usually received them in their patrol cars. Andel had never directed deputies to pull over when driving to exchange shift-change information.

Andel always exchanged shift-change information after his shift, and he admitted to exchanging that information with his cell phone while driving. Andel could tell when a deputy was talking to him from a vehicle, but he had never reprimanded a deputy for talking to him while he or she was driving. Andel

acknowledged that it would be possible for a deputy to do a job-related duty, like exchanging shift-change information, when he or she was "off the clock" and not being paid. On the day of Daniel's accident and subsequent death, Daniel was assigned to work from 7 p.m. to 7 a.m. and clocked out at 7:01 a.m. The same day, Messerlie was assigned to work from 7 a.m. to 7 p.m.

Andel testified that he was having "issues" relating to field training and interdepartmental matters with Daniel and Messerlie at the time of the accident.

(c) Sergeant Hemmer's Testimony

Tony Hemmer testified that as a sergeant with the Department, he was the immediate supervisor for the deputies on patrol. Hemmer had never reprimanded an employee for failing to pull over when using his or her cell phone, and at the time of trial, he did not pull over 70 percent of the time that he used his cell phone while driving to communicate with deputies.

Hemmer explained that the exchange of shift-change information was important, furthered the business of the Department, and, at times, affected deputy safety. While the deputies' field training checklist directed them to exchange shift-change information, exchanging that information was only a suggested practice. Deputies had a choice as to how they exchanged shift-change information, and it was appropriate to exchange that information over the telephone. Because of the distance Messerlie lived from the courthouse, Hemmer felt it would not have been practical or convenient for him to meet with Daniel at the courthouse to exchange shift-change information.

Hemmer also testified that the entire county was the Department's fixed place of employment or workplace.

(d) Sheriff Kruse's Testimony

Paul Kruse, the Colfax County sheriff, testified that he administered the day-to-day operations of the Department at the time of the accident. The Department had written policies

and procedures, which did not include policies or procedures for exchanging shift-change information.

In Kruse's opinion, exchanging of shift-change information was an important duty for deputies and sergeants that had safety benefits. Although Kruse suggested that deputies stay on the clock to exchange shift-change information, no policy required them to do so. Kruse had never reprimanded a deputy for exchanging shift-change information after he or she clocked out. Nevertheless, Kruse felt that if Daniel had important information to share with Messerlie on January 12, 2016, he would have stayed on the clock. Kruse allowed his deputies 15 or 30 minutes of overtime to exchange shift-change information, but his deputies needed written overtime approval from his sergeant if they required more than 15 minutes of overtime. At trial, Kruse testified that he did not try to limit overtime, although his sergeant may have. In his deposition, however, he testified that he did try to limit overtime.

Deputies who lived in Colfax County drove their patrol cars to their homes and were able to clock in and out of work from there. Deputies who lived outside of Colfax County drove their personal vehicles to the Department's office at the county courthouse, where their patrol cars were parked in a garage. Those deputies clocked in from their patrol cars at the Department's office. At the time of Daniel's accident, he was the only deputy who was living outside of Colfax County.

While the Department did not have a written policy about what off-duty officers could do in their personal vehicles, it did have a written policy regarding cell phone use in patrol cars:

> [U]se of a cell phone or other electronic device while driving is dangerous and specifically prohibited while on working time. You are prohibited from using a cell phone or electronic device at any time while driving a County vehicle. If you must make an emergency communication while driving, you should normally pull to the side of the

> road and stop before making the call, texting, or otherwise using the device.

Kruse believed this policy was strictly adhered to at the time of Daniel's accident, and he personally pulled over whenever he used his cell phone.

Kruse acknowledged that the public's ability to listen to the dispatch radio channel was "a concern." As a result, deputies were required to discern whether to communicate information with each other using the radio or using their cell phones. The Department reimbursed the deputies for part of their cell phone bills.

Kruse went to the scene of Daniel's accident when he heard about it. At the scene, he observed Daniel's bulletproof vest, weapon, "badge of authority," and a pair of handcuffs in the backseat of his vehicle. Daniel had taken off his vest in compliance with the Department's written policy that off-duty deputies remove their bulletproof vests.

### 2. Workers' Compensation Court Order

On April 30, 2018, the Workers' Compensation Court entered an order dismissing Kyle's claims. The court found that Daniel's accident and injury did not arise out of and in the course of his employment with the County. The court found that the record contained no evidence of a causal connection between Daniel's cell phone call with Messerlie and the accident such that the going to and from work rule would allow recovery under § 48-101.

The court rejected Kyle's argument that "the telephone call was related to work for purposes of 'shift change information,' and thus established a distinct causal connection." The court explained its finding:

> [I]n this case, [Daniel's] shift had ended, he had clocked out of work, he was in his personal vehicle driving home, and several minutes had passed from the time he clocked out before he placed the call. According to his superiors, [Daniel] should have been in his patrol car and remained on the clock to make this call.

As a result, the court concluded that the conversation between Daniel and Messerlie at the time of the accident was not "work-related to overcome the flaws of [Kyle's] case."

The court also rejected Kyle's argument that the going to and from work rule did not apply because Daniel did not have a fixed place of employment. The court explained that the Department had an office in the county courthouse. Although other deputies could clock in to work without traveling to the courthouse, Daniel was required to go to the courthouse to begin his workday by picking up his patrol car. The court noted that finding Daniel did not have a fixed place of employment would result in a dramatic expansion of workers' compensation law:

> The Court simply cannot find for [Kyle] under this scenario as every state or county employee could conceivably be entitled to workers' compensation benefits for injuries occurring while going to or coming from work if the accident occurred in the state or county where he or she worked.

Kyle appeals.

## III. ASSIGNMENTS OF ERROR

Kyle assigns, consolidated and restated, that the district court erred in (1) finding that Daniel's injury was noncompensable under the going to and from work rule, (2) finding that Daniel had a fixed place of employment such that the going to and from work rule applied, and (3) concluding that finding for him would result in a dramatic expansion of workers' compensation law.

## IV. STANDARD OF REVIEW

Under Neb. Rev. Stat. § 48-185 (Cum. Supp. 2018), the judgment made by the compensation court shall have the same force and effect as a jury verdict in a civil case and 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. *Bower v. Eaton Corp.*, 301 Neb. 311, 918 N.W.2d 249 (2018).

[1-4] 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. *Gimple v. Student Transp. of America*, 300 Neb. 708, 915 N.W.2d 606 (2018). In reviewing workers' compensation cases, this court is not free to weigh the facts anew; rather, we accord to the findings of the compensation court the same force and effect as a jury verdict in a civil case. *Bower, supra*. 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. *Kaiser v. Metropolitan Util. Dist.*, 26 Neb. App. 38, 916 N.W.2d 448 (2018). An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Dragon v. Cheesecake Factory*, 300 Neb. 548, 915 N.W.2d 418 (2018).

## V. ANALYSIS

[5] Before discussing the particular circumstances of this case, we review some of the basic principles of workers' compensation law that will be relevant to our analysis. The Nebraska Workers' Compensation Act allows employees to recover damages for certain injuries:

> When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer if the employee was not willfully negligent at the time of receiving such injury.

§ 48-101. The two phrases "arising out of" and "in the course of" in § 48-101 are conjunctive; in order to recover, a claimant must establish by a preponderance of the evidence that both conditions exist. *Zoucha v. Touch of Class Lounge*, 269 Neb. 89, 690 N.W.2d 610 (2005); *Maradiaga v. Specialty Finishing*, 24 Neb. App. 199, 884 N.W.2d 153 (2016).

[6,7] The phrase "arising out of," as used in § 48-101, describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope of the employee's job; the phrase "in the course of," as used in § 48-101, refers to the time, place, and circumstances surrounding the accident. *Maradiaga, supra*. The "in the course of" requirement of § 48-101 has been defined as testing the work connection as to time, place, and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment. *Zoucha, supra*.

### 1. Going To and From Work Rule

The compensation court concluded that Daniel's injuries did not arise out of and in the course of his employment with the County because of the going to and from work rule. Specifically, the court found that Kyle failed to show a causal connection between an employer-created condition and Daniel's death. Kyle challenges this determination. As discussed below, we find that Daniel's use of his cell phone while driving was not an employer-created condition under the going to and from work rule.

[8,9] Injuries sustained by an employee while going to and from work at a fixed place of employment do not arise out of and in the course of employment unless a distinct causal connection exists between an employer-created condition and the occurrence of the injury. See, *Zoucha, supra*; *La Croix v. Omaha Public Schools*, 254 Neb. 1014, 582 N.W.2d 283 (1998). The employee has the burden to establish the presence of a causal connection between an employer-created

condition and his or her injury. See, e.g., *La Croix, supra*; *Coffey v. Waldinger Corp.*, 11 Neb. App. 293, 649 N.W.2d 197 (2002).

(a) Fixed Place of Employment

Because the existence of a fixed place of employment is integral to application of the going to and from work rule, we first address Kyle's assigned error regarding the compensation court's finding. The compensation court found that because Daniel had to report to the Department's office at the county courthouse before beginning his shifts, the Department had a fixed place of employment at the courthouse as it related to him. We agree.

[10] For the going to and from work rule to apply, an employer must have a fixed place of employment. See, *Torres v. Aulick Leasing*, 261 Neb. 1016, 628 N.W.2d 212 (2001); *La Croix, supra*. The most analogous case to the present situation is *Torres, supra*, and we find that its reasoning applies to Daniel's employment situation.

The employee in *Torres* was a driver for a company that hauled materials to highway construction projects. The company had a home office in Scottsbluff, Nebraska, but the nature of its business required it to move its operations from one location to another on a regular basis. In his employment with the company, the employee worked at various locations throughout Nebraska, South Dakota, and Wyoming. The company's drivers generally worked Monday through Friday. Because they were not required to stay at the jobsite on weekends, they could go home if they chose to do so. If the job lasted less than 30 days, the company allowed employees to use their company-owned trucks to return to their homes for the weekends.

The company assigned the employee in *Torres* to a 4- to 5-month project in Wyoming, where the company had established a "'hub'" facility consisting of tanks, a maintenance van, and a mailbox in which the drivers deposited their paperwork. 261 Neb. at 1019, 628 N.W.2d at 216. The trucks were also parked at the facility overnight and on the weekends.

One weekend, the employee drove home in his personal vehicle. On his way back to the Wyoming facility, the employee swerved to avoid a deer and rolled his vehicle into a ditch. The employee was injured and sought workers' compensation benefits. The compensation court found that the employee had a fixed place of employment at the Wyoming facility such that the going to and from work rule applied, which finding the Nebraska Supreme Court determined was not clearly erroneous. *Torres, supra*.

Similarly, in the present case, the record contained sufficient facts to support the compensation court's conclusion that Daniel had a fixed place of employment. Daniel's patrol car was located at the Department's garage at the county courthouse. Daniel drove his personal vehicle to the garage to retrieve his patrol car and returned it to the garage at the completion of his shift. He could not clock in or out of work without exchanging his personal vehicle for the patrol car. After the accident, Kruse observed Daniel's bulletproof vest, "badge of authority," weapon, and handcuffs in the backseat of his personal vehicle, which indicates that he had left his place of employment and was off duty. Taken together, these facts support the compensation court's conclusion that Daniel had a fixed place of employment at the time of his accident, and we do not find that conclusion to be clearly erroneous.

(b) Employer-Created Condition

We next examine whether there was an employer-created condition in this case that renders the going to and from work inapplicable.

The Nebraska Supreme Court first applied the exception to the bright line rule, referred to as the "premises rule" or the "going and coming" rule, in *La Croix v. Omaha Public Schools*, 254 Neb. 1014, 582 N.W.2d 283 (1998). The court allowed an employee to recover for injuries that occurred while she was going to work because she was able to show a distinct causal connection between an employer-created condition and her injury.

In *La Croix*, the employer encouraged an employee to park in a parking lot that the employer did not own and to use a shuttle service supplied by the employer to get to her work premises. The employee fell and was injured in the parking lot while on her way to board the shuttle. The Nebraska Supreme Court held that by encouraging the employee to park in the lot and providing transportation to the workplace from the lot, the employer created a condition under which its employees will necessarily encounter hazards while traveling to the premises where they work. As a result, the court held that there was a distinct, causal connection between the employer-sponsored parking lot and the employee's injury and that because a causal connection was present, the employee's injury arose out of and in the course of her employment. *Id.* See, also, *Zoucha v. Touch of Class Lounge*, 269 Neb. 89, 690 N.W.2d 610 (2005) (employee leaving employer's premises in shopping center parking lot was in course of employment); *Coffey v. Waldinger Corp.*, 11 Neb. App. 293, 649 N.W.2d 197 (2002) (employee who sustained injuries while walking from parking spot to worksite entitled to benefits under exception to going to and from work rule).

[11] The Nebraska Supreme Court has recognized other exceptions to the going to and from work rule, each of which follow from the rule's requirement that an employee show a causal connection between an employer-created condition and his or her injury. These exceptions include the employer-supplied transportation exception, *Schademann v. Casey*, 194 Neb. 149, 231 N.W.2d 116 (1975); the commercial traveler exceptions, *Torres v. Aulick Leasing*, 261 Neb. 1016, 628 N.W.2d 212 (2001); and the special errand exception, *id.*

The relevant question in this case is whether Daniel's use of his cell phone to communicate shift-change information while he was driving home was an employer-created condition. As discussed below, the record shows that although the Department expected Daniel to exchange shift-change

information, it did not prescribe any one way of doing so. Therefore, Daniel's use of his cell phone while driving home after his shift to convey that information was not an employer-created condition.

While the County characterized exchanging shift-change information as a "suggested practice," the Department clearly expected its deputies to do it. The training staff and supervisors of the Department each testified that exchanging shift-change information is part of every deputy's job and can affect their safety. The practice of exchanging shift-change information appears on the Department's field training checklist, which Andel reviewed with new recruits when they were hired. Andel testified that he exchanged shift-change information every day he was on duty. There was no official policy regarding when the information should be exchanged; that is, whether the exchange should be before or after the deputy clocked in or out. Kruse explained that he allowed 15 or 30 minutes of overtime to ensure that the deputies exchanged shift-change information, although his sergeant may have limited that overtime and deputies were not required to take the overtime to exchange the information.

Even though the Department expected its deputies to exchange shift-change information, it did not dictate how to do so. Specifically, the Department did not instruct them to use their cell phones while driving to exchange shift-change information. In fact, the Department's policy prohibited employees from using their cell phones while driving a county-owned vehicle and instructed them to pull over while engaging in a telephone conversation.

Here, Daniel exchanged shift-change information with Messerlie after he returned his patrol car to the Department's garage at the county courthouse. He clocked out from his shift and chose to use his cell phone to exchange the information while driving his personal vehicle home. The record shows that Daniel was not required to exchange the information in

the manner he chose to do so and that other options existed to exchange the information.

[12] Although the Department expected Daniel to exchange any necessary shift-change information with Messerlie, Daniel's use of his cell phone while driving to exchange that information was not an employer-created condition. Thus, the going to and from work rule renders Daniel's injury and death noncompensable. Because we find no employer-created condition existed, we need not discuss whether Daniel's accident was causally connected to his cell phone use. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Bayliss v. Clason*, 26 Neb. App. 195, 918 N.W.2d 612 (2018).

### 2. Expansion of Workers' Compensation Law

Kyle assigns that the compensation court erred in concluding that finding for him would result in a dramatic expansion in workers' compensation law as "every state or county employee could conceivably be entitled to workers' compensation benefits for injuries occurring while going to or coming from work if the accident occurred in the state or county where he or she worked." Because we found above that the record in this case contains sufficient information to support the compensation court's denial of benefits, we do not reach this assignment. See *Bayliss, supra*.

## VI. CONCLUSION

The compensation court's conclusion that Daniel had a fixed place of employment at the time of his accident was not clearly erroneous. Further, the court was not clearly erroneous in finding that Daniel's use of his cell phone to exchange shift-change information while driving home after work was not an employer-created condition. As a result, we affirm the compensation court's conclusion that the going to and from work rule renders the injury in this case noncompensable.

Affirmed.

# Harlan D. Burgardt, appellee and cross-appellant, v. Shirley L. Burgardt, appellant and cross-appellee.

926 N.W.2d 452

Filed April 9, 2019. No. A-17-1116.

1. **Divorce: 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.
2. **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.
3. **Evidence: Appeal and Error.** In a review de novo on the record, an appellate court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue. When evidence is in conflict, an 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.
4. **Divorce: Property Division.** The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
5. ____: ____. As a general rule, all property accumulated and acquired by either party during the marriage is part of the marital estate, unless it falls within an exception to the general rule.
6. ____: ____. Setting aside nonmarital property is simple if the spouse possesses the original asset but can be problematic if the original asset no longer exists.
7. ____: ____. Separate property becomes marital property by commingling if it is inextricably mixed with marital property or with the separate property of the other spouse. If the separate property remains segregated or is traceable into its product, commingling does not occur.

8. **Property Division: Proof.** When there is a dispute regarding whether certain property ought to be characterized as marital property, the burden of proof rests with the party claiming that property is nonmarital.
9. **Divorce: Property Division: Pensions.** Generally, amounts added to and interest accrued on retirement accounts which have been earned during the marriage are part of the marital estate. Contributions to retirement accounts before marriage or after dissolution are not assets of the marital estate.
10. **Property Division: Taxes.** Income tax liability incurred during the marriage is one of the accepted costs of producing marital income, and thus, income tax liability should generally be treated as a marital debt.
11. **Divorce: Property Division: Alimony.** In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party.
12. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.
13. **Alimony.** The primary purpose of alimony is to assist an ex-spouse for a period of time necessary for that individual to secure his or her own means of support.
14. ____. The ultimate criterion in determining an alimony award is reasonableness.

Appeal from the District Court for Adams County: Terri S. Harder, Judge. Affirmed in part, and in part reversed and remanded with directions.

Richard L. Alexander, of Richard Alexander Law Office, for appellant.

Nicholas D. Valle, of Langvardt, Valle & James, P.C., L.L.O., for appellee.

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

Arterburn, Judge.

## I. INTRODUCTION

Shirley L. Burgardt appeals from the decree of dissolution entered by the district court for Adams County, which dissolved her marriage to Harlan D. Burgardt. On appeal, she argues that the district court abused its discretion in finding portions of Harlan's 401K and inherited farm were nonmarital property. She also argues that the alimony award she received is insufficient. Harlan cross-appeals, arguing that the district court abused its discretion by not dividing certain tax liabilities between the parties and by ordering him to pay excessive alimony. We affirm the district court's findings with regard to the amount of alimony awarded to Shirley. However, we hold that the court erred in finding that Harlan proved the amount of his inheritance or the value of any premarital interest he may have had in his 401K. We also find that the district court should have considered the postseparation payment of 2015 tax estimates and the refunds received thereon in dividing the marital estate. We therefore reverse as to the district court's division of property.

## II. BACKGROUND

Harlan and Shirley were married on April 12, 1992. No children were born from the marriage, but Shirley and Harlan each had children from previous relationships. Harlan, age 73 at the time of trial, has various medical issues related to his back, leg, and knee and also experiences high blood pressure and chronic obstructive pulmonary disease. He testified that he requires some assistance getting dressed due to those issues. Harlan also testified that he has very poor hearing and wants to purchase hearing aids but feels he cannot afford them. Harlan takes a variety of prescription medications and testified that there are some additional medications he cannot afford and does not purchase even though they are prescribed to him. Harlan's daughter, son-in-law, and two grandsons now live with him and help with household chores and other tasks, but

they maintain mostly separate expenses. They do not pay rent to Harlan.

Shirley, age 66 at the time of trial, also has various medical issues. She had a "5 bypass heart surgery" and has encountered subsequent complications. Shirley testified that she will not be able to work again in the future due to her medical issues. She has lived with her son since her bypass surgery in April 2015. Shirley worked during the first 14 years of the marriage, primarily in hardware stores. She stopped working when Harlan retired and they moved back to Nebraska from Colorado in 2006.

Harlan began working for what is now called Kinder Morgan in April 1978. He started out as a laborer but was promoted to "junior engineer" after receiving additional training and education throughout his career. The focus of his work throughout his career was corrosion control. Harlan initially worked in Lakin, Kansas, but was transferred to Hastings, Nebraska. He met Shirley while living in Hastings. Shortly after the parties married in 1992, Harlan accepted a transfer to Glenwood Springs, Colorado, where he worked until retiring in May 2006. Kinder Morgan provided Harlan with retirement benefits in the form of both a pension plan and a 401K.

Harlan was given three options related to his pension benefits. The first option paid the most but only paid Harlan while he was alive. The second option paid less than the first and would pay him during his lifetime and then pay Shirley half as much from the date of Harlan's death until the date of her death if she survived him. The third option, which Harlan ultimately chose, paid less than either of the two previous options. It pays Harlan during his lifetime and then will pay Shirley an equal amount from the date of Harlan's death until the date of her death. Harlan noted that this pension benefit designation cannot be changed even due to divorce or remarriage. He testified that he made that election because he did not want Shirley to "end up totally broke."

Throughout Harlan's career, including for the period of time before his marriage to Shirley, contributions were made to his 401K. Harlan testified that his 401K was valued at $130,000 on the date of his marriage to Shirley in 1992, stating that the number "sticks out in my mind just plain as day." However, he acknowledged that there was no documentation to support this valuation and stated that he had contacted the company but was told it did not keep records dating back to 1992. Harlan also testified that he did not begin contributing to the 401K until 1985. Shirley testified that she was unaware of any 401K belonging to Harlan that was valued at $130,000 at the time of their marriage.

In 2006, Harlan's father died, leaving Harlan an interest in a quarter section of farmland including the farmstead in Kansas referred to as the "home farm." Although a "Transfer on Death Deed" transferred the home farm from Harlan's father to Harlan and his sister only, Harlan and his two living siblings agreed that the entirety of their father's intestate estate should be divided into four equal portions, one for each of the siblings and a fourth for the two sons of their deceased brother. Harlan testified that his inherited share translated into a $60,000 credit, which he combined with cash to buy the home farm in its entirety at a total cost of $157,500. On cross-examination, Harlan acknowledged that he used marital assets to purchase the portion of the home farm that he had not inherited.

When Harlan retired from Kinder Morgan in 2006, he converted his 401K into a traditional IRA. That account was valued at $445,000 in 2010. Harlan subsequently liquidated the IRA, using the proceeds to purchase a second farm in 2010, improve the home farm, purchase a compact tractor and other equipment, and purchase gold and silver coins.

Harlan and Shirley traveled back and forth between their residence in Holdrege to the home farm from 2006 to 2010, fixing up the property together and moving into the house.

Harlan testified that improvements included the addition of fencing, a new irrigation well, and irrigation equipment. Near the time of the parties' separation, Harlan and Shirley sold the home farm and their farm equipment for a total of $358,000 in July 2015, depositing the proceeds into their joint account. Harlan subsequently withdrew $190,000 from the joint account and deposited it into his separate account at a different bank. He also withdrew $168,000 from the joint account and deposited it into his separate account at a credit union. Harlan acknowledged that he basically emptied their joint account and placed all the funds into accounts in his name alone.

Earlier, at the end of 2014, Harlan and Shirley sold the second farm, which was reflected by a $151,492.95 deposit into their joint account. Shirley testified that the proceeds from selling the second farm were used to purchase a home in Hastings. According to Harlan, Harlan and Shirley purchased the Hastings home for $135,000. Harlan moved there in the summer of 2015 and continues to reside there.

Harlan and Shirley filed a joint tax return in 2015. Based on estimates from a tax preparation company, Harlan testified that they made tax prepayments of $31,400 to the federal government, $40,200 to the State of Kansas, and $3,000 to the State of Nebraska. A withdrawal of $31,400 was made from Harlan's account at the credit union on September 2. A withdrawal of $3,000 from the same account was made on August 31. The parties' tax return demonstrates an estimated tax paid of only $10,291, however. The parties' total prepayments and other withholdings overestimated their tax liability, and Harlan and Shirley later received refunds, which they split equally.

On August 4, 2015, Harlan filed a complaint for legal separation from Shirley. In her answer and cross-complaint filed on August 18, Shirley alleged that the marriage was irretrievably broken. Shirley filed a motion for temporary orders on August 18, requesting, among other things, that Harlan be ordered to pay her temporary alimony and to pay temporary attorney fees

for her. The court granted Shirley's motion on September 25, and ordered Harlan to pay her $900 per month in temporary alimony and $5,000 in temporary attorney fees.

On September 26, 2016, Shirley filed an amended cross-complaint seeking to have the marriage dissolved. Trial on the complaint for dissolution of marriage occurred in June and July 2017. The court dissolved Harlan and Shirley's marriage on September 5. As relevant in the present appeal, in the decree of dissolution, the district court ordered Harlan to pay Shirley $200 of alimony each month for 60 months or until either party's death, whichever occurs first. In dividing their property, the district court awarded Harlan $130,000 as the nonmarital value of his 401K plus $60,000 as the nonmarital value of his inherited share of the home farm. The court did not allocate any portion of the tax liability created by the sale of the farms to Shirley.

Shirley now appeals, and Harlan cross-appeals.

## III. ASSIGNMENTS OF ERROR

On appeal, Shirley argues that the district court erred by finding that $130,000 of Harlan's 401K was nonmarital property and that $60,000 of the inherited home farm was nonmarital property. She also argues that the district court erred by awarding her insufficient alimony.

In Harlan's cross-appeal, he argues the district court erred by not allocating the tax liability that was created by the sale of farms and property and by awarding Shirley excessive alimony.

## IV. STANDARD OF REVIEW

[1,2] 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. *Westwood v. Darnell*, 299 Neb. 612, 909 N.W.2d 645 (2018). This standard of review applies to both the trial court's determinations regarding division of property and alimony. See *id*. 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. *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016).

[3] In a review de novo on the record, an appellate court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue. *Osantowski v. Osantowski*, 298 Neb. 339, 904 N.W.2d 251 (2017). However, when 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. *Id*.

## V. ANALYSIS

### 1. Property Distribution

[4] The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Lorenzen v. Lorenzen*, 294 Neb. 204, 883 N.W.2d 292 (2016). See Neb. Rev. Stat. § 42-365 (Reissue 2016). Under § 42-365, the equitable division of property is a three-step process. *Lorenzen v. Lorenzen, supra*. The first step is to classify the parties' property as marital or nonmarital, setting aside the nonmarital property to the party who brought that property to the marriage. *Id*. The second step is to value the marital assets and marital liabilities of the parties. *Id*. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Lorenzen v. Lorenzen, supra*.

[5-8] As a general rule, all property accumulated and acquired by either party during the marriage is part of the marital estate, unless it falls within an exception to the general rule. *Westwood v. Darnell, supra*. Exceptions include property that a spouse acquired prior to the marriage or by gift or inheritance. See *id.* Setting aside nonmarital property is simple if

the spouse possesses the original asset but can be problematic if the original asset no longer exists. *Brozek v. Brozek, supra*. Separate property becomes marital property by commingling if it is inextricably mixed with marital property or with the separate property of the other spouse. *Id*. If the separate property remains segregated or is traceable into its product, commingling does not occur. *Id*. When there is a dispute regarding whether certain property ought to be characterized as marital property, the burden of proof rests with the party claiming that property is nonmarital. See *id.*

[9] Generally, amounts added to and interest accrued on retirement accounts which have been earned during the marriage are part of the marital estate. *Coufal v. Coufal*, 291 Neb. 378, 866 N.W.2d 74 (2015). Contributions to retirement accounts before marriage or after dissolution are not assets of the marital estate. See *id.*

In the present case, Shirley argues the district court erred in finding that $130,000 of Harlan's 401K and $60,000 of the home farm's worth were nonmarital property. Harlan argues in response that the district court did not abuse its discretion in either determination. Based on our de novo review, we find that Harlan did not meet his burden of proving that his 401K contained $130,000 as of the date of the marriage and did not prove the amount he inherited from his father.

(a) Premarital 401K Contributions

Harlan claims that $130,000 existed in his 401K as of the date of his marriage to Shirley in 1992 and that this amount should be set off to him as nonmarital property. The problem with Harlan's claim is that it is based solely on his own recollection. Harlan failed to adduce any documentation whatsoever regarding when the 401K came into existence, what contributions were made to it by him or his employer, and how it was invested or grew over the years. The only documentation of its value at retirement comes by way of a bank record evidencing its rollover into an IRA on January 1, 2010. Harlan

testified that he called his former employer and was told that they had no records that would demonstrate the balance of his 401K in 1992. However, there was no indication that he could not retrieve pay records that would demonstrate his income from 1985 (when he states he started his 401K contributions) to 1992. Such company pay records could demonstrate what his income was and any deductions made therefrom, as well as any company contributions. Failing specific information, there is also no testimony indicating that he could not obtain from his employer information that would generally explain how contributions to the company 401K retirement program were computed and withheld. In addition, no tax or Social Security records were provided that would give us any idea what Harlan's salary was during the years leading up to the parties' marriage. As Shirley points out, it is difficult to accept, given the nature of Harlan's employment, that he could amass $130,000 in his 401K by 1992, particularly when he did not start contributing until 1985. Harlan contends that the $130,000 figure is clear in his mind, but he struggled and even changed his testimony with regard to a number of other topics during the course of his testimony. While we do not doubt that Harlan had a 401K plan prior to the marriage, we cannot find that Harlan sufficiently proved the value of his 401K was $130,000 prior to the marriage.

In *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016), the trial court found that crops in storage and the balance of the husband's bank accounts that held the proceeds of past crop sales as of the date of marriage should be awarded to him as nonmarital property. The Nebraska Supreme Court reversed the trial court judgment, finding that the husband had not definitively identified the values of his premarital assets. As a result, since one cannot trace an unknown value of assets, the court found it to be unreasonable to set off a value of assets that is not proved. See, also, *Osantowski v. Osantowski*, 298 Neb. 339, 904 N.W.2d 251 (2017).

In *Onstot v. Onstot*, 298 Neb. 897, 906 N.W.2d 300 (2018), the husband testified that he purchased the family home 9 years prior to the marriage. He testified to the purchase price and what he believed to be the amount of the original mortgage. He then testified to what he believed to be the value of the home on the date of marriage but provided no evidence regarding the balance of the mortgage at that time. No documentation was provided to confirm his testimony regarding the date of purchase, the purchase price, the amount of the mortgage, or the value of the house at the time of the marriage. The Supreme Court in *Onstot* found that the equity in the residence at the time of the parties' marriage would be a nonmarital asset, which, if established, should be set aside to the husband. However, given the lack of documentation that any equity existed at the time of the parties' marriage, the Supreme Court found that the husband failed to meet his burden of proving that the property was a nonmarital asset. *Id*.

The present case is similar to *Brozek* and *Onstot*. Harlan's testimony, standing alone, is insufficient to definitively identify the value of his premarital asset. As such, we find that the district court erred in setting off $130,000 in assets as nonmarital property to Harlan based solely on his testimony. Therefore, the entirety of the 401K and the assets to which those funds have been transferred must be considered marital in nature.

(b) Inherited Portion of Home Farm

The district court also found that Harlan inherited $60,000 from his father which could be set off to him as nonmarital property. Ordinarily, inherited property is classified as nonmarital property. See *Westwood v. Darnell*, 299 Neb. 612, 909 N.W.2d 645 (2018). If the inheritance can be identified, it is to be set off to the inheriting spouse and eliminated from the marital estate. *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003). Our courts have noted that the law does not require a complete segregation or dollar-by-dollar tracing of inherited

funds. See, generally, *Marshall v. Marshall*, 298 Neb. 1, 902 N.W.2d 223 (2017).

Harlan testified that the value of his inherited share of the home farm was $60,000. A "Transfer on Death Deed" was received into evidence demonstrating that Harlan and his sister inherited the home farm upon his father's death. Harlan and Shirley then purchased the entirety of the home farm utilizing his inheritance coupled with marital funds derived from the sale of the parties' house in Colorado. The total value of the home farm at purchase was $157,500. Therefore, unlike the 401K, Harlan has presented documentation which supports his claim that he did receive an inheritance. However, he presented no documentation which in any way establishes or corroborates the amount of that inheritance. Consequently, he has again failed to meet his burden of proof to definitively identify the value of his claimed premarital asset as required by *Brozek* and *Onstot.* As a result, we must find that he has failed to meet his burden of proof and must reverse the district court's finding that $60,000 should be set off to him as nonmarital inherited property.

### 2. Tax Liability

[10] On cross-appeal, Harlan argues that the district court erred in not allocating between the parties the tax liability that was created by selling the farms and equipment. Income tax liability incurred during the marriage is one of the accepted costs of producing marital income, and thus, income tax liability should generally be treated as a marital debt. *Meints v. Meints*, 258 Neb. 1017, 608 N.W.2d 564 (2000).

Evidence adduced at trial showed that Harlan and Shirley prepaid estimated taxes of $31,400 to the federal government, $10,291 to the State of Kansas, and $3,000 to the State of Nebraska based on the sale of the home farm. Additional withholdings are reported on their 2015 federal tax return. Because they overpaid, Harlan and Shirley received refunds of $12,351 from the federal government, $1,856 from Kansas, and $2,990

from Nebraska which they split evenly. Evidence adduced at trial also shows that the tax estimates were made from marital funds. However, the evidence also demonstrates that the estimates were paid from an account that was valued by the parties and the court as of July 22, 2015. The court divided the amount of the account evenly between the parties but did not account for the fact that the amount of funds in the account had been subsequently reduced by the payment of a marital obligation. The effect of not allocating the tax liability is that Harlan's share is reduced by the amount of the tax estimates paid less the portion of the refund he received. Conversely, Shirley does not share in the liability but has received half of the refund. We find that the court erred in failing to allocate the tax liability paid.

The evidence demonstrates that a total of $44,691 was paid in estimates. The total refund received was $17,197. This refund was split evenly by the parties. The net tax liability is $27,494. Divided by two, each party's share of the net liability is $13,747. This amount should have been shown as a deduction from each party's portion of the marital estate. On remand, we order the district court to include this deduction in the division of property.

### 3. Alimony Award

[11] "The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate." § 42-365. In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party. *Wiedel v. Wiedel*, 300 Neb. 13, 911 N.W.2d 582 (2018). See, also, § 42-365. In addition,

a court should consider the income and earning capacity of each party and the general equities of the situation. *Wiedel v. Wiedel, supra*.

[12-14] In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Bergmeier v. Bergmeier*, 296 Neb. 440, 894 N.W.2d 266 (2017). The primary purpose of alimony is to assist an ex-spouse for a period of time necessary for that individual to secure his or her own means of support. *Id*. Thus, the ultimate criterion is one of reasonableness. *Id*.

Shirley argues that the district court abused its discretion by awarding insufficient alimony that did not account for the couple's length of marriage, the disparity in their incomes, or her inability to seek employment due to health ailments. Harlan argued in response and on cross-appeal that Shirley overstated her expenses, received a sizable property equalization payment, and will benefit from Harlan's pension if she survives him. We find, particularly in light of our findings above—which result in Shirley's receiving a greater value of marital assets—that there was no error in the district court's award.

The evidence demonstrates that at the time of trial, Harlan had a larger monthly income than Shirley. The combination of Social Security income, his portion of his pension, a $100 per month insurance payment, and a historical average of $300 per month in oil royalties put Harlan's average monthly income at approximately $2,700. Deducting the $200 per month alimony award places Harlan's monthly net income at $2,500. In contrast, Shirley's income, taking into account the order of the court, is much lower. Combining her Social Security income with her portion of Harlan's pension and the $200 alimony award places her at approximately $1,035 in monthly income. However, several other factors must figure into our assessment of the district court's award.

First, we must consider other income available to Shirley. In the decree of dissolution, the district court awarded Shirley significant cash assets. That amount will be supplemented by over $81,000 by virtue of our decision herein. In addition, Shirley was awarded a portion of the coins the parties invested in. Therefore, she has a significant amount of assets from which additional income can be produced. While Harlan also has cash and precious metals from which additional income may be drawn, his income-producing assets are not as significant given his ownership of a house and the decision of this court.

The evidence further established that Shirley has twice been a part of decisions that deferred present income to the future. The evidence established that the parties opted to take the lowest possible pension amount when Harlan retired in exchange for Shirley's receiving the same amount if she survives Harlan. The parties also agreed that the oil royalty payments held in their joint names should all go to Harlan in return for his being awarded those royalties as an asset in the division of property. Shirley will be entitled to those royalties for the remainder of her life if Harlan predeceases her.

The evidence also demonstrated that Harlan has significant costs related to his health. While some of the expenses enumerated on his expense list may be inflated, it is apparent that at the time of trial, Harlan's monthly expenses were much higher than Shirley's. It is difficult to ascertain what Shirley's expenses are. While reference was made in the testimony to a listing of expenses, this exhibit was never offered and does not appear in our record. The evidence does establish that Shirley lives in the home of her son. While she has experienced serious health issues in the past, her only medication at the time of trial was a daily "baby aspirin."

Finally, we note that we must also consider that Shirley received $900 per month in temporary alimony for nearly 2 years prior to trial. Given the totality of the foregoing factors,

we find no error in the district court's award of alimony, particularly given our findings regarding property division.

## VI. CONCLUSION

Based on our de novo review of the record, we find that the district court erred in finding that a portion of Harlan's 401K constituted nonmarital property and thus reverse that determination. We direct the district court to award half of the $130,000 previously set off to Harlan as nonmarital property to Shirley. We further find that the district court erred in finding that Harlan's inheritance constituted nonmarital property. We direct the district court to award to Shirley half of the $60,000 previously set off to Harlan as nonmarital property. We also find that the net tax liability of $27,494 should be divided evenly between the parties and deducted from the parties' shares of the marital property. We affirm the district court's award of alimony.

Affirmed in part, and in part reversed and remanded with directions.

# State of Nebraska, appellee, v. Jeffrey S. Loving, appellant.

926 N.W.2d 686

Filed April 9, 2019. No. A-18-112.

1. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.
2. **Jury Instructions: Proof: Appeal and Error.** The appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
3. **Trial: Courts: Homicide: Jury Instructions.** A trial court is required to give an instruction where there is any evidence which could be believed by the trier of fact that the defendant committed manslaughter and not murder.
4. **Homicide: Intent: Words and Phrases.** A "sudden quarrel" is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control; the question is whether there existed reasonable and adequate provocation to excite one's passion and obscure and disturb one's power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment.
5. **Appeal and Error: Words and Phrases.** Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of the 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.
6. **Trial: Judges: Jury Instructions: Appeal and Error.** It is the duty of a trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing

from the jury an essential issue or element in the case are prejudicially erroneous.

7. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial if the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Douglas County: Gregory M. Schatz, Judge. Reversed and remanded for a new trial.

Thomas C. Riley, Douglas County Public Defender, and Leslie E. Cavanaugh for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

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

Arterburn, Judge.

## INTRODUCTION

Jeffrey S. Loving was convicted by a jury of murder in the second degree and use of a deadly weapon to commit a felony. The district court subsequently sentenced Loving to a total of 110 to 130 years' imprisonment. Loving appeals from his convictions here. On appeal, Loving assigns numerous errors, including that the district court erred by incorrectly instructing the jury as to the elements of murder in the second degree. Because we find merit to Loving's assertion that the district court erred in instructing the jury as to the elements of murder in the second degree and because we find such error is not harmless, we reverse Loving's convictions and remand the cause for a new trial.

## BACKGROUND

The State filed an information charging Loving with first degree murder pursuant to Neb. Rev. Stat. § 28-303(1) (Reissue 2016) and with use of a deadly weapon to commit a felony pursuant to Neb. Rev. Stat. § 28-1205(1) (Reissue 2016). The charges against Loving stem from an incident which occurred on July 7, 2016. Evidence adduced at trial revealed that at

5:53 p.m., shots were fired near the intersection of 28th and Laurel Avenues in Omaha, Nebraska. Approximately 3 minutes after the shots were fired, the 911 emergency dispatch service received a telephone call indicating that there was a shooting victim located at a gas station a short distance from 28th and Laurel Avenues.

When police arrived at the gas station, they found Marshall Washington in the front seat of a silver sport utility vehicle (SUV) suffering from a gunshot wound to his right cheek. Washington's injuries were "'not compatible with life.'" He was pronounced dead at a hospital upon his arrival. At the gas station, police also located the driver of the SUV, Theodore Loving. Theodore told police that his nephew, Loving, had shot at the vehicle as a result of a dispute they were having. Theodore claimed that Loving owed him $3,000 for drugs he had purchased. Loving was subsequently arrested and charged with the murder of Washington.

At trial, Loving admitted that he fired the shots at Theodore's SUV, which shots resulted in Washington's death. However, he claimed that he was justified in firing the shots in defense of himself and his family, because he was afraid that Theodore was going to kill him, his sister, and his sister's children.

The State disputed Loving's claim of self-defense. It presented evidence to demonstrate that Loving was angry with, and not afraid of, Theodore on the day of the shooting. The State also presented evidence to show that Loving fired the shots at Theodore's SUV when it was moving away from him and that after the shooting, Loving attempted to change his appearance and avoid arrest.

The State called Theodore to testify. Theodore testified that he lives in California, but occasionally comes to Nebraska to visit family, including Loving and Loving's sister, Dynasti Loving. Theodore explained that his relationship with Loving and Dynasti was "nothing but love" and that he "always went out of [his] way to help them." When Theodore visited Nebraska in 2012 or 2013, he helped supply Loving with a

large quantity of marijuana. Specifically, Theodore testified that on Loving's behalf, he obtained 1 pound of marijuana from his associates in Juarez, Mexico, and 1 pound of marijuana from his "friends in east Oakland." Despite receiving the 2 pounds of marijuana, Loving refused to pay for it. Because of Loving's refusal, Theodore paid $3,000 of his own funds to his associates in Mexico, because "you don't want to mess with the Juarez boys." Theodore's friends from Oakland were never paid.

In May 2016, Theodore returned to Nebraska for a visit. When he arrived in Nebraska, Theodore had a "friendly" conversation with Loving about the debt Loving owed to Theodore's friends in Oakland. Theodore testified that he was not concerned about Loving's repaying the $3,000 he owed to Theodore; rather, he wanted Loving to repay Theodore's friends from Oakland. According to Theodore, Loving told Theodore that he needed a few weeks to obtain the funds to repay his debt. After Theodore's conversation with Loving, he continued to have contact with Loving, including purchasing marijuana from Loving and spending time together at Dynasti's house. Theodore testified that everything was "[f]ine" and "great" between him and Loving through the beginning of July.

In the first few days of July 2016, Theodore's relationship with Loving changed. Theodore testified that he observed Loving to be spending a lot of money "partying," so he brought up again to Loving the drug debt. Testimony from Theodore and Loving and evidence recovered from Loving's cellular telephone indicated that in the first few days of July, Theodore and Loving exchanged numerous text messages and telephone calls regarding Loving's drug debt. Theodore sent Loving a text message telling him he could "at least send $200 towards [his] debt." Loving replied to the message that he did not intend to repay a 3-year-old debt. Loving also told Theodore to stop calling him and threatened to go to Theodore's girlfriend's house where Theodore was staying "to do something" to him. The State presented evidence that around this same time, Loving

sent a text message to Dynasti, stating, "'He talking about he on his way I'm going to smoke him.'"

Theodore testified that based on Loving's behavior, on July 5, 2016, he contacted a friend of his from Oakland named "Mike." Theodore gave this friend Loving's telephone number and told him that Loving lived with Dynasti. Text messages recovered from Theodore's cellular telephone indicate that Theodore also instructed Mike what to say when he telephoned Loving. Theodore also texted Mike at some point asking him if he had called Loving yet. Ultimately, Mike telephoned Loving sometime in early July and left him a voice mail message. On the message, Mike mentioned Theodore's name and threatened violence against Loving, Dynasti, and everyone who lived in Dynasti's house, if Loving did not repay his debt. Specifically, the voice mail message stated as follows:

> Your Uncle Theodore will get that money. I know you are at your sister's house and I will come there if I have to and I will fuck both you all up. I am not going to leave nothing. Do you understand? So you best try to get that money as soon as you can and pass it to your blood or there will be some blood. And that is real ass talk. Now, if you got any sense, you better get my money or else I am going to [indecipherable] everybody in the house at your sister's.

Theodore testified that he learned that Mike had left the message after Dynasti contacted Theodore on July 7 and was upset with him. Theodore then sent a text message to Mike, asking him, "'Why did you say my name?'"

Also on July 7, 2016, Theodore learned through social media that it was the birthday of his childhood friend, Washington, who he had not seen in a number of years. Theodore also learned that Washington was not in good health and was residing at a local nursing home. He went to visit Washington for his birthday. Theodore and Washington left the nursing home after eating dinner there so that Theodore could "show [Washington] a good time on his birthday." From the nursing home, Theodore drove with Washington in the passenger seat

of his SUV to the area of 30th and Crown Point Avenues to obtain marijuana. Dynasti's house is located at the intersection of 28th and Crown Point Avenues. Theodore testified that he was not "particularly heading to Dynasti's" when he left the nursing home.

Theodore testified that when he approached Dynasti's house on Crown Point Avenue, he recognized someone, whose name he did not know, who was parked in front of the house and pulled up next to the person's vehicle to ask him if he had any marijuana to sell. While Theodore was stopped in front of the house, Loving came to the front of the house from the backyard. Loving told Theodore, "'You better get out of here before something happens. Ya'll weed days over here are over with.'" Theodore then began to drive away from Dynasti's house, telling Loving that he and Washington would just go around the corner to buy marijuana.

Theodore drove around the block, trying to get to a nearby liquor store. He testified that he could not continue east on Crown Point Avenue after leaving Dynasti's house because there was a schoolbus blocking his way. Theodore admitted that this was the first time he had mentioned the schoolbus. When Theodore's SUV was near the intersection of 28th and Laurel Avenues, which is located behind Dynasti's house, Theodore observed Loving running toward him from behind Dynasti's house. At this time, Theodore had slowed his SUV down, but he did not stop. Loving then started shooting a gun toward the SUV. Theodore believed Loving fired four shots. Theodore quickly drove away from the area. He observed that Washington had been shot and "knew it was bad." Theodore testified that he was not heading anywhere in particular and that he ended up at a nearby gas station. He did not call 911 until he reached the gas station because his cellular telephone's "battery was dead." Theodore testified that he did not threaten Loving during their encounter on July 7, 2016. He also testified that he did not have a gun.

During the defense's cross-examination of Theodore, he admitted that although he spoke with numerous officers

immediately after the shooting and had given a deposition prior to trial, he had never before mentioned obtaining marijuana for Loving from people located in Mexico and Oakland and, thus, never mentioned Loving owed the people from Mexico or Oakland any money. Instead, Theodore repeatedly told police that Loving owed him money for marijuana and that Theodore wanted it back. In fact, in Theodore's text messages to Loving from May through July 2016, he never mentioned Loving owing anyone but Theodore money. In a telephone call to his sister while he was in a police interview room, Theodore stated that "'all I want is my money.'" Theodore also told police several times that he went to Dynasti's house on July 7, 2016, in order "'to settle this with Jeffrey.'" Theodore believed that Loving was "dodging" him. Theodore did not mention wanting to buy marijuana for Washington when he initially spoke with police. Theodore told police that he did not even smoke marijuana.

During the defense's cross-examination of Theodore, it presented evidence that prior to Theodore's trial testimony, he had denied knowing anything about Mike or about the threatening message Mike had sent to Loving.

Forensic investigators who inspected Theodore's SUV after the shooting located three bullets on its passenger side. One of the bullets entered through the outside of the front passenger-side door and was located inside that door. A second bullet was located in the top molding of the rear passenger-side door. The third bullet was located on the plastic trim on the bottom of the passenger side between the front and rear doors. The three bullets recovered from Theodore's SUV and the bullet recovered from Washington were all .40-caliber and were all fired from the same gun.

Both the front and rear passenger-side windows of Theodore's SUV were shattered during the shooting. The front passenger-side window was made of clear or greenish-colored glass. Glass matching that window was located on the east side of the intersection of 28th and Laurel Avenues. The rear passenger-side window was made of tinted glass. The glass appeared to

be black in color. Glass matching the rear window was located on Laurel Avenue, a few feet to the west of 28th Avenue. There was no damage to the driver's side of the SUV, the front of the SUV, or the back of the SUV.

Forensic investigators also recovered 12 casings from the area of the shooting. Ten of these casings were found approximately halfway between Crown Point and Laurel Avenues on 28th Avenue. The casings were located near the curb on the east side of the street. The other two casings were located on the northeast corner of 28th and Crown Point Avenues, across the street from Dynasti's house. All of the casings were from .40-caliber bullets and were fired from the same gun; however, two of the casings were a different brand. Although police searched the area thoroughly, they were unable to locate a gun.

The State also presented evidence regarding Loving's actions after the shooting to refute his claim of self-defense and defense of others. The State called Kirk Carter, Loving's friend, to testify. Carter testified that he was at Dynasti's house at the time of the shooting. In fact, Carter was in his vehicle in front of Dynasti's house when Theodore's SUV pulled up next to him. Carter indicated that he did not see who was in the SUV, but he did observe Loving to gesture that the SUV should leave. Carter indicated that the music playing in his vehicle was very loud and that, as a result, he could not hear the exact words exchanged between Loving and the person in the SUV. Carter explained that after the SUV left, he saw Loving move to the side of Dynasti's house and then heard three or four "bangs" from behind Dynasti's house. Loving then got into Carter's vehicle and they drove away. Carter drove Loving to the house of another of Loving's friends. During the drive, Carter testified that he and Loving did not say much. However, Loving did say, "'He played with me.'" Carter and Loving smoked marijuana in Carter's vehicle, and then Carter left Loving at his friend's house.

Later on the night of July 7, 2016, Loving's girlfriend picked up Loving from his friend's house in a vehicle that she

had borrowed from a friend. Apparently, prior to picking up Loving, she had driven to her friend's house in her own vehicle in order to borrow her friend's vehicle so that she could go look for Loving. The State presented evidence to demonstrate that by the time Loving's girlfriend picked up Loving, he had changed his clothes from the clothes he was wearing at the time of the shooting and had cut his hair much shorter than it had been earlier that day.

After Loving's girlfriend picked up Loving, they returned to the area of her friend's home, presumably to return the friend's vehicle. However, when Loving and his girlfriend drove by, they observed a number of police at the house. They attempted to drive away from the house, but were ultimately stopped by the police and Loving was arrested.

After the State rested its case, Loving called Dynasti to testify in his defense. Dynasti essentially agreed with Theodore's testimony that Theodore had a good relationship with her and Loving when Theodore first came to visit in May 2016. Dynasti testified that she saw Theodore "[a]lmost every other day" and that Theodore spent a lot of time with her and her three children. Dynasti also testified that "sometimes" when she was with Theodore, Loving was also present.

Dynasti also agreed with Theodore's testimony that the relationship between Theodore, Loving, and herself changed in July 2016. Dynasti described that Theodore's attitude toward her and Loving changed dramatically around July 1. She testified that Theodore became extremely upset after he observed her and Loving spend a lot of money on a party they were planning for the Fourth of July holiday. Theodore demanded repayment of Loving's drug debt. Dynasti indicated that Theodore and Loving's relationship became so negative, she uninvited Theodore and his girlfriend from the Fourth of July party. She indicated that she rescinded the invitation partly because she was concerned about Theodore's being violent.

Dynasti described the events of July 7, 2016, differently than Theodore, however. On the morning of July 7, Dynasti was at work when Loving and his girlfriend came to see her. Loving

played the voice mail he received from Theodore's friend, Mike, for Dynasti. Upon hearing the voice mail, Dynasti became very upset. She testified that she began to cry and that Loving and his girlfriend also cried. Dynasti described feeling very worried that something may happen to her children and worried that everyone living in her house was going to be killed. Dynasti indicated that in addition to feeling worried and fearful, she also felt very angry and hurt.

Dynasti planned on contacting an acquaintance who was a police officer after she got home from work. In the meantime, however, she forwarded a recording of the voice mail message to Theodore and asked why he would have someone threaten her and her family. Dynasti admitted that she appeared very angry in her text messages to Theodore: "'You little weak faggot-ass bitch. You're going to regret that you ever did that[.] I don't give a fuck about you. . . .'" "'You don't put no fear in my heart . . . .'" Additionally, Dynasti texted Loving's girlfriend: "'I want his bitch-ass to come to my house'" and "'I'll do it my motherfucking-self.'"

After work, Dynasti was at her house with her three children. She testified that Loving and Carter were outside of the house. Dynasti observed Theodore's SUV pull up in front of her house. She heard Loving scream at Theodore, "'Get the fuck out of here.'" Dynasti indicated that Loving appeared to be afraid. He told her to get inside the house, which frightened her. Dynasti heard Theodore yell back at Loving. She testified that Theodore's words caused her to fear for her life and for Loving's life. From inside the house, she observed Theodore drive around the block. It appeared to her that Theodore was going to turn onto 28th Avenue in order to return to her house. She then saw Loving standing in the middle of 28th Avenue and watched him fire three shots toward Theodore's SUV. Dynasti admitted that her testimony was different than what she told the police immediately after the shooting. She testified that she had told no one, including Loving, that she saw and heard the shooting until a few weeks before trial. On the day of the shooting, Dynasti told

police that she did not even hear the gun shots. In addition, she acted surprised when police informed her that Loving was a suspect in the shooting.

Loving also testified in his own defense. Loving testified that he did not owe Theodore any money for a drug debt. In May 2016, Theodore contacted Loving for the first time in years. Loving testified that Theodore did not bring up the drug debt during their conversation. After that telephone call, Loving saw Theodore "[q]uite often" from May through June. Loving indicated that during that time period, Theodore often purchased marijuana from him. Loving testified that in early July, his relationship with Theodore changed. Theodore began discussing the purported drug debt. Loving indicated that Theodore suddenly had a very different attitude toward him and had a threatening demeanor.

Loving testified that on the morning of July 7, 2016, he listened to the voice mail message that had been left on his cellular telephone by Loving's friend, Mike. After hearing the message, Loving felt "panicked," fearful, and hurt. He testified that he believed that the message was essentially a death threat directed at him from Theodore. During his testimony, Loving described what else had occurred on July 7, prior to the shooting. Loving testified that at some point, prior to the shooting, he shaved his head, because he had "messed up" when "lining [his] hair up." He also testified that prior to the shooting, Carter came over to Dynasti's house and they left the house for a few minutes to go buy cigarettes at a nearby gas station. When they returned, they pulled up in front of Dynasti's house and listened to music in the vehicle. Approximately 5 or 10 minutes later, Theodore pulled up in his SUV and stopped next to Carter's vehicle.

Loving testified that when Theodore first stopped his SUV, he was yelling something that Loving could not hear because the music in Carter's vehicle was too loud. When Loving got out of Carter's vehicle, he grabbed Carter's gun and put it in his pocket. Once outside of Carter's vehicle, Loving could hear that Theodore was yelling about the drug debt. Loving testified

that Theodore shouted, "'I want my motherfucking money.'" Loving yelled at Theodore to leave. He then saw Theodore point a gun at him from inside the SUV.

Loving testified that once he saw Theodore with a gun, he yelled at Dynasti to get inside of the house and he went on the side of the house where he was outside of Theodore's vantage point. Loving indicated that once on the side of the house, he continued to walk toward the backyard. Loving testified that he then heard Carter say, "'They're coming back.'" Loving looked up and saw Theodore's SUV on the street behind Dynasti's house. He testified that Theodore was starting to turn north on 28th Avenue so as to return to Dynasti's house. Loving stated that Theodore stopped his SUV at the intersection of 28th and Laurel Avenues and that Loving again observed Theodore point a gun at him from inside the SUV. Loving believed that Theodore planned to kill him, so he pulled Carter's gun out of his pocket and started to shoot at Theodore and his SUV. Loving was unable to recall exactly how many times he shot; however, he did testify that he shot until the gun was out of bullets. He did testify that he did not intend to kill Theodore or Washington, he just wanted to stop Theodore from returning to Dynasti's house.

Loving testified that after the shooting, he intended to turn himself in at the police station. He indicated that before he did so, he wanted to go to his mother's house. He also indicated that he was fearful that police would shoot him if he was arrested somewhere other than the police station. Loving admitted that during recorded telephone calls from jail after his arrest, he repeatedly denied any involvement with the shooting, rather than stating that he shot Theodore in self-defense. In addition, Loving admitted that the first time he ever mentioned that Theodore had a gun on July 7, 2016, was during his trial testimony.

After hearing all the evidence, the jury rendered its verdict. Although Loving was charged with first degree murder, the jury convicted him of second degree murder, pursuant to a step instruction given by the district court. The jury also convicted

Loving of use of a deadly weapon to commit a felony. Loving filed a motion for new trial, which the district court overruled. The court subsequently sentenced Loving to 80 to 90 years' imprisonment on his conviction for second degree murder and 30 to 40 years' imprisonment on his conviction for use of a deadly weapon to commit a felony.

Loving appeals.

## ASSIGNMENTS OF ERROR

On appeal, Loving assigns five errors. He asserts, restated and renumbered, that the district court erred in (1) overruling his objection to "the racial makeup" of the jury; (2) not permitting him to testify about "his fears of fights in jail" to counter the State's evidence that during jailhouse telephone calls, he denied shooting Washington; (3) failing to properly instruct the jury regarding the elements of second degree murder; and (4) imposing excessive sentences. In addition, Loving argues that there was insufficient evidence presented to prove that he did not act in self-defense or defense of others when shooting at Theodore's SUV.

## STANDARD OF REVIEW

[1] Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011).

## ANALYSIS

### Jury Instructions

Contained within the jury instructions in this case was instruction No. 6, which delineated the elements of first degree murder, second degree murder, and intentional manslaughter. This step instruction also explained to the jury the manner in which it was to consider whether Loving had committed each crime. Because instruction No. 6 is so important to our disposition of this case, we quote it in its entirety:

## INSTRUCTION NO. 6

Depending on the evidence, you may return one of several possible verdicts for Count 1 of the Information. You may find the Defendant:

1. Guilty of Murder in the First Degree; or
2. Guilty of Murder in the Second Degree; or
3. Guilty of Intentional Manslaughter; or
4. Not guilty.

## ELEMENTS

1. MURDER IN THE FIRST DEGREE

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the Defendant of the crime of Murder in the First Degree under Count 1 of the Information are:

1. That the Defendant on or [about] July 7, 2016, did kill Marshall Washington Jr.;

2. That the Defendant did so in Douglas County, Nebraska;

3. That the Defendant killed Marshall Washington Jr. purposely and with deliberate and premeditated malice; and

4. That the Defendant did not act in self-defense; and

5. The Defendant did not act in defense of another.

The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements of the crime of Murder in the First Degree.

2. MURDER IN THE SECOND DEGREE

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the Defendant of the crime of Murder in the Second Degree under Count 1 of the Information are:

1. That the Defendant on or about July 7, 2016 did kill Marshall Washington, Jr.;

2. That the Defendant did so in Douglas County, Nebraska;

3. That the Defendant did so intentionally, but without premeditation;

4. That the Defendant did not act in self-defense and;

5. The Defendant did not act in defense of another.

The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements of the crime of Murder in the Second Degree.

3. INTENTIONAL MANSLAUGHTER

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the Defendant of the crime of Intentional Manslaughter under Count 1 are:

1. That the Defendant on or about July 7, 2016 did kill Marshall Washington, Jr.; and

2. That the Defendant did so in Douglas County, Nebraska; and

3. That the Defendant did so intentionally upon a sudden quarrel, without malice; and

4. That the Defendant did not act in self-defense; and

5. That the Defendant did not act in defense of another.

The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements of the crime of Intentional Manslaughter.

**EFFECT OF FINDINGS**

You must separately consider in the following order the crimes of Murder in the First Degree, Murder in the Second Degree, and Intentional Manslaughter.

For the crime of Murder in the First Degree, you must decide whether the State proved each element beyond a reasonable doubt. If the State did so prove each element, then you must find Defendant guilty of Murder in the First Degree and stop.

If, however, you find that the State did not so prove, then you must proceed to consider the next crime on the list, Murder in the Second Degree. You must proceed in this fashion to consider each of the crimes on the list, in the manner described, until you find the Defendant guilty of one of the crimes or find him not guilty of all of them.

Although at trial, neither Loving nor the State objected to the language of instruction No. 6, Loving claims on appeal that the instruction was not a correct statement of the law because it failed to "include as an element of the crime [of murder in the second degree], the necessary language that 'the Defendant did so without provocation of a sudden quarrel.'" Brief for appellant at 30. Loving asserts that as a result of the omission from the elements of murder in the second degree, the jury instruction constituted plain error which was prejudicial to him. In the State's brief on appeal, it "acknowledges" that instruction No. 6 was erroneous because it omitted from the list of elements of murder in the second degree that Loving acted without the provocation of a sudden quarrel. Brief for appellee at 26. In addition, the State conceded during its oral argument that the erroneous jury instruction amounted to plain error. However, the State argues that this error is harmless.

We agree with Loving and with the State that instruction No. 6 was not a correct statement of the law because it omitted a necessary element of murder in the second degree. A similar instruction to instruction No. 6 was given in *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011), wherein Ronald Smith was ultimately convicted of murder in the second degree. On appeal, he argued that the step instruction given by the district court deprived him of due process because it did not allow the jury to consider whether his specific intent to kill was the result of a sudden quarrel. The Nebraska Supreme Court agreed with Smith's contention. The court stated:

> [T]he step instruction given in this case was not a correct statement of the law. Specifically, the step instruction required the jury to convict on second degree murder if it found that Smith killed [the victim] intentionally, but it did not permit the jury to consider the alternative possibility that the killing was intentional but provoked by a sudden quarrel, and therefore constituted manslaughter.

*Id.* at 734, 806 N.W.2d at 394.

In this case, as in *State v. Smith, supra*, the jury instructions did not correctly instruct the jury as to the elements of

murder in the second degree, in that the jury was not permitted to consider whether Loving killed Washington as a result of a sudden quarrel. The jury found beyond a reasonable doubt that Loving intentionally killed Washington without premeditation and, as a result, found Loving guilty of murder in the second degree. Instruction No. 6 instructed the jury that if it found Loving guilty of murder in the second degree, it was to stop and not review the elements of intentional manslaughter. Thus, the jury never considered whether Loving killed Washington "upon a sudden quarrel," which could have reduced Loving's conviction to manslaughter.

[2] However, in order for us to reverse based on a defective jury instruction, the evidence must support the inclusion of "upon a sudden quarrel" and the defendant must have been prejudiced by the exclusion of that language. See *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013). The appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Id*.

[3] A trial court is required to give an instruction where there is any evidence which could be believed by the trier of fact that the defendant committed manslaughter and not murder. *Id*. In the context of this case, Loving was prejudiced by the erroneous jury instruction only if the jury could have reasonably concluded on the evidence presented that his intent to kill was the result of a sudden quarrel.

[4] A "sudden quarrel" is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control. *State v. Trice*, 286 Neb. 183, 835 N.W.2d 667 (2013). It does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim. *Id*. The question is whether there existed reasonable and adequate provocation to excite one's passion and obscure and disturb one's power of reasoning to the extent that one acted rashly and from passion, without due deliberation and

reflection, rather than from judgment. *Id*. The test is an objective one. *State v. McGuire, supra*.

In *State v. Trice, supra*, the Supreme Court considered whether there was any evidence that De'Aris Trice's intent to kill was the result of a sudden quarrel. The evidence presented in that case indicated that Trice and his brother had been involved in a "brawl" at an after-hours party. *Id.* at 191, 835 N.W.2d at 673. During that brawl, Trice fatally stabbed the victim. Although witness accounts differed, the evidence suggested that Trice got in the middle of a fight between the victim and a third party. Testimony from Trice's brother indicated that after he and Trice got involved in the fight, the victim swung a bottle in Trice's direction. Trice later told his brother that he stabbed the victim in order to protect the two of them. After analyzing this evidence, the Supreme Court stated, "We believe, all things considered, that a jury could find that Trice acted upon a sudden quarrel. Certainly, the evidence does not compel this conclusion; as we have stated, the evidence in this regard is slight. But such a conclusion is at least reasonably inferable." *Id*. at 191-92, 835 N.W.2d at 673. As a result of the court's finding, it concluded that the court's failure to properly instruct the jury on the elements of murder in the second degree constituted plain error.

In a similar case, *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012), the Supreme Court considered whether there was any evidence of a sudden quarrel when William Smith shot at the victim, who was running away from him. In that case, the evidence revealed that Smith and the victim were involved in an altercation outside of a bar. During that altercation, the victim punched Smith in the face. The victim and his friends then left the scene, and Smith and his friend followed them. When the other group of individuals stopped at a grocery store 5 or 10 minutes later, Smith yelled that he wanted to fight with the victim. At least three or four of the victim's friends joined in the fight. Smith's friend then fired his gun two or three times in the air. As the victim and his friends were running away,

Smith grabbed the gun from his friend and fired in the victim's direction. The Supreme Court found:

> From this evidence, a finder of fact could conclude that Smith was provoked when he was "jumped" by several persons in the parking lot and that as a result of this sudden occurrence, he acted rashly and from passion, without due deliberation and reflection, rather than from judgment. Certainly this conclusion is not compelled by the evidence, but it is at least fairly inferable.

*Id*. at 645, 822 N.W.2d at 409.

However, in *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011), the Supreme Court determined that there was no evidence of a sudden quarrel when Ronald Smith admitted to arguing with the victim and in the course of that argument, pushed the victim off of the bed and then held a pillow over her face for 1 to 2 minutes. The Supreme Court found:

> From this, the jury could reasonably infer that Smith and [the victim] had been arguing and that Smith was angry. But there is no evidence explaining how or by whom the argument was started, its duration, or any specific words which were spoken or actions which were taken before [he] pushed [the victim] to the floor. And most importantly, there is no evidence that [the victim] said or did anything which would have provoked a reasonable person in Smith's position to push her from the bed and smother her with a pillow. In the absence of some provocation, a defendant's anger with the victim is not sufficient to establish the requisite heat of passion. Nor does evidence of a string of prior arguments and a continuing dispute without any indication of some sort of instant incitement constitute a sufficient showing to warrant a voluntary manslaughter instruction.

*Id*. at 735, 806 N.W.2d at 395.

In this case, there was evidence presented at trial which suggested that the shooting of Washington was the result of a continuing dispute between Loving and Theodore. Both Loving

and Theodore testified that in the days preceding the shooting, they had been arguing about a debt that Theodore believed Loving owed to him. Additionally, there was evidence that on the day of the shooting, there was "some sort of instant incitement" in that Loving listened to a voice mail message which, in his mind, was a threat against his life which had been initiated by Theodore. See *id.* at 735, 806 N.W.2d at 395. Loving testified that not more than a few hours after hearing this message, Theodore arrived at the house of Loving's sister, Dynasti; demanded repayment of Loving's debt; and pointed a gun at Loving from inside his SUV. The two engaged in a screaming match after which Loving went around the side of the house to hide from Theodore. Loving testified that Theodore then drove his vehicle around the block and appeared to be turning back toward Dynasti's house. Loving testified that Theodore again pointed a gun at him and that as a result, Loving fired his weapon. Loving's testimony was corroborated in part by Dynasti.

During his testimony, Theodore disputed Loving's account of the events which occurred on the day of the shooting. Specifically, he testified that there was no real argument between Loving and himself on that day. He testified that he went to Dynasti's house in order to purchase marijuana, not to collect on Loving's debt. Theodore also indicated that he did not threaten Loving during their encounter, nor did he ever point a gun at Loving. In fact, Theodore insisted that he did not have a gun at that time. Notably, however, Theodore's testimony appears to be different than the account he gave to the police immediately after the shooting. At that time, Theodore indicated that he had gone to Dynasti's house to collect the debt and that all he wanted was his money back.

Although witness accounts of what occurred on July 7, 2016, differ somewhat, there is evidence in the record which, if believed, indicates that Loving acted upon a sudden quarrel when he fired the shots at Theodore's SUV and killed Washington. A jury could reasonably find that Loving

acted rashly and from passion, without due deliberation and reflection, rather than from judgment, when he fired the shots at Theodore's SUV. As in *State v. Trice*, 286 Neb. 183, 835 N.W.2d 667 (2013), and *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012), this finding is not compelled by the evidence presented at trial, but it is at least plausible. However, the evidence present herein does meet the test of some evidence of a sudden quarrel set out by these cases. Unfortunately, because the district court incorrectly instructed the jury regarding the elements of murder in the second degree, the jury did not have the opportunity to consider whether Loving killed Washington as a result of a sudden quarrel. We therefore find plain error.

[5,6] Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of the 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. *State v. Trice, supra*. Here, although neither Loving nor the State objected to instruction No. 6 at trial, it is clear that the instruction did not properly instruct the jury regarding the interplay between murder in the second degree and manslaughter. It is the duty of a trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous. *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012). Because there was evidence upon which a jury could have convicted Loving for intentional manslaughter, the district court's error was prejudicial. We reverse Loving's conviction for murder in the second degree. And, because Loving's use of a deadly weapon conviction was predicated on his conviction of an underlying felony, the use of a weapon conviction must also be reversed. See *State v. Wilson*, 247 Neb. 948, 530 N.W.2d 925 (1995), *overruled on*

*other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

### Double Jeopardy

[7] Having found reversible error, we must determine whether the totality of the evidence was sufficient to sustain Loving's conviction. If it was not, then double jeopardy forbids a remand for a new trial. See *State v. Trice, supra*. But the Double Jeopardy Clause does not forbid a retrial if the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *Id*.

After reviewing the record, we conclude that the evidence at trial was sufficient to support the jury's verdict finding Loving guilty of murder in the second degree and use of a deadly weapon to commit a felony. Loving, himself, admitted to firing the shots which ultimately killed Washington. Although Loving testified that he fired the shots in self-defense, based on its verdict, the jury clearly rejected such an assertion. There is evidence to support the jury's determination. The location of broken glass from the two passenger-side windows suggests that Theodore's SUV was moving away from Loving at the time he fired the shots. In addition, Theodore testified that he did not threaten Loving during their encounter on July 7, 2016, nor did he have a gun. There was also evidence which suggested that after the shooting, Loving attempted to change his appearance in order to evade arrest. Based upon this evidence, we conclude that double jeopardy does not preclude a remand of the cause for a new trial and that the State may retry Loving on the second degree murder and manslaughter charges, as well as the use of a deadly weapon to commit a felony charge.

We note that because the jury found Loving guilty of murder in the second degree, it essentially acquitted him on the charge of murder in the first degree. As a result, the State is prohibited from retrying Loving on the charge of first degree murder.

## Other Assigned Errors

Because we are reversing Loving's convictions and remanding the cause for a new trial, we need not address his assertions that the district court erred in overruling his objection to the makeup of the jury or in imposing excessive sentences. During oral argument, defense counsel specifically requested that we review whether the district court erred in prohibiting Loving from testifying, in detail, about why he denied any involvement in Washington's shooting while he was in jail awaiting trial. Defense counsel stated that she believed this issue may recur during a subsequent trial. We have reviewed the argument as to this issue which Loving made in his brief to this court. In addition, we have carefully reviewed Loving's testimony in this regard. Ultimately, we conclude that our record is insufficient to review this issue, because during the trial, defense counsel failed to make an offer of proof as to what Loving would have testified to had the court not sustained the State's objection. Moreover, we note that upon our remand, this issue can be fully examined by the district court prior to a new trial upon the filing of a proper motion in limine.

## CONCLUSION

We find plain error in the step instruction given regarding the elements of murder in the second degree and manslaughter. We also find that this error was prejudicial to Loving because it prevented the jury from considering whether Loving killed Washington as a result of a sudden quarrel. We reverse Loving's convictions and remand the cause for a new trial.

Reversed and remanded for a new trial.

# Charles Hutchison and Melissa Hutchison, appellees and cross-appellants, v. Mark Kula and Renie Kula, appellants and cross-appellees.

927 N.W.2d 373

Filed April 16, 2019. No. A-17-1275.

1. **Trial: Witnesses.** In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given to their testimony.
2. **Witnesses: Evidence: Appeal and Error.** An appellate court will not reevaluate the credibility of witnesses or reweigh testimony but will review the evidence for clear error.
3. **Judgments: Appeal and Error.** The trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous.
4. ____: ____. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
5. **Actions: Pleadings.** Two or more claims in a complaint arising out of the same operative facts and involving the same parties constitute separate legal theories, of either liability or damages, and not separate causes of action.
6. **Actions: Real Estate: Sales: Pleadings: Proof.** To state a cause of action under Neb. Rev. Stat. § 76-2,120 (Reissue 2018), the buyer must plead and prove either that the seller failed to provide a disclosure statement or that the statement contained knowingly false disclosures by the seller.
7. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.

8. **Attorney Fees: Appeal and Error.** A party may recover attorney fees and expenses in a civil action only when a statute permits recovery or when the Nebraska Supreme Court has recognized and accepted a uniform course of procedure for allowing attorney fees.
9. **Real Estate: Sales: Attorney Fees.** Attorney fees are mandatory in an action under Neb. Rev. Stat. § 76-2,120(12) (Reissue 2018).
10. **Attorney Fees: Appeal and Error.** When an attorney fee is authorized, the amount of the fee is addressed to the trial court's discretion, and its ruling will not be disturbed on appeal absent an abuse of discretion.

Appeal from the District Court for Sarpy County: Stefanie A. Martinez, Judge. Affirmed.

Blake E. Johnson, of Bruning Law Group, for appellants.

Douglas W. Ruge for appellees.

Pirtle and Bishop, Judges.

Bishop, Judge.

## I. INTRODUCTION

Charles Hutchison and Melissa Hutchison purchased a house located in Bellevue, Nebraska, from Mark Kula and Renie Kula. The Hutchisons subsequently sued the Kulas in the Sarpy County District Court due to problems related to the real estate purchase, namely, water intrusion, a leaking window, a defective refrigerator fan and garage door keypad, and a dead tree. After a bench trial, the district court found the Kulas liable for (1) violation of Neb. Rev. Stat. § 76-2,120 (Reissue 2018) (governing seller real property condition disclosure statements), (2) fraudulent misrepresentation, (3) negligent misrepresentation, and (4) fraudulent concealment. The Hutchisons were awarded $16,744 in damages, plus costs and $10,000 in attorney fees.

The Kulas appeal the judgment, and the Hutchisons cross-appeal, claiming they should have been awarded the entirety of the attorney fees requested rather than the partial amount awarded. We affirm the district court's order in all respects.

## II. BACKGROUND

### 1. The Kulas' Disclosure Statement

On June 22, 2015, the Kulas signed a "Seller Property Condition Disclosure Statement" (Disclosure Statement), which was received at trial as exhibit 1. The Kulas disclosed that they had owned and occupied the property for 7 years. We set forth only those portions of the Disclosure Statement relevant to the issues raised on appeal. Beginning with "Part I," by placing checkmarks in boxes next to the listed item, the Kulas disclosed that the following items were "Working": the refrigerator, the garage door keypad, and the sump pump.

In "Part II," "Section A. Structural Conditions," question No. 5 asks, "Has there been water intrusion in the basement or crawl space?" The Kulas placed a checkmark under "Yes." The form directs that if the answer to any item in section A is "Yes," the seller is to explain the condition in the comments section of "Part III" of the Disclosure Statement. In the comments section, the Kulas handwrote: "section A - Structural Conditions - during 2014 during heavy rains, nei[g]hbor[']s sump pump not working, etc. some water (minor) seeped up in basement (NE [northeast] corner) - added additional drain system."

Also in part II, section A, the Kulas answered "Do Not Know" to question No. 9, "Are there any windows which presently leak, or do any insulated windows have any broken seals?" In part II, "Section D. Other Conditions," question No. 13 asks, "Are there any diseased or dead trees, or shrubs on the real property?" The Kulas placed a checkmark under "No." In the same section, question No. 14 asks, "Are there any flooding, drainage, or grading problems in connection to the real property?" Again, the Kulas placed a checkmark under "No."

The Kulas provided the Disclosure Statement to the Hutchisons prior to execution of the purchase agreement for the property in December 2015. The Hutchisons closed and took possession of the property in March 2016.

### 2. The Hutchisons' Claims

According to the Hutchisons' second amended complaint, immediately after moving into the property, there was water leaking "during rains." Allegedly, after closing in March 2016, they discovered "rust staining on the carpet and efflorescence staining on concrete slab" from previous water intrusions and that the "drain tile system did not function as designed for long before closing." They claimed that "[w]ithin a couple months of closing the carpeting in the basement started to mold," the carpeting was removed, and the "carpet nails were rusty." They asserted that vinyl flooring was removed, "revealing wetness and mold underneath." In May 2016, "gutter downspouts exit points were located buried under 2 inches of dirt with grass growing over it."

Regarding the Kulas' Disclosure Statement which noted a "minor" water leakage in the northeast corner of the basement in 2014, the Hutchisons claimed that the Kulas "had experienced other leakage or seepage issues in other areas and at other times[,] and leaking was known by them to be an ongoing problem with the home," and that the Kulas did not disclose the long-term and continuing water intrusion and "ongoing leaking issues." They claimed that upon moving into the property, the leakage or seepage in the basement and crawl spaces was most pronounced in the northwest corner of the house and "along the south of the house." And they alleged that the previous leak was not due to the neighbor's malfunctioning sump pump, contrary to what was represented in the Disclosure Statement. Purportedly, waterproofing companies gave the Kulas a proposal in 2014, and that work was limited to the northeast corner. The waterproofing companies allegedly "recommended more extensive remedial action." The Hutchisons claimed that waterproofing companies and contractors were "recommending repairs in the amount of $15,940 to waterproof and remedy damage to the basement areas."

The Hutchisons further alleged that the Kulas' representations about windows, the refrigerator, garage door keypad, and trees were "false and known to be false by the [Kulas]." They claimed that there was a leaking window, the refrigerator fan and garage door keypad did not work, and there was a tree that had been dead for over 1 year; they asserted it would cost $834 to remediate those issues.

The Hutchisons claimed that they read and relied on the representations in the Disclosure Statement and that the Kulas intended them to so rely and knew about these conditions or reasonably should have known and failed to disclose or misrepresented the condition of the home. The Hutchisons sought relief, claiming there was fraud and material misrepresentation and violation of § 76-2,120, fraudulent concealment, and negligent misrepresentation. They requested $16,774 in damages, plus costs and attorney fees.

The Kulas filed an answer denying the material allegations of the Hutchisons' complaint.

### 3. Trial

At the bench trial on July 13, 2017, witness testimony was presented and exhibits 1 through 40 were admitted into evidence.

#### (a) The Hutchisons

Charles testified that the Hutchisons took possession of the property on March 7, 2016, and that he started moving in half of his "stuff" the following weekend. According to exhibit 5, the Hutchisons wed and went on a honeymoon from April 9 to 19, and the move was completed on April 23. Exhibit 5 is a timeline Charles created relating to alleged water intrusions, and during Charles' testimony, he often referred to photographs contained in exhibit 8 which depicted the various problem areas he described. The Hutchisons experienced several water intrusions in the basement "every time it rained" from March 26 to August 22 or 23, when Jerry's Basement Waterproofing (Jerry's) performed remedial work.

*(i) Water Intrusion*

According to Charles (either through testimony or exhibit 5), the first water intrusion occurred around March 26, 2016. This involved basement window leaks and water intrusion "along the floor, north section, the section where the faux wood tiles were along the west wall; and then that southwest corner, a little bit of dampness along that west wall in that corner." On April 20, during a rainstorm, the water intrusion was "severe"; the basement did not dry out again until all the tile and part of the carpet was removed on May 14. Also, the basement window "leak[ed] again" during the rainstorm. Charles described "water sitting in the windowsill" on the south wall with a "drip of the water coming down the wall" and "standing water outside the basement sliding glass door [located] in close proximity to the south wall . . . over an inch deep . . . just pooling there." Photographs from April 20 show carpetstains along the south wall. Another photograph shows the area where Charles thought the Kulas replaced carpet with a "tile product" (also referred to as a "wood faux tile") after the Kulas' water intrusion, and "when you stepped or pushed on the tile product, water would seep up through that tile product." On April 27, there were "longstanding water problems in furnace room." On April 29, a new downspout extension was purchased and installed on the southwest side of the property to mitigate pooling of water in front of the basement patio door.

On May 11, 2016, Jerry's inspected the water intrusion issues and recommended "interior drain systems with new sump & pump and exterior drain system around basement patio area." As of May 14, Charles said, "Everything stayed wet despite the fact [they] purchased a dehumidifier and brought fans down into the basement." The Hutchisons "noticed mold coming through the carpet" that was visible from the top of the carpet. According to Charles, a photograph relating to May 14 shows "a piece of wooden rail moulding" that was on the far north end of the basement. When that piece of moulding

was removed and flipped over, there was "black mold that had already grown substantially." Another photograph showed "a downspout that had been grown over by about two inches." He described that another photograph showed that the wood faux tile was "mildewy" and that upon pulling back tiles "to see how wet it was," there was no "area under that entire north section where the tile was that was not wet and mildewy or molding." They pulled all of the tile out; Charles referred to a photograph which showed that concrete underneath the tile was "all wet." Only "about a five foot by six foot, or so, piece [of carpet] had actually molded," so Charles cut and removed that as well as the wet carpet pad underneath that area. He rolled back the rest of the carpet to dry it out. He referenced photographs of the May 14 "stained and moldy carpet" and "residue of the previous carpet glue," where the Kulas allegedly removed and replaced carpet with tile, that "had started to mold because it had been wet for a couple of weeks." A downspout extension was added to the northeast corner that day, and another was added to the northwest corner on May 16. Charles claimed that there were no downspout extensions upon taking possession of the property. He stated that after recaulking the basement window on May 14, there were no additional "water drips in the window."

Charles described photographs from May 21, 2016, showing "moldy carpet glue in the northeast corner," "a piece where it looks like someone tried to seal the concrete crack," "rusty nails in the southwest corner," and "[in the northwest corner] darkened places where the water damage . . . ha[d] been able to discolor the concrete, similarly along the west wall." For May 26, it is noted that "[e]ven after downspout extension in place, water still pools outside basement sliding glass door." Charles testified that another water intrusion occurred on June 21 to the northwest corner and near the northeast corner when there had been rain of "only seventeen hundredths of an inch," and he described water intrusions July 2, 7, and 12 in the north, northwest, northeast, and/or west wall of the basement.

Charles indicated that in preparation for Jerry's installation of an interior drain system, the Hutchisons had to remove the bottom 36 inches of drywall and did so on July 30, 2016. He described photographs from that day as showing "mold[] on the back of the drywall and the stud that it had been connected to" and "moulding . . . with mildew/mold." On August 12, the Hutchisons experienced another water intrusion; Charles described the photographs from that day, saying, "[Y]ou can see that water is coming in all the way along that north wall. And in the photo below it, it continues all the way along that north wall and continues to come down that west wall on the photo below it." More water intrusions on August 19 were noted in exhibit 5 as along the west wall, northwest corner, and north wall. Charles claimed that on August 24, after Jerry's performed the remedial work, and "to this date, [the Hutchisons] have not had water in [their] basement."

*(ii) Refrigerator*

Charles testified that as soon as the Hutchisons started using the refrigerator in March 2016, the food "just never got cold" so he "realized there was something wrong with the refrigerator." He said he called a repairman who on March 26 "diagnosed . . . the problem . . . was a fan motor"; the repairman installed the part about a week or so later and the refrigerator has worked since then.

*(iii) Garage Door Keypad*

Charles said that from the time they moved in, the garage door keypad entry had not worked. He stated that "after replacing the batteries and doing a number of different things, the lights on the keypad would come on" but the garage door would not open. Charles "reprogrammed it to make sure that [they] had the code correct, and it still wouldn't work." Charles claimed that when Mark Kula came over on May 11, 2016, Mark "admitted to [Charles] that there had been problems in the past with the keypad." "He did not say it was not

working but they had had problems with it." Mark suggested that Charles change the batteries; "[h]e did not seem surprised that the keypad was not working." The Hutchisons eventually bought a new keypad.

*(iv) Tree*

Charles testified that at the time the Hutchisons took possession in March 2016, "[l]eaves were not yet on the trees" and there had not been leaves on the trees when the Hutchisons visited the property in November 2015. He said that they did not notice that the tree was dead until the spring of 2016 when their tree never formed leaves. Melissa Hutchison testified that she believed the tree was dead at the time they bought the house, because "[the tree] never leaved that spring" and thought she had remembered that the Kulas maybe "had offered to pay for the tree after the fact and that [the Hutchisons] had pointed out to them that it was dead." But, Charles denied that Mark made this offer.

(b) Mark Dorner

Mark Dorner testified that he is one of the owners of Jerry's and that he was familiar with the property because he provided an estimate for repair of the basement and Jerry's did the work on the property. Jerry's invoice dated August 27, 2016, and the accompanying bid from May 11 to Charles for basement work was received as exhibit 6. Dorner said the bid was something he recommended to remedy water problems and that Jerry's issued a warranty in connection with the bid. The invoice shows that the Hutchisons paid for an "[i]nside tile system installed as per contract" and for installation of a "new sump pump."

Although Dorner admitted he did not visit the property while the Kulas owned it, Dorner testified regarding exhibit 11, which was Jerry's invoice dated August 11, 2014, and the accompanying bid from June 21 to Mark for repair of the basement. The bid presented two options. Option 1 listed

prices for "sump well location by owner" and "battery backup pump." Dorner said that option 1 was the more expensive option, and he acknowledged that a notation in handwriting at the bottom of the bid indicated that a warranty is available for only option 1. Dorner stated, and exhibit 11 shows, that the Kulas chose option 2 with no warranty. Work was invoiced as follows: "Excavated Corner to expose [drain] tile system. Connected to it and run tail to daylight as per contract." To explain why a warranty was not issued for option 2, Dorner said, "[I]t would be a trial and error. It's something that will evacuate some of the water from the drain tile but may not give a complete dry basement."

(c) Neighbor

A neighbor testified that her residential address is "next door" and immediately to the north of the property. The neighbor stated that she has a sump pump in her house and has had one ever since the property was bought, which was "[a]t least 11 years ago." She denied ever having a sump pump malfunction problem with her house in 2014. She said that in 2014, she talked with Renie about the Kulas' water issues at the property, but the neighbor denied saying that she was having sump pump malfunctions in those discussions.

(d) Brad Lauritsen

According to Brad Lauritsen's resume, he is a mechanical engineer with experience in providing investigative engineering services for insurance claim cases, including property losses involving water infiltration. The purpose of his investigation report for this case was to render an opinion as to (1) the nature, extent, and history of water intrusion issues at the property and (2) the accuracy of the statements made in the Disclosure Statement regarding water intrusion issues of the property.

In his report, Lauritsen stated, "Most people think that a drain tile and sump pump system will prevent water from

entering their basement through the walls, during a heavy rain. This is not true." He explained that the "water table" is under the house and is the "level at which when digging down, one would reach water . . . . When it rains, the water table rises. If the water table rises higher than the floor of your basement, water can seep in between the basement slab and the foundation wall." He said a drain tile system is a system of perforated pipes around a house's foundation that "drain[s] into a pit located in the basement floor (the sump)." And, "[w]hen the water level in the sump pit rises, [a float switch in the sump pit] turns on the pump." He defined seepage as "when the basement floor gets some little rivulets and puddles of water, usually no deeper than 1/4 to 1/2″ deep, which soaks and ruins the carpet."

Lauritsen indicated that he added rain data to a timeline provided by Charles (the timeline in the report is similar to the timeline of exhibit 5). He verified the original rain data with the weather station at Offutt Air Force Base and verified the rainfall history for the preceding years using the same source. He stated that the rainfall data showed "daily totals." Lauritsen testified, "My findings were that, basically, the rainfall was fairly consistent, I believe, from 2010 to 2016." In his report, he wrote, "[I]t is not plausible the seepage only started as soon as [the Hutchisons] moved into the house. All conditions which would contribute to seepage remained the same." He testified as to what he meant by "all conditions." He stated that the patio was "a very flat area surrounded by landscaping with river rock draining water right onto it" and that there was "a gutter with no extension draining right at the top of that river rock that would direct water down" to the patio. The landscaping barrier prevented any water from draining out in the yard; he referenced a photograph of "a large amount of standing water on the patio that wasn't being drained off." He testified that "the drainage right at the foundation, around the perimeter of the house; particularly, in the back, wasn't

adequate" and that the foundation was "sloped toward the back of the house" and "was pretty flat right at the foundation and didn't really have the slope you would want to direct water away from the foundation." He stated that "a large contributor to basement seepage is not having that slope right to the foundation there." He stated that there were several areas of water intrusion, noting the areas of the patio, a depressed area along the west wall, and all along the north wall in the northeast corner. He said that if downspout extensions are missing, it is a "big sign" that water is being deposited "right on the foundation."

Lauritsen's report noted the Hutchisons "experienced water intrusion and leaking windows with only 0.37″ of rainfall during the first occurrence. It is nearly impossible this type of water infiltration was just happening for the first time during the first rainfall of the [Hutchisons'] occupancy." In relation to that statement, Lauritsen testified that he was shown the photograph of the basement window and that he verified the amount of rainfall, which he said was "a pretty small amount of rainfall, even if it occurred in a short period of time, to produce that type of water." And further, that "if that problem occurred with that little bit of rainfall right after it took place, there would be no reason to believe it didn't take place before [the Hutchisons] took possession of the house, as well, back any number of years."

On cross-examination, Lauritsen opined that "[t]he evidence [he] saw in the basement show[ed] a fairly long-term problem." He pointed out "there was some significant water intrusion" after the Hutchisons moved in that was "ongoing until it was fixed." He stated that it was "very unusual, in [his] experience, to see that much over that short of period of time and that consistent throughout varying levels of rainfall." That led him to believe that "since the conditions didn't change, as far as grading or construction or any type of repairs, when [the Hutchisons] took possession, those conditions existed prior to that as well."

Lauritsen's report shows that he also concluded that (1) "[t]he characterization of the water infiltration as 'minor' in the [Disclosure Statement] is inconsistent with [the Kulas'] statements in the deposition" and (2) "[a] non-functioning sump pump at a neighboring house did not contribute to water infiltration of the basement." According to his report, "A house's drainage system does not rely on a neighbor's sump pump and drainage system to keep water out of it." Further, the water intrusion at the property was "strictly from excess surface/rain water not being drained properly by the house's own perimeter drainage system." He observed that "the original drain tile system and sump pit were dry" and that water was "not getting into the pit to be pumped out." He said that did not mean the pump was malfunctioning, but, rather, that the pump "was never required to run because the sump never filled with enough water to trigger the float switch."

### (e) The Kulas

#### *(i) Water Intrusion*

Mark described the extent of the disclosed 2014 water intrusion, saying that "we had quite a rainy season [during spring to early in the summer], and all [of a] sudden we noticed the carpet in the northeast corner of the house . . . was starting to get damp." He stated that "as the rains continued, the dampness kind of traveled down along the wall." The northeast corner was where the "living area" of the downstairs was with the "couch, TV and everything." He testified that the leakage first occurred "a little bit down the wall. So it would have been down east a little bit on the north wall is where we first noticed it" and that the leakage "started creeping . . . and ultimately it made the little turn at the corner of the house and started to go along the — it would be the west side of the house a few feet." In Mark's deposition, he said the wetness of the carpet "progressed to where you could push down and, and feel the water."

When asked about the Disclosure Statement's question of whether there had ever been water intrusion, Mark claimed that "[he] remember[ed] responding that, yes, we had had a water intrusion in the one area of the basement, and [he] really didn't know what it was caused by. Rains. I heard maybe a sump pump. Could have been really anything." He further claimed that "we added an additional drain system out into, as Jerry['s] said, daylight, which worked." Mark said he indicated the water intrusion as "minor" because "a major water issue would be where your whole basement would flood" and "[t]his was, to [him], minor damage and a nuisance, yes, but it wasn't, to [his] definition, major." During Renie's deposition, she characterized the time of the 2014 water intrusion as "the time when [the Kulas] were having lots of water and stuff." At his deposition, Mark indicated he cited the neighbor's malfunctioning sump pump as a cause of the 2014 water intrusion due to "neighborhood gossip [that] the neighbor's sump pump failed." Renie asserted that she had "never spoken to [the neighbor]" and that the "sump pump part of [their disclosure] came from a neighbor across the street."

Mark said he never experienced any pooling on the patio on the south side of the property. Mark claimed he kept downspout extensions attached, except sometimes during the winter, and that he left the extensions at the property when he moved out. He claimed that the "sump pump was working fine" and that he "did not know [the drain tile system] was not functioning." He said that he has two children and one grandchild who "visited frequently" and that during their visits, they would stay in the property's basement. His deposition testimony revealed that he used the basement areas "[p]robably on a daily basis." He denied ever experiencing leaking with the basement window and said that "[the window] would have been right above where the kids and grandkid slept."

*(ii) Refrigerator and Garage Door Keypad*

Mark testified that the garage door keypad was working when he moved out "[b]ecause that is how [the Kulas] actually made [their] last exit out of there." He claimed the refrigerator was working when he moved out because the Kulas "took [their] food immediately from that fridge over to the new fridge in [the Kulas'] new house." Renie testified that she "moved out on that Sunday, would have been March 6th," and that when she took everything out of the refrigerator to move it to their new home, "[a]t that time it was cool." She said, "There was ice cubes and everything. So at that time it was working."

*(iii) Tree*

As to the tree, Mark remembered that when the Hutchisons did a walk-through inspection of the property in November 2015, he mentioned the tree "had lost its leaves early but that it was still green when you scratched it." Mark claimed that a lot of trees had been "stressed out because of all the water" and that he did not know if the tree was "going to come back in the spring or not." He alleged that he told Charles this concern and that if the tree did not come back, he would replace it. Mark admitted he did not know if the tree was stressed or diseased; he claimed that "[the tree] did not appear diseased to [him]" and that, in his opinion, "[s]tressed is not diseased." Renie testified that she had "gone out there [to the tree] many times" and that "[her] father worked for Earl May for 40-some years and [she] did a lot of work with him, and he always taught [her] to go out and scrape to see if a tree was green; that it was still living." At her deposition, Renie admitted that "the tree was stressed."

4. District Court's Decision

Following the bench trial, the district court filed an "Opinion and Order" in which it found the Kulas liable for

damages. The court found that the representations made by the Kulas in their Disclosure Statement were not accurate and not set forth to the best of their knowledge with regard to water intrusion issues. The court also found that the Kulas did not complete the Disclosure Statement to the best of their knowledge "with respect to the diseased or dead tree, garage door keypad, refrigerator, and leaking windows." The court stated, "It is clear that [the Kulas] did not complete the [Disclosure Statement] to the best of their knowledge and/or update it accordingly." The district court went on to find that the Hutchisons also proved fraudulent misrepresentation, negligent misrepresentation, and fraudulent concealment. The district court awarded the Hutchisons a judgment of $16,774, plus costs and $10,000 in attorney fees.

## III. ASSIGNMENTS OF ERROR

The Kulas claim that the district court erred in determining the evidence was sufficient to hold them liable for (1) violating § 76-2,120, (2) fraudulent misrepresentation, (3) fraudulent concealment, and (4) negligent misrepresentation.

The Hutchisons claim on cross-appeal that the district court erred in "not awarding all of the [Hutchisons'] reasonable attorney fees."

## IV. STANDARD OF REVIEW

[1-3] In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Eicher v. Mid America Fin. Invest. Corp.*, 275 Neb. 462, 748 N.W.2d 1 (2008). An appellate court will not reevaluate the credibility of witnesses or reweigh testimony but will review the evidence for clear error. *Id*. Similarly, the trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous. *Id*.

[4] In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but

considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Id.*

## V. ANALYSIS

### 1. Sufficiency of Evidence

[5] The Kulas "do not dispute the evidence adduced at trial" and do not request this court "to set aside any factual finding made by the trial court." Reply brief for appellants at 10. Rather, the Kulas challenge the sufficiency of the evidence to support the district court's conclusion as to the four theories of recovery set forth in the Hutchisons' operative complaint: violation of § 76-2,120, fraud and material misrepresentation, fraudulent concealment, and negligent misrepresentation. We note that although the operative complaint refers to separate causes of action, the allegations all arise out of the same operative facts and involve the same parties, and therefore constitute separate legal theories rather than separate causes of action. See *Poppert v. Dicke*, 275 Neb. 562, 747 N.W.2d 629 (2008) (two or more claims in complaint arising out of same operative facts and involving same parties constitute separate legal theories, of either liability or damages, and not separate causes of action).

#### (a) § 76-2,120

[6] We begin with a review of § 76-2,120, which requires in subsection (2) that each seller of residential real property located in Nebraska shall provide the purchaser with a written disclosure statement of the real property's condition. Section 76-2,120 further provides:

> (5) The disclosure statement shall be completed to the best of the seller's belief and knowledge as of the date the disclosure statement is completed and signed by the seller. If any information required by the disclosure statement is unknown to the seller, the seller may indicate

> that fact on the disclosure statement and the seller shall be in compliance with this section. On or before the effective date of any contract which binds the purchaser to purchase the real property, the seller shall update the information on the disclosure statement whenever the seller has knowledge that information on the disclosure statement is no longer accurate.

If a conveyance of real property is not made in compliance with § 76-2,120, the purchaser shall have a cause of action against the seller and may recover the actual damages, court costs, and reasonable attorney fees. See § 76-2,120(12). However, "[t]he seller shall not be liable under [§ 76-2,120] for any error, inaccuracy, or omission of any information in a disclosure statement if the error, inaccuracy, or omission was not within the personal knowledge of the seller." § 76-2,120(8). See, also, *Bohm v. DMA Partnership*, 8 Neb. App. 1069, 1078-79, 607 N.W.2d 212, 219 (2000) (to state cause of action under § 76-2,120, "the buyer must plead and prove either that the seller failed to provide a disclosure statement or that the statement contained knowingly false disclosures by the seller").

The Kulas generally claim that evidence was insufficient to prove that they had actual knowledge of "some error, inaccuracy, or omission in the [Disclosure Statement]" as to each alleged property issue. Brief for appellants at 10. They contend that they testified as to their belief of the Disclosure Statement's accuracy. The Kulas argue that the Hutchisons speculated that "'because they experienced "X", then [the] Kulas must have had knowledge of some undisclosed condition,'" *id.*, citing that in *R.J. Miller, Inc. v. Harrington*, 260 Neb. 471, 618 N.W.2d 460 (2000), "circumstantial evidence alone [was found as] insufficient to impute knowledge to the seller for purposes of . . . § 76-2,120." Brief for appellants at 10.

It is obviously difficult to prove what someone may or may not have known at a particular point in time. In such

circumstances, consideration of conflicting or inconsistent evidence and the credibility of witness testimony is significant. We will therefore consider the district court's findings and conclusions as to each identified problem, keeping in mind that the trial court is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. See *Eicher v. Mid America Fin. Invest. Corp.*, 275 Neb. 462, 748 N.W.2d 1 (2008). Further, the trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous. *Id*. We will also consider the evidence in the light most favorable to the Hutchisons and resolve evidentiary conflicts in their favor because they are entitled to every reasonable inference deducible from the evidence. See *id*.

*(i) Water Intrusion*

Regarding the 2014 water intrusion disclosure, the Kulas contend that they attributed the water intrusion they experienced to several potential causes, including "'heavy rains, nei[g]hbor[']s sump pump not working, etc.'" Brief for appellants at 11. They rely on *Burgess v. Miller*, 9 Neb. App. 854, 621 N.W.2d 828 (2001), to support their argument that their explanations of "the cause of the water intrusion problems they disclosed is not sufficient to prove they had actual knowledge of some undisclosed condition." Brief for appellants at 11. The Kulas cite to both *R.J. Miller, Inc. v. Harrington, supra*, and *Burgess v. Miller, supra*, to advance their position; we find both cases distinguishable, as discussed next.

In *R.J. Miller, Inc. v. Harrington, supra*, the purchasers brought an action against vendors to recover repair costs incurred for structural damages to a building purchased from the vendors. The purchasers alleged that the vendors failed to provide a disclosure statement as required by § 76-2,120 and that the purchasers suffered damages as a result of the undisclosed defects. Significant in that case, the vendors admitted during the purchasers' inspection of the property that the

building had experienced water damage in the past, but it was believed installation of a rubber roof corrected the problem. Also, the purchasers were not aware of any structural damage to the alleged defective wall until 7 months after they had taken possession of the property, and an engineer who testified for the purchasers was unable to say what the condition of the wall was at the time of the transaction. The purchasers also admitted it had rained during the summer months without causing any water problems. The Nebraska Supreme Court pointed out that structural damage in September 1997 did not prove the defects existed at the time of contract in November 1996. Therefore, the Supreme Court concluded that the district court properly found the vendors had no actual knowledge of the building's defects.

This court also addressed a purchaser's action under § 76-2,120 against sellers of residential real property to recover for alleged water damages incurred in that residence in *Burgess v. Miller, supra*. The sellers had purchased the residence in 1993 from a prior owner; before that purchase, the sellers obtained an independent inspection of the property, of which the inspection report revealed, "'Evidence of seepage-stains on north wall mainly at the northwest corner of the basement.'" *Burgess v. Miller*, 9 Neb. App. at 856, 621 N.W.2d at 831. In March 1997, the sellers completed a disclosure statement in preparation of selling the residence; to the question, "'Has there ever been leakage/seepage in the basement or crawl space? If yes, explain in Comment Section,'" the sellers answered no. *Id.* at 857, 621 N.W.2d at 831. One seller testified that he answered that way because he had not experienced any water leakage or seepage in the basement.

The purchaser agreed to buy the residence from the sellers in April 1997. After the purchaser received the sellers' disclosure statement, she obtained an independent inspection of the home (sellers' 1993 inspection report was not provided to the purchaser at the time of purchase). The 1997 inspection report stated, "'Evidence of past moisture seepage noted

at the northwest basement corner under the built-in cabinets. . . .'" *Id.* Thereafter, the purchaser sought an explanation from the sellers by way of providing them with a copy of an "'Inspection Addendum Response'" that asked: "'Explain seller's statement on [the disclosure statement form which] states No leakage/seepage in the basement,'" and pointed out that the inspection revealed water damage, and "'Have they made repairs due to water damage?'" *Id.* at 857-58, 621 N.W.2d at 832. The sellers responded they had never experienced leakage/seepage in the basement while living there but they could "'speculate downspout left off once under previous owner to cause spot.'" *Id.* at 858, 621 N.W.2d at 832. The purchaser went forward with the purchase, and after taking possession in May 1997, the purchaser encountered water issues in the basement.

At trial, the county court granted the seller's motion for directed verdict, noting the lack of testimony to support the purchaser's claims. The judgment was affirmed on appeal to the district court. On appeal to this court, we concluded that the sellers did not complete the initial disclosure statement to the best of their belief due to their prior personal knowledge about seepage stains from their 1993 inspection report. However, "[b]ased upon the language contained in the inspection obtained by [the purchaser], her ensuing inquiry in the inspection addendum, and the response by the [sellers], [this court found] that the [sellers] completed the addendum response to the best of their knowledge and belief." *Burgess v. Miller*, 9 Neb. App. 854, 864, 621 N.W.2d 828, 835 (2001). We concluded that the motion for directed verdict was properly granted, since the addendum to the disclosure statement disclosed the condition of the basement to the best of the sellers' belief and knowledge.

We find the two cases discussed above to be distinguishable from this case for the following reasons: The Hutchisons alleged that immediately after they moved in, there was water leaking during rains. Additionally, Charles testified, and

exhibit 5 generally provided, that the Hutchisons experienced several water intrusions in the basement "every time it rained" from March 26, 2016, until Jerry's performed remedial work on August 22 or 23. See *R.J. Miller, Inc. v. Harrington*, 260 Neb. 471, 618 N.W.2d 460 (2000) (purchasers unaware of alleged damage until 7 months after possession of property and admitted it had rained during summer months without causing any water problems). It is true that the Hutchisons testified based on their personal beliefs that the Kulas' disclosure regarding the water intrusion was false, or generally inaccurate and incomplete, and that their photographs contained in exhibit 8 depicting the extent of water damages were taken only during their possession of the property. However, the Hutchisons bolstered such testimony and evidence through their expert, Lauritsen, which presents another distinguishing situation. See, *R.J. Miller, Inc. v. Harrington, supra* (engineer unable to testify as to condition of defective wall at time of transaction); *Burgess v. Miller, supra* (purchaser offered no evidence to support her belief that sellers had water seepage or leakage in past, were aware of it, and hid such information from her at time of sale). The Hutchisons also introduced evidence of home inspection reports; as explained below, the second inspection report contained the inspector's opinion of long-term water intrusion issues.

Charles testified that the home inspector did not note any water intrusion issues after the first inspection, which was obtained prior to closing; exhibit 3, the inspection report summary dated January 21, 2016, confirms his testimony. See *Burgess v. Miller, supra* (inspection report retained by purchaser did reveal evidence of seepage stains). But the same home inspector returned on April 27 to perform a second home inspection, which was obtained after closing. Exhibit 4, the second inspection report, revealed that there were exterior drainage and grading issues and that "all exterior[] areas were frozen and concealed by snow cover during original inspection [in January]." The inspector saw "ongoing water

intrusion through [the] window frame" and noted "[a]ctive dampness" on carpeting in the basement "Rec room," rust stains "originally concealed by [the Kulas'] furnishings," and dampness and standing water elsewhere in the basement. The inspector was of the opinion that efflorescence staining on concrete floor slabs in the furnace room was "an indication of previous (long term) water intrusion issues through floor slabs due to over saturation or possible high water table." The inspector also noted that it appeared the "originally installed drain tile system may not [be] functioning as originally designed and has been this way for some time."

This case is further unlike *Burgess v. Miller*, 9 Neb. App. 854, 621 N.W.2d 828 (2001), where the sellers' addendum explicitly indicated they were speculating about a cause as to what happened *prior* to the sellers' possession of the home. In this case, the Kulas provided a disclosure about a water intrusion that happened *during their own possession* of the property. Such disclosure cannot be characterized as speculation given its declarative tone; further, we note the district court's undisputed factual findings as to the water intrusion and leaking window issues:

> [E]vidence and testimony reflected that there were multiple areas of water infiltration that happened during each rainfall after [the Hutchisons] took possession and moved into the Property. [Lauritsen] testified that [the Kulas] would have experienced the same water intrusions as [the Hutchisons], given that the water table had not changed, and rainfall was not significantly different. [Lauritsen] further testified that there is "[a] pattern of long term water intrusion dating back to the [Kulas'] ownership including multiple points of entry and water damage." . . .
>
> . . . [A]lthough [the Kulas] stated that the "minor" water seepage that occurred in 2014 was the result of a neighbor's malfunctioning sump pump, the testimony was less than convincing in that regard. At trial, when asked why [the Kulas] gave the malfunctioning sump

> pump as a reason for water intrusion, [Mark] stated that he had no theory on that issue and was just repeating "neighborhood gossip." [Renie] testified that the water seepage problem occurred as a result of the sump pump of the neighbor to the north . . . . [The neighbor], however, testified that she had never had a sump pump malfunction, never told [the Kulas] that she had, and that she had spoken with [Renie] in 2014 about the water problems that they were having.
>
> The . . . water intrusion issues in 2014 were not minor and were not limited to the NE corner of the basement. Testimony . . . indicated that [the Kulas] were having ". . . lots of water and stuff. . ." that started in the northeast corner and then spread over time, progressing along the north wall to the west about 15 feet as time went by. It also progressed along the west wall about five (5) feet to the south. See, Exhibit #8. It is apparent that [the Kulas] were aware that the water intrusion(s) in the basement were not minor and were not solely, if at all, attributable to the neighbor's malfunctioning sump pump.
>
> [The Kulas] also provided . . . that they "added additional drain system." See, Exhibit #1. At trial, however, the evidence reflected that there was no installation of an additional drainage system. Rather, there was an extension to the existing external drain tile.
>
> . . . .
>
> . . . Evidence and testimony received at trial established that there was a steady stream of leaking along the entire top of one of the basement windows.

The factual findings show that the Kulas knew that during the 2014 water intrusion, water was not limited to the northeast corner of the basement as asserted on the Disclosure Statement. We defer to the district court's findings that the 2014 water intrusion was "not minor" and that the Kulas' testimony attributing that water intrusion to a neighbor's malfunctioning sump pump was not convincing. The district court

noted the disclosure of an "'added additional drain system'" and found that evidence showed that there was no such installation. Exhibit 11, Jerry's invoice to the Kulas for basement work in August 2014, confirms that finding. Exhibit 11 reflects that the Kulas had knowledge that they did not add an additional drain system, but, instead, that they paid for the other option proposed to them in the accompanying bid sheet.

Further, the district court noted evidence, including Lauritsen's opinion, which reflected that the Kulas had to know the property was subjected to a history of multiple water intrusions rather than the one-time intrusion disclosed. Lauritsen's report noted water in multiple points of the basement and water entering the basement window as signs of a pattern of long-term water intrusion dating back to the Kulas' possession of the property. Additionally, as described previously, the second home inspection report explained why certain water intrusion issues were not discovered during the first home inspection and included an opinion of long-term water intrusion issues.

*(ii) Garage Door Keypad and Refrigerator*

The Hutchisons took possession of the property on March 7, 2016. Charles testified that from the time they moved into the property, the garage keypad entry did not work. He claimed that when Mark came over on May 11, Mark "admitted to [Charles] that there had been problems in the past with the keypad." "He did not say it was not working but they had had problems with it." Mark suggested that Charles change the batteries; "[h]e did not seem surprised that the keypad was not working." The Kulas testified that the garage door keypad was working when they moved out; according to Mark, that is how the Kulas "actually made [their] last exit out of there. We . . . punched the code, garage door shut, closed the pad, and that was our final exit." Mark did acknowledge that about

"60 some days later" Charles contacted him regarding problems with the home and that Mark visited the home to look at the problems.

Regarding the refrigerator, Charles testified that as soon as they moved into the house in March 2016, the food "just never got cold." Charles stated, "[T]he refrigerator doesn't get cold, and the only thing that's changed is title to the house." The Hutchisons had a repairman diagnose the problem on March 26; a fan motor was ordered and installed a week or so later and the refrigerator has worked since then. Although Charles could not say the Kulas knew that the refrigerator was not working, he could "say for a fact . . . that it didn't work when we took possession." However, Renie testified that she "moved out on that Sunday, would have been March 6th," and that when she took everything out of the refrigerator to move it to their new home, "[a]t that time it was cool." She said, "There was ice cubes and everything. So at that time it was working."

The district court found that the Kulas did not complete the Disclosure Statement "to the best of their knowledge" with respect to the garage door keypad and refrigerator. The court stated that "[Mark] testified that there had been problems with the garage keypad when he came out to the property on May 11th. Similarly, when [the Hutchisons] took possession of the Property, the refrigerator was not working."

We note that the district court made an error when finding that Mark testified that there had been problems with the garage keypad when he went to the property on May 11, 2016. We are unable to find any place in Mark's trial or deposition testimony where he admitted to making this statement. Rather, it was Charles who testified that Mark "admitted to [Charles] that there had been problems in the past with the keypad." "He did not say it was not working but they had had problems with it." We conclude that although the district court mistakenly attributed the statement to Mark rather than Charles, there was nevertheless evidence the court could

rely upon that Mark acknowledged having problems with the keypad.

Although there is conflicting evidence as to the Kulas' knowledge about problems related to the garage door keypad and the working condition of the refrigerator, it was not clearly erroneous for the district court to disbelieve the Kulas' testimony as to these problems. When considering the Kulas moved out immediately before the Hutchisons moved into the home, the Hutchisons' testimony that these items were not working immediately upon moving in is sufficient for the trial court to conclude the Kulas had to have had knowledge of the problems. In fact, according to Charles, Mark admitted to past problems with the garage door keypad. And whether a refrigerator is working on one day but not the next is a factual determination dependent upon the believability of the witnesses; such determinations are properly left to the trial court. Further, in our review, we consider the evidence in the light most favorable to the Hutchisons; evidentiary conflicts should be resolved in their favor because they are entitled to every reasonable inference deducible from the evidence. See *Eicher v. Mid America Fin. Invest. Corp.*, 275 Neb. 462, 748 N.W.2d 1 (2008).

*(iii) Diseased or Dead Tree*

Regarding the tree at issue, the district court found:

> [The Kulas] had scraped the tree repeatedly to see if the bark was green, but testified that they would have to wait until the fall or spring to see if the tree would survive. [Mark] Kula testified that he offered to compensate [Charles] Hutchison prior to purchase if the tree did not survive. [Charles], however, disputed that any such conversation took place; it was his contention that if [Mark] had discussed the diseased tree with him, he would have asked for additional compensation . . . .

We also note that Mark testified he did not know if the tree was "going to come back in the spring or not." Renie admitted

during her deposition that the tree was having difficulties and that the Kulas had noticed leaves had fallen off the tree early, "which is a good sign a tree is in stress, [so that one would] have to wait until later in the fall or spring to see if that tree's going to make it." Given the Kulas' knowledge that the tree was stressed and could possibly not survive past closing, they should have placed a checkmark under "Do Not Know" rather than under "No" on the Disclosure Statement as to whether the tree was diseased or dead. The checkmark under "No" was not an accurate representation of their knowledge regarding the tree.

*(iv) Summary of Violations Under § 76-2,120*

Based on the foregoing, we find no clear error in the district court's findings and conclusion that the Kulas violated § 76-2,120 with their disclosures related to the matters discussed above because they did not complete the Disclosure Statement to the best of their belief and knowledge as of the date it was completed and signed, and as they were otherwise required by law to update before closing on the property. See § 76-2,120(5).

(b) Other Theories of Recovery

[7] We need not address the other pled theories of recovery given our decision that the award for damages is supported by the district court's determination of violations under § 76-2,120. See *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002) (appellate court is not obligated to engage in analysis which is not needed to adjudicate case and controversy before it).

2. The Hutchisons' Cross-Appeal on Attorney Fees

On cross-appeal, the Hutchisons claim the district court awarded "only part of [their] attorney fees" and that they are entitled to "all reasonable attorney fees." Brief for appellees

at 46. They point to exhibit 40, which is an affidavit of their counsel showing $19,470.25 in attorney fees as of the date of the affidavit on July 12, 2017, with expected additional fees of $2,200 through trial. Exhibit 40 contains 15 itemized invoices dated from May 31, 2016, through July 5, 2017.

[8,9] A party may recover attorney fees and expenses in a civil action only when a statute permits recovery or when the Nebraska Supreme Court has recognized and accepted a uniform course of procedure for allowing attorney fees. See *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009). Attorney fees are authorized by statute in the present matter. Section 76-2,120(12) states, in relevant part, "If a conveyance of real property is not made in compliance with this section, the purchaser shall have a cause of action against the seller and may recover the actual damages, court costs, and reasonable attorney's fees." The Nebraska Supreme Court held that "attorney fees are mandatory in an action under § 76-2,120(12)." *Pepitone v. Winn*, 272 Neb. 443, 449, 722 N.W.2d 710, 714 (2006). However, the Nebraska Supreme Court did not state that the total amount of attorney fees requested had to be awarded. Although attorney fees were required to be awarded in this case, the amount constituting reasonable attorney fees remained discretionary to the district court.

[10] When an attorney fee is authorized, the amount of the fee is addressed to the trial court's discretion, and its ruling will not be disturbed on appeal absent an abuse of discretion. *McGill v. Lion Place Condo. Assn.*, 291 Neb. 70, 864 N.W.2d 642 (2015). The district court cited to exhibit 40 when it stated that it found that an award of "reasonable attorney fees" was warranted; thus, the record reflects that the district court's award was based upon a review of the pertinent evidence. Based on the record before us, we cannot say the district court abused its discretion by awarding $10,000 in attorney fees rather than the full amount requested.

We note that the Hutchisons also make a cursory request in their brief for attorney fees on appeal. However, said request does not comply with Neb. Ct. R. App. P. § 2-109(F) (rev. 2014), and therefore, we do not consider it here.

## VI. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

Affirmed.

Riedmann, Judge, participating on briefs.

# In re Interest of Donald B. and Devin B., children under 18 years of age. State of Nebraska, appellee, v. Candice I., appellant.

927 N.W.2d 67

Filed April 16, 2019. No. A-18-675.

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 the section have been satisfied and that termination is in the child's best interests.
3. **Juvenile Courts: Parental Rights.** A court may accept a parent's in-court admission as to all or any part of the allegations in a petition for the termination of parental rights.
4. ____: ____. When a parent admits all or part of the allegations in a petition for termination of parental rights, the court must still ascertain a factual basis for the admission.

Appeal from the Separate Juvenile Court of Douglas County: Chad M. Brown, Judge. Affirmed.

John J. Ekeh, of Ekeh Law Office, for appellant.

Donald W. Kleine, Douglas County Attorney, and Natalie Killion for appellee.

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

Arterburn, Judge.

## INTRODUCTION

Candice I. appeals from an order of the separate juvenile court of Douglas County that terminated her parental rights with respect to her son Devin B. On appeal, Candice argues that the juvenile court erred in accepting her admission to allegations in the termination motion as a voluntary relinquishment of her parental rights to Devin. She also argues that the court erred in terminating her parental rights with respect to one of her sons but not the other. Based on the following, we affirm the juvenile court's decision.

## BACKGROUND

Candice is the mother of two sons: Donald B., who was born in July 2003, and Devin, who was born in October 2004. On January 11, 2018, the State filed a third motion for termination of Candice's parental rights with respect to both of her sons. A hearing on the motion was held on June 8, at which time the parties advised the court that they had negotiated an agreement. Candice agreed to enter an admission to certain allegations contained in the third motion for termination as it related to Devin, and the State agreed in exchange to dismiss the motion's remaining allegations and remove Donald from the motion altogether. The State and Candice agreed that her admission would be treated as a voluntary relinquishment of her parental rights with respect to Devin so as to prevent the State or any other party from using the termination of her rights as to Devin against her with respect to Donald or any other child.

In accepting the parties' agreement, the court began by advising Candice of her rights and the possible consequences of the agreement. The court then discussed the terms of the parties' agreement before reviewing the motion's specific counts that Candice was admitting were true. Candice admitted that counts I, II, IV, IX, and X of the third motion for termination of parental rights were true.

Count I of the third motion for termination of parental rights alleged that Devin had been found to be a juvenile within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016) on June 24, 2015. Count II alleged that Candice had been ordered to comply with various rehabilitation plans on June 24 and December 22, 2015; June 16 and December 14, 2016; June 27, 2017; and January 4, 2018. Count IV alleged that Devin fell within the meaning of Neb. Rev. Stat. § 43-292(1) (Reissue 2016), because he was a juvenile who had been abandoned by Candice for 6 or more months immediately prior to the petition's filing. Count IX alleged that termination of Candice's parental rights to Devin was in Devin's best interests. Count X alleged that reasonable efforts under Neb. Rev. Stat. § 43-283.01 (Cum. Supp. 2018) were not required, because Candice had subjected Devin to aggravating circumstances, including abandonment. Candice also acknowledged the benefits of the agreement, namely the State's inability to use the voluntary relinquishment against her in future proceedings and that the termination proceedings as to Donald would be dismissed.

The factual basis given by the State established that Devin was removed from parental care on March 24, 2015, and that Candice did not have any contact with Devin for approximately 2 years before the third motion for termination of parental rights was filed on January 11, 2018, despite the court's allowing her to have contact with him. Following Devin's removal in 2015, Candice was ordered to engage with certain services offered by the State in pursuit of reunification and did not follow through with these services. A caseworker would testify that she made efforts at engaging Candice in reunification services. The caseworker would also testify based on her education, training, and experience with the family that it would be in Devin's best interests that Candice's parental rights be terminated. The caseworker would further testify that Candice had not made sufficient progress, and the caseworker

and other witnesses would testify that Candice lacked contact with Devin for a significant period of time.

When the State concluded its presentation of the factual basis for Candice's admission, Candice stated that she understood what evidence would be presented and did not dispute the factual basis. Accordingly, the court found that there was a factual basis for Candice's admission of the allegations in counts I, II, IV, IX, and X of the third motion for termination of her parental rights. The court noted that count III of the motion was also satisfied because the court took judicial notice of the case file, which was presented as an exhibit. The court further found that Candice's admission was knowingly, intelligently, and understandingly made. Thus, the court terminated Candice's parental rights with respect to Devin. Pursuant to the parties' agreement, the State then moved to dismiss the motion's remaining allegations. The remainder of the hearing largely revolved around the future case plan for Donald, which maintained a goal of reunification with a concurrent goal of guardianship.

The court entered an order dated June 8, 2018, which stated that termination of Candice's parental rights was in Devin's best interests and that it therefore accepted Candice's voluntary relinquishment of her parental rights with respect to Devin. The court ordered Devin to be placed into the custody of the Nebraska Department of Health and Human Services (the Department) for adoption planning and placement. In the same order, the court also noted that the permanency planning objective with respect to Donald was reunification concurrent with guardianship.

Candice now appeals.

## ASSIGNMENTS OF ERROR

Candice assigns that the juvenile court erred in accepting her admission to allegations in the termination motion as a voluntary termination of her parental rights with respect to

Devin and further erred in terminating her parental rights with respect to one of her two sons but not the other.

## 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

[2-4] 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 the section have been satisfied and that termination is in the child's best interests. *In re Interest of Nicole M.*, 287 Neb. 685, 844 N.W.2d 65 (2014). A court may accept a parent's in-court admission as to all or any part of the allegations in a petition for the termination of parental rights. Neb. Rev. Stat. § 43-279.01(3) (Reissue 2016). See *In re Interest of Zanaya W. et al.*, 291 Neb. 20, 863 N.W.2d 803 (2015). When a parent admits all or part of the petition's allegations, the court must still ascertain a factual basis for the admission. § 43-279.01(3).

In the present case, Candice does not dispute the factual basis accepted by the juvenile court. Instead, she argues, "The Court has no authority to accept [Candice's] relinquishment pursuant to Nebraska Law." Brief for appellant at 9. On the contrary, § 43-279.01(3) empowers juvenile courts to accept a parent's in-court admission of the allegations in a petition for the termination of parental rights so long as there also exists a factual basis for the admission. See *In re Interest of Zanaya W. et al., supra* (affirming termination of father's parental rights where he admitted neglect allegation under § 43-292(2) and for which State provided sufficient factual basis).

Candice admitted portions of the third motion for termination of her parental rights, including count IV, which alleged that Candice had abandoned Devin for a period of 6 months or

more immediately prior to the petition's filing. This established that Devin came within the meaning of § 43-292(1). The court accepted Candice's admission, finding that it was knowingly, intelligently, and understandingly made. The court thereafter accepted the State's factual basis, which included mention that Candice had no contact with Devin for approximately 2 years before the motion for termination was filed and had not followed through with the services offered to her.

In her brief on appeal, Candice cites two cases in support of her argument that the juvenile court could not accept her admission as a voluntary termination of her parental rights: *In re Interest of Gabriela H.*, 280 Neb. 284, 785 N.W.2d 843 (2010), and *In re Interest of Cornelius K.*, 280 Neb. 291, 785 N.W.2d 849 (2010). Neither of these cases is analogous to the present case.

Unlike the present case, the Department was the appellant in both *In re Interest of Gabriela H.* and *In re Interest of Cornelius K.* In *In re Interest of Gabriela H.*, the Department appealed from a juvenile court's order that directed the Department to accept a voluntary relinquishment of parental rights. Both of the child's parents decided to relinquish their parental rights, but the Department asked the court to defer action on their relinquishment until it could find an adoptive home for the child. Notably, one of the child's parents was making substantial child support payments, which partially offset the Department's costs with respect to the child. On appeal, the Nebraska Supreme Court held that a juvenile court has authority to order the Department to accept a voluntary relinquishment of parental rights when the child has already been adjudicated pursuant to § 43-247(3)(a) and a permanency objective of adoption has been determined.

On appeal, the court in *In re Interest of Cornelius K.* first reaffirmed its holding in *In re Interest of Gabriela H.* before addressing a slightly different factual scenario. The juvenile court in *In re Interest of Cornelius K.* had accepted a voluntary relinquishment of parental rights *before* any adjudication

or permanency plan was developed for the child. This did not follow the procedure outlined in *In re Interest of Gabriela H.* Thus, the Supreme Court held that the relinquishment in *In re Interest of Cornelius K.* was not legally accepted, therefore constituting procedural error by the juvenile court.

Neither of these cases has any bearing on the case now before us. We find that the juvenile court was empowered to accept Candice's admission to the allegations contained in the third motion for termination of her parental rights and to rely on her admission in terminating her parental rights.

Candice also argues in the present case that the juvenile court erred in terminating her parental rights with respect to Devin but not Donald. We note that the State argued in response that Devin needed permanency more than Donald due to their disparate ages. The State's brief on appeal indicated that Devin was 14 years old at the time of the termination hearing, while Donald was 18 years old. This is incorrect. Our record shows that Devin was born in October 2004, while Donald was born in July 2003, making them ages 13 and 14, respectively, at the time of the termination hearing. However, the age of the children is not germane to our analysis.

Candice specifically alleges, "You cannot terminate on one child and not the other." Brief for appellant at 10. Candice's proposition is not supported in our case law. We have found that it is appropriate in some instances to terminate parents' rights with respect to some, but not all, of their children. In *In re Interest of Justin H. et al.*, 18 Neb. App. 718, 791 N.W.2d 765 (2010), we found that the parental rights of the mother and father should be terminated as to some, but not all, of the children. We noted that one of the children had sexually assaulted another of the children. We found that due to the safety considerations for the remaining children in the home and the ongoing issues that needed to be addressed with the offending child, the parents could not protect the remaining children in the home. We also found that the evidence demonstrated that the victimized child had been so traumatized by the sexual

assault that the child was never going to be able to feel safe in his parents' home. As a result, the evidence supported terminating the parental rights with respect to only those two children. However, the evidence did not support termination as to the remaining children.

Moreover, the termination in the present case was voluntary. Candice admitted that the factual basis was true and that it was in Devin's best interests to have her parental rights terminated. Nonetheless, Candice relies on *In re Interest of Xavier H.*, 274 Neb. 331, 740 N.W.2d 13 (2007), which reversed the termination of a mother's parental rights with respect to one of her three children. In *In re Interest of Xavier H.*, the State made no attempt to adjudicate or seek termination of the mother's rights to the youngest child's older siblings. The State sought termination of her rights to the youngest child based on a number of factors, which included, but were not limited to, the difficulties that the mother had in managing the two children she had custody of, particularly when considered in light of the heightened demands that would exist by adding a third child to the household. The Supreme Court was troubled by the State's contrasting position as to the three children. Finding that it could not account for the inconsistency of those positions, the court found that the mother's rights as to the youngest child should not be terminated. Additionally, the Supreme Court also cited numerous other factors, which did not favor termination. These included several areas of improvement with respect to the mother's mental health, employment, and parenting abilities in reaching its conclusion.

The present case is much different from *In re Interest of Xavier H.* Here, Candice agreed that a factual basis existed for termination of parental rights and that termination was in Devin's best interests. Moreover, she received the benefit of being able to avoid trial and work toward reunification with respect to Donald. Our record demonstrates the basis for this distinction. The record shows that although Candice

ceased having contact with Devin more than 2 years prior to the State's filing the third petition for termination of parental rights, she was maintaining contact with Donald. Her caseworker testified that therapeutic visits were going well and that reports from the therapist and Donald's foster parent were positive. Candice was enrolled in an outpatient treatment program and was testing negative for drugs. Plans were being made to begin supervised visitation.

While the record is not clear why Candice was engaged in services aimed at strengthening her relationship with Donald while not doing so as to Devin, it is clear that she entered into the agreement with the State knowingly, voluntarily, and intelligently. She waived her rights and entered her admission with full knowledge of the repercussions. Based on the record before us, we can find no basis to set the parties' agreement aside and return the case to the status that existed prior to its inception. We therefore find her argument without merit and affirm the order of the juvenile court that terminated Candice's parental rights with respect to Devin but not Donald.

## CONCLUSION

Based on our de novo review of the record, we find that the juvenile court did not err in relying on Candice's admissions as a voluntary termination of her parental rights. Moreover, we find that the juvenile court did not err in terminating Candice's parental rights with respect to one of her two sons pursuant to her agreement with the State. We therefore affirm the order of the juvenile court that terminated Candice's parental rights with respect to her son Devin.

Affirmed.

# In re Interest of Artamis G. et al., children under 18 years of age. State of Nebraska, appellee, v. Krysta G., appellee, and Auburne G., appellant.

927 N.W.2d 830

Filed April 16, 2019. No. A-18-743.

1. **Interventions.** Whether a party has the right to intervene in a proceeding is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.
3. **Interventions.** As a prerequisite to intervention under Neb. Rev. Stat. § 25-328 (Reissue 2016), the intervenor must have a direct and legal interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered by the action.
4. ____. An indirect, remote, or conjectural interest in the result of a suit is not enough to establish intervention as a matter of right.
5. **Interventions: Final Orders.** The denial of a motion to intervene is a final, appealable order.
6. **Parental Rights: Interventions.** Grandparents have a sufficient legal interest in dependency proceedings involving their biological or adopted minor grandchildren to entitle them to intervene in such proceedings prior to final disposition.
7. **Statutes: Presumptions: States.** Where the applicable law of a sister state is not presented to a Nebraska court, it is presumed to be the same as the law of Nebraska.

Appeal from the Separate Juvenile Court of Douglas County: Douglas F. Johnson, Judge. Affirmed.

Andrea Finegan McChesney, of McChesney & Farrell Law Offices, for appellant.

No appearance for appellee.

Anne E. Troia, P.C., L.L.O., guardian ad litem.

Riedmann, Bishop, and Welch, Judges.

Riedmann, Judge.

## INTRODUCTION

Auburne G. asserts that she is the grandmother of Krysta G.'s six children. She appeals the order of the separate juvenile court of Douglas County denying her complaint to intervene in proceedings to adjudicate Krysta's children. For the reasons set out below, we affirm.

## BACKGROUND

In February 2017, the State filed a petition in the separate juvenile court of Douglas County, seeking to adjudicate Krysta's six children under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016). In August, Auburne filed a complaint to intervene in the adjudication proceedings, alleging that she was the "*in loco* grandparent" of the children and therefore had an interest in the adjudication proceedings under Neb. Rev. Stat. § 25-328 (Reissue 2016). Following a hearing, the juvenile court denied Auburne's complaint "for the reason that the Complainant is not a biological relative, she is not [Krysta's] stepmother, and, additionally, [Auburne] resides in Texas." Auburne did not appeal this decision.

In May 2018, Auburne filed a second complaint to intervene, alleging that she was the grandmother of the children and therefore had a right to intervene. It appears that at least one objection to the complaint was filed, but it is not contained in our record. At the hearing on her second complaint, Auburne attempted to prove that she had adopted Krysta by

offering into evidence a copy of Krysta's birth certificate, but the court sustained objections to the exhibit on the basis that it was not authenticated. Krysta then testified that she was adopted by Auburne in Texas in December 2017. Krysta admitted that she was 33 years old at the time of the adoption. On cross-examination, Krysta stated that she has lived in Omaha, Nebraska, for approximately 8 years and, prior to that, lived in Leander, Texas, for 2 years. She confirmed that Auburne currently lives in Leander and has lived there over 10 years. Krysta further admitted that her biological mother was still living and that her parental rights to Krysta had not been terminated, nor had she relinquished those rights. Auburne offered no further evidence.

Following Krysta's testimony, the guardian ad litem for the minor children objected to Auburne's complaint to intervene, arguing that there was no testimony that Auburne had any relationship with the children. Counsel for the Department of Health and Human Services also objected to the complaint to intervene, alleging there was no evidence that Auburne was the parent of Krysta or that she was a grandparent of any of the children. The juvenile court subsequently denied Auburne's second complaint to intervene, stating that "[t]here is no evidentiary basis to grant the relief sought." Auburne timely appealed.

## ASSIGNMENT OF ERROR

Auburne assigns, restated, that the juvenile court abused its discretion in denying her complaint to intervene.

## STANDARD OF REVIEW

[1,2] Whether a party has the right to intervene in a proceeding is a question of law. *Jeffrey B. v. Amy L.*, 283 Neb. 940, 814 N.W.2d 737 (2012). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court. *Id.*

## ANALYSIS

Auburne asserts that the juvenile court abused its discretion in denying her complaint to intervene. We do not review the juvenile court's decision for abuse of discretion; rather, as a question of law, we resolve the question independently of the lower court's decision. See *id*. Auburne's ability to intervene is governed by § 25-328, which states:

> Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the State of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences.

[3,4] Thus, as a prerequisite to intervention under § 25-328, the intervenor must have a direct and legal interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered by the action. *Wayne L. Ryan Revocable Trust v. Ryan*, 297 Neb. 761, 901 N.W.2d 671 (2017). An indirect, remote, or conjectural interest in the result of a suit is not enough to establish intervention as a matter of right. *Id.* Therefore, a person seeking to intervene must allege facts showing that he or she possesses the requisite legal interest in the subject matter of the action. *Id*.

On appeal, Auburne argues that she has a direct legal interest in the adjudication proceedings because she stands in loco parentis over the minor children. Additionally, Auburne asserts that she has a direct legal interest in the adjudication proceedings because she adopted Krysta and therefore has the same legal rights as if she were Krysta's biological mother. We find each claim to be without merit.

[5] First, Auburne claims she stands in loco parentis over the minor children. However, in loco parentis status was the basis for Auburne's first complaint to intervene. The juvenile court denied that complaint, and Auburne did not appeal that decision. The denial of a motion to intervene is a final, appealable order. *Streck, Inc. v. Ryan Family*, 297 Neb. 773, 901 N.W.2d 284 (2017). See, also, *In re Interest of Kayle C. & Kylee C.*, 253 Neb. 685, 574 N.W.2d 473 (1998). Having failed to appeal the denial of her complaint to intervene on an in loco parentis basis, Auburne has waived this argument.

The operative pleading upon which this appeal is brought is Auburne's second complaint to intervene, in which she asserts that as the children's grandmother, she should be made a party as a matter of right.

[6] The Nebraska Supreme Court has held that grandparents have a sufficient legal interest in dependency proceedings involving their biological or adopted minor grandchildren to entitle them to intervene in such proceedings prior to final disposition. *In re Interest of Kayle C. & Kylee C., supra*. However, Auburne failed to prove that she is Krysta's mother. The only evidence adduced to support her assertion is Krysta's testimony that Auburne adopted her in December 2017 at the age of 33. The birth certificate offered by Auburne, which purportedly supported this assertion, was not an authenticated copy and was not admitted into evidence.

[7] Moreover, Auburne did not submit to the court Texas' adoption law; thus, the juvenile court could properly presume Texas adoption law to be the same as Nebraska's. See, *Gruenewald v. Waara*, 229 Neb. 619, 428 N.W.2d 210 (1988) (where applicable law of sister state is not presented to Nebraska court, it is presumed to be same as law of Nebraska); *Quintela v. Quintela*, 4 Neb. App. 396, 544 N.W.2d 111 (1996). Therefore, in order for this court to determine that Auburne successfully adopted Krysta, Krysta's testimony must establish that the adoption was valid under Nebraska's adoption statute.

Adoption of an adult in Nebraska is governed by Neb. Rev. Stat. § 43-101(2) (Reissue 2016), which states, in relevant part:

> The adoption of an adult child by another adult or adults who are not the stepparent of the adult child may be permitted if the adult child has had a parent-child relationship with the prospective parent or parents for a period of at least six months next preceding the adult child's age of majority and (a) the adult child has no living parents, (b) the adult child's parent or parents had been deprived of parental rights to such child by the order of any court of competent jurisdiction, (c) the parent or parents, if living, have relinquished the adult child for adoption by a written instrument, (d) the parent or parents had abandoned the child for at least six months next preceding the adult child's age of majority, or (e) the parent or parents are incapable of consenting.

Assuming, without deciding, that Auburne could establish she had a parent-child relationship with Krysta for the 6 months prior to Krysta's age of majority, the record does not support any of the circumstances set forth in § 43-101(2)(a) through (e). Krysta testified that she has a living biological mother and that her biological mother's parental rights were not terminated prior to Krysta's adoption, nor did she relinquish her parental rights to Krysta. Further, there is no evidence in the record before us indicating that Krysta was abandoned by her biological mother before she reached the age of majority or that her biological mother is incapable of consenting to Krysta's adoption. Therefore, Auburne failed to prove that she was Krysta's mother and, thus, the children's grandmother. Absent such relationship, Auburne did not have a legal right to intervene as a grandparent.

At oral argument, Auburne's counsel asserted that the evidence was sufficient to find a beneficial relationship between Auburne and the children and that, therefore, proof of a grandparent relationship was not required. We note, however,

that Auburne presented no evidence at the hearing on her second motion to intervene regarding her relationship with the children; rather, only argument of her counsel was made on this issue. The only evidence offered was the birth certificate (which was not received) and Krysta's testimony regarding the purported adoption. Denial of the second complaint to intervene was therefore proper.

## CONCLUSION

For the foregoing reasons, we conclude that the juvenile court did not err in denying Auburne's complaint to intervene.

Affirmed.

# In re Estate of Berniece C. Filsinger, deceased. Marvin O. Filsinger et al., appellants, v. Merlin Jacobs and Dana Anderson, Copersonal Representatives of the Estate of Berniece C. Filsinger, deceased, appellees.

927 N.W.2d 391

Filed April 23, 2019. No. A-17-918.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Decedents' Estates: Wills: Contracts: Breach of Contract.** The effect of a valid contract for wills is not to create a cause of action against the decedent's estate, but instead is to create a cause of action for breach of contract.
4. **Wills: Contracts: Time.** Even where a valid contractual will exists, that existence does not make a will irrevocable. Wills by their nature are ambulatory and may be revoked at any time.
5. **Decedents' Estates: Wills: Contracts: Breach of Contract.** If the surviving party revokes or breaches a mutual contractual will, an action lies for a breach of contract against the estate of the survivor.
6. **Decedents' Estates: Claims: Limitations of Actions.** In addition to the time limitations of bringing claims against distributees, there are additional limitations on bringing such claims, including, but not limited to, when the matter was previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal representative.

7. **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 County Court for Cheyenne County: Randin R. Roland, Judge. Affirmed.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellants.

Paul E. Hofmeister, of Hofmeister Law Offices, L.L.C., for appellees.

Moore, Chief Judge, and Riedmann and Welch, Judges.

Welch, Judge.

## I. INTRODUCTION

Marvin O. Filsinger, Javonne Kreuger, and Gloria Vegas (the Claimants) appeal the order of the Cheyenne County Court granting summary judgment in favor of Merlin Jacobs and Dana Anderson, the copersonal representatives of the estate of Berniece C. Filsinger (the Copersonal Representatives) and dismissing the Claimants' creditor claim. For the reasons set forth herein, we affirm.

## II. STATEMENT OF FACTS

This matter arises from a creditor claim filed by the Claimants against Berniece's estate. In that claim, the Claimants allege that they are the "remainder heirs" of the estate of Orville W. Filsinger under his prior estate proceedings; that Berniece, now deceased, obtained an excessive distribution from Orville's estate as a distributee; and that said distribution was in violation of a contract entered between Orville and Berniece during their lifetimes.

The Copersonal Representatives filed a notice of disallowance of the Claimants' claim. The Claimants subsequently filed a petition for allowance of the claim, which attached and incorporated their original claim. The Copersonal Representatives filed an answer with affirmative defenses and

a counterclaim requesting that the Claimants' claim be deemed frivolous. The Copersonal Representatives then filed a motion for summary judgment, arguing that there was no genuine issue of material fact and that Berniece's estate was entitled to summary judgment as a matter of law. Specifically, the Copersonal Representatives argued that pursuant to Neb. Rev. Stat. § 30-24,120 (Reissue 2016), the Claimants' claim against Berniece's estate as distributee was brought outside of the applicable statute of limitations period, thereby barring any claim for recovery.

In an April 2017 order, the court granted the Copersonal Representatives' motion for summary judgment as to the Claimants' claim but not on the specific basis argued by the Copersonal Representatives. Instead, in its order, the court reasoned: "Although the Claimants have filed their claim in this case, it is actually a claim that should be asserted in the Estate of Orville Filsinger, PR 09-48, because the claim asserts an improper distribution from that estate. Berniece Filsinger was simply the benefactor of the alleged improper distribution." Several months later, the court denied the Copersonal Representatives' counterclaim. The Claimants timely appealed to this court, alleging error on the part of the county court in granting the Copersonal Representatives' motion for summary judgment. The Copersonal Representatives did not cross-appeal the denial of their counterclaim. Accordingly, we address only the court's order granting the motion for summary judgment.

## III. ASSIGNMENTS OF ERROR

The Claimants argue the court erred (1) in granting the Copersonal Representatives' motion for summary judgment, (2) in determining the claim must be filed in Orville's estate, and (3) in not finding that fraud was perpetrated on the Claimants.

## IV. STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue

regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Colwell v. Mullen*, 301 Neb. 408, 918 N.W.2d 858 (2018). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id*.

## V. ANALYSIS

### 1. Assignments of Error Nos. 1 and 2

In assignments of error Nos. 1 and 2, the Claimants argue that the county court erred in granting the Copersonal Representatives' motion for summary judgment on a basis different than argued by the Copersonal Representatives and that the basis on which the court granted the motion was in error. Specifically, the Claimants argue that the Copersonal Representatives' motion for summary judgment was based upon § 30-24,120, but the court erroneously granted the motion for summary judgment, sua sponte, on the basis that the claim was brought in the wrong estate proceeding.

The Claimants and Berniece, prior to her passing, were distributees of Orville's estate, which was administered in the Cheyenne County Court. In connection with that proceeding, on or about January 18, 2014, the personal representative of Orville's estate filed a formal petition for complete settlement after an informal testate proceeding. On February 13, the Cheyenne County Court entered a formal order for complete settlement after the informal testate proceeding. In addition to other matters, the court, in that order, found:

> F. The [p]ersonal [r]epresentative be, and hereby is authorized and directed to deliver and distribute title and possession of the assets of the estate to the Distributees in the amount and manner set forth in the Schedule of Distribution filed with the Petition for Complete Settlement After Informal Testate Proceeding.

> G. Distributions previously made by the [p]ersonal [r]epresentative and reported on the Final Accounting and/or Schedule of Distribution are hereby approved and ratified.

Notwithstanding the contents of that order, the Claimants are now looking to collaterally attack the subject matter of that order by a direct lawsuit by one distributee against another for an alleged excessive distribution. As stated in connection with their motion for summary judgment, the Copersonal Representatives argue that the claim is barred by application of § 30-24,120. Without addressing § 30-24,120, the county court held that this claim should have been asserted in Orville's estate and not as a collateral attack against Berniece's estate.

The Claimants' claim, filed as a creditor's claim in Berniece's estate, reads in part as follows:

> The basic principle of the claim is that Orville W. Filsinger and Berniece Filsinger signed an agreement on October 2, 2002, which agreed that Berniece would recover, at most, from the estate of Orville W. Filsinger's Estate the residence, contents, jewelry and assets amounting to One Million Dollars ($1,000,000.00). Berniece Filsinger confirmed this agreement and all of its terms by the execution of a Disclaimer and Renunciation Pursuant to Agreement filed in PR 09-48. However, Berniece acquired, took, claimed and held onto property which, by estate instruments just recently provided to them, that showed Berniece obtained property or monies which exceeded the One Million Dollar Agreement sum by Two Hundred Thousand Dollars ($ 200,000.00), more or less.

After reviewing this language, we are unsure if the Claimants are alleging that Orville breached the terms of this agreement by failing to draft his will in the manner specified in the agreement, which then resulted in Berniece's receiving more than she was entitled to under the agreement, or whether

the Claimants are claiming the final distribution does not conform to Orville's will which does conform with the agreement. We will examine those possibilities independently.

(a) Failure to Conform to Agreement

Assuming the Claimants are alleging that Berniece obtained an excessive amount of money under Orville's will in violation of the agreement, we must determine whether that claim can be brought as a creditor's claim in Berniece's estate. That claim would be grounded in the October 2002 agreement between Orville and Berniece.

Neb. Rev. Stat. § 30-2351 (Reissue 2016) contemplates contracts concerning succession, sometimes referred to as a "contract for wills." Assuming, without deciding, that the October 2002 agreement was a valid contract for wills, we turn first to the language of that contract, which was admitted into evidence as exhibit 20. In the applicable portion of that agreement, the parties stated:

> I. PROPERTY TO BERNIECE C. FILSINGER
>
> In the event of the death of Orville W. Filsinger, or in the event Orville W. Filsinger and Berniece C. Filsinger shall die in a common disaster or accident or under such circumstances that it is difficult to ascertain the order of their deaths, then and either [text not readable] such events, the parties agree that Berniece C. Filsinger shall receive at a minimum, the following real property and personal property:
>
> A. The personal residence of the parties, including all furniture, fixtures and appliances located within said residence;
>
> B. The personal effects, jewelry and tools of Orville W. Filsinger;
>
> C. The further sum of One Million Dollars ($1,000,000.00), reduced by non-probate transfers of real estate and personal property, including stocks, bonds, bank accounts, mutual funds, IRA accounts and insurance

> proceeds distributed, transferred or payable to Berniece C. Filsinger.
>
> Any Will and/or Trust of Orville W. Filsinger shall substantially so provide for the benefit of Berniece C. Filsinger.

[3-5] Assuming the Claimants are arguing that Orville failed to draft a will in conformance with the agreement, the nature of the cause of action and proper forum in which to file were addressed in *In re Estate of Stuchlik*, 289 Neb. 673, 857 N.W.2d 57 (2014), *modified on denial of rehearing*, 290 Neb. 392, 861 N.W.2d 682 (2015). In *In re Estate of Stuchlik*, the Nebraska Supreme Court held:

> The effect of a valid contract for wills is not to create a cause of action against the decedent's estate, but instead is to create a cause of action for breach of contract. In *Pruss v. Pruss*, [245 Neb. 521, 514 N.W.2d 335 (1994),] beneficiaries filed an action seeking relief that would compel the distribution of a wife's estate under the terms of a mutual contractual will, rather than under a subsequent will executed after the death of the husband. There, we held that even where a valid contractual will existed, that existence did not make a will irrevocable. Wills by their nature are ambulatory and may be revoked at any time. Instead, if the surviving spouse revokes or breaches the mutual contractual will, an action may lie for breach of contract *against the estate of the survivor*.

289 Neb. at 684-85, 857 N.W.2d at 67-68 (emphasis in original).

Applying that principle here, if Orville left a will which did not conform to the terms of his agreement with Berniece, a party with proper standing could bring a breach of contract claim against Orville's estate for breach of that contract. If that is the nature of the Claimants' claim, the trial court rightly held that the Claimants brought their claim in the wrong estate and properly granted the Copersonal Representatives' motion for summary judgment on that basis.

(b) Failure of Distribution to Conform to Will

Assuming that the Claimants are alleging that Orville's will conformed with the agreement, but that the final distribution from Orville's estate failed to conform with Orville's will, we must undergo a separate analysis. During oral argument, the Claimants' counsel acknowledged that the basis for the Claimants' claim filed in Berniece's estate was Neb. Rev. Stat. § 30-24,107 (Reissue 2016), which provides:

> Unless the distribution or payment no longer can be questioned because of adjudication, estoppel, or limitation, a distributee of property improperly distributed or paid, or a claimant who was improperly paid, is liable to return the property improperly received and its income since distribution if he has the property. If he does not have the property, then he is liable to return the value as of the date of disposition of the property improperly received and its income and gain received by him.

Section 30-24,120 places limitations on actions and proceedings against distributees, and it provides:

> Unless previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal representative or otherwise barred, the claim of any claimant to recover from a distributee who is liable to pay the claim, and the right of any heir or devisee, or of a successor personal representative acting in their behalf, to recover property improperly distributed or the value thereof from any distributee is forever barred at the later of (1) three years after the decedent's death; or (2) one year after the time of distribution thereof. This section does not bar an action to recover property or value received as the result of fraud.

[6] Although the Copersonal Representatives concentrated on the time limitation components of § 30-24,120, we note the first sentence of that statute, which provides:

> Unless previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a

> personal representative or otherwise barred, the claim of any claimant to recover from a distributee . . . and the right of any heir or devisee . . . to recover property improperly distributed . . . from any distributee is forever barred . . . .

This means that in addition to the time limitations of bringing such claims against distributees, there are additional limitations on bringing such claims, including, but not limited to, when the matter was previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal representative.

Here, the record shows that the distribution of Orville's estate was resolved as a result of a petition for formal settlement of his estate followed by the court's formal order for complete settlement, which included a formal resolution of distribution of his estate. Although the Claimants argue there were irregularities or "'snafu[s]'" in connection with that administration, brief for appellants at 17, there is no question that the court entered a final order for complete settlement in connection with that distribution.

The question then becomes whether the personal representative's petition for formal settlement in Orville's estate followed by the court's final order for complete settlement in Orville's estate amounted to a previous adjudication in a proceeding settling the accounts of a personal representative. If it did, then the Claimants' direct claim against a distributee from that estate—Berniece, in this matter—is barred by application of § 30-24,120. We first note that there is no statutory definition to the phrase "proceeding settling the accounts of a personal representative," nor do we find any Nebraska cases where its specific meaning has been explored. See § 30-24,120. In *In re Estate of Shuler*, 981 P.2d 1109 (Colo. App. 1999), the Colorado Court of Appeals was confronted with a similar issue. In reasoning whether a "petition for final settlement and distribution of the estate" constitutes a

"'proceeding settling the accounts for a personal representative,'" the Colorado Court of Appeals held:

> There is no statutory definition of "a proceeding settling the accounts of a personal representative." However, "settlement," in this context, is defined as "the full process of administration, distribution, and closing." Section 15-10-201(47), C.R.S.1998.
>
> The probate court's decree of final discharge states in pertinent part: "[T]he personal representative of this estate . . . has filed receipts showing compliance with the Order for Final Settlement and Distribution . . . and the Court determines that the fiduciary should be discharged."
>
> We conclude from the language of the petition, order, and decree that the closing of this estate constituted a proceeding settling the accounts of the personal representative.

*In re Estate of Shuler*, 981 P.2d at 1114.

Applying similar reasoning, after reviewing the petition for formal settlement and the formal order for complete settlement in this matter, we hold that the petition and order in Orville's estate was a proceeding settling the accounts of a personal representative. That leaves only the question of whether the claim was previously adjudicated in that proceeding. If it was, it is now barred in a claim against a distributee.

The phrase "previously adjudicated" is not defined in the Nebraska Probate Code. The Colorado Court of Appeals found the phrase ambiguous in the context of its statute. In this context, we must decide whether the claim formulated by the Claimants as a creditor's claim in Berniece's estate was previously adjudicated in Orville's formal closing proceeding. More specifically, as we mentioned in the previous section, if the Claimants' claim is founded in contract, the Claimants brought the claim in the wrong estate. If, however, they are arguing that the final distribution simply did not conform to Orville's will, we must decide whether that issue was

adjudicated in Orville's estate. In doing so, we review the petition for formal settlement in Orville's estate, which was also admitted into evidence as part of exhibit 20.

In that petition, the personal representative of Orville's estate states, among other things, that "Petitioner, having filed herein the Final Accounting, requests the Court to approve the final settlement and direct that the distribution of remaining assets of the estate be made to the Distributees in the amount and manner set forth in the annexed Schedule of Distribution" and that "Bernice C. Filsinger has received by virtue of joint tenancy ownership and transfer and Assignment of the Promissory Note of Ron Anderson, at least One Million Dollars ($1,000,000.00) as directed by Paragraph V of the Last Will and Testament of Orville W. Filsinger." In its order, the court found and determined that the personal representative of Orville's estate was authorized and directed to distribute assets to the distributees in the amount and manner set forth in the schedule of distribution.

Accordingly, the very issue the Claimants now desire to contest was alleged and resolved in the court's previous order in Orville's estate. The Claimants now desire to relitigate that issue as a claim against the distributee. We hold that, because that specific issue was adjudicated in connection with the personal representative's petition for formal settlement, the Claimants' direct claim against the distributee of Orville's estate is barred by the terms of § 30-24,120.

[7] In summary, if the Claimants are alleging that Orville breached his contract for a will by improperly providing for Berniece in his will, the court did not err in finding that the claim was commenced in the wrong estate and properly granted the Copersonal Representatives' claim for summary judgment. In the alternative, if the Claimants are alleging that Orville conformed to his contract for a will in his will, but that the county court in Orville's estate improperly construed the will in its order of distribution, that claim is barred as a claim by one distributee against another due to the

prior adjudication of this issue in Orville's estate pursuant to § 30-24,120. As such, the county court did not err in granting summary judgment to the Copersonal Representatives. See *Bayliss v. Clason*, 26 Neb. App. 195, 918 N.W.2d 612 (2018) (correct result will not be set aside even when lower court applied wrong reasoning in reaching that result).

### 2. Assignment of Error No. 3

In assignment of error No. 3, the Claimants next argue that the county court erred in not finding that fraud was perpetrated on the Claimants. We interpret the Claimants' argument to mean that the court erred in granting the Copersonal Representatives' motion for summary judgment, because the Claimants argue there was some level of fraud committed in connection with the administration of Orville's estate which entitled them to file this claim directly against Berniece's estate as a distributee. In connection with this argument, the Claimants cite Neb. Rev. Stat. § 30-2206 (Reissue 2016), which provides:

> Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this code or if fraud is used to avoid or circumvent the provisions or purposes of this code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud or restitution from any person (other than a bona fide purchaser) benefiting from the fraud, whether innocent or not. Any proceeding must be commenced within two years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than five years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

Additionally, we note that the last sentence of § 30-24,120 provides: "This section does not bar an action to recover property or value received as the result of fraud."

In support of this proposition of law, the Claimants argue that interested persons were not given notice in Orville's estate proceeding and that there were failures in connection with the "'final accounting,'" "'schedule of distribution,'" and other matters giving rise to "a legal basis for asserting a fraud or evasion claim." Brief for appellants at 24. In order to prevail under this theory, the Claimants must demonstrate that the claim they made was either a claim of fraud against Berniece's estate or a claim involving fraud which bars application of § 30-24,120.

In the Claimants' petition for allowance of claim, the Claimants pled as follows:

> [The Claimants], hereby make claims against the Estate of Berniece C. Filsinger, as creditors of the decedent, for the sum of Two Hundred Thousand Dollars based upon events that occurred to the remainder heirs of the Estate of Orville W. Filsinger, PR 09-48. The basic principle of the claim is that Orville W. Filsinger and Berniece Filsinger signed an agreement on October 2, 2002, which agreed that Berniece would recover, at most, from . . . Orville W. Filsinger's Estate the residence, contents, jewelry and assets amounting to One Million Dollars ($1,000,000.00). Berniece Filsinger confirmed this agreement and all of its terms by the execution of a Disclaimer and Renunciation Pursuant to Agreement filed in PR 09-48. However, Berniece acquired, took, claimed and held onto property which, by estate instruments just recently provided to them, that showed Berniece obtained property or monies which exceeded the One Million Dollar Agreement sum by Two Hundred Thousand Dollars ($ 200,000.00), more or less. This claim is not contingent, is now liquidated, or is owing as a beneficiary under the Orville Filsinger Estate or to the remaindermen as the devisees and transferee's of the estate rights and interests.

Contrary to the Claimants' argument now, the Claimants' claim filed against Berniece's estate as distributee from

Orville's estate was that there was a separate agreement between Orville and Berniece which prohibited a distribution in excess of $1 million, but that Berniece obtained a distribution from the estate in excess of that amount. On its face, the claim suggests that the distribution from Orville's estate proceeding amounted to a breach of contract between those individuals or improper construction of Orville's will. There is nothing in the Claimants' pleading which in any way suggests fraud in connection with the distribution of Orville's estate and purports, on its face, to be nothing more than a claim against a distributee that is barred by application of the rule set forth in *In re Estate of Stuchlik*, 289 Neb. 673, 857 N.W.2d 57 (2014), *modified on denial of rehearing*, 290 Neb. 392, 861 N.W.2d 682 (2015), or by the rule set forth in § 30-24,120 following the adjudication and formal order for complete settlement in Orville's estate. Accordingly, the county court did not err in failing to find that this was an action based in fraud which might otherwise negate application of these principles.

## VI. CONCLUSION

Having determined that the county court properly granted summary judgment in favor of the Copersonal Representatives, we affirm the order of the county court.

Affirmed.

# Felicia J. Melendez, appellant, v. Rodney L. Holling and Brandy A. Holling, appellees.

927 N.W.2d 834

Filed April 23, 2019. No. A-17-1201.

1. **Easements: Adverse Possession: Equity: Jurisdiction: Appeal and Error.** A suit to confirm a prescriptive easement is one grounded in the equitable jurisdiction of the district court and, on appeal, is reviewed de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, an appellate court will consider that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Easements: Words and Phrases.** An easement is an interest in land owned by another person, consisting of the right to use or control the land, or an area above or below it, for a specific limited purpose.
3. **Easements.** A claimant may acquire an easement through prescription.
4. **Easements: Proof: Time.** A party claiming a prescriptive easement must show that its use was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period.
5. **Easements: Adverse Possession: Words and Phrases.** The word "exclusive" in reference to a prescriptive easement does not mean that there must be use only by one person, but, rather, means that the use cannot be dependent upon a similar right in others.
6. **Adverse Possession: Title: Time.** Use by predecessors in title may be tacked onto a claimant's use in order to meet the 10-year requirement for adverse possession.
7. **Easements: Adverse Possession: Proof.** In order to prove a prescriptive easement, the claimant must establish each of the elements by clear, convincing, and satisfactory evidence.
8. **Easements: Presumptions: Proof: Time.** Generally, once a claimant has shown open and notorious use over the 10-year prescriptive period,

adverseness is presumed. At that point, the landowner must present evidence showing that the use was permissive.

9. **Easements: Presumptions.** A presumption of permissiveness exists when an owner permits unenclosed and undeveloped lands to be used by neighbors.
10. ____: ____. The presumption of permissiveness applies to unenclosed wilderness but not to an unenclosed parking lot in a downtown shopping center or a driveway in a suburban neighborhood.
11. ____: ____. When the owner of a property has opened or maintained a right of way for his or her own use and the claimant's use appears to be in common with that use, a presumption of permissiveness exists.
12. ____: ____. The presumption of permissiveness may be rebutted by showing that the claimant is making the claim as of right.

Appeal from the District Court for Adams County: Stephen R. Illingworth, Judge. Affirmed.

Jeffrey P. Ensz, of Lieske, Lieske & Ensz, P.C., L.L.O., for appellant.

Richard L. Alexander, of Richard Alexander Law Office, for appellees.

Pirtle, Arterburn, and Welch, Judges.

Arterburn, Judge.

## INTRODUCTION

Felicia J. Melendez appeals from an order of the district court for Adams County that found she had failed to prove the existence of either a prescriptive easement or an implied easement across land belonging to her neighbors, Rodney L. Holling and Brandy A. Holling. Melendez argues on appeal only that the district court erred in not awarding her a prescriptive easement across the Hollings' property. Finding no merit to her argument, we affirm the order of the district court.

## BACKGROUND

Melendez owns a house located at 716 North Colorado Avenue in Hastings, Nebraska, while the Hollings own the

house located immediately to the south, at 712 North Colorado Avenue. Melendez' house contains three one-bedroom apartment-style units. The Hollings purchased the house located at 712 North Colorado Avenue with the intent to renovate and then resell it. Part of the renovation included the installation of a paved driveway running from the street, then alongside the house, and ending flush with the back of the house. A privacy fence was built around the backyard. The newly constructed driveway and privacy fence were built along the property line between the two properties.

On October 15, 2015, Melendez filed a complaint against the Hollings, asking the district court to find that a prescriptive easement existed over a portion of the Hollings' property. She alleged that a shared driveway previously existed, which was located on the southern portion of her property and the northern portion of the Hollings' property. Melendez further alleged that the shared driveway had been continuously used for a period of more than 10 years and used in an actual, open, notorious, and hostile manner. Melendez alleged in her complaint that the Hollings' new driveway and privacy fence along the property line would cause irreparable injury and damage to her by preventing her tenants from being able to access the rear of her property for purposes of parking. At trial, Melendez testified that if two panels of the privacy fence were ordered removed, her tenants would retain the ability to park their cars behind the house.

Trial was held on July 19, 2017, consisting of the testimony of the parties, two tenants who previously rented from Melendez, the prior owner of the Melendez property, and the Hastings building inspector. Numerous exhibits were also admitted into evidence.

The driveway in question sits between Melendez' apartment house and the Hollings' house. Melendez testified that the driveway between the two properties was a shared driveway with separate approaches when she purchased the property. She stated that people from both properties used the driveway.

She never asked for nor received either written or verbal permission to use the driveway from the previous owners of 712 North Colorado Avenue or the Hollings. Melendez described the driveway as narrowing as you move from the street, past the houses, and toward the back of the properties. In the backyard of Melendez' property is a small parking area where her tenants parked their cars. Melendez testified that she bought her property in 2012 from Laura Witte. Melendez testified that she never communicated with the prior owner of 712 North Colorado Avenue or the Hollings regarding use of the driveway between the houses. No permission was granted nor had there been any past denial of access to the portion of the driveway located on the 712 North Colorado Avenue side of the property line. Melendez made no improvements such as providing gravel or other resurfacing with respect to either the parking area or the driveway as it existed on her side of the property line.

Witte testified that she had owned the property at 716 North Colorado Avenue for 12 years before selling it to Melendez. While Witte owned the property, she told her tenants that they could use the shared driveway to access the back parking area on her property but that they could not park on the driveway due to its shared nature. She testified that she believed that the driveway was part of both neighboring properties and had always considered it to be a shared driveway. Witte could not recall ever asking for or receiving any type of permission from the prior owners of 712 North Colorado Avenue to drive vehicles over a portion of that property in order to access the rear of her property. She also could not ever recall being told by the prior owners that her tenants should stop using the driveway.

In August 2015, the Hollings bought the house at 712 North Colorado Avenue, intending to renovate and then resell it. Rodney Holling testified that the seller made no representations to him regarding a shared driveway. He testified that he had never given any of Melendez' tenants permission to use

the driveway nor had he told them they were prohibited from using it. Even though neither Melendez nor her tenants asked him for permission to use the preexisting driveway to access the rear of her property, he did not seek to prohibit the tenants from using the driveway until such time as the exterior improvements were made. He acknowledged that a portion of the privacy fence would have to be removed in order for cars to access the back parking area on Melendez' property. He noted that he made the exterior improvements based on his belief that most prospective buyers would prefer a private driveway over a shared driveway. He also noted that the backyard of Melendez' property consisted of "grass and weeds." Until the lawsuit was filed, he had intended to build a garage inside the privacy fence.

Melendez had the property surveyed. The surveyor's flags showed that the dirt driveway in question laid almost evenly on the Hollings' property and on Melendez' property. Based on the property survey, the Hollings installed the privacy fence on the property line in the backyard and poured the new concrete driveway flush with the property line.

Two of Melendez' tenants testified during trial. Anthony Garvin lived in an apartment at 716 North Colorado Avenue for about a year during a period of time that included the Hollings' purchase of the neighboring property and adding the new driveway and privacy fence. Garvin testified that there was no division between the properties when he first moved in and that he used the shared driveway to access the back parking area. However, he stated that he could no longer get his vehicle to the back parking area once the Hollings' privacy fence was erected. From that point on, Garvin accessed the back parking area by driving across the neighboring property to the north.

Breanna Draper lived in an apartment at 716 North Colorado Avenue both before and after the Hollings installed the new driveway and erected their privacy fence. Like Garvin, Draper testified that she also used the shared driveway to access the

parking area behind Melendez' property. However, once the Hollings' privacy fence was up, she could no longer access the backyard parking area. She testified that she did not enter the parking area from the north side as Garvin had because she did not want to drive through that neighbor's yard.

Both Garvin and Draper testified that they observed other tenants park in a small parking area directly across the street, which was in front of a daycare center. Draper testified that the daycare parking lot was often full during operating hours. Draper and Melendez also testified that one parking spot immediately to the side of the house remained available for the use of tenants.

A building inspector for the city of Hastings testified that the parking area in front of the daycare was open to the public. Street parking was prohibited on the near, or east, side of North Colorado Avenue but was allowed on the other side. He also testified that city codes required that any parking lot behind the house be paved, be graveled, or have crushed rock on it. He stated Melendez' house could have multiple apartments only if it had "legal nonconforming status."

Following trial, the district court entered an order on October 20, 2017, which held that Melendez had failed to prove that she was entitled to a prescriptive easement or an implied easement. The court found that Melendez did not have exclusive use of the driveway and that her use was permissive in nature. The court further found that Melendez had not put the Hollings on notice that she was claiming use of the driveway under right. Accordingly, the district court entered judgment on behalf of the Hollings and dismissed Melendez' complaint.

Melendez now appeals the district court's judgment.

## ASSIGNMENT OF ERROR

Melendez assigns on appeal that the district court erred in finding that she was not entitled to a prescriptive easement across a portion of 712 North Colorado Avenue, the property owned by the Hollings.

## STANDARD OF REVIEW

[1] A suit to confirm a prescriptive easement is one grounded in the equitable jurisdiction of the district court and, on appeal, is reviewed de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, an appellate court will consider that the trial court observed the witnesses and accepted one version of the facts over another. *K & H Hideaway v. Cheloha*, 24 Neb. App. 297, 885 N.W.2d 760 (2016).

## ANALYSIS

[2,3] The law of prescriptive easements has been called "a tangled mass of weeds," yet the core principles of the doctrine are well established in Nebraska. *Feloney v. Baye*, 283 Neb. 972, 815 N.W.2d 160 (2012). An easement is an interest in land owned by another person, consisting of the right to use or control the land, or an area above or below it, for a specific limited purpose. *Id*. Nebraska case law recognizes that a claimant may acquire an easement through prescription. *Id*. However, the law treats a claim of prescriptive right with disfavor. *Id*. The reasons are obvious—allowing a person to acquire prescriptive rights over the lands of another is a harsh result for the burdened landowner and essentially rewards a trespasser by granting a trespasser the right to use another's land without compensation. See *id*.

[4-7] A party claiming a prescriptive easement must show that its use was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period. *K & H Hideaway v. Cheloha, supra*. The word "exclusive" in reference to a prescriptive easement does not mean that there must be use only by one person, but, rather, means that the use cannot be dependent upon a similar right in others. *Id*. Use by predecessors in title may be tacked onto a claimant's use in order to meet the 10-year requirement. *Fischer v. Grinsbergs*, 198 Neb. 329, 252 N.W.2d 619 (1977). In order to prove a prescriptive easement,

the claimant must establish each of the elements by clear, convincing, and satisfactory evidence. See *K & H Hideaway v. Cheloha, supra*.

[8-10] Generally, once a claimant has shown open and notorious use over the 10-year prescriptive period, adverseness is presumed. *Feloney v. Baye, supra*. At that point, the landowner must present evidence showing that the use was permissive. *Id*. Exceptions to this general rule do exist, however. First, the Supreme Court determined in *Scoville v. Fisher*, 181 Neb. 496, 149 N.W.2d 339 (1967), that a presumption of permissiveness exists instead when an owner permits unenclosed and undeveloped lands to be used by neighbors. However, in *Feloney v. Baye, supra*, the court held that this presumption of permissiveness applies to unenclosed wilderness but not to an unenclosed parking lot in a downtown shopping center or a driveway in a suburban neighborhood. As such, this presumption does not apply in the present case. However, this finding does not end our analysis.

In *Feloney v. Baye, supra*, the court addressed a scenario wherein the plaintiff for a number of years utilized the defendant's driveway in order to turn his vehicle to enter his garage. A narrow alley separated the parties' properties, but did not leave adequate space for the plaintiff to make a sharp turn into the driveway. The defendant decided to build a retaining wall on his driveway in order to alleviate a drainage issue which made it impossible for the plaintiff to use the defendant's driveway. The plaintiff filed suit seeking the removal of the wall by way of the declaration of a prescriptive easement.

[11,12] Although the Supreme Court found that this presumption of permissive use did not apply, another exception related to permissive use did exist. The court held that when the owner of a property has opened or maintained a right of way for his or her own use and the claimant's use appears to be in common with that use, a presumption of permissiveness also exists. See *Feloney v. Baye*, 283 Neb. 972, 815 N.W.2d

160 (2012). The foundation for the presumption is the likelihood that the owner is acting neighborly as opposed to acquiescing in a tortious trespass over his land. *Id*.

> [W]hen a claimant uses a neighbor's driveway or roadway without interfering with the owner's use or the driveway itself, the use is to be presumed permissive. As noted, the law disfavors prescriptive easements. And using a neighbor's driveway to turn around in is a common act. Landowners who permit such acts out of neighborly accommodation would likely stop doing so if their continued accommodation meant that they would one day lose the power to control the development of their land. "'Such [a] rule would [lead to] a prohibition of all neighborhood accommodations in the way of travel.'"

*Id*. at 981, 815 N.W.2d at 167-68. Permissiveness is merely a presumption in instances such as this, and the presumption may be rebutted by showing that the claimant is making the claim as of right. See *id*.

In the present case, Melendez argues that the district court's reliance on the principles outlined in *Feloney v. Baye, supra*, ignored the holding of *Majerus v. Barton*, 92 Neb. 685, 139 N.W. 208 (1912). The court in *Majerus v. Barton, supra*, established that adverseness is presumed when the claimant of an easement demonstrates uninterrupted and open use for the necessary period of time without explanation of how the use began. The court in *Feloney v. Baye, supra*, reaffirmed that general rule. Although Melendez correctly states the general rule, she ignores its exceptions that have developed during the century since *Majerus v. Barton, supra*, was decided. The court in *Feloney v. Baye, supra*, merely recognized—and not for the first time—that there are factual scenarios where a presumption of permissiveness can exist. See, e.g., *Gerberding v. Schnakenberg*, 216 Neb. 200, 204, 343 N.W.2d 62, 65 (1984) ("[w]hile it is the general rule . . . that a showing the use has been open, visible, continuous, and unmolested for the prescriptive period raises a presumption that the use was under

a claim of right and not permissive, . . . the rule is not without exceptions").

Melendez demonstrated uninterrupted and open use of the shared driveway for at least 10 years, including her predecessor in title's use, meaning that adverseness would be presumed under the general rule if it applied. However, in this case, the exception to the general rule applies. A presumption of permissiveness exists, because Melendez was using the Hollings' driveway in common with the Hollings and their predecessors and without interfering with their use. Melendez herself testified that occupants of both properties drove on the shared driveway without interference from the other's use. Therefore, since Melendez presented no evidence that rebutted the presumption of permissiveness and no evidence that she had put the Hollings on notice that she was making a claim of right, she has failed to meet her burden.

Melendez used the shared driveway at issue in this case by virtue of the Hollings' neighborly accommodation. We cannot now find that the Hollings lost their power to control the development of their land because of their act of neighborly accommodation. We agree with the district court in finding that Melendez failed to ever put the Hollings on notice that she was claiming use of the shared driveway under right. Therefore, we further agree with the district court in finding that Melendez did not rebut the presumption of permissiveness and that she was not entitled to a prescriptive easement across the Hollings' property.

## CONCLUSION

The district court did not err in finding that Melendez was not entitled to a prescriptive easement across the Hollings' property. Thus, we affirm the district court's judgment.

Affirmed.

# Heath Wolter, appellee, v. Christina Fortuna, appellant.

928 N.W.2d 416

Filed April 30, 2019. No. A-18-267.

1. **Domicile: Intent: Words and Phrases.** Domicile is obtained only through a person's physical presence accompanied by the present intention to remain indefinitely at a location or site or by the present intention to make a location or site the person's permanent or fixed home.
2. **Child Custody: Jurisdiction.** Jurisdiction over a child custody proceeding is governed exclusively by the Uniform Child Custody Jurisdiction and Enforcement Act.
3. **Child Custody: Words and Phrases.** "Child custody proceeding" is defined under Neb. Rev. Stat. § 43-1227(4) (Reissue 2016) of the Uniform Child Custody Jurisdiction and Enforcement Act as a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue and includes a proceeding for paternity in which the issue of custody or visitation may appear.
4. **Child Custody: Jurisdiction: Appeal and Error.** In considering whether jurisdiction exists under the Uniform Child Custody Jurisdiction and Enforcement Act, a jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires an appellate court to reach a conclusion independent from the trial court.
5. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
6. **Child Custody: Jurisdiction: States.** For a state to exercise jurisdiction over a child custody dispute, it must either be the home state as defined by the Uniform Child Custody Jurisdiction and Enforcement Act or fall under limited exceptions to the home state requirement specified by the act.
7. **Child Custody: Jurisdiction.** A Nebraska court has "last resort" jurisdiction to make an initial child custody determination under Neb. Rev.

Stat. § 43-1238(a)(4) (Reissue 2016) of the Uniform Child Custody Jurisdiction and Enforcement Act if no court of any other state would have jurisdiction under the criteria specified in subdivision (a)(1), (a)(2), or (a)(3) of § 43-1238.

8. ____: ____. A decision to decline to exercise jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act for the reason of an inconvenient forum is entrusted to the discretion of the trial court.
9. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
10. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
11. **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.
12. **Child Custody: Visitation: Appeal and Error.** Child custody determinations, and parenting time determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
13. **Visitation.** The trial court has discretion to set a reasonable parenting time schedule.
14. ____. The determination of reasonableness of a parenting plan is to be made on a case-by-case basis.
15. ____. Parenting time relates to continuing and fostering the normal parental relationship of the noncustodial parent.
16. ____. The best interests of the children are the primary and paramount considerations in determining and modifying visitation rights.
17. **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.
18. **Paternity: Attorney Fees: Appeal and Error.** An award of attorney fees in a paternity action is reviewed de novo on the record to determine whether there has been an abuse of discretion by the trial judge. Absent such an abuse, the award will be affirmed.
19. **Attorney Fees.** As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.
20. **Paternity: Child Support: Attorney Fees: Costs.** Attorney fees and costs are statutorily allowed in paternity and child support cases.

21. **Child Custody: Jurisdiction: Attorney Fees.** Under the Uniform Child Custody Jurisdiction and Enforcement Act, the court shall award the prevailing party attorney fees unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.
22. **Attorney Fees.** Customarily, attorney fees and costs are awarded only to the prevailing party or assessed against those who file frivolous suits.

Appeal from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Affirmed.

Matt Catlett, of Law Office of Matt Catlett, for appellant.

Heath Wolter, pro se.

Riedmann, Bishop, and Welch, Judges.

Riedmann, Judge.

## INTRODUCTION

Christina Fortuna appeals the order of the district court for Lancaster County, which established paternity and determined custody and parenting time for the parties' minor child. Finding no merit to the arguments raised on appeal, we affirm.

## BACKGROUND

Fortuna gave birth to a child in December 2015. In March 2016, Fortuna and the child moved from Nebraska to Florida in order to live with Fortuna's mother. In June, the Nebraska Department of Health and Human Services determined that Heath Wolter was the father of the child and sent notice to Fortuna and Wolter. Thus, on July 1, Wolter filed a complaint in the district court for Cass County asking the court to enter an order for custody, parenting time, and child support.

At the same time, Wolter filed a motion for ex parte temporary custody. The court declined to enter an ex parte order but set the matter for hearing on July 18, 2016. Fortuna, pro se, requested a continuance on July 15, and the court rescheduled the hearing for August 15. Thereafter, Fortuna obtained counsel who filed a motion to dismiss the action,

arguing that despite its caption, Wolter's complaint was a complaint to establish paternity, and that the court lacked jurisdiction because the child was neither domiciled nor found in Nebraska.

After holding a hearing, the district court denied the motion to dismiss, finding that it had jurisdiction over the matter, and ordered Fortuna to return the child to Nebraska within 30 days. On September 22, 2016, Wolter filed a motion for temporary custody in which he alleged that Fortuna had not returned to Nebraska as previously ordered. In an order dated September 26, the court awarded temporary custody of the child to Fortuna, who had returned to Nebraska, and granted Wolter parenting time with the child a minimum of every other Saturday from 9 a.m. until 6 p.m.

In October 2016, Fortuna filed several motions, including a motion to decline jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), motion for temporary child support, motion for temporary removal of the child, motion to transfer the action from Cass County to Lancaster County, and motion to excuse some of the requirements of Nebraska's Parenting Act. The district court for Cass County granted the motion to transfer and awarded temporary child support, to be paid by Wolter, in the amount of $389 per month. The court reserved ruling on the remaining motions pending transfer of the action. Thereafter, the district court for Lancaster County considered the outstanding motions and denied each of them.

Trial on the issues of paternity, custody, parenting time, and child support was held on November 1, 2017. At the outset, the parties stipulated as to Wolter's paternity of the child.

Fortuna testified that she moved to Florida in March 2016, and that at the time, her mother had lived there for approximately 1 year. Fortuna did not work while living in Florida and planned to stay home with the child for the first year of his life while living with her mother. She did receive government assistance in the form of "SNAP" and Medicaid while

in Florida. At the time of trial, Fortuna had moved back to Nebraska. She was again living with her mother, who had also returned to Nebraska and intended to remain here.

Fortuna proposed a parenting plan in which Wolter would receive parenting time every other Saturday for 8 hours per day. In her opinion, the child was too young for overnight visits. She also explained that Wolter does not listen to her when she tries to provide him with information regarding the child and has missed several of his scheduled visits. She acknowledged that there have been times that Wolter has asked for additional time with the child, but she refused to give him that time because it was not his designated parenting time.

Fortuna expressed additional concerns that "[a]bout half the time" when the child would return from Wolter, he would be "a little dehydrated and hungry," and that Wolter did not pay enough attention to the child during his parenting time. She was also concerned about the condition of Wolter's residence because it has "a bunch of holes in the walls," "it leaks," and it has "moldy" walls in the laundry room. Ultimately, she believed that her proposed parenting plan was in the best interests of the child. Because of the child's young age and the fact that Wolter did not exercise his time with the child regularly, she believed it was in the child's best interests "to stay mostly with [her]."

Wolter also testified and admitted that he missed some of his scheduled visits. He explained that at that time, he was working as the general manager of a chain of gas stations, and that at times, he would unexpectedly have to cover shifts for employees who did not show up for work, causing him to miss some of his Saturday visits. He testified that he has since left that employment, in part because it was interfering with his time with his child.

Wolter's live-in girlfriend testified at trial that she has been present during his parenting time and has no concerns about his ability to parent. She explained that the child is close with Wolter and is happy while at Wolter's house. She has

observed Wolter tend to the child's needs, such as making him food and changing his diapers.

Wolter proposed a parenting plan in which he would initially receive parenting time every other week from Thursday evening through Monday morning, and beginning January 1, 2018, the parties would begin a "one week on, one week off" arrangement. He opined that this plan was in the child's best interests, because it would allow him to be part of his child's life and because the parenting time he received under the temporary order, which amounted to 18 hours per month, was insufficient to allow him to be a father to his child.

On February 14, 2018, the court entered an order finding that venue was proper and that it had jurisdiction over the parties and the subject matter of the proceeding. The court determined that Wolter was the father of the minor child. Legal and physical custody of the child was awarded to Fortuna subject to Wolter's parenting time set out in an attached parenting plan. The parenting plan awarded Wolter parenting time for every other week from Thursday evening through Monday morning, certain holidays, and two 2-week periods in the summer. Wolter was ordered to pay child support in the amount of $533 per month, and each party was ordered to pay his or her own attorney fees.

The following month, the court entered an order which reads, "The Court finds that the Parenting Plan filed February 14, 2018 and the Order filed February 14, 2018 are filed as separate filings in this matter. The Parenting Plan should be filed as an attachment to the Order." Fortuna timely appeals to this court.

## ASSIGNMENTS OF ERROR

Fortuna assigns, renumbered and restated, that the district court (1) erred in finding that it had jurisdiction to make an initial custody determination; (2) abused its discretion in denying her motion to decline jurisdiction, because Florida was a more appropriate forum; (3) lacked authority to set a

temporary hearing to be held on July 18, 2016; (4) lacked authority to order her to move herself and the child back to Nebraska and to thereafter reside in Nebraska as a condition of her having custody of the child and lacked authority to award visitation to Wolter; (5) abused its discretion in not excusing Fortuna's compliance with the Parenting Act requirements; (6) abused its discretion in not adopting her proposed parenting plan; and (7) abused its discretion in failing to order Wolter to pay her attorney fees.

## ANALYSIS

*Subject Matter Jurisdiction.*

Fortuna argues that the district court erred in concluding it had jurisdiction to make an initial child custody determination and that as a result, its custody order is void. We disagree.

[1] Fortuna claims that despite the fact that Wolter's initial pleading was captioned as a complaint for custody, the pleading was in reality a complaint to establish paternity of the child. She correctly notes that a proceeding to establish the paternity of a child may be instituted in the court of the district where the child is domiciled or found, subject to an exception not present here. See Neb. Rev. Stat. § 43-1411 (Reissue 2016). Domicile is obtained only through a person's physical presence accompanied by the present intention to remain indefinitely at a location or site or by the present intention to make a location or site the person's permanent or fixed home. *Metzler v. Metzler*, 25 Neb. App. 757, 913 N.W.2d 733 (2018). It is undisputed that at the time the complaint was filed, the child was domiciled in Florida.

[2] On the other hand, jurisdiction over a child custody proceeding is governed exclusively by the UCCJEA. *In re Guardianship of S.T.*, 300 Neb. 72, 912 N.W.2d 262 (2018). The question then becomes whether the instant matter constitutes a proceeding to establish the paternity of a child or a child custody proceeding.

An action for paternity or parental support under Neb. Rev. Stat. §§ 43-1401 to 43-1418 (Reissue 2016 & Cum. Supp.

2018) may be initiated by filing a complaint with the clerk of the district court as provided in Neb. Rev. Stat. § 25-2740 (Cum. Supp. 2018). § 43-1411.01(1). Section 25-2740(1)(b) provides that "[p]aternity or custody determinations means proceedings to establish the paternity of a child under sections 43-1411 to 43-1418 or proceedings to determine custody of a child under section 42-364." Thus, the law distinguishes paternity actions from custody actions.

[3] Similarly, "[c]hild custody proceeding" is defined under Neb. Rev. Stat. § 43-1227(4) (Reissue 2016) of the UCCJEA as "a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue." The term "[c]hild custody proceeding" includes a proceeding for paternity in which the issue of custody or visitation may appear. *Id*.

From the foregoing, we deduce that if the proceeding is solely to establish the paternity of a child or seeks parental support, § 43-1411 applies, and the proceeding is to be instituted in the court of the district where the child is domiciled or found. But when the custody and/or visitation of a child is also at issue, even if the action is a paternity action, jurisdiction over the proceeding is governed exclusively by the UCCJEA.

Accordingly, the present case is governed by the UCCJEA, not § 43-1411, even though Wolter sought to establish his paternity, because he was also seeking an order regarding custody and visitation. We observe that there have been two previous cases in which this court has determined that Nebraska has jurisdiction under the UCCJEA over actions where a putative father filed a complaint seeking to establish paternity and custody of a child located outside of Nebraska at the time the complaint was filed. See, *Shandera v. Schultz*, 23 Neb. App. 521, 876 N.W.2d 667 (2016); *Zimmerman v. Biggs*, 22 Neb. App. 119, 848 N.W.2d 653 (2014).

[4,5] Having decided that the UCCJEA applies, we must now determine whether the district court properly found that it had jurisdiction over the proceeding. In considering whether

jurisdiction exists under the UCCJEA, a jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires an appellate court to reach a conclusion independent from the trial court. *In re Guardianship of S.T.*, 300 Neb. 72, 912 N.W.2d 262 (2018). Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court. *Id*.

Jurisdiction to make an initial child custody determination is governed by Neb. Rev. Stat. § 43-1238 (Reissue 2016) of the UCCJEA, which provides in part:

> (a) Except as otherwise provided in section 43-1241 [regarding temporary emergency jurisdiction], a court of this state has jurisdiction to make an initial child custody determination only if:
>
> (1) this state is the home state of the child on the date of the commencement of the proceeding or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;
>
> (2) a court of another state does not have jurisdiction under subdivision (a)(1) of this section, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under section 43-1244 or 43-1245, and:
>
> (A) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and
>
> (B) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;
>
> (3) all courts having jurisdiction under subdivision (a)(1) or (a)(2) of this section have declined to exercise jurisdiction on the ground that a court of this state is the

more appropriate forum to determine the custody of the child under section 43-1244 or 43-1245; or

(4) no court of any other state would have jurisdiction under the criteria specified in subdivision (a)(1), (a)(2), or (a)(3) of this section.

(b) Subsection (a) of this section is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

[6] For a state to exercise jurisdiction over a child custody dispute, it must either be the home state as defined by the UCCJEA or fall under limited exceptions to the home state requirement specified by the UCCJEA. *In re Guardianship of S.T., supra*. Generally speaking, § 43-1238(a)(1) grants jurisdiction to the home state of the child and § 43-1238(a)(2) through (4) sets out the exceptions under which a court will have jurisdiction, even if it is not in the child's home state. *In re Guardianship of S.T., supra*.

The UCCJEA defines "[h]ome state" as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding." § 43-1227(7). As used in the UCCJEA, "[c]ommencement" of a proceeding means "the filing of the first pleading in a proceeding." § 43-1227(5).

In the present case, Nebraska was not the child's home state because the child had not lived in Nebraska for 6 consecutive months. Therefore, Nebraska did not have subject matter jurisdiction over the proceeding under § 43-1238(a)(1).

[7] However, a Nebraska court has jurisdiction to make an initial child custody determination under § 43-1238(a)(4) of the UCCJEA if "no court of any other state would have jurisdiction under the criteria specified in subdivision (a)(1), (a)(2), or (a)(3) of [§ 43-1238]." See *DeLima v. Tsevi*, 301 Neb. 933, 921 N.W.2d 89 (2018). This has been referred to as "last resort" jurisdiction. See *id*.

Jurisdiction under § 43-1238(a)(4) here depends on whether a Florida court would have had jurisdiction to make an initial child custody determination under the criteria set forth in either subsection (a)(1), (a)(2), or (a)(3). See *DeLima v. Tsevi, supra*. As with Nebraska, Florida would not qualify as the child's home state under § 43-1238(a)(1) because the child had not lived in Florida for at least 6 consecutive months before the action was commenced.

With respect to § 43-1238(a)(2), Florida would have jurisdiction under this subsection if no court has jurisdiction as the child's home state and the following are true:

> (A) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and
>
> (B) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.

This basis for jurisdiction under the UCCJEA is commonly referred to as "significant connection" jurisdiction. *DeLima v. Tsevi, supra*.

When tasked with deciding whether an individual has a significant connection to a state for purposes of this section of the UCCJEA, courts consider a wide variety of ties to the state. *DeLima v. Tsevi, supra*. Relying upon cases from other jurisdictions, the Nebraska Supreme Court in *DeLima* iterated that some factors that have been weighed in these cases are the child's relationship with extended or blended family members; enrollment in school or day care; participation in social activities; access to medical, dental, or psychological care; the availability of government assistance; or the parent's employment or family ties.

In *DeLima v. Tsevi, supra*, the Supreme Court concluded that the child and his mother had a significant connection to the nation of Togo because the child resided with family members in the country continuously for 6 years and attended

school and received medical attention there. In addition, the mother was married in Togo, had family living there, and voluntarily sent the child to live in Togo with his maternal grandmother while the mother remained in Nebraska.

To the contrary here, Fortuna and the child had lived in Florida for fewer than 4 months at the time this proceeding was commenced. Fortuna was not working in Florida or looking for employment, but she did receive government assistance in the form of "SNAP" and Medicaid. Fortuna testified that she found a pediatrician in Florida for the child, but it is unclear whether the child received any medical care there, and the child did not attend daycare. Fortuna and the child lived with Fortuna's mother, but at the time Fortuna moved to Florida, her mother had lived in the state for only 1 year. There was no evidence that Fortuna had any other family members living in Florida. On the other hand, Fortuna has siblings that live in Nebraska, and her mother moved back to Nebraska in October 2017. Based on the foregoing, we conclude that Fortuna and the child did not have a significant connection with Florida at the time the action was commenced, and therefore, Florida would not have had jurisdiction to make an initial child custody determination under § 43-1238(a)(2).

Finally, § 43-1238(a)(3) provides for jurisdiction when all courts having jurisdiction under subsection (a)(1) or (a)(2) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum. There is no evidence that any courts in the present case have declined to exercise jurisdiction on the ground that Florida is the more appropriate forum. Accordingly, a court in Florida could not have exercised jurisdiction under § 43-1238(a)(3). Because Florida would not have jurisdiction over this matter under the criteria specified in subsections (a)(1), (a)(2), or (a)(3), Nebraska has "last resort" jurisdiction under § 43-1238(a)(4). As a result, the district court did not err in concluding that it had jurisdiction over the proceedings and entering a custody order after trial.

*Inconvenient Forum.*

Fortuna next asserts that even if the district court had jurisdiction to make an initial child custody determination, the court should have declined jurisdiction because Florida was a more appropriate forum. We find no merit to this argument.

[8] A court of this state which has jurisdiction under Neb. Rev. Stat. § 43-1244(a) (Reissue 2016) of the UCCJEA to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. As a general rule, a decision to decline to exercise jurisdiction under the UCCJEA for the reason of an inconvenient forum is entrusted to the discretion of the trial court. *Watson v. Watson*, 272 Neb. 647, 724 N.W.2d 24 (2006).

Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. § 43-1244(b). For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

> (1) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
>
> (2) the length of time the child has resided outside this state;
>
> (3) the distance between the court in this state and the court in the state that would assume jurisdiction;
>
> (4) the relative financial circumstances of the parties;
>
> (5) any agreement of the parties as to which state should assume jurisdiction;
>
> (6) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
>
> (7) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

> (8) the familiarity of the court of each state with the facts and issues in the pending litigation.

§ 43-1244(b).

The evidence in the present case reveals that at the time the action was commenced, the child had resided outside of Nebraska for fewer than 4 months. The court that would assume jurisdiction is located in Florida, but there was no evidence presented as to the exact distance between the courts.

There is a disparity in the financial circumstances of the parties: Wolter was working full time, and Fortuna was unemployed. At the time the hearing on this motion was held, however, Fortuna had moved back to Nebraska, and was looking for employment, and Wolter had been ordered to pay temporary child support.

The child is too young to testify, and otherwise, the evidence required to resolve the pending litigation would be presented in the form of testimony from Wolter and Fortuna, both of whom were residing in Nebraska. There was no specific evidence as to the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence or the familiarity of the court of each state with the facts and issues in the pending litigation.

Before determining whether Nebraska was an inconvenient forum, the court was required to consider whether it would be appropriate for a court in Florida to exercise jurisdiction. Pursuant to § 43-1244(b), the court held an evidentiary hearing on the issue. Based on the foregoing evidence that was presented at that hearing, we conclude that the district court did not abuse its discretion in concluding that Florida would not be an appropriate forum and accordingly denying Fortuna's motion to decline jurisdiction.

*Authority to Schedule Temporary Hearing.*

Fortuna asserts that the district court erred in entering an order setting the matter for a temporary hearing on July 18, 2016, because this was a paternity action and paternity had

not yet been established. Even assuming without deciding that the court's order was an abuse of discretion, we cannot afford relief to Fortuna from the temporary order. See, *State ex rel. Pathammavong v. Pathammavong*, 268 Neb. 1, 679 N.W.2d 749 (2004); *Coleman v. Kahler*, 17 Neb. App. 518, 766 N.W.2d 142 (2009).

[9] A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Coleman v. Kahler, supra.* The issue of whether the district court erred in scheduling a temporary hearing and thereafter entering a temporary order was relevant only from the time the order was entered until it was replaced by the final order after trial. Therefore, any issue relating to the temporary order is moot and need not be resolved in this appeal. See *id*.

*Authority to Order Return to Nebraska and Award Visitation.*

Fortuna challenges the court's authority to order her to return the child to Nebraska in the August 22, 2016, order and to award Wolter visitation with the child in the September 26 order. We note, however, that Fortuna did not raise these issues before the district court.

[10] An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Cattle Nat. Bank & Trust Co. v. Watson*, 293 Neb. 943, 880 N.W.2d 906 (2016). After reviewing the transcript in the instant case, we observe that Fortuna referenced her belief that the district court lacked the authority to order her to return to Nebraska, but she never placed the issue before the district court in the form of a motion for the court's consideration and ruling. To the extent Fortuna relies upon her belief that the district court lacked jurisdiction to enter either order, we have resolved that issue. Because the arguments Fortuna asserts on appeal were not presented to the district court, we do not consider them on appeal.

*Compliance With Parenting Act Requirements.*

Fortuna contends that the district court abused its discretion in not excusing her compliance with the Parenting Act requirements of mediation and a parenting education course. We find these issues to be moot.

Fortuna filed a motion asking the district court to waive the parties' participation in mediation pursuant to Neb. Rev. Stat. § 43-2937(4) (Reissue 2016). The court denied the motion, and at trial, Wolter testified that the parties had attempted mediation but were unsuccessful.

[11] 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). Because the parties attended mediation and ultimately a trial on the issues was held, the issue of whether the court should have waived the mediation requirement is moot.

Likewise, Fortuna requested that the court, under Neb. Rev. Stat. § 43-2928(1) (Reissue 2016), excuse her participation in the required parenting education course. The motion was denied, and as noted above, trial was held. Rules of Dist. Ct. of Third Jud. Dist. 3-9(B) (rev. 1995) provides that the court may not schedule a hearing on a motion to set the case for trial until the parties have completed the statutorily required parenting classes. Because the court declined to excuse participation in the parenting classes and trial was held, we infer that Fortuna completed the required course prior to trial. As a result, this issue is also moot.

*Parenting Plan.*

Fortuna claims that the court should have adopted the parenting plan she proposed because it was in the child's best interests. We find no abuse of discretion in the parenting plan adopted by the district court.

[12] Child custody determinations, and parenting time determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Aguilar v. Schulte*, 22 Neb. App. 80, 848 N.W.2d 644 (2014).

[13-16] The trial court has discretion to set a reasonable parenting time schedule. *Thompson v. Thompson*, 24 Neb. App. 349, 887 N.W.2d 52 (2016). The determination of reasonableness of a parenting plan is to be made on a case-by-case basis. *Id*. Parenting time relates to continuing and fostering the normal parental relationship of the noncustodial parent. *Id*. The best interests of the children are the primary and paramount considerations in determining and modifying visitation rights. *Id*.

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 following:

> (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.

Neb. Rev. Stat. § 43-2923(6) (Reissue 2016). See, also, *State on behalf of Slingsby v. Slingsby*, 25 Neb. App. 239, 903 N.W.2d 491 (2017).

Fortuna testified at trial as to her concerns regarding Wolter's ability to parent the child, including the fact that he canceled several visits, the condition of his residence, and her perception that he was unable to care for a young child. She believed that the child was too young for overnight visits with Wolter.

Wolter admitted to canceling some of his parenting time, but explained that he had to do so because of employment issues and that he has since left that job in part because it was interfering with his parenting time. He opined that his proposed parenting plan was in the best interests of the child because it would allow him to be part of the child's life.

[17] Essentially, Fortuna did not believe that overnight visits were in the child's best interests, but Wolter did. In fact, the parenting plan proposed by Fortuna afforded Wolter less parenting time than he was receiving under the temporary order. She proposed that he receive parenting time for every other Saturday from 10 a.m. until 6 p.m. and certain holidays, but no overnight visits. 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. *Schmeidler v. Schmeidler*, 25 Neb. App. 802, 912 N.W.2d 278 (2018).

Here, in adopting a parenting plan almost identical to Wolter's proposed plan and affording him overnight visits, the district court apparently found Wolter's testimony more credible. We give weight to the district court's assessment of the evidence presented.

We understand Fortuna's position given the young age of the child and the relatively little amount of time Wolter has spent with the child during his lifetime. However, parenting time relates to continuing and fostering the normal parental relationship of the noncustodial parent. See *Thompson v. Thompson*, 24 Neb. App. 349, 887 N.W.2d 52 (2016). Fortuna's proposed plan granting Wolter just 16 hours of

parenting time per month with the child does little to continue and foster Wolter's relationship with the child. We therefore cannot find that the court abused its discretion in declining to adopt Fortuna's proposed parenting plan.

*Attorney Fees.*

Fortuna argues that the district court erred in denying her request for attorney fees. We find no merit to this argument.

[18] An award of attorney fees in a paternity action is reviewed de novo on the record to determine whether there has been an abuse of discretion by the trial judge. Absent such an abuse, the award will be affirmed. *Jessen v. Line*, 16 Neb. App. 197, 742 N.W.2d 30 (2007).

[19,20] As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. *Coleman v. Kahler*, 17 Neb. App. 518, 766 N.W.2d 142 (2009). Attorney fees and costs are statutorily allowed in paternity and child support cases. *Id*. See Neb. Rev. Stat. § 43-1412(3) (Reissue 2016).

[21,22] Further, under Neb. Rev. Stat. § 43-1259(a) (Reissue 2016) of the UCCJEA, the court shall award the prevailing party attorney fees unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate. *Coleman v. Kahler, supra*. Customarily, attorney fees and costs are awarded only to the prevailing party or assessed against those who file frivolous suits. *Id.*

Here, Fortuna sought an award of attorney fees from Wolter, but it was Wolter who was the prevailing party. His paternity of the child was established, and despite Fortuna's objection to overnight visits, the court granted Wolter parenting time every other weekend from Thursday evening until Monday morning, as Wolter requested, and awarded him parenting time for certain holidays and two 2-week periods in the summer. The court also adopted his proposed child support calculations. In

addition, despite Fortuna's repeated attempts, the court properly found that it had jurisdiction over the matter under the UCCJEA. Accordingly, the court did not abuse its discretion in declining to award attorney fees to Fortuna.

## CONCLUSION

We find no merit to the arguments raised on appeal and therefore affirm the order of the district court.

Affirmed.

# In re Guardianship and Conservatorship of Inez Natalia Stierstorfer, an alleged incapacitated and protected person. Megan Malloy, appellee and cross-appellant, v. Inez Natalia Stierstorfer, appellant and cross-appellee, and Mark Malousek, Conservator, et al., appellees.

929 N.W.2d 87

Filed May 7, 2019. No. A-17-1232.

1. **Guardians and Conservators: Appeal and Error.** An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Guardians and Conservators: Evidence.** A court may appoint a guardian under Neb. Rev. Stat. § 30-2620(a) (Reissue 2016) if it is satisfied by clear and convincing evidence that (1) the person for whom a guardian is sought is incapacitated and (2) the appointment is necessary or desirable as the least restrictive alternative available for providing continuing care or supervision of the person alleged to be incapacitated.
4. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the County Court for Douglas County: John E. Huber, Judge. Affirmed.

D.C. "Woody" Bradford III and Ryan J. Dougherty, of Houghton, Bradford & Whitted, P.C., L.L.O., for appellant.

Molly M. Blazek and Alex J. McCarty, Senior Certified Law Student, of Blazek Law Group, L.L.C., for appellee Megan Malloy.

Pirtle, Riedmann, and Welch, Judges.

Pirtle, Judge.

## INTRODUCTION

Inez Natalia Stierstorfer appeals from an order of the Douglas County Court which appointed a conservator for her. Megan Malloy cross-appeals, challenging the court's refusal to appoint a guardian for Stierstorfer. Based on the reasons that follow, we affirm.

## BACKGROUND

On May 15, 2017, Malloy, Stierstorfer's granddaughter, filed a petition for the appointment of an emergency temporary guardian and the appointment of a permanent guardian and conservator for Stierstorfer. The petition nominated Malloy to serve as guardian and conservator. On the same day, the trial court entered an order appointing Malloy as temporary guardian. On May 30, an expedited hearing was held at the request of Stierstorfer. At the hearing, the trial court removed Malloy as temporary guardian and appointed Christine Solis Sahebjamii, Stierstorfer's niece, as temporary guardian until a trial could be held.

Trial took place in July and August 2017. The evidence showed that Stierstorfer was 80 years old at the time the petition for conservatorship and guardianship was filed. Stierstorfer has two daughters, Inez Elvira Stierstorfer and Renate Stierstorfer Campbell. Malloy is Inez Elvira's daughter.

Stierstorfer's husband became ill around December 2015 and died on August 3, 2016. During the fall of 2016, arrangements were made with an attorney to prepare a financial power of attorney and a health care power of attorney for Stierstorfer, both of which were signed on November 21, 2016. The financial power of attorney and the health care power of

attorney each named Malloy and Campbell as Stierstorfer's attorneys in fact.

On February 9, 2017, Stierstorfer was evaluated by Dr. Heather Morgan, who specializes in geriatric medicine. Morgan diagnosed Stierstorfer with "[d]ementia related to Alzheimer's disease" with paranoia, as well as anxiety. She concluded that Stierstorfer was unable to independently perform all of her instrumental activities of daily living and that Stierstorfer required supervision and some assistance with her activities of daily living. Morgan further opined that given Stierstorfer's cognitive and functional impairments, she was no longer capable of safely managing her financial and business affairs and was also incapable of making informed decisions about her health care and general well-being. Morgan recommended that Stierstorfer be placed in a facility with a "memory care unit" and that her health care power of attorney be activated. At the time of Morgan's evaluation, Stierstorfer was living in the home she had shared with her husband before he died.

As a result of Malloy's and Campbell's appointment as Stierstorfer's attorneys in fact, they complied with Morgan's recommendation and moved Stierstorfer into a facility with a memory care unit on March 20, 2017, choosing Parsons House for such care. Subsequent to Stierstorfer's move to Parsons House, Malloy and Campbell engaged an attorney's services to establish a plan to preserve Stierstorfer's assets. To implement such planning, an annuity was purchased to supplement the cost of care at Parsons House for at least 5 years. The planning also included transferring Stierstorfer's assets out of her name into a family trust, with Malloy and Campbell as trustees. The trust was created so that Stierstorfer's assets could continue to be used for her care and lifestyle and would not have to be spent down as a requirement for her eligibility for Medicaid. The planning also included a transfer of Stierstorfer's home by quitclaim deed to Malloy and Campbell.

Stierstorfer was unhappy with her placement at Parsons House, which placement was not discussed with her before she was moved there, and in May 2017, she had a priest pick her up at Parsons House and she contacted an attorney.

On May 18, 2017, 3 days after the petition for appointment of a guardian and conservator was filed, Stierstorfer underwent an evaluation by Dr. Robert G. Arias, a clinical psychologist and neuropsychologist, to assess her cognitive state, whether she had dementia or not, and whether she was capable of functioning on her own without a power of attorney or legal guardian. As a result of the evaluation, Arias concluded that Stierstorfer did not appear to be mentally incapacitated in terms of having dementia, incoherence, confusion, or problems with reasoning and that from a strictly cognitive standpoint, she seemed capable of independent living, financial management, and medication management. Arias further concluded that Stierstorfer seemed capable of making responsible decisions, had no cognitive impairment, and had no pattern of paranoid behavior. He testified that Stierstorfer did not present as in need of a guardian, a conservator, or an appointed power of attorney.

Several witnesses, including Malloy, Campbell, and Campbell's husband testified that prior to Stierstorfer's husband's getting sick and during the time he was sick, Stierstorfer had gotten increasingly paranoid. She believed people, including family members and neighbors, were breaking into her house and moving things around, going through her mail, and stealing from her. She also believed that a neighbor was spying on her through her bathroom skylight and that another neighbor had "bugged" her telephone and was listening to her conversations. Stierstorfer also was not taking care of her home, and it became increasingly dirty and cluttered. There was pet urine and feces throughout the house, there were "piles of junk" throughout the house, there was food "in various states of mold," there was a bathtub full of urine-soaked

cat litter, and the home had a stench of "decay, pet dander, and pet feces."

After her husband got sick, Stierstorfer was also unable to manage the payment of bills, had fallen behind on her mortgage, and was misplacing her wallet and checkbook. Stierstorfer had piles of mail in her home and would not or could not distinguish between what was a bill that needed attention and what was junk mail. Malloy testified that Stierstorfer would call her in a state of panic saying she was receiving final notices and communication from debt collectors. Malloy testified that the family was unable to assist Stierstorfer with writing checks to pay bills because Stierstorfer frequently lost her checkbook. There was also testimony that Stierstorfer had discontinued using her prescription eye drops for glaucoma and had not seen her eye doctor in several years.

Stierstorfer testified and disagreed with the condition of her home as described by witnesses. She believed Malloy and Campbell put the trash and pet urine and feces in her home to make it appear that she was incapable of taking care of herself and her home. She also testified that in the past, she believed her neighbor was coming into her home in the middle of the night and stealing her mail. She testified that she now believed Malloy had been taking the mail to "incriminate [her]," explaining that Malloy was trying to make it appear that Stierstorfer had dementia.

Sahebjamii, Stierstorfer's niece, testified that Stierstorfer had been living in an apartment at an independent-living facility and that she had been staying with her since her appointment as temporary guardian on May 30, 2017. She testified about Stierstorfer's daily routine at the retirement home and testified that she was able to function without assistance throughout her day and meet her own basic needs. For example, she testified that Stierstorfer got herself ready in the morning and ready for bed in the evening, went to meals in the dining area on her own, did her own laundry, participated in activities offered at the facility, and utilized the transportation offered by the

facility. Sahebjamii also testified that Stierstorfer had seen her ophthalmologist four times since May 30 for her glaucoma and had been using her prescribed eye drops regularly.

Following trial, the court entered an order on August 23, 2017, finding there was substantial evidence that during a period of time when Stierstorfer's husband was sick and subsequently died, Stierstorfer was unable to provide for her basic needs. It further found, based on the testimony of Sahebjamii and Arias, that at the time of trial Stierstorfer was in an appropriate facility and was able to meet her own basic needs. It noted that she was not living in her own home and no longer had animals which were a problem for her in maintaining her home. The court denied the motion to appoint a guardian for Stierstorfer. The court also found that there was substantial evidence that Stierstorfer had been unable to manage her financial affairs for a substantial period of time and was in need of a conservator to assist in the managing of her financial affairs. Therefore, it granted the motion to appoint a conservator, but further found that Malloy and Campbell were not appropriate and qualified persons to be appointed.

On September 1, 2017, Stierstorfer filed a motion to reconsider the appointment of a conservator. Malloy subsequently filed a petition for the appointment of an emergency temporary guardian, which the court granted.

Following a hearing on Stierstorfer's motion, the trial court entered an order denying the motion to reconsider the appointment of a conservator, terminating the temporary guardianship, and naming Mark Malousek as conservator. This appeal followed.

## ASSIGNMENTS OF ERROR

Stierstorfer assigns that the trial court erred in (1) determining that there was substantial evidence that she had been unable to manage her financial affairs for a substantial period of time and (2) appointing a conservator for her. Stierstorfer does not assign error with respect to the court's ruling on her motion to reconsider.

On cross-appeal, Malloy assigns that the trial court erred in (1) failing to find there was clear and convincing evidence that Stierstorfer required the appointment of a guardian, (2) failing to find Stierstorfer required a full guardianship, and (3) failing to appoint a guardian for Stierstorfer.

## STANDARD OF REVIEW

[1,2] An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record made in the county court. *In re Conservatorship of Gibilisco*, 277 Neb. 465, 763 N.W.2d 71 (2009). When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

## ANALYSIS

*Conservatorship.*

Stierstorfer argues that the trial court erred in determining that there was substantial evidence that she had been unable to manage her financial affairs for a substantial period of time and as a result, finding that she was in need of a conservator. She contends that the court failed to identify any evidence it considered in determining she was unable to manage her financial affairs and that the record lacks evidence to support this determination.

The power of the county court to appoint a conservator for an adult is governed by Neb. Rev. Stat. § 30-2630(2) (Reissue 2016), which provides:

> Appointment of a conservator or other protective order may be made in relation to the estate and property affairs of a person if the court is satisfied by clear and convincing evidence that (i) the person is unable to manage his or her property and property affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, or lack of discretion in managing benefits

> received from public funds, detention by a foreign power, or disappearance; and (ii) the person has property which will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care, and welfare of the person or those entitled to be supported by him or her and that protection is necessary or desirable to obtain or provide funds.

Stierstorfer argues that Arias' testimony clearly established that the appointment of a conservator was not necessary. Arias found that Stierstorfer was capable of making responsible decisions regarding person and property, was not in need of a guardian or a conservator, and was capable of independent living, financial management, and medication management. However, Morgan concluded that due to Stierstorfer's diagnosis of dementia related to Alzheimer's disease, she could no longer manage her financial and business affairs.

In addition to Morgan's opinion, there was competent evidence to show that Stierstorfer could not manage her finances from the time her husband got sick to the time of trial. Several family members testified about Stierstorfer's inability to manage her property affairs effectively. There was testimony that she did not keep her bills organized and did not know what bills needed to be paid or how to pay them. She would also lose or misplace bills, and her family would then need to make calls to such places as the bank and utility companies to try to find out what bills were due. However, Stierstorfer also frequently lost her purse and checkbook, which also made it difficult for family members to help her write checks and pay bills. Family members also tried to help Stierstorfer consolidate her bank accounts in an effort to simplify her finances. Campbell's husband testified that Stierstorfer was not amenable to such consolidation effort, and he did not think she really understood the concept.

The evidence also supports a finding that Stierstorfer had assets that would be wasted or dissipated unless proper management was provided. Stierstorfer had income from Social

Security, a pension, and the annuity that was purchased as part of the asset preservation planning. The annuity itself pays out over $2,700 per month that is deposited into Stierstorfer's checking account.

Based on the record before us, there was competent evidence to support a finding that Stierstorfer was unable to manage her assets and that she has property that will be wasted or dissipated without the appointment of a conservator. Therefore, the trial court did not err in appointing a conservator for Stierstorfer.

*Guardianship.*

On cross-appeal, Malloy argues that the court erred in failing to appoint a guardian for Stierstorfer and that a full guardianship was warranted.

[3] A court may appoint a guardian under Neb. Rev. Stat. § 30-2620(a) (Reissue 2016) if it is satisfied by clear and convincing evidence that (1) the person for whom a guardian is sought is incapacitated and (2) the appointment is necessary or desirable as the least restrictive alternative available for providing continuing care or supervision of the person alleged to be incapacitated. *In re Guardianship & Conservatorship of Mueller*, 23 Neb. App. 430, 872 N.W.2d 906 (2015). An incapacitated person means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning himself or herself. Neb. Rev. Stat. § 30-2601(1) (Reissue 2016).

Upon our review of the record, there is competent evidence to support the trial court's finding that appointment of a guardian for Stierstorfer was not necessary. Although Stierstorfer had paranoid behavior before and after her husband's death and was living in a filthy home, the court found that the problems caused by her home and her animals had been remedied.

At the time of trial, she was living in an apartment at a retirement community where she was happy and getting along well. Sahebjamii testified about Stierstorfer's daily routine at the retirement home, describing how she was able to function without assistance throughout her day and meet her own basic needs. Sahebjamii also testified that Stierstorfer had seen her ophthalmologist for her glaucoma four times since Sahebjamii was appointed as temporary guardian and had been using her prescribed eye drops regularly. Arias also concluded that Stierstorfer did not appear to be mentally incapacitated and seemed capable of independent living, financial management, and medication management.

We conclude that there was not clear and convincing evidence that Stierstorfer was incapacitated, the first requirement before a court may appoint a guardian under § 30-2620(a). Accordingly, the trial court did not err in failing to appoint a guardian for Stierstorfer.

[4] Malloy also assigns that the trial court erred in failing to find that Stierstorfer required a full guardianship. Section 30-2620(a) states that if the court finds that a guardianship should be created, it shall be a limited guardianship unless there is clear and convincing evidence that a full guardianship is necessary. Because we have concluded that the trial court did not err in failing to appoint a guardian for Stierstorfer, we need not address whether a full guardianship was necessary. See *Weatherly v. Cochran*, 301 Neb. 426, 918 N.W.2d 868 (2018) (appellate court is not obligated to engage in analysis not necessary to adjudicate case and controversy before it).

## CONCLUSION

Based on the foregoing, we conclude that the trial court did not err in finding that a guardianship was not necessary for Stierstorfer, but that a conservatorship was necessary. Accordingly, the trial court's order is affirmed.

Affirmed.

# In re Estate of Demariont'e Brown-Elliott, deceased. Adrienne Elliott, Special Administrator of the Estate of Demariont'e Brown-Elliott, deceased, appellee, v. Bernard Brown, Sr., appellant.

930 N.W.2d 51

Filed May 7, 2019. No. A-18-177.

1. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. ____: ____. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **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 such evidence admitted or excluded.
5. **Wrongful Death: Damages.** When a judgment for damages results from a wrongful death action, the proceeds shall be paid to the decedent's next of kin in the proportion that the pecuniary loss suffered by each bears to the total pecuniary loss suffered by all such persons.
6. ____: ____. In an action for wrongful death of a child, recoverable damages include parental loss of the child's society, comfort, and companionship.
7. **Wrongful Death: Damages: Words and Phrases.** The term "society" embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection.

8. **Appeal and Error.** Absent plain error, errors argued but not assigned will not be considered on appeal.

Appeal from the County Court for Douglas County: Jeffrey L. Marcuzzo, Judge. Affirmed.

Loretta D. Collins, of Collins Law Office, P.C., L.L.O., for appellant.

James Martin Davis, of Davis Law Office, for appellee.

Pirtle, Arterburn, and Welch, Judges.

Arterburn, Judge.

## INTRODUCTION

Bernard Brown, Sr., appeals from an order of the county court for Douglas County, which awarded to Adrienne Elliott the entire wrongful death settlement that was recovered following their son's death. On appeal, Brown challenges the county court's determinations related to his relationship and contact with his son who had died and the division of the wrongful death settlement proceeds. Brown also contends that the county court ignored his exclusion from the wrongful death settlement negotiations. For the reasons set forth herein, we affirm the order of the county court.

## BACKGROUND

Demariont'e Brown-Elliott, the son of Brown and Elliott, died on November 14, 2014, as the result of drowning in the swimming pool at his middle school in Omaha, Nebraska, during physical education class. He was 12 years old at the time.

On September 24, 2015, Elliott applied to be appointed the special administrator of the estate of Demariont'e, and Brown consented to Elliott's appointment. On September 26, Brown also waived notices of all proceedings except those notices related to distribution of the estate's assets. On November 24, the county court appointed Elliott the special administrator

of the estate of Demariont'e. Brown then filed on December 29 a demand for notice of all filings and orders related to the estate of Demariont'e.

Omaha Public Schools and its insurers agreed to a wrongful death settlement in the amount of $250,000 to be paid to the estate of Demariont'e. As special administrator of the estate, Elliott applied on April 29, 2016, for the court's approval of that settlement offer. On June 29, the county court approved the $250,000 wrongful death settlement that was reached between the estate of Demariont'e and Omaha Public Schools.

On June 24, 2016, Elliott applied for authority to distribute the settlement funds. She suggested that after paying attorney fees in the amount of $83,564, the remaining $166,436 ought to be distributed to her as the surviving mother of Demariont'e. Elliott also applied on June 24 for authority to distribute solely the portion of the settlement to be paid for attorney fees. On June 27, Brown applied for an equitable distribution of the wrongful death settlement funds and alleged that he was denied a "meaningful opportunity" to be heard during the settlement negotiations. Brown also applied for a distribution of $41,375 to be paid for his attorney fees. On June 29, the court authorized the distribution of $83,564 for attorney fees and expenses incurred by the attorney who represented Elliott as special administrator of the estate. On July 6, the court ordered that an evidentiary hearing would be held to determine the appropriate distribution of the remaining settlement proceeds.

An evidentiary hearing was held on September 13, 2016, at which testimony was received from Elliott, Brown, and Bernard Brown-Elliott, Jr. (Bernard Jr.), who was the younger brother of Demariont'e. Demariont'e was born to Brown and Elliott in May 2002. Elliott lived with her mother during her pregnancy and moved into an apartment with Brown following the birth of Demariont'e. Elliott testified that Demariont'e was 8 or 9 months old when they moved into the apartment with Brown and that they lived with Brown for less than a

year. Brown and Elliott had another son together, Bernard Jr., who was born in August 2003.

Elliott testified that Brown provided nothing for Demariont'e while they lived together: "He wouldn't even change diapers." She acknowledged that Brown was listed as the head of household on rental documents, but that was only because she was too young to be listed. She said they lived off her earnings while together because Brown was unemployed. Brown testified that he had provided for Elliott before she was pregnant, while she was pregnant, and after Demariont'e was born. Brown also testified that he was the primary income earner while he lived with Elliott. He stated that he mowed and moved people's possessions through his employment as a laborer.

Because Elliott was only 17 years old at the time of the birth of Demariont'e, she said that Brown and she waited to marry until she turned 18 years old in April 2003. Brown was over 30 years old at the time of their marriage. Elliott filed for divorce in 2004, approximately a year after marrying Brown. Elliott testified that she petitioned for divorce after being granted a protection order against Brown, because he had been physically abusive toward her and damaged her property. She stated that Brown had driven past her home and shot at her sons, which also led to her being granted a protection order. Brown testified that he was never charged with shooting at Elliott and her sons. Elliott and Brown's divorce was finalized in April 2005. Elliott received sole custody of her sons, and Brown was ordered to pay monthly child support of $100.

Elliott testified that the court allowed Brown to have supervised visitations after the divorce decree was entered and that he did exercise that right on two or three occasions. Brown testified that he did not continue seeking supervised visitations, because he felt like the supervision requirement was unfair. Brown's next contact with his sons was in 2006, when Elliott took them to meet with Brown for approximately 20

minutes in a parking lot. Elliott testified that visitations were encouraged and organized through Brown's father.

Brown was next in contact with his sons 4 years later, in 2010. Elliott testified that Brown visited them at their home for about an hour and said that Brown "[d]id the whole dad spiel." She said it was the first time that Brown had really seen Bernard Jr. since he was a baby. Brown also testified regarding a visit in 2010, but he said that he stayed in Elliott's home for two nights. As Brown described it, he returned from Georgia, where he had been living, and was social with Elliott, playing cards, drinking, and "reminiscing." Brown testified that he helped Demariont'e clean his room and took his sons to the store for snacks during his stay.

The next interaction was 4 years later, approximately a week before Demariont'e died in 2014. Elliott testified that they unexpectedly ran into Brown at a grocery store one morning. She said the interaction lasted about 2 minutes. Brown described the incident similarly. Elliott said she was surprised to see Brown on that day because she believed he was living in Georgia. Brown testified that he lives in Georgia "off and on" and is "back and forth" between Omaha and Georgia.

Elliott testified that she cared for her sons without help from Brown aside from limited and sporadic child support payments. She testified that Brown never helped with rent, groceries, school expenses, or household items. Elliott took Demariont'e to school, picked him up, and helped him with his homework. She testified that Brown had never interacted with any teachers of Demariont'e or aided his education. Additionally, Elliott testified that Demariont'e was in band, choir, football, and basketball. When Elliott was not working, she attended the basketball and football games of Demariont'e but she testified that Brown had not attended a single game.

Brown acknowledged that he had only provided shelter and food to his sons up until the time Elliott and he divorced, but he also testified that he had spent $800 to $1,000 on toys and clothes for his sons one Christmas. Brown further testified

that he tried to spend time with his sons but that Elliott "put up a road block" and would not allow him to see them. Brown acknowledged that two felony convictions had taken him away from spending time with Demariont'e. He served sentences of 2 years and of 6 months.

Records from the Nebraska Department of Health and Human Services showed that Brown neglected making court-ordered child support payments. The records show that from June 1, 2004, through March 3, 2016, Brown made only seven child support payments. The two largest payments were income tax refunds that were garnished in order to pay portions of Brown's past-due child support obligation. Each of the five remaining payments that Brown made was less than $100. Despite the handful of payments and two garnishments, Brown still owed $9,612.44 in past-due child support as of March 3, 2016.

Bernard Jr., who was 13 years old at the time of the hearing, testified that he had a close relationship with his brother until he died. Bernard Jr. also testified that he did not recall seeing Brown at any time prior to their brief run-in at the grocery store in 2014. He testified that he remembered receiving no presents, visits, or telephone calls from Brown prior to the death of Demariont'e.

Based on the evidence received, the county court entered an order on November 4, 2016, which awarded the entirety of the settlement proceeds to Elliott. The court found that Brown had "less than two hours of contact" with Demariont'e during his lifetime. It also found that Brown's extremely limited contact with Demariont'e was not the same character of parental love and affection that an ordinarily caring, loving parent would exercise. The court found that Elliott had "constant contact" with Demariont'e throughout his lifetime and that she exhibited the type of parental care and love that is associated with an ordinary parent-child relationship. Noting the disparity in Brown's and Elliott's contact with Demariont'e during his lifetime, the court held that awarding Brown any portion

of the settlement proceeds was unjustified and unwarranted. Accordingly, the county court awarded the remaining wrongful death settlement proceeds, or $166,782, to Elliott.

Brown now appeals from the order of the county court.

## ASSIGNMENTS OF ERROR

Brown assigns, restated and renumbered, that the county court erred in its determinations related to the parent-child relationship between Brown and Demariont'e, the amount of contact Brown had with Demariont'e, and the division of the wrongful death settlement proceeds. Brown also assigns that the county court erred in ignoring the appearance of Elliott's "unclean hands" by excluding him from settlement negotiations.

## STANDARD OF REVIEW

[1-3] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Estate of Panec*, 291 Neb. 46, 864 N.W.2d 219 (2015). When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id*.

## ANALYSIS

### Brown's Relationship With Demariont'e

Brown alleges that the county court abused its discretion, manifested bias and prejudice, and made findings that were contrary to the evidence in relation to the parent-child relationship between Brown and Demariont'e. Brown specifically takes issue with the court's findings that his relationship with Demariont'e "did not include any semblance of normal parental love and affection that would be exercised by a caring,

loving parent." Upon our review, we find that the county court did not err in its findings related to Brown's relationship with Demariont'e.

The evidence produced at trial showed that Brown was generally present as a parent to Demariont'e for only his first 2 to 3 years of life. This changed following Brown's divorce from Elliott. It is not uncommon for parent-child relationships to change as a result of divorce. However, the evidence shows that Brown's relationship with Demariont'e essentially vanished during the decade leading up to the death of Demariont'e.

Although the court awarded Brown the right to supervised visitations with his sons, Brown only exercised this right a few times during the time surrounding his divorce from Elliott. Brown acknowledged that he did not seek additional supervised visitations because he felt that the supervision requirement was unfair.

Brown only saw Demariont'e three more times during the almost 10 years thereafter. The evidence showed that Brown saw Demariont'e for about 20 minutes in 2006. Elliott testified that in 2010, Brown visited for about an hour; however, Brown testified that he actually stayed with Elliott and their sons for two nights. The last time Brown interacted with Demariont'e was for a few minutes, approximately a week before his death in 2014.

Although time is not the sole measure of a parent-child relationship, Brown provided no evidence to show that his relationship with Demariont'e included "any semblance of normal parental love and affection." Bernard Jr. testified that Brown never called or sent gifts to them while Demariont'e was alive. Elliott testified that Brown never aided in the education of Demariont'e or attended his extracurricular activities. Brown acknowledged that the only time he ever provided shelter and food for Demariont'e was during the first years of his life, up until the time of Brown's divorce from Elliott. Moreover, child support records show that Brown

owes $9,612.44 in past-due child support. Brown made only seven child support payments during a 12-year time period. The largest two payments came by way of involuntary income tax refund garnishments. Brown testified that he quit filing tax returns following the second garnishment.

Based on our review of the record, we find that the county court's findings related to Brown's parental relationship with Demariont'e were not contrary to the evidence. We further find that the county court's findings exhibited neither bias nor prejudice, nor were they arbitrary or capricious.

### Brown's Contact With Demariont'e

Brown next argues that the county court erred in finding that "Brown had very little contact, less than two hours of contact with [Demariont'e] during his 12 year life span." Brown also argues that the county court erred in finding that, if assigned a percentage, his contact with Demariont'e "would amount to far less than 1%." Brown contends that these findings were contrary to the evidence, an abuse of the court's discretion, arbitrary and capricious, and manifested bias against Brown. Upon our review, we find that the county court's finding with respect to the amount of Brown's contact with Demariont'e during his lifetime was in error. However, we find that the county court's conclusion with respect to the amount of contact existing between Brown and Demariont'e is supported.

[4] 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 such evidence admitted or excluded. *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007). The evidence is undisputed that Brown had more than 2 hours of contact with Demariont'e throughout his lifetime. Both parties acknowledge that Brown was present immediately following the birth of Demariont'e and for the period until Brown and Elliott divorced 2 years later. In calculating that Brown spent only 2 hours with Demariont'e,

the county court may have mistakenly excluded the period of his infancy.

As recounted above, Brown visited Demariont'e under supervision two or three times within his first few years of life. Thereafter, he saw Demariont'e on only three more occasions. In 2006, Brown was with Demariont'e for approximately 20 minutes, and in 2014, Brown was with Demariont'e for only a few minutes. In 2010, Brown was either with Demariont'e for 1 hour, as recounted by Elliott, or for a few days, as recounted by Brown.

Although the county court may have miscalculated the precise amount of time that it believed Brown had spent with Demariont'e, its decision was predicated on Brown's near total absence in the life of Demariont'e following the parties' divorce, not a precise calculation. The record is clear that Brown participated in the life of Demariont'e on an extremely limited basis, irrespective of the precise amount of time. The county court's decision and rationale is only negligibly impacted, if at all, by its miscalculation. Thus, the county court's finding does not constitute reversible error.

### Division of Wrongful Death Settlement

Brown contends that the county court erred in awarding the entirety of the wrongful death settlement proceeds in the amount of $166,782 to Elliott while completely excluding him. Based on our review of the record, we agree with the county court that distributing the settlement proceeds entirely to Elliott conformed to the law and was supported by the evidence.

[5-7] When a judgment for damages results from a wrongful death action, the proceeds shall be paid to the decedent's next of kin "in the proportion that the pecuniary loss suffered by each bears to the total pecuniary loss suffered by all such persons." Neb. Rev. Stat. § 30-810 (Reissue 2016). In an action for wrongful death of a child, recoverable damages include parental loss of the child's society, comfort, and

companionship. *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001). The term "society" embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection. *Id*.

Our appellate courts have not often examined § 30-810 in the context of one parent's near total absence in their deceased child's life. However, the issue did arise in a case nearly 80 years ago. In *In re Estate of Lucht*, 139 Neb. 139, 296 N.W. 749 (1941), a 14-year-old boy died as the result of a motor vehicle accident, which led to a wrongful death award of $3,261.78. His parents divorced within the year following his birth. *Id*. Custody was awarded to his mother, and the court noted that "[f]rom the time the son was about one year old until his death, his father and himself were as strangers to each other." *Id*. at 141, 296 N.W. at 750. Applying a statute essentially identical to our present § 30-810, the court in *In re Estate of Lucht* held that the decedent's father had suffered no pecuniary loss on occasion of his son's death.

Here, as in *In re Estate of Lucht*, the proper division of wrongful death settlement proceeds is based on the proportion of the pecuniary loss suffered by each of the parents of Demariont'e relative to the total pecuniary loss. Therefore, the county court had to compare Brown's pecuniary loss to that of Elliott's pecuniary loss and determine their respective shares of the settlement reached between the estate of Demariont'e and Omaha Public Schools.

Much like the court in *In re Estate of Lucht*, we confront a situation in which the parents' pecuniary loss on occasion of their son's death could not be more antithetical. Our record demonstrates that Elliott suffered far greater pecuniary loss from the death of Demariont'e—that is, she received the overwhelming benefit of his love, affection, and companionship while he was alive. Elliott was the sole parent who enjoyed the companionship of Demariont'e for nearly a decade. Elliott

described that Demariont'e played basketball and football. She attended those games while Brown did not. Elliott testified that she took Demariont'e to school each day, picked him up from school, and helped him with his homework. Brown was not involved in the education of Demariont'e.

Although we cannot say that Brown suffered no loss by the death of Demariont'e, based on our record, Elliott's loss of the society, comfort, and companionship of Demariont'e is exponentially greater than that suffered by Brown. Brown chose to invest little in his relationship with Demariont'e. As a result, his loss of society, comfort, and companionship is miniscule as compared to the deep relationship that Elliott enjoyed with Demariont'e. Therefore, we agree with the county court's decision to award Elliott the entirety of the settlement proceeds in the amount of $166,782.

### Wrongful Death Settlement Negotiations

Brown contends that the county court erred in ignoring Elliott's "unclean hands" and the appearance of impropriety due to Brown's exclusion from settlement negotiations where his interests differed from Elliott's interests. Our record contains little, if any, support for Brown's contention that he was excluded from settlement negotiations, and thus, we find no merit to this claimed error.

We note that Brown consented on September 26, 2015, to Elliott's appointment as special administrator and waived notices of any matters except for those related to distribution of the estate's assets. On December 29, Brown then demanded that he be given notice of all filings related to the estate of Demariont'e. Elliott applied on April 29, 2016, for the court's approval of the $250,000 settlement, which the court approved on June 29. In his application for equitable distribution of settlement funds filed on June 27, Brown alleged that he was denied a meaningful opportunity to be heard during settlement negotiations. However, there is nothing in our record which indicates that Brown contested the proposed settlement amount at the time of the June 29 hearing.

Brown does not otherwise describe in his brief on appeal or in the evidence offered to the county court how he was excluded from settlement negotiations. He also does not describe the ways in which his interests differed from Elliott's such that their positions during settlement negotiations were adverse. Moreover, having now determined that Brown is entitled to no portion of the wrongful death settlement, we note by extension that he would not stand to benefit from any additional or alternative settlement negotiations. Based on the record before us, we find no merit to Brown's claim that he was meaningfully or detrimentally excluded from settlement negotiations.

## Unassigned Error

[8] Brown argues that the county court erred in failing to find that Elliott had substantially interfered with his rights as the noncustodial parent of Demariont'e. He does not assign this error, however. Absent plain error, errors argued but not assigned will not be considered on appeal. *Osantowski v. Osantowski*, 298 Neb. 339, 904 N.W.2d 251 (2017). We find no plain error regarding Brown's contention that Elliott interfered with his parental rights. Accordingly, we will not consider Brown's arguments related to this contention.

## CONCLUSION

Based on the foregoing, we find that the county court did not err in its findings related to distributing the entirety of the wrongful death settlement proceeds to Elliott. Thus, we affirm the order of the county court.

Affirmed.

# Wendy Pearrow, appellant, v. Marcus G. Pearrow, appellee.

928 N.W.2d 430

Filed May 7, 2019. No. A-18-334.

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. **Modification of Decree: Attorney Fees: Appeal and Error.** 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.
3. **Child Support: Rules of the Supreme Court.** A deviation in the amount of child support is allowed whenever the application of the Nebraska Child Support Guidelines in an individual case would be unjust or inappropriate.
4. **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.
5. ____. Customarily, attorney fees are awarded only to prevailing parties or assessed against those who file frivolous suits.
6. **Divorce: Attorney Fees.** A uniform course of procedure exists in Nebraska for the award of attorney fees in dissolution cases.
7. ____: ____. In awarding attorney fees in a dissolution action, a court shall consider the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services.

Appeal from the District Court for Sarpy County: Stefanie A. Martinez, Judge. Affirmed.

Angela M. Minahan, of Reinsch, Slattery, Bear & Minahan, P.C., L.L.O., for appellant.

No appearance for appellee.

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

Riedmann, Judge.

## INTRODUCTION

Wendy Pearrow appeals the order of the district court for Sarpy County which modified the decree dissolving her marriage to Marcus G. Pearrow. On appeal, she challenges the district court's calculation of child support, the court's failure to divide expenses for two of the parties' four children, and the court's failure to award her attorney fees. Because we find no merit to the arguments raised on appeal, we affirm.

## BACKGROUND

A decree dissolving Wendy and Marcus' marriage was entered in November 2015. The parties were awarded joint legal and physical custody of their four minor children, with the parents alternating parenting time on a weekly basis. Marcus was ordered to pay $631 per month in child support.

In October 2016, Wendy filed a complaint to modify the decree. Prior to trial, the parties agreed to retain joint legal custody of all of the children and joint physical custody of the two younger children. They agreed to continue to alternate parenting time on a weekly basis for the younger children, but on the days that Marcus is unable to pick them up from school at 3:20 p.m., they will stay with Wendy until Marcus can pick them up after work around 5 p.m. The parties additionally agreed to modify the decree so that Wendy would have sole physical custody of the two older children. Parenting time between Marcus and the two older children would be arranged between Marcus and the children.

The parties were unable to agree on child support, however, so trial was held as to that issue. Evidence was adduced as to

the parties' employment and income, and each party submitted a proposed child support calculation to the court. Wendy proposed that the court utilize a sole physical custody calculation for all four children. She reasoned that she had sole custody of the two older children, for which Marcus would receive an unknown amount of parenting time, and that even though the parties had joint custody of the two younger children, Wendy had additional time with them after school until Marcus could pick them up after work. Wendy also asked that the court divide the out-of-pocket expenses for all four children equally between the parties and award her attorney fees.

Marcus described his proposed child support calculation as a hybrid between a joint physical custody calculation and a sole physical custody calculation. He calculated child support for all four children under each calculator and then averaged the amounts owed, while deducting credit for the health insurance he carries for the children. He also provided calculated amounts for child support for three children, two children, and one child. The exhibit he offered as an aid to the court explained how he arrived at the amounts proposed and included the worksheets for sole physical custody and joint physical custody of the children.

With respect to direct expenses for the children, such as clothing and extracurricular activities, Marcus agreed that he should contribute to those expenses for the two younger children for whom he has joint custody and agreed that he should pay his proportionate share of their expenses, which was 70 percent. He objected, however, to sharing expenses for the two older children.

After trial, the district court entered a modification order. The court approved the terms of the parties' agreement, and it was incorporated into the order. The court ordered Marcus to pay $876 per month in child support for four children, $561 per month for three children, $315 per month for two children, and $153 per month for one child. The order indicates that the child support worksheet is attached and marked

as "'Exhibit A'" and was utilized and adopted by the court. The order also provided that Marcus was to pay 70 percent and Wendy was to pay 30 percent of reasonable and direct expenses, such as clothing and extracurricular activities, for the two younger children. All other requests made by either party were denied. Wendy appeals.

## ASSIGNMENTS OF ERROR

Wendy assigns that the district court erred in (1) calculating child support, (2) failing to make findings related to the two older children's out-of-pocket activity expenses, and (3) failing to make findings related to her request for attorney fees.

## STANDARD OF REVIEW

[1] 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).

[2] 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. *Garza v. Garza*, 288 Neb. 213, 846 N.W.2d 626 (2014).

## ANALYSIS

*Child Support.*

Wendy argues that the district court erred in calculating child support because the amounts contained in the court's order are inconsistent with the attached worksheet, the attached worksheet is not marked as "'Exhibit A'" as indicated, and the court improperly deviated from the child support guidelines. We find no abuse of discretion in the child support order.

All orders concerning child support, including modifications, should include the appropriate child support worksheets. *Rutherford v. Rutherford*, 277 Neb. 301, 761 N.W.2d

922 (2009). The purpose of this requirement is to ensure that the appellate courts are not left to speculate about the trial court's conclusions; these worksheets show the parties and the appellate courts that the trial court has "'"done the math."'" *Fetherkile v. Fetherkile*, 299 Neb. 76, 98, 907 N.W.2d 275, 294 (2018). Without a worksheet specifying the trial court's calculations and delineating any deviations it took into consideration, an appellate court is unable to undertake any meaningful review. *Pearson v. Pearson*, 285 Neb. 686, 828 N.W.2d 760 (2013).

In the present case, despite Wendy's argument to the contrary, the worksheet attached to the district court's order does display the calculations for sole custody of all four children and for joint custody of all four children. Although the figures on the worksheets do not match the amounts contained in the court's order, it is clear that the court adopted Marcus' proposed calculation, which explains how it arrived at the amounts owed. And the court attached the worksheets as it was required to do.

Although it would have been a better practice for the court to specify that it was adopting the calculation proposed by a party or to include the explanation in its order, based on the record before us, we are not left to speculate about the district court's conclusions and are able to undertake a meaningful review. Because the order contains the child support amounts proposed by Marcus and the attached worksheets identical to those offered by Marcus, we understand that the court adopted his proposed calculations and the methodology by which he calculated them.

We also recognize that the worksheet attached to the court's order was not marked as "'Exhibit A'" as indicated in the order, but because it was attached to the order, there is no confusion as to what worksheet the court was referencing. And the missing label does not affect our ability to conduct a meaningful review or to see that the district court has "'"done

the math."'" See *Fetherkile v. Fetherkile*, 299 Neb. at 98, 907 N.W.2d at 294. We therefore do not find that the district court abused its discretion in the child support order.

Wendy additionally claims that the district court improperly deviated from the child support guidelines. We do not agree that the child support order here constitutes a deviation from the guidelines.

In general, child support payments should be set according to the Nebraska Child Support Guidelines. *Pearson v. Pearson, supra*. The guidelines shall be applied as a rebuttable presumption, and all orders for child support obligations shall be established in accordance with the provisions of the guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied. *Pearson v. Pearson, supra*; Neb. Ct. R. § 4-203 (rev. 2011).

[3] Under the guidelines, a deviation in the amount of child support is allowed whenever the application of the guidelines in an individual case would be unjust or inappropriate. *Pearson v. Pearson, supra*. Deviations from the guidelines must take into consideration the best interests of the child or children. *Id*.

The complication in the instant case is that the custody arrangement agreed to by the parties does not fit the definition of sole physical custody, joint custody, or split custody so as to fit squarely within a single type of child support calculation under the guidelines. In her brief, Wendy refers to the parties' arrangement as a "hybrid" custody arrangement. Brief for appellant at 13. Thus, there is no one application of the guidelines for the present situation from which the court could deviate. In other words, a deviation is an amount ordered that is different from the amount that should have been ordered under a strict application of the child support guidelines. But here, there is no ability to strictly apply the guidelines. As a result, the child support ordered by the district court was not a deviation from the guidelines, but, rather, a flexible solution

to the unique custody arrangement present here. See *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006) (child support guidelines offer flexibility and guidance, with understanding that not every child support scenario will fit neatly into calculation structure). We therefore reject Wendy's argument that the support ordered by the district court was an improper deviation from the guidelines.

To the extent Wendy argues that the district court abused its discretion in failing to adopt her proposed child support calculation, we disagree. Wendy proposed using a sole custody calculator for all four children or, in the alternative, adjusting the amount owed pursuant to Neb. Ct. R. § 4-210. She reasoned that she had sole custody of the two older children and that the two younger children were with her after school during Marcus' parenting time and potentially during the summer while Marcus was at work.

Section 4-210 allows for adjustments in child support related to parenting time when support is not calculated under joint physical custody and parenting time substantially exceeds alternating weekends and holidays and 28 days or more in any 90-day period. Thus, Wendy's alternative argument proposed that the court utilize the sole custody calculation but give Marcus credit for the alternating weeks of parenting time he has with the two younger children, although she still proposed subtracting out the hours the younger children will spend with her during Marcus' parenting time. Essentially, Wendy proposed that the court "deviate from the sole custody calculation based upon the parenting time that [Marcus] has" in the manner set forth in § 4-210.

Although the district court's order does not explicitly state its rationale, we can infer that the court rejected Wendy's request to utilize a sole custody calculator because it adopted Marcus' proposed calculation. We find no abuse of discretion in this decision because the children will not spend a significant amount of time with Wendy during Marcus' parenting time. Marcus testified that he works from home approximately

twice per month and has the ability to do so more frequently. Thus, it is unclear whether the children will spend additional time with Wendy during the summer or if Marcus will work from home more often to allow the children to remain with him.

Further, § 4-210 allows for adjustments based on additional days spent with a parent, and the word "day" is defined to include an overnight period. See Neb. Ct. R. § 4-212 (rev. 2011). The guidelines therefore do not appear to contemplate adjustments based on a short number of additional hours spent with a parent. Given that the parties continue to share joint physical custody of two of the children, the court's decision to reject Wendy's calculation based on sole custody of all four children was not an abuse of discretion.

*Out-of-Pocket Expenses.*

Wendy assigns that the district court failed to make a finding regarding the division of expenses for the two older children. The order does not specifically address out-of-pocket expenses for the older children but states that "all other requests made by either party in this proceeding are denied." Thus, the order implicitly denied Wendy's request to divide these expenses for the older children.

Wendy argues that assuming the court truly intended to adopt and order child support based on a joint custody calculation, then it was required under the child support guidelines to divide out-of-pocket activity expenses for the two older children. Wendy is correct that if child support is determined under a joint physical custody calculation, "all reasonable and necessary direct expenditures made solely for the child(ren) such as clothing and extracurricular activities shall be allocated between the parents." § 4-212. However, we disagree that the district court used a joint custody calculation. Rather, it used the hybrid approach proposed by Marcus. Therefore, Wendy's argument has no merit.

*Attorney Fees.*

Wendy asserts that the district court erred in failing to award her attorney fees. She again claims that the district court failed to rule on this issue because the order of modification is silent as to her request for an award of attorney fees. However, because the order denied "all other requests made by either party," we construe this as a denial of Wendy's request for attorney fees. See *Olson v. Palagi*, 266 Neb. 377, 665 N.W.2d 582 (2003) (silence of judgment on issue of attorney fees requested in pleadings must be construed as denial of request). We conclude that this decision was not an abuse of discretion.

[4-6] 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*, 288 Neb. 213, 846 N.W.2d 626 (2014). Customarily, attorney fees are awarded only to prevailing parties or assessed against those who file frivolous suits. *Id*. A uniform course of procedure exists in Nebraska for the award of attorney fees in dissolution cases. *Id*. Thus, there was authority, in this modification of a dissolution decree case, for the awarding of attorney fees. See *id.*

[7] In awarding attorney fees in a dissolution action, a court shall consider the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services. *Id*.

In the instant case, the parties settled most of the issues raised in the complaint for modification with the exception of child support and child-related expenses. The court adopted Marcus' proposed child support calculation and denied Wendy's request to divide expenses for the two older children. We therefore find no abuse of discretion in the court's decision to deny Wendy's request for attorney fees.

## CONCLUSION

We conclude that the district court did not abuse its discretion in its child support order or in denying Wendy's request for a division of expenses for the two older children or for attorney fees. Accordingly, the district court's order is affirmed.

AFFIRMED.

# State of Nebraska, appellee, v. Heather M. McBride, appellant.

927 N.W.2d 842

Filed May 7, 2019. No. A-18-797.

1. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an abuse of judicial discretion.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Courts: Final Orders: Appeal and Error.** When a district court, sitting as an intermediate appellate court, enters an order that affects a substantial right, that order is final for purposes of appeal if its judgment can be executed without any further action by the district court.
4. **Courts: Final Orders: Jurisdiction: Appeal and Error.** A district court order affirming, reversing, or remanding an order or judgment of the county court is itself a final order that an appellate court has jurisdiction to review.
5. **Pleas: Sentences: Restitution.** The failure to inform a defendant of the possibility of restitution renders the entry of a plea of guilty involuntary and unintelligent in that regard and consequently prevents the imposition of an order of restitution.
6. **Pleas: Proof.** While in order for a defendant to enter a voluntary and intelligent plea of guilty, he or she must know the penalty for the crime to which he or she is pleading, and although it is preferable that such knowledge be imparted by the judge accepting the plea, it is nonetheless possible to prove the defendant's knowledge by other means.
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. ____: ____: ____. Pursuant to Neb. Rev. Stat. § 29-2281 (Reissue 2016), before restitution can be properly ordered, the trial court must

consider: (1) whether restitution should be ordered, (2) the amount of actual damages sustained by the victim of a crime, and (3) the amount of restitution a criminal defendant is capable of paying.

9. **Sentences: Restitution.** When a court orders restitution to a crime victim under Neb. Rev. Stat. § 29-2280 (Reissue 2016), restitution is a criminal penalty imposed as punishment and is part of the criminal sentence imposed by the sentencing court.
10. **Sentences.** 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.
11. **Sentences: Restitution.** 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.
12. ____: ____. Under Neb. Rev. Stat. § 29-2281 (Reissue 2016), the sentencing court may hold a hearing at the time of sentencing to determine the amount of restitution.
13. **Sentences: Restitution: Evidence.** Under Neb. Rev. Stat. § 29-2281 (Reissue 2016), the sentencing court's determination 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.

Appeal from the District Court for Madison County, Mark A. Johnson, Judge, on appeal thereto from the County Court for Madison County, Ross A. Stoffer, Judge. Judgment of District Court affirmed.

Ronald E. Temple, of Fitzgerald, Vetter, Temple & Bartell, for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Riedmann, Bishop, and Welch, Judges.

Riedmann, Judge.

## INTRODUCTION

Heather M. McBride pled guilty in the county court for Madison County to an amended charge of attempted forgery. She was sentenced to 90 days in jail and ordered to pay

restitution. She appealed to the district court, which affirmed the jail term and the county court's determination of the amount of restitution, but vacated the restitution order and remanded the matter to the county court for a determination of McBride's ability to pay. McBride appeals to this court. We find no abuse of discretion in the district court's order and therefore affirm.

## BACKGROUND

McBride and her sister, Danica AllAround, purchased a 2009 GMC Acadia in December 2016 for $13,144. Both of their names appeared on the bill of sale and title to the vehicle. In May 2017, McBride had someone forge AllAround's signature on the title, and McBride sold the vehicle for $6,500. McBride retained all of the proceeds of the sale, and AllAround was not reimbursed for any portion of the purchase price.

As a result of these events, McBride was originally charged with three felony counts. Pursuant to a plea agreement with the State, she pled guilty to an amended charge of attempted second degree forgery, a Class I misdemeanor. At the outset of the plea hearing, McBride's counsel indicated to the county court that the parties had reached an agreement whereby McBride would plead guilty to the amended charge and "the parties will ask the [c]ourt to set the matter for a restitution hearing and sentencing thereafter." After advising McBride of her rights and ascertaining her understanding, the court accepted her plea and found her guilty. The court then clarified with McBride's counsel his request to have the matter set for a restitution hearing, and counsel confirmed his request.

The restitution hearing was held immediately prior to sentencing. A copy of the bill of sale for the purchase of the vehicle, a copy of AllAround's bank statement showing that she paid the purchase price, and a copy of the vehicle's title depicting AllAround's forged signature were all received into evidence at the restitution hearing.

AllAround testified that she paid all of the $13,144 for the vehicle and that McBride did not pay any portion of the purchase price. Thus, she was seeking restitution from McBride in the amount of the purchase price. She admitted that she did not have an opinion as to the value of the vehicle at the time McBride sold it.

McBride also testified and admitted that she thought $3,300, approximately half of the price for which she sold the vehicle, was a fair amount of restitution. McBride was asked whether she contributed any money toward the purchase of the vehicle, and she responded, "I choose not to say anything right now."

After hearing the evidence, the county court found that the evidence showed that the vehicle was purchased for $13,144 and that although the names of both AllAround and McBride were on the title to the vehicle, there was no evidence that McBride put any money toward the purchase price. Therefore, because the evidence before the court established that only AllAround paid the entire amount, the court ordered McBride to pay restitution in the amount of $13,144. McBride was also sentenced to 90 days in jail.

McBride appealed to the district court for Madison County. She assigned that the county court erred in ordering restitution and imposing an excessive sentence. The district court affirmed the jail sentence and the amount of actual damages. However, it vacated the restitution order and remanded the matter for further determination as to McBride's ability to pay restitution and as to the timeframe in which she is able to pay. McBride now appeals to this court.

## ASSIGNMENTS OF ERROR

McBride couches her assigned errors as those committed by the trial court; however, because she is appealing from the order on appeal by the district court, we restate her assigned errors as follows: The district court erred in finding that

(1) she was properly advised of the possibility of an order of restitution, (2) the circumstances warranted an order of restitution, and (3) the State sufficiently proved the amount of actual damages.

## STANDARD OF REVIEW

[1] Sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an abuse of judicial discretion. *State v. Ramirez*, 285 Neb. 203, 825 N.W.2d 801 (2013). 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*.

## ANALYSIS

At the outset, we note that the State asserts that although the district court remanded portions of the restitution order for further determination by the county court, this court has jurisdiction over the appeal. We agree.

[2-4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. Coble*, 299 Neb. 434, 908 N.W.2d 646 (2018). When a district court, sitting as an intermediate appellate court, enters an order that affects a substantial right, that order is final for purposes of appeal if its judgment can be executed without any further action by the district court. *Barrios v. Commissioner of Labor*, 25 Neb. App. 835, 914 N.W.2d 468 (2018). Where the district court reverses a judgment in favor of a party, and remands the matter for further proceedings, that party's substantial right has been affected. *Id*. Further, a district court order affirming, reversing, or remanding an order or judgment of the county court is itself a final order that an appellate court has jurisdiction to review. *State v. Coble, supra*. Having found that this court has jurisdiction over this matter, we now turn to the assigned errors.

*Advisement of Possibility of Restitution.*

McBride argues that the district court erred in finding that restitution was appropriate because she was never advised of the possibility of an order of restitution. We disagree.

[5,6] The Nebraska Supreme Court has held that the failure to inform a defendant of the possibility of restitution renders the entry of a plea of guilty involuntary and unintelligent in that regard and consequently prevents the imposition of an order of restitution. See *State v. War Bonnett*, 229 Neb. 681, 428 N.W.2d 508 (1988). However, the court has also held that while in order for a defendant to enter a voluntary and intelligent plea of guilty, he or she must know the penalty for the crime to which he or she is pleading, and although it is preferable that such knowledge be imparted by the judge accepting the plea, it is nonetheless possible to prove the defendant's knowledge by other means. *State v. Fischer*, 220 Neb. 664, 371 N.W.2d 316 (1985). In *State v. Mentzer*, 233 Neb. 843, 448 N.W.2d 409 (1989), the Supreme Court upheld a restitution order where the defendant, through his attorney, advised the court at sentencing that he was willing to make any restitution that would be ordered, thereby establishing that he was aware that an order of restitution was a possibility.

Likewise here, McBride was not informed at arraignment or at the time she entered her plea that restitution was a possible penalty for her crime. However, at the outset of the plea hearing, McBride, through her attorney, informed the county court that the parties would be asking the court to set the matter for a restitution hearing. Thus, prior to the time she entered her plea, McBride was aware that the court could order her to pay restitution. The record therefore establishes that McBride was aware of the possibility of restitution prior to entering her plea, and thus, her plea was not entered involuntarily or unintelligently.

*Circumstances Warranting Order of Restitution.*

McBride argues that the circumstances of the present case do not warrant an order of restitution. She claims that the dispute between her and AllAround should be handled as a civil matter rather than in the context of the criminal proceedings. We find no abuse of discretion in the decision to order restitution.

[7,8] 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. *State v. Ramirez*, 285 Neb. 203, 825 N.W.2d 801 (2013). Pursuant to Neb. Rev. Stat. § 29-2281 (Reissue 2016), before restitution can be properly ordered, the trial court must consider: (1) whether restitution should be ordered, (2) the amount of actual damages sustained by the victim of a crime, and (3) the amount of restitution a criminal defendant is capable of paying. *State v. Holecek*, 260 Neb. 976, 621 N.W.2d 100 (2000). The question here falls under the first consideration: whether restitution should be ordered. Neb. Rev. Stat. § 29-2282 (Reissue 2016) provides:

> In determining restitution, if the offense results in damage, destruction, or loss of property, the court may require: (1) Return of the property to the victim, if possible; (2) payment of the reasonable value of repairing the property, including property returned by the defendant; or (3) payment of the reasonable replacement value of the property, if return or repair is impossible, impractical, or inadequate. 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. If the offense results in the death of the victim, the court may require payment to be made to the estate of the victim for the cost of any medical care prior to death and for funeral and burial expenses.

The Nebraska Supreme Court has stated, "Under § 29-2282, *restitution is warranted* '[i]f the offense results in bodily injury.'" *State v. Ramirez*, 285 Neb. at 208, 825 N.W.2d at 806 (emphasis supplied). Thus, we interpret § 29-2282 to also warrant restitution where, as here, "the offense results in damage, destruction, or loss of property."

The evidence in the present case established that as a result of McBride's forging AllAround's signature on the vehicle's title and selling the vehicle, AllAround lost property to which she was entitled. We understand McBride's argument that because her name was also on the title, she may have been entitled to at least a portion of the value of the vehicle. However, she argues, without authority, that determination of any monetary damages is better left to a civil proceeding rather than handled in the context of this criminal proceeding.

[9,10] When a court orders restitution to a crime victim under § 29-2280, restitution is a criminal penalty imposed as punishment and is part of the criminal sentence imposed by the sentencing court. *State v. Clapper*, 273 Neb. 750, 732 N.W.2d 657 (2007). Imposing a sentence within statutory limits is a matter entrusted to the discretion of the trial court. *State v. King*, 19 Neb. App. 410, 807 N.W.2d 192 (2011). In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *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. *Id*.

At sentencing in the instant case, the county court noted that McBride knew the title was forged and therefore was aware that she was doing something illegal. The court also observed that McBride herself could have elected to handle the matter with AllAround via a civil proceeding, but instead, she chose to circumvent the process and take matters into her own hands by selling the vehicle unlawfully and retaining all of the proceeds. The court therefore concluded that an order

of restitution was appropriate in this case. Based on the record before us, including the court's rationale, we cannot find that that decision constitutes an abuse of discretion.

*Actual Damages.*

McBride asserts that the order of restitution was an abuse of discretion because the State failed to prove the amount of actual damages sustained as a result of the crime. We find no merit to this argument.

[11-13] 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*, 285 Neb. 203, 825 N.W.2d 801 (2013). Under § 29-2281, the sentencing court may hold a hearing at the time of sentencing to determine the amount of restitution. *Id*. The sentencing court's determination 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." § 29-2281. To be relied upon by the sentencing court, the evidence must be sworn and corroborated. *State v. Ramirez, supra*.

In relevant part, § 29-2282 provides that in determining restitution, if the offense results in loss of property, the court may require payment of the "reasonable replacement value" of the property.

McBride argues, without authority, that the court's failure to consider depreciation when determining the actual damages for restitution purposes was an abuse of discretion. We note that the restitution statutes refer to "actual damages" and "reasonable replacement value" but do not specifically refer to depreciation or market value. See §§ 29-2281 and 29-2282. Nor do the statutes address the manner in which actual damages are to be calculated other than the amount of restitution must be supported by evidence which shall become part of the court record. See § 29-2281.

At the restitution hearing, AllAround testified that she paid $13,144 for the vehicle and that McBride contributed nothing toward the purchase price. A copy of the bill of sale and evidence that AllAround paid the purchase price were received into evidence.

The vehicle at issue here was a 2009 GMC Acadia, purchased in December 2016 and sold in May 2017. The district court, in reviewing the trial court's order, found no abuse of discretion, the "actual damages being based upon a recent purchase price of the 2009 GMC." We do not find such a determination to be an abuse of the court's discretion, either. And the undisputed evidence before the court proved that AllAround paid the entire cost of the vehicle and had not been reimbursed. Therefore, we find that the district court did not abuse its discretion in affirming the county court's valuation of $13,144 and ordering restitution in that amount.

## CONCLUSION

Finding no merit to the arguments raised on appeal, we affirm the district court's order.

Affirmed.

# Charles Sargent Irrigation, Inc., doing business as Sargent Drilling, appellee, v. Mary Martha Pohlmeier, appellant.

929 N.W.2d 527

Filed May 14, 2019. No. A-17-1231.

1. **Motions to Vacate: Time.** The decision to vacate an order at any time during the term in which the judgment is rendered is within the discretion of the court; such a decision will be reversed only if it is shown that the district court abused its discretion.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Rules of the Supreme Court: Pretrial Procedure: Appeal and Error.** The determination of an appropriate discovery sanction rests within the discretion of the trial court, and an appellate court will not disturb it absent an abuse of discretion.
4. **Motions to Vacate: Time.** In a civil case, a court has inherent power to vacate or modify its own judgments at any time during the term at which those judgments are pronounced, and such power exists entirely independent of any statute.
5. **Courts: Time.** Unless otherwise provided by order of the district court, a term of court begins on January 1 of a given year and ends on December 31 of that same year.
6. **Judgments: Judicial Sales: Appeal and Error.** An order overruling a motion to deny confirmation of a judicial sale and to set the sale aside is not a final or reviewable order.
7. **Courts.** Nebraska's courts, through their inherent judicial power, have the authority to do all things necessary for the proper administration of justice.
8. **Pretrial Procedure.** The main purpose of the discovery process is to narrow the factual issues in controversy so that the trial is efficient and economical.

9. ____. The discovery process helps the litigants conduct an informed cross-examination and avoid tactical surprise, a circumstance which might lead to a result based more on legal maneuvering than on the merits of the case.
10. **Rules of the Supreme Court: Pretrial Procedure.** The court may sanction a party under Neb. Ct. R. Disc. § 6-337, despite the absence of a prior discovery order.
11. **Courts: Evidence.** A trial court's exclusion of evidence may be sustained as an exercise of a trial court's inherent powers.
12. **Appeal and Error.** An appellate court will not consider an issue that was not presented to or passed upon by the trial court, because a trial court cannot commit error in resolving an issue never presented and submitted to it for disposition.

Appeal from the District Court for Fillmore County: Vicky L. Johnson, Judge. Affirmed.

Travis Penn, of Penn Law Firm, L.L.C., for appellant.

Charles W. Campbell, of Angle, Murphy & Campbell, P.C., L.L.O., for appellee.

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

Riedmann, Judge.

## INTRODUCTION

As a discovery sanction, the district court for Fillmore County entered a default judgment against Mary Martha Pohlmeier and in favor of Charles Sargent Irrigation, Inc., doing business as Sargent Drilling (Charles Sargent). The court included prejudgment interest in the damages awarded, and after Pohlmeier's land was sold to satisfy the judgment, the court denied Pohlmeier's objection to the confirmation of the sale. We affirm the decisions related to the default judgment but lack jurisdiction to address issues related to the confirmation of the sale.

## BACKGROUND

In 2014, Pohlmeier entered into a written contract with Charles Sargent for the drilling of wells and associated work

on Pohlmeier's property. Certain work was completed, but Pohlmeier failed to pay as agreed; thus, Charles Sargent commenced this action seeking to recover payment from Pohlmeier. In response to Charles Sargent's amended complaint, Pohlmeier filed an answer and counterclaim.

In February 2016, Charles Sargent filed a motion for sanctions. The motion and attached affidavit alleged that on December 4, 2015, Charles Sargent had served interrogatories and requests for production of documents on Pohlmeier by sending them to her counsel and that Pohlmeier had requested additional time within which to respond. Pohlmeier's counsel then moved to withdraw, and on January 11, 2016, the district court granted counsel's motion to withdraw and allowed Pohlmeier until February 4 to serve her discovery responses. Pohlmeier never responded to the discovery requests.

The court held a hearing on the motion for sanctions, and neither Pohlmeier nor her counsel appeared. The court entered a written order on March 10, 2016, stating that notice of the hearing had been provided to Pohlmeier at her last known address. Based on Pohlmeier's failure to respond to discovery, the court found that Charles Sargent was entitled to sanctions. The court therefore entered a default judgment in favor of Charles Sargent against Pohlmeier on the amended complaint and awarded judgment in the amount of $27,498.38 plus interest in the amount of $8,013.25.

As a result of the default judgment, a writ of execution was issued for Pohlmeier's property, and the record shows that Pohlmeier was personally served with the writ on August 10, 2016. A sale of the property was held on October 3, and the property was sold. On October 6, Charles Sargent filed a motion to confirm the sale in the district court. On November 1, Pohlmeier, represented by new counsel, filed an objection to the confirmation of sale and a motion to vacate the default judgment. At a hearing on the motions, Pohlmeier's counsel argued that the default judgment was not a final judgment because it failed to dispose of Pohlmeier's counterclaim.

In an order entered January 5, 2017, the district court recognized that the March 10, 2016, order was not final because of the outstanding counterclaim. The court therefore modified the March 10 order, striking the counterclaim and reiterating that default judgment was entered in favor of Charles Sargent. The court did not rule on the objection to the confirmation of sale or the motion to vacate at that time.

Thereafter, Pohlmeier filed a motion to alter or amend the January 5, 2017, order. At a hearing on that motion, Charles Sargent recognized that the sale could not be confirmed because the execution was issued upon a nonfinal judgment; thus, a new sale would have to take place. The court issued a written order on October 26 overruling the motion to vacate and the objection to the confirmation of sale. No order was entered on the motion to confirm the sale, nor did Charles Sargent withdraw the motion. Pohlmeier appeals from that order.

## ASSIGNMENTS OF ERROR

Pohlmeier assigns, restated, that the district court (1) lacked authority to modify the March 10, 2016, judgment on January 5, 2017; (2) erred in overruling her objection to the confirmation of sale; (3) erred in issuing sanctions improperly and failing to set aside those sanctions; and (4) erred in awarding prejudgment interest, because the claim was not liquidated.

## STANDARD OF REVIEW

[1,2] The decision to vacate an order at any time during the term in which the judgment is rendered is within the discretion of the court; such a decision will be reversed only if it is shown that the district court abused its discretion. *In re Change of Name of Whilde*, 298 Neb. 510, 904 N.W.2d 707 (2017). An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id*.

[3] The determination of an appropriate discovery sanction rests within the discretion of the trial court, and an appellate court will not disturb it absent an abuse of discretion. *Hill v. Tevogt*, 293 Neb. 429, 879 N.W.2d 369 (2016).

## ANALYSIS

*Modification of Judgment.*

In her first assignment of error, Pohlmeier argues that the district court lacked the authority to modify the March 10, 2016, judgment on January 5, 2017, because the modification was made out of term and without a motion filed by either party within 6 months of the original judgment. We disagree.

At the outset, we note Charles Sargent asserts that the January 5, 2017, order was a final judgment disposing of all of the claims of the case and that because Pohlmeier does not assign any errors related to that order, she has waived any challenge to that order on appeal. The January 5 order struck Pohlmeier's counterclaim but did not rule on her motion to vacate the default judgment, as evidenced by Pohlmeier's allegations contained in her motion to alter or amend. Thus, because the motion to vacate remained outstanding, the January 5 order was not a final order from which Pohlmeier could appeal. The district court did not rule on the motion to vacate until October, that ruling being the order from which this appeal was taken. The present appeal is therefore Pohlmeier's first opportunity to raise issues related to the January 5 order. We now turn to the merits of Pohlmeier's argument.

[4,5] In a civil case, a court has inherent power to vacate or modify its own judgments at any time during the term at which those judgments are pronounced, and such power exists entirely independent of any statute. *In re Change of Name of Whilde, supra*. The inherent power of a district court to vacate or modify its judgments or orders during term may also be exercised after the end of the term, upon the same grounds, upon a motion filed within 6 months after the entry

of the judgment or order. Neb. Rev. Stat. § 25-2001 (Reissue 2016). Unless otherwise provided by order of the district court, a term of court begins on January 1 of a given year and ends on December 31 of that same year. *Andersen v. American Family Mut. Ins. Co.*, 249 Neb. 169, 542 N.W.2d 703 (1996).

Rules of Dist. Ct. of First Jud. Dist. 1-1 (rev. 2005) allows the judge in each county to set the terms of court, and we have found nothing in the record to reflect that the district court fixed a term of court other than the calendar year. Therefore, the district court in this case had the inherent power to modify a judgment or order during the same calendar year in which it was filed.

Pohlmeier argues that because the original order was entered in March 2016 and the modification order was filed in January 2017, the modification was made out of term. The Nebraska Supreme Court addressed this issue in *Moackler v. Finley*, 207 Neb. 353, 299 N.W.2d 166 (1980). There, the trial court entered a default judgment against the defendant in February 1979. On June 26, the defendant moved to set aside and vacate the default judgment. The trial court's term ended on June 29. Thus, the order setting aside and vacating the default judgment filed on July 12 was entered in the new term of court.

On appeal, the plaintiff argued that the trial court abused its discretion when it vacated the default judgment in a term of court beyond that in which the judgment was entered. The Supreme Court noted that a court has inherent power to vacate or modify its own judgments at any time during the term in which those judgments are pronounced, and such power exists entirely independent of any statute. *Id*. The court also observed that it is equally clear that § 25-2001 specifies in which instances the district court has the power to vacate or modify its own judgments or orders after the term has been adjourned. *Moackler v. Finley, supra*. Thus, the issue before the court was whether the district court loses its jurisdiction

to vacate an order when the term ends, if the motion to vacate was made during the term in which the judgment was rendered and none of the grounds for vacation exist pursuant to § 25-2001. *Moackler v. Finley, supra*. In resolving that question, the Supreme Court held that the district court retains the authority to rule upon a motion to vacate if the motion was made within the original term. *Id*. In reaching this decision, the Supreme Court relied upon Neb. Rev. Stat. § 24-310 (Reissue 2016), which provided then, as it does now, that upon any final adjournment of the court, all business not otherwise disposed of shall stand continued generally. The Supreme Court determined that once a motion is made and has not yet been ruled upon, the motion is pending, and when the term is adjourned, that pending motion cannot be other than a matter "'not otherwise disposed of.'" *Moackler v. Finley*, 207 Neb. at 357, 299 N.W.2d at 168. Therefore, the court retains jurisdiction by law to modify its previous order. *Id*.

In the present case, the term of court ran from January 1 through December 31, 2016. Default judgment was entered in March, and the motion to vacate was filed in November. Although the district court did not rule on the motion until January 2017, the motion remained pending at the end of the court's term, and thus, the court retained jurisdiction to rule on the motion in the following term. It therefore permissibly entered the order in January 2017 modifying the March 2016 order pursuant to its inherent authority. Accordingly, we find no merit to Pohlmeier's argument to the contrary.

Finally, as to this issue, Pohlmeier argues that § 25-2001 does not apply because the March 2016 order was not a judgment and no motion to vacate was filed within 6 months of entry of the order as required by § 25-2001. We agree with Pohlmeier that § 25-2001 does not control the outcome here, except to the extent that it recognizes a district court's inherent power to vacate or modify its judgments or orders during the term in which they are entered. Section 25-2001 provides the circumstances under which a district court may vacate or

modify a judgment or order after the end of the term in which the judgment or order was entered. But because a court retains jurisdiction to rule on a pending motion to vacate after the term has ended, reliance upon § 25-2001 is not necessary. For the sake of completeness, we also note that § 25-2001 recognizes a court's inherent power to vacate or modify its judgments *or orders*. Therefore, even though the March 2016 order was not a final judgment because it did not dispose of Pohlmeier's counterclaim, it was an order of the court, and thus, the district court had the authority to modify it in January 2017.

*Objection to Confirmation of Sale.*

Pohlmeier argues that the district court erred in overruling her objection to the confirmation of the sale. We conclude that we lack jurisdiction over this issue.

The district court entered a default judgment in favor of Charles Sargent, and a writ of execution was issued in May 2016. A sale of the property was completed on October 3, and on October 6, Charles Sargent filed a motion asking the district court to confirm the sale. On November 1, Pohlmeier filed an objection to the confirmation of the sale. The district court overruled the objection in the October 26, 2017, order. The court never ruled on Charles Sargent's motion to confirm the sale, but we note that Charles Sargent agreed that because the writ of execution was issued upon a nonfinal judgment, the sale could not be confirmed and a new sale would have to be held.

[6] The writ of execution and sale are postjudgment proceedings over which we do not have jurisdiction because, although a motion to confirm the sale was filed, it was never ruled upon. The only ruling related to the confirmation of sale is the overruling of Pohlmeier's objection to the confirmation of sale. An order overruling a motion to deny confirmation of a judicial sale and to set the sale aside is not a final or reviewable order. See *County of Lancaster v. Schwarz*, 152

Neb. 15, 39 N.W.2d 921 (1949). Therefore, the district court's decision overruling the objection to the confirmation of sale is not final and appealable, and as a result, we do not have jurisdiction over this issue.

*Motion for Sanctions.*

Pohlmeier asserts that the district court erred in issuing sanctions improperly and failing to set aside those sanctions. Her argument is twofold: (1) Neb. Ct. R. Disc. § 6-337 (rule 37) does not allow the imposition of sanctions without a prior motion to compel, and (2) she did not receive procedural due process because she was not given notice of the motion for sanctions. She does not argue that in the hierarchy of available sanctions, the imposition of a default judgment was too severe. See *Hill v Tevogt*, 293 Neb. 429, 879 N.W.2d 369 (2016). To the extent Pohlmeier is arguing that the court erred in denying her motion to vacate on the two bases asserted, we reject her arguments as set forth below.

[7-10] Nebraska's courts, through their inherent judicial power, have the authority to do all things necessary for the proper administration of justice. *In re Interest of Zachary D. & Alexander D.*, 289 Neb. 763, 857 N.W.2d 323 (2015). Here, the district court entered a default judgment against Pohlmeier as a sanction for failing to respond to discovery. The main purpose of the discovery process is to narrow the factual issues in controversy so that the trial is efficient and economical. *Hill v. Tevogt, supra*. The discovery process helps the litigants conduct an informed cross-examination and avoid tactical surprise, a circumstance which might lead to a result based more on legal maneuvering than on the merits of the case. *Id*. If the parties fall short of their discovery obligations, rule 37 allows the court to sanction them. *Hill v. Tevogt, supra*.

Sanctions under rule 37 serve several purposes. See *In re Estate of Graham*, 301 Neb. 594, 919 N.W.2d 714 (2018). First, they punish a litigant or counsel who might be inclined

to frustrate the discovery process. *Id*. Second, they deter those who are tempted to break the rules. *Id*. Finally, they prevent parties who have failed to meet their discovery obligations from profiting from their misconduct. *Id*.

In relevant part, rule 37 provides:

> (b) Failure to Comply with Order.
>
> . . . .
>
> (2) Sanctions by Court in Which Action is Pending. If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him or her from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> . . . .
>
> (d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party . . . fails
>
> . . . .
>
> (2) To serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories[,]
>
> (3) . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action

> authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule.

Pohlmeier relies upon rule 37(b) to argue that the sanction "clearly exceeded [the] Court's jurisdiction" because Charles Sargent never moved to compel the discovery responses, and therefore, there was no court order with which she failed to comply. Brief for appellant at 15. However, aside from rule 37(b), the court may sanction a party under rule 37(d), despite the absence of a prior discovery order. *Hill v. Tevogt*, 293 Neb. 429, 879 N.W.2d 369 (2016). If a party fails to serve answers to interrogatories, the court may issue a sanction that is "just," see rule 37(d)(3), including "rendering a judgment by default against the disobedient party," see rule 37(b)(2)(C). Thus, no prior court order is required before the court may sanction a party for its failure to answer interrogatories.

[11] In addition, a court has inherent power to sanction. This court has previously held that where there is no court order regarding discovery under rule 37, the exclusion of evidence "may be sustained as an exercise of a trial court's inherent powers." *Schindler v. Walker*, 7 Neb. App. 300, 310, 582 N.W.2d 369, 377 (1998). In *Schindler v. Walker*, we recognized that a district court's inherent powers include the broad discretion to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial. Therefore, contrary to Pohlmeier's assertions, the court did not exceed its jurisdiction by imposing a sanction without a prior order to compel discovery, and the court did not err in denying her motion to vacate on this ground.

Pohlmeier also asserts that she was never served with the motion for sanctions and that therefore, the March 10, 2016, order violated her constitutional right to procedural due process because she was not given notice and the opportunity to be heard.

At the hearing on Pohlmeier's motion to vacate, she offered no evidence in support of her motion or evidence establishing that she never received the motion for sanctions. And the

evidence presented at the hearing established that the clerk of the district court sent to Pohlmeier personally copies of the January 11, 2016, orders allowing Pohlmeier's counsel to withdraw and granting her additional time to respond to discovery. The certificate of service for the order dated March 10, 2016, entering default judgment against Pohlmeier, also reveals that it was sent to Pohlmeier personally.

Even if Pohlmeier received none of these filings in the mail as she claims, it is clear that she was personally served on August 10, 2016, with the writ of execution, and thus, she was aware at that time that a judgment had been entered in this matter against her and that the property was to be sold. Yet, she did nothing to attempt to vacate the judgment at that time or postpone the sale or participate in any way in the proceedings. It was not until November 1 that Pohlmeier filed anything in the district court. As a result, we reject Pohlmeier's argument that she was denied procedural due process, and the court did not err in denying her motion to vacate for this reason.

*Prejudgment Interest.*

When the district court entered default judgment against Pohlmeier, it awarded Charles Sargent judgment in the amount of $27,498.38 plus interest as pled in the amended complaint. The January 5, 2017, order reentered judgment in the same amount, including the interest. Pohlmeier argues that the court should not have awarded prejudgment interest, because the claim was not liquidated. We decline to address this argument.

[12] After the default judgment was entered, Pohlmeier filed a motion to vacate the default judgment. She never filed a motion related to the amount of the judgment; rather, her subsequent motion to alter or amend asked the court to set aside the January 5, 2017, order because it was entered out of term. And while she argued at the hearing on the motion to alter or amend that prejudgment interest should not have

been included, it was not a basis upon which she filed her initial motion to vacate. An appellate court will not consider an issue that was not presented to or passed upon by the trial court, because a trial court cannot commit error in resolving an issue never presented and submitted to it for disposition. *Upper Republican NRD v. Dundy Cty. Bd. of Equal.*, 300 Neb. 256, 912 N.W.2d 796 (2018). Because Pohlmeier failed to properly raise the issue of prejudgment interest to the district court, we decline to address the issue now.

## CONCLUSION

For the foregoing reasons, we affirm the order of the district court.

Affirmed.

# In re Interest of Cayden R. et al., children under 18 years of age.
# State of Nebraska, appellee, v. Gail R., appellant.

929 N.W.2d 913

Filed May 14, 2019. No. A-18-817.

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. **Child Support: Appeal and Error.** The determination of the amount of child support is initially entrusted to the discretion of the trial court, and although on appeal the issue is tried de novo on the record, in the absence of an abuse of discretion, the trial court's award of child support will be affirmed.
3. **Child Support: Rules of the Supreme Court.** The Nebraska Child Support Guidelines apply in juvenile cases where child support is ordered.

Appeal from the Separate Juvenile Court of Lancaster County: Linda S. Porter, Judge. Affirmed.

Lea Wroblewski, of Legal Aid of Nebraska, for appellant.

Patrick F. Condon, Lancaster County Attorney, and Anna Marx for appellee.

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

Bishop, Judge.

Gail R. appeals from the decision of the separate juvenile court of Lancaster County ordering her to pay $50 per

month in child support for her children living in foster care. We affirm.

## BACKGROUND

Gail is the mother of five children who were removed from her home in May 2017. The juvenile court granted temporary custody of the children to the Nebraska Department of Health and Human Services (DHHS), and they were placed into foster care.

The State filed a juvenile petition on May 19, 2017, alleging that the children were within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016) by reason of the faults or habits of Gail and/or because the children were in a situation dangerous to life or limb or injurious to their health or morals. The petition contained allegations of domestic violence, bodily injury to one of the children, and failure to provide a safe and stable home. The petition also included allegations against the two fathers of the children.

The State filed a second amended petition on July 28, 2017, adding an allegation that a hair follicle test for one or more of the children yielded positive results for illegal substances and removing the allegation that Gail failed to provide a safe and stable home. Both the petition and the second amended petition asked the court to make such orders as deemed proper, including "ability and liability for child support" if the children were placed out of the parental home. Because neither father is at issue in this appeal, we will only discuss them as necessary.

On October 10, 2017, one of the children was adjudicated to be within the meaning of § 43-247(3)(a) by reason of the faults or habits of that child's father and/or because that child was in a situation dangerous to life or limb or injurious to his health or morals. Although no adjudication order for the other four children or any adjudication order referencing the allegations against Gail appears in our record, the parties and the juvenile court proceeded as if there was one, and no one argues otherwise in this appeal.

On February 12, 2018, the juvenile court entered an order referring the juvenile case to a child support referee "for the purpose of findings and recommendations regarding the establishment of child support to be paid by . . . Gail" for the support of her five children in the case.

A hearing before the child support referee was held on March 21, 2018. At the hearing, the State informed the referee of its understanding that there was a court order for Gail to attend inpatient treatment for substance abuse and that "she's simply waiting for a bed." The State explained, "[B]ecause of that order, the State is simply asking for a bare minimum order, $50 a month, to begin April 1st of 2018, with one month of retroactive support representing the month of March."

The State's child support calculation was received into evidence for informational purposes; the calculation used a total monthly income of $0 for both Gail and DHHS, and suggested a monthly share of $50 per month for Gail. The State's "Cost of Care Affidavit" was received into evidence, and it states that DHHS was paying $267.68 per day for the out-of-home care for Gail's five children. A juvenile court order from February 12, 2018, was also received into evidence and states, in part, that Gail was ordered to maintain employment or other legal means of support for herself and her children, maintain a safe and stable home environment for herself and her minor children, maintain contact with DHHS and inform the case manager of any change to her address or telephone number within 48 hours of such change, have supervised visitation with her children a minimum of one time per week, attend and cooperate with individual and/or group counseling to address her "history of interpersonal violence" and the effects on the children who have been exposed to violence in the home environment, cooperate with short-term residential treatment for substance abuse and follow all recommendations, and cooperate with family support services.

Gail testified that her five children lived with her until May 2017 and that since that time, they have been in two foster

homes and a "kinship home." Gail had been ordered by the juvenile court to attend treatment for substance abuse. She was currently attending outpatient treatment twice a week, for 1 hour each time, and was waiting for an inpatient room; once there was an opening in inpatient treatment, Gail believed treatment would take 6 weeks, but she did not know for sure. Gail also had court-ordered visitation with the children and attended a domestic abuse class, "[s]o my time is kind of spread." She stated that she started with five visits per week and was "down to two"; she is required to provide food for her children during visits and to make sure that her youngest child has a "diaper change." She also stated that her domestic abuse class was once a week for 1½ hours.

At the time of the hearing, Gail did not have a permanent residence, but she was "looking into housing." She affirmed that she did not have any money for application fees or deposits for an apartment or a house. She denied having any other assets she could use to obtain housing. She did have a vehicle, but it was not insured.

Gail was court ordered to maintain employment and was currently seeking employment. When asked if she believed she had a duty to support her children, Gail responded, "I do, but my role is to be the homemaker, the caregiver," so "I'm not familiar with the full-time work." Gail acknowledged that when the children lived with her, she was a stay-at-home mother. But she "usually . . . tried to hold a part-time job" when she could. She worked part time for 6 weeks in 2017, starting at $11 per hour "and then it bounced up to 14 for two weeks." When asked why she was not working at that job anymore, Gail responded, "Because of the whole — the court system, actually. I found out that they'd took my kids two days before I went to work on Monday. So, I had a rough Monday and it just — it fell apart." She said she voluntarily left that job "so I wouldn't get fired." Gail has a high school degree but no further education or specialized training. She acknowledged that she did not have any disabilities that would keep her from working.

The child support referee filed a report on March 27, 2018. The report notes that the parties disagreed about the applicability of the Nebraska Child Support Guidelines to the present case; however, the referee, citing to a Nebraska statute and case law, found the guidelines applicable. The referee found that although Gail had no residence, only a high school degree, and a limited work history (because she was a stay-at-home mother prior to the removal of the children from her home), she had no disabilities that would prevent her from working, had held employment in the past, was currently seeking employment, and was court ordered to maintain employment or other legal means of support for herself and her children. The referee recommended that Gail's child support obligation be set at a minimum level of $50 per month beginning April 1, finding this would give her incentive to maintain some level of employment to understand the "'necessity, duty, and importance'" of supporting her children, while also allowing her to comply with her ordered short-term residential treatment for substance abuse and followup treatment. The referee did not recommend retroactive support, as requested by the State, noting that Gail is "struggling financially and may be entering short term residential treatment soon."

Gail filed an exception to the child support referee's report on April 11, 2018, claiming that the findings and recommendations (1) were not supported by the evidence, (2) were contrary to Nebraska law, (3) failed to recognize a rebuttable presumption applies because the children are placed in foster care, (4) do not support an order of minimum support as intended by Neb. Ct. R. § 4-209, and (5) are not in the best interests of the children. Gail requested a hearing before a juvenile court judge for a de novo review of the referee's report.

After a hearing on May 16, 2018, during which the bill of exceptions, including exhibits, from the child support referee hearing was received into evidence and arguments were made, the juvenile court filed its order July 25, ordering Gail

to pay child support of $50 per month for her children, with the support order commencing April 1.

Gail appeals.

## ASSIGNMENTS OF ERROR

Gail assigns, consolidated and restated, that the juvenile court erred in (1) applying the Nebraska Child Support Guidelines to a juvenile court case in which the children were placed in foster care and (2) ordering her to pay $50 per month in child support for her children.

## 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 Isabel P. et al.*, 293 Neb. 62, 875 N.W.2d 848 (2016).

[2] The determination of the amount of child support is initially entrusted to the discretion of the trial court, and although on appeal the issue is tried de novo on the record, in the absence of an abuse of discretion, the trial court's award of child support will be affirmed. *In re Interest of Crystal T.*, 4 Neb. App. 503, 546 N.W.2d 77 (1996).

## ANALYSIS

[3] In *In re Interest of Tamika S. et al.*, 3 Neb. App. 624, 529 N.W.2d 147 (1995), this court held that the Nebraska Child Support Guidelines apply in juvenile cases where child support is ordered. See *In re Interest of Crystal T., supra*. See, also, Neb. Rev. Stat. § 43-290 (Reissue 2016) (when care or custody of juvenile, as described in various subsections of § 43-247, including subsection (3), is given by court to someone other than juvenile's parent, court may order that parent to pay reasonable sum that will cover support, study (medical, psychological, or psychiatric), and treatment of juvenile; if juvenile has been committed to care and custody of DHHS, DHHS shall pay costs which are not otherwise paid by juvenile's parent). Additionally, Neb. Ct. R. § 4-203 (rev.

2011) provides that *all* orders for child support obligations shall be established in accordance with the provisions of the guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied. Section 4-203 also states that deviations from the guidelines are permissible for juveniles placed in foster care. Finally, Neb. Ct. R. § 4-222 (rev. 2011) states that if the child is residing with a third party, the court "shall order each of the parents to pay to the third party their respective amounts of child support as determined by the worksheet."

The child support guidelines shall be applied as a rebuttable presumption. § 4-203. As noted above, all orders for child support obligations shall be established in accordance with the provisions of the guidelines unless sufficiently rebutted by the evidence. See *id*. In this case, DHHS presented a child support calculation which was received for informational purposes. In its calculation, DHHS attributed a total monthly income of $0 to Gail; thus, her monthly support from table 1 ("Income Shares Formula") of the child support guidelines was $0. However, § 4-209 states:

> It is recommended that even in very low income cases, a minimum support of $50, or 10 percent of the obligor's net income, whichever is greater, per month be set. This will help to maintain information on such obligor, such as his or her address, employment, etc., and, hopefully, encourage such person to understand the necessity, duty, and importance of supporting his or her children.

And Neb. Ct. R. § 4-218 (rev. 2019) states:

> A parent's support, child care, and health care obligation shall not reduce his or her net income below the minimum of $1,041 net monthly for one person, or the poverty guidelines updated annually in the Federal Register by the U.S. Department of Health and Human Services under authority of 42 U.S.C. § 9902(2), *except minimum support may be ordered as defined in § 4-209*.

(Emphasis supplied.) In accordance with §§ 4-209 and 4-218, Gail's child support obligation was determined to be $50 per month. She claims that the purpose of the minimum support, as set forth in § 4-209, is already being met by the juvenile court order because she is already required to maintain her information (address and telephone number) and is already required to maintain employment or a legal source of income, maintain a safe and stable home, and cooperate with family services. We fail to see why this should exempt her from a minimum support order of $50 per month.

Gail also argues that a deviation from the guidelines was appropriate in this case. She claims this "is a family in crisis with substance abuse treatment needs, domestic violence counseling needs, and family support and therapy" and that "[a]dding a financial obligation that comes with . . . severe and immediate consequences for noncompliance [e.g., contempt, possible arrest and incarceration, and interest on a growing child support arrearage], is an unnecessary stressor and hurdle for the family." Brief for appellant at 9-10. Although Gail claimed at the child support referee hearing that her "time is kind of spread" because of treatment, a domestic abuse class, and visitation, her testimony was that she spent only 3½ hours per week in treatment and a domestic abuse class and that her visitations had gone from five "down to two" per week. Thus, it is clear that her time commitments were not so great that she could not work. And although she testified that she was unemployed, there was no reason she could not work. She had a high school diploma and no disabilities that would keep her from working. In fact, at the time of the children's removal from Gail's home, she had been employed for 6 weeks (and had gone from earning $11 to $14 per hour during that time), but quit because she "had a rough Monday" after the children's removal. Clearly, she is capable of working and was able to earn $11 to $14 per hour. Based on the evidence presented, Gail has not rebutted the presumption of the guidelines, and we find that no deviation was warranted.

Gail also argues that the juvenile court failed to make findings about whether a child support order of $50 was appropriate or reasonable. It is true that the juvenile court did not make specific findings in its order. However, the child support referee did make specific findings in the referee's report, and the juvenile court considered the evidence before the court, "including the Referee Report." As noted by the State in its brief, "In order for [Gail] to meet her $50.00 per month obligation, earning $11 per hour, she would have to work less than two hours per week." Brief for appellee at 11. "Factoring in the cost of care, the requirements placed upon [Gail] by the ongoing juvenile court action and her ability to work, the minimum support obligation of $50.00 per month is neither unfair nor inequitable. The support obligation is reasonable." *Id*. We agree. DHHS was paying $267.68 per day for the out-of-home care for Gail's five children, and she was only required to pay $50 per month in child support. The purpose of § 43-290, which allows the juvenile court to order a parent to pay support for a child committed to the care and custody of someone other than a parent, is "to promote parental responsibility and to provide for the most equitable use and availability of public money." Contrary to Gail's contention, the child support order is in the best interests of the children, as it will help facilitate Gail's acceptance of the financial responsibilities associated with caring for her children. Demonstrating the ability to financially contribute to the care of her children will be a favorable factor in her efforts to reunite with them.

## CONCLUSION

For the reasons stated above, we affirm the decision of the separate juvenile court ordering Gail to pay $50 per month in child support for her children living in foster care.

Affirmed.

# Grant Jonas, appellant, v. Brent Willman, M.D., and Doctors of Children - Lincoln, P.C., appellees.

930 N.W.2d 60

Filed May 21, 2019. No. A-17-1016.

1. **Jury Instructions.** Whether the jury instructions given by a trial court are correct is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
4. **Trial: Courts: Juries: Appeal and Error.** A trial court's response to a question posed by the jury is reviewed for an abuse of discretion.
5. **Motions for New Trial: Appeal and Error.** An appellate court reviews a denial of a motion for new trial for an abuse of discretion.
6. **Negligence: Trial.** Generally, it is error to submit a general allegation of negligence to the jury.
7. **Pretrial Procedure: Parties.** A pretrial order is binding upon the parties.
8. **Pretrial Procedure: Evidence.** In relation to evidence, the pretrial conference is designed for and primarily used to restrict evidence to the issues formulated, secure admissions or stipulations, and avoid unduly cumulative evidence and the necessity of proving foundation in regard to clearly competent evidence.
9. **Jury Instructions: Pleadings: Evidence.** A litigant is entitled to have the jury instructed upon only those theories of the case which are

presented by the pleadings and which are supported by competent evidence.

10. **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.
11. **Malpractice: Physicians and Surgeons: Proximate Cause: Damages.** In the 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.
12. **Physician and Patient: Negligence.** Nebraska does not recognize the loss-of-chance doctrine.
13. **Trial: Evidence: Juries.** Before evidence is submitted to a jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it and upon whom the burden is imposed.
14. **Malpractice: Physicians and Surgeons: Expert Witnesses: Words and Phrases.** Medical expert testimony regarding causation based upon possibility or speculation is insufficient; it must be stated as being at least "probable," in other words, more likely than not.
15. **Trial: Evidence: Proof.** The burden of proof is not sustained by evidence from which a jury can arrive at its conclusions only by guess, speculation, or conjecture.
16. **Trial: Juries.** The trial judge is in the best position to sense whether the jury is able to proceed with its deliberations and has considerable discretion in determining how to respond to communications indicating that the jury is experiencing confusion.
17. **Rules of the Supreme Court: Appeal and Error.** Under Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2014), a party filing a cross-appeal must set forth a separate division of the brief prepared in the same manner and under the same rules as the brief of appellant.

Appeal from the District Court for Lancaster County: John A. Colborn, Judge. Affirmed.

Diana J. Vogt, of Sherrets, Bruno & Vogt, L.L.C., and Patrick J. Cullan and Joseph P. Cullan, of Cullan & Cullan, L.L.C., for appellant.

Patrick G. Vipond, William R. Settles, and John M.Walker, of Lamson, Dugan & Murray, L.L.P., for appellees.

Riedmann, Bishop, and Arterburn, Judges.

Riedmann, Judge.

## I. INTRODUCTION

Grant Jonas brought a medical malpractice action alleging that his pediatrician failed to diagnose and treat him for congenital bilateral undescended testicles. Following a jury verdict in favor of the defendants, Jonas appeals, arguing that the district court erred in instructing the jury, answering questions from the jury, and denying his motion for a new trial. The defendants attempt to cross-appeal from the district court's denial of their motion for sanctions. For the reasons set out below, we affirm the order of the district court in all respects.

## II. BACKGROUND

Jonas brought a medical malpractice suit against Brent Willman, M.D., and his professional practice, Doctors of Children - Lincoln, P.C., in 2013. Jonas alleged that he was born with congenital bilateral cryptorchidism and that Willman was negligent in not diagnosing, treating, or referring him to a specialist for his condition. Congenital bilateral cryptorchidism was defined at trial as testicles that had not descended at birth. Thus, Jonas claimed that he was born with testicles that did not descend and that Willman did not recognize and treat his condition.

The defendants countered Jonas' allegations by attempting to establish that Jonas had descended testicles at birth, but his testicles later ascended out of his scrotum. One of their experts explained that "[an] ascended testicle is a testicle that was descended at birth, and then at some point it ascended [and] can no longer [be brought] into the scrotum." The defendants argued that Jonas did not suffer any injuries as a result of his ascended testicles.

### 1. Jonas' Medical History

Jonas was born in July 1997. The day after he was born, he was examined by Willman, who found Jonas' testicles to be descended and in the scrotum. Willman again examined Jonas when he was 4 days old and noted that his testicles were descended. Before leaving the hospital, Jonas was also examined by Dr. Brad Brabec, who found Jonas' testicles to be normal.

Jonas' 2-month checkup was performed by Willman, and his testicles appeared normal and descended. Dr. Barton Bernstein performed Jonas' 4-month checkup and noted on Jonas' medical chart that he was a normal, healthy child. Jonas then saw Willman regularly for checkups, and on each visit, Willman found Jonas' testicles to be normal and descended. Additional medical professionals examined Jonas while he was a young child, including Kathy Carter, a nurse practitioner, who examined him when he was 2 years old, and Dr. Susan Johnson, who examined him when he was 6 years old, and each found his testicles to be descended and in his scrotum.

In 2003, Jonas was examined by Erin Hoffman, a new physician assistant who worked for Willman. While examining Jonas, Hoffman had difficulty locating his testicles due to extra fat tissue in his genital region. Being inexperienced in these examinations, Hoffman requested that Willman assist her, which he did, and Hoffman was able to "visualize" Jonas' testicles. Between 2003 and 2008, Jonas was seen regularly by Willman and Hoffman, and there were no concerns that his testicles had not descended.

In 2008, Hoffman became concerned that Jonas' penis was abnormally small and that his genitalia were not developing at the same rate as the rest of his body. However, after being informed of Hoffman's concerns, Willman examined Jonas and found Jonas' testicles to be descended. Willman ran tests to determine whether Jonas had started puberty, and the tests indicated that he had low testosterone and had not yet started puberty. In 2009, Jonas' mother contacted Willman with

concerns about Jonas' penis size and testicles. Willman referred Jonas to Dr. Jean-Claude Desmangles, an endocrinologist, to evaluate him for delayed puberty.

In March 2009, Desmangles performed a physical examination on Jonas and could not locate his testicles. Desmangles then ordered an ultrasound examination of Jonas, which indicated that his testicles were not in his scrotum. Jonas was referred to Dr. Euclid DeSouza, a urologist, who diagnosed him with bilateral undescended testicles at the age of 11. DeSouza performed an orchiopexy, which is a surgery to bring testicles into the scrotum. Prior to his surgery, Jonas was examined by Hoffman for a physical to ensure he was healthy enough for the procedure. At the same visit, Hoffman performed a 12-year-old checkup on Jonas and indicated on his medical chart that his testicles were normal at that time.

After surgery, Jonas was informed that he was at a higher risk of testicular cancer and likely would have fertility issues due to his undescended testicles. He subsequently underwent testing where it was determined that his sperm count rendered him infertile.

### 2. Pretrial Procedure

In 2013, Jonas' parents, individually and as next friends of Jonas, filed a complaint in the district court for Lancaster County against Willman; Complete Children's Health, P.C.; and Doctors of Children - Lincoln, alleging that the defendants were negligent in failing to identify Jonas' bilateral undescended testicles and in failing to timely refer him to specialty care for this condition. Complete Children's Health was subsequently dismissed from the case.

After multiple continuances and lengthy discovery, a pretrial conference was held in June 2015. Prior to the pretrial conference, the parties were ordered to submit a pretrial conference memorandum. Jonas and his parents submitted their memorandum on June 15, which stated, in relevant part: "On July . . . 1997 Grant Jonas was born. Plaintiffs contend [Jonas]

was born with a medical condition known as a congenital bilateral cryptorchidism."

On September 2, 2015, Jonas' parents were dismissed after the defendants filed a motion for partial summary judgment, arguing that the parents' claims were barred by the applicable statute of limitations, and the parents agreed. The case proceeded with Jonas, who was no longer a minor, as the sole plaintiff.

Trial on Jonas' claim was held in February 2017.

### 3. Trial

During Jonas' opening statement, his counsel repeatedly stated that Jonas was born with undescended testicles, which caused his injuries. Specifically, counsel stated:

> He was diagnosed, at age 11, with undescended testicles at birth. Let me say that again. His diagnosis from age 11 until today, his diagnosis is undescended testicles. Words matter. That matters, because that diagnosis is going to try to be changed here in court, but that is his current diagnosis. And if his current diagnosis is true and accurate, then our case is made for us, because if his testicles were undescended from birth, it should have been caught.

Jonas' counsel later stated, "A diagnosis, not some ascending testicles, some vanishing testicle theory, his diagnosis at that stage is undescended testicles. . . . His diagnosis, undescended testicles. That means from birth, that's what that term means." His counsel continued to emphasize that Jonas had undescended testicles from birth by explaining, "this diagnosis, undescended testes, means from birth, they've never been in the scrotum." Finally, while discussing Jonas' alleged injuries, his counsel stated, "And the only cause of testicular dysfunction that we're aware of in [Jonas] is the fact that these things were never descended."

Jonas' first witness was DeSouza, the urologist who performed Jonas' surgery to bring his testicles into the scrotum.

DeSouza testified that Jonas' right testicle was located in his abdomen and that his left testicle was located in the inguinal canal, above the scrotum. DeSouza opined that it was unlikely that either testicle was ever in the scrotum because the gubernaculum, the structure that brings a male's testicles to his scrotum, did not lead to Jonas' scrotum. During DeSouza's testimony, Jonas' counsel continued to attempt to demonstrate that Jonas was born with bilateral undescended testicles, even attempting to impeach DeSouza when he opined that Jonas' left testicle may or may not have been descended at one point. DeSouza also indicated that Jonas' testicles were atrophic, or small, because they were located in his groin and inguinal canal, not the scrotum.

On cross-examination, DeSouza testified that he did not observe a hernia sac while he performed Jonas' surgery and that a hernia sac is usually present when there are undescended testicles. DeSouza also acknowledged that in his operative report, written directly after the surgery, he stated that Jonas' testicles were "anatomically normal."

Jonas next called Dr. Kevin Ferentz, a family physician, as an expert witness. Ferentz testified that Jonas was born with undescended testicles that were not diagnosed. Ferentz explained that there are increased risks of infertility and testicular cancer in a male who has undescended testicles. However, if undescended testicles are diagnosed and corrected at approximately 1 year of age, the male should not have any increased health risks. Ferentz stated that his opinion Jonas had undescended testicles since birth was based on Desmangles' medical reports and DeSouza's findings during surgery. It was Ferentz' opinion that Willman breached his duty of care because Willman indicated that he felt Jonas' testicles, but, based on DeSouza's findings during surgery, it was not possible that Jonas' testicles were ever in the scrotum. Finally, Ferentz opined that it was not possible for Jonas' testicles to descend, and then reascend into his body, because his gubernaculum did not reach his scrotum.

Jonas also called Dr. Dudley Danoff, a urologic surgeon, as an expert witness. Danoff concurred with Ferentz' opinion that Jonas was born with undescended testicles and that he was not diagnosed with bilateral undescended testicles until he was 11 years old. Danoff also opined that it was impossible for Jonas' testicles to have ever been in his scrotum. After reading the test results from Jonas' fertility test, Danoff testified that Jonas was infertile. Danoff further testified that the injuries Jonas suffered were proximately caused by the delayed diagnosis of his undescended testicles. Danoff indicated he did not believe the concept of ascending testicles was a "viable concept." Danoff further stated that not only did he not believe the concept of descending testicles that then ascend, but he could not "conceive" how that would happen.

Following Jonas' case in chief, the defendants moved for a directed verdict, which was denied by the court. The defendants then presented their case, attempting to demonstrate that Jonas had descended testicles at birth that later ascended. They elicited testimony from Bernstein, Brabec, Johnson, Carter, and Hoffman who all testified that Jonas' testicles were descended when they examined him. Willman also testified Jonas' testicles were descended when he was born. He further stated that it was virtually impossible for all the medical professionals who examined Jonas to miss his undescended testicles. Willman conceded that he examined Jonas in 2008 prior to referring him to Desmangles and that it was possible he did not feel Jonas' testicles at that visit.

The defendants also called two expert witnesses to testify on their behalf. Dr. John Weiner, a pediatric urologist, testified that it was possible for a male to have ascending testicles, meaning testicles that retreat into the body after being descended at birth. Weiner further testified that "the risk of infertility and cancer are well known for undescended testicles from birth"; however, he stated that there is no medical literature stating that there is an increased risk of infertility

or cancer in ascended testicles. He stated that although the exact cause of increased risk of infertility and cancer for undescended testicles is unknown, most people believe that there is something "wrong" with the testicle from the very beginning and that the testicle was not destined to be a "good testicle[]." Weiner opined that Jonas had no more risk of infertility or testicular cancer "than any other young boy" because he did not have undescended testicles. Weiner concluded that Jonas did not suffer an increased risk of cancer or infertility due to his ascended testicles.

Dr. Timothy Bukowski, another pediatric urologist, also testified that at birth, Jonas had descended testicles, and that as time went on, they ascended. He based this opinion in part upon the fact that there was no hernia sac found during surgery. According to Bukowski, with a "true undescended testicle," a hernia sac exists. Similar to Weiner, Bukowski opined that Jonas did not have an increased risk of infertility or cancer, explaining:

> [A] boy whose testicles are descended should function normally throughout puberty, throughout adulthood, provide normal fertility, normal pubertal growth, have a minimal risk of testicular cancer development. And as opposed to a boy whose testicles were not descended at birth, they have a higher risk of testis tumor development and a little bit higher rate of fertility problems.

Bukowski attributed the increased risk of infertility and cancer with undescended testicles to a defect in the testicle itself.

Prior to the end of the trial, the district court held a jury instruction conference. At the conference, Jonas' counsel objected to instruction No. 5, which contained the statement of the case. Instruction No. 5, as given to the jury, states:

> I. PLAINTIFFS' CLAIMS
>
> A. ISSUES
>
> The Plaintiff, Grant Jonas, claims that Defendant[s] Brent Willman, M.D. and Doctors of Children-Lincoln, P.C. were professionally negligent in the following ways:

1. In failing to timely identify Grant Jonas' undescended testicles;

2. In failing to timely manage Grant Jonas' undescended testicles;

3. In failing to arrange a proper referral for Grant Jonas' undescended testicles condition.

Defendants deny all allegation of negligence; deny that the Plaintiff's injuries were proximately caused by the actions of Brent Willman, M.D. and Doctors of Children-Lincoln, P.C. and defendants employees; and deny the nature and extent of the Plaintiff's damages.

Jonas objected, believing that the evidence was broader than the court's limitation of "undescended testes." Specifically, Jonas' counsel argued that

> at any time testicles were not in the scrotum and a finding of normal was done, that, that was negligence. . . . And so it's the limitation in the term undescended testes in those three items, which we believe makes it prejudicial and confuses the jury, and is not in conformance with the evidence proffered at trial.

In conformity with an amended pretrial order, Jonas had submitted a proposed jury instruction which stated:

**I. Plaintiffs' Claims**

**A. ISSUES**

The Plaintiff, Grant Jonas, claims that Defendants Brent Willman, M.D. and Doctors of Children-Lincoln, P.C. were professionally negligent in the following ways:

1. In failing to timely identify Grant Jonas' undescended testicles[;]

2. In failing to timely manage Grant Jonas' undescended testicles[;]

3. In providing false assurance to the family of Grant Jonas regarding his testicular descent; and

4. In failing to arrange a proper referral for Grant Jonas' undescended testicle condition.

5. Otherwise to conform to the testimony at trial.

The district court overruled Jonas' objection, stating that instruction No. 5 was taken from Jonas' theory of the case and that there was not any expert testimony that associated Jonas' injuries with ascending testicles.

After the case was submitted to the jury, it posed two questions. First, the jury asked, "'Does the plaintiff's claim of undescended testicles mean both testicles, e.g., bilateral?'" Second, the jury asked, "'Does "undescended" mean from birth?['"] After consulting with counsel for both parties, the court answered "yes" to each question. The jury subsequently returned a verdict in favor of the defendants.

### 4. Posttrial Proceedings

Following trial, Jonas moved for a new trial and the defendants sought sanctions against Jonas under Neb. Rev. Stat. § 25-824(4) (Reissue 2016). Jonas argued two grounds for a new trial. First, he asserted that Weiner testified regarding the absence of a hernia sac, which was an opinion that was not disclosed prior to trial. Second, he alleged that the use of the plural form of "testicle" in instruction No. 5 was erroneous. Jonas further argued that the evidence presented at trial would have allowed the jury to find in his favor if they had determined that only one testicle was undescended. Jonas also alleged that the court's error in issuing instruction No. 5 was compounded by the court's answer of "yes" to the jury's questions.

The district court denied Jonas' motion for a new trial. It found that Jonas failed to establish unfair surprise with Weiner's testimony. The court further stated that Jonas' expert witnesses did not present sufficient testimony to allow the court to submit his requested instruction, allowing the jury to find for him even if they found that only one testicle was undescended. The court indicated that Jonas was attempting to use expert testimony regarding bilateral undescended testicles to prove causation and damages resulting from one undescended testicle. Finally, the court stated that Jonas' claim that he was at an increased risk of cancer due to a single testicle being

undescended failed because it was based on a lost chance of survival, which the Nebraska Supreme Court had recently prohibited. See *Cohan v. Medical Imaging Consultants*, 297 Neb. 111, 900 N.W.2d 732 (2017), *modified on denial of rehearing* 297 Neb. 568, 902 N.W.2d 98. The district court also denied the defendants' motion for sanctions.

Jonas appeals, and the defendants attempt to cross-appeal.

## III. ASSIGNMENTS OF ERROR

Jonas assigns, restated and renumbered, that the district court erred in (1) refusing to give Jonas' proposed statement-of-the-case jury instruction; (2) entering a directed verdict against Jonas on damages arising from Willman's failure to diagnose, treat, or refer for ascended testicles; (3) answering jury questions which precluded the jury from acting as fact finder; (4) answering jury questions that indicated the court's opinion of the evidence and credibility of the witnesses; (5) using a "general dictionary" and conducting its own research in answering the jury questions; and (6) denying Jonas' motion for a new trial.

## IV. STANDARD OF REVIEW

[1,2] Whether the jury instructions given by a trial court are correct is a question of law. *Armstrong v. Clarkson College*, 297 Neb. 595, 901 N.W.2d 1 (2017). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

[3] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Lesiak v. Central Valley Ag Co-op*, 283 Neb. 103, 808 N.W.2d 67 (2012).

[4] A trial court's response to a question posed by the jury is reviewed for an abuse of discretion. See *In re Petition of Omaha Pub. Power Dist.*, 268 Neb. 43, 680 N.W.2d 128 (2004). See, also, *In re Estate of Clinger*, 292 Neb. 237, 872 N.W.2d 37 (2015).

[5] An appellate court reviews a denial of a motion for new trial for an abuse of discretion. See *Hemsley v. Langdon*, 299 Neb. 464, 909 N.W.2d 59 (2018). 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*.

## V. ANALYSIS

### 1. Jury Instruction No. 5

Jonas asserts that the district court erred in refusing to give the jury his proposed jury instruction on acts of negligence shown by the evidence and supported by the record. Relatedly, Jonas also argues that the district court erred by entering a "directed verdict" against him on damages arising from Willman's failure to diagnose, treat, or refer him for ascended testicles. Because our analysis of these assigned errors impacts Jonas' remaining errors, we address these errors first. We determine that the district court did not err in refusing to give Jonas' proposed jury instruction and that the court did not err in directing a verdict against Jonas on his claim of damages resulting from Willman's alleged failure to diagnose, treat, or refer Jonas for ascended testicles.

During the jury instruction conference, Jonas' counsel objected to instruction No. 5, which reads in pertinent part:

> I. PLAINTIFFS' CLAIMS
>
> A. ISSUES
>
> The Plaintiff, Grant Jonas, claims that Defendant[s] Brent Willman, M.D. and Doctors of Children-Lincoln, P.C. were professionally negligent in the following ways:

1. In failing to timely identify Grant Jonas' undescended testicles;

2. In failing to timely manage Grant Jonas' undescended testicles;

3. In failing to arrange a proper referral for Grant Jonas' undescended testicles condition.

Jonas argued that the evidence presented during trial was broader than the specific acts contained in instruction No. 5 and that the instruction should have included a claim of general negligence against the defendants and should not have been limited to "undescended testes." The district court overruled the objection, stating that Jonas' expert witnesses testified Jonas' injuries and damages were based on undescended testicles from birth and that that had been Jonas' theory of the case since the beginning.

In his appeal, Jonas argues that the court erred in giving instruction No. 5, because the evidence presented at trial entitled Jonas to recover even if the jury found his testicles were descended at birth and then ascended, or if only one testicle was undescended. Jonas' argument is flawed for numerous reasons.

[6] First, Jonas' proposed instruction contained a catch-all allegation of negligence. Specifically, he sought to include a statement that defendants were negligent: "Otherwise to conform to the testimony at trial." Such an instruction is improper. See *Graham v. Simplex Motor Rebuilders, Inc.*, 189 Neb. 507, 203 N.W.2d 494 (1973) (stating it is error to submit general allegation of negligence to jury).

As to Jonas' argument that the court should not have limited the instruction to bilateral testicles or to undescended testicles, Jonas is attempting to expand the case beyond the allegations laid out in his complaint and pretrial memorandum. In his complaint, he specifically pled that the defendants were negligent in failing to identify Jonas' "bilateral undescended testicles." In his pretrial memorandum, Jonas again identified "congenital bilateral cryptorchidism," which

his experts defined as testicles that had not descended from birth. And pursuant to the amended pretrial conference order, he submitted a jury instruction setting forth the specific act of negligence in "failing to timely identify Grant Jonas' undescended testicles."

[7,8] A pretrial order is binding upon the parties. *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). In relation to evidence, the pretrial conference is designed for and primarily used to restrict evidence to the issues formulated, secure admissions or stipulations, and avoid unduly cumulative evidence and the necessity of proving foundation in regard to clearly competent evidence. See *Cockrell v. Garton*, 244 Neb. 359, 507 N.W.2d 38 (1993). The Supreme Court has affirmed the limiting of the issues at trial to those specified in the pretrial order and limiting the admission of evidence to the issues thus established. See, *Hall v. County of Lancaster, supra*; *Cockrell v. Garton, supra*.

Here, a pretrial conference was held by the district court in June 2015. The order specifically stated: "[T]his Order shall control the subsequent course of this action. A copy of each party's Pretrial Conference Memorandum shall be attached to and filed with this Order. Such Memoranda shall be deemed incorporated in this Order . . . ." In his pretrial conference memorandum, Jonas stated: "On July . . . 1997 Grant Jonas was born. Plaintiffs contend [Jonas] was born with a medical condition known as congenital bilateral cryptorchidism. . . . Plaintiffs contend that Defendant Dr. Willman failed to recognize[] and failed to diagnose [Jonas'] congenital bilateral cryptorchidism for over 11 years." Thus, according to Jonas' own pretrial memorandum, his claim was that he had congenital bilateral cryptorchidism, defined as undescended testicles from the time of birth. Therefore, Jonas could not change his theory of the case during the jury instruction conference to allow him relief for something other than undescended bilateral testicles from birth.

The Supreme Court has either affirmed a trial court's refusal to allow a plaintiff to modify his or her theory of the case to encompass alleged negligence, beyond what was laid out in the complaint, or reversed a trial court's decision to instruct the jury on issues that could mislead them. In *Hunt v. Methodist Hosp.*, 240 Neb. 838, 485 N.W.2d 737 (1992), the Supreme Court affirmed the trial court's refusal to give the plaintiff's requested instruction which would have shifted liability to a separate physician under the doctrine of respondeat superior, when the plaintiff's complaint was predicated on specific acts of negligence of another named physician.

In contrast, in *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994), the Supreme Court determined that the trial court erred in instructing the jury regarding alternate methods of localization for a spinal surgery because this was not at issue in the case. To the extent that it was raised, it was raised by the defendant. The Supreme Court found that the instruction could mislead the jury about the issues in the case, and thus, it reversed the judgment and remanded the cause for a new trial.

In the present case, Jonas requested that the court give an instruction which would hold the defendants liable for a greater swath of negligence than that on which Jonas predicated his case. Jonas' theory of the case from the time he filed his complaint was that he was born with bilateral undescended testicles and that Willman failed to diagnose and treat his condition for over 11 years. This theory remained the same throughout the pretrial process, throughout opening statements, and throughout examination of the witnesses. The defendants based their defense on Jonas' theory and attempted to show that Jonas was born with descended testicles that later ascended. Jonas' requested jury instruction would have allowed him to recover even if the jury found that he had only one undescended testicle or if they had ascended; yet, as discussed below, no evidence supported a finding that either of these resulted in injury to Jonas. The district court was correct to refuse the proposed instruction.

[9,10] Additionally, the evidence produced at trial did not warrant Jonas' requested instruction. A litigant is entitled to have the jury instructed upon only those theories of the case which are presented by the pleadings and which are supported by competent evidence. *First Nat. Bank North Platte v. Cardenas*, 299 Neb. 497, 909 N.W.2d 79 (2018). 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*. 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*.

[11,12] In the 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. *Thone v. Regional West Med. Ctr.*, 275 Neb. 238, 745 N.W.2d 898 (2008). Expert testimony is almost always required to prove proximate cause. *Id*. Additionally, Nebraska does not recognize the loss-of-chance doctrine. *Cohan v. Medical Imaging Consultants*, 297 Neb. 111, 900 N.W.2d 732 (2017), *modified on denial of rehearing* 297 Neb. 568, 902 N.W.2d 98.

Jonas' proposed instruction sought to allow him to recover damages if the jury found that his testicles were descended at birth, but later ascended, or if only one testicle was undescended at birth. The injuries and damages that Jonas alleged he suffered included infertility, an increased risk of testicular cancer, and psychological distress. However, Jonas' expert witnesses testified that he suffered his injuries because of bilateral undescended testicles from birth. They explicitly disagreed with the theory of ascending testicles presented by the defendants, and Jonas' experts did not testify that Jonas

would have the same damages if only one testicle was undescended. Moreover, Jonas' experts were not in a position to opine on damages caused by ascending testicles, because both experts stated that it was impossible that Jonas had ascending testicles. Danoff went on to state that the concept of ascending testicles was not a "viable concept." Consequently, Jonas did not establish proximate cause between his alleged injuries and the defendants' failure to diagnose and treat him for a single undescended testicle or ascending testicles.

Additionally, and as noted by the district court in its order denying Jonas' motion for a new trial, Jonas' alleged injury of an increased risk of testicular cancer is not a recognized injury under Nebraska law. See *Cohan v. Medical Imaging Consultants, supra*.

The district court did not err by refusing to give Jonas' requested jury instruction because such an instruction was incompatible with Jonas' theory of the case contained in his pretrial memorandum, was contrary to established law in Nebraska, and was not warranted by the evidence.

### 2. Directed Verdict

In its response to Jonas' objection to instruction No. 5 at the jury instruction conference, the district court stated: "Therefore, I guess, in essence, I'm directing a verdict on your request, or your claim, that the ascended testicle resulted in some injury to your client, because you have offered no evidence that an ascended testicle causes infertility or an increased risk of cancer." In its denial of Jonas' motion for a new trial, the court again stated that it was directing a verdict against Jonas' claim for relief on his claim that he suffered damages even if he had only a single undescended testicle or ascending testicles. In his appeal, Jonas argues that there was sufficient evidence presented to survive a directed verdict. We disagree.

[13-15] Before evidence is submitted to a jury, there is a preliminary question for the court to decide, when properly

raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it and upon whom the burden is imposed. *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999). A directed verdict is proper only when reasonable minds can draw but one conclusion from the evidence. *Scheele v. Rains*, 292 Neb. 974, 874 N.W.2d 867 (2016). Medical expert testimony regarding causation based upon possibility or speculation is insufficient; it must be stated as being at least "probable," in other words, more likely than not. *Doe v. Zedek, supra*. The burden of proof is not sustained by evidence from which a jury can arrive at its conclusions only by guess, speculation, or conjecture. See *id*.

As iterated above, and as stated by the district court in its denial of Jonas' motion for a new trial, no expert testimony was presented by Jonas which connected his alleged injuries to only a single undescended testicle or ascending testicles. Jonas' experts testified that he suffered from congenital bilateral cryptorchidism, which condition caused him to be infertile and have an increased risk of cancer. Notably, both Ferentz and Danoff testified that it was not physically possible for Jonas' right testicle to have ever descended, because his gubernaculum, the structure which brings a male's testicles into his scrotum, did not reach his scrotum. Further, both experts testified that it was not possible for the left testicle to have descended because it was "heavily scarred" and adhered to the structures of Jonas' inguinal canal, the area directly above a male's scrotum. Therefore, Jonas' entire theory of the case was that his testicles could not have descended into his scrotum and were undescended from birth.

Additionally, Ferentz testified that it was not possible for Jonas to have ascending testicles and Danoff indicated that the theory of ascending testicles was not a "viable concept"; therefore, neither expert was in a position to offer opinions on any damages that Jonas may have suffered even if he had ascending testicles. Although Jonas argues on appeal that

both Ferentz and Danoff testified that Jonas could have suffered injuries even if his testicles had descended at birth and then later ascended, we disagree that the experts' testimony supports this conclusion.

Jonas argues that Ferentz' testimony that "[a]fter a year, if the testicle is still too warm, if it's still inside the body, it's going to lead to problems down the road," supports a finding that even ascended testicles can result in an increased risk of infertility or of cancer. However, this statement came after Ferentz testified, "So generally speaking, if a testicle doesn't descend within about a year of child — after childbirth, then the problems will seem — will develop, or can develop, or are more likely to develop." Thus, Ferentz was not testifying that a testicle could be damaged any time it was not in the scrotum; rather, he was specifically testifying that a testicle could become damaged if it did not descend at childbirth and was not corrected within a year of childbirth.

We recognize that Danoff testified that "if the testicle is exposed to body temperature for a long period of time, i.e. being undescended, it will result in a severely damaged testicle." However, Danoff's statement again directly followed a statement indicating that injuries associated from undescended testicles occur when the testicles are not descended at birth, not any time in a male's life. Danoff stated, "Well, if the testicles remain undescended past the age of one, perhaps two, the testicle becomes dystrophic, which means the ability of the testicle to both make sperm, which we call spermatogenesis, and make testosterone, is severely damaged . . . ." Therefore, contrary to Jonas' assertion on appeal, Danoff was not testifying that any time a male's testicles are not in the scrotum, they can become damaged; rather, he was specifically testifying that when testicles do not descend at birth and then remain undescended for a year, they can become dystrophic. Neither expert testified that the dangers inherent in an undescended testicle are the same if the testicle has descended and later ascended.

On the other hand, experts for the defense testified that a male who has ascending testicles has the same risk of developing cancer as the rest of the male population. Bukowski expressly stated that a male with descended testicles at birth should have testicles that function normally, provide normal fertility, and carry a minimal risk of testicular cancer development. Thus, the only expert testimony that addressed damages for ascending testicles was produced by the defense, and the testimony expressly stated that Jonas did not suffer damages as a result of ascended testicles. Therefore, because Jonas' experts did not present any testimony specifically regarding Jonas' injuries as a result of ascended testicles, the jury would have had to speculate as to whether Jonas' ascended testicles caused any injuries and the extent of those injuries. It is the duty of the district court to refrain from submitting to the jury the issue of damages where the evidence is such that it cannot determine that issue without indulging in speculation and conjecture. *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000). Consequently, the district court was correct in directing a verdict against Jonas' claim that his alleged injuries were caused by a single undescended testicle or ascending testicles.

### 3. Jury Questions Submitted to Court

Jonas has multiple assigned errors related to the court's response to the jury's two questions submitted during its deliberations which we address together. We find that the district court did not abuse its discretion in answering these questions.

After the case was submitted to the jury, the jury asked the court two questions. First, the jury asked, "'Does the plaintiff's claim of undescended testicles mean both testicles, e.g., bilateral?'" Second, it asked, "'Does "undescended" mean from birth?['"] After consulting with counsel for both parties by telephone on the record, the court answered "yes" to each question.

[16] The trial judge is in the best position to sense whether the jury is able to proceed with its deliberations and has considerable discretion in determining how to respond to communications indicating that the jury is experiencing confusion. *In re Estate of Clinger*, 292 Neb. 237, 872 N.W.2d 37 (2015). Further, Neb. Rev. Stat. § 25-1116 (Reissue 2016) states:

> After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court where the information upon the point of law shall be given, and the court may give its recollection as to the testimony on the point in dispute in the presence of or after notice to the parties or their counsel.

Therefore, the court has discretion to further instruct the jury and is not limited to simply directing the jury to reread the instructions previously given as Jonas asserts should have been done.

(a) Court Did Not Preclude Jury From Performing Its Function as Fact Finder and Did Not Comment on Credibility of Witnesses

Jonas asserts that, in answering "yes" to each question submitted by the jury, the district court did not allow the jury to perform its role as a fact finder and directed the jury to rely on the defendants' witnesses. We disagree.

In support of his argument, Jonas directs us to numerous cases in which a trial judge went outside his or her role and commented during trial on the evidence from the bench. We find those cases inapplicable to a situation in which the judge provides a response to a jury question, and we decline to further address them.

However, Jonas also relies upon *Bahrs v. R M B R Wheels, Inc.*, 6 Neb. App. 354, 574 N.W.2d 524 (1998), a premises

liability action against two separate entities. In that case, we determined it was improper to instruct the jury that the two defendants were to be treated the same and that if one was liable, so was the other. Jonas cites this case, stating that we determined "it was prejudicial error requiring reversal for the court to have *sua sponte* decided there was a joint enterprise between the defendants" because such a decision is for the jury. Brief for appellant at 24. However, we specifically stated, "assuming, without deciding, that the trial court had the authority to determine sua sponte as a preliminary matter the existence of a joint enterprise between the defendants," it was error to do so because there was no evidence of a joint enterprise. *Bahrs v. R M B R Wheels, Inc.*, 6 Neb. App. at 361-62, 574 N.W.2d at 529.

Here, the court did not instruct the jury requiring it to treat a certain set of facts as true. As discussed in more detail below, the court answered the jury's questions in a manner that was consistent with Jonas' theory of the case. The court did not instruct the jury that Jonas had ascended testicles or a single undescended testicle; rather, it simply responded to the jury's questions in a manner which was consistent with Jonas' theory of the case—that he had bilateral undescended testicles.

Furthermore, Jonas cannot prove he was prejudiced by the court's answers to the jury questions. As stated above, the court's answers to the jury questions are consistent with Jonas' theory of the case as stated in his complaint, pretrial memorandum, and opening statement. Additionally, the court stated that the only definition of "undescended" given during trial was "undescended from birth." Finally, the court based its answers on the fact that both of Jonas' expert witnesses testified that Jonas had bilateral undescended testicles from birth. Thus, the court's answers to the jury's questions were taken directly from Jonas' complaint and the evidence that Jonas presented during trial. Jonas was not prejudiced by the court's answers to the jury's questions.

### (b) District Court Did Not Abuse Its Discretion in Consulting Dictionary to Answer Jury's Questions

Jonas also assigns that the district court erred in consulting a "general dictionary" in answering the jury's questions. This assigned error is without merit. In explaining to counsel its decision to answer the jury's questions, the court stated:

> With respect to, "Does undescended mean from birth?" I'm going to answer, as used in Instruction No. 5, undescended testicles means from birth. And the reason I'm going to do that is because, one, the definition — I looked for a definition of undescended, and they all refer, basically, back to undescended testicles. And in the Merriam-Webster Dictionary, it says, retained within the inguinal region rather than descending into the scrotum, undescended.

Jonas argues that this constituted the trial judge's conducting his own independent investigation of the facts, contrary to Nebraska law. However, the trial judge went on to state that his response to the question was also based on the testimony from Jonas' witnesses and how the term "undescended" was used throughout the trial. Thus, the trial judge did not base his answer to the jury's question solely on the dictionary definition of undescended. The court's response was based on Jonas' complaint, pretrial memorandum, and opening statement where he stated, "His diagnosis, undescended testicles. That means from birth, that's what that term means." And it was consistent with the testimony of Jonas' expert witnesses. Thus, the court did not abuse its discretion in consulting a "general dictionary" because the court's response was consistent with Jonas' theory of the case and the evidence presented at trial.

### 4. Motion for New Trial

In his final assigned error, Jonas asserts that the district court abused its discretion in denying his motion for a new

trial. We disagree. Jonas' motion was predicated on his belief that the district court erred in issuing instruction No. 5 and erred again by answering the jury's questions. However, as stated above, we find no error in either of these. Therefore, there are no grounds for a new trial, and the district court was correct in denying the motion.

### 5. Defendants' Cross-Appeal

[17] The defendants attempted to file a cross-appeal in this case, arguing that the district court erred in denying their motion for sanctions against Jonas. Under Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2014), a party filing a cross-appeal must set forth a separate division of the brief prepared in the same manner and under the same rules as the brief of appellant. *Vokal v. Nebraska Acct. & Disclosure Comm.*, 276 Neb. 988, 759 N.W.2d 75 (2009). Thus, under § 2-109(D)(1), 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. See *Vokal v. Nebraska Acct. & Disclosure Comm., supra*.

Here, the defendants failed to properly set forth any assignment of error in their cross-appeal. Errors argued but not assigned will not be considered on appeal. *Id.* Therefore, we decline to address the defendants' attempted cross-appeal.

## VI. CONCLUSION

For the foregoing reasons, we affirm the decisions of the district court.

Affirmed.

# Charity Field Farms, Inc., appellant, v. Board of Educational Lands and Funds et al., appellees.

930 N.W.2d 581

Filed May 21, 2019. No. A-18-044.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's.
2. **Jurisdiction: Appeal and Error.** When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
3. **Administrative Law: Final Orders: Appeal and Error.** Under the Administrative Procedure Act, any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review.
4. **Administrative Law: Words and Phrases.** For purposes of the Administrative Procedure Act, a contested case is defined as a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.

Appeal from the District Court for Lancaster County: Kevin R. McManaman, Judge. Appeal dismissed.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Douglas J. Peterson, Attorney General, and James D. Smith, Solicitor General, for appellees.

Pirtle, Arterburn, and Welch, Judges.

Arterburn, Judge.

## INTRODUCTION

Charity Field Farms, Inc. (Charity Field), requested that the Board of Educational Lands and Funds refer a dispute over a land survey which had arisen between Charity Field and a neighboring land owner, Trampe Bros., L.L.C., to Nebraska's State Surveyor for an evidentiary hearing and settlement. At the time of Charity Field's request, it was involved in litigation with Trampe Bros. regarding a property line dispute and an associated land survey. After a regular meeting of the board, it declined to refer the dispute to the State Surveyor. Charity Field sought judicial review of the board's decision. The Lancaster County District Court concluded it lacked subject matter jurisdiction because the board's decision "was not a final order in a contested case." See Neb. Rev. Stat. § 84-917(1) (Reissue 2014). The court dismissed Charity Field's purported appeal from the board's decision, and now Charity Field appeals to this court. Upon our review, we determine that the district court did not have jurisdiction and that as such, we also lack jurisdiction. Therefore, the appeal is dismissed.

## BACKGROUND

Before we recite the factual circumstances surrounding this appeal, we note some concerns regarding the record before us. In particular, we note that our "record" of the proceedings held before the board was created by Charity Field, and not the board, which was the agency presiding over the proceedings. This "record" is found in the transcript as an attachment to the "Appeal" that was filed in the Lancaster County District Court. Charity Field has provided some indication that the board refused to make or provide an official record regarding what transpired at the pertinent board meeting. Ultimately, we need not decide whether the record before us is proper, because even if we consider the record created and provided

by Charity Field, we conclude that we do not have jurisdiction to consider the merits of Charity Field's assertions. Accordingly, we simply note that our recitation of the factual circumstances underlying this appeal are taken from an "unofficial" record created by Charity Field.

On January 5, 2017, counsel for Charity Field sent two letters to the office of the State Surveyor. In one of the letters, counsel describes the ongoing litigation between Charity Field and Trampe Bros. and indicates that Charity Field is requesting that the State Surveyor resolve a dispute regarding a land survey that was conducted as a part of the litigation. That letter reads as follows:

> [Trampe Bros. and Charity Field] are involved in litigation filed in the District Court of Phelps County, Nebraska. This litigation involves accretion land. As a result of the litigation a survey of the accretion land and surrounding land, together with designation of boundaries was prepared by Mitch Humphrey, dated December 7, 2016, and concerns land in Sections 10 & 15 in Township 8 North, Range 17 West. This survey designating boundaries has created a dispute between the parties. As attorneys for . . . Charity [Field], pursuant to §84-410 Neb. R.R.S., it is requested that this dispute be referred to the State Surveyor for settlement and hearing be held on the matter.
>
> To make it clear, Charity Field[']s dispute is limited to the surveyor's designation and placement of the boundary line between Buffalo and Phelps County, Nebraska and the surveyor's opinion, set forth in the survey, that a certain location on the survey is the "thread of the stream".

In the second January 5, 2017, letter to the office of the State Surveyor, Charity Field's counsel writes that Charity Field "respectfully objects to the filing" of the December 2016 land survey authored by Mitch Humphrey. Counsel explains:

> Because, according to statute, the information contained within a filed survey is given the status of "prima

> facie evidence of correctness", it is important that a surveyor's mere opinion [regarding the location of the thread of the stream] appearing on a survey is not given the status of "prima facie evidence of correctness."

Counsel for Charity Field wrote a third letter to the office of the State Surveyor on January 25, 2017. In this letter, counsel notes that after the January 5 letters were forwarded to the office, Humphrey's December 2016 land survey was, in fact, filed over Charity Field's objection. The January 25 letter renews the objections to the now filed survey and requests that the land survey "be stricken from [the] repository."

On February 2, 2017, the board responded to Charity Field's previous correspondence. In a written letter, the chief executive officer of the board wrote:

> The Nebraska Board of Educational Lands and Funds has received your correspondence addressed to the State Surveyor, dated January 5, 2017 wherein, essentially, you request that an inquiry or dispute regarding a survey be referred to the State Surveyor for his opinion, in reference to Section 84-410, Neb. R.R.S.
>
> This letter is to inform you that this matter has been placed on the agenda to be discussed at the Board of Educational Lands and Funds' next regularly scheduled meeting on Friday, February 17th at 8:15 a.m. at our offices in Lincoln, Nebraska. A total of ½ hour has been allocated to this issue, which time shall be divided proportionately among any members of the public who appear to provide comment.
>
> Should you wish to be heard on this matter, please be present on the above date at the aforementioned time, which meeting will be held in our Board room.

Counsel for Charity Field continued corresponding with the board in a letter dated February 7, 2017. In the letter, counsel for Charity Field expresses some confusion with what was to transpire at the board's meeting on February 17. Counsel expressed concern that the board meeting would not be "an

evidentiary hearing as contemplated by the statute and as we requested." Charity Field requested that it be provided with an opportunity to present evidence and argument on its position at a hearing without such a limited timeframe. Charity Field also indicated its desire to have a court reporter present at the evidentiary hearing in order to make a record. The board responded to Charity Field's inquiry the next day. In a letter dated February 8, 2017, the board explained that "the item placed upon the agenda of the Board of Educational Lands and Funds is to allow the Board of Educational Lands and Funds to take formal action as to whether to refer this matter to the State Surveyor," and that "[p]ursuant to statute, that step needs to be accomplished prior to the Surveyor rendering any opinion."

Counsel for Charity Field and for Trampe Bros. appeared at the board meeting on February 17, 2017. Counsel for Charity Field brought a court reporter to the meeting to make a record. Counsel then described to the board the underlying litigation between Charity Field and Trampe Bros. and discussed, in detail, Charity Field's objections to the December 2016 land survey authored by Humphrey. In support of Charity Field's position, it provided "exhibits" to the board members. Such exhibits included copies of the pleadings filed in the case before the Phelps County District Court; copies of the correspondence between counsel and the board; portions of deposition testimony from a designated representative of Charity Field; and copies of the survey at issue. Ultimately, Charity Field expressed to the board its belief that because there was a "legitimate dispute" regarding the land survey, the board was statutorily required to submit the issue to the State Surveyor for his review. Counsel for Trampe Bros. also made a brief statement to the board. First, counsel indicated his belief that the board meeting was not "an evidentiary hearing" and that, as a result, Trampe Bros. would not be offering any exhibits. Counsel also argued that the board did not have jurisdiction to consider the dispute regarding the land survey,

because of the pending litigation in the district court. Finally, counsel provided case law to the board to demonstrate that there was no statutory right to review by the State Surveyor under these circumstances. The board took the "matter under advisement" and indicated it would render a decision at some point in the future.

On March 20, 2017, the board authored a letter addressed to counsel for Charity Field and to counsel for Trampe Bros. In the letter, the board indicated that at its regularly scheduled March board meeting, it had taken a vote regarding whether to refer the parties' survey dispute to the State Surveyor. The letter stated, "It was the determination of the Board, following a motion, second and unanimous vote, to defer to the jurisdiction of the Phelps County District Court, and thereby deny Charity Field [its] request to refer this matter to the State Surveyor's Office."

On April 18, 2017, Charity Field filed a document it entitled "Appeal" in the Lancaster County District Court. The case caption listed the board, the chief executive officer of the board, and the State Surveyor as "Appellees." In the document, Charity Field indicated that it was appealing from the board's decision to deny its request to submit the dispute over the December 2016 land survey authored by Humphrey to the State Surveyor. Charity Field requested that the district court order the board to submit the dispute to the State Surveyor for review. The named appellees, including the board, filed a motion to dismiss Charity Field's purported appeal. In the motion, the appellees argued, among other things, that the district court did not have subject matter jurisdiction to decide the issue raised in Charity Field's appeal.

A hearing was held on the motion to dismiss. After the hearing, the district court entered a detailed order granting the motion to dismiss. Specifically, the court found that it lacked jurisdiction over the matter because it "does not involve an [Administrative Procedure Act] appeal, a necessary party is missing, and to entertain the matter would lead to piecemeal

litigation and appeals." We will further discuss the district court's specific findings as necessary in our analysis below.

Charity Field appeals from the district court's finding that it lacked jurisdiction over Charity Field's appeal from the board's decision to deny the request to submit the survey dispute to the State Surveyor.

## ASSIGNMENTS OF ERROR

Charity Field's assignments of error can be summarized to allege that the district court erred in failing to find that it had jurisdiction of the matter and in dismissing the case.

## STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's. *Kaplan v. McClurg*, 271 Neb. 101, 710 N.W.2d 96 (2006).

[2] When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *Id*.

## ANALYSIS

In the district court's order granting the board's motion to dismiss, it indicated that Charity Field's "Appeal," purported to be an appeal pursuant to the Administrative Procedure Act (APA). See Neb. Rev. Stat. § 84-901 et seq. (Reissue 2014 & Cum. Supp. 2018). However, the court indicated that the "Appeal" may also be read as an action for declaratory judgment which was asking the district court to direct the board "to refer a survey dispute between landowners to the State Surveyor for arbitration." Ultimately, the district court concluded that under either theory, it did not have jurisdiction to consider the merits of Charity Field's claims.

The district court found that if the action was to be construed as asking for a declaratory judgment, then the court did not have jurisdiction because (1) Charity Field did not join Trampe Bros., which was a necessary party to the action, and (2) there was already a pending action with regard to the disputed land in the Phelps County District Court. The court explained, "Entertaining a declaratory judgment action in this circumstance would result in the precise judicial inefficiency, complete with piecemeal litigation and appeals, that [the Nebraska Supreme Court has previously] strongly discourage[d]." We note that, on appeal, Charity Field does not assert that its "Appeal" filed in the district court contained an action for declaratory judgment. Rather, Charity Field has proceeded as though the only action raised by the pleading was an appeal from an agency decision under the APA. As a result, we need not address whether the district court was correct in determining that it did not have jurisdiction over a declaratory judgment action.

In the district court's order, it found that it lacked jurisdiction over Charity Field's purported appeal from the decision of the board, which is a state agency. The district court concluded that "this matter does not constitute a contested case or controversy under the APA." Specifically, the court found that there was not a contested hearing held before the board and that the board was not required to refer the dispute over the December 2016 land survey to the State Surveyor for review. Upon our review of the record provided to us, we agree with the findings of the district court.

[3,4] Under the APA, "Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review under the [APA]." § 84-917(1). For purposes of the APA, a contested case is defined as a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing. See § 84-901(3). See, also, *Kaplan v.*

*McClurg*, 271 Neb. 101, 710 N.W.2d 96 (2006). A proceeding becomes a contested case when a hearing is required. *Id.*

Here, there was no hearing held before the board. Rather, Charity Field attended a regularly scheduled monthly meeting of the board and argued that the board should refer the dispute over the land survey to the State Surveyor. Arguably, Charity Field proceeded as though the board meeting were an evidentiary hearing. Charity Field brought a court reporter to the meeting to make a record of what occurred. It also offered "exhibits" to the board as evidence of its position. However, Charity Field's actions did not transform the monthly board meeting into an evidentiary hearing. In fact, in its February 8, 2017, letter to Charity Field, the board made it quite clear that the monthly board meeting was not an evidentiary hearing. Instead, the issue of whether to refer the dispute over the land survey to the State Surveyor was merely one item on the board's meeting agenda.

Moreover, the board was not required by law or constitutional right to provide any specific relief to Charity Field. Contrary to Charity Field's assertion at the board meeting, in the district court, and now, in this appeal, the statutorily defined powers of the board did not require it to refer the dispute over the land survey to the State Surveyor. Neb. Rev. Stat. § 84-408 (Reissue 2014) provides, in relevant part: "The [b]oard . . . shall refer to the State Surveyor all questions or inquiries relating to surveys, grievances or disputes growing out of conflicting surveys of lands or lots. The surveyor shall issue and prepare the advice, instruction and opinion, and issue the same under the approval of the board." In addition, Neb. Rev. Stat. § 84-410 (Reissue 2014) provides as follows:

> In case of any dispute among owners of and arising for or by reason of any survey of boundaries of lands within this state, or in case of dispute or disagreement between surveyors as to said surveys or boundaries, the same shall be referred to the State Surveyor for settlement. He is hereby appointed as arbitrator to settle and determine

> such disputes or disagreements as to said surveys and boundaries and his decision shall be prima facie evidence of the correctness thereof. In making such surveys, the State Surveyor and deputies shall each have power in any county of the State of Nebraska to summon and compel the attendance of witnesses before them to testify as to material facts relating to their knowledge of lost or obliterated corners. The State Surveyor and deputies are authorized and empowered to administer oaths and affirmations to their assistants and to witnesses.

Although each of these statutory sections is worded such that the board "shall refer" disputes to the State Surveyor, the Supreme Court has held that this language is permissive, and not mandatory. *Reed v. Wellman*, 110 Neb. 166, 193 N.W. 261 (1923). In *Reed v. Wellman*, 110 Neb. at 171, 193 N.W. at 263, the court held:

> With these principles in view, it seems that the word "shall" should be construed as permissive rather than mandatory, which will effectuate the intention of the [L]egislature to provide by agreement of the parties a prompt and inexpensive method of determining disputed boundaries, without interference with the common law and constitutional right of the citizen to appeal to the courts.

The court further explained that if the language was read to be mandatory, it would "provide a condition precedent to the presentation of the dispute to the courts of the state" and such a condition precedent would be unconstitutional. *Id*. at 170, 193 N.W. at 262. To the extent that Charity Field suggests that *Reed v. Wellman, supra*, is no longer good law or that it should be overruled due to further developments in our statutory laws, we note that neither Charity Field nor our own research has produced any specific statute or case which has expressly overruled the Supreme Court's holding in *Reed v. Wellman, supra*. As such, the case remains good law and continues to be precedent which this court is obligated to follow.

The APA does not provide for judicial review of the board's decision in this matter. There has not been a final decision in a contested case. There was no evidentiary hearing held by the board, and the board was not required to provide Charity Field with the relief it sought. As such, the district court was correct in deciding that, pursuant to the APA, it did not have subject matter jurisdiction over Charity Field's purported appeal.

## CONCLUSION

Our record reveals that the board's decision to deny Charity Field's request to refer the dispute over the December 2016 land survey to the State Surveyor did not create a contested case over which the district court had jurisdiction, and the court correctly determined that it lacked jurisdiction over this matter. When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *Kaplan v. McClurg*, 271 Neb. 101, 710 N.W.2d 96 (2006). The district court did not have jurisdiction, and this court also lacks jurisdiction. Therefore, the appeal is dismissed.

Appeal dismissed.

# Rita Sundermann, appellant, v. Hy-Vee, Inc., and Sweetbriar II, LLC, appellees.

929 N.W.2d 919

Filed May 28, 2019. No. A-18-250.

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. ____: ____. In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Proof.** A party moving for summary judgment makes a prima facie case for summary judgment by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial.
4. ____: ____. 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.
5. **Summary Judgment.** On a motion for summary judgment, the question is not how the factual issue is to be decided but whether any real issue of material fact exists.
6. ____. Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show 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.
7. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most

favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.

8. **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. To warrant summary judgment in its favor in a negligence action, a party must submit evidence showing the absence of at least one of these elements.
9. **Negligence.** Whether a duty exists is a policy decision, and a lack of foreseeable risk in a specific case may be a basis for a no-breach determination, but such a ruling is not a no-duty determination.
10. ____. In order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence.
11. **Negligence: Judgments.** The extent of foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable. Courts should leave such determinations to the trier of fact unless no reasonable person could differ on the matter. And if the court takes the question of negligence away from the trier of fact because reasonable minds could not differ about whether an actor exercised reasonable care (for example, because the injury was not reasonably foreseeable), then the court's decision merely reflects the one-sidedness of the facts bearing on negligence and should not be misrepresented or misunderstood as involving exemption from the ordinary duty of reasonable care.
12. **Negligence: Judgments: Summary Judgment.** Although foreseeability is a question of fact, there remain cases where foreseeability can be determined as a matter of law, such as by summary judgment.

Appeal from the District Court for Douglas County: Horacio J. Wheelock, Judge. Reversed and remanded for further proceedings.

Matthew A. Lathrop, of Law Offices of Matthew A. Lathrop, P.C., L.L.O., and Kathy Pate Knickrehm for appellant.

Michael T. Gibbons and Raymond E. Walden, of Woodke & Gibbons, P.C., L.L.O., for appellees.

Pirtle, Riedmann, and Arterburn, Judges.

Arterburn, Judge.

## INTRODUCTION

Rita Sundermann appeals from an order of the district court for Douglas County granting the motion for summary judgment made by Hy-Vee, Inc., and Sweetbriar II, LLC (collectively Hy-Vee). Sundermann argues on appeal that the district court erred in finding, as a matter of law, that Hy-Vee could not have breached its duty of care to her because the motor vehicle accident that injured her on Hy-Vee's property was not reasonably foreseeable. For the following reasons, we reverse the grant of summary judgment of the district court and remand the matter for further proceedings.

## BACKGROUND

Sundermann filed a complaint against Hy-Vee on December 21, 2015, alleging that she was injured as a result of Hy-Vee's negligence during a motor vehicle accident on its property on March 2, 2012. On January 12, 2016, Sundermann filed an amended complaint. Hy-Vee filed an answer to the amended complaint, which included affirmative defenses, on January 29. Also on January 29, Hy-Vee filed a third-party complaint against Robert Swanson, alleging that he was the driver who negligently struck Sundermann with his vehicle. On March 16, the third-party complaint against Swanson was dismissed with prejudice. Hy-Vee filed a motion for summary judgment against Sundermann on December 4, 2017.

A hearing on the motion for summary judgment was held on February 16, 2018. No testimony was offered, but 17 total exhibits were offered and admitted, in particular a deposition given by Sundermann and a deposition given by Swanson.

Hy-Vee, Inc., owns a grocery store on North 156th Street in Omaha, Nebraska. On the corner of 156th Street and West Maple Road, Hy-Vee, Inc., owns and operates a filling station and convenience store, which sits on land owned by Sweetbriar II. Immediately to the north of the convenience store on a grassy area was an air compressor and hose for filling tires.

To the north of the air compressor was a 24-foot-wide paved access drive that vehicles used to enter and exit the property. Swanson described the northern access drive as being busier and used by more vehicles than a second access drive located to the south of the convenience store. On the north side of the northern access drive was a row of six parking spots, which were described as "'right angle'" or "'90-degree'" parking spots, meaning they were situated perpendicular to the access drive. There was no designated parking space for patrons using the air compressor, but drivers could park along the south curb of the northern access drive in order to fill their tires.

On March 2, 2012, Sundermann stopped at Hy-Vee and filled her car with gasoline. She said that it was a windy, chilly day that was nearing dusk. As she had done on prior occasions, she used the air compressor to refill her tires. Because the parking spots in front of the air compressor—to the convenience store's east—were occupied, she parked alongside the south curb of the northern access drive. Her car was facing west. She said that she had parked in the same place in the past when using the air compressor.

Sundermann noticed a number of vehicles, including a pickup truck that belonged to Swanson, parked in the right-angle parking spots to the north of the access drive. She stated that she looked at the pickup truck before filling her tires, but could not tell whether anyone was inside it, and that she noticed no illuminated brake lights, exhaust, or other indications that the pickup truck was running. She never saw anyone walk out of the store and get into the pickup truck.

Sundermann first filled her two driver's-side tires before looping the hose over the hood of her car to fill the passenger's-side tires. As she was facing her car and crouched down filling the front passenger-side tire, she heard Swanson's pickup truck's ignition start. Sundermann stood up but did not have time to turn around or get out of the way before she felt the impact of the pickup truck hitting her. She said that she

was hit from the hips down to her knees and collapsed to the ground once Swanson pulled forward, because her legs would not support her. As a result of her injuries, a metal rod was implanted in Sundermann's left leg.

Swanson worked as a cashier at the Hy-Vee convenience store from 2009 through 2013 or 2014 and usually worked from 10 a.m. to 6 p.m. Swanson stated that employees were supposed to park in the right-angle parking spots to the north of the store and that he had parked his pickup truck in one of those spots on March 2, 2012. Swanson also stated that he had observed people park their vehicles alongside the south curb of the northern access drive in order to use the air compressor. He said that more people parked in the access drive than in the parking spots to the east of the store when they used the air compressor.

Noting that there was no signage advising where to park to use the air compressor, Swanson stated that he thought it created an unsafe situation. He believed that the air compressor should not be located where it was because the northern access drive was "very, very busy." Swanson said that on past occasions, he had been parked in a right-angle parking spot to the north of the store and had to wait to leave until a car finished using the air compressor if it was parked alongside the south curb of the access drive. In order to get out of the right-angle parking spots when someone was parked alongside the south curb using the air compressor, Swanson stated, a driver would have to "cut [his or her] tires real hard to the back." Swanson acknowledged that he had never heard of any accidents involving someone using the air compressor, however.

On March 2, 2012, Swanson exited the convenience store shortly after 6 p.m. and got in his pickup truck, which was parked in a right-angle parking spot to the north of the store. He said that Sundermann's car was not parked in the northern access drive when he exited the store. Swanson said that it was dark enough that he turned on his headlights. He also said that he called his wife while he was sitting in his pickup

truck, which was running, but that he hung up before putting his pickup truck in reverse.

Swanson stated that he waited for three to four cars to pass behind him before beginning to back up. Then, when he saw Sundermann's car behind him, he hit the wrong pedal, pressing on the accelerator instead of the brake pedal. Swanson said that he never saw Sundermann herself until he realized he had hit a car and a person. After the collision with Sundermann, Swanson pulled back into his parking spot and waited for the authorities to arrive. Swanson said that he was not ticketed, although he has never denied responsibility for the accident and has accepted fault. Swanson also acknowledged that his insurance company had settled Sundermann's claim against him.

At the hearing on Hy-Vee's motion for summary judgment, the court also received as exhibits depositions from the parties' expert witnesses. Sundermann retained Daniel Robison, whose report and deposition were admitted as evidence. Hy-Vee retained Jason Stigge, whose report and deposition were likewise admitted. Hy-Vee's director of site planning, Jeff Stein, was also deposed, and his deposition was admitted, as were exhibits containing photographs of the site and an affidavit signed by Sundermann's counsel.

Robison, who has 40 years' experience complying with codes in designing facilities that include convenience stores and gas stations, opined that it was unsafe for Hy-Vee to place the air compressor in a location that would cause patrons to park in the drive aisle when using it. Robison said he believed that if Hy-Vee had properly designed and constructed the property, the accident would not have occurred. Robison also stated that he had not encountered many cases in which a convenience store placed devices like an air compressor in a location that encouraged patrons to block drive aisles, but he acknowledged that other stores in Omaha positioned their air compressors similarly to the one at issue in this matter. He opined it was foreseeable both that a patron would park

as Sundermann did and that drivers would make errors while backing out of a parking spot as Swanson did.

In his written report, Robison said that Hy-Vee ought to have adhered to safety guidelines that designated a separate area for exterior amenities such as an air compressor. Robison noted that the original site design did not include installing a tire filling station on the north side of the convenience store. He opined that Hy-Vee's failure to construct a dedicated parking area that was separated from the drive aisle was a cause of Sundermann's injuries. Such a failure also violated codes and standards for maintaining safe premises according to Robison.

In contrast, Stigge, a mechanical engineer and consultant, opined that the Hy-Vee convenience store was designed in compliance with relevant codes and safety standards and found that the parking lot was not dangerous. Stigge stated that a convenience store does not necessarily have a predetermined flow of traffic, so an air compressor could never really be placed outside possible traffic flow. Stigge also opined that the physical separation of pedestrian and automobile traffic was not feasible based on a convenience store's purpose.

In his written report, Stigge noted that there were not specific requirements related to the location of an air filling station included in codes adopted by the city of Omaha. He also reviewed the police report and photographs and pointed out in his report that Swanson's tires left acceleration marks on the ground, leaving the impression that Swanson had pressed the accelerator fully to the floor before colliding with Sundermann. Based on his inspection of the accident scene and automotive accident reconstruction techniques, Stigge wrote that Swanson struck Sundermann with enough force to rotate the front of her car around the curb and place a gouge on the concrete curb. He opined that Hy-Vee's layout and location of its air compressor had not created an unsafe condition, however. Stigge noted that Hy-Vee's placement of the air compressor was common among convenience stores in the

area and that convenience stores naturally create a mixture of pedestrian and vehicular traffic. Additionally, Stigge opined that it was not reasonably foreseeable that a driver such as Swanson would lose control of his vehicle and strike a person like Sundermann, who was positioned beside another vehicle immediately behind the first vehicle.

Stein, Hy-Vee's director of site planning, acknowledged in his deposition that not all Hy-Vee convenience stores include a designated area for using such an air compressor. He stated that convenience store parking lots necessarily include a mixture of both pedestrian and automobile traffic using the same space, including in drive aisles. Stein said that he did not think it was unreasonable for Sundermann to park where she did in order to use the air compressor. He also stated that it appeared there was plenty of room for other drivers to have navigated around Sundermann when she parked where she did.

Having reviewed the parties' briefs and exhibits, the district court entered an order on February 23, 2018, granting Hy-Vee's motion for summary judgment. The district court found that Hy-Vee owed a legal duty to all patrons of its convenience store premises, including Sundermann. However, the district court further found that Hy-Vee did not, as a matter of law, breach the duty of care it owed to Sundermann.

The district court held that a breach of duty occurs only when the resulting injury to a plaintiff is a reasonably foreseeable consequence of the defendant's conduct. The court held that the accident in this instance was not reasonably foreseeable as a matter of law. The court specifically examined whether it was reasonably foreseeable that a "person filling [a] vehicle's tires with air at a gas station will be hit by the driver of another vehicle whose foot slipped off the break [sic] onto the accelerator and caused injury to a plaintiff." The court found that no reasonable jury could find that Hy-Vee breached its duty of care to Sundermann, because the accident that injured her was not reasonably foreseeable.

In finding that Hy-Vee did not, as a matter of law, breach the duty of care it owed to Sundermann, the district court therefore also found that Hy-Vee was not negligent as a matter of law. Thus, the district court granted Hy-Vee's motion for summary judgment.

Sundermann now appeals.

## ASSIGNMENTS OF ERROR

On appeal, Sundermann assigns that the district court erred in granting Hy-Vee's motion for summary judgment based on the findings, as a matter of law, that Hy-Vee did not breach its duty of care and that it did not cause Sundermann's injuries.

## STANDARD OF REVIEW

[1,2] 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. *Ray Anderson, Inc. v. Buck's, Inc.*, 300 Neb. 434, 915 N.W.2d 36 (2018). In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

## ANALYSIS

Sundermann argues that summary judgment should not have been granted in this matter because she presented evidence of genuine issues of material fact related to Hy-Vee's breach of its duty of care and Hy-Vee's causation of her injuries. Hy-Vee argues in response that because the accident was not a reasonably foreseeable consequence of Hy-Vee's actions, Hy-Vee could not, as a matter of law, breach the duty it owed to Sundermann. Hy-Vee also argues that its site design was not the proximate cause of Sundermann's injuries. Viewing

the evidence in the light most favorable to Sundermann, we disagree with the district court's finding that Hy-Vee did not, as a matter of law, breach its duty of care. We find that Sundermann presented sufficient evidence of Hy-Vee's negligence as to engender a question of material fact that must be determined by the finder of fact in this matter. We therefore reverse the judgment of the district court and remand the matter for further proceedings.

[3,4] A party moving for summary judgment makes a prima facie case for summary judgment by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. *Thomas v. Board of Trustees*, 296 Neb. 726, 895 N.W.2d 692 (2017). 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. *Id*.

[5-7] On a motion for summary judgment, the question is not how the factual issue is to be decided but whether any real issue of material fact exists. *Cisneros v. Graham*, 294 Neb. 83, 881 N.W.2d 878 (2016). Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show 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. *Id*. 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*.

[8] 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*, 298 Neb. 654, 905 N.W.2d 540 (2018). To warrant summary judgment in its favor in a negligence action, a party must submit evidence showing the absence of at least

one of these elements. See *Thomas v. Board of Trustees, supra*. Because the district court granted summary judgment based on an absence of evidence supporting Hy-Vee's breach of its duty to Sundermann, we turn our attention to that element of negligence.

[9,10] In adopting the duty analysis contained in 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7 (2010), the Nebraska Supreme Court held that whether a duty exists is a policy decision and that a lack of foreseeable risk in a specific case may be a basis for a no-breach determination, but that such a ruling is not a no-duty determination. See *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010). In order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence. *Id*.

[11,12] The extent of foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable. *Id*. "[D]eciding what is reasonably foreseeable involves common sense, common experience, and application of the standards and behavioral norms of the community—matters that have long been understood to be uniquely the province of the finder of fact." *Id*. at 212, 784 N.W.2d at 914. Thus, courts should leave such determinations to the trier of fact unless no reasonable person could differ on the matter. *Id*. And if the court takes the question of negligence away from the trier of fact because reasonable minds could not differ about whether an actor exercised reasonable care (for example, because the injury was not reasonably foreseeable), then the court's decision merely reflects the one-sidedness of the facts bearing on negligence and should not be misrepresented or misunderstood as involving exemption from the ordinary duty of reasonable care. *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra*. Therefore, although foreseeability is a question of fact, there remain cases where

foreseeability can be determined as a matter of law, such as by summary judgment. *Thomas v. Board of Trustees*, 296 Neb. 726, 895 N.W.2d 692 (2017).

Turning to the present case, we are mindful that in evaluating an appeal from a summary judgment, we evaluate only whether the parties' pleadings and admitted evidence show a genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts. See *Ray Anderson, Inc. v. Buck's, Inc.*, 300 Neb. 434, 915 N.W.2d 36 (2018). We are also mindful that we give the benefit of all reasonable inferences deducible from the evidence and review the evidence in the light most favorable to Sundermann because she is the party against whom summary judgment was granted. See *id*.

Evidence was presented to the district court showing that Sundermann parked alongside the south curb of Hy-Vee's northern access drive in order to use the store's air compressor to fill her car's tires. As employees were instructed to do, Swanson was parked in the right-angle parking spots when Sundermann was parked in the northern access drive. Swanson described needing to sharply turn his vehicle when backing out of those parking spots if someone was parked alongside the curb using the air compressor. Swanson stated in his deposition that during the 4 to 5 years he worked as a store cashier, he had observed more people use the air compressor while parked in the access drive than parked in the parking spots on the east side of the convenience store. Swanson opined that he believed the location of the air compressor created an unsafe situation for people parked in the access drive.

Robison, the expert witness retained by Sundermann, opined that it was foreseeable that patrons would park where Sundermann had parked in the northern access drive if they intended to use the air compressor. He noted that Hy-Vee's placement of the air compressor encouraged patrons to block drive aisles in order to fill their tires. Robison also opined that it was foreseeable that a driver may make errors while backing out of a parking spot. Hy-Vee's director of site planning,

Stein, stated that it was not unreasonable for Sundermann to have parked alongside the northern access drive's curb when using the air compressor. He also acknowledged that convenience stores necessarily include a mixture of both pedestrian and automobile traffic within the same spaces.

Considering this evidence in a light most favorable to Sundermann, it is clear that a finder of fact could find it reasonably foreseeable that a patron would park in the northern access drive while using Hy-Vee's air compressor. There is some evidence that more patrons who used the air compressor actually parked in the northern access drive than elsewhere. It is also clear that a finder of fact could find it foreseeable that automobiles would be parked in the right-angle parking spots to the north of the access drive, including automobiles belonging to store employees.

Moreover, finders of fact may—when using their common sense and common experience and applying the standards and behavioral norms of the community—infer from the evidence that automobiles could simultaneously be parked in the northern access drive and in the right-angle parking spots farther to the north. Finders of fact may also reasonably infer from the evidence that an automobile would back out from one of the right-angle parking spots and collide with an automobile parked in the northern access drive, perhaps owing, in part, to the need for drivers to sharply turn their vehicles when backing out of those parking spots. We note the district court focused on the very narrow fact pattern present in this case, that being the foreseeability that a person's foot would slip off the brake pedal and inadvertently hit the gas pedal, resulting in the collision. We find that such a fact-specific analysis is not necessary in assessing the question at hand and find that a reasonable person could conclude that it was foreseeable to Hy-Vee that a vehicle could be operated in such a manner as to fail to observe a person such as Sundermann utilizing the air compressor in the access drive area, resulting in a collision and injury.

Reasonable minds may differ in their assessment of foreseeable risk at the time of Hy-Vee's alleged negligence—which is to say that material questions of fact surround whether Hy-Vee exercised appropriate care or breached its duty of care to Sundermann. We find that Sundermann proffered sufficient evidence to engender questions of material fact that must be resolved by a trier of fact. Thus, summary judgment was inappropriate in this matter. We therefore reverse the judgment of the district court and remand the matter for further proceedings.

As a final matter, we note that Sundermann also assigned that the district court erred in its findings related to the causation element of her negligence action. Both Sundermann and Hy-Vee also briefed this issue. However, the district court's order makes only passing reference to causation and did not fully evaluate the issue. Nonetheless, we have reviewed the parties' arguments and, for substantially the same reasons discussed herein, hold that material questions of fact do exist related to causation as well, which warrant a finder of fact's review upon further proceedings.

## CONCLUSION

Based on the foregoing, we reverse the district court's order granting Hy-Vee's motion for summary judgment and remand the matter for a trial on the merits.

Reversed and remanded for
further proceedings.

# Mark Allen Koch, appellant, v. Lower Loup Natural Resources District, appellee.

931 N.W.2d 160

Filed June 4, 2019. No. A-17-1257.

1. **Actions: Equity: Public Meetings: Appeal and Error.** An appellate court reviews actions for relief under Nebraska's Open Meetings Act in equity because the relief sought is in the nature of a declaration that action taken in violation of the act is void or voidable.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. But when credible evidence is in conflict on material issues of fact, an appellate court considers and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.
3. **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 decision made by the court below.
4. **Public Meetings: Words and Phrases.** Although the Open Meetings Act does not define "subcommittee," a subcommittee is generally defined as a group within a committee to which the committee may refer business.
5. **Public Meetings: Public Policy.** The purpose of the Open Meetings Act is to prevent the formation of public policy in secret.
6. **Public Meetings: Public Policy: Legislature.** The Open Meetings Act does not require policymakers to remain ignorant of the issues they must decide until the moment the public is invited to comment on a proposed policy. By excluding nonquorum subgroups from the definition of a public body, the Legislature has balanced the public's need to be heard on matters of public policy with a practical accommodation for a public body's need for information to conduct business.

7. **Public Meetings.** The prohibition against decisions or formal action in a closed session also proscribes rubberstamping or reenacting by a pro forma vote any decision reached during a closed session.

Appeal from the District Court for Valley County: Karin L. Noakes, Judge. Affirmed.

Mark Allen Koch, pro se.

Thomas S. Kruml, of Kruml Law Office, P.C., L.L.O., for appellee.

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

Bishop, Judge.

## I. INTRODUCTION

Mark Allen Koch filed a pro se complaint requesting a writ of mandamus to void various meetings of the Lower Loup Natural Resources District Programs/Projects Committee (Committee), and all actions taken therein and therefrom, alleging that the Committee violated Nebraska's Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 to 84-1414 (Reissue 2014 & Cum. Supp. 2018). The district court for Valley County granted summary judgment in favor of the Lower Loup Natural Resources District (Lower Loup NRD). Koch appealed, and this court reversed the judgment and remanded the cause for further proceedings. See *Koch v. Lower Loup NRD*, No. A-15-559, 2016 WL 7209828 (Neb. App. Dec. 13, 2016) (selected for posting to court website). After a postremand bench trial, the district court determined that the Committee was not functioning as a "public body" during the meetings complained of and that therefore, it did not violate the Open Meetings Act. Koch's requested relief was denied, and judgment was entered in favor of the Lower Loup NRD. Koch appeals; we affirm.

## II. FACTUAL BACKGROUND

This case concerns four meetings that took place in June and July 2014: two meetings of the Committee (June 17 and

July 15) and two meetings of the Lower Loup NRD Board of Directors (Board) (June 26 and July 24). Koch attended the meetings as a citizen, but also as a spokesman for the "Bredthauer Dam Proposal," a project which was discussed at the meetings. We briefly summarize what happened at these four meetings.

### 1. June 17, 2014—Committee Meeting

The Committee held a meeting on June 17, 2014. In attendance at that meeting were six Committee members (all of whom were directors on the Board), two other directors from the Board, five staff members, and five members of the public. It is undisputed that Koch, Eugene Bredthauer, and Bredthauer's son were not in the meeting room when the meeting began, but entered some minutes later. Five items appeared on the meeting agenda, one of which was the dam proposal.

The section of the minutes discussing the dam proposal reveals the following: The Committee was informed that Koch was told that in order for him to speak to the Committee, he was to send an updated proposal prior to the meeting so that staff could review the new information before it was presented to the Committee. The proposal was not submitted prior to the meeting. Discussion was had as to how to proceed. It was "again" explained to Koch that "normal procedure" is to give the proposal to staff in advance, then staff would review the information and make recommendations to the Committee; then the Committee would review and discuss the proposal and make recommendations to the Board. The Committee ultimately voted to table the proposal until July, "pending the Bredthauer proposal be[ing] submitted to staff in advance of the meeting, allowing sufficient time to review the proposal."

Other than the budget report, for each of the other items on the agenda, the Committee voted on what recommendation to make to the Board: "City of Columbus Area Recreational Trails (CART) Request"—the Committee voted to recommend

to the Board to rescind the previous monetary commitment to "CART" and to recommend to provide funds for the "Columbus City Hospital Lake Trail" and for the "Lost Creek Trail"; "Lake Ericson Gate Controller Request"—the Committee voted to recommend to the Board to provide funds for the purchase of the "SCADA" system; and "Davis Creek Restroom Doors Bids"—the Committee voted to recommend to the Board that a bid for the restroom doors and ceilings be approved.

### 2. June 26, 2014—Board Meeting

The Board held a meeting on June 26, 2014. The minutes reflect that 17 out of the 21 directors were present at the meeting. Ten staff members were in attendance, as well as several "[g]uests," including Koch and Bredthauer. The section of the minutes titled "Public Comments" provides as follows: Bredthauer told the Board that he had authorized Koch to speak on his behalf regarding the dam proposal. Koch handed out a proposal to each member of the Board and said he understood that the Committee had "tabled the project" until July. The chairman of the Board informed Koch that anything the Board would consider for the proposal needed to be "submitted to management first for [its] review." Koch responded that he would not be commenting on anything in the proposal. However, Koch said the public comment he wanted to make was that he was not allowed to enter the June 17 meeting of the Committee for 15 minutes and that he had wanted to record the meeting and was disappointed when that did not happen. He said he planned to attend the Committee meeting in July and would like to present the proposal in an indepth manner. He also said he hoped it would be a "feasible project."

One of the directors said he requested the dam proposal be put on the June 2014 agenda for the Committee to determine whether the request should be revisited, but that Koch was not "necessarily 'on' the agenda." The director said that the procedure was to "submit information to staff for [its]

review, and if staff felt it was warranted, [staff] would bring it to the Committee"; "staff would determine if the project would be on the July Committee agenda." Leon Koehlmoos, the general manager of the Lower Loup NRD, said that at the June meeting of the Committee, he had said he would review proposals to see if there were any changes from the original discussions with Bredthauer, and if there was nothing new and Koch was asking for the same things as in the past, Koehlmoos "probably would not be taking the information forward." Koch responded that the proposal he distributed to the Board was "an entirely new proposal"; Koehlmoos said he would review it.

The section of the minutes titled "Programs/Projects Committee Report" contains a section regarding the dam proposal and states as follows: A director said that the Committee discussed whether or not to bring the dam proposal "forward" and that it decided not to because Koch and Bredthauer did not follow the protocol of giving information to staff first for its review and letting staff decide whether or not to bring the information to the Committee. The director told the Board that the Committee voted to table the proposal until July, pending the proposal being submitted to staff in advance of the meeting and allowing sufficient time for review. Koehlmoos also told the Board that it was a "misunderstanding" when Koch was not immediately allowed to enter the Committee meeting and that having someone wait to be introduced and brought into a meeting is the process for certain other committee meetings, so "the mistake was not intentional." The chairman stated that "the meeting was advertised as a public meeting, so . . . Koch could have come in right from the beginning"; Koehlmoos agreed and stated he would correct the misunderstanding for public meetings in the future.

The section of the minutes titled "Programs/Projects Committee Report" also contains sections for the "CART" request, the "Lake Ericson Gate Controller Request," and the "Davis Creek Restroom Doors Bids." After a report was given

to the Board on each of these items, the Board took votes on each. The Board's votes were the same as the Committee's recommendations.

### 3. July 15, 2014—Committee Meeting

The Committee held a meeting on July 15, 2014. The Committee minutes appearing in our record do not appear to be a complete copy of the minutes (there are only two pages, and the second page appears to be from the Committee meeting in June). The July minutes state that seven Committee members were present (all of whom are directors on the Board). In addition to six "[s]taff present," the minutes also list Koch and Bredthauer as "[o]thers present." The section of the minutes discussing the dam proposal stated that Koch was informed he could not make a video recording because the Committee meeting was not a public meeting. "Koch reviewed the proposal that he had presented to the Board at its June meeting. Following the presentation, the Board discussed the project, discussing issues with the 404 permit, public access to the property, and the design of the project." The Committee then voted to recommend to the Board that the dam proposal be denied.

Other items discussed were "CART Letters of Support" (letters of support had been received and were included "in the packet" for information purposes), "LLNRD Attendance at County Fairs" (because of cost, Lower Loup NRD decided to stop participating in county fairs "for a year or two and then re-evaluate"), "Headquarter Road Signs" (staff provided Committee "with mock-ups of potential road signs to be added to the Airport Motel sign to direct the public to the office"; Koehlmoos said potential expansion at the motel might mean the sign would be moved, and he proposed waiting on the sign until more information could be received; and Committee consensus was to have staff address the issue, select signs, and have them installed), and "Davis Creek Recreation Areas" (simply states "Water Line Design and Estimates"; it

appears we do not have a complete copy of minutes from this point forward).

4. July 24, 2014—Board Meeting

The Board held a meeting on July 24, 2014. The minutes reflect that 14 out of the 21 directors were present at the meeting. Twelve staff members were in attendance, and Koch and Bredthauer were among those listed as "[g]uests" in attendance. The section of the minutes titled "Public Comments" states that "[t]here were no public comments."

The section of the minutes titled "Programs/Projects Committee Report" contains a section regarding the dam proposal, which states as follows: Koehlmoos said that Koch spent about an hour reviewing the proposal with the Committee on July 15, 2014. A member of both the Committee and the Board stated that Koch's presentation was "very interesting and well presented," but there were issues and unanswered questions about the proposal regarding permits, public access, and design. He also said that there was "a lot of uncertainty" about the proposal and that the Committee "didn't feel comfortable moving forward," so it was recommending denial of the request.

The minutes note that Koch "outlined his concerns regarding the Open Meetings Act" and gave a 15-minute presentation reiterating items in the proposal. Another guest in attendance at the Board meeting then spoke in favor of the dam proposal. Discussion was had "about the project being a private structure, engineering assistance, DNR permit, and funding." Eleven of the directors present at the meeting then voted to deny the dam proposal.

The section of the minutes titled "Programs/Projects Committee Report" also contains sections for the "CART Letters of Support," "LLNRD Attendance at County Fairs," and "Headquarters Road Signs." A report was given to the Board on each of these items; however, no vote of the Board was taken.

The "Programs/Projects Committee Report" also contained a section for the "Davis Creek Recreation Area"; it reflects that more items were addressed at the July 2014 meeting of the Committee than appear in our incomplete copy of the minutes, as we noted above. The Committee report states that the "Water Line Design and Estimates" were discussed. Koehlmoos said that the "water line design was in the budget" and that the Committee recommended requests for bidding be sent out to potential bidders; after the report, the Board voted that requests for bidding be sent to potential bidders for the water system and lines at the recreation area. A "Request for Campground Design" was also discussed for the recreation area. Koehlmoos said there was a need for more campsites at the recreation area, that the Committee discussed the development of a new campsite, and that there was money in the budget for one; "[i]t was the recommendation of staff and the Committee to seek a design." After the report, the Board voted to hire a consultant to design a new campground at the recreation area. The Committee report included updates on two other items, but no votes were taken.

## III. PROCEDURAL BACKGROUND

On October 14, 2014, Koch filed a "Complaint Request for Writ of Mandamus for Open Meetings Act and Freedom of Information Act Violations by the Lower Loup [NRD] and Discrimination Against Koch Repair When Representing the Eugene Bredthauer Dam Project." Koch alleged various violations of the Open Meetings Act. He asked that actions taken in violation of the Open Meetings Act be voided and that those responsible for violating the Open Meetings Act be held accountable. He also requested that the Lower Loup NRD be made to allow him access to public records.

On November 14, 2014, the Lower Loup NRD filed its answer to Koch's complaint, generally denying all allegations. The Lower Loup NRD also alleged affirmative defenses. On December 29, the Lower Loup NRD filed a motion for

summary judgment, alleging that there were no issues of material fact and that it was entitled to judgment as a matter of law.

On March 10, 2015, Koch filed a motion to amend the complaint, stating that the amended complaint was to be filed on March 16.

On March 16, 2015, Koch, without leave of the court, filed an "Amended Complaint for Writ of Mandamus for Open Meetings Act Violations by the Lower Loup Natural Resource District and Discrimination Against Koch Repair Representing the Eugene Bredthauer Dam Project." In his amended complaint, Koch alleged the following "Cause[s] of Action": (1) he was refused access to and the ability to record the first 14 to 16 minutes of the "published public meeting" of the Committee on June 17, 2014; (2) the Lower Loup NRD (a) changed the classification of the Committee to a "sub-committee" to circumvent the Open Meetings Act and then (b) changed the date of the published July 2014 meeting of the Committee without published notification; (3) he was not allowed to video record the July 2014 meeting of the Committee; and (4) (a) he was not allowed to present the dam proposal at the "public meeting" even though the proposal was "on the agenda" (it is unclear which meeting Koch is referring to in his pleading), (b) he was told he would not get to speak if staff decided not to put the proposal on the agenda for the July meeting of the Committee, and (c) staff refused to allow him an agenda item. Koch asked the district court to (1) "void the entire meeting of the Programs and Projects Committee for July, 2014"; (2) order "all information given to the [Board at the] meeting [in] July, 2014 and action taken on that information (including the vote against the Bredthauer Mira Creek Dam Project) from the illegal meeting be voided"; and (3) hold all members of the Committee accountable for violating the Open Meetings Act.

In its journal entry and order filed on March 17, 2015, the district court memorialized the following: A hearing was held

that day on the Lower Loup NRD's motion for summary judgment and on Koch's motion to amend his complaint. At the hearing, the Lower Loup NRD agreed to proceed on Koch's motion to amend his complaint, even though it was not given proper notice. Prior to ruling on the motion, the district court inquired of Koch as to his specific and complete requests for relief in each cause of action alleged in the amended complaint. Koch stated that as to the first cause of action, he was requesting an order declaring the June 17, 2014, meeting void. As to the second cause of action, he was requesting an order requiring the Committee meetings to be open to the public. As to the third cause of action, he was requesting an order directing the Committee to allow video recordings of meetings. As to the fourth cause of action, he was requesting an order directing the Committee to allow citizens to speak at the Committee hearings, including items on the agenda. Koch was also requesting $12,500 in damages and costs. The district court sustained Koch's motion to amend his complaint and found that the amended complaint filed March 16, 2015, was the operative complaint. The Lower Loup NRD was given 7 days to file an amended answer. The district court also granted the Lower Loup NRD's oral motion to continue the motion for summary judgment, and the matter was rescheduled for April 21.

On March 18, 2015, the Lower Loup NRD filed its answer to Koch's amended complaint and denied all allegations. Also on March 18, the Lower Loup NRD filed an amended motion for summary judgment, alleging that there were no issues of material fact and that it was entitled to judgment as a matter of law.

On April 21, 2015, a hearing was held on the Lower Loup NRD's amended motion for summary judgment. In its order filed on June 16, the district court granted summary judgment in favor of the Lower Loup NRD on all causes of action and dismissed Koch's complaint. Koch appealed; this court reversed the judgment and remanded the cause for further

proceedings. See *Koch v. Lower Loup NRD*, No. A-15-559, 2016 WL 7209828 (Neb. App. Dec. 13, 2016) (selected for posting to court website). In our memorandum opinion, we found there was a genuine issue of material fact as to whether the Committee is a subcommittee, and thus exempt from the Open Meetings Act. We also noted that neither the parties nor the district court addressed whether the Committee is an advisory committee which would be subject to the Open Meetings Act.

A postremand bench trial was held on August 28, 2017. Evidence will be discussed as necessary later in our analysis. In its order filed on November 8, the district court found that the Committee was a subcommittee of the Board, and not an advisory committee, and therefore was not a public body as defined in the Open Meetings Act. The court further found that the Committee meetings were not required to be open to the public because there was not a quorum of the Board present at the Committee meetings and because the Committee did not hold hearings, make policy, or take formal action on behalf of the Board. The court denied all relief requested by Koch, and judgment was entered in favor of the Lower Loup NRD.

Koch appeals.

## IV. ASSIGNMENTS OF ERROR

Koch assigns numerous errors to the district court, which ultimately boil down to whether or not the district court erred in concluding that the Committee was not a public body subject to the requirements of the Open Meetings Act.

## V. STANDARD OF REVIEW

[1,2] An appellate court reviews actions for relief under Nebraska's Open Meetings Act in equity because the relief sought is in the nature of a declaration that action taken in violation of the act is void or voidable. *Salem Grain Co. v. City of Falls City*, 302 Neb. 548, 924 N.W.2d 678 (2019). On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both

fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. *Id*. But when credible evidence is in conflict on material issues of fact, we consider and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another. *Id*.

[3] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id*.

## VI. ANALYSIS

### 1. Nebraska's Open Meetings Act in General

"Every meeting of a public body shall be open to the public . . . except as otherwise provided by the Constitution of Nebraska, federal statutes, and the Open Meetings Act." § 84-1408. Section 84-1409 defines "[p]ublic body" as follows:

> (1)(a) Public body means (i) governing bodies of all political subdivisions of the State of Nebraska, (ii) governing bodies of all agencies, created by the Constitution of Nebraska, statute, or otherwise pursuant to law, of the executive department of the State of Nebraska, (iii) all independent boards, commissions, bureaus, committees, councils, subunits, or any other bodies created by the Constitution of Nebraska, statute, or otherwise pursuant to law, (iv) all study or advisory committees of the executive department of the State of Nebraska whether having continuing existence or appointed as special committees with limited existence, (v) advisory committees of the bodies referred to in subdivisions (i), (ii), and (iii) of this subdivision, and (vi) instrumentalities exercising essentially public functions; and
>
> (b) *Public body does not include (i) subcommittees of such bodies unless a quorum of the public body attends a subcommittee meeting or unless such subcommittees are holding hearings, making policy, or taking formal action*

> *on behalf of their parent body*, except that all meetings of any subcommittee established under section 81-15,175 [to evaluate projects and proposals seeking allocations from the Nebraska Environmental Trust Fund and/or the Nebraska Environmental Endowment Fund] are subject to the Open Meetings Act, and (ii) entities conducting judicial proceedings unless a court or other judicial body is exercising rulemaking authority, deliberating, or deciding upon the issuance of administrative orders.

(Emphasis supplied.) "[N]o public body shall designate itself a subcommittee of the whole body for the purpose of circumventing the Open Meetings Act." § 84-1410(4).

The public has the right to attend and speak at meetings of the public bodies. § 84-1412(1). Any person in attendance may videotape or record all or any part of a meeting of the public body. *Id.* However, the public body may make and enforce reasonable rules and regulations regarding the conduct of persons attending, speaking at, videotaping, or recording its meetings. § 84-1412(2). A body may not be required to allow citizens to speak at each meeting, but it may not forbid public participation at all meetings. *Id.* No public body shall, for the purpose of circumventing the Open Meetings Act, hold a meeting in a place known by the body to be too small to accommodate the anticipated audience. § 84-1412(4).

Finally, § 84-1414(1) provides in relevant part:

> Any motion, resolution, rule, regulation, ordinance, or formal action of a public body made or taken in violation of the Open Meetings Act shall be declared void by the district court if the suit is commenced within one hundred twenty days of the meeting of the public body at which the alleged violation occurred.

Koch filed his original complaint within 120 days of all meetings at issue.

### 2. Board Is Public Body

In 1969, the Nebraska Legislature created the State's natural resources districts. See Neb. Rev. Stat. § 2-3201 (Reissue

2012). The Legislature has declared that natural resource districts are political subdivisions of the State. See Neb. Rev. Stat. § 2-3213 (Reissue 2012). Each district is governed by a board of directors. *Id.* Accordingly, the Board is a "public body," and its meetings are subject to the Open Meetings Act. See §§ 84-1408 and 84-1409(1)(a)(i). See, also, Neb. Rev. Stat. § 2-3219 (Reissue 2012) (notice of all board meetings shall be given pursuant to § 84-1411 of Open Meetings Act).

### 3. Is Committee a Subcommittee?

We must determine whether or not the Committee is a subcommittee of the Board; the district court concluded it was. If the Committee is a subcommittee, then its meetings are not subject to the Open Meetings Act unless a quorum of the public body attends a subcommittee meeting or unless it is holding hearings, making policy, or taking formal action on behalf of its parent body. See §§ 84-1408 and 84-1409.

#### (a) Applicable Law

[4-7] Although the Open Meetings Act does not define "subcommittee," a subcommittee is generally defined as a group within a committee to which the committee may refer business. *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007) (citing Black's Law Dictionary 290 (8th ed. 2004)). In *City of Elkhorn*, members of the Omaha City Council attended informational sessions prior to a public meeting regarding the annexation of Elkhorn, Nebraska; there was no quorum of council members present at any one of the informational sessions. The Nebraska Supreme Court held that informational sessions attended by a subgroup of the city council, consisting of less than a quorum which, according to city charter, had no power to make any determination or effect any action, were not meetings of a public body under the Open Meetings Act. The Supreme Court noted that the purpose of the Open Meetings Act is to prevent "the formation of public policy . . . in secret." § 84-1408. The court then stated:

But it does not require policymakers to remain ignorant of the issues they must decide until the moment the public is invited to comment on a proposed policy. The public would be ill served by restricting policymakers from reflecting and preparing to consider proposals, or from privately suggesting alternatives. See *Hispanic Educ. Com. v. Houston Ind. Sch. Dist.*, 886 F. Supp. 606 (S.D. Tex. 1994) [(actual decision to appoint specific person formally to position of superintendent was undisputedly made at open meeting in full compliance with Texas law, and earlier discussions of that person's candidacy for position were not final decisions and thus not illegal)]. By excluding nonquorum subgroups from the definition of a public body, the Legislature has balanced the public's need to be heard on matters of public policy with a practical accommodation for a public body's need for information to conduct business.

Also, other courts have declined to apply public meeting laws to nonquorum gatherings intended to obtain information or voice opinions. See, e.g., *id.*; *Freedom Newspapers v. Orange Cty.*, 6 Cal. 4th 821, 863 P.2d 218, 25 Cal. Rptr. 2d 148 (1993) [(committee composed solely of board members numbering less than quorum of board was excluded from open meeting requirements; committee's function was to review various matters related to business of board and to make recommendations to full board for action; full board considered committee's recommendations in public meetings, at which time there was opportunity for full public discussion and debate; and committee did not have any decisionmaking authority)]; *Delaware Solid Waste Authority v. News-Journal*, 480 A.2d 628 (Del. 1984) [(standing committee composed solely of directors numbering less than quorum of directors for Delaware Solid Waste Authority (Authority) are not subject to open meetings laws; standing committee investigated Authority operations and then reported its

conclusions and recommendations, if any, to full board; all meetings of Authority, where work of committees is discussed, are open to public; after debate, Authority as whole publicly renders policy decision, and publicly takes steps to implement it; and throughout its meetings, Authority is open to public questions, comment, and criticism)]; *Lyon v. Lake County*, 765 So. 2d 785 (Fla. App. 2000) [(when committee has been established for and conducts only information gathering and reporting, activities of that committee are not subject to open meetings laws)]; *Mason v. Vision Iowa Bd.*, 700 N.W.2d 349 (Iowa 2005) [(committee not subject to open meetings laws; committee did not have policymaking duties, but, rather, it made recommendations and then board made ultimate decision on course of action to be taken)]. It is true that we have been concerned with a public body's perfunctorily approving a decision in a public meeting that was apparently reached in a private meeting. "The prohibition against decisions or formal action in a closed session also proscribes . . . rubberstamping or reenacting by a pro forma vote any decision reached during a closed session." *Grein v. Board of Education*, 216 Neb. 158, 168, 343 N.W.2d 718, 724 (1984). But *Grein* is distinguishable on two counts.

First, *Grein* involved a closed session of a full school board. Obviously, a private meeting of a full public body, or a quorum thereof, raises the concern that the members will reach consensus on a matter of public concern out of the public's view. See, also, *Johnson v. Nebraska Environmental Control Council*, 2 Neb. App. 263, 509 N.W.2d 21 (1993).

Second, the school board in *Grein* immediately voted on an agenda item after a closed session, without further discussion or deliberations. "The necessary inference is that the vote during the reconvened open session was the extension, culmination, and product of the closed

> session." 216 Neb. at 167-68, 343 N.W.2d at 724. Here, Omaha informed the public of all relevant facts supporting the annexation, and the public had full opportunity to voice its concerns.

*City of Elkhorn v. City of Omaha*, 272 Neb. 867, 881-82, 725 N.W.2d 792, 806 (2007). And the Supreme Court noted that the Omaha City Council did not reach a final decision on the annexation until it had received the public's input on the plan.

In addressing the claim in *City of Elkhorn* that under § 84-1410(4), "no public body shall designate itself a subcommittee of the whole body for the purpose of circumventing the Open Meetings Act," the Nebraska Supreme Court stated:

> We need not decide whether, under this section, a subcommittee need be composed of the entire body or a quorum before it could circumvent the [Open Meetings] Act, because here, the evidence shows Omaha did not attempt to circumvent the [a]ct. As noted, Omaha gave the public access to the same information as the council received and an opportunity to be heard. We conclude that the informational sessions of less than a quorum of the Omaha City Council members did not constitute a public meeting under the [a]ct.

272 Neb. at 883, 725 N.W.2d at 807.

(b) Trial Evidence

At the bench trial, Russell Callan, the assistant general manager of the Lower Loup NRD, testified and explained the project proposal process as follows: When someone applies for a project approval to the Lower Loup NRD, the application is initially submitted to staff. "[S]taff . . . usually tries to sit with folks and review it to make sure that . . . it's warranted, that it's even an NRD activity," and to determine the appropriate committee for the proposal. Staff helps "participant[s] accumulate the correct information" and makes sure that "they get all their information put together so when they come to the committee they can make a presentation to the committee."

After being presented to the Committee, the Committee looks through the proposal and then votes to send it to the Board as "an approval request or recommendation" or "a denial recommendation." Callan affirmed that if the Committee believes that it needs more information or further study of the matter, it can refer that proposal back to staff for further development. Regardless of whether the Committee recommends approval or denial, all proposals are presented to the entire Board. On cross-examination, Callan stated that "there's usually discussion" on all proposals that are brought to the Board. Callan agreed that the Board usually follows the recommendation of the Committee.

According to Callan, neither staff nor the Committee has any absolute authority to approve or deny a project proposal. The "Board of directors has the authority to . . . approve or deny projects." The Board, not the Committee, is the governing body of the Lower Loup NRD. Callan agreed that the Committee is "a committee underneath [or] a subgroup" of the Board; the Committee does not involve a quorum of the Board and does not have any authority to act on behalf of the Board. He affirmed that the role of the Committee is to consider information and make recommendations to the Board for a final decision.

Callan was present at the Committee meetings on June 17 and July 15, 2014. Callan testified that "[d]uring the [C]ommittee meeting, staff takes minutes and then records them and submits them through the agenda process to the . . . full [B]oard." There were a total of eight directors present at the June 17 meeting (six members of the Committee and two other directors not on the Committee), and there were seven directors present at the July 15 meeting. There are 21 directors on the Lower Loup NRD, so 11 directors are needed for a quorum; there was no quorum at the Committee meetings on either June 17 or July 15. According to Callan, the Committee does not hold hearings and no hearings were held at either the June 17 or July 15 meeting. Callan's definition of a hearing is

"a formal process that a governing body goes through to take testimony and . . . information from . . . a person or the general public . . . for a certain function or need," weighing both evidence and testimony. Callan denied that the Committee holds hearings where it takes sworn testimony or public information of that nature. Callan also denied that the Committee made any policy binding upon the Lower Loup NRD or that it took any formal action on behalf of the Board.

Callan acknowledged that Koch was present at the Committee meeting on June 17, 2014, but was "very agitated that he was not able to enter the meeting right away." Koch was able to present his proposal regarding the dam, and "[i]t was recommended to go back to staff for review." The meeting minutes do not reflect that Koch was able to present his proposal. Rather, the minutes reflect that the Committee voted to table the proposal until July, "pending the Bredthauer proposal be[ing] submitted to staff in advance of the meeting, allowing sufficient time to review the proposal."

Callan acknowledged that Koch was also present at the Committee meeting on July 15, 2014, and gave a presentation regarding the dam proposal. Members of the Committee were able to ask questions and have interaction with Koch, and the members had "concerns about permitting, engineering and design, [and] the fact that it's a private structure, not a public structure." The Committee's recommendation was to deny the request. Callan acknowledged that the recommendation would include a presentation of the findings and studies and the concerns that were developed at that meeting.

Koehlmoos, the general manager of the Lower Loup NRD, was called as a rebuttal witness by Koch. Koch had Koehlmoos read a portion of the minutes from the June 26, 2014, meeting of the Board, which state:

> Koehlmoos said, that at the June Committee meeting, he had said he would review proposals to see if there were any changes from original discussions with Bredthauer; and if there was nothing new and Koch was asking for the

> same things as in the past, Koehlmoos said he probably would not be taking the information forward.

Koch then asked Koehlmoos if that meant that Koehlmoos could decide if the proposal went forward to the Committee. Koehlmoos responded, no, that there were "a number of ways to be put on any agenda." Koehlmoos said that the chairman of the Board can request an agenda item be added or that two members of the Board can ask that an agenda item be added. But that as the preparer of the agenda, Koehlmoos said it was his job to "look through the information, and if its information that's already been covered and nothing significantly has changed, because of time of directors, . . . I don't report the same thing over and over and over again." He further said, "So, I think, per my statement, that . . . I looked to see if there were changes from the original discussion and there were none, so, you know, it didn't go forward." Koehlmoos was also asked who had the authority to place things on the agenda for the Board. He responded, "I do as far as the preparer of the agenda, or I can be directed to add an agenda item by the chair" or by "two or more . . . members on the NRD Board."

Koehlmoos stated that if something "doesn't meet our [Lower Loup] NRD authority, I probably will not take it before the [C]ommittee," but "it's not to say that it can't get to the [C]ommittee by way of either the chairman or . . . a number of directors that wish [it] to be placed there." At the Committee meetings, "ideas are brought, discussion is made" and "we do discuss the item in greater detail than allowable during the public [meeting of the Board]." The Committee is a "subcommittee or a committee of a non-quorum group that are allowed some flexibility in asking questions and throwing out ideas and maybe even doing some discussions on the items to come to what then is carried, you know, a recommendation to take to the [B]oard."

Koch testified that he attempted to present the dam proposal for Bredthauer, whose dam washed out in 2010 (Bredthauer

asked Koch for assistance in building his dam). Koch said he attempted to get the proposal on the agenda for the Committee meeting on June 17, 2014, but was told that it would not be on the agenda; however, the Committee meeting agenda had the proposal listed.

Koch said he was refused entry to the Committee meeting on June 17, 2014, for 15 minutes, but was then told he could go in because it was a "public meeting." He could not record the entire meeting because of the late entry. He claimed that the meeting room was too small for the number of people in attendance. (Bredthauer also testified that the room was "cramped.") According to Koch, a discussion regarding the "CART" agenda item was in progress when Koch entered the meeting and "specific dialogue made me understand that there were decisions being formulated" in the Committee that "were not represented entirely" in front of the Board. Koch wants every decision of the Committee that was not public—"[a]nything that I wasn't allowed to hear"—to be declared void.

When the Committee reached the agenda item for the dam proposal on June 17, 2014, Koch said he was told that the proposal was "on the agenda to decide whether [it was] going to [be] on the agenda." (An audio recording of the meeting made by Koch was received into evidence and reveals that the dam proposal was listed on the agenda so that the Committee could decide whether it wanted to discuss the proposal again. The Committee noted that the proposal had been brought to the Board and voted against in the past, so if there was nothing new in the proposal, there was no reason to look at it again. Because Koch had not submitted the allegedly new proposal to staff for review prior to the Committee meeting, the issue was tabled until July in order to allow the review to occur.) Koch sought to have the proposal put on the agenda for the Committee meeting in July, and he noted that the meeting date had been changed from July 17 to July 15. He said he was told he could not record the Committee meeting on July 15

because the Committee does not go by the Open Meetings Act. Koch stated that the meeting room for the Committee meeting in July was again too small. According to Koch, he presented the dam proposal for 2 hours at the Committee meeting in July, but at the Board meeting in July, only 4 or 5 minutes were taken to summarize his 2-hour presentation; the Board voted to deny any funding for the dam proposal.

Koch stated that votes were taken at the Committee meetings in June and July. He further stated that each of the agenda items for the Board meeting in July took 2 to 5 minutes to decide, whereas discussion at the Committee meeting took 30 to 45 minutes. Koch believes what the Committee does is "rubberstamped" by the Board.

(c) Our Decision

Although there is evidence in the record that staff and/or the Committee had stated that the Committee meeting in June was an "open meeting" and was "public," their personal descriptions of the meeting is not controlling for purposes of determining whether the Committee is a subcommittee subject to the Open Meetings Act.

Keeping in mind the evidence and the legal principles set forth previously, we conclude that the Committee was a subcommittee of the Board and was not subject to the Open Meetings Act at either its June or July 2014 meetings. Neither of those meetings of the Committee had a quorum of the Board in attendance. And as testified to by Callan, the Committee does not hold hearings, make policy, or take formal action on behalf of the Board.

According to the testimony of Callan and Koehlmoos, ideas are brought and discussion is had at the Committee meetings; the Committee considers the information and makes recommendations to the Board for a final decision. According to Callan, neither staff nor the Committee has any absolute authority to approve or deny a project proposal. The Board "has the authority to . . . approve or deny projects." The

Board, not the Committee, is the governing body of the Lower Loup NRD. We have reviewed the meeting minutes of the Committee and the Board, as well as listened to the various audio recordings made by Koch that were received into evidence, and we note that no final decisions were made at the Committee meetings; the Committee only voted on what recommendations to make to the Board on the various proposals. The Board then held a public meeting, where the public was allowed to comment, further discussion was had, and a final decision was made.

As the Nebraska Supreme Court stated in *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 881, 725 N.W.2d 792, 806 (2007), the Open Meetings Act "does not require policymakers to remain ignorant of the issues they must decide until the moment the public is invited to comment on a proposed policy. The public would be ill served by restricting policymakers from reflecting and preparing to consider proposals, or from privately suggesting alternatives." The court also recognized that "other courts have declined to apply public meeting laws to nonquorum gatherings intended to obtain information or voice opinions." *Id.* The *City of Elkhorn* court cited authority from other states which held that committees that did not have any decisionmaking authority, but reviewed matters and made recommendations to the full board for final decision (after full public discussion and debate) were not subject to the Open Meetings Act. That is exactly what occurred in the instant case. The Committee reviewed projects and proposals and then made recommendations to the Board. The Board had a public meeting, where the public was allowed to comment, further discussion was had, and then a final decision was made.

Although Koch contends that the Committee's decision is "rubberstamped" by the Board, we disagree. Unlike in *Grein v. Board of Education*, 216 Neb. 158, 343 N.W.2d 718 (1984), where the school board immediately voted on an agenda item after a closed session without further discussion

or deliberations, the Board in the instant case had a public meeting more than a week after the Committee meeting. At the public meeting, the public was allowed to comment, further discussion was had, and then a final decision was made. Just like in *City of Elkhorn, supra*, and the cases cited therein, the Board did not reach a final decision on issues until it had allowed and received the public's input.

For the sake of completeness, we note that the district court also concluded that the Committee was not an advisory committee. This finding was made in response to our previous opinion where we noted that neither party nor the district court had addressed whether the Committee was an advisory committee. See *Koch v. Lower Loup NRD*, No. A-15-559, 2016 WL 7209828 (Neb. App. Dec. 13, 2016) (selected for posting to court website). However, that observation was made solely to point out that the record on summary judgment lacked sufficient information to determine exactly what the Committee's role was with respect to actions taken by the Board; the record before this court now sufficiently establishes that the Committee qualifies as a subcommittee under § 84-1409(1)(b) and is therefore not a public body subject to the Open Meetings Act. That being the case, it follows that the Committee cannot also be an advisory committee, which is specifically identified as a public body subject to the Open Meetings Act. See § 84-1409(1)(a)(v).

## VII. CONCLUSION

Because we have determined that the Committee was not functioning as a public body at the meetings complained of, and thus not subject to the requirements of the Open Meetings Act, we affirm the district court's denial of all relief requested by Koch and its judgment in favor of the Lower Loup NRD.

Affirmed.

# City of Beatrice, Nebraska, appellee, v. Daniel A. Meints, Sr., appellant.

931 N.W.2d 175

Filed June 4, 2019. Nos. A-18-300 through A-18-320.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Standing: Jurisdiction: Parties.** Standing refers to whether a party had, at the commencement of the litigation, a personal stake in the outcome of the litigation that would warrant a court's or tribunal's exercising its jurisdiction and remedial powers on the party's behalf.
3. **Standing: Claims: Parties.** To have standing, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third parties.
4. **Sentences: Final Orders: Appeal and Error.** A criminal sentence is not considered a final judgment until the entry of a final mandate from an appellate court, if an appeal has been taken.

Appeals from the District Court for Gage County: Ricky A. Schreiner, Judge. Affirmed.

Terry K. Barber, of Barber & Barber, P.C., L.L.O., for appellant.

Abigail M. Stark, Beatrice City Attorney, for appellee.

Pirtle, Arterburn, and Welch, Judges.

Welch, Judge.

## INTRODUCTION

Daniel A. Meints, Sr., appeals an order of the Gage County District Court relating to 21 writs of execution issued by the

district court involving a parcel of real property he owns. Meints claims that the judgments on which the City of Beatrice, Nebraska, requested execution were dormant, that he was entitled to exemptions from execution, and that Lynette Reinke should have been allowed to intervene in the proceedings. For the reasons stated below, we affirm.

## STATEMENT OF FACTS

On 25 separate dates in May and June 2011, police officers cited Meints for parking several junked or unlicensed motor vehicles on his property in violation of Beatrice Mun. Code, ch. 16, art. XVII, § 16-623 (2002). Meints was charged with 12 counts in each of 25 cases brought against him and was convicted on all 300 counts in a consolidated trial. In April 2012, the Gage County Court entered judgments against Meints in each case; each of the 25 judgments included court costs and 12 fines equal to $1,299 per judgment, or a total of $32,475.

Meints appealed to the Gage County District Court, which, in each case, affirmed 10 of the 12 convictions and sentences and reversed 2 of the convictions. Meints then appealed to the Nebraska Court of Appeals, which affirmed the judgment of the district court. See *City of Beatrice v. Meints*, 21 Neb. App. 805, 844 N.W.2d 85 (2014). On petition for further review, the Nebraska Supreme Court affirmed the decision of the Court of Appeals. See *City of Beatrice v. Meints*, 289 Neb. 558, 856 N.W.2d 410 (2014). In March 2015, the county court issued orders of judgment on 10 of the 12 fines in each of the 25 cases in accordance with the mandate from the district court.

In December 2017, the City of Beatrice filed 21 praecipes requesting that the clerk of the district court issue execution on 21 of the 25 judgments against Meints. Each praecipe requested that the sheriff levy on the same parcel of real property owned by Meints located on South 9th Street in Beatrice, Nebraska. The district court issued 21 writs of execution in response to the requests.

On January 2, 2018, Meints filed a request for a hearing in the district court alleging that some or all of his property seized may be exempt from execution. On January 10, Meints filed a motion to quash the execution, alleging that the judgments the City of Beatrice sought to execute were dormant because it had been over 5 years since the court issued the May 2012 order requiring him to pay the fees and costs.

Also on January 10, 2018, Reinke, who Meints' counsel identified as Meints' girlfriend, filed a motion to intervene in the proceedings and a complaint in intervention. Reinke alleged that she had an ownership interest in a property involved in the execution because she purchased tax sale certificates in 2011, she was a resident of the property, and her tax sale certificates provided her a right to intervene.

A hearing was held in January 2018 on Meints' claim for exemptions during which Meints claimed he was entitled to a serviceman's exemption and a homestead exemption. In connection with the execution proceedings, the City of Beatrice argued Meints was not entitled to exemptions because the execution related to criminal proceedings.

In an order dated January 16, 2018, the district court denied Meints' claim for exemptions. Following a hearing on Reinke's motion to intervene and Meints' motion to quash the execution, the district court entered an order on February 23 which denied Reinke's motion to intervene and overruled Meints' motion to quash. Meints timely appeals from the orders denying his request for exemptions and his motion to quash. Reinke did not appeal from the district court's denial of her motion to intervene.

## ASSIGNMENTS OF ERROR

Meints assigns that the district court erred in denying Reinke's motion to intervene, finding his property was not exempt from execution, and denying his motion to quash.

## STANDARD OF REVIEW

[1] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an

independent conclusion irrespective of the decision made by the court below. *State v. Jerke*, 302 Neb. 372, 923 N.W.2d 378 (2019).

## ANALYSIS

### Reinke's Intervention

Meints first assigns that Reinke, his girlfriend, should have been permitted to intervene in the proceedings. In order for Meints to appeal a claim on behalf of Reinke, he first must have standing to do so.

[2,3] Standing refers to whether a party had, at the commencement of the litigation, a personal stake in the outcome of the litigation that would warrant a court's or tribunal's exercising its jurisdiction and remedial powers on the party's behalf. *Applied Underwriters v. S.E.B. Servs. of New York*, 297 Neb. 246, 898 N.W.2d 366 (2017). To have standing, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third parties. *Id.*

Reinke did not appeal from the court's order denying her attempt to intervene. Because Meints is attempting to now litigate Reinke's right to intervene, he is resting his claim on her rights. She could have chosen to appeal, but did not. Accordingly, Meints has no standing to assert Reinke's rights and any assigned errors in connection therewith shall not be considered by this court.

### Right to Exemption

Meints next assigns that the district court erred in overruling his motion to grant him certain exemptions in connection with the City of Beatrice's attempt to execute on judgments involving his property. In support of his contention, Meints cites Neb. Rev. Stat. § 25-1542 (Reissue 2016) of the rules governing executions on civil judgments, which rules entitle him to certain exemptions from execution, and argues that the judgments obtained against him are civil in nature.

In response, the City of Beatrice cites to Neb. Rev. Stat. § 29-2407 (Reissue 2016), which at the pertinent time period provided:

> Judgements for fines and costs in criminal cases shall be a lien upon all the property of the defendant within the county from the time of docketing the case by the clerk of the proper court, and judgments upon forfeited recognizance shall be a like lien from the time of forfeiture. No property of any convict shall be exempt from execution issued upon any such judgment as set out in this section against such convict except in cases when the convict is sentenced to a Department of Correctional Services adult correctional facility for a period of more than two years, in which cases there shall be the same exemptions as at the time may be provided by law for civil cases. The lien on real estate of any such judgment for costs shall terminate as provided in section 25-1716.

Accordingly, the issue of whether Meints was entitled to exemptions in connection with the execution on judgments involving his property turns on whether the proceedings against Meints were civil or criminal in nature.

In support of his argument that the proceedings against him were civil, Meints cites to *McLaughlin v. State*, 123 Neb. 861, 244 N.W. 799 (1932), *disapproved on other grounds, State v. Amick*, 173 Neb. 770, 114 N.W.2d 893 (1962). In *McLauglin*, the Nebraska Supreme Court noted:

> But in *Peterson v. State*, 79 Neb. 132, it was held: "A prosecution for the violation of a city ordinance, which does not embrace any offense made criminal by the laws of the state, while in form a criminal prosecution, is, in fact, a civil proceeding to recover a penalty, and clear and satisfactory proof that the offense has been committed is sufficient to sustain a conviction. Proof beyond a reasonable doubt is not required." See *Liberman v. State*, 26 Neb. 464.

123 Neb. at 863, 244 N.W. at 799-800.

The specific issue in *McLaughlin* was whether keeping racetrack gambling devices in a place of business, which was prohibited by ordinance, was a civil or criminal proceeding, only the latter of which would have entitled the defendant to a jury trial. In finding no State counterpart to the city ordinance on harboring racetrack devices, the court held: "It is not argued, nor are we able to find, that keeping race track gambling devices, as in this case, is other than a violation of city ordinances, and, therefore, defendant was not entitled to a trial by a jury." *McLaughlin*, 123 Neb. at 863, 244 N.W. at 800.

Later cases support the rule espoused in *McLauglin, supra*. See, e.g., *State v. Warren*, 162 Neb. 623, 625, 76 N.W.2d 728, 730 (1956) (holding "charge made against defendant is not an offense by any statute of this state. This is a civil proceeding to recover a penalty for the violation of an ordinance"). As such, in order for us to determine whether Meints' violation of § 16-623 of the City of Beatrice's code was a civil or criminal proceeding, we must determine whether the subject matter in § 16-623 is made criminal by the laws of the State of Nebraska.

In *State v. Meints*, 21 Neb. App. 805, 815, 844 N.W.2d 85, 94 (2014), the Court of Appeals quoted § 16-623, which at that time provided:

> "It shall be unlawful for any person to park, store, leave or permit the parking, storing or leaving of any junked motor vehicle, or parts of a motor vehicle, on private property within the city for a period of time in excess of twenty-one (21) days. It shall be unlawful for any person in charge or control of any private property within the city, whether as owner, tenant, occupant, lessee or otherwise, to allow any motor vehicle which has been unregistered for more than twenty-one (21) days to remain upon any private property. Any motor vehicle allowed to remain on private property in violation of this subsection shall constitute a nuisance and shall be abated."

For Meints to prevail on his theory that violation of this ordinance is civil in nature, he must demonstrate that the conduct described in § 16-623 does not embrace conduct made criminal by the laws of the State of Nebraska.

We first note that Meints takes the opposite position now than he took in *Meints*, 21 Neb. App. at 816, 844 N.W.2d at 95, wherein he argued that § 16-623 was "invalid because it criminalizes conduct which is not criminal under the Nebraska Revised Statutes." We further note that the county court and reviewing courts treated the proceeding in *Meints, supra*, as a criminal proceeding, including applying the beyond a reasonable doubt standard, reviewing alleged errors in connection with a motion to suppress evidence, reviewing the sufficiency of evidence under the criminal standard, and reviewing an alleged claim of double jeopardy. In direct response to Meints' assignment of error in *Meints* that the City of Beatrice was forbidden from "criminaliz[ing] that which is not criminal" under the statutes, we held:

> The city is authorized by Neb. Rev. Stat. § 18-1720 (Reissue 2012) to "define, regulate, suppress and prevent nuisances, and to declare what shall constitute a nuisance, and to abate and remove the same." The Nebraska statutes do not address or regulate the placement or open storage of unlicensed, unregistered, or junk motor vehicles upon private property. This falls within the discretion of the city, as authorized by § 18-1720. In addition, the district court also notes that a similar ordinance regulating and prohibiting junked vehicles was upheld by the Nebraska Supreme Court in *Village of Brady v. Melcher*, 243 Neb. 728, 502 N.W.2d 458 (1993). The general rule is that courts should give great deference to a city's determination of which laws should be enacted for the welfare of the people. See *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2d 182 (1989).

21 Neb. App. at 818, 844 N.W.2d at 95, 96. In so holding, we implicitly held that via Neb. Rev. Stat. § 18-1720 (Reissue

2012), § 16-623 of the City of Beatrice's code embraced conduct made criminal by the laws of the State of Nebraska.

Because we find that § 16-623 is a criminal ordinance and that a criminal charge and process involving § 16-623 is a criminal proceeding, Meints' convictions and judgments under § 16-623 were subject to execution under § 29-2407. Further, because the explicit language in § 29-2407 provides that "[n]o property of any convict shall be exempt from execution issued upon any such judgment," we hold that the district court did not err in denying Meints' notice of hearing and claim for exemptions in connection with this execution. Further, because we find that Meints was not entitled to exemptions in connection with execution on a criminal judgment, we find that Meints' argument that pursuing his property would be "futile" because its "assessed value . . . was less than twenty-five (25%) percent of the exemptions" is without merit. Brief for appellant at 8.

## Dormant Judgment

Meints finally argues that the district court erred in not finding that the judgments upon which the City of Beatrice sought execution were dormant. In support of this argument, Meints argues that under Neb. Rev. Stat. § 25-1542 (Reissue 2016), "a judgment becomes dormant if no execution is taken out within five (5) years of the judgment date." Brief for appellant at 9. But just like his claim for exemptions, Meints is citing to a statute which governs execution on civil judgments. As stated above, Meints was convicted, and judgment was rendered, under a criminal proceeding. When a lien is the result of a criminal judgment, the rule governing dormancy is different. The version of § 29-2407 in effect at the pertinent time provided that "[t]he lien on real estate of any such judgment for costs shall terminate as provided in section 25-1716." Neb. Rev. Stat. § 25-1716 (Reissue 2016) provides, in pertinent part:

> The judgment for unpaid court costs in any court of this state shall cease to be a lien on real estate unless

> action has been brought thereon within (1) five years after the latest partial payment has been made thereon, or (2) five years after such case becomes inactive or is closed by final judgment.

[4] A criminal sentence is not considered a final judgment until the entry of a final mandate from an appellate court, if an appeal has been taken. *State v. White*, 256 Neb. 536, 590 N.W.2d 863 (1999); *Jones v. Clark*, 253 Neb. 161, 568 N.W.2d 897 (1997); *State v. Schrein*, 247 Neb. 256, 526 N.W.2d 420 (1995). The 5-year term under § 25-1716 began to run in March 2015, when the mandate was entered on Meints' judgments and the judgments became final. The City of Beatrice's executions on those judgments were commenced in 2017, well within the lifespan of the judgment liens. Meints' assignment of error is without merit.

## CONCLUSION

Having found that Meints has no standing to raise Reinke's claim and that his other assignments of error are without merit, we affirm.

Affirmed.

# State of Nebraska, appellee, v. Wilder A. Interiano Alvarado, appellant.

931 N.W.2d 463

Filed June 11, 2019. No. A-18-052.

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. **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.
4. **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.
5. **Effectiveness of Counsel: Postconviction: 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 in a subsequent postconviction proceeding.

6. **Effectiveness of Counsel.** As a matter of law, counsel cannot be ineffective for failing to raise a meritless argument.
7. ____. Defense counsel does not perform in a deficient manner simply by failing to make the State's job more difficult.
8. ____. The Sixth Amendment guarantees a right not just to counsel, but to effective assistance of counsel.
9. **Effectiveness of Counsel: Presumptions.** If counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.
10. **Trial: Attorney and Client: Effectiveness of Counsel: Testimony: Waiver.** Defense counsel's advice to waive the right to testify can present a valid claim of ineffective assistance in two instances: (1) if the defendant shows that counsel interfered with his or her freedom to decide to testify or (2) if counsel's tactical advice to waive the right was unreasonable.

Appeal from the District Court for Lancaster County: Jodi L. Nelson, Judge. Affirmed.

Darik J. Von Loh, of Hernandez Frantz, Von Loh, for appellant.

Douglas J. Peterson, Attorney General, and Siobhan E. Duffy for appellee.

Riedmann, Bishop, and Welch, Judges.

Riedmann, Judge.

## I. INTRODUCTION

Wilder A. Interiano Alvarado appeals his conviction and sentence for first degree sexual assault, claiming that the evidence was insufficient to support his conviction and that the sentence imposed was excessive. Based upon our standard of review, we affirm his conviction and sentence. Alvarado also asserts multiple claims of ineffective assistance of counsel which we address below.

## II. BACKGROUND

B.H., a 22-year-old college student, attended a St. Patrick's Day party at the law firm at which she was working on March

17, 2017. She consumed approximately 2½ "Solo cups" of alcoholic beverages between the hours of 5 and 8:30 p.m. At that point, she felt "buzzed." She left the law firm with one of the attorneys and traveled with him in his car to a nearby bar. They stayed at the bar until about 11:30 p.m., during which time she consumed another 1½ to 2 alcoholic beverages. About halfway through the first of those drinks, B.H. started to "get fuzzy," and by the time she stopped drinking the second drink, she was "losing [her] balance" and felt "intoxicated." When they exited the bar, she tried to perform field sobriety tests to determine her level of intoxication and determined she was unable to keep her balance. They decided to "split an Uber," a ride-sharing service, that would take each of them to their respective houses.

The attorney that accompanied B.H. to the bar testified that he decided it was time for them to leave the bar when B.H. "started rubbing her back against" the man on the barstool next to her. When B.H. paid her bar bill, she wrote her name "four or five times" on the charge slip and pretended that she was going to take the tip money that the attorney set on the bar. The attorney testified that based upon the way B.H. was acting, he would not have been comfortable letting her drive his car home from the bar and he did not want to drive because he, too, had been drinking.

B.H. has little recollection of the Uber ride home. The Uber driver testified that when B.H. and the attorney got in her car, B.H. was "chatty," but then she got "rather tired-like." She described the decline as if "she drank a bottle of cold medicine . . . she just became this really zoned-out kind of person." According to the driver, B.H. was leaning against her companion "to brace herself." After they dropped off the attorney, B.H. leaned against the door and then "sprawl[ed] out along the back seat" and began singing along to the radio. The driver described B.H.'s speech as "sloshy slurry" but not necessarily intoxicated. By the time they reached B.H.'s house, B.H. was asleep and it took the driver "a little bit to actually wake her

up." Upon exiting the car, B.H. "had to catch herself" and used a "zombie walk" to her door. The driver saw B.H. search her purse and then disappear around the side of the house before the driver left for her next trip.

According to B.H., when she arrived at her house, she realized that she had left her house key in her car, which was parked at the law firm. She recalls talking on her cell phone to her boyfriend and one of her friends, who were already downtown, to ask for a ride, but they had been drinking and did not want to drive. She planned to call an Uber, but when she tried to use her cell phone, it looked like "the setting had been changed to, like, Japanese or something." At that point, B.H. started walking toward downtown. She recalled "taking five steps on the sidewalk" in front of her house, but does not remember walking beyond that.

The evidence reveals that B.H. planned to stop at her house near 9th and F Streets in Lincoln, Nebraska, get something to eat, and then head downtown to meet her friends and boyfriend. According to a friend of B.H., she had texted B.H. several times throughout the night. At approximately 8:30 p.m., B.H. indicated that she planned to meet them downtown. At about 10:30 p.m., she sent B.H. a text to let her know that B.H.'s boyfriend had joined them downtown. And then about midnight, in a cell phone conversation, B.H. said that she had taken an Uber home and that she was going to walk downtown to meet them. At some point in the conversation, B.H. said she was across the street from her house, which her friend interpreted to mean she was across 10th Street on her way downtown. When B.H. did not arrive, the friend continued to send text messages to B.H. and call her, but she did not receive any response. When B.H. did not arrive, the friends set out on foot and bicycle to find her, but were unable to do so.

B.H. testified that she had a "snapshot" memory of sitting in a kitchen with a man, who was later identified as Alvarado. She did not know him prior to March 17, 2017. She also had a memory of lying on her back with Alvarado on top of her.

In the early morning hours of March 18, 2017, B.H. awoke, naked, in a strange bed. Alvarado was lying next to her with one hand on her breast and the other hand touching her "[i]nside of the lips" of her vagina. When she tried to get out of the bed, he held her down and told her "stay, stay; you're so beautiful." B.H. was ultimately able to free herself, locate her clothes, and retrieve her cell phone from him. When she ran out of the house, she realized she was across the street and approximately one-half block from her house. She ran home, where her boyfriend and friend were waiting.

Upon her arrival, her boyfriend and friend told her that they had reported her missing the night before so they needed to call the police to let them know she was home. The police responded, interviewed B.H., and took her to the hospital for a forensic examination. While at the hospital, investigators asked B.H. to "go through" her cell phone. She located a photograph of the inside of a house that she did not recognize. Based on the photograph and information from B.H., the police canvassed the area and Alvarado was arrested and charged with first degree sexual assault, a Class II felony, and false imprisonment, a Class IIIA felony.

At trial, the evidence revealed that B.H. did not remember text messages that her friend had sent the night of March 17, 2017, and early morning of March 18, nor did she remember conversations that her cell phone reflected she had. Her cell phone also contained video of her trying to get into her house after the Uber driver dropped her off, but B.H. did not recall taking that video.

The State produced photographs taken after the incident of various bruises on B.H., as well as photographs of Alvarado depicting scratches and cuts on his back, side, chest, neck, and face. B.H.'s gynecologist testified that scratch marks would be consistent with an individual trying to resist sexual intercourse. He further testified that shortly after this incident, B.H. was diagnosed with genital herpes. The evidence revealed that Alvarado had herpes. Results of the forensic examination were

also presented that revealed the presence of DNA from both Alvarado and B.H. on samples taken from Alvarado's penis shaft and from around B.H.'s rectum.

Following a jury trial, Alvarado was found guilty of first degree sexual assault and was acquitted on the charge of false imprisonment. He was sentenced to 25 to 35 years' imprisonment with credit for 298 days served. Alvarado timely appeals.

## III. ASSIGNMENTS OF ERROR

Alvarado assigns, restated and renumbered, that the district court erred in (1) finding him guilty of first degree sexual assault, because the evidence was insufficient, and (2) imposing an excessive sentence. Alvarado also asserts that trial counsel was ineffective for stipulating to certain exhibits, in failing to object to other exhibits and testimony, and in instructing Alvarado not to testify.

## IV. 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. McCurdy*, 301 Neb. 343, 918 N.W.2d 292 (2018).

[2] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Leahy*, 301 Neb. 228, 917 N.W.2d 895 (2018).

[3] Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law. *State v. Schwaderer*, 296 Neb. 932, 898 N.W.2d 318 (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. Sufficiency of Evidence

Alvarado argues that the evidence was insufficient to prove the elements of first degree sexual assault beyond a reasonable doubt. This argument ignores recent case law and the circumstantial evidence that was presented at trial.

First degree sexual assault is defined as follows:

> Any person who subjects another person to sexual penetration (a) without the consent of the victim, (b) who knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct, or (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.

Neb. Rev. Stat. § 28-319(1) (Reissue 2016).

Under the facts of this case, subsection (c) of § 28-319 is inapplicable; therefore, the State was required to prove either that Alvarado sexually penetrated B.H. without her consent or that he knew or should have known that she was mentally or physically incapable of resisting or appraising the nature of his conduct. Alvarado claims that the "touching and 'petting' of the alleged victim's vaginal lips" is not enough to find penetration. Brief for appellant at 24. However, the Nebraska Supreme Court recently addressed this issue in *State v. Smith*, 302 Neb. 154, 922 N.W.2d at 444 (2019).

In *State v. Smith, supra*, the defendant argued that the evidence was insufficient to convict him of first degree sexual assault of a child because there was no credible evidence he

had sexually penetrated the child. Rather, the evidence was that he had touched her "'between the skin folds known as the labia'" and "'between the lips of her vagina.'" *Id*. at 183, 922 at 465. Relying upon Neb. Rev. Stat. § 28-318(6) (Reissue 2016), the court defined sexual penetration to include, inter alia, "'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.'" *Id*.

Quoting *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007), the *Smith* court iterated: "'The slightest intrusion into the genital opening is sufficient to constitute penetration, and such element may be proved by either direct or circumstantial evidence. It is not necessary that the vagina be entered or that the hymen be ruptured; the entry of the vulva or labia is sufficient.'" 302 Neb. at 183, 922 N.W.2d at 465.

In the present case, B.H. testified that when she awoke on March 18, 2017, Alvarado was touching her "[i]nside of the lips" of her vagina. This evidence was sufficient for the jury to determine Alvarado sexually penetrated B.H.

In addition to the penetration on the morning of March 18, 2017, circumstantial evidence supports a finding of penetration the night of March 17. B.H. testified that following this incident, her vagina was sore. Alvarado points to testimony that B.H. did not have any physical evidence of a vaginal injury; however, a gynecologist testified that one would not necessarily expect to see a traumatic injury to the vaginal area from nonconsensual intercourse if the patient had prior sexual activity. Additionally, B.H. testified that she was menstruating on March 17 and that she was using tampons. Her normal practice was to flush a used tampon down the toilet and insert a new one. However, a used tampon containing B.H.'s blood was found in the trash at Alvarado's apartment and B.H. awoke without a tampon in her vagina. She had no recollection of removing her tampon that night.

Furthermore, the rectal swab taken from B.H. revealed semen with a DNA profile that included Alvarado as a contributor

with a population frequency of 1 in 31.96 sextillion. B.H. was included as a contributor of the DNA sample taken from Alvarado's penis shaft. The evidence was therefore sufficient for a jury to find penetration.

Alvarado argues that if penetration is found, "then this case turns solely on the intoxication of the victim." Brief for appellant at 24. He relies upon *State v. Rossbach*, 264 Neb. 563, 650 N.W.2d 242 (2002), for the proposition that the issue of consent is not reached if the alleged victim is intoxicated to the point to be incapable of resisting or apprising the nature of her conduct. Relying on an exhibit, a Nebraska State Patrol Crime Laboratory report, he claims there was no alcohol in B.H.'s urine when tested. He cites B.H.'s testimony that she consumed four drinks, but that she did not believe them to be particularly strong. He claims there is a lack of evidence that B.H. was physically or mentally incapable of resisting or appraising the nature of her conduct.

The State presented evidence regarding the amount of alcohol B.H. consumed, what she had eaten that day, and her approximate weight. The attorney that accompanied B.H. to the bar testified as to her behavior, as did the Uber driver. B.H., herself, testified to her inability to operate her cell phone and her lack of recollection of the night's events. From this evidence, the jury could conclude that B.H. was intoxicated and incapable of resisting or appraising the nature of her conduct.

But even if the evidence was insufficient for a jury to conclude that B.H. was intoxicated beyond the point of resisting or appraising the nature of her conduct, first degree sexual assault can also be found where sexual penetration occurs without the consent of the victim. See § 28-319(1)(a). B.H. testified that she was sleeping while Alvarado was touching her inside the lips of her vagina; therefore, she could not have given consent. A jury could have determined on the basis of this testimony that Alvarado sexually penetrated her without her consent.

Additionally, the physical evidence depicted in the photographs of Alvarado taken after the incident shows numerous red marks and scratches. He is shown with scratches and cuts to his side, chest, face, and neck. One of the investigating officers testified that those injuries were "consistent with fingernail markings." B.H., likewise, had numerous bruises that appeared over the course of the next 2 days that were not there before the incident. The nurse who performed the forensic examination testified B.H. had red marks, "like, finger mark[s]," on her hips. Viewing the evidence in the light most favorable to the State, a jury certainly could have determined that these marks were a result of B.H.'s resisting Alvarado's advances the night before, and thus, that there was nonconsensual sexual penetration.

In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005). Reviewing the evidence in this matter, we determine that there was sufficient evidence from which the jury could have determined that B.H. did not consent. The photographs introduced at trial show bruising to various parts of B.H.'s body. Additionally, and perhaps more compelling, are the photographs of scratches and cuts on Alvarado's back, chest, side, neck, and face. This evidence, coupled with the gynecologist's testimony that such markings are consistent with an individual's resisting sexual intercourse, provides ample support for the jury to conclude that B.H. did not consent to sexual penetration.

### 2. Excessive Sentence

Alvarado's assigned error regarding the court's sentence is that the district court failed to consider the relevant sentencing factors when imposing sentence upon him. We disagree.

[4] 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. See *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*.

At sentencing, the court indicated that it had reviewed the presentence investigation. Our review of that same presentence investigation reveals information regarding Alvarado's age, mentality, education and experience, social and cultural background, and past criminal record. Additionally, the court stated that having sat through the trial, it was clear to the court that Alvarado took advantage of B.H. "in ways that should never happen to anyone." Before imposing its sentence, the court indicated that by "virtue of comments made in the pre-sentence, [Alvarado] does not take full responsibility for his actions in this case." The court further noted the impact his actions had on B.H. and her family. As a result, it found that "[h]aving regard for the nature and circumstances of this crime, . . . Alvarado's history, character and condition; I absolutely find that imprisonment is necessary for the protection of the public."

We find nothing in the court's sentencing to support a determination that it failed to consider the appropriate factors; to the contrary, the record reflects that it did consider the appropriate factors and based upon what it found, a sentence of imprisonment was necessary. Alvarado was convicted of a Class II felony, which carries with it a maximum sentence of 50 years' imprisonment and minimum sentence of 1 year's

imprisonment. See Neb. Rev. Stat. § 28-105 (Reissue 2016). He was sentenced to 25 to 35 years' imprisonment. This is well within the statutory guidelines, and we find no abuse of discretion.

### 3. Ineffective Assistance of Counsel

[5] Alvarado, who has new counsel on appeal, claims that his trial counsel provided ineffective assistance in nine separate ways, which we condense to six. 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 in a subsequent postconviction proceeding. *State v. Garcia*, 302 Neb. 406, 923 N.W.2d 725 (2019). 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*.

#### (a) Stipulation to Exhibits

Defense counsel stipulated to exhibits regarding herpes virus testing of both B.H. and Alvarado, chain of custody of urine samples, and chain of custody of medical items from B.H. Alvarado asserts that counsel was ineffective for stipulating to these exhibits. We find the record is insufficient to address the issue of trial counsel's failure to question the gynecologist regarding the exhibits relating to the herpes virus, but that the record refutes the remaining claims.

Alvarado claims that the herpes virus testing results should have been objected to and that their admission should have been challenged through a motion in limine. However, one of the elements of the charged crime was penetration. Medical evidence at trial indicated that the herpes virus can be transferred via oral or vaginal intercourse and that skin-to-skin contact is necessary. Its incubation period is 2 to 12

days. B.H. testified that a few days after the incident, she came down with a fever and began experiencing vaginal lesions. A culture taken on March 24, 2017, confirmed that B.H. had genital herpes. She had not been infected with the virus before.

[6] The testimony and exhibits regarding herpes were relevant and admissible to support a finding that penetration occurred. Therefore, a motion in limine likely would not have been successful. As a matter of law, counsel cannot be ineffective for failing to raise a meritless argument. *State v. Schwaderer*, 296 Neb. 932, 898 N.W.2d 318 (2017). Counsel was not ineffective for failing to challenge the admissibility of herpes evidence through a motion in limine.

Alvarado also asserts that counsel should have questioned B.H.'s gynecologist regarding the interpretation of the test results. His failure to do so does not require a reversal, because although Alvarado has accurately described what was not done, the record does not show why trial counsel did not explore this issue on cross-examination. See *State v. Mrza*, 302 Neb. 931, 926 N.W.2d 79 (2019). Because the undisputed facts in the record cannot conclusively determine whether counsel did or did not provide effective assistance and whether Alvarado was prejudiced by the alleged deficient performance, the record is not sufficient to address the claim on direct review.

[7] Alvarado asserts that counsel was ineffective for stipulating to the herpes virus test results and to the chain of custody items in the exhibits because Alvarado received no benefit from the stipulation. However, defense counsel does not perform in a deficient manner simply by failing to make the State's job more difficult. *State v. Ash*, 293 Neb. 583, 878 N.W.2d 569 (2016). Alvarado "surmised" that the State could not have proved the chain of custody; hence, the need for the stipulation. Brief for appellant at 13. However, he does not support this surmise with any reason for it. We therefore reject this assigned error. See *State v. Ash, supra*.

(b) Photographs of B.H. and Alvarado

Numerous photographs of both B.H. and Alvarado were offered into evidence by the State without objection from Alvarado's counsel. Alvarado claims that counsel was deficient in not objecting to the exhibits on the basis of foundation and relevancy. He asserts that there was no comparison of the condition of either B.H. or Alvarado before the pictures were taken and therefore they lacked foundation and were irrelevant. We determine that the record refutes this assertion.

B.H. testified that she did not have the bruises depicted in the exhibits prior to the morning of March 18, 2017; therefore, it was not necessary to have "before and after" pictures in order to make them relevant or to establish foundation. She explained where each of the bruises were located, when the photographs were taken, and that the bruises had not existed prior to the night of March 17.

Alvarado also takes issue with the fact that the examining nurse did not identify any of the injuries shown in the pictures. However, the pictures were taken on March 18 and 19, 2017. Testimony indicated that bruises typically take 1 to 2 days to appear. The examining nurse did identify red "finger marks" on B.H.'s hips and a small abrasion on her palm. Alvarado asserts that "there was testimony from the examining nurse that the alleged victim fell down the steep stairs leading to [Alvarado's] second-floor apartment." Brief for appellant at 16. However, no citation to the record is provided and our review of the bill of exceptions contains only the following statement from the examining nurse regarding a fall: "She had a small abrasion, I believe it was on her left palm. And she said she thought she remembered falling."

Regarding the photographs of Alvarado, those pictures depicted numerous scratches and red marks on his upper body, neck, and face. The investigating officer who took the photographs explained that the purpose of taking photographs is to document the condition of a person when he is brought in to

show either injuries or lack thereof. He established the proper foundation that the photographs depicted Alvarado's physical condition at the time he was brought into the police station. And those pictures were relevant to establish Alvarado's physical condition upon arrest. While no one testified that the injuries were inflicted by B.H., one of the investigating officers testified that they were "consistent with fingernail markings." Because the proper foundation was laid and the photographs were relevant, counsel was not ineffective for failing to object to them.

(c) *United States v. Cronic*

Relying upon *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), Alvarado argues that because trial counsel made only eight objections during the 4-day trial, and none of those were directed to the admissibility of an exhibit, trial counsel was ineffective.

[8,9] *United States v. Cronic, supra*, stands for the principle that the Sixth Amendment guarantees a right not just to counsel, but to effective assistance of counsel. The Court explained "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *United States v. Cronic*, 406 U.S. at 659. But the Court also held that because the surrounding circumstances did not make it unlikely that the defendant could have received effective assistance, he could "make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel." *Id.*, 466 U.S. at 666.

The Nebraska Supreme Court addressed *United States v. Cronic, supra*, in *State v. Jedlicka*, 297 Neb. 276, 900 N.W.2d 454 (2017). It noted that *Cronic* provides narrow exceptions to the analysis in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2062, 80 L. Ed. 2d 674 (1984), where prejudice will be presumed, identifying those circumstances "'(1) where the accused is completely denied counsel at a critical stage of the

proceedings, (2) where counsel [entirely] fails to subject the prosecution's case to meaningful adversarial testing, and (3) where the surrounding circumstances may justify the presumption of ineffectiveness without inquiry into counsel's actual performance at trial.'" *State v. Jedlicka*, 297 Neb. at 294-95, 900 N.W.2d at 469.

Here, while it is true that trial counsel did not object to any exhibits offered, we have addressed the specific errors argued by appellate counsel as they relate to his failure to object and have concluded either that counsel was not ineffective for failing to object or that the record is insufficient to make a determination of his performance. And we note that trial counsel did make objections and presented a closing argument calling into question the State's proof. Counsel recognized, "We entered into a lot of stipulations that are in evidence, because those things are not in dispute. And some things in cross-examination I didn't contest because we agree." Counsel instead chose to focus on whether B.H. knew she was having sex and whether Alvarado knew that she was incapable of consenting, if in fact, she was incapable.

Because counsel did not entirely fail to subject the prosecution's case to meaningful adversarial testing, the record refutes the assertion that counsel was ineffective under *United States v. Cronic, supra*, for having made only eight objections at trial.

(d) Evidence of Plan B Medication

When Alvarado's apartment was searched on March 18, 2017, investigators found a "Plan B" medication instruction sheet and a pair of pants with a "Plan B" pill in the pocket. A search of his vehicle also revealed two pharmacy receipts, dated March 16, 2017, and March 18, 2017, for Plan B pills and a plastic bag containing Plan B packaging. This testimony, and photographs of the evidence, were admitted without objection. Plan B was described as a medication for women to take following unprotected intercourse. Alvarado claims that "trial

counsel was ineffective by not objecting and/or challenging the 'Plan B' pill evidence since urine testing revealed only the presence of marijuana, lidocaine, and flecainide in the alleged victim." Brief for appellant at 19. Consequently, he claims the evidence was irrelevant.

The State's theory, as explained in closing arguments, was that Alvarado kept Plan B medication on hand so he would be prepared for opportunities such as the one with B.H. It used the evidence as circumstantial evidence that B.H. and Alvarado had intercourse. To this extent, the evidence was relevant. The absence of the medication in B.H.'s urine does not controvert the State's theory; it simply indicates that B.H. may not have ingested one of the pills, if, in fact, her urine was tested for this drug. We note that the forensic scientist responsible for the testing of B.H.'s urine sample testified that there are seven categories of drugs that she screens for including amphetamine, methamphetamine, cannabinoids, barbiturates, benzodiazepines, cocaine metabolite, opiates, and methadone. The record is not clear whether Plan B medication would have registered in the samples.

Alvarado also claims that counsel should have objected to this evidence or filed a motion in limine because it was inflammatory and prejudicial. Whether the decision not to object to this testimony was trial strategy cannot be determined from the record, and we therefore conclude that the record is insufficient to address this argument.

(e) Instructing Not to Testify

[10] Alvarado asserts he was advised by his trial counsel not to testify. Defense counsel's advice to waive the right to testify can present a valid claim of ineffective assistance in two instances: (1) if the defendant shows that counsel interfered with his or her freedom to decide to testify or (2) if counsel's tactical advice to waive the right was unreasonable. *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011). Although the record affirmatively shows that Alvarado stated on the

record that he was choosing not to testify, the record does not contain the substance of counsel's advice and whether that advice was reasonable. Therefore, the record is insufficient to address this assigned error.

(f) Evidence of Lidocaine

Alvarado asserts that counsel was ineffective for failing to object or file a motion in limine regarding the presence of lidocaine in B.H.'s urine, because there was no evidence Alvarado had the drug in his apartment or vehicle. As a result, Alvarado claims the evidence was speculative.

The gynecologist who testified explained that lidocaine is a numbing-type medication sometimes given to people who have herpes to decrease the pain. The State's theory was that Alvarado was infected with herpes, that Alvarado was using lidocaine for the pain, and that it entered B.H.'s system through intimate contact. Alvarado claims that a plausible explanation was that B.H. "suffered from herpes and used the lidocaine as treatment for her condition. The record is absent facts and evidence to rebut this plausible conclusion." Brief for appellant at 22. However, B.H. testified that she was not using any form of lidocaine on March 17, 2017, and that she did not have herpes before her encounter with Alvarado.

Given the other admissible testimony regarding herpes, this testimony was circumstantial evidence supporting the State's theory that B.H. and Alvarado engaged in intercourse, and given the other testimony regarding herpes, it was not so prejudicial and inflammatory that an objection would have been sustained. Counsel is not ineffective for failing to make a meritless objection. *State v. Schwaderer*, 296 Neb. 932, 898 N.W.2d 318 (2017). Therefore, we reject this claim.

## VI. CONCLUSION

Viewing the evidence in the light most favorable to the prosecution, we conclude that the evidence was sufficient to support Alvarado's conviction of first degree sexual assault

and find no abuse of discretion in the sentence imposed. We determine that the record is insufficient to determine whether counsel was ineffective in advising Alvarado not to testify or in failing to object to evidence regarding the Plan B medication. We therefore affirm the conviction and sentence.

Affirmed.

# In re Guardianship of Issaabela R., a minor child. Cami S., Guardian, appellant, v. Nebraska Department of Health and Human Services, appellee.

932 N.W.2d 749

Filed June 18, 2019. No. A-18-906.

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. **Constitutional Law: Parent and Child: Public Policy.** Where a parent's constitutionally protected relationship with a child is not at issue, both public policy and the Nebraska statutes require the case to be determined by reference to the paramount concern in child custody disputes—the best interests of the child.
4. **Pleadings: Proof.** Pleadings alone are not proof but mere allegations of what the parties expect the evidence to show.
5. **Pleadings: Trial: Evidence.** Pleadings and their attachments which are not properly admitted into evidence cannot be considered by the trial court.
6. **Evidence: Records: Appeal and Error.** A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.

Appeal from the County Court for Saunders County: C. Jo Petersen, Judge. Reversed and remanded for further proceedings.

Jennifer D. Joakim for appellant.

No appearance for appellee.

Riedmann, Arterburn, and Welch, Judges.

Riedmann, Judge.

## INTRODUCTION

Cami S. was appointed permanent guardian for the minor child, Issaabela R., through a probate action. The county court for Saunders County ultimately terminated the guardianship, and Cami appeals that decision. We conclude that the evidence was insufficient to support terminating the guardianship and therefore reverse the county court's order and remand the cause for further proceedings.

## BACKGROUND

Cami is the maternal grandmother of Issaabela, who was born in 2015. The county court for Lancaster County appointed Cami temporary guardian of Issaabela in March 2017 and permanent guardian in August. Issaabela was removed from Cami's care in December and placed in the custody of the Nebraska Department of Health and Human Services (DHHS) due to allegations that Issaabela was exposed to abuse while living with Cami. A juvenile court case with respect to Issaabela and Cami was initiated in the county court for Saunders County, sitting as a juvenile court, and the guardianship matter was transferred to Saunders County upon a motion filed by the guardian ad litem appointed for Issaabela.

On August 15, 2018, DHHS filed a motion to terminate the probate guardianship. The motion alleged that Cami had entered a "no contest" plea to the allegations raised in the juvenile court petition, resulting in the adjudication of Issaabela as to Cami under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016). The motion indicated that Issaabela remained in the custody of DHHS and was placed in foster care, that DHHS was seeking to terminate the probate guardianship in

order to pursue permanency through the juvenile court case, and that Cami opposed terminating the guardianship.

A hearing before the county court was held on August 20, 2018. At the hearing, the court addressed issues related to a separate juvenile case involving Issaabela's sister, a motion for bonding assessment filed by Cami in Issaabela's juvenile case, and DHHS' motion to terminate the guardianship in the probate case. The court also accepted documents whereby Issaabela's biological mother and father each relinquished their parental rights to her. The county court, seeing "no basis" to continue the probate guardianship, granted the motion to terminate the guardianship. A written order to that effect was filed that day. Cami timely appeals.

## ASSIGNMENTS OF ERROR

Cami assigns, restated and renumbered, that the county court erred in terminating the guardianship, because (1) the evidence was insufficient to support terminating the guardianship, (2) there was not sufficient notice of the hearing to all interested parties, and (3) the termination of the guardianship was not in the best interests of the child.

## STANDARD OF REVIEW

[1,2] Appeals of matters arising under the Nebraska Probate Code are reviewed for error on the record. *In re Guardianship of K.R.*, 26 Neb. App. 713, 923 N.W.2d 435 (2018). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

## ANALYSIS

Cami assigns that the evidence was insufficient to support terminating the guardianship. We agree.

Any person interested in the welfare of a ward may petition for removal of a guardian on the ground that removal would be in the best interests of the ward, and after notice and

hearing on a petition for removal, the court may terminate the guardianship. Neb. Rev. Stat. § 30-2616 (Reissue 2016).

Cases regarding termination of guardianships generally involve a biological or adoptive parent's attempting to terminate a guardianship in order to regain custody of his or her child. Under those circumstances, the Nebraska Supreme Court has held that the parental preference principle serves to establish a rebuttable presumption that the best interests of the child are served by reuniting the child with his or her parent. *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004). Therefore, 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. *Id*. Absent such proof, the constitutional dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent. *Id*.

[3] But where, as here, the rights of a biological or adoptive parent are not at issue, Cami concedes and we agree that she does not possess the same constitutional interests as a parent, and therefore, the parental preference doctrine does not apply. Where a parent's constitutionally protected relationship with a child is not at issue, both public policy and the Nebraska statutes require the case to be determined by reference to the paramount concern in child custody disputes—the best interests of the child. *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004). Thus, the standard for removal of a guardian of a minor pursuant to § 30-2616 is the best interests of the ward. See *In re Estate of Jeffrey B., supra*. Accordingly, in the instant case, the county court was authorized to remove Cami as guardian and terminate the guardianship over Issaabela upon proof that doing so would be in Issaabela's best interests.

In guardianship termination proceedings involving a biological or adoptive parent, the parental preference principle establishes a rebuttable presumption in favor of terminating

the guardianship; thus, the party opposing the termination of a guardianship bears the burden of proving by clear and convincing evidence that the biological or adoptive parent is unfit or has forfeited his or her right to custody. See *In re Guardianship of D.J., supra*. Because the case at hand does not involve a biological or adoptive parent, the rebuttable presumption which shifts the burden of proof to the party opposing termination of the guardianship does not exist. Therefore, the burden of proof in this case was on DHHS, as the moving party, to establish that terminating the guardianship was in Issaabela's best interests.

At the August 20, 2018, hearing, the court addressed several separate issues relevant to the three separate cases. Notably, in addressing the separate juvenile cases involving Issaabela and her sister, the county court was sitting as a juvenile court, and when addressing the guardianship in the probate action, the court was sitting as a county court.

In addressing the motion to terminate the guardianship, Cami's counsel explained that Cami would like the guardianship to continue. The court stated that it saw no basis to continue the guardianship, given that Issaabela's parents had relinquished their parental rights and Issaabela remained in the custody of DHHS. When given the opportunity to be heard on the motion, counsel for DHHS replied, "Your Honor, essentially what I would say is what you've already said." No evidence was offered or received as to the motion, and the court was not asked to take judicial notice of the existence of the juvenile case or the contents of its file.

[4-6] We recognize that in its motion to terminate the guardianship, DHHS made various allegations, including that terminating the guardianship would allow Issaabela to obtain permanency through the juvenile court case and that this was in her best interests. However, pleadings alone are not proof but mere allegations of what the parties expect the evidence to show. *In re Estate of Radford*, 297 Neb. 748, 901 N.W.2d 261 (2017). Pleadings and their attachments which are not properly

admitted into evidence cannot be considered by the trial court. *Id*. A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered. *Id*. As a result, we cannot consider allegations contained in a pleading as substantive evidence of Issaabela's best interests.

We also observe that Cami testified in support of her motion for a bonding assessment in the juvenile case, and evidence was received regarding the separate juvenile court case for Issaabela's sister. We do not consider that evidence, however, because it was not introduced into evidence in connection with the motion to terminate the guardianship. See *Bailey v. First Nat. Bank of Chadron*, 16 Neb. App. 153, 741 N.W.2d 184 (2007) (appellate court did not consider exhibits introduced in support of separate motions addressed at same hearing). As a result, there was no evidence presented with respect to the motion to terminate the guardianship.

Without any evidence, the county court was unable to make a determination as to Issaabela's best interests in order to decide whether to grant DHHS' motion. In evaluating the court's decision, we review for error on the record, and 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. See *In re Guardianship of K.R.*, 26 Neb. App. 713, 923 N.W.2d 435 (2018). If the court's decision is based upon information from the juvenile case, there is no indication that it took judicial notice of that information, and that information is not contained in our record. See *In re Estate of Radford, supra*.

The record before us is similar to that addressed in *In re Estate of Radford, supra.* There, a hearing was held but no sworn testimony was given and no exhibits were offered or received into evidence. Although the court was asked to take judicial notice of its file, it failed to identify what documents it was noticing and did not mark and introduce into evidence

each document that it considered. On appeal, the Supreme Court concluded that as a result, the only information available for review was the pleadings, the attachments to the pleadings, and the court's order. But because these were not properly admitted into evidence, they could not be considered by the trial court. Consequently, the Supreme Court reversed and remanded because the trial court received no evidence which would have proved the allegations in the motion before it. See *id*.

Because there was no evidence before the court as to Issaabela's best interests vis-a-vis the guardianship, we conclude that the county court's decision is not supported by competent evidence. And because the deficiency in the record is not the fault of the appellant, the proposition that an appellate court will affirm a lower court's decision when the appellant fails to present a record to support her errors is inapplicable. See *In re Estate of Radford*, 297 Neb. 748, 901 N.W.2d 261 (2017).

As the moving party, DHHS had the burden to provide sufficient evidence to prove that terminating the guardianship was in Issaabela's best interests. See *id*. Its failure to adduce any evidence was not the fault of Cami. To affirm the county court's decision because of the lack of evidence would reward DHHS for failing to meet its burden. See *id*. We therefore reverse the county court's order terminating the guardianship and remand the cause for further proceedings.

## CONCLUSION

We conclude that the county court erred in failing to create a record containing evidence to support its decision that terminating the guardianship was in Issaabela's best interests. Because we find that the county court had insufficient evidence to make its determination, we reverse the order terminating the guardianship and remand the cause for further proceedings.

Reversed and remanded for
further proceedings.

# State of Nebraska, appellee, v. Marlon Franco, appellant.

932 N.W.2d 84

Filed June 25, 2019. No. A-18-208.

1. **Statutes.** Statutory interpretation presents a question of law.
2. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
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. **Convictions: Corroboration: Witnesses: Testimony: Controlled Substances.** Under the Uniform Controlled Substances Act, corroboration is sufficient to satisfy the requirement that a conviction not be based solely upon uncorroborated testimony of an individual cooperating with the prosecution if the witness' testimony is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue.
5. **Criminal Law: Corroboration: Testimony.** Testimony of a cooperating individual need not be corroborated on every element of a crime.
6. **Controlled Substances.** A person possesses a controlled substance when he or she knows of the nature or character of the substance and of its presence and has dominion or control over it.
7. **Controlled Substances: Evidence: Circumstantial Evidence: Proof.** Possession can be either actual or constructive, and constructive possession of an illegal substance may be proved by direct or circumstantial evidence.

8. **Controlled Substances: Circumstantial Evidence: Intent.** Circumstantial evidence may support a finding that a defendant intended to distribute, deliver, or dispense a controlled substance in the defendant's possession.
9. ____: ____: ____. Circumstantial evidence sufficient to establish possession of a controlled substance with intent to deliver may consist of evidence of the quantity of the substance, equipment and supplies found with the substance, the place where the substance was found, the manner of packaging, and the testimony of witnesses experienced and knowledgeable in the field.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Affirmed.

Justin B. Kalemkiarian, of Berry Law Firm, for appellant.

Douglas J. Peterson, Attorney General, and Erin E. Tangeman for appellee.

Riedmann, Arterburn, and Welch, Judges.

Arterburn, Judge.

## INTRODUCTION

Marlon Franco appeals from a conviction, pursuant to jury verdict, for possession of methamphetamine with the intent to deliver in violation of Neb. Rev. Stat. § 28-416(1) (Reissue 2016). On appeal, Franco alleges that a cooperating individual's testimony was not sufficiently corroborated and that the jury verdict rested on insufficient evidence. We reject these arguments for the following reasons and, thus, affirm Franco's conviction.

## BACKGROUND

On March 27, 2017, Undreia Martinez' probation officer, Avidan Perez, directed Martinez to report for drug testing. Martinez was on probation at the time due to a conviction for the unauthorized use of a financial transaction device. She tested positive for methamphetamine on March 27 and admitted her drug use to Perez. Pursuant to Martinez' probation

order, her residence was subject to search, and Perez informed her that he would search her home following the positive drug test.

Because probation officers do not carry firearms, police officers often assist in searching homes, particularly when a probation officer anticipates the presence of drugs or weapons. Martinez admitted to Perez that there were drugs present in her home. Martinez also told Perez that three individuals were present in the home: Dylan Siefker, Jeremy Cushing, and Yolanda Reyes. Perez asked a second probation officer, Jaime Evans, and two police officers to assist in the search. They gathered in a nearby parking lot to formulate a plan before entering Martinez' home. Perez directed Martinez, who was also present, to remain in the parking lot during the search.

Perez led Evans and the police officers to Martinez' residence, where two men, later identified as Siefker and Cushing, were standing outside smoking. Perez ran into the home in order to preserve its condition. As he entered, he saw Reyes near the door moving toward him and a man, later identified as Franco, sitting on the couch. Perez asked Reyes and Franco to step outside. Perez noted Franco's confused facial expression until Reyes conveyed the message to him in Spanish. Perez said that he did not see anything in Franco's hands and that Reyes was carrying only a cell phone. Perez also said he did not observe any suspected drugs on the couch at that point.

A few seconds after Perez entered the home, Reyes and Franco exited, and then Evans joined Perez inside. Evans began searching the main level of Martinez' home while Perez searched the second floor. In one room upstairs, Perez found marijuana; a folded dollar bill with white residue, which he believed to be methamphetamine; and three scales. In the other room upstairs, Perez found "a glass pipe with residue in it [and] a syringe with a needle and a spoon." Meanwhile, Evans found a black zippered bag, smaller than a purse, that was lying on the couch. Inside the black zippered bag was a

plastic Ziploc bag, with green coloring at the top, that contained methamphetamine. Martinez later testified that although she had plastic baggies in her home, they had neither the Ziploc seal nor the green coloring at the top. Evans said that the black zippered bag, with the Ziploc bag inside that contained methamphetamine, was on a couch cushion rather than "in the crack in between the . . . cushions." The Ziploc bag of methamphetamine contained large "shards," not salt-like crystalline. One of the police officers described the Ziploc bag of methamphetamine as "a lot larger than what [he] was used to seeing" as a street officer.

Franco was thereafter arrested and charged by criminal complaint on March 29, 2017, with the crime of possessing 10 to 27 grams of methamphetamine with the intent to deliver. A probable cause affidavit filed in the case noted that the Ziploc bag of methamphetamine seized from the couch at Martinez' home where Franco was sitting contained 25 grams of methamphetamine. It also noted that Franco had $230 cash on his person when he was arrested.

A jury trial was held from December 11 to 15, 2017. The State introduced numerous exhibits and offered testimony from 11 witnesses: probation officers Perez and Evans; Martinez; Siefker and Cushing, who were present outside Martinez' home; Rhiannon Rojas; and five police officers. Franco offered no evidence. In addition to the foregoing evidence, the following evidence was adduced by the State.

Martinez testified that she had used methamphetamine during the past 10 years, stopped using methamphetamine before she gave birth to her son, and then relapsed. In March 2017, Martinez allowed her friend Reyes to move into her home and place property in a spare second-floor bedroom. Reyes began providing methamphetamine to Martinez. In the days leading up to Martinez' testing positive for methamphetamine and the probation and police officers' searching her home on March 27, Martinez and Reyes obtained methamphetamine from Franco.

On Friday, March 24, 2017, Martinez met Franco for the first time when she and Reyes went to his trailer home to get methamphetamine. Martinez testified that although she was under the influence of both alcohol and methamphetamine that night, she observed Franco give Reyes methamphetamine in exchange for cash. Martinez testified that Franco and Reyes spoke in Spanish, which she does not speak. Early in the morning on Sunday, March 26, Martinez and Reyes again went to Franco's trailer home and smoked methamphetamine with Franco, supplied by him.

Rojas, who lived in the same trailer home as Franco, also received methamphetamine from him during February and March 2017. Rojas testified that she observed Franco store methamphetamine in Ziploc bags that were colored green at the top. She also testified that she knew Franco owned a black zippered bag, like a fanny pack, in which he sometimes stored his cell phone and cash but said that she never saw him keep methamphetamine in it. Rojas said that in the past, she had seen Franco with large quantities of methamphetamine, including amounts up to a half pound.

Siefker testified that he did not see Franco or anyone with methamphetamine at Martinez' home on March 27, 2017. He also said he did not see a black bag on the couch. Cushing similarly testified that he did not see any methamphetamine at Martinez' home on March 27.

A police officer who interviewed Franco testified that Franco denied any knowledge of the methamphetamine that was found on Martinez' couch. Franco told the officer that he was at Martinez' home to give a woman money for a hotel. Another police officer testified that he tested the Ziploc bag of methamphetamine for fingerprints, which yielded no result. He said that he only finds fingerprints on plastic bags approximately 10 percent of the time. Another police officer with expertise of methamphetamine testified that the 23-gram package found at Martinez' home would yield 115 individual doses, because there are five doses per gram.

The jury found Franco guilty of possession of methamphetamine with the intent to deliver, and the court entered judgment accordingly. The court thereafter sentenced Franco to 4 to 10 years' imprisonment with credit for 302 days' time served.

Franco now appeals.

## ASSIGNMENTS OF ERROR

On appeal, Franco argues generally that the evidence was insufficient to support the jury's verdict. He also specifically argues that Martinez was a cooperating individual whose testimony was not corroborated as required by Neb. Rev. Stat. § 28-1439.01 (Reissue 2016).

## STANDARD OF REVIEW

[1,2] Statutory interpretation presents a question of law. *In re Trust of Shire*, 299 Neb. 25, 907 N.W.2d 263 (2018). We independently review questions of law decided by a lower court. *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. *State v. Garcia*, 302 Neb. 406, 923 N.W.2d 725 (2019). 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*.

## ANALYSIS

*Corroboration of Cooperating Individual.*

Franco argues that Martinez was a cooperating individual under § 28-1439.01 and that her testimony was not sufficiently corroborated as the statute requires. The State argues in response that Martinez was not a cooperating individual. We find that Martinez was not a cooperating individual under the

relevant statute, and therefore, her testimony was not subject to the statute's corroboration requirement.

[4,5] Nebraska law provides, "No conviction for an offense punishable under any provision of the Uniform Controlled Substances Act shall be based solely upon the uncorroborated testimony of a cooperating individual." § 28-1439.01. Under the Uniform Controlled Substances Act, corroboration is sufficient to satisfy the requirement that a conviction not be based solely upon uncorroborated testimony of an individual cooperating with the prosecution if the witness' testimony is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue. *State v. Savage*, 301 Neb. 873, 920 N.W.2d 692 (2018), *modified on denial of rehearing* 302 Neb. 492, 924 N.W.2d 64 (2019). Testimony of a cooperating individual need not be corroborated on every element of a crime. *Id*.

For § 28-1439.01 to apply, however, the person testifying must be a "cooperating individual." Neb. Rev. Stat. § 28-401(26) (Reissue 2016) provides, "Cooperating individual means any person, other than a commissioned law enforcement officer, who acts on behalf of, at the request of, or as agent for a law enforcement agency for the purpose of gathering or obtaining evidence of offenses punishable under the Uniform Controlled Substances Act." Our review of pertinent case law reveals cases which discuss whether, under the facts of each case, a cooperating individual's testimony was adequately corroborated, but none which make a specific determination as to whether a particular witness meets the definition of a cooperating individual. The question in this case is whether Martinez acted on behalf of, at the request of, or as an agent for law enforcement for the purpose of gathering or obtaining evidence against Franco.

We find that Martinez was not a cooperating individual. First, we note that it seems axiomatic that a cooperating individual must perform a function greater than simply providing information to law enforcement regarding events that she has

observed in the past. Cooperating individuals also often participate in some sort of quid pro quo agreement whereby investigators receive assistance from the individual in exchange for providing to the individual some benefit.

This quid pro quo arrangement between investigators and cooperating individuals is well established in our case law. For example, in *State v. Palser*, 238 Neb. 193, 469 N.W.2d 753 (1991), the arrangement was made explicit. To induce an individual to cooperate in a controlled drug buy, officers explained to the cooperating individual that he "had the option of cooperating with the prosecuting authorities or a criminal complaint might be filed against him" for his participation in past drug purchases. *Id*. at 197, 469 N.W.2d at 757.

Similarly, in *State v. Jimenez*, 248 Neb. 255, 533 N.W.2d 913 (1995), an individual cooperated with investigators in exchange for a reduced charge. In *Jimenez*, the court noted that corroboration may be supplied by observation of the cooperating individual's meeting with the target of the investigation and searching the cooperating individual before and after the purchase of controlled substances. These are common occurrences in cases involving cooperating individuals, which connote active evidence gathering on the part of the cooperator. See, also, *State v. Kuta*, 12 Neb. App. 847, 686 N.W.2d 374 (2004).

In *State v. Johnson*, 261 Neb. 1001, 627 N.W.2d 753 (2001), a drug task force monetarily compensated a cooperating individual who participated in controlled drug transactions. Investigators gave that cooperating individual "'buy money'" prior to the drug transaction and also searched him both before and after the transaction. *Id*. at 1004, 627 N.W.2d at 757. Additionally, investigators outfitted the cooperating individual with a transmitter disguised as a pager. *Id*.

While dismissal or reduction of charges and/or compensation are commonly found in cases involving cooperating individuals, these factors are not required. What is required is that the cooperating individual "acts on behalf of, at the

request of, or as an agent for a law enforcement agency." See § 28-401(26). This definition requires that the individual take some action in response to law enforcement's request. Finally, the definition requires that the act requested be "for the purpose of gathering or obtaining evidence." See *id*. In our view, this definition indicates that this "gathering" takes place in response to law enforcement's request for the cooperator to "act[]." It does not mean that a person who merely provides information regarding a crime he or she has observed is transformed thereby into a cooperating individual.

In the present case, Martinez is not a "cooperating individual" under § 28-1439.01. First, we note that it is highly questionable whether her probation officer would qualify as a "law enforcement agency" under § 28-401(26). However, even assuming that the probation officer coupled with the police department's later involvement qualifies, Martinez' active cooperation, to the extent that it existed at all, was providing Perez a key to her home and informing him of its contents and occupants. But Perez was entitled to search Martinez' home at any time. Martinez' provision of a key to her home was required under her probation order, and informing Perez of what he may encounter when he entered the home does not connote the type of active evidence gathering found in the statutory definition. Here, ascertaining Martinez' compliance with her probation order was the purpose of searching her home, not collecting evidence of crimes under the Uniform Controlled Substances Act. Moreover, there is no evidence that Martinez was offered any leniency or other incentive to provide information to Perez or to the police department or to testify at trial. In fact, Martinez was sanctioned for her probation violation and later was sentenced to jail. Martinez' actions in this case exhibited none of the paradigmatic qualities of a "[c]ooperating individual" as defined by § 28-401(26) or pertinent case law.

Because Martinez did not act as a cooperating individual under § 28-1439.01, her trial testimony was not subject to

the statute's corroboration requirement. We therefore need not consider whether, and to what extent, Martinez' testimony was corroborated by other sources.

*Sufficiency of Evidence.*

Franco was convicted of possession of methamphetamine with the intent to deliver in violation of § 28-416(1). However, Franco contends that his conviction was based on insufficient evidence of possession of methamphetamine with the intent to deliver. We find that the jury's finding of Franco's guilt was supported by sufficient evidence.

[6-9] A person possesses a controlled substance when he or she knows of the nature or character of the substance and of its presence and has dominion or control over it. *State v. Rocha*, 295 Neb. 716, 890 N.W.2d 178 (2017). Possession can be either actual or constructive, and constructive possession of an illegal substance may be proved by direct or circumstantial evidence. *Id*. Circumstantial evidence may also support a finding that a defendant intended to distribute, deliver, or dispense a controlled substance in the defendant's possession. *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011). Circumstantial evidence sufficient to establish possession of a controlled substance with intent to deliver may consist of evidence of the quantity of the substance, equipment and supplies found with the substance, the place where the substance was found, the manner of packaging, and the testimony of witnesses experienced and knowledgeable in the field. *Id*.

Taken in the light most favorable to the State, the evidence produced at trial showed that Franco had a history of distributing methamphetamine to others. Both Rojas and Martinez testified that they personally had received methamphetamine from Franco in March 2017. Moreover, Martinez testified that she observed Reyes provide cash to Franco in exchange for methamphetamine on the evening of March 24.

The evidence also showed that Franco owned a black zippered bag like the one containing methamphetamine that

Evans found on Martinez' couch. Rojas testified that she knew Franco owned a black zippered bag that was smaller than the size of a purse, although she said that she did not know Franco to store methamphetamine inside it. Rojas also testified that she had observed Franco with methamphetamine in a Ziploc bag that had green coloring at the top, which comports with the Ziploc bag of methamphetamine found inside the black zippered bag on Martinez' couch. Moreover, Franco had been sitting on Martinez' couch immediately before Evans found the black zippered bag, which she said was sitting on top of the couch and not "in the crack in between the . . . cushions." A police officer testified that the quantity of methamphetamine found in the Ziploc bag was consistent with an intent to deliver given the quantity contained therein.

Franco contends that the evidence does not support the verdict because the methamphetamine was found in the home of a known methamphetamine user who had other drug paraphernalia in her home and was on probation at the time. Nevertheless, the evidence in this case, when taken in a light most favorable to the State, was sufficient to support the jury's finding Franco guilty of possession of methamphetamine with the intent to deliver. Thus, we affirm the judgment entered by the district court.

## CONCLUSION

We find that the corroboration requirement of § 28-1439.01 was inapplicable to the testimony of Martinez, because she was not a cooperating individual as defined by § 28-401(26). We further find that there was sufficient evidence to support the verdict finding Franco guilty of possession of methamphetamine with the intent to deliver.

Affirmed.

# Andrew Albrecht, appellee and cross-appellant, v. Kevin Fettig, doing business as Fettig Cattle Company, appellant and cross-appellee.

932 N.W.2d 331

Filed July 16, 2019. No. A-18-445.

1. **Contracts: Appeal and Error.** The interpretation of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
2. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
3. **Trial: Witnesses.** In a bench trial of an action at law, the trial court is the sole judge of the witnesses' credibility and the weight to be given their testimony.
4. **Prejudgment Interest: Appeal and Error.** Whether prejudgment interest should be awarded is reviewed de novo on appeal.
5. **Uniform Commercial Code: Contracts.** Under the Uniform Commercial Code, a buyer is given the right to reject the whole if the goods fail in any respect to conform to the contract.
6. ____: ____. An output contract is one in which the actual quantity of goods subject to the sale or purchase is indefinite. The quantity is determined by either the output of the seller or the requirements of the buyer.
7. ____: ____. Nebraska's codification of the Uniform Commercial Code (particularly Neb. U.C.C. § 2-601 (Reissue 2001)) and Nebraska Supreme Court precedent make it clear that buyers may reject an entire delivery that in any way fails to conform to the contract.
8. **Prejudgment Interest: Appeal and Error.** Prejudgment interest may be awarded only as provided in Neb. Rev. Stat. § 45-103.02 (Reissue 2010).

9. **Prejudgment Interest: Claims.** A claim is liquidated for purposes of prejudgment interest when there is no reasonable controversy as to both the amount due and the plaintiff's right to recover.

Appeal from the District Court for Thurston County: John E. Samson, Judge. Affirmed.

David A. Domina, of Domina Law Group, P.C., L.L.O., and Stuart B. Mills for appellant.

Wendy J. Ridder, of Law Offices of Daniel P. Bracht, P.C., L.L.O., for appellee.

Pirtle, Arterburn, and Welch, Judges.

Arterburn, Judge.

## INTRODUCTION

Kevin Fettig appeals from an order of the district court for Thurston County that ordered him to return a $6,000 deposit to Andrew Albrecht from an uncompleted cattle sale and awarded Albrecht incidental damages of $449.53, both of which carried a 3.61-percent postjudgment interest rate. The court initially ordered Fettig to pay prejudgment interest at a rate of 12 percent on the $6,000 deposit but subsequently granted Fettig's motion to alter or amend, thereby ordering that no prejudgment interest was owed on the deposit. Albrecht cross-appeals from the order granting Fettig's motion to alter or amend. For the reasons that follow, we affirm the district court's award of damages to Albrecht totaling $6,449.53 and the district court's amended order that eliminated the award of prejudgment interest on the $6,000 award.

## BACKGROUND

Albrecht operates a cow-calf ranch in Thurston County, Nebraska, breeding and selling primarily Red Angus cattle. Although he performs some work individually, Albrecht also does some work through a business that involves his brother and father. That business holds an annual sale in April wherein it primarily sells Red Angus bulls. Albrecht's individual

operation involves feeding cattle in his own feedlot and then selling them for slaughter. He prefers to feed primarily Red Angus cattle based on what he believes to be their superior performance and for the reason that prospective customers for the annual bull sale stop at his feedlots to view the cattle. He noted that buyers are more likely to bid at the annual bull sale when they have seen Red Angus cattle on the Albrecht family feedlots. Additionally, Albrecht is a member of the Red Angus Association.

Albrecht attributed his preference for Red Angus cattle to the cattle's superior performance. In comparison to black-hided cattle, Albrecht's father described Red Angus cattle as being more docile and more heat tolerant during the summertime. Steers that tolerate heat better are less likely to unexpectedly die. Albrecht's brother also observed Red Angus steers' better heat tolerance and docile temperament, noting that they are less likely to run in their pens and kick up dust, which can cause illness. Albrecht's brother stated that he had paid more for red cattle than black cattle based on their coloration. He also noted that Red Angus steers can garner a higher price in the region due to years of ranchers' culling red-hided cattle from their herds, which led to their scarcity as compared to black-hided cattle.

Fettig works as a rancher and cattle buyer, whereby he purchases cattle and resells them to buyers, including Albrecht. Albrecht bought cattle through Fettig when his normal cattle buyer was unavailable in May 2015. Although Albrecht wanted mostly red-hided steers, Fettig purchased mostly black-hided steers for Albrecht. Albrecht testified that Fettig apologized for "sending [him] the wrong color of cattle" following a prior transaction. Despite the cattle not meeting Albrecht's specifications, Albrecht told Fettig that he would accept that particular shipment of cattle but would reject any future deliveries of the wrong color of cattle.

A few months later, in July 2015, Albrecht again retained Fettig to purchase cattle for him. Albrecht testified that they

discussed Albrecht's desire to buy around 150 head of primarily red-hided cattle, and Fettig told Albrecht that there might be 5 head of black-hided cattle in the order. Fettig prepared a contract for the sale, which described that the cattle would be 80 percent red hided and 20 percent black hided. Fettig testified that he did not make statements indicating that there would be less than 20 percent black-hided cattle. However, Albrecht said that the contract varied from their initial conversation and that he called Fettig to discuss the description of cattle as 80 percent red hided and 20 percent black hided. According to Albrecht, Fettig said that he included the percentages only to "cover his bas[e]s" but that he nonetheless intended for there to be only a few black-hided steers in the delivery.

The contract for the purchase of livestock is dated July 15, 2015, and signed by both parties. A number of terms are handwritten, including the quantity of steers, their description, and the price. Albrecht and Fettig both testified that all the handwritten terms on the contract were written by Fettig. The quantity is given as "APPROX 150 - HD," which both parties understood to mean approximately 150 head of cattle. Albrecht testified that he understood he could receive some deviation from 150 head of cattle, such as receiving 151 head of cattle. The contract describes the cattle to be delivered as "80% Red Angus cross [and] 20% Bl[ac]k Angus cross steers" at a base average weight of 780 pounds. The price is given as $235 per hundredweight. Additionally, a sliding price scale was provided whereby the price could be adjusted up to $0.15 per pound if the average weight of the steers was higher or lower than the 780-pound base weight stated in the contract. The contract memorialized a "country deal" according to the parties, which is signed with an understanding that delivery will occur at a date in the future. In this case, as in many such deals, the buyer did not view the cattle prior to signing the contract. Here, the contract specified a delivery window of between October 10 and 25, 2015. As part of the negotiation,

Fettig informed Albrecht of the ranch from which he would be buying the steers in North Dakota, which included a discussion of the owner and the Red Angus bulls the owner utilized for the cattle he raised and sold. Fettig and the owner, Randy Kahl, executed a contract for the sale of the steers to Fettig, which in turn were sold to Albrecht.

The parties spoke by telephone on a number of occasions in early October 2015, prior to the delivery of the steers. During one of these conversations, Fettig indicated that there were 10 additional head of cattle that were ready for delivery if Albrecht was interested. Albrecht confirmed that he was interested in purchasing the 10 additional head and negotiated a price for them of $189 per hundredweight because prices in the cattle market had gone down since they signed the original contract in July. Albrecht testified that the additional 10 head of cattle fell outside the "approximately" term of their original contract. However, Fettig testified that he asked Albrecht about the 10 additional head of cattle and negotiated a new price as a "courtesy," even though he believed that he could have included them under the "approximately" term of the original contract.

The cattle were delivered to Albrecht late at night on October 14, 2015, after it was dark outside. The next morning, Albrecht saw the cattle in the daylight and observed that there were a lot of black-hided steers: "I knew there was more than 20 percent without even counting them . . . ." Albrecht also observed a few "butterscotch" steers, which he believed to have Charolais genetics. In preparation for trial, Albrecht counted the steers from a video he took and found 88 red steers, 68 black steers, and 4 butterscotch steers.

Albrecht called Fettig on October 15, 2015, and expressed frustration and displeasure at receiving so many black steers. Fettig offered to take back the black steers, leaving Albrecht with 88 head of red steers, but Albrecht rejected that offer. Albrecht testified that Fettig's offer was unsatisfactory to him because it would leave him with a partial pen of cattle, which

would result in a higher cost of feeding each cow given that the labor required to feed a partial pen of cattle is no different than is needed to feed a full pen. According to Albrecht, Fettig never offered to bring more red cattle.

After discussing the mix of cattle delivered with his brother, father, and an attorney, Albrecht called Fettig on October 16, 2015, and rejected the delivery based on the inclusion of too many black steers. Albrecht also noted that the contract did not allow for the delivery of any butterscotch steers. Albrecht testified that Fettig made no offers after he rejected the delivery on October 16. Despite having until October 25 to cure the problem, Fettig admitted that he made no efforts to find more red cattle to meet the 80-percent threshold after Albrecht's rejection on October 16. Fettig testified that he did not work to find additional red steers "[b]ecause the door was slammed on me to take them all back and he refused them." Kahl testified that he informed Fettig that he had more red steers available, which could have been swapped for black steers. He did note that the additional red steers would weigh less than the 780-pound average called for in the contract but that the slide could be applied.

Fettig sent trucks to pick up all the steers on October 17, 2015, and return them to North Dakota. Between the time the cattle were delivered to Albrecht on October 14 and when the cattle were picked up on October 17, Albrecht said he fed them as he would feed his own cattle—giving them hay, silage, corn, and "modified distillers." Albrecht testified that he told Fettig he was feeding the cattle and discussed whether Fettig wanted them fed before being loaded onto trucks for the return trip to North Dakota. However, Fettig testified that he did not recall Albrecht discussing feeding the cattle but acknowledged that Albrecht discussed administering an antibiotic mix to the cattle.

Before loading the cattle for their return trip, Albrecht asked that Fettig refund the $6,000 deposit he paid. Fettig agreed and (at Albrecht's insistence) drafted a written agreement reflecting

the repayment promise pursuant to Albrecht's request. Fettig emailed that agreement to Albrecht, which also included a provision requiring Fettig to pay the trucking bill from North Dakota to Nebraska. The agreement was dated October 17, 2015. Although Fettig testified that Albrecht made no threats to coerce him to sign the repayment agreement, he also stated that Albrecht was "forcing [his] hand" because Albrecht stated he would not load the cattle until Fettig signed the repayment agreement. Albrecht testified that he made no threats of any kind to induce Fettig to sign the repayment agreement. He simply wanted their verbal agreement in writing because he "didn't trust [Fettig] at that point anymore." Fettig signed the repayment agreement, and Albrecht loaded the cattle for the return trip to North Dakota. Fettig admitted that he never returned Albrecht's $6,000 deposit. Fettig testified that he had the steers transported back to a feedlot in North Dakota. He maintained ownership of the cattle, paying for them to be fed. He ultimately sold the cattle at a sale barn at a price below the price contracted for with Albrecht.

Between October 17 and 25, 2015—the close of the performance period provided in their purchase agreement—Fettig and Albrecht had no contact. On November 9, Albrecht text messaged Fettig to inquire about the $6,000 deposit refund. Fettig replied and told Albrecht that he had filed a lawsuit against Albrecht and that his attorney instructed him not to discuss the matter.

Albrecht then filed a complaint in the county court for Thurston County on November 11, 2015, alleging that Fettig breached their written purchase agreement that was dated July 15, 2015. Albrecht alleged that he was damaged in the amount of the $6,000 deposit he paid to Fettig, the yardage and feed costs incurred by housing the cattle from October 14 to 17, transportation costs, and the labor and miscellaneous costs associated with loading the cattle for their return trip.

On December 14, 2015, Fettig filed an answer and counterclaim. Fettig's counterclaim alleged that Albrecht breached

their written purchase agreement that was dated July 15, 2015, by refusing to accept delivery of cattle that complied with their agreement. Fettig requested that the court award to him damages in the amount of the value lost on the cattle between their delivery to Albrecht and their eventual sale on December 5, 2015, along with associated costs and expenses he incurred.

The matter was subsequently transferred to district court on July 28, 2016. Fettig filed an amended answer and counterclaim on September 14, which more specifically set forth damages. Trial on the matter occurred on November 28 and December 13, 2017. Albrecht testified and offered the testimony of four other witnesses. Fettig also testified but called no other witnesses. He did offer the deposition testimony of Kahl, which was received. Numerous exhibits were admitted.

Following trial, the court entered its order on February 7, 2018. Specifically, the court noted that "Albrecht was a very credible witness and that his testimony regarding the conversations and dealings between he and . . . Fettig was believable and persuasive." The court found that Albrecht had never accepted delivery of the cattle and verbally notified Fettig of the issue regarding the cattle's coloration on October 15, 2015, after Albrecht saw the cattle in the daylight for the first time. On October 16, Albrecht officially rejected the cattle. The court found Albrecht's testimony credible that Fettig's only offer to cure was his offer to remove all the black-hided steers, which would leave Albrecht with significantly fewer than the approximately 150 head of cattle called for in the purchase agreement. The court found that Fettig made no other attempts to cure the delivery before the final performance date of October 25, 2015, and that if the only action taken by Fettig was to take back the black cattle, he would still have breached the contract's requirements as to the number of cattle delivered.

The court held that the parties' agreement did not limit Albrecht's right to reject the cattle. Instead, the provision that

unmerchantable cattle—those exhibiting disease and deformities—could be rejected was a nonexclusive ground on which Albrecht could reject the cattle delivery. Moreover, the court held that Albrecht was entitled under Nebraska's Uniform Commercial Code (U.C.C.) to reject the entire delivery, accept the entire delivery, or accept any portion of the delivery and reject the rest. Albrecht's rejection of the entire cattle delivery was therefore allowed under the U.C.C. Finally, the court found that Fettig had not met his burden of proof regarding his counterclaim and therefore dismissed the counterclaim.

The court awarded damages to Albrecht based on Fettig's breach. The court ordered Fettig to refund Albrecht's $6,000 deposit. The court ordered Fettig to pay 12 percent prejudgment interest on the $6,000 deposit from October 17, 2015, and 12 percent postjudgment interest. The court also ordered Fettig to pay incidental damages based on the costs Albrecht incurred in caring for the cattle on his property from October 14 through 17, totaling $449.53, and attached postjudgment interest at the rate of 3.61 percent until paid in full. The court found that Albrecht did not meet his burden of proof as to establishing the amount of the trucking bill, so it awarded no damages related to trucking expense.

Fettig filed a motion to alter or amend on February 15, 2018, arguing that prejudgment interest was inappropriate and that a postjudgment interest rate of 12 percent was also inappropriate. A brief hearing was held on April 11, 2018. In ruling from the bench, the court's rationale centered on Albrecht's failure to plead prejudgment interest. On April 13, the court amended its order to reflect a 3.61-percent postjudgment interest rate as to the $6,000 judgment for the deposit and eliminated any prejudgment interest award.

Fettig now appeals, and Albrecht cross-appeals.

## ASSIGNMENTS OF ERROR

Fettig assigns, restated, that the district court erred in finding that Albrecht could reject the cattle for failing to consist of

approximately "80% red-hided and 20% black-hided steers," that Fettig had failed to notify Albrecht of his intention to cure the purported breach, and that Albrecht repudiated the contract before the performance period closed.

Albrecht assigns that the district court erred in vacating its award of 12 percent prejudgment interest on the $6,000 deposit owing to Albrecht from October 17, 2015.

## STANDARD OF REVIEW

[1-3] The interpretation of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *Omaha Police Union Local 101 v. City of Omaha*, 292 Neb. 381, 872 N.W.2d 765 (2015). In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Bloedorn Lumber Co. v. Nielson*, 300 Neb. 722, 915 N.W.2d 786 (2018). In a bench trial of an action at law, the trial court is the sole judge of the witnesses' credibility and the weight to be given their testimony. *Stauffer v. Benson*, 288 Neb. 683, 850 N.W.2d 759 (2014).

[4] 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).

## ANALYSIS

The U.C.C. applies to transactions in goods. Neb. U.C.C. § 2-102 (Reissue 2001). The U.C.C. defines the term "goods" as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (article 8) and things in action." Neb. U.C.C. § 2-105 (Reissue 2001). This matter involves a sale of cattle, which are movable at the time of identification in the parties' purchase agreement. Thus, the U.C.C. governs this matter.

*Albrecht's Rejection of Fettig's Delivery.*

Fettig argues on appeal that the written purchase agreement exclusively limited Albrecht's right of rejection to unmerchantable cattle—those that are diseased, crippled, or deformed. He argues that Albrecht could not reject the cattle for failing to be a "'perfect-tender'" under the terms of their purchase agreement. Brief for appellant at 18. Fettig also argues that their purchase agreement was an "output contract" and did not call for delivery of exactly 80 percent red-hided steers and 20 percent black-hided steers. *Id.* at 30. For the reasons that follow, we agree with the district court that Albrecht could reject Fettig's delivery because the steers he delivered were not 80 percent red hided and 20 percent black hided.

An agreement between parties may provide remedies in addition to, or in substitution for, those remedies provided in article 2 of the U.C.C. Neb. U.C.C. § 2-719(1)(a) (Reissue 2001). Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy. § 2-719(1)(b). Section 2-719(1)(b) creates a presumption that contract clauses prescribing remedies are cumulative rather than exclusive. § 2-719, comment 2. If the parties intend that the contract term describes the sole remedy under the contract, this must be clearly expressed. *Id*.

[5] Where goods or the tender of delivery fail in any respect to conform to the contract, the buyer may reject the whole, accept the whole, or accept "any commercial . . . units and reject the rest." Neb. U.C.C. § 2-601 (Reissue 2001). Under the U.C.C., a buyer is given the right to reject the whole if the goods fail in any respect to conform to the contract. *Maas v. Scoboda*, 188 Neb. 189, 195 N.W.2d 491 (1972).

[6] An output contract is one in which the actual quantity of goods subject to the sale or purchase is indefinite. *Meyer v. Sandhills Beef, Inc.*, 211 Neb. 388, 318 N.W.2d 863 (1982). The quantity is determined by either the output

of the seller or the requirements of the buyer. *Id*. A lawful output contract imposes an obligation upon the seller to use best efforts to supply the goods and upon the buyer to use best efforts to promote their sale. See Neb. U.C.C. § 2-306(2) (Reissue 2001).

In the present case, the parties' purchase agreement provides that Albrecht, as the buyer, may reject any cattle that are not in a merchantable condition. However, the agreement does not describe this remedy as the sole remedy under the contract. In the absence of such clear expression of exclusivity, a remedy is presumed cumulative—not exclusive—under § 2-719(1)(b). Nevertheless, Fettig contends that the Latin phrase "expressio unius est exclusio alterius," which means "the expression of one thing is the exclusion of the other," ought to be applied here to show that Albrecht was limited under their agreement to rejecting the delivery only if the cattle were unmerchantable. Brief for appellant at 15. Our codified adoption of the U.C.C. supplants general principles of interpretation, and we will adhere to the presumption that remedies are cumulative unless exclusivity is clearly expressed. Therefore, like the district court, we will not read into the contract the addition of terms that do not appear, and thus, we find that Albrecht was entitled to reject the cattle delivered for reasons beyond their merchantable condition.

The contract that Fettig drafted specified that he was to provide to Albrecht approximately 150 head of cattle that were 80 percent red hided and 20 percent black hided. They subsequently negotiated the sale of an additional 10 head of cattle. Fettig delivered 88 red steers, 68 black steers, and 4 butterscotch steers. That amounted to 160 head of cattle that were 55 percent red hided, 42.5 percent black hided, and 2.5 percent butterscotch hided. Thus, the cattle delivered did not conform to the terms of the contract, entitling Albrecht to reject the entire delivery, accept the entire delivery, or accept "any commercial . . . units and reject the rest." See § 2-601. Albrecht elected to reject the entire delivery.

[7] Fettig argues that the so-called perfect tender rule has eroded over time and only stands for the proposition that buyers may reject a substantially nonconforming delivery. Nebraska's codification of the U.C.C. (particularly § 2-601) and our Supreme Court precedent make it clear that buyers may reject an entire delivery that in any way fails to conform to the contract. See, e.g., *Maas v. Scoboda, supra*. Even if we accepted Fettig's position as correct, which we decline to do, it is unreasonable to suggest that the delivery in this case substantially conformed to the contract. The contract specified that Fettig was to deliver cattle that were 80 percent red hided and 20 percent black hided, but Fettig instead delivered cattle that were 55 percent red hided and 42.5 percent black hided. Fettig's delivery was much more than a slight deviation from the terms of the contract.

At trial, Fettig and Kahl testified that there would be no difference in the price paid for cattle, whether red hided or black hided. They testified that the key provision in a "country deal" was the weight and that cattle feeders are not concerned about hide color. Based on this testimony, Fettig essentially argues that the color of the steer delivered is of no consequence so long as the underlying genetics and weight meet the contract's requirements. Albrecht testified that color was a critical factor in his decision to enter the contract and noted his insistence to Fettig that the cattle delivered be, at minimum, 80 percent red hided. Moreover, he testified to his dissatisfaction with a past shipment of cattle that did not conform to the description provided by Fettig. While Fettig and Kahl may have disagreed that color of the cattle was important, the evidence demonstrated that Fettig agreed to deliver what Albrecht demanded but failed to deliver on his promise.

Fettig also urges us to decide that the contract term "approximately" ought to be applied to both the quantity and the proportion of red-hided to black-hided steers. The plain language of the contract demonstrates that "approximately" only attached to the quantity. Nevertheless, even if we again

accept Fettig's proposition that he was required to deliver *approximately* 80 percent red-hided steers and *approximately* 20 percent black-hided steers, his delivery does not conform to that fictional iteration of the contract. We cannot find that a delivery of 55 percent red-hided steers satisfies the requirement of delivering approximately 80 percent red-hided steers, nor that a delivery of 42.5 percent black-hided steers satisfies the requirement of delivering approximately 20 percent black-hided steers. Fettig's delivery did not comply with the contract, and Albrecht was therefore entitled to reject the entire delivery.

Lastly, Fettig argues that the contract here was an output contract, which necessitated that both parties deal in good faith. Notwithstanding Fettig's admission that he did not attempt to load steers for delivery that were 80 percent red hided and 20 percent black hided, we find no indication that either party dealt in bad faith. However, we also find that the contract here was not an output contract. Albrecht agreed to buy a set number of steers that also met weight and hide-color requirements. The inclusion of the term "approximately" does not negate the defined nature of the parties' contract. The parties did not sign an output contract because Albrecht did not agree to buy, for example, all the red-hided steers that Fettig could secure or all the steers that weighed 780 pounds. The contract's quantity was a definite, albeit approximate, term and unlike those found in output contracts.

Based on the foregoing, we agree with the district court that Albrecht was entitled to reject the cattle delivery because it did not include 80 percent red-hided and 20 percent black-hided steers. Albrecht's right to reject on this ground existed notwithstanding the contract's additional ground for rejection if the cattle were unmerchantable.

*Fettig's Purported Cure.*

Fettig argues on appeal that he notified Albrecht of his intention to cure the nonconforming delivery by offering to

pick up the black-hided steers. We agree with the district court that Fettig's purported offer to cure would have actually resulted in another material breach of the contract. Thus, we affirm the district court's finding that Fettig failed to timely notify Albrecht of his intention to appropriately cure the breach.

Where any tender or delivery by the seller is rejected because nonconforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery. Neb. U.C.C. § 2-508(1) (Reissue 2001).

Albrecht and Fettig agree that the contract required performance before October 25, 2015. The parties also agree that Albrecht rejected Fettig's delivery of the cattle on October 16, meaning that Fettig had from October 16 until October 25 to notify Albrecht of his intention to cure and then make a conforming delivery. Fettig argues that he did attempt to cure because he "offered to pick up the black cattle . . . Albrecht did not want." Brief for appellant at 31. Fettig also argues that Albrecht did not request the delivery of additional red steers.

The very nature of curing a nonconforming delivery is to make a conforming delivery. As the district court noted in its order, if Fettig had taken back all the black cattle, then the resulting delivery would not conform to the required quantity of cattle to be delivered. Even if Fettig took back some but not all of the black cattle, then the 80-20 proportion may be achieved, but the quantity requirement would remain unmet. Aside from Fettig's offer to take back the black cattle, he made no other potential offers to cure. We note that, between the cattle returning to North Dakota on October 17 and the performance period's conclusion on October 25, the parties had no contact. We also note that Fettig admitted to not attempting to secure additional red-hided steers despite Kahl's offer to provide him with additional red steers.

We agree with the district court that Fettig never timely notified Albrecht that he intended to appropriately cure the breach as Fettig's purported offer to cure would have actually resulted in other breaches. Therefore, we affirm the district court's finding that Fettig failed to notify Albrecht of his intention to cure the nonconforming tender.

*Albrecht's Purported Repudiation.*

Fettig's final argument on appeal is that the district court erred by failing to find that Albrecht repudiated the contract prior to the time allowed for Fettig to perform his contractual obligations. Specifically, Fettig argues that Albrecht repudiated the contract because he "told . . . Fettig to take back all the cattle — and not just bring some reds and take back some blacks." Brief for appellant at 35. The district court in essence found that Albrecht did not repudiate the contract by rejecting the entirety of the nonconforming delivery as was his right under § 2-601 by finding that Fettig retained the ability to cure the breach. The evidence supports the district court's finding. Although the parties did have some discussion regarding a cure, the only action offered by Fettig was to pick up some or all of the black steers. After Albrecht rejected this offer and rejected the delivery, Fettig was still free to attempt to fulfill the provisions of the contract. Instead, he arranged for removal of all of the cattle and prepared a second contract that provided for how the parties would accomplish the return. His own testimony demonstrates no postrejection efforts to meet the terms of the original contract. Thus, we cannot say the district court erred by failing to conclude that Albrecht repudiated the parties' contract before the performance period concluded.

*Albrecht's Claim for*
*Prejudgment Interest.*

We now turn to Albrecht's cross-appeal. Albrecht alleges that the district court erred in vacating its February 7, 2018,

order, which awarded prejudgment interest at a rate of 12 percent on the $6,000 damage award. During the hearing on Fettig's motion to alter or amend, the district court found that there was no specific request in Albrecht's complaint for prejudgment interest. The court found that the request found in Albrecht's complaint for "such other and further relief as the Court deems just and equitable" did not sufficiently plead a request for prejudgment interest in order for a recovery to be made. The court noted its opinion that prejudgment interest is not equitable in nature. Although our rationale varies somewhat from that utilized by the district court, we agree with the court's conclusion.

[8,9] Prejudgment interest may be awarded only as provided in Neb. Rev. Stat. § 45-103.02 (Reissue 2010). *Roskop Dairy v. GEA Farm Tech.*, 292 Neb. 148, 871 N.W.2d 776 (2015). Subsection (2) of § 45-103.02 provides that interest shall accrue on the unpaid balance of liquidated claims from the date the cause of action arose until the entry of judgment. A claim is liquidated for purposes of prejudgment interest when there is no reasonable controversy as to both the amount due and the plaintiff's right to recover. *Roskop Dairy v. GEA Farm Tech., supra*. Interest shall be allowed at the rate of 12 percent per annum on money due on any instrument in writing. Neb. Rev. Stat. § 45-104 (Reissue 2010). For purposes of our analysis, we assume without deciding that Albrecht's claim is liquidated.

Albrecht argues that his claim was liquidated and that his request for "further relief as the Court deems just and equitable" was sufficient to put Fettig on notice that prejudgment interest could be awarded. He urges us to adopt a rule that prejudgment interest be ordinarily granted unless exceptional or unusual circumstances make the award inequitable. See *J.C. Brager Co., Inc. v. Chesen*, 999 F. Supp. 675 (D. Neb. 1998). However, our review of the pertinent case law and rules of pleading lead us to a different conclusion.

The most recent case in Nebraska to address this issue is *Life Investors Ins. Co. v. Citizens Nat. Bank*, 223 Neb. 663, 392 N.W.2d 771 (1986). In that case, the Nebraska Supreme Court held that if a party does not pray for prejudgment interest, none can be provided. The basis for the Supreme Court's opinion was Neb. Rev. Stat. § 25-804 (Reissue 1985), which was repealed in 2002. That statute provided in part that special damages be stated in a petition "and if interest thereon be claimed, the time from which interest is to be computed shall also be stated." We note that not only has § 25-804 been repealed, but the decision made in *Life Investors Ins. Co.* predates the adoption of § 45-103.02(2). Therefore, we must analyze the interplay between § 45-103.02(2) with the court rule which has replaced § 25-804.

In 2002, the Legislature repealed Neb. Rev. Stat. § 25-801 through § 25-823 (Reissue 1995), which statutes related to pleadings, and adopted Neb. Rev. Stat. § 25-801.01 (Reissue 2016), which empowered the Supreme Court to adopt rules of pleading in civil actions "which are not in conflict with the statutes governing such matters." Pursuant to § 25-801.01, the Supreme Court promulgated the Nebraska Court Rules of Pleading in Civil Cases. Pertinent to this case is Neb. Ct. R. Pldg. § 6-1108(a), which provides, in part, "If the recovery of money be demanded, the amount of special damages shall be stated . . . ; and if interest thereon be claimed, the time from which interest is to be computed shall also be stated." We note that the language of the rule as it relates to interest is identical to the language that previously existed in § 25-804. Therefore, absent a distinguishing factor, it would appear that we would be required to follow the holding of *Life Investors Ins. Co., supra*, and find that since Albrecht did not state a time from which interest should be computed in his prayer for relief, his request for prejudgment interest must fail.

This leads us back to our analysis of § 45-103.02(2), which provides that prejudgment interest "*shall accrue* on the unpaid balance of liquidated claims from the date the cause

of action arose until the entry of judgment." (Emphasis supplied.) This provision was adopted after *Life Investors Ins. Co.* was decided but before the adoption of Neb. Ct. R. Pldg. § 6-1108(a). We recognize that a tension appears to exist between the statute and the court rule, but we do not believe that this tension is irreconcilable. Section 45-103.02(2) clearly sets out the availability of prejudgment interest. However, the court rule (adopted as part of the introduction of notice pleading to Nebraska) is concerned with litigants having adequate notice of the relief a plaintiff is seeking to obtain. Therefore, although the rule does place a procedural condition on a plaintiff's ability to recover prejudgment interest, it does not negate a plaintiff's ability to recover. Moreover, the rule secures a defendant's ability to have notice of the entire scope of the relief requested and prepare defenses thereto. Therefore, for the foregoing reasons, we affirm the decision of the district court to deny prejudgment interest to Albrecht.

## CONCLUSION

We therefore affirm the district court's order awarding to Albrecht a refund of his $6,000 deposit, incidental damages amounting to the cost of caring for the cattle between delivery and return, and court costs. We also affirm the district court's order denying prejudgment interest on the $6,000 judgment for return of the deposit.

Affirmed.

# In re Estate of Leonard John Sedlacek, deceased.
# James Psota, Personal Representative of the Estate of Leonard John Sedlacek, deceased, appellee, v. Valley County, Nebraska, appellant.

932 N.W.2d 91

Filed July 16, 2019. No. A-18-836.

1. **Decedents' Estates: Taxation: Appeal and Error.** On appeal of an inheritance tax determination, an appellate court reviews the case for error appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Decedents' Estates: Parent and Child: Taxation: Appeal and Error.** Factual findings necessary in determining whether the requisite acknowledged parent-child relationship of Neb. Rev. Stat. § 77-2004 (Reissue 2018) exists should be reviewed for sufficient evidence and should not be disturbed on appeal unless clearly wrong.
4. **Decedents' Estates: Taxation: Statutes: Proof.** Statutes exempting property from inheritance tax should be strictly construed, and the burden is on the taxpayer to show that he or she clearly falls within the language of the statute.
5. **Decedents' Estates: Parent and Child: Taxation.** The following factors serve as appropriate guideposts to the trial court in making a determination of an acknowledged relationship of a parent under Neb. Rev. Stat. § 77-2004 (Reissue 2018): (1) reception of the child into the home and treatment of the child as a member of the family, (2) assumption of the responsibility for support beyond occasional gifts and financial aid, (3) exercise of parental authority and discipline, (4) relationship by blood or marriage, (5) advice and guidance to the child, (6) sharing of time and affection, and (7) existence of written documentation

evincing the decedent's intent to act as a parent. This list of guideposts is not exhaustive, nor will every factor necessarily be present in each case. A trial court should consider all pertinent factors in arriving at that determination.

6. ____: ____: ____. The law recognizes that although a natural parent-child relationship may exist elsewhere, if the parties regard each other in all of the usual incidents and relationships of family life as parent and child, the benefits of the inheritance tax statute flow.

Appeal from the County Court for Valley County: Tami K. Schendt, Judge. Affirmed.

Brandon B. Hanson for appellant.

Amanda L. Tobey, of Peterson Legal Services, P.C., L.L.O., for appellee.

Pirtle and Bishop, Judges.

Pirtle, Judge.

## INTRODUCTION

Valley County (County) appeals from an order entered in the county court for Valley County finding that Leonard John Sedlacek stood in place of a parent for James Psota and that thus, Psota was entitled to a "Class 1" inheritance tax rate for property inherited from Sedlacek's estate. The County argues that there was not sufficient evidence of a parent-child relationship between Psota and Sedlacek and that therefore, the county court erred in granting Psota a Class 1 inheritance tax rate. For the reasons that follow, we affirm.

## BACKGROUND

Sedlacek was a longtime farmer in Valley County, Nebraska. Psota met him when he was around 10 years old and Sedlacek would come to help on the family farm. Psota's mother died in approximately 1991, and it was at this time that he and Sedlacek formed a closer relationship, with Psota stating it was like he had two fathers. Sedlacek was divorced and had several children who were distant and rarely in contact with him.

During the years that followed, Sedlacek would attend holiday parties, birthdays, and church programs—even attending Psota's wedding. He would regularly be invited to the Psota home for dinner with Psota's family. Psota and his family would likewise spend time with Sedlacek at his home for meals. Psota and Sedlacek also worked closely with each other as they were both farmers, with Psota seeking advice from Sedlacek and each helping the other when needed.

As Sedlacek got older and needed additional support, Psota provided both financial and emotional support. He assisted in paying for Sedlacek's utilities, telephone, and other bills, as well as assisting him in paying off loans to prevent him from losing his farm. Psota also rode with Sedlacek in an ambulance for needed surgery when Sedlacek initially refused to go. Sedlacek was eventually required to enter a nursing home due to his failing health, and Psota acted as a "co-power of attorney." Psota was the primary contact for the nursing home if it had any issues with Sedlacek, and Psota would assist them regularly. As Sedlacek's health further declined, Psota contacted Sedlacek's stepchildren to let them know about his condition—all of whom declined to visit him in his final weeks. Sedlacek passed away in August 2017, and Psota handled the funeral arrangements. In his will, Sedlacek specifically noted that he did not wish his "children and other relatives" to share in his estate and left the entirety of his estate to Psota.

On July 24, 2018, Psota filed a petition for determination of inheritance tax. Psota asked the court to consider him a child of Sedlacek, because Sedlacek had stood in the acknowledged relation of a parent pursuant to Neb. Rev. Stat. § 77-2004 (Reissue 2018). A hearing was held on July 25, with five witnesses testifying. The court entered an order on July 31, determining that Sedlacek had stood in the acknowledged role of a parent pursuant to § 77-2004 and granted the petition for determination of inheritance tax with Psota receiving a Class 1 inheritance tax rate. It is from this order that the County appeals.

## ASSIGNMENTS OF ERROR

On appeal, the County assigns that the county court erred in determining that Psota was entitled to a Class 1 inheritance tax rate as dictated by § 77-2004 and in determining there was sufficient evidence that Sedlacek stood in place of a parent for Psota.

## STANDARD OF REVIEW

[1,2] On appeal of an inheritance tax determination, an appellate court reviews the case for error appearing on the record. *In re Estate of Hasterlik*, 299 Neb. 630, 909 N.W.2d 641 (2018). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3] Factual findings necessary in determining whether the requisite acknowledged parent-child relationship of § 77-2004 exists should be reviewed for sufficient evidence and should not be disturbed on appeal unless clearly wrong. *In re Estate of Hasterlik, supra*.

## ANALYSIS

[4] The County argues that there was not sufficient evidence to find that Sedlacek stood in place of a parent for Psota. Statutes exempting property from inheritance tax should be strictly construed, and the burden is on the taxpayer to show that he or she clearly falls within the language of the statute. *In re Estate of Breslow*, 266 Neb. 953, 670 N.W.2d 797 (2003). Section 77-2004 provides that "any person to whom the deceased for not less than ten years prior to death stood in the acknowledged relation of a parent" shall receive an inheritance tax exemption of $40,000 and shall be taxed at the rate of 1 percent of the clear market value of the property thereafter.

[5] The Nebraska Supreme Court has identified the following factors as appropriate guideposts to the trial court in making a determination of an acknowledged relationship of

a parent under § 77-2004: (1) reception of the child into the home and treatment of the child as a member of the family, (2) assumption of the responsibility for support beyond occasional gifts and financial aid, (3) exercise of parental authority and discipline, (4) relationship by blood or marriage, (5) advice and guidance to the child, (6) sharing of time and affection, and (7) existence of written documentation evincing the decedent's intent to act as a parent. *In re Estate of Kite*, 260 Neb. 135, 615 N.W.2d 481 (2000). However, this list is not exhaustive, nor will every factor necessarily be present in each case. *In re Estate of Ackerman*, 250 Neb. 665, 550 N.W.2d 678 (1996). A trial court should consider all pertinent factors in arriving at that determination. *Id.* The county court specifically identified two additional factors as being important in its consideration: the "'community perception'" factor and the support provided by Psota to Sedlacek.

[6] The County's primary argument is that, even if there were a parent-child relationship, such a relationship did not exist for 10 or more years as Psota's biological father passed away in 2013. However, "'The law recognizes that although a natural parent-child relationship may exist elsewhere, if the parties regard each other in all of the usual incidents and relationships of family life as parent and child, the benefits' of the inheritance tax statute flow." *In re Estate of Ackerman*, 250 Neb. at 672, 550 N.W.2d at 683, citing *Estate of Larson*, 106 Cal. App. 3d 560, 166 Cal. Rptr. 868 (1980). See, also, *In re Estate of Kite, supra.* As such, so long as the relationship between Psota and Sedlacek was of a parent-child nature prior to the death of Psota's biological father, it will be included for the purposes of establishing the required 10 years.

The County next argues that there was not sufficient evidence to find that there was a parent-child relationship between Psota and Sedlacek. It concedes that the fifth factor set forth in *In re Estate of Ackerman*, providing advice and guidance, and the sixth factor, sharing of time and affection, were present in this case and that the evidence showed that Psota and Sedlacek

had a close relationship. Psota concedes that the fourth factor, that the decedent and devisee are related by blood, and the seventh factor, written documentation of decedent's intent to act as a parent, were not present in this case. As such, our analysis focuses on the other three factors, as well as the additional factors considered by the county court.

The first factor listed in *In re Estate of Ackerman*, reception of the child into the home and treatment of the child as a member of the family, is claimed by both parties. Initially, residency in the home of the decedent was required by the statute to demonstrate a relationship. *In re Estate of Ackerman, supra.* However, this requirement was removed and this factor is resolved based on whether the individuals treated each other as family such as spending holidays together and sharing meals together. See *In re Estate of Kite, supra.* The County argues that because Psota never resided for even a temporary amount of time with Sedlacek, this factor weighed in favor of no relationship existing. While it is true that Psota did not reside in Sedlacek's home at any point, the testimony showed that Sedlacek had invited Psota and Psota's family into his home on many occasions for various meals, visits, and holidays and that Sedlacek regularly visited the Psota home for meals and holiday visits over a period of more than 10 years prior to his death.

The second factor listed in *In re Estate of Ackerman*, assumption of the responsibility of support beyond occasional gifts and financial aid, is also claimed by each party. We note that this does not mean that the parent must accept a legal obligation for support, because this would rarely exist where the child was an adult. See *In re Estate of Ackerman*, 250 Neb. 665, 550 N.W.2d 678 (1996). However, courts have considered whether the parent provided support in other ways such as providing room and board or paying for classes. *Id.* It is undisputed that Psota never accepted financial aid from Sedlacek, although he testified that Sedlacek had offered it to him.

The third factor listed in *In re Estate of Ackerman*, exercise of parental authority and discipline, has been similarly questioned when applying it to an adult. It has been recognized that after a child has established his or her independence, it is not unusual that the level of discipline is slight. *Id.* The County argues that the way Sedlacek treated Psota did not rise to the level of discipline for the purpose of this factor. Both Psota and the County agree that the testimony showed that Sedlacek would criticize Psota and would tell him to quit doing something if he "step[ped] out of line." Further, Psota testified that Sedlacek had disciplined Psota's children.

The final two additional factors identified by the county court, "community perception" and the support provided by Psota to Sedlacek, did have specific findings made by the court. The court found that testimony from individuals in the community familiar with Psota and Sedlacek was weighed in favor of treating the relationship between them as familial because the members of the community perceived them as being father and child. A witness who knew Sedlacek for over 10 years testified that he initially thought Psota and Sedlacek were father and son and that they presented themselves as such to the community. Another witness similarly testified that having known them both for over 13 years, she regarded Sedlacek as a father figure to Psota. She also testified that Sedlacek's relationship with Psota's children was one of a grandfather with grandchildren. A witness who worked at the nursing home Sedlacek was placed at testified that she had known Psota and Sedlacek for a year and that she believed they were father and son until she was told otherwise just a few months before Sedlacek passed away. Lastly, another witness also testified that she had known the two for over 15 years and that they had a father-son relationship. Of particular note, she testified that Sedlacek referred to Psota and Psota's family when asked about his family.

The second factor the county court identified was the support provided by Psota to Sedlacek. The court specifically

noted that the fact Psota cared for Sedlacek, supported him financially and emotionally, and provided considerable care for him during the end of his life weighed in favor of treating the relationship as that of a parent and child. Psota testified that he helped Sedlacek pay his utilities, telephone, and other bills, as well as assisting him in paying off loans to prevent him from losing his farm. This financial assistance was also testified to by one of the witnesses. As Sedlacek aged, Psota assisted him on his farm, rode with him to his medical appointments, and regularly visited him every other day when he was in the nursing home.

While it is clear that some of the factors are either less relevant in this case or not present, the remaining factors and the evidence supporting them are sufficient to find that there was a parent-child relationship between Psota and Sedlacek. Certainly, we cannot say that the county court's conclusion was clearly wrong in light of the substantial evidence that Sedlacek viewed Psota as his family, as did the rest of the community, and that both Psota and Sedlacek treated each other as such, providing emotional and financial support for one another for a period of more than 10 years prior to the passing of Sedlacek. Therefore, the order of the county court is supported by sufficient evidence.

## CONCLUSION

In conclusion, we find that there was sufficient evidence to support the county court's determination that a parent-child relationship existed for the purposes of § 77-2004 and that Psota should be entitled to a Class 1 inheritance tax rate. The order of the county court is affirmed.

Affirmed.

Moore, Chief Judge, participating on briefs.

# In re Estate of Deena Chambers, deceased. Kent A. Chambers, Personal Representative of the Estate of Deena Chambers, deceased, appellant, v. State of Nebraska, appellee.

932 N.W.2d 343

Filed July 16, 2019. No. A-18-876.

1. **Decedents' Estates: Taxation: Appeal and Error.** On appeal of an inheritance tax determination, an appellate court reviews the case for error appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Decedents' Estates: Parent and Child: Taxation: Appeal and Error.** Factual findings necessary in determining whether the requisite acknowledged parent-child relationship of Neb. Rev. Stat. § 77-2004 (Reissue 2018) exists should be reviewed for sufficient evidence and should not be disturbed on appeal unless clearly wrong.
4. **Statutes: Words and Phrases.** As a general rule, the word "shall" in a statute is considered mandatory and is inconsistent with the idea of discretion.
5. ____: ____. The word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective.
6. **Decedents' Estates: Taxation: Statutes: Proof.** Statutes exempting property from inheritance tax should be strictly construed, and the burden is on the taxpayer to show that he or she clearly falls within the language of the statute.
7. **Decedents' Estates: Parent and Child: Taxation.** The following factors serve as appropriate guideposts to the trial court in making a determination of an acknowledged relationship of a parent under Neb. Rev.

Stat. § 77-2004 (Reissue 2018): (1) reception of the child into the home and treatment of the child as a member of the family, (2) assumption of the responsibility for support beyond occasional gifts and financial aid, (3) exercise of parental authority and discipline, (4) relationship by blood or marriage, (5) advice and guidance to the child, (6) sharing of time and affection, and (7) existence of written documentation evincing the decedent's intent to act as parent.

8. **Judicial Notice: Records.** Papers requested to be judicially noticed must be marked, identified, and made a part of the record.
9. **Pleadings: Proof.** Pleadings alone are not proof but mere allegations of what the parties expect the evidence to show.

Appeal from the County Court for Furnas County: Anne M. Paine, Judge. Affirmed.

Jon S. Schroeder and Whitney S. Lindstedt, of Schroeder & Schroeder, P.C., for appellant.

No appearance for appellee.

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

Per Curiam.

## INTRODUCTION

Kent A. Chambers, personal representative of the estate of Deena Chambers, deceased, appeals from the determination by the county court for Furnas County that Anthony K. Chambers, as an individual beneficiary, did not qualify for preferential inheritance tax treatment under Neb. Rev. Stat. § 77-2004 (Reissue 2018). The court found that Kent failed to prove the decedent stood in the acknowledged relation of a parent to Anthony. Because the county court's factual determination was not clearly wrong, we affirm.

## BACKGROUND

Deena died testate in January 2018. Deena was a resident of Furnas County, Nebraska, and she was survived by Kent, her husband. Kent and Deena were married for a little over

30 years and have no biological children. One of the devisees in Deena's will was Kent's nephew, Anthony, who was born in 1975 to Kent's brother and the brother's then-wife. A copy of Deena's signed, January 2009 will was filed in the county court in February 2018. In the 2009 will, Anthony is named as alternate personal representative and alternate trustee for all trusts established by the will and is the residuary beneficiary of the will.

In March 2018, Kent, as personal representative, filed an inventory for Deena's estate in the county court. On June 12, he filed a petition for determination of inheritance tax, along with an inheritance tax worksheet, voluntary appearance, and waiver of notice. Kent asked the court to "dispense with giving of any further notice as provided by law; and upon hearing, without delay," determine the value of Deena's assets and the amount of inheritance tax. On the inheritance tax computation portion of the worksheet, Anthony's designated "Beneficiary Relationship" was "Like a Child." The Furnas County Attorney signed the worksheet on May 25, under the printed paragraph stating:

> I, the undersigned . . . County Attorney, hereby enter my voluntary appearance . . . in the above captioned proceeding and waive the service of notice upon me to show just cause, and furthermore waive all notice required by law of time and place of hearing for the determination of values of property for inheritance tax purposes and for the purpose of assessing inheritance tax . . . . I have examined the foregoing Worksheet and have no objections thereto for inheritance tax purposes only.

On June 22, 2018, Kent filed with the county court an affidavit from Anthony, detailing Deena and Anthony's relationship. Attached to the affidavit as an exhibit was a copy of an unsigned draft of a February 2013 last will and testament of Deena, naming Anthony as one of the beneficiaries. Anthony is identified at three points in the draft will as having "been like a child of [Deena's] for his entire life."

A hearing was held before the county court on July 23, 2018. At the hearing, Kent's attorney stated that he had presented an inheritance tax worksheet to the county attorney, who had the opportunity to review Anthony's affidavit about his relationship with Deena and to ask any questions of Kent. According to Kent's attorney, the county attorney "said he was satisfied and signed off on it." During the hearing, Kent's attorney asked the court to take judicial notice of Anthony's affidavit, "the will that is in the file," the inventory, and the inheritance tax worksheet. The court did so, but these papers were not marked and made part of the record. The only exhibits offered by Kent and received by the court were copies of durable power of attorney documents for business and for healthcare, in which Deena named Anthony as her "alternate business attorney in fact" and "alternate . . . health care power of attorney." The court also heard testimony from both Kent and Anthony about the relationship between Deena and Anthony.

Anthony's parents divorced at some point in the mid-1980's, and Anthony's father eventually drifted away from the family. Anthony and his sister lived with his mother after the divorce. Anthony was a frequent visitor to Kent and Deena's home as a child and into adulthood. Anthony estimated that he spent the following number of days per year with Kent and then with Kent and Deena (after age 10): 3 days per year prior to age 10, "[r]oughly" 10 days per year between ages 10 and 15, "probably" 9 days per year between ages 15 and 20, and "maybe" 3 days during 2017 (after he was married and started having children).

Kent testified that he felt he had treated Anthony like a son during his life and that he loved him like a son. Anthony's middle name is Kent, and he assumes he was named after his uncle. The record shows that they would do chores together on Kent's father's family farm and that Kent taught Anthony about various farm-related duties. Kent provided

Anthony spiritual guidance, and the two shared interests including movies, music, and the outdoors. Kent gave Anthony Kent's father's gun because of their shared love of hunting and pistols and because Anthony had a good relationship with Kent's father. Kent and Deena married when Anthony was in approximately the seventh grade, and Anthony was a groomsman in their wedding.

Kent indicated that their limited financial circumstances did not allow him and Deena to provide Anthony with any significant gifts beyond ordinary birthday gifts, but he testified that if they had had the money, they would have shared it with Anthony. Likewise, Anthony did not remember any gifts "beyond the normal gifts."

Kent was asked about whether he disciplined Anthony at any time. He recalled an incident that happened when they were moving irrigation pipe. According to Kent, Anthony was "kicking up the dust in the air," and Kent told him not to. It "wasn't a big deal" to Kent, but it was something that Anthony remembered. Kent indicated that while he exercised parental authority over Anthony at times while performing chores at the farm and mentored him, Anthony was "not a difficult child" and did not require much discipline. Anthony also testified about this incident, indicating that it was a time where he "let Kent down" and realized that his actions "could have been better." He described it as "an embarrassing moment" from which he "learned quickly."

Kent testified that he and Deena shared time and affection with Anthony and had many days of "family time" together, although he wished "there had been more times." He indicated that it seemed like the times they did have together were always good. Anthony spent time with Kent and Deena after their marriage, and he felt that whenever he was there, it "was just like before, it was a welcoming home." They would eat together, talk about things, and watch television "or whatever," and Anthony felt it was "always a fun time." Anthony testified

that he learned a great deal about marriage, hard work, character, and faith from them. Anthony is now married and has two children, and they have had "many days of family time" with Kent and Deena in which Deena would cook for all of them, and Kent and Deena would engage in various activities with the children.

Kent testified about the unsigned 2013 draft will designating property to Anthony and including language that acknowledged Anthony was like a child to Deena. In 2013, Kent and Deena asked their attorney to prepare wills for them. Although the attorney prepared wills and sent them to Kent and Deena, they did not sign the drafts of those wills at that time. According to Kent, the wills were not signed in 2013 because "life is complicated sometimes" and they were "embroiled in a lawsuit" involving a tenant of Kent's mother's estate. He indicated further that after the litigation was over, he "lost [his] dog" and then Deena began having health issues, which shifted his focus to taking care of her at home. Kent testified that he currently has an up-to-date will that includes "the language . . . about how close" he is to Anthony.

On August 7, 2018, the county court entered an order finding that Kent had not met his burden of proof to show that the relationship between Deena and Anthony rose to the level required by § 77-2004. Accordingly, the court instructed him to submit an amended inheritance tax worksheet in conformity with the court's order. In reaching this determination, the court analyzed case law factors for determining whether a decedent stood in the acknowledged relation of a parent with a devisee in order to qualify for preferential inheritance tax treatment. The court found the following factors did not weigh in favor of a parent-child relationship between Deena and Anthony: the assumption of responsibility for support beyond occasional gifts and financial aid, and the existence of written documentation evincing decedent's intent to act as parent. The court also found the following factors did not weigh

heavily in favor of a parent-child relationship: the reception of the child into the home and treatment as a member of the family, and the exercise of parental authority and discipline. Finally, the court found that the relationship by blood or marriage and the sharing of time and affection factors weighed in favor of a parent-child relationship, and the advice and guidance to the child factor weighed somewhat in favor of a parent-child relationship.

After analyzing the above factors and reviewing various other cases applying the factors, the county court concluded:

> In most of the cases cited, the [d]ecedent exercised parental authority over the taxpayer—providing discipline and guidance over major life decisions such as schooling, career choice, dating, and medical treatment, as well as providing financial assistance including things like co-signing on loans, partnering in businesses, providing help with school or housing. Later in life[,] the taxpayers often returned and provided assistance to the [d]ecedent as they grew elderly, taking them to the doctor and visiting them regularly.
>
> In the case at hand it is clear that [Anthony] was very close to Kent and Deena and benefitted greatly from his relationship with them as he was growing up. It is also clear that Kent and Deena shared great affection for [Anthony], having no children of their own, and enjoyed sharing their interests, passions and values with not only [Anthony] but also [his] family. Sadly, Deena passed away while she was young and still married so did not need assistance from [Anthony] for things like going to the doctor, etc.
>
> However, the Court cannot distinguish these facts from the facts in In re Estate of Malloy, [15 Neb. App. 755, 736 N.W.2d 399 (2007)], wherein the Court found that it was not uncommon for families who farm and ranch together to form a close relationship and that their close

> bond was not out of the ordinary for family members in a rural society. The Court in that case found that to be true, even where the facts were such that [the devisee] had stayed in the [decedent's] house for extended periods as a child, received financial assistance from [the decedent] and spent three-four days a week and all his holidays with [the decedent].
>
> While in no way diminishing the positive relationship between Deena and [Anthony], the Court is required to strictly construe statutory language exempting property from inheritance tax. The Court cannot find under these facts that the burden of proof has been met to show that the relationship rises to the level required by §77-2004.

Kent subsequently perfected his appeal to this court.

## ASSIGNMENTS OF ERROR

Kent asserts that the county court erred in (1) requiring a hearing on an inheritance determination when the county attorney, on behalf of the county, approved the calculation, voluntarily appeared, and waived notice of the inheritance tax determination and (2) holding that the evidence did not establish that Anthony was a person to whom Deena, for more than 10 years prior to death, stood in the acknowledged relation of a parent.

## STANDARD OF REVIEW

[1,2] On appeal of an inheritance tax determination, an appellate court reviews the case for error appearing on the record. *In re Estate of Hasterlik*, 299 Neb. 630, 909 N.W.2d 641 (2018). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3] Factual findings necessary in determining whether the requisite acknowledged parent-child relationship of § 77-2004 exists should be reviewed for sufficient evidence and should

not be disturbed on appeal unless clearly wrong. *In re Estate of Hasterlik, supra*.

## ANALYSIS

*Decision to Hold Hearing.*

Kent asserts that the county court erred in requiring a hearing on an inheritance determination when the county attorney, on behalf of the county, approved the calculation, voluntarily appeared, and waived notice of the inheritance tax determination. Kent argues that by signing the voluntary appearance and waiver of notice on the inheritance tax worksheet, indicating that he had no objection to the worksheet, the county attorney bound the county to the facts detailed in the worksheet including that Anthony fit the designation of being "Like a Child" to Deena.

We note, as did the county court, two relevant statutory provisions. First, Neb. Rev. Stat. § 77-2018.03 (Reissue 2018) provides:

> In all matters involving the determination of inheritance tax, notice served upon the county attorney shall constitute notice to the county and the State of Nebraska. It shall be the duty of the county attorney to represent the county and the State of Nebraska in such matters as its attorney. In so representing the county and the State of Nebraska, the county attorney is authorized, in addition to such other powers as he normally may exercise as attorney for the county, to enter into and bind the county and the State of Nebraska by stipulation as to any facts which could be presented by evidence to either the inheritance tax appraiser or the county court, and to waive service of notices upon him to show cause or of the time and place of hearing, and to enter a voluntary appearance in such proceeding, in behalf of the county and the State of Nebraska.

This statute, while authorizing the county attorney to stipulate to facts regarding the determination of inheritance tax which

could be presented by evidence to the county court, does not require the court to accept the stipulated facts.

Second, we note Neb. Rev. Stat. § 77-2018.02 (Reissue 2018), which concerns the procedure for determination of inheritance tax in the absence of probate of the estate. With regard to the requirement that the court hold a hearing on the petition for determination of inheritance tax, and, as relevant in this case, subsection (5) of § 77-2018.02 provides:

> If it appears to the county court that (a) the county attorney of each county in which the property described in the petition is located has executed a waiver of notice upon him or her to show cause, or of the time and place of hearing, and has entered a voluntary appearance in such proceeding in behalf of the county and the State of Nebraska, and (b) either (i) all persons against whom an inheritance tax may be assessed are either a petitioner or have executed a waiver of notice upon them to show cause, or of the time and place of hearing, and have entered a voluntary appearance, or (ii) a party to the proceeding has agreed to pay to the proper counties the full inheritance tax so determined, the court *may dispense with the notice provided for* in subsections (2) and (3) of this section and proceed without delay to make a determination of inheritance tax, if any, due on account of the property described in the petition.

(Emphasis supplied.)

In its August 7, 2018, order, after noting the above statutory provisions, the county court observed that while the parties may enter into stipulations concerning the evidence and waive appearances, the court, ultimately, is responsible for determining the inheritance tax. We agree.

The court also noted *In re Estate of Malloy*, 15 Neb. App. 755, 736 N.W.2d 399 (2007), where the court, on its own motion, scheduled a hearing to determine inheritance tax. In that case, after being devised a substantial portion of his uncle's estate, a nephew and another copersonal representative

of the estate filed a petition for determination of inheritance tax, and the court assessed inheritance tax against various parties, including the nephew, whom the court taxed at the rate for an immediate relative of the decedent under § 77-2004. Subsequently, the value of the uncle's estate increased, and the nephew filed an amended petition for determination of inheritance tax, again alleging that he qualified for preferential treatment under § 77-2004. The court, on its own motion, scheduled a hearing to redetermine the inheritance tax. At the hearing, the court received exhibits including the first inheritance tax worksheet signed by the State, which allowed the nephew to be taxed as a "Class I heir" under § 77-2004. *In re Estate of Malloy*, 15 Neb. App. at 757, 736 N.W.2d at 401. The parties stipulated that prior to signing the first worksheet, the State was aware of how the nephew was being treated. The State admitted that the nephew had provided it with affidavits, also admitted into evidence at the hearing, attesting to the closeness of the relationship between the uncle and nephew. The State also admitted that it made a mistake in agreeing to the initial tax worksheet by signing it.

[4,5] Kent argues that *In re Estate of Malloy* is distinguishable because the county court in that case scheduled a hearing only after the county attorney apparently refused to sign the waiver form on the second inheritance tax worksheet. He argues that the county attorney had authority under § 77-2018.03 to bind the State and that because the county attorney did so in this case, § 77-2018.02 does not support the court requiring a hearing. Kent's argument ignores the language of § 77-2018.02(5), which provides that, under the circumstances described in that subsection, the court "*may dispense with the notice provided for* in subsections (2) and (3) . . . and proceed without delay to make a determination of inheritance tax." (Emphasis supplied.) As a general rule, the word "shall" in a statute is considered mandatory and is inconsistent with the idea of discretion. *State v. Irish*, 298 Neb. 61, 902 N.W.2d 669 (2017). The word "may" when used in a

statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective. *Holloway v. State*, 293 Neb. 12, 875 N.W.2d 435 (2016). Although the county attorney in this case signed the waiver of notice, the decision of whether to dispense with notice of a hearing was within the court's discretion. Further, § 77-2018.02(5) still requires the county court to make a determination of inheritance tax. It does not prevent the court from holding a hearing, nor does it require the court to simply accept the proffered inheritance tax worksheet.

The court did not err in holding a hearing to determine the inheritance tax due in this case. This assignment of error is without merit.

*Findings Under § 77-2004.*

Kent asserts that the county court erred in concluding that the evidence did not establish that Anthony was a person to whom Deena, for more than 10 years prior to death, stood in the acknowledged relation of a parent.

Again, we note, as did the county court, two pertinent statutes. First, we note § 77-2004, which provides:

> In the case of . . . any person to whom the deceased for not less than ten years prior to death stood in the acknowledged relation of a parent, or the spouse or surviving spouse of any such persons, the rate of tax shall be one percent of the clear market value of the property in excess of forty thousand dollars received by each person. Any interest in property, including any interest acquired in the manner set forth in section 77-2002, which may be valued at a sum less than forty thousand dollars shall not be subject to tax. In addition the homestead allowance, exempt property, and family maintenance allowance shall not be subject to tax. Interests passing to the surviving spouse by will, in the manner set forth in section 77-2002, or in any other manner shall not be subject to tax.

We also note Neb. Rev. Stat. § 77-2005 (Reissue 2018), which provides:

> In the case of an uncle, aunt, niece, or nephew related to the deceased by blood or legal adoption, or other lineal descendant of the same, or the spouse or surviving spouse of any of such persons, the rate of tax shall be thirteen percent of the clear market value of the property received by each person in excess of fifteen thousand dollars. If the clear market value of the beneficial interest is fifteen thousand dollars or less, it shall not be subject to tax.

This is the provision that would apply to Deena and Anthony's relationship absent evidence that for not less than 10 years prior to her death, Deena stood in the acknowledged relation of a parent to Anthony.

[6] Statutes exempting property from inheritance tax should be strictly construed, and the burden is on the taxpayer to show that he or she clearly falls within the language of the statute. *In re Estate of Hasterlik*, 299 Neb. 630, 909 N.W.2d 641 (2018).

[7] The following factors serve as appropriate guideposts to the trial court in making a determination of an acknowledged relationship of a parent under § 77-2004: (1) reception of the child into the home and treatment of the child as a member of the family, (2) assumption of the responsibility for support beyond occasional gifts and financial aid, (3) exercise of parental authority and discipline, (4) relationship by blood or marriage, (5) advice and guidance to the child, (6) sharing of time and affection, and (7) existence of written documentation evincing the decedent's intent to act as parent. *In re Estate of Hasterlik, supra*.

[8,9] Initially, we note that the items judicially noticed by the county court (Anthony's affidavit, "the will that is in the file," the inventory, and the inheritance tax worksheet) were not marked and made part of the record. Papers requested to be judicially noticed must be marked, identified, and made a

part of the record. *In re Estate of Radford*, 297 Neb. 748, 901 N.W.2d 261 (2017). Although these documents were filed in the transcript, they are not evidence in this case. Pleadings alone are not proof but mere allegations of what the parties expect the evidence to show. *Id.*

Turning our attention to the evidence adduced at the hearing with respect to the factors laid out above, we first address those factors which the county court found did not weigh in favor of a parent-child relationship between Deena and Anthony: the assumption of the responsibility for support beyond occasional gifts and financial aid, and the existence of written documentation evincing the decedent's intent to act as parent.

The evidence clearly showed that Kent worked with his father and did not have a lot of extra money. Accordingly, he and Deena did not provide financial support to Anthony beyond occasional birthday gifts. Kent argues that this factor should only count against the finding of a parent-child relationship "if the parent has money that could have been given to the child." Brief for appellant at 18. While the county court's finding that Kent and Deena did not provide financial support to Anthony was not clearly wrong, under the circumstances of this case, we conclude that this factor is, at best, neutral.

With respect to written documentation, the county court found no evidence of any written documentation that Kent or Deena ever called Anthony their son, no oral declarations that they considered him their child, and—other than "the obviously favorable treatment" in Deena's will—no writing "evincing [an] intent to act as parent." See *In re Estate of Hasterlik*, 299 Neb. at 634, 909 N.W.2d at 644. In arguing that there was such evidence, Anthony relies on the unsigned 2013 draft will with the "Like a Child" language, as well as the 2009 will which provided for Anthony as a beneficiary. Neither the 2013 unsigned draft nor Deena's signed 2009 will

was admitted as an exhibit at trial, but they were included in the transcript. While there is an explanation in the record for why Kent and Deena never signed the draft wills prepared for them in 2013, the fact remains that Deena did not sign the 2013 draft and the "Like a Child" language is not included in her 2009 will. Even if these two documents had been admitted into evidence, we cannot say that it would amount to more than slight evidence of a parent-child relationship between Deena and Anthony.

The county court found that these factors did not weigh heavily in favor of a parent-child relationship: the reception of the child into the home and treatment of the child as a member of the family, and the exercise of parental authority and discipline. Although Anthony visited Kent and then Kent and Deena regularly throughout his life, he never actually lived with them, always residing with one or both of his parents as a child. Anthony felt comfortable and welcome in Kent and Deena's home, but he did not stay with them for extended periods. After marrying and having a family of his own, he estimated that he visited them approximately three times per year. Finally, the incident when Kent told Anthony to stop "kicking up the dust in the air" while they were moving irrigation pipe was the only evidence of an instance of Kent or Deena exercising parental authority or discipline over Anthony. The county court was not clearly wrong in finding that these factors did not weigh heavily in favor of a parent-child relationship between Deena and Anthony.

With respect to the remaining factors, Anthony is related to Kent by blood and to Deena by marriage. It is clear that Kent provided guidance to Anthony by teaching him about farming. He also provided spiritual guidance, and Anthony testified that he learned about marriage and relationships by spending time with Kent and Deena. Clearly, Kent and Deena had a close and caring relationship with Anthony. However, the county court concluded that the evidence was insufficient to establish

Kent and Deena acted in a manner toward Anthony that went above and beyond the normal circumstances of the relationship between an aunt and uncle and their nephew.

We cannot say that the county court was clearly wrong in determining that Kent failed to carry his burden of proof.

## CONCLUSION

Because the county court's factual determination was not clearly wrong, we affirm the order of the county court.

Affirmed.

# Kathy Girard Williams, Ph.D., and Michael Williams, appellants, v. City of Lincoln, Nebraska, appellee.

932 N.W.2d 490

Filed July 23, 2019. No. A-18-680.

1. **Judges: Recusal.** A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned.
2. **Judgments: Statutes: Appeal and Error.** Questions of law and statutory interpretation require an appellate court to reach a conclusion independent of the decision made by the court below.
3. **Political Subdivisions Tort Claims Act.** Whether the allegations made by a plaintiff present a claim that is precluded by exemptions set forth in the Political Subdivisions Tort Claims Act is a question of law.
4. **Political Subdivisions Tort Claims Act: Appeal and Error.** An appellate court has an obligation to reach its conclusion on whether a claim is precluded by exemptions set forth in the Political Subdivisions Tort Claims Act independent from the conclusion reached by the trial court.
5. **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.
6. **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.
7. **Judges: Recusal.** Under the Nebraska Revised Code of Judicial Conduct, a judge must recuse himself or herself from a case if the judge's impartiality might reasonably be questioned.

8. ____: ____. Under the Nebraska Revised Code of Judicial Conduct, such instances in which the judge's impartiality might reasonably be questioned specifically include where the judge has a personal bias or prejudice concerning a party or a party's lawyer.
9. **Judges: Recusal: Presumptions.** A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.
10. **Judges: Recusal: Waiver.** A party is said to have waived his or her right to obtain a judge's disqualification when the alleged basis for the disqualification has been known to the party for some time, but the objection is raised well after the judge has participated in the proceedings.
11. **Political Subdivisions Tort Claims Act: Waiver: Immunity.** The Political Subdivisions Tort Claims Act reflects a limited waiver of governmental immunity and prescribes the procedure for maintenance of a suit against a political subdivision.
12. **Political Subdivisions Tort Claims Act.** The Political Subdivisions Tort Claims Act is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees.
13. **Statutes: Immunity: Waiver.** Statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver.
14. **Political Subdivisions Tort Claims Act: Immunity: Waiver.** The Political Subdivisions Tort Claims Act provides limited waivers of sovereign immunity, which are subject to statutory exceptions.
15. **Political Subdivisions Tort Claims Act.** A court engages in a two-step analysis to determine whether the discretionary function exception of the Political Subdivisions Tort Claims Act applies. First, the court must consider whether the action is a matter of choice for the acting employee. Second, if the court concludes that the challenged conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exception was designed to shield.
16. ____. The purpose of the discretionary function exception of the Political Subdivisions Tort Claims Act is to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.
17. ____. The discretionary function exception of the Political Subdivisions Tort Claims Act does not apply when the governmental entity has a nondiscretionary duty to warn or take other protective measures that may prevent injury as the result of the dangerous condition or hazard.
18. **Political Subdivisions Tort Claims Act: Negligence.** A nondiscretionary duty to warn or take other protective measures exists when (1) a

> governmental entity has actual or constructive notice of a dangerous condition or hazard caused by or under the control of the governmental entity and (2) the dangerous condition or hazard is not readily apparent to persons who are likely to be injured by the dangerous condition or hazard.

Appeal from the District Court for Lancaster County: Susan I. Strong, Judge. Affirmed.

Jerry W. Katskee and Thomas C. Dorwart, of Govier, Katskee, Suing & Maxell, P.C., L.L.O., for appellants.

Jeffery R. Kirkpatrick, Lincoln City Attorney, Elizabeth D. Elliott, and Margaret M. Blatchford for appellee.

Riedmann, Arterburn, and Welch, Judges.

Riedmann, Judge.

## INTRODUCTION

Kathy Girard Williams and Michael Williams appeal the order of the district court for Lancaster County which entered summary judgment in favor of the City of Lincoln, Nebraska (the City), based on the court's determination that the Williamses' claims against the City were barred by sovereign immunity. We affirm.

## BACKGROUND

On September 13, 2015, the Williamses were riding their bicycles on a sidewalk owned by the City. Shortly past an intersection, a row of pear trees lined the median between the sidewalk and the street. Michael was riding in front of Kathy, and the pair rode past the first three trees without incident. The branches of the fourth tree, however, extended over the sidewalk. Michael was approximately 20 to 30 feet away when he noticed the overgrown tree. Michael yelled back to warn Kathy of the tree up ahead and successfully veered to the side and around the tree, but Kathy, who was riding approximately 5 to 10 feet behind Michael, collided with the low-hanging

branches of the tree, was knocked off her bicycle, and sustained serious injuries.

The Williamses filed a tort claim with the City pursuant to the Political Subdivisions Tort Claims Act (PSTCA), Neb. Rev. Stat. § 13-901 et seq. (Reissue 2012), seeking damages in the amount of $1 million. The City rejected the claim. The Williamses then filed a complaint in the district court. The complaint alleged that Kathy's injuries were the result of the City's negligent failure to properly prune and maintain the tree with which Kathy collided.

The City filed an answer, which asserted, among other things, that it was immune from suit due to sovereign immunity. The City subsequently filed a motion for summary judgment.

The evidence received at the hearing on the motion for summary judgment establishes that there are 81,785 "street trees" under the care of the City's parks and recreation department and another 30,505 trees located in the City's parks. The tree at issue here is considered one of the "street trees."

The City's municipal code requires that the City maintain "street trees." See Lincoln Mun. Code § 12.20.030 (2003). The city charter provides that the city council shall have the power to provide for the removal or trimming of trees located along the streets or public ways, including the sidewalk space, and to trim the branches of trees overhanging them. In response to these requirements, the City's parks and recreation department created the community forestry division, which is responsible for the care and management of all public trees, including planting, tree inspections, maintenance, and removal.

Due to limited resources and budget constraints, the City established a plan for prioritizing maintenance of trees on a complaint basis, giving priority to any tree with identified defects that could result in damage to property or personal injury and then providing regular maintenance on the City's other trees. There is no specific requirement as to how often a tree must be inspected or trimmed.

The City never received a complaint or service request regarding the tree at issue here. It was clear that the three trees adjacent to the tree with which Kathy collided had been trimmed, but according to an affidavit of the director of the City's parks and recreation department, the City had not trimmed them on or before the date of the accident, and it is unknown who did so.

The Williamses offered into evidence the deposition of their expert witness, Melanie Short. Short is an architect, not an arborist. She opined that the low-hanging branches on the subject tree violate the standard of care for safe sidewalks and bikeways and that the City failed to reasonably maintain the trees along the sidewalk, which created a dangerous condition that caused Kathy's fall and injuries. In order to establish the applicable standard of care, Short looked at the Lincoln Municipal Code and the 2009 International Building Code, which she admitted is not applicable here, but gives a "secondary understanding" of clearances and head heights. She also used "some best practices both from the Federal Highway Administration, as well as ASTM," which she said is a standards organization for "different types of issues and industries." The standard of care Short relied upon in forming her opinion was based on the standard of care in architecture, but she did not know if arborists follow the same standard.

Short explained that the recommended clearance for a tree branch above a sidewalk is 8 or 9 feet, depending upon who is making the recommendation. The City's community forestry division indicates that the recommended minimum clearance for a tree branch over a sidewalk is 9 feet. A clearance of 40 inches in width is also recommended. Short admitted, however, that these numbers are recommendations and not requirements. According to Short, the sidewalk where the Williamses were riding their bicycles is 5 feet wide, and she estimated that the subject tree branches extended at least 3 feet over the sidewalk and were only 3 feet above the ground.

The trees lining the sidewalk where the accident occurred are "Chanticleer flowering pear" trees. The subject tree and three adjacent trees were planted prior to 2007, and Short did not know the growth rate for the subject tree or how many inches per year it grew, acknowledging that trees grow at different rates and that their growth can be affected by the weather and environment. She also admitted that she could not say for how many years the tree's branches had been extending over the sidewalk. Short explained that when the three adjacent trees were trimmed, this tree's condition would have been apparent, and it could have been trimmed at the same time.

In its order on summary judgment, the district court determined that the discretionary function exception to the PSTCA applies and that the City did not have a nondiscretionary duty to warn or take measures to prevent injury. Therefore, the district court found that the Williamses' claims against the City were barred by sovereign immunity and granted the City's motion for summary judgment. The Williamses appeal.

## ASSIGNMENTS OF ERROR

The Williamses assign that the district court erred in (1) failing to recuse itself from the proceedings, (2) finding that their claim fell within the exceptions to the PSTCA and that the claims are barred by sovereign immunity, (3) finding that the City did not have a nondiscretionary duty and did not have notice of the low-hanging tree branches, and (4) granting the City's motion for summary judgment and finding that there was no genuine issue of material fact.

## STANDARD OF REVIEW

[1] A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. *Tierney v. Four H Land Co.*, 281 Neb. 658, 798 N.W.2d 586 (2011).

[2] Questions of law and statutory interpretation require an appellate court to reach a conclusion independent of

the decision made by the court below. *Kimminau v. City of Hastings*, 291 Neb. 133, 864 N.W.2d 399 (2015).

[3,4] Whether the allegations made by a plaintiff present a claim that is precluded by exemptions set forth in the PSTCA is a question of law. *Kimminau v. City of Hastings, supra*. An appellate court has an obligation to reach its conclusion on whether a claim is precluded by exemptions set forth in the PSTCA independent from the conclusion reached by the trial court. *Kimminau v. City of Hastings, supra*.

[5,6] 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. *Id.* In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id*.

## ANALYSIS

*Judicial Bias.*

The Williamses argue that the judge presiding over this proceeding should have recused herself because she is employed by Lancaster County, the county in which the City is located, and is a taxpayer of the City; they claim that she was therefore inherently biased in favor of the City. We conclude that this issue has not been preserved for appeal.

[7-9] Under the Nebraska Revised Code of Judicial Conduct, a judge must recuse himself or herself from a case if the judge's impartiality might reasonably be questioned. *State v. Buttercase*, 296 Neb. 304, 893 N.W.2d 430 (2017). Under the code, such instances in which the judge's impartiality might reasonably be questioned specifically include where the judge has a personal bias or prejudice concerning a party or a party's lawyer. *State v. Buttercase, supra*. A defendant seeking to disqualify a judge on the basis of bias or prejudice bears

the heavy burden of overcoming the presumption of judicial impartiality. *Id*.

[10] A party is said to have waived his or her right to obtain a judge's disqualification when the alleged basis for the disqualification has been known to the party for some time, but the objection is raised well after the judge has participated in the proceedings. *Blaser v. County of Madison*, 285 Neb. 290, 826 N.W.2d 554 (2013). Under these facts, once a case has been litigated, an appellate court will not disqualify a judge and give litigants "'"a second bite at the apple."'" *Id*. at 299, 826 N.W.2d at 562.

The rule that it is generally too late to raise the issue of disqualification after the matter is submitted for decision rests on the principle that a party may not gamble on a favorable decision. *Blaser v. County of Madison, supra*. This principle does not apply when the facts constituting the disqualification are unknown, because no gamble could have been purposefully made. *Id*. Instead, the issue of disqualification is timely if submitted at the earliest practicable opportunity after the disqualifying facts are discovered. *Id*.

In the present case, the Williamses did not raise the issue of disqualification or judicial bias during any of the proceedings before the district court; rather, the issue was raised for the first time on appeal. The record before us contains transcripts of hearings held before the district court on January 26 and May 3, 2018, on various motions, but the issue of judicial bias was not raised at either hearing. The Williamses base their allegations of judicial bias on the fact that the City was a party to the proceeding; thus, this alleged disqualifying fact was known to them prior to the hearings. See *State v. Buttercase, supra*. And at the conclusion of the January 26 hearing, the court asked the parties, "Anything else?" Counsel for the Williamses did not raise the issue at that time. We therefore find that they failed to raise the issue at the earliest practicable opportunity and have waived any argument regarding bias. See *id*.

In response to the City's claim that this issue has not been properly preserved, the Williamses argue that there "is no timeframe deadline for recusal of a biased judge" and that no motion for disqualification is required. Reply brief for appellants at 8. They cite to Neb. Rev. Code of Judicial Conduct § 5-302.11, comment 2, which provides that a judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

The "Preamble" to the Nebraska Revised Code of Judicial Conduct explains that the code establishes standards for the ethical conduct of judges and judicial candidates. According to the "Scope" of the Nebraska Revised Code of Judicial Conduct, the comments that accompany the rules under the code provide guidance regarding the purpose, meaning, and proper application of the rules and also identify aspirational goals for judges. Thus, the code governs the conduct of *judges* and requires that a judge disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned regardless of whether a motion to disqualify is filed by a party to the proceeding.

Our case law makes clear, however, that if a party believes that a judge should recuse himself or herself because of bias, the party must ask the court to do so at the earliest practicable opportunity. If the party does not, and the judge participates in the proceedings, the party waives the right to assert error as to alleged judicial bias on appeal, and an appellate court will not allow the party to gamble on a favorable decision and then afford that party "'"a second bite at the apple."'" See *Blaser v. County of Madison*, 285 Neb. 290, 299, 826 N.W.2d 554, 562 (2013). See, also, *In re Interest of J.K.*, 300 Neb. 510, 915 N.W.2d 91 (2018); *State v. Buttercase*, 296 Neb. 304, 893 N.W.2d 430 (2017); *Tierney v. Four H Land Co.*, 281 Neb. 658, 798 N.W.2d 586 (2011). Because the Williamses did not raise this issue at the earliest practicable opportunity, it has not been preserved for appeal.

*Discretionary Function Exception.*

The Williamses argue that the district court erred in determining that their claims under the PSTCA are barred by the discretionary function exception to the waiver of sovereign immunity. We disagree.

[11-13] The City is a political subdivision of the State of Nebraska. See § 13-903(1). The PSTCA reflects a limited waiver of governmental immunity and prescribes the procedure for maintenance of a suit against a political subdivision. *Geddes v. York County*, 273 Neb. 271, 729 N.W.2d 661 (2007). It is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees. *Id*. Statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver. *Id*.

[14] The PSTCA provides limited waivers of sovereign immunity, which are subject to statutory exceptions. See *McGauley v. Washington County*, 297 Neb. 134, 897 N.W.2d 851 (2017). If a statutory exception applies, the claim is barred by sovereign immunity. *Id*.

The statutory exception provided by § 13-910(2) is commonly known as the discretionary function exception. See *McGauley v. Washington County, supra*. Under that exception, the PSTCA shall not apply to any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion is abused. § 13-910(2). Examples of discretionary functions include the initiation of programs and activities, establishment of plans and schedules, and judgmental decisions within a broad regulatory framework lacking specific standards. *Kimminau v. City of Hastings*, 291 Neb. 133, 864 N.W.2d 399 (2015).

[15] A court engages in a two-step analysis to determine whether the discretionary function exception of the PSTCA

applies. *Id*. First, the court must consider whether the action is a matter of choice for the acting employee. *Id*. This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice. *Berkovitz v. United States*, 486 U.S. 531, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988) (considering discretionary function exception of Federal Tort Claims Act). Thus, the discretionary function exception will not apply when a statute, regulation, or policy specifically prescribes a course of action for an employee to follow. *Id*. In this event, the employee has no rightful option but to adhere to the directive. *Id*. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect. *Id*. Second, if the court concludes that the challenged conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exception was designed to shield. *Kimminau v. City of Hastings, supra*. The purpose of the discretionary function exception is to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. *Id*. See, also, *Berkovitz v. United States, supra*.

In order to determine whether the challenged conduct in the present case involves an element of choice or judgment under the first step of the analysis, we look to factually similar federal cases. See *Lemke v. Metropolitan Utilities Dist.*, 243 Neb. 633, 502 N.W.2d 80 (1993) (discretionary function exception of Federal Tort Claims Act is substantially similar to PSTCA).

In *Autery v. U.S.*, 992 F.2d 1523 (11th Cir. 1993), a tree in a national park fell on a car, killing the driver and injuring the passenger. The plaintiffs filed suit against the government under the Federal Tort Claims Act. At the time of the accident, the park service had an unwritten policy to make every reasonable effort within the constraints of budget, manpower,

and equipment available to detect, document, remove, and prevent tree hazards. To implement the policy, the park service required personnel to initially conduct visual inspections from trucks driven along the road. Any tree that appeared hazardous was then inspected more closely.

On appeal, the 11th Circuit determined that for purposes of a discretionary function exception analysis, it must first identify the specific governmental conduct at issue. The court observed that it is the governing administrative policy that determines whether certain conduct is mandatory for purposes of the discretionary function exception. Therefore, the relevant inquiry is whether controlling statutes, regulations, and administrative policies mandated that the park service inspect for hazardous trees in a specific manner. If not, then the park officials' decision to employ a particular inspection procedure, and its execution of that plan, is protected by the discretionary function exception.

The 11th Circuit recognized that the applicable laws afforded the government broad authority to promote and regulate its parks and the discretion for the destruction of plant life as may be detrimental to the use of the parks. The court concluded that pursuant to those statutory grants of authority, the park service had discretion to design and implement a policy for evaluating and removing trees from the park. Further, the park service's unwritten policy prescribed neither a particular method of inspection nor special rules for inspecting this particular type of tree. The court recognized that such general guidelines are insufficient to deprive the government of the protection of the discretionary function exception and that only if a federal statute, regulation, or policy specifically prescribes a course of action, embodying a fixed or readily ascertainable standard, will the conduct of the government not fall within the discretionary function exception. The court therefore held that the decisions made by the park service in designing and implementing its tree inspection program fell within the ambit of the discretionary function exception.

Similarly, in *Merando v. U.S.*, 517 F.3d 160 (3d Cir. 2008), a tree in a national recreational area fell on a vehicle, killing two passengers. The evidence established that the tree's natural growth caused it to lean with its branches extending over the roadway and that more than 10 years before the accident, an unknown person had trimmed the tree. The plaintiffs brought a claim under the Federal Tort Claims Act. The government moved to dismiss the action on the basis of the discretionary function exception, and the trial court granted the motion.

On appeal, the Third Circuit, like the court in *Autery v. U.S.*, 992 F.2d 1523 (11th Cir. 1993), determined that the relevant inquiry was whether the controlling statutes, regulations, and administrative policies mandated that the park service, which managed the recreational area, locate and manage hazardous trees in any specific manner. The applicable regulations generally afforded the authority to maintain and manage the recreational area and protect visitor safety. The park service's management policies specifically provided that the means by which public safety concerns are to be addressed is left to its discretion, working within the limits of funding and staffing.

The Third Circuit concluded that the controlling statutes, regulations, and policies that led to the creation of the park service's plan did not mandate any particular methods of hazardous tree management such as inspecting certain trees on certain days or removing a particular number of trees per week. In addition, although the park service's unwritten plan required personnel to scan for hazardous trees as they drove the recreational area's roads, there was no statute, regulation, or policy dictating the specifics of that requirement such as when or how often personnel must drive or when they must exit their vehicles to conduct individual tree inspections. Therefore, the Third Circuit concluded that the park service's plan came within the discretionary function.

In the present case, the Williamses argue that maintenance of the City's trees overhanging a sidewalk was not a

discretionary function, because the City was required by law to trim and maintain its trees and to maintain sidewalks in a reasonably safe condition; thus, there was no choice or discretion involved. However, the Williamses misidentify the particular conduct at issue. As the federal courts of appeal held in *Autery v. U.S., supra*, and *Merando v. U.S., supra*, the relevant inquiry is whether the controlling statutes, regulations, and administrative policies mandate the location and management of hazardous trees in a specific manner. If not, then the official's decisions as to the precise manner in which to do so, and execution of that plan, are protected by the discretionary function exception.

We agree with the Williamses that under the applicable regulations, the City had a duty to maintain its trees. Specifically, the Lincoln Municipal Code provides that the selection, planting, maintenance, and removal of trees along public ways within the City are matters over which the City must exercise the control set forth under the municipal code. Lincoln Mun. Code § 12.20.010 (2003). The municipal code further provides that the trimming, spraying, removing, and destroying of all existing trees and of all "street trees . . . planted in or upon any street, parkway, sidewalk space, or other public way within the [C]ity, shall be done by and at the expense of the [C]ity and at its discretion and by no other person." § 12.20.030. But nothing under these sections of the municipal code delineate how or when the maintenance is to be done. And the municipal code specifically grants the City discretion regarding maintenance of its trees.

The Williamses also cite to Neb. Rev. Stat. § 15-734 (Reissue 2012). Section 15-734 provides the City with "general charge, control, and supervision of the streets and sidewalks thereof" and requires the City to "maintain the same in a reasonably safe condition." In order to define "reasonably safe," the Williamses direct our attention to Neb. Rev. Stat. § 39-1812 (Reissue 2016), which mandates that trees "shall be trimmed from the ground up eight feet."

Although § 15-734 requires the City to maintain its sidewalks, it is questionable whether this statute would apply to the maintenance of trees adjacent to a sidewalk, particularly when the statute specifically requires maintenance of sidewalks "in a safe and sound condition and free from snow, ice, and other obstructions." Regardless, assuming without deciding that sidewalk maintenance includes maintaining and trimming the trees adjacent to a sidewalk, § 15-734 does not impose any obligation upon the City to make regular inspections for safety or defects or provide how or when maintenance must be performed. Thus, similar to the provisions of the municipal code, § 15-734 imposes an obligation upon the City, but allows the City to exercise discretion in determining how to fulfill its obligation to maintain its sidewalks.

[16] Having concluded that the challenged conduct involves an element of judgment, we must now determine whether that judgment is of the kind that the discretionary function exception was designed to shield. *Kimminau v. City of Hastings*, 291 Neb. 133, 864 N.W.2d 399 (2015). The purpose of the discretionary function exception is to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. *Id*. See, also, *Berkovitz v. United States*, 486 U.S. 531, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988).

After deciding that no mandatory statute, regulation, or policy controlled the development and implementation of the unwritten tree inspection policy, the 11th Circuit in *Autery v. U.S.*, 992 F.2d 1523 (11th Cir. 1993), addressed whether the choices involved in such a development and implementation were grounded in social, economic, and public policy. The court observed that generally, courts have held that decisions about what safety measures to employ in national parks and how to execute them involve balancing the same considerations that inform all policy decisions regarding the management of national parks: safety, aesthetics, environmental impact, and available financial resources. The 11th Circuit

recognized that the U.S. Supreme Court has cautioned against conducting a fact-based inquiry into the circumstances surrounding the government actor's exercise of a particular discretionary function, urging courts instead to look to the nature of the challenged decision in an objective, or general, sense and ask whether that decision is one which would be inherently grounded in considerations of policy. *Autery v. U.S., supra* (citing *United States v. Gaubert*, 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991)). When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a government agent to exercise discretion, it must be *presumed* that the agent's acts are grounded in policy when exercising that discretion. *United States v. Gaubert, supra*. Under the facts of *Autery v. U.S., supra*, the 11th Circuit concluded that to decide on a method of inspecting potentially hazardous trees, and in carrying out the plan, the park service likely had to determine and weigh the risk of harm from trees in various locations, the need for other safety programs, the extent to which the natural state of the forest should be preserved, and the limited financial and human resources available.

Similarly, in the instant case, the City is afforded the discretion to determine how to maintain its trees, and we therefore presume that the City's acts in carrying out that discretion are grounded in policy. The evidence supports that presumption where the affidavit of the director of the City's parks and recreation department states that in order to carry out the City's obligation of maintaining its trees, it created the community forestry division and established a complaint-based schedule for prioritizing potentially hazardous trees. The community forestry division and tree maintenance are funded through the City's general fund budget, which, according to the affidavit, has been limited in the past 15 years or more due to budget constraints. The affidavit avers that tree maintenance is conducted as diligently as possible using available but limited funds by completing maintenance first on trees that have been

identified with defects that could result in damage to property or personal injury and then providing regular maintenance to other trees. These are the types of policy decisions the discretionary function exception was designed to protect and which we will not second guess. We therefore conclude that the district court did not err in finding that the discretionary function exception applies to bar the Williamses' claims.

*Nondiscretionary Duty and Notice.*

The Williamses argue that the district court erred in finding that the City did not have a nondiscretionary duty to warn and did not have actual or constructive notice of the low-hanging tree branches. We find no merit to this argument.

[17,18] The discretionary function exception does not apply when the governmental entity has a nondiscretionary duty to warn or take other protective measures that may prevent injury as the result of the dangerous condition or hazard. *McGauley v. Washington County*, 297 Neb. 134, 897 N.W.2d 851 (2017). Such a duty exists when (1) a governmental entity has actual or constructive notice of a dangerous condition or hazard caused by or under the control of the governmental entity and (2) the dangerous condition or hazard is not readily apparent to persons who are likely to be injured by the dangerous condition or hazard. *Id*.

In the present case, the uncontroverted evidence establishes that the City had no actual notice of the low-hanging tree branches. The affidavit of the director of the City's parks and recreation department states that the City had never received a complaint or service request regarding the tree at issue here and that although the adjacent trees had been trimmed, they had not been trimmed by the City and the City was unaware of who had trimmed them. Thus, it is undisputed that the City had no actual notice of a dangerous condition.

The Williamses argue that the City had constructive notice because of the length of time the tree had been overgrown.

To support their argument, they rely upon *Foels v. Town of Tonawanda*, 75 Hun 363, 27 N.Y.S. 113 (1894). There, the plaintiff was injured when she stepped into a hole in the sidewalk of a highway bridge. There was evidence tending to show that the hole had been in the sidewalk for 2 or 3 weeks immediately prior to the accident, which the New York Supreme Court found was ample time to justify the jury's finding that the town had constructive notice of it.

Similarly, in *Gielen v. City of Florence*, 94 Neb. 619, 143 N.W. 932 (1913), the plaintiff was injured when she stumbled on a pile of bricks on the sidewalk. The evidence established that for several months prior to the accident, bricks had been piled in a row on the sidewalk (where the plaintiff was injured) by a city contractor preparing to pave the street. While walking on the sidewalk one night, the plaintiff stumbled on a pile of bricks, which was a new obstruction of which she had no knowledge. The pile had been on the sidewalk for approximately 2 weeks. The Nebraska Supreme Court, relying upon *Foels v. Town of Tonawanda, supra*, among other cases, determined that the question as to whether the obstruction remained on the sidewalk for a length of time sufficient to charge the defendant with notice was properly submitted to the jury. And the Supreme Court found that the evidence was sufficient to justify a finding that the city had constructive notice and was negligent in failing to remove the obstacle before the plaintiff was injured.

We find *Foels v. Town of Tonawanda, supra*, and *Gielen v. City of Florence, supra*, distinguishable, because in the instant case, there was nothing that would place the City on notice that the tree needed to be trimmed or evidence of a specific period of time that a dangerous condition existed. In *Gielen v. City of Florence, supra*, an employee of the defendant stacked the bricks on the sidewalk, giving rise to constructive notice that a dangerous condition could exist. Here, however, although the City planted the tree sometime prior to 2007, nothing occurred in the interim to place the City on notice that a dangerous

condition could exist. While it is obvious that the tree continued to grow during that time, Short explained that the growth rate of the tree is unknown and that it is unclear how long the branches were overhanging the sidewalk. Thus, there was no timeframe from which it could be inferred that the City had constructive notice of a dangerous condition.

Additionally, Short's opinion that the City would have had knowledge of the tree's dangerous condition was based on her belief that the City trimmed the surrounding three trees, thus giving it notice of this tree's condition. But the evidence is uncontroverted that the City did not trim the three trees adjacent to the subject tree, and it is unknown who did so.

Moreover, Short is an architect, not an arborist, and she admitted that the standard of care she referenced was based on codes which come together to create the standard of care in architecture, but she did not know whether arborists follow the codes she referenced. Essentially, Short opined that the branches of the tree at issue were overhanging the sidewalk for an unknown period of time, creating a dangerous condition based on recommendations, not requirements, and a standard of care that arborists may or may not follow, and that the City had constructive notice of a dangerous condition based on the faulty premise the City had trimmed the surrounding trees. This evidence does not prove actual or constructive knowledge on the part of the City, nor does it create a genuine issue of material fact as to whether the City had knowledge of this tree's condition. We therefore conclude that the district court did not err in determining that the City did not have actual or constructive notice of a dangerous condition.

In addition to the absence of notice of a dangerous condition, the district court also determined that the evidence establishes that the hazard was readily apparent. We note that the Williamses do not challenge this conclusion on appeal, and we agree with the district court's decision.

According to Michael's affidavit, he was riding in front of Kathy and saw the low-hanging tree branches when he

was approximately 20 to 30 feet away. He warned Kathy and veered around the tree. The district court found it significant that Michael had time to warn Kathy about the overgrown tree and still avoid it by maneuvering around it. The photographs of the tree at issue depict its branches extending over the sidewalk, and according to Short, the branches extended at least 3 feet over the 5-foot-wide sidewalk. Short testified in her deposition that the branches extending over the sidewalk were visible. As a result, the district court did not err in determining that the dangerous condition was readily apparent.

Because the evidence establishes that the City did not have actual or constructive notice of a dangerous condition and that the dangerous condition was readily apparent, we conclude the district court properly determined that there was no nondiscretionary duty to warn or take other protective measures. Accordingly, this assigned error lacks merit.

*Summary Judgment.*

The Williamses argue that the district court erred in granting the City's motion for summary judgment, because they presented numerous genuine issues of material fact. They specifically allege that issues of fact exist, because Short testified as to the "clearance standard for trees" and they testified that "they believed they were riding their bicycles on a bicycle path and were using a public right-of-way." Brief for appellants at 23. They also claim that they presented facts regarding the City's discretionary versus ministerial duty, the nature of the City's duty to trim trees, and the City's actual and constructive notice "due to the disputed fact of who trimmed the three adjacent trees and to the fact of how long the tree at issue had been dangerously overgrown and low-hanging." *Id.* at 23.

The Williamses do not explain how these issues created issues of material fact, and we have generally addressed them above, determining that the district court properly granted the City's motion for summary judgment. To briefly recap,

although Short explained the clearance standards for trees, she admitted that the numbers provided were merely recommendations and not requirements, and she could not estimate how long the tree at issue had surpassed the recommended clearances. Although the Williamses may have believed they were riding on a bicycle path, an affidavit of the City's director of the planning department states that that particular sidewalk "was not a designated bike path or facility," but that bicycling on that sidewalk was not prohibited. Regardless, this does not change the fact that the recommended clearance levels were not mandatory.

We additionally determined above that setting a tree maintenance schedule was a discretionary function of the City. And despite the Williamses' argument, the evidence was undisputed that the City did not trim the trees adjacent to the tree at issue here. According to the affidavit of the director of the City's parks and recreation department, the City had not trimmed the three adjacent trees on or before the date of the accident, and it was unknown who trimmed them. The Williamses did not present any evidence to the contrary which would establish that the City had, in fact, trimmed those trees, placing it on notice of the dangerous condition of the subject tree. We therefore disagree that the evidence established any genuine issue of material fact which would have precluded entry of judgment as a matter of law. Accordingly, the district court did not err in granting the City's motion for summary judgment.

## CONCLUSION

Having rejected the arguments raised on appeal, we conclude that the district court did not err in determining that the Williamses' claims against the City are barred by sovereign immunity and in granting the City's motion for summary judgment. We therefore affirm the district court's order.

Affirmed.

# State of Nebraska, appellee, v. Jaquez S. Sherrod, appellant.

932 N.W.2d 880

Filed July 30, 2019. No. A-18-593.

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. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.
3. ____: ____. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.
4. **Controlled Substances.** A person possesses a controlled substance when he or she knows of the nature or character of the substance and of its presence and has dominion or control over it.
5. **Controlled Substances: Evidence: Circumstantial Evidence: Proof.** Possession can be either actual or constructive, and constructive possession of an illegal substance may be proved by direct or circumstantial evidence.
6. **Controlled Substances.** Mere presence at a place where a controlled substance is found is not sufficient to show constructive possession.
7. **Evidence.** The holder of a key, be it to a dwelling, vehicle, or motel room, has constructive possession of the contents therein.
8. **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.

9. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel, the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.
10. **Effectiveness of Counsel: Records: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.
11. **Effectiveness of Counsel: Proof: Appeal and Error.** 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.
12. ____: ____: ____. 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.
13. **Effectiveness of Counsel: Records: Appeal and Error.** 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.
14. **Trial: Attorneys at Law.** Trial counsel is afforded due deference to formulate trial strategy and tactics.
15. **Effectiveness of Counsel: Presumptions: Appeal and Error.** There is a strong presumption that counsel acted reasonably, and an appellate court will not second-guess reasonable strategic decisions.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Abbi R. Romshek for appellant.

Douglas J. Peterson, Attorney General, and Siobhan E. Duffy for appellee.

Riedmann, Arterburn, and Welch, Judges.

Riedmann, Judge.

## INTRODUCTION

Jaquez S. Sherrod was convicted in the district court for Douglas County of manufacturing, distributing, or possession with intent to distribute 10 to 28 grams of crack cocaine with a firearm and possession of a deadly weapon (firearm) by a prohibited person. On appeal, he alleges that the evidence was insufficient to support the convictions and that he received ineffective assistance of counsel in four respects. We conclude that the record on direct appeal is sufficient to address only one of the ineffective assistance of counsel claims. We find the evidence was sufficient to support the convictions and therefore affirm.

## BACKGROUND

On September 26, 2017, Sherrod was charged with manufacturing, distributing, or possession with intent to distribute a controlled substance (crack cocaine) with a firearm, a Class IC felony, and possession of a deadly weapon (firearm) by a prohibited person, a Class ID felony. At trial, the evidence revealed that on September 13, the Omaha Police Department SWAT team executed a "no-knock search warrant" at a residence located on North 18th Street in Omaha, Nebraska. Sherrod was the subject of the search warrant. The SWAT team broke down the front door to the residence, looked inside, and observed Sherrod at the opposite end of the residence. The SWAT team then deployed a "flash bang" distraction device before entering the home. Sherrod and another male were located in an upstairs bedroom.

The residence was searched, and officers located a set of keys in the bedroom on the first floor. The keyring had two keys on it. One was a key to a vehicle that was registered to Sherrod and parked about a block away from the 18th Street residence. The other key was described as an "older style skeleton key" and "a pretty antique or old looking key." That key fit into the lock on the door to the first floor bedroom.

There was a closet and bathroom inside the first floor bedroom. Officers found a "hollowed out" area on the top of the doors to the closet and bathroom, and each hollowed-out area held two plastic baggies containing crack cocaine. Officers also found a baggie of crack cocaine on the floor in the kitchen at the base of the stairs going upstairs. The parties stipulated that each of the five baggies contained approximately 3 grams of crack cocaine, and testing concluded that the substance was, in fact, crack cocaine and that the total weight of all five baggies combined was approximately 13.452 grams.

Using the key found in the first floor bedroom, officers searched Sherrod's vehicle and found sandwich baggies in the center console. Inside the residence, police found digital scales and glass plates with razor blades. When Sherrod was arrested at the scene, he was carrying $833 in cash on his person in a combination of bills no larger than a $20 bill.

An Omaha police officer with special training in the field of narcotics testified that "street level" crack cocaine dealers sell drugs for cash and commonly use weapons, such as firearms, to protect their business. He explained that crack cocaine is cut with a razor or knife and normally packaged in small sandwich baggies. A dose of crack cocaine is .2 grams, which sells for $20. Thus, an amount between 10 and 15 grams of crack cocaine is an amount consistent with distribution.

Officers also found a firearm in the dresser drawer in the first floor bedroom. The parties stipulated that Sherrod was prohibited from possessing a weapon because he had previously been convicted of a felony. Testing revealed that there was DNA from at least three people on the firearm. A DNA analyst explained that Sherrod could not be excluded as a partial profile contributor to the DNA found on the firearm. The probability of a random individual's matching the partial DNA profile within the mixture, given that Sherrod expresses such a profile, is approximately 1 in 5.76 million. There are currently approximately 1.9 million people in the State of Nebraska.

Although Sherrod could not be excluded as a contributor to the DNA found on the firearm, the DNA analyst explained that it is possible for DNA to be transferred onto an item that someone did not touch. For example, if someone owns a hammer and shakes someone else's hand and then touches their own hammer, the DNA of the person whose hand they shook could be transferred onto the hammer. Generally, however, the most DNA found on the item touched would come from the person who actually touched the item.

As a result of the execution of the search warrant and location of the crack cocaine and firearm, Sherrod was arrested. The following day, he made a telephone call from jail which was recorded. In the call, he asked the male to whom he was speaking if he had "been back to the house." The recipient of the call said that he had, but that he did not want to talk because he knew the call was being recorded. Sherrod then asked whether he "check[ed] the door" when he went to the house.

During its case in chief, the State made an oral motion in limine because the defense had indicated a desire to inquire into how Sherrod became the subject of the search warrant. The State explained that Sherrod became the target for the warrant because police had completed a controlled buy of crack cocaine 2 days before executing the search warrant and that the confidential informant had identified Sherrod as the person who sold the drugs from the 18th Street residence. The State indicated that it had not charged Sherrod with any crimes related to the controlled buy because it did not want to disclose the identity of the informant. The controlled buy was audio and video recorded, and thus, in order to protect the identity of the informant, the district court granted the motion in limine except to the extent the video could be manipulated to remove any identifying features of the informant.

During the defense's case, several law enforcement officers were recalled to the stand, and the defense elicited testimony as to why Sherrod was named as a suspect in the search warrant,

which led to an explanation of the controlled buy. The video recording of the controlled buy was marked as an exhibit, and Sherrod offered it into evidence. The State objected and invoked its privilege under Neb. Rev. Stat. § 27-510 (Reissue 2016) to protect the identity of the informant. The court sustained the objection.

The officers then testified that after the controlled buy was completed, the informant provided them with a physical description of the person who sold the crack cocaine and a "street name." The police department keeps a file of street names, and the only person in the file who matched the street name provided by the informant is Sherrod. The officers showed the informant a photograph of Sherrod, and the informant identified him as the person who sold the drugs during the controlled buy. The informant used in the controlled buy has previously provided reliable information to police on approximately 15 to 20 occasions.

The defense reoffered the video into evidence, and the State objected or, in the alternative, requested that the video be played for the jury without its audio. The court received the video into evidence, and it was played for the jury without audio.

The defense also called to testify the man who lived at the 18th Street residence. He testified that Sherrod is his friend, but that Sherrod does not live at that residence, nor does he have any clothing or property at the residence.

After the conclusion of trial and deliberation, the jury found Sherrod guilty of both charges. Sherrod was sentenced to 7 to 9 years for the drug conviction and a concurrent term of 3 to 3 years and 1 day for the weapons conviction. Sherrod timely appeals to this court.

## ASSIGNMENTS OF ERROR

Sherrod assigns that (1) the evidence was insufficient to sustain the convictions and (2) he received ineffective assistance of counsel.

## 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. McCurdy*, 301 Neb. 343, 918 N.W.2d 292 (2018).

[2,3] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. *State v. Sundquist*, 301 Neb. 1006, 921 N.W.2d 131 (2019). 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. Sundquist, supra*.

## ANALYSIS

*Sufficiency of Evidence.*

Sherrod argues that the evidence was insufficient to sustain his convictions. We disagree.

It is unlawful for any person to knowingly or intentionally manufacture, distribute, or possess with intent to distribute a controlled substance. Neb. Rev. Stat. § 28-416(1) (Cum. Supp. 2018). Any person who violates § 28-416(1) with respect to crack cocaine in a quantity of at least 10 grams but less than 28 grams is guilty of a Class ID felony. § 28-416(8). The penalty is enhanced for a person knowingly or intentionally possessing a firearm while in violation of § 28-416(1), and

thus, an offense under § 28-416(1) that would be a Class ID felony without a firearm becomes a Class IC felony. See § 28-416(16).

Sherrod concedes that the amount of crack cocaine found during the execution of the search warrant is consistent with an amount used in distribution as opposed to a personal use amount, and the parties stipulated at trial that the total amount of crack cocaine found during the search was approximately 13.452 grams. Sherrod argues, however, that the evidence was not sufficient to identify him as the person selling the drugs. He claims that he did not live at the residence, and the only evidence connecting him to the first floor bedroom was the key that unlocked the bedroom door which was found on the same keyring as the key to Sherrod's vehicle.

[4,5] A person possesses a controlled substance when he or she knows of the nature or character of the substance and of its presence and has dominion or control over it. *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011). Possession can be either actual or constructive, and constructive possession of an illegal substance may be proved by direct or circumstantial evidence. *Id*.

[6] Because Sherrod was not found to be in actual possession of the crack cocaine, the question before us is whether there is sufficient evidence from which a trier of fact could reasonably infer that he was in constructive possession, i.e., that he was aware of the presence of the crack cocaine and had dominion or control over it. See *id*. Mere presence at a place where a controlled substance is found is not sufficient to show constructive possession. *Id*. Instead, the evidence must show facts and circumstances which affirmatively link Sherrod to the crack cocaine so as to suggest that he knew of it and exercised control over it. See *id*.

[7] In the present case, the majority of the crack cocaine was found in the first floor bedroom where officers also found a key to a vehicle registered to Sherrod on the same keyring as a key that unlocked the door to the bedroom. The Eighth

Circuit Court of Appeals has joined every other circuit in ruling that the holder of a key, be it to a dwelling, vehicle, or motel room in question, has constructive possession of the contents therein. *U.S. v. Timlick*, 481 F.3d 1080 (8th Cir. 2007). Thus, because Sherrod had a key to the first floor bedroom, a reasonable jury could have inferred that he had dominion or control over its contents. See *id*.

Additional circumstantial evidence supports the jury's conclusion that Sherrod had constructive possession over the contents of the first floor bedroom, including the crack cocaine. There was DNA on the firearm found in the bedroom, and Sherrod could not be excluded as a contributor to that DNA. In a recorded telephone call made from jail, Sherrod asked whether the recipient of the call had "been back to the house" and whether he had "check[ed] the door." This gives rise to a reasonable inference that Sherrod knew there was crack cocaine located in hollowed-out portions of doors in the bedroom.

In addition, officers found small plastic baggies in a vehicle registered to Sherrod, which are consistent with the packaging for crack cocaine. And when Sherrod was arrested, he was carrying a large amount of cash. Moreover, an informant had purchased crack cocaine from a person at the residence 2 days before the search warrant was executed and identified Sherrod as the person who sold the drugs. We therefore find that the evidence was sufficient for a reasonable jury to conclude that Sherrod had constructive possession of the crack cocaine.

Sherrod raises a similar argument with respect to the firearm. He argues that the evidence was insufficient to establish that he possessed the firearm at the time he manufactured, distributed, or possessed with intent to distribute crack cocaine. He notes that DNA from at least three different people was found on the firearm, and he argues that his DNA could have been transferred onto the firearm by someone else.

As we addressed above, the circumstantial evidence was sufficient for the jury to find that Sherrod had dominion and

control over the contents of the first floor bedroom, the location where the firearm was found. In addition, Sherrod could not be excluded as a contributor to DNA found on the firearm, and the probability of an unrelated individual matching the DNA profile was approximately 1 in 5.76 million. From this evidence, the jury could conclude that Sherrod possessed the firearm while manufacturing, distributing, or possessing with intent to distribute crack cocaine.

Sherrod argues that his DNA could have been transferred onto the firearm by someone who had handled an item that Sherrod also handled. While this possibility exists according to the DNA analyst, it is clear from the jury's verdict that it did not believe that is how Sherrod's DNA got on the firearm. To accept Sherrod's argument would require us to reweigh the evidence, which an appellate court cannot do on appeal. See *State v. McCurdy*, 301 Neb. 343, 912 N.W.2d 292 (2018) (appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, or reweigh evidence; such matters are for finder of fact). Therefore, viewing the evidence in the light most favorable to the prosecution, we conclude that the evidence was sufficient for a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.

Sherrod was also convicted of possession of a deadly weapon (firearm) by a prohibited person. As applicable here, a person commits the offense of possession of a deadly weapon by a prohibited person if he or she possesses a firearm and has previously been convicted of a felony. See Neb. Rev. Stat. § 28-1206(1) (Cum. Supp. 2018). The parties stipulated at trial that Sherrod was prohibited from possessing a weapon because he had previously been convicted of a felony.

With respect to this offense, Sherrod raises the same argument as he raised for the drug offense: He argues that the evidence was insufficient to prove that he possessed the firearm found at the residence. We find no merit to this argument.

This court has extended the doctrine of constructive possession to the crime of possession of a firearm by a felon

under § 28-1206. See *State v. Long*, 8 Neb. App. 353, 594 N.W.2d 310 (1999). As stated above, constructive possession means the possessor did not have actual possession but was aware of the presence of the contraband and had dominion or control over it. See *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011).

We incorporate our analysis from above where we determined that the evidence was sufficient for the jury to conclude that Sherrod had constructive possession of the firearm found in the first floor bedroom. A key to the bedroom was found alongside the key to a vehicle registered to Sherrod. DNA was located on the firearm, and Sherrod could not be excluded as a contributor to that DNA. As a result, the evidence was sufficient to support the conviction for possession of a firearm by a prohibited person.

*Ineffective Assistance of Counsel.*

[8] Sherrod is represented in this direct appeal by different counsel than the counsel who represented him at the trial level. 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).

[9-12] 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 his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *State v. Sundquist*, 301 Neb. 1006, 921 N.W.2d 131 (2019). A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question. *Id*. When the 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. *Id*. 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*.

[13] 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*.

Sherrod asserts that his trial counsel was ineffective in four respects. First, he claims that trial counsel was ineffective in failing to object to prejudicial and irrelevant evidence, including evidence of prior bad acts. He specifically argues that trial counsel should have objected to testimony that Sherrod was the subject of the search warrant because such evidence allowed the jury to infer that Sherrod had committed prior crimes. He also contends that trial counsel's performance was deficient because he elicited evidence of the controlled buy and the informant's identification of Sherrod as the person who sold the drugs.

[14,15] The decision whether or not to object has long been held to be part of trial strategy. *State v. Huston*, 285 Neb. 11, 824 N.W.2d 724 (2013). When reviewing claims of alleged ineffective assistance of counsel, trial counsel is afforded due deference to formulate trial strategy and tactics. *Id*. There is a strong presumption that counsel acted reasonably, and an appellate court will not second-guess reasonable strategic decisions. *Id*. Because of this deference, the question whether the

failure to object was part of counsel's trial strategy is essential to a resolution of Sherrod's ineffective assistance of counsel claims. See *id*. There is no evidence in the record regarding trial counsel's trial strategy, including why he did not object to testimony that Sherrod was the subject of the warrant or why he elicited testimony regarding the controlled buy and the informant's identification of Sherrod. We therefore conclude that the record on direct appeal is insufficient to address this claim.

Sherrod additionally asserts that trial counsel was ineffective in failing to elicit more specific testimony regarding the skeleton key to the first floor bedroom. He claims that the evidence is unclear as to whether the key was a traditional skeleton key in the sense that it could be used to unlock many different doors or whether the term was used to describe the key simply because of its antique appearance. He alleges that as a result of trial counsel's deficient performance, the jury was permitted to erroneously assume that the key, like most keys, unlocked only the door to the first floor bedroom and that thus, Sherrod resided or had control over the bedroom and its contents.

The State argues that Sherrod is unable to show he was prejudiced by counsel's failure to elicit specific testimony regarding the key, because the key opened the door to this bedroom, and that given the other evidence, there is not a reasonable probability the result of the proceeding would have been different.

We find the record insufficient to address this claim. Because trial counsel did not inquire into what the officer meant by the term "skeleton key," it was unclear for the jury exactly how the key worked, other than the fact that it opened the bedroom door. And if the key was, in fact, a traditional skeleton key that opened multiple doors, that fact may have been relevant to the jury. Because we do not know why trial counsel did not elicit testimony regarding the key from the officer, the record is insufficient to address this argument.

Sherrod further asserts that trial counsel was ineffective in failing to properly investigate defenses and advise him by offering the video into evidence at trial without personally reviewing it or reviewing it with Sherrod. He claims that if counsel had reviewed the video prior to trial, he would have realized that the video had no probative value and that offering it into evidence at trial would open the door to evidence of his prior bad acts.

The record makes clear that trial counsel had attempted to get a copy of the video "since day one," but the State, claiming its privilege to protect the identity of the informant, would not release a copy. Thus, the fact that trial counsel was unable to review the video prior to trial was not for lack of trying. We therefore interpret this claim as an argument that trial counsel should not have offered the video into evidence without having first reviewed it. Sherrod concedes that the record is insufficient to address this claim, and we agree. The record before us does not contain any information as to why trial counsel offered the video into evidence, a decision which was part of counsel's trial strategy. We are therefore unable to address this claim on direct appeal.

Finally, Sherrod argues that trial counsel was ineffective in failing to file a motion to suppress the evidence seized as a result of the search of the 18th Street residence and Sherrod's vehicle. He asserts that there is no evidence the search occurred with consent or was based on probable cause and that because the search warrant is not part of the record, the record is insufficient to address this claim.

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 to recognize whether the claim was brought before the appellate court. *State v. Ash*, 293 Neb. 583, 878 N.W.2d 569 (2016).

Sherrod asserts only that the record does not contain evidence of consent or probable cause; he does not assert that there was no consent or probable cause for the execution of the search warrant. Furthermore, to the extent he contends probable cause was lacking, he does not specify upon what facts he bases that conclusion. We determine that he has not alleged deficient performance with sufficient particularity, and therefore, this claim is not properly raised in this appeal. See *id*.

## CONCLUSION

We conclude that the record before us is sufficient to address only one of the ineffective assistance of counsel claims, and we reject that claim. We additionally conclude that the evidence is sufficient to support the convictions and therefore affirm.

Affirmed.

# State of Nebraska, appellee, v. Michael T. Schramm, appellant.

933 N.W.2d 600

Filed July 30, 2019. No. A-18-738.

1. **Criminal Law: Motions for Continuance: Appeal and Error.** A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent 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. **Motions for Continuance: Appeal and Error.** The failure to comply with the provisions of Neb. Rev. Stat. § 25-1148 (Reissue 2016) is but a factor to be considered in determining whether a trial court abused its discretion in denying a continuance.
4. **Motions for Continuance.** A continuance must be granted to allow defense counsel adequate time to prepare a defense.
5. **Constitutional Law: Criminal Law: Pretrial Procedure: Evidence.** A criminal defendant has constitutional and statutory rights which mandate the timely disclosure of the State's evidence in a criminal case.
6. **Pretrial Procedure: Evidence.** Neb. Rev. Stat. § 29-1912(2) (Reissue 2016) requires the State, upon request, to disclose evidence that is material to the preparation of a defense.
7. **Motions for Continuance: Appeal and Error.** There is no abuse of discretion by a court in denying a continuance unless it clearly appears that the defendant suffered prejudice as a result thereof.
8. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

9. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
10. **Trial: Expert Witnesses.** Under the principles set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion.
11. **Pretrial Procedure: Expert Witnesses.** A challenge to the admissibility of evidence 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. It should identify, in terms of the *Daubert*/*Schafersman* factors, what is believed to be lacking with respect to the validity and reliability of the evidence and any challenge to the relevance of the evidence to the issues of the case.
12. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
13. **Jury Instructions: 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.
14. ____: ____. 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.
15. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
16. **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.

Appeal from the District Court for Lancaster County: Darla S. Ideus, Judge. Reversed and remanded for a new trial.

Matthew K. Kosmicki for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Riedmann, Arterburn, and Welch, Judges.

Arterburn, Judge.

## I. INTRODUCTION

Pursuant to a jury verdict, Michael T. Schramm was convicted in the district court for Lancaster County of strangulation and sentenced to 2 years' imprisonment followed by 12 months' postrelease supervision. Schramm appeals from his conviction and sentence. On appeal, he alleges that the district court erred in denying his motion to continue the trial so that he could obtain his own expert witness, in permitting the State's expert witness to testify over his objections, in instructing the jury, and in imposing an excessive sentence. For the reasons set forth herein, we find that the district court abused its discretion in denying Schramm's motion to continue the trial. Schramm should have been provided with additional time to attempt to find his own expert witness. As a result of our finding, we must reverse Schramm's conviction and remand the cause for a new trial.

## II. BACKGROUND

On November 1, 2017, the State filed an information charging Schramm with strangulation, in violation of Neb. Rev. Stat. § 28-310.01 (Reissue 2016), a Class IIIA felony. The charge against Schramm stemmed from an incident between Schramm and his then girlfriend, J.K., which occurred in the early morning hours of August 28, 2017.

J.K. is a citizen of the Czech Republic. Beginning in 2014, she began spending time in Lincoln, Nebraska, after obtaining a student visa. She completed a semester of classes at the University of Nebraska-Lincoln and had an internship. When her student visa expired, she went home to the Czech Republic, but later obtained a tourist visa and returned to Lincoln. While J.K. was in Lincoln, she met Schramm through mutual friends.

The two began a romantic relationship in February or March 2016. Schramm testified that "immediately we fell in love and she moved in with me." During their relationship, J.K. went back and forth between Lincoln and the Czech Republic. When she was in the Czech Republic, Schramm would come to visit her there.

By August 2017, J.K. was back in Lincoln and was living with Schramm at his home. J.K. was not employed, but Schramm had his own business buying and selling video games online. On the afternoon of August 27, 2018, Schramm surprised J.K. by taking her on a day trip to Omaha, Nebraska, to visit a zoo. On their way to Omaha, they stopped at a shopping center where Schramm bought J.K. a new purse. They then traveled the rest of the way to the zoo where they stayed until it closed. After leaving the zoo, J.K. and Schramm went to a bar in Omaha where they each had at least one alcoholic beverage. J.K. then drove them back to Lincoln. Schramm testified that on the drive back to Lincoln, they were "[m]adly in love." They arrived home around 10 or 11 p.m., consumed more alcohol, and then decided to go to a local bar. At the bar, both J.K. and Schramm continued to drink alcohol. They left the bar at 2 a.m. and returned to Schramm's house.

When they returned to Schramm's house, J.K. and Schramm engaged in a verbal argument regarding Schramm's business and his ability to earn an income. J.K. testified at trial that during the verbal argument, Schramm indicated that he wanted to buy a new house and that he believed he could quickly obtain enough money to do so by selling all of his video game inventory. She indicated that he also began to insult and disparage her regarding her financial situation, including making comments that she did not have a job and that she still received financial support from her parents. Schramm then went upstairs to play video games. J.K. explained that she was upset with Schramm and did not like his exaggerations about the success of his business. So, out of anger, she yelled up the stairs to Schramm, telling him that he did not earn

enough money to be able to buy a new house and that she did not believe what he had said about his ability to earn so much money so quickly. J.K. admitted that she knew these comments would make Schramm mad.

J.K. indicated that Schramm, in fact, became very upset by her comments. She heard him yell that "this is enough, I am going to kill you." She then heard him start to run toward the stairs, so she started to run downstairs to the basement to hide from him. When she got to the landing of the basement steps, she became worried that Schramm would laugh at her for being scared, so she pretended to get food for their dogs on a shelf above the landing. While her back was turned, J.K. heard Schramm open the basement door. She felt him push her in the back, and she fell the rest of the way down the basement stairs, landing against a mattress that was propped up against the wall of the basement. She started to cry and attempted to stand up. Schramm ran down the stairs after her, grabbed her neck with his left hand, pulled her to a standing position, and pushed her head against the wall. Schramm told her, "this is enough" and "I am going to kill you this time." J.K. described Schramm as looking her straight in the face, with eyes that "were violent," while "[g]rinding" his teeth.

J.K. testified that while Schramm had his hand around her neck, she felt pressure. She tried to tell Schramm that he was hurting her, but she was unable to talk and unable to breathe. J.K. described that as the pressure around her neck continued, she started to panic and realized she needed to fight back. She testified that she was very scared and knew that she might die. She pulled Schramm's hair so that his head was very close to her face and bit his ear as hard as she could. J.K. was then able to get free from Schramm's grasp. She ran up the stairs and out the main door of the house, without stopping to grab her purse or her cellular telephone. She ran to a neighbor's house and banged on the door until someone answered. The neighbor called police. J.K. testified that she chose this neighbor to run to, even though she knew he had "issues" with

police, because her other neighbor was friends with Schramm and she believed he might not help her.

When police arrived, they spoke with J.K. about what had occurred. One of the first officers on the scene, Officer Jesse Orsi, contacted J.K. first. He described J.K. as crying and being unable to speak. She had her hands up by her neck, "doing a gesture as if she was choking herself," and was also pointing at Schramm's house. Eventually, J.K. spoke in a voice that Orsi described as not being "normal" and sounding "soft [and] broken." All she was able to say was, "my boyfriend." Orsi understood J.K. to be trying to explain that "her boyfriend choked her."

Officer Robert Hallowell spoke with J.K. next. He indicated that upon his arrival, J.K. was "frantic" and was crying. She had leaves in her hair and was speaking very fast. J.K. told Hallowell that she had been pushed down the stairs and strangled during a fight with her boyfriend. J.K. also told him that the fight was her fault, because she had made comments which she knew would upset Schramm. Hallowell observed various injuries on J.K., including "extremely bloodshot eyes," which, in his opinion, were caused by more than just her consumption of alcohol; some redness to both sides of her neck around the area of her clavicle bones; a small bump on the back of her head; and abrasions on her elbow and on her knee. His photographs of these injuries were offered into evidence by the State. J.K. declined any medical treatment for her injuries.

Hallowell also photographed the area in the basement where J.K. described the assault as occurring. These photographs depict a "steep" staircase with a mattress propped up at the bottom of the staircase. Close up pictures of the wall of the basement near the staircase appear to show long blond hairs to be stuck "within [the] rough texture on the [basement] wall." According to Hallowell, these hairs "were consistent with coming from [J.K.'s] head." The photographs also depict leaves

on the basement floor which appear to be consistent with the leaves seen in J.K.'s hair.

At trial, Schramm testified in his own defense and described a much different series of events after he and J.K. returned from the bar in the early morning hours of August 28, 2017. Schramm testified that he and J.K. actually began arguing in the car on the way home from the bar. He explained that he was upset with J.K. because she had been talking to "an old interest" while they were at the bar. He told her that he was not happy with her and was jealous because of her behavior. When they got home, Schramm explained that J.K. "got aggressive." He went on to testify, "She was bored with the house and she did not like or think my job was a real thing. And she brings it up. So she brought it up about that I need to stop doing something besides sitting in the house and selling video games all day." Schramm indicated that he did not engage in the argument with J.K. Instead, he asked her why she "always [was] so mean" to him. She responded by telling him, "[Y]ou have no idea how many times I have cheated on you." She then ran down the basement stairs, stopping on the second to the last step.

Schramm followed J.K. down the basement stairs, asking her to repeat what she had just told him. When she turned around to address him, she lost her footing and leaned back into the mattress at the bottom of the staircase. As he approached her, she hit him three times on the head with a closed fist, without saying anything to him. She then pulled his hair and pressed her fingers into his face. He pushed her away from him, placing his hands at her clavicle bones. As she moved away from him, she continued to hold on to his hair, and she pulled some hair out of his head. Schramm testified that he never squeezed J.K.'s throat and that J.K. did not bite his ear. She did run upstairs and outside, however. Schramm explained that he did not immediately follow her, because he was trying to give her some "space" so that she could calm down. Schramm watched as J.K. ran to a neighbor's house.

He testified they did not get along with that neighbor and were "terrified" of him.

Schramm offered into evidence a picture of himself, which he explained was taken close in time to J.K.'s assault of him. The pictures do not depict any obvious injury to his ear.

After Schramm was arrested and transported to jail, he called J.K.'s cellular telephone. A recording of this call was offered into evidence. During the conversation, Schramm told J.K. that he could call only one telephone number and that because he called her, he could not call anyone else. He repeatedly begged her to call his father and instructed her to write down his father's telephone number. J.K. refused. She told Schramm that he "almost killed [her]." Schramm did not deny this, but said that he is "going to be in jail for a very long time." He also told J.K. that "all [she] ha[d] to do [was] show up at court at 12:00." He instructed her to "say that I didn't," but then his voice trailed off.

During Schramm's trial testimony, he admitted that contrary to his statements to J.K. during the telephone call, he made calls to people other than J.K., including his mother, while he was in jail. In addition, Hallowell testified that in the "book-in area" at the jail, there are two telephones available for the prisoners' use. Prisoners are permitted to make as many telephone calls as they want to as many telephone numbers as they want, all free of charge. Schramm further explained that he called J.K. because he loved her and that he asked her to call his father because he could not remember his father's telephone number. Schramm was unable to explain how he could provide J.K. with his father's telephone number if he did not remember it.

During the trial, the State offered the testimony of Susan Michalski as an expert witness on domestic violence and strangulation. Schramm objected to Michalski's testimony on various grounds, which we will address more thoroughly in our analysis below, but the district court overruled all of Schramm's objections and permitted Michalski to testify.

At trial, Michalski testified regarding her extensive experience with domestic violence. Michalski is a licensed registered nurse who is self-employed in "training, education, nursing activities and consulting in criminal justice cases," including cases involving domestic assault, strangulation, custody, and sexual assault. For the 12 years prior to her starting her own business, Michalski served as the training and education director for a domestic violence coordinating council in Omaha. She has received specialized training related to conflict management, strangulation, and domestic violence. As an educator, Michalski has given training sessions and symposiums regarding domestic violence, and specifically strangulation. Michalski also testified that she provides training for law enforcement, members of the criminal justice system, medical students, hospital personnel, and members of the community in the Omaha and surrounding areas. Through her work, Michalski has had articles published twice and has come into contact with several thousand victims of domestic violence.

Michalski explained that domestic violence involves the power and control that one partner exerts over another in an intimate relationship. It can include "a variety of different tactics of abuse [that] can range from emotional, psychological to physical and sexual kinds of abuse and violence." Additionally, domestic violence can involve one partner isolating the other partner.

Michalski further explained that there were particular characteristics that define victims of domestic violence, including minimization of the abuse, denial of being in such a relationship, and feelings of isolation. Victims often blame themselves for the abuse, believing that if they had handled a situation differently, the partner would not have gotten so upset. And while victims often want the abuse to end, they may not want the relationship to end. As such, they are willing to forgive and do not want their partner to go to jail or get into trouble.

There are often characteristics of offenders, as well, such as getting involved romantically and seriously very early on in the relationship, exhibiting controlling behaviors which are initially masked as a sense of concern, and minimizing and denying accountability for behaviors. Offenders often blame the victims, making them feel bad or guilty about what has happened. In fact, Michalski explained that if an offender is arrested and taken to jail, they will often call their victim, asking the victim to accept responsibility for the situation and to "fix" the problem. Michalski also testified that offenders often act differently in public than they do in private so that it is very hard to identify them as someone who is abusive or violent in their relationships.

Michalski further testified about strangulation and how the act of strangulation is generally carried out. She explained how little pressure is necessary to start affecting the blood and oxygen flow to and from the brain. Michalski testified that the medical signs and symptoms of strangulation can vary; however, most of the time there are few, if any, obvious bodily injuries. There can be bruising, scratches, or redness on the neck, coughing or wheezing, confusion, pain in the neck area, difficulty swallowing, or the occurrence of urination. Other possible signs of strangulation are "petechial hemorrhage" and "linear vascular congestion." Michalski defined the term "petechial hemorrhage" as "small flat red areas or dots that are caused from pressure when the neck is squeezed." She indicated that, often, "the best place to see petechiae . . . is in the whites of the eyes or anywhere above the level of where the compression has occurred." She defined the term "linear vascular congestion" as the breaking of blood vessels due to pressure being exerted on the neck, which would be most noticeable in the eyes. Michalski emphasized that strangulation is potentially lethal. Despite the seriousness of strangulation, many victims will not report having been strangled because they feel better very quickly after the pressure is released from their neck and because, due to the

lack of oxygen, victims can sometimes suffer from a loss of memory.

Michalski testified that she had neither met with nor interviewed J.K. or Schramm. She had also not read any police reports about the August 28, 2017, incident. However, Michalski had viewed four photographs taken of J.K.'s eyes shortly after the incident, although Michalski testified that she did not know that the photographs were of J.K.'s eyes. Michalski explained that in the photographs, she observed linear vascular congestion, which can be consistent with strangulation. However, Michalski explained that things other than strangulation can cause linear vascular congestion, including sneezing, coughing very hard, or "anything that creates a pressure." In order to determine with precision the exact cause of linear vascular congestion, a medical professional would have to know a person's medical history and have an understanding of a person's current circumstances. During cross-examination, Michalski admitted that an exact cause of linear vascular congestion could not be determined by merely looking at a few photographs. In addition, she explained that she is not qualified to determine an exact cause of linear vascular congestion because she is not a diagnosing physician.

After hearing all of the evidence, the jury found Schramm guilty of strangulation. The district court ordered a presentence report to be completed and subsequently sentenced Schramm to 2 years' imprisonment followed by 12 months' postrelease supervision.

Schramm appeals his conviction and sentence here.

## III. ASSIGNMENTS OF ERROR

On appeal, Schramm assigns four errors. He alleges that the district court erred in denying his motion to continue the trial so that he could obtain his own expert witness, in permitting Michalski to testify as an expert on domestic violence and strangulation over his objections, in instructing the jury, and in imposing an excessive sentence.

## IV. ANALYSIS

### 1. Schramm's Motion to Continue Trial

#### (a) Additional Background

On March 19, 2018, approximately 3 weeks before trial was to begin, the State filed a motion to endorse Michalski as an additional witness. At a hearing on the State's motion, which was held approximately 10 days after the motion was filed, the State indicated that it had given Schramm's counsel notice that "[it] was thinking about calling [Michalski] as a witness on March 1st and then . . . maybe a few days later or a week later . . . did inform [counsel] that [it] was in fact intending on calling her as a witness." Schramm's counsel did not dispute the State's explanation of the timeline; however, counsel did argue that initially, the State had indicated that Michalski was not going to offer any opinions specific to this case. However, the day before the hearing, which was less than 2 weeks prior to the scheduled trial, the State informed counsel that Michalski had looked at photographs of J.K.'s eyes and was going to opine that redness in the eyes could be consistent with strangulation. Counsel stated:

> [T]his is kind of the eleventh hour before trial. We are getting - first she wasn't going to offer any opinions and wasn't going to look at any reports. Now, I find out as of yesterday morning that she has looked at reports and now offer a medical opinion.
>
> So, that is kind of the eleventh hour for me to find out about that. Now I got to find - if you are going to allow her to testify, I have got to scramble to find someone to look at these reports and I got phone calls into doctors trying to find - in case you allow her to testify.

Ultimately, the district court sustained the State's motion to endorse Michalski as a witness.

At a separate hearing held on April 5, 2018, which was 4 days before the trial was to begin, Schramm's counsel made an oral motion to continue the trial. Counsel indicated that he was "running into problems finding expert witnesses" who

could dispute the opinion provided by Michalski regarding the condition of J.K.'s eyes. Specifically, counsel explained:

> I tried to find somebody locally. I went to [one forensic institute located in Nebraska]. I took reports and the same thing . . . Michalski looked at, the videos. [The forensic expert] contacted me yesterday. He has an opinion but he cannot help me. It's a scheduling thing. I don't know. He just can't come and he is sorry.
>
> So now, I have Thursday and Friday and the trial on Monday to find someone else and doctors are busy. It is hard to find experts.
>
> . . . .
>
> I did make a call today. I would ask to continue this so I can locate a witness and I did make a call today to another witness in Kansas City and got her voicemail. I don't know if I got a call when I get back, don't know her availability, I don't know anything. But I am pretty sure this short amount of notice, this doctor is not going to be available.

The State opposed Schramm's motion to continue the trial. The State indicated that it had informed defense counsel about Michalski "about a month ago"; however, the State did not dispute that it had not informed counsel about Michalski's testifying as to her medical opinion regarding the condition of J.K.'s eyes until about March 27, 2018. The State asserted that it had spent a significant amount of money in arranging for J.K. to fly from the Czech Republic, where she was then living, to Lincoln so that she could testify. The State asserted that J.K. was already on the plane and en route to Nebraska in anticipation of the trial which was to begin in 4 days.

The court denied Schramm's motion to continue the trial. The court stated, "We will proceed with trial[;] you still have four or five days to locate an expert if that is what you choose to do."

Prior to Michalski's testimony at trial, Schramm again brought up his motion to continue the trial. Defense counsel

indicated that he had not had an acceptable amount of time to secure his own expert witness, even though he had "diligently tried to find people." The district court overruled Schramm's objections to Michalski's testifying.

On appeal, Schramm argues that the district court abused its discretion in denying his motion to continue the trial so that he could obtain his own expert medical witness to refute Michalski's testimony about the condition of J.K.'s eyes. Upon our review, we conclude that Schramm's assertion has merit.

(b) Standard of Review

[1,2] A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Ash*, 286 Neb. 681, 838 N.W.2d 273 (2013). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *Id.*

(c) Analysis

Although not mentioned by either party, it must be noted that Neb. Rev. Stat. § 25-1148 (Reissue 2016) provides, in pertinent part:

> Whenever application for continuance or adjournment is made by a party or parties to any cause or proceeding pending in the district court of any county, such application shall be by written motion entitled in the cause or proceeding and setting forth the grounds upon which the application is made, which motion shall be supported by the affidavit or affidavits of person or persons competent to testify as witnesses under the laws of this state, in proof of and setting forth the facts upon which such continuance or adjournment is asked.

Not only was the application for continuance in this case made by oral motion, the motion was not supported by affidavits.

[3] However, the failure to comply with the provisions of § 25-1148 is but a factor to be considered in determining whether a trial court abused its discretion in denying a continuance. *State v. Santos*, 238 Neb. 25, 468 N.W.2d 613 (1991). Here, the motion for continuance was made at a hearing held approximately 1 week after the district court had granted the State's motion to endorse Michalski as a witness. According to both defense counsel and the State, the motion to continue was made only 1 week after defense counsel had learned that Michalski would be providing a medical opinion regarding the condition of J.K.'s eyes based upon photographs taken on August 28, 2017. As such, the motion was made at a time when, after 1 week of searching, Schramm had been unable to secure his own expert witness to testify. Given that Schramm made the oral motion to continue at his next appearance before the district court and given the close proximity in time to the start of the trial, we cannot say that the oral nature of the motion is, in and of itself, a sufficient basis upon which to declare that the district court did not abuse its discretion in denying the continuance. Moreover, while supporting affidavits may have been useful to confirm Schramm's efforts at finding an expert witness, we recognize that Schramm was under strict time constraints and, as such, do not find that the failure to include the affidavits is, under these circumstances, fatal to his motion.

[4] We thus move on to a consideration of the merits of the continuance request. The general rule, which has been articulated by the Nebraska Supreme Court, is that a continuance must be granted to allow defense counsel adequate time to prepare a defense. See *Dolen v. State*, 148 Neb. 317, 27 N.W.2d 264 (1947). See, also, *State v. Santos, supra*. Our analysis of whether the district court abused its discretion in denying Schramm's motion to continue the trial centers on whether he was provided with sufficient notice regarding Michalski's testimony such that he had adequate time to prepare his defense. Ultimately, we conclude that Schramm did

not receive sufficient notice of Michalski's testimony and that he should have been granted a continuance of trial in order to prepare his defense.

[5,6] A criminal defendant has constitutional and statutory rights which mandate the timely disclosure of the State's evidence in a criminal case. *State v. Ash*, 286 Neb. 681, 838 N.W.2d 273 (2013). In fact, Neb. Rev. Stat. § 29-1912(2) (Reissue 2016) requires the State, upon request, to disclose evidence that is material to the preparation of a defense. See *State v. Ash, supra*. In *State v. Kula*, 252 Neb. 471, 486, 562 N.W.2d 717, 727 (1997), the Nebraska Supreme Court held:

> [W]hether a prosecutor's failure to disclose evidence results in prejudice depends on whether the information sought is material to the preparation of the defense, meaning that there is a strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses, corroborating testimony, or assisting impeachment or rebuttal.

In this case, while it is true that the State did, eventually, endorse Michalski as a witness and, then later, did inform Schramm that Michalski would be offering her expert medical opinion regarding the condition of J.K.'s eyes after the August 28, 2017, incident, it is also true that the State made these disclosures very close in time to the scheduled trial date. Although the State contends that it mentioned the possibility of Michalski's testifying to defense counsel on March 1, 2018, approximately 5 weeks prior to trial, the State did not file its motion to endorse Michalski as a witness until March 19, which was approximately 3 weeks prior to trial. Moreover, as Schramm asserts, and the State does not dispute, the State did not inform Schramm until March 27, or approximately 10 days prior to trial, that Michalski would be offering opinion testimony regarding the specific facts of this case. We find that such opinion testimony is clearly material to the preparation of Schramm's defense, particularly when the bulk of the remaining evidence offered at trial amounted to only J.K's version

of events and Schramm's version of events, with Michalski's testimony clearly corroborating J.K.'s version.

Given the State's late disclosure that Michalski would be testifying, and its even later disclosure about what Michalski would be testifying about, Schramm was left with approximately 10 days to locate a person with expertise in the area of strangulation and linear vascular congestion, to provide that person with the materials sufficient for an opinion to be rendered, to determine whether that person may dispute Michalski's opinion, and to secure that person's attendance at trial. We do not disagree with Schramm's contention that it would be very difficult, if not impossible, to secure such a medical opinion in such a limited timeframe.

[7] In its brief on appeal, the State argues that Schramm has failed to demonstrate that he was in any way prejudiced by the district court's denial of his motion to continue the trial. Specifically, the State asserts that Schramm has failed to explain "what another expert would have countered with" and how such testimony would have been helpful to his defense. Brief for appellee at 21. We recognize that the Nebraska Supreme Court has previously held that there is no abuse of discretion by a court in denying a continuance unless it clearly appears that the defendant suffered prejudice as a result thereof. See *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990). See, also, *State v. Bruna*, 12 Neb. App. 798, 686 N.W.2d 590 (2004). However, we must disagree with the State's contention that Schramm's argument must fail because he did not demonstrate any specific prejudice in his trial strategy. Under the circumstances of this case, Schramm did not even have enough time to determine whether an expert could assist in his defense because he did not have adequate time to find an expert, to have that expert evaluate the evidence, and to provide Schramm with any opinion. As such, it is impossible to know whether Schramm suffered any prejudice in his trial strategy because we do not know what a potential expert might have testified to. The fact that Schramm did not have enough

time to consult with an expert and to then move forward with his trial strategy caused him prejudice.

Moreover, although Schramm was able to cross-examine Michalski regarding her medical opinion and was able to flesh out both that Michalski was not qualified to diagnose a specific condition and that there were other possible causes of the linear vascular congestion present in J.K.'s eyes besides strangulation, Michalski was still able to testify that in her expert medical opinion, the appearance of J.K.'s eyes in the photographs was consistent with being strangled. Schramm should have had an opportunity not only to soften the impact of this testimony during cross-examination, but also to attempt to hire an expert of his own who could potentially either refute or diminish the impact of Michalski's testimony.

The State also argues on appeal, as it did in the district court, that it had expended a great deal of money in reliance on the scheduled trial date and that Schramm was aware of this expenditure. We recognize that the State did spend a not insignificant amount of money in paying for the travel expenses of J.K. We also recognize that by the time Schramm made his oral motion to continue, J.K. was, apparently, already on a plane en route to Nebraska from the Czech Republic. However, we do not find that the State's monetary investment outweighs Schramm's right to be able to present a defense to the State's case against him. We also note that it was the State which added Michalski to its witness list close in time to the trial and which did not disclose the full extent of her testimony until approximately 10 days before the trial. The State knew of the investment it had made in securing J.K.'s presence presumably before it made these changes to its trial strategy. And, moreover, the State should have known that these material changes would affect the trial strategy of the defense.

Upon our review of the totality of the circumstances, we must conclude that Schramm was not provided with adequate time to prepare his defense. Specifically, he was not provided

with adequate time to adjust his trial strategy to address Michalski's expert medical testimony given the limited time available to him prior to the trial. We find that the district court abused its discretion in denying Schramm's motion to continue the trial.

[8] Having concluded that the denial of the motion to continue was reversible error, we must determine whether the totality of the evidence admitted by the district court was sufficient to sustain Schramm's conviction; if it was not, then double jeopardy forbids a remand for a new trial. See *State v. Ash*, 286 Neb. 681, 838 N.W.2d 273 (2013). But the Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *State v. Ash, supra*.

After reviewing the record, we conclude that the evidence presented at trial was sufficient to support the verdict against Schramm. As such, we conclude that double jeopardy does not preclude a remand for a new trial, and we therefore reverse, and remand for a new trial.

### 2. Schramm's Other Assigned Errors

Our determination that the district court committed reversible error by failing to grant Schramm a continuance in order to attempt to secure his own expert witness resolves this appeal. While we are not required to consider Schramm's additional assignments of error, see *White v. Board of Regents*, 260 Neb. 26, 614 N.W.2d 330 (2000), and *In re Interest of Battiato*, 259 Neb. 829, 613 N.W.2d 12 (2000) (appellate court is not obligated to engage in analysis not needed to adjudicate case and controversy before it), we may, at our discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings, see *State v. Edwards*, 286 Neb. 404, 837 N.W.2d 81 (2013). We will therefore address Schramm's assertions regarding the admissibility of Michalski's testimony and whether the district court

correctly instructed the jury, as those issues are likely to recur on remand.

### 3. Admissibility of Michalski's Testimony

#### (a) Additional Background

Once Schramm learned that the State was indeed planning on calling Michalski as a witness at trial, he filed a motion asking the court to hold a *Daubert*/*Schafersman* hearing in order to determine whether Michalski qualified as an expert witness. See *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). In the motion, Schramm generally asserted that the "[e]xpert opinions regarding domestic violence and strangulation testimony, specifically the testimony of Susan Michalski RN, MS SANE/FNE, . . . does not meet the standard for admissibility required . . . ." Schramm also filed a motion which asserted that Michalski's testimony should not be admitted because it was not relevant and because any probative value was substantially outweighed by the danger of unfair prejudice.

A hearing was held on Schramm's motions prior to trial. At the hearing, Michalski testified to substantially the same information as she testified to during the trial, which we detailed in the background section above. She did explain during her testimony at the hearing that she has previously qualified to testify as an expert on domestic violence and/or strangulation on 11 previous occasions. After Michalski testified, Schramm argued that she is not an expert on domestic violence or strangulation. He asserted that she is only a registered nurse and not a diagnosing physician, that she "has not had enough continuing education to stay up on this topic," and that she has been merely a "trainer" for the past few years. He also asserted that Michalski should not be permitted to testify that J.K. was telling the truth, which he believed was "all . . . Michalski is going to do." Schramm asserted that

the jurors would understand what strangulation is without Michalski's explaining it to them.

After the hearing, the district court entered an order finding that "Michalski is qualified as an expert in the areas of domestic violence and strangulation by her knowledge, skill, experience, training, and education." The court further found that Michalski's "specialized knowledge in these areas . . . will assist a trier of fact in understanding the evidence and/or determining a fact in issue." The court noted that it did "not believe that characteristics of a perpetrator and/or victim of domestic violence are common knowledge. Nor does the court expect that a lay person knows the physical effects of strangulation and/or the signs and symptoms typically associated with strangulation."

Prior to Michalski's testimony at trial, Schramm renewed his objection to her testimony. The district court overruled his objection and permitted Michalski to testify as an expert. On appeal, Schramm challenges the district court's finding that Michalski was qualified to testify as an expert.

(b) Standard of Review

[9] 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. Herrera*, 289 Neb. 575, 856 N.W.2d 310 (2014). The standard for reviewing the admissibility of expert testimony is abuse of discretion. *Id*. We review the record de novo to determine whether a trial court has abdicated its gatekeeping function when admitting expert testimony. *Id*.

(c) Analysis

In his brief on appeal, Schramm asserts that the district court erred in permitting Michalski to testify as an expert witness. Specifically, Schramm argues that Michalski's "testimony was not scientific, technical or specialized in that it would have assisted the trier of fact to understand the evidence. Neither

did she have the knowledge, skill, experience, training or education required to qualify her as an expert witness on the evidence that was . . . admitted in this trial." Brief for appellant at 13. Upon our review, we find that the district court did not err in permitting Michalski to testify as an expert on the subject of strangulation.

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). In *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), the Nebraska Supreme Court adopted the standards which the U.S. Supreme Court set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), to determine whether expert testimony is admissible under § 27-702.

[10] Under the principles set forth in *Daubert*/*Schafersman*, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. *State v. Herrera, supra*. 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. *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010). Several nonexclusive factors are considered in making this determination: (1) whether a theory or technique can be (and has been) tested; (2) whether it has been subjected to peer review and publication; (3) whether, in respect to a particular technique, there is a high known or potential rate of error; (4) whether there are standards controlling the technique's operation; and (5) whether the theory or technique enjoys general acceptance within a relevant scientific community. *State v. Herrera, supra*. In order to properly conduct appellate review, it is the duty of the trial court to adequately demonstrate by

specific findings on the record that it has performed its gatekeeping functions. *State v. Casillas, supra*.

[11] A challenge to the admissibility of evidence under *Daubert*/*Schafersman* should take the form of a concise pretrial motion. *State v. Herrera*, 289 Neb. 575, 856 N.W.2d 310 (2014). It should identify, in terms of the *Daubert*/*Schafersman* factors, what is believed to be lacking with respect to the validity and reliability of the evidence and any challenge to the relevance of the evidence to the issues of the case. *Id*. In order to preserve judicial economy and resources, the motion should include or incorporate all other bases for challenging the admissibility, including any challenge to the qualifications of the expert. *Id*.

Schramm's motion requesting that the district court hold an evidentiary hearing to determine the admissibility of Michalski's testimony pursuant to the *Daubert*/*Schafersman* factors did not reference any specific factor which he believed was lacking with respect to Michalski's testimony. Rather, the motion very generally asserted that Michalski's testimony "does not meet the standard for admissibility." In its order, the district court noted the deficiency in the motion, indicating that Schramm had "failed to sufficiently call into question the reliability or validity of any aspect of . . . Michalski's anticipated testimony. He has not called into question the factual basis, data, principles, or methods underlying . . . Michalski's anticipated testimony." Despite the shortcomings with Schramm's motion, the district court went on to analyze whether Michalski's testimony was admissible pursuant to the entire *Daubert*/*Schafersman* framework.

On appeal, Schramm argues that Michalski's testimony did not meet the requirements of § 27-702, and even if it did, it was inadmissible under *Daubert*/*Schafersman.* Our review of these arguments is complicated by the fact that Schramm has not identified the specific testimony that he claims was erroneously admitted. He refers only to testimony regarding "strangulation," brief for appellant at 13, and complains

that Michalski "was allowed to testify and offer an opinion to issues that were central to this case," *id.* at 14. He does not, however, identify what that opinion was. He has also not identified which prong of the *Daubert*/*Schafersman* analysis is lacking. We recognize that Schramm was hindered in his presentation of evidence at the *Daubert*/*Schafersman* hearing due to the untimely designation of Michalski and her proposed testimony; however, we are limited to the record before us in reviewing the district court's decision. Based upon the evidence presented at the pretrial hearing, we find no error in the district court's order allowing Michalski's testimony.

### 4. Jury Instructions

#### (a) Additional Background

Schramm requested that the district court include an additional jury instruction related to analyzing the credibility of expert testimony. The language of the proposed instruction read as follows:

> You have heard testimony from an expert witness. It is up to you to determine the validity and weight of the scientific testimony. Factors you should consider are:
>
> (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 technique has been subjected to peer review and publication;
>
> (4) The general acceptance of the theory or technique in the scientific community.

The State objected to Schramm's proposed jury instruction. It argued that jury instruction No. 9, as authored by the court, was sufficient to instruct the jury regarding evaluating the credibility of an expert witness. Jury instruction No. 9 read as follows:

> A witness who has special knowledge, skill, experience, training, or education in a particular area may testify

> as an expert in that area. You determine what weight, if any, to give to an expert's testimony just as you do with the testimony of any other witness. You should consider the expert's credibility as a witness, the expert's qualifications as an expert, the sources of the expert's information, and the reasons given for any opinions expressed by the expert.

Accord NJI2d Crim. 5.4. Ultimately, the district court rejected Schramm's proposed jury instruction and did not include it in the instructions read to the jury. Schramm appeals from the district court's decision.

(b) Standard of Review

[12] Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *State v. McCurry*, 296 Neb. 40, 891 N.W.2d 663 (2017).

[13,14] 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*.

(c) Analysis

On appeal, Schramm argues that the district court erred in rejecting his proposed jury instruction. He asserts that the proposed instruction provided the jury with a more detailed explanation than jury instruction No. 9 regarding how to evaluate expert witness testimony. He asserts that this instruction is a correct statement of the law and would have assisted the jury during its deliberations. Specifically, he states, "The

prejudice to [Schramm] is readily apparent. The impact of the jury being improperly instructed with respect to the credibility and weight to give expert testimony is fathomless." Brief for appellant at 19. Upon our review, we conclude that the district court's refusal to give the proposed jury instruction did not constitute reversible error.

[15] 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. Rothenberger*, 294 Neb. 810, 885 N.W.2d 23 (2016).

[16] Here, the district court used a pattern jury instruction regarding the jury's evaluation of the credibility of an expert witness. See NJI2d Crim. 5.4. 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. Morgan*, 286 Neb. 556, 837 N.W.2d 543 (2013). Schramm requested that the district court depart from the pattern jury instruction and provide the jury with a more detailed explanation of how to evaluate the credibility of an expert witness. However, Schramm's proposed jury instruction asked the jury to consider the underlying principles of Michalski's testimony. In fact, Schramm's proposed jury instruction asked the jury to consider the exact *Daubert*/*Schafersman* factors that the trial court is to use in determining whether the reasoning or methodology underlying the expert's opinion is scientifically valid and, thus, in determining whether an expert can testify before a jury. In this case, as we discussed more thoroughly above, the district court had performed its proper gatekeeping function and had determined that Michalski's testimony was admissible pursuant to the *Daubert*/*Schafersman* factors. It was not the province of the jury to review the district court's decision. Rather, the jury was to evaluate the credibility of the expert witness and to

determine what weight to give the expert's testimony, just as it was to do with any other witness.

The district court did not err in utilizing the pattern jury instruction to instruct the jury on how to evaluate the credibility of expert testimony. Such an instruction was a correct statement of the law and did not prejudice Schramm in any way.

## V. CONCLUSION

Because the district court failed to grant Schramm's motion to continue the trial and, thus, failed to provide Schramm with adequate time to prepare his defense, the judgment and sentence of the district court are reversed and the cause is remanded for a new trial.

Reversed and remanded for a new trial.

# In re Guardianship of Suzette G., an incapacitated person. Alvin G., Guardian, et al., appellees, v. Suzette G., appellant.

934 N.W.2d 195

Filed August 6, 2019. No. A-18-785.

1. **Guardians and Conservators: Appeal and Error.** An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. ____: ____. An appellate court, in reviewing a judgment of the trial court for errors appearing on the record, will not substitute its factual findings for those of the trial court where competent evidence supports those findings.
4. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.
5. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.

Appeal from the County Court for Douglas County: Marcena M. Hendrix, Judge. Affirmed.

James Walter Crampton for appellant.

Jayne Wagner and Emily J. Briski, of Legal Aid of Nebraska, for appellee Alvin G.

Denise E. Frost, of Johnson & Mock, for guardian ad litem.

Riedmann, Arterburn, and Welch, Judges.

Riedmann, Judge.

## I. INTRODUCTION

Suzette G. appeals from an order of the county court for Douglas County appointing her brother, Alvin G., as her limited guardian. On appeal, Suzette argues that there was not sufficient evidence demonstrating she was in need of a guardian and that the guardian ad litem (GAL) appointed for her should not have been permitted to testify at trial. We find that the county court did not err, and therefore, we affirm.

## II. BACKGROUND

In November 2017, Alvin filed two petitions with the county court seeking to be appointed temporary and permanent guardian for Suzette. In his petitions, Alvin stated that a guardianship was necessary because Suzette lacked sufficient understanding to make or communicate responsible decisions concerning her own person in several areas, including giving necessary consents, approvals, and releases; arranging for training, education, or other rehabilitative services; and applying for government or private benefits to which she may have been entitled. In his petition for permanent guardianship, he also asserted that Suzette was incapable of arranging for her treatment or medical care. As part of both petitions, Alvin stated that his and Suzette's parents and their sister were necessary persons required by law to receive notice of the time and place of the hearing for guardianship. The court subsequently appointed Alvin as temporary guardian of Suzette, giving him the limited powers he requested in his petition and the power to arrange for her medical care.

At a hearing held in February 2018 on Alvin's petition for permanent guardianship, the court appointed Suzette both a GAL and separate legal counsel. Alvin's temporary guardianship of Suzette was extended until June 2018, when a final

hearing was held on his petition for permanent guardianship. At the hearing, Alvin adduced evidence demonstrating that Suzette was struggling with her mental health and was hospitalized twice in the preceding year for it. Suzette had been diagnosed at different times in her adult life with paranoid schizoaffective disorder and paranoid schizophrenia.

The evidence revealed that in October 2017, the mental health board for Douglas County found Suzette to be mentally ill and dangerous, and that she was hospitalized until December 2017 and then placed in outpatient care until January 2018. Alvin and his sister had petitioned the mental health board to hospitalize Suzette because she was contacting law enforcement and federal marshals claiming that people were following her. She also believed that someone was living inside her house, that she was being "medically murdered," and that she asked her neighbors to test her hair and fingernails for poison.

The evidence also showed that after Suzette was released from the hospital in December 2017, a treatment plan was created by the mental health board which required that she receive an injectable medication every month for her mental health and that she seek a guardianship. However, in February 2018, Suzette was hospitalized a second time, after she failed to take her medication. Suzette argued that although she did not take the injectable medication because it made her ill, she was taking the tablet form of the medication. Suzette was released from the hospital in March 2018, and it was recommended that she see a psychiatrist and a therapist.

Suzette has had a history of noncompliance with treatment for her mental illness. Despite being recommended to do so, Suzette did not meet consistently with a therapist. She had three therapists between January and June 2018. She stopped seeing her first therapist because she did not choose her. She discontinued treatment with the second therapist, Dr. Aveva Shukert, because she was "negative," and she stopped working with the third therapist after two visits because Suzette believed

she was lying. At the time of the hearing, Suzette was not in therapy. Additionally, Suzette had stopped taking medication for her mental health in the past because it was "fruitless," and she had stopped working with her psychiatrist in 2015 because she did not find it to be effective.

Suzette's GAL testified, over an objection by Suzette, that Suzette had been the subject of seven mental health board holds in her adult life. Suzette provided the GAL with a release for her to obtain information from only Shukert, who indicated that Suzette was having delusional thoughts while she was her patient. The GAL also testified that Suzette was under a mental health board commitment at the time of the hearing, meaning she could be hospitalized again if she failed to address her mental health.

The GAL stated that she was concerned Suzette did not recognize the severity of her mental illness and therefore stopped receiving treatment for it. It was the GAL's recommendation that Suzette be appointed a limited guardian for the purpose of ensuring that she receive her medications and professional help for her mental illness. The GAL testified that a limited guardianship was preferred because Suzette was able to handle her finances and budget, but she required assistance regarding her mental health needs. Finally, the GAL opined that a limited guardianship would be the least restrictive alternative for Suzette.

Alvin testified that he sought a temporary guardianship for Suzette because her doctors recommended it and it was part of the treatment plan formulated by the mental health board. Alvin stated that while he was Suzette's temporary guardian, he worked to obtain full Medicaid assistance for her, worked with her local pharmacy to ensure she was receiving her medications, sat in on a therapy session for her, contacted Shukert to receive information on Suzette's appointments and treatment, and assisted in ensuring that her house was livable. Alvin further testified that while he believed Suzette was capable of handling her finances, she had displayed a long

history of not complying with medication and treatment for her mental health, which led to a deteriorated quality of life. On cross-examination, Alvin stated that Suzette was not forthcoming with information regarding her health and that he was able to obtain information regarding her mental health only by speaking directly to her medical professionals, which he was authorized to do as her temporary guardian.

Suzette also testified at the hearing. She stated that Alvin was not speaking with her while he was her temporary guardian because she had confronted him in the past, alleging that he fondled her when she was a child. She further stated that she was not consulted regarding the first mental health board hold that was placed on her in October 2017 and that she was not happy with the proceedings. Additionally, she testified that she paid the mortgage on her home, drove herself to appointments, and bought her own groceries.

Following the hearing, the county court appointed Alvin as Suzette's limited guardian. The court stated that a guardian was necessary for Suzette because she lacked sufficient understanding and capacity to make or communicate responsible decisions concerning her person and her health. The court's order indicated that Alvin was responsible for arranging medical care for Suzette; giving necessary consent, approval, or releases on her behalf; and arranging for training, education, or other habilitating services for her. Suzette timely appealed.

## III. ASSIGNMENTS OF ERROR

Suzette assigns, restated, that the county court erred in (1) finding there was clear and convincing evidence that Alvin should be appointed limited guardian for her and (2) allowing the GAL to testify.

## IV. STANDARD OF REVIEW

[1-3] An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record made in the county court. *In re Guardianship & Conservatorship*

*of Forster*, 22 Neb. App. 478, 856 N.W.2d 134 (2014). When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*. An appellate court, in reviewing a judgment of the trial court for errors appearing on the record, will not substitute its factual findings for those of the trial court where competent evidence supports those findings. *Id*.

## V. ANALYSIS

### 1. Appointment of Limited Guardian

Suzette argues that the county court erred in finding that Alvin proved by clear and convincing evidence that he should be appointed her limited guardian. Suzette asserts that the evidence does not demonstrate that she needs a guardian, that notice was not given to all parties required by statute, and that Alvin did not have priority to be appointed as her limited guardian. We disagree.

#### (a) County Court Did Not Err in Determining Suzette Required Limited Guardian

A court may appoint a guardian if it is satisfied by clear and convincing evidence that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as the least restrictive alternative available for providing continuing care or supervision of the person alleged to be incapacitated. Neb. Rev. Stat. § 30-2620 (Reissue 2016). An incapacitated person includes any person who is impaired by reason of mental illness or mental deficiency to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning himself or herself. Neb. Rev. Stat. § 30-2601(1) (Reissue 2016).

Here, the county court's determination that Suzette was incapacitated because she lacked sufficient understanding and

capacity to make or communicate responsible decisions concerning her person and her mental health, and thus required a guardian, was supported by clear and convincing evidence.

First, the record demonstrates that Suzette has struggled with mental illness for many years. Despite her history, the record reveals that Suzette has not adequately addressed her mental health. In October 2017, she was hospitalized due to delusional thoughts which led her to contact local law enforcement and federal marshals claiming that people were after her and that she was being "medically murdered." She also took samples of her hair and fingernails to neighbors to be tested for poison. Upon her release from the hospital, Suzette failed to take her required monthly injectable medication and was again hospitalized in February 2018. Additionally, Suzette testified that in the past, she had stopped taking medications for her mental health because they were "fruitless."

Furthermore, Suzette admits that she did not consistently meet with therapists as required. She had three therapists between January and June 2018 and was not seeing a therapist at the time of the hearing. She had various reasons for discontinuing her therapy. Even while treating with one of the therapists, Suzette continued to suffer from delusional thoughts.

Suzette's inability or refusal to receive treatment for her mental illness supports the court's determination that she lacked sufficient understanding or capacity to make responsible decisions concerning her mental health. Alvin testified that while he was her temporary guardian, Suzette did not inform him when she stopped seeing her therapists; nor did she inform him when she began seeing a new primary care physician. Thus, the record supports the court's finding that Suzette was not able to communicate responsible decisions regarding her mental health.

Although Suzette argues on appeal that a guardianship was unnecessary because Alvin did not employ his powers as her temporary guardian, Alvin testified that he attempted to obtain full Medicaid assistance for her, worked with her local

pharmacy to ensure she was receiving her medications, set up initial appointments for her with medical professionals, and contacted her health care providers to receive updates on her treatment. Therefore, the court's decision that Suzette was incapacitated, and in need of a guardian, was supported by clear and convincing evidence.

Further, the county court was correct in appointing Alvin as a limited guardian. If the court finds that a guardianship should be created, the guardianship shall be a limited guardianship unless the court finds by clear and convincing evidence that a full guardianship is necessary. § 30-2620. If a limited guardianship is created, the court shall specify the authorities and responsibilities which the guardian shall have including arranging for medical care for the ward; giving necessary consent, approval, or releases on behalf of the ward; and applying for private or governmental benefits to which the ward may be entitled. See *id*.

The record indicates that Suzette was able to adequately manage her finances and life outside of her mental health. She paid her mortgage, drove herself to appointments, and bought her own groceries. Both the GAL and Alvin testified that Suzette could manage her financial affairs but needed a guardian to ensure she was addressing her mental health. Therefore, the court properly limited Alvin's role as guardian to those tasks necessary to manage Suzette's mental health treatment.

### (b) Record Does Not Indicate Alvin Failed to Provide Notice to All Required Persons

Suzette asserts that Alvin failed to provide notice of his petition for guardianship to all persons required by statute, namely, her parents. We disagree.

Neb. Rev. Stat. § 30-2625 (Reissue 2016) requires a person seeking to be appointed as a guardian for a person alleged to be incapacitated to provide notice of hearing to the person alleged to be incapacitated and his or her spouse, parents, and adult

children. Suzette asserts that her parents were given notice of the February 2018 hearing but that Alvin did not provide her parents notice "as required by . . . § 30-2625." Brief for appellant at 6. She does not identify the manner in which notice was deficient.

[4] Our record contains a notice of hearing for the February 2018 hearing, and it reflects notice to Suzette's parents more than 14 days prior to the hearing as required. Our record does not contain the notice of hearing for the June hearing, but some notice must have been provided, because Suzette, her father and sister, Alvin, the GAL, and all counsel appeared for trial on June 29. It is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors. *Pierce v. Landmark Mgmt. Group*, 293 Neb. 890, 880 N.W.2d 885 (2016).

[5] Nonetheless, the transcript indicates that the journal entry documenting that trial occurred on June 29, 2018, was sent to Suzette's parents, as was the subsequent order appointing Alvin as guardian. The record further reflects that Suzette's father attended the hearing. Our record does not contain any objection by Suzette or her parents regarding the alleged lack of notice, either at the hearing or following the appointment of Alvin as guardian. It appears the issue was not raised in the trial court. An appellate court will not consider an issue on appeal that was not passed upon by the trial court. *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006). Because the issue was not raised in the trial court, we decline to further address this argument.

### (c) Court Appropriately Appointed Alvin as Limited Guardian for Suzette

Suzette also alleges that the county court erred in appointing Alvin as her limited guardian, because Alvin did not have priority to be appointed as a guardian. We disagree.

Any competent person may be appointed as a guardian of a person alleged to be incapacitated. Neb. Rev. Stat. § 30-2627(a) (Reissue 2016). Section 30-2627(b) sets forth the following order of priority for persons who are not disqualified and who "exhibit the ability to exercise the powers to be assigned by the court":

> (1) A person nominated most recently by one of the following methods:
>
> (i) A person nominated by the incapacitated person in a power of attorney or a durable power of attorney;
>
> (ii) A person acting under a power of attorney or durable power of attorney; or
>
> (iii) A person nominated by an attorney in fact who is given power to nominate in a power of attorney or a durable power of attorney executed by the incapacitated person;
>
> (2) The spouse of the incapacitated person;
>
> (3) An adult child of the incapacitated person;
>
> (4) A parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;
>
> (5) Any relative of the incapacitated person with whom he or she has resided for more than six months prior to the filing of the petition;
>
> (6) A person nominated by the person who is caring for him or her or paying benefits to him or her;
>
> (7) The Public Guardian.

However, the court, acting in the best interests of the incapacitated person, may pass over a person having priority and appoint a person having lower priority or no priority. § 30-2627(c).

On appeal, Suzette argues that Alvin had lower priority than her parents to be appointed as limited guardian and thus should not have been appointed. However, there is no evidence in the record that any person besides Alvin, including Suzette's parents, applied to be her guardian. A person interested in

becoming a guardian of a person alleged to be incapacitated must file a petition to be a guardian. Neb. Rev. Stat. § 30-2619 (Reissue 2016). Thus, Alvin was the only individual who properly petitioned to become Suzette's limited guardian.

Section 30-2627(a) states that any competent person may be appointed guardian of a person alleged to be incapacitated. There is nothing in the record indicating that Alvin is not competent to be Suzette's limited guardian. Although Suzette testified that Alvin was not speaking to her because she confronted him about his alleged inappropriate touching of her when she was a child, she presented no corroborating evidence of such an act and the county court clearly did not find the allegation credible. We therefore find no error in the court's appointment of Alvin as Suzette's limited guardian.

### 2. Court Did Not Err in Permitting GAL to Testify at Trial

The GAL cross-examined witnesses and was allowed to testify over Suzette's objection. Suzette argues that the court erred in permitting the GAL to testify, because she was improperly acting as both an advocate and a witness. We find no error in the county court's decision.

A GAL may conduct 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. Neb. Rev. Stat. § 30-4203(2)(a) (Reissue 2016). Pursuant to the GAL practice standards for proceedings under the Nebraska Probate Code, a GAL may testify to the extent allowed by the Nebraska Rules of Professional Conduct. See Neb. Ct. R. § 6-1469 (2017). Neb. Ct. R. of Prof. Cond. § 3-503.7(a) prohibits a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness. Where a lawyer has already been appointed to represent the legal interests of a person alleged to be in need of a guardian, the GAL functions only to advocate for the best interests of that person. § 6-1469(C)(2).

Suzette was appointed an attorney and a GAL; therefore, the GAL's duty was to advocate for Suzette's best interests. In doing so, the GAL was not required to make a determination consistent with Suzette's preferences. See § 6-1469(C)(3)(a). That was the responsibility of Suzette's attorney. We note that the reason the Nebraska Rules of Professional Conduct prohibit an attorney from acting as a witness is to avoid a conflict of interest with his or her client. See § 3-503.7, comment 1. But here, where the GAL is representing the person's best interests, such potential conflict does not exist.

The GAL was called to testify as to the content of her report; to the extent her testimony was contained within the report, any testimony was merely cumulative. To the extent the GAL's testimony extended beyond the content of her report, we find no error, because it did not run afoul of the Nebraska Rules of Professional Conduct. As the GAL was an advocate for Suzette's best interests, no conflict of interest arose between the GAL and Suzette.

## VI. CONCLUSION

The county court did not err in determining that Suzette was in need of a limited guardian and appointing Alvin to serve in that capacity. The court also did not err in permitting the GAL to testify at the hearing. Accordingly, we affirm the order of the county court.

Affirmed.

# In re Interest of Becka P. et al., children under 18 years of age. State of Nebraska, appellee and cross-appellee, v. Robert P., appellant, and Veronica M., appellee and cross-appellant.

933 N.W.2d 873

Filed August 6, 2019. Nos. A-18-884 through A-18-887.

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 juvenile court observed the witnesses and accepted one version of facts over another.
2. **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.
3. ____: ____: ____. In determining whether admission or exclusion of particular evidence would violate fundamental due process, the Nebraska Evidence Rules serve as a guidepost.
4. **Parental Rights: Rules of Evidence: Due Process: Appeal and Error.** Rather than the formal rules of evidence, an appellate court evaluates the admission of evidence in termination of parental rights cases using a due process analysis.
5. **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.

6. **Juvenile Courts: Parental Rights: Proof.** For a juvenile court to terminate parental rights under Neb. Rev. Stat. § 43-292 (Reissue 2016), it must find that one or more of the statutory grounds listed in this section have been satisfied and that such termination is in the child's best interests. The State must prove these facts by clear and convincing evidence.
7. **Parental Rights: Proof.** Neb. Rev. Stat. § 43-292(7) (Reissue 2016) operates mechanically and, unlike the other subsections of the statute, does not require the State to adduce evidence of any specific fault on the part of a parent.
8. **Parental Rights.** In a case of termination of parental rights based on Neb. Rev. Stat. § 43-292(7) (Reissue 2016), the protection afforded the rights of the parent comes in the best interests step of the analysis.
9. **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.
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 show that the parent is unfit.
12. **Parental Rights: Presumptions: Proof.** 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.
13. **Constitutional Law: Parental Rights: Words and Phrases.** 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 the child's well-being.
14. **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.
15. **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.

16. **Parental Rights: Appeal and Error.** Where termination of parental rights is based on Neb. Rev. Stat. § 43-292(7) (Reissue 2016), appellate courts must be particularly diligent in their de novo review of whether termination of parental rights is in fact in the child's best interests.
17. **Parental Rights.** 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.
18. ____. Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.

Appeals from the County Court for Garden County: Randin R. Roland, Judge. Affirmed.

Robert S. Harvoy for appellant.

Philip E. Pierce, Garden County Attorney, for appellee State of Nebraska.

Jaquelin G. Leef, of Sonntag, Goodwin & Leef, P.C., for appellee Veronica M.

Steven E. Elmshaeuser, guardian ad litem.

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

Pirtle, Judge.

## I. INTRODUCTION

Robert P. (Bob) appeals, and Veronica M. cross-appeals, from an order of the Garden County Court sitting as a juvenile court, terminating their parental rights to four of their children. Upon our de novo review of the record, we affirm the juvenile court's order.

## II. BACKGROUND

Bob and Veronica are the parents of Becka P., born in July 2011; Robert P., Jr., born in July 2013; Thomas P., born in October 2014; and Brandy P., born in November 2016. Bob and Veronica are also the parents of a fifth child, Brittney P.,

born in December 2017. However, the termination trial did not involve Brittney. Accordingly, Brittney is not part of the appeal before us now and she will only be discussed as necessary to address Bob's and Veronica's assigned errors.

In December 2015, separate petitions were filed to adjudicate Becka, Robert, and Thomas pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2015) based on the actions of both parents. Becka, Robert, and Thomas were adjudicated in February 2016. The basis of the adjudication was the parents' failure to use proper car seats on a regular basis. The petition also included concerns in regard to the children's being developmentally delayed. A petition to adjudicate Brandy was filed in December 2016, and she was adjudicated in April 2017. Becka, Robert, Thomas, and Brandy were removed from the parental home on December 16, 2016. They have remained out of the home since that time.

On July 31, 2018, the State filed a motion for termination of Bob's and Veronica's parental rights in regard to the four children, alleging statutory grounds to terminate existed pursuant to Neb. Rev. Stat. § 43-292(2), (3), (5), (6), and (7) (Reissue 2016), and alleging that termination was in the best interests of the children. A termination trial was held over the course of 4 days in August 2018.

The evidence showed that the family first became involved with the Nebraska Department of Health and Human Services (Department) in 2013 based on the living conditions of the home and Becka's being developmentally delayed. At that time, only Becka and Robert were born. The case was dismissed when the family moved into an acceptable home and educational services were being provided for Becka, which Bob and Veronica agreed to continue. Shortly after the case was dismissed, Bob would not allow the continuation of the educational services.

In 2015, the Department investigated the family on two separate occasions based on intakes involving allegations of abuse and neglect. Voluntary services were offered to the

family both times, but they were denied. As previously stated, the present case began in January 2016 when petitions to adjudicate Becka, Robert, and Thomas were filed. The petition to adjudicate Brandy was filed in December 2016.

Sonya Oliverius, who supervises caseworkers for the Department, became involved with the case when Becka, Robert, and Thomas were adjudicated in February 2016. She testified that during her time assigned to the case, Bob did not want to participate in services that were offered by the Department and would argue with her or tell her that either she or the Department had done something wrong. She testified that Veronica "pretty much followed whatever Bob's directions were" and that Bob made all the decisions. Oliverius testified that Bob had threatened her life and that he made her aware he knew where she lived, her husband's name, and what school and daycare her children attended. As a result of Bob's threats and innuendos, Oliverius obtained a protection order against him in December 2016. The caseworker at the time also obtained a protection order against Bob. Oliverius and that caseworker discontinued working on the case in December 2016 after they obtained the protection orders.

During the time Oliverius was involved with the case, an educational surrogate was appointed because Bob would not sign a release for "Early Development Network" to do evaluations of the children. The evaluations were only completed after the educational surrogate signed the necessary documents. Bob and Veronica also did not take the children to the doctor and would not allow the children to be immunized. Oliverius also testified that it was difficult to assess whether the home was safe and stable because Bob often refused to let Department workers into the home. Oliverius further testified that the only goal the parents met in regard to the case plan was in regard to using car seats. She testified that Bob and Veronica learned about the proper car seats for the children, but the only reason the goal was met was because someone brought the car seats to the home and installed them for the parents.

Dennis O'Brien was the caseworker assigned to do an initial investigation of the family in December 2016 and was assigned to the case until January 2018. He was reassigned the case in May 2018 and was still assigned to the case at the time of trial. He testified that as a result of his initial investigation, he made the decision to remove the children from the home on December 16, 2016. After their removal, the children were examined by a doctor. The doctor discovered that the children had "pretty serious upper respiratory infections" and one of the children was dehydrated. The children had not had much, if any, medical care prior to their removal, and three of the four children had not received any immunizations. Brittney had received some immunizations. The children were also diagnosed as being "developmentally behind and seriously neglected."

O'Brien testified that at the beginning of his involvement with the case, Bob would be "reasonably pleasant" to talk to at times; however, at other times, he would be mad and argue with O'Brien, causing him to have to communicate through Bob's attorney. O'Brien testified that Bob's refusal to talk to him delayed getting services in place. O'Brien also testified that Bob made subtle threats toward him, alleged that O'Brien wanted to adopt the children, and alleged that he was having an affair with the foster parent. O'Brien testified that during his involvement with the case, Bob's attitude toward the Department had not changed. He continued to argue with and yell at workers present in the home, which often would upset the children.

O'Brien testified that Bob made all the parenting decisions and that he did not want O'Brien talking to Veronica. He further testified that Veronica never went against what Bob said.

O'Brien testified that in July 2018, he located two guns in a vehicle on Bob and Veronica's property, as well as a gun in a gun case located in a closet inside the house. The gun in the closet was loaded and the safety was off. O'Brien also stated that in July 2018, there were numerous "junk vehicles" on the

property, a couple of them lifted up on blocks and one balanced on a cinder block. He testified that Bob believed that it was appropriate for the children to play in and around the vehicles and argued against removing the vehicles. On the property, there were also two refrigerators outside and a stack of wood with nails exposed. The basement of the home had standing water in it, and there were mice feces in the children's dresser drawers and in the kitchen cabinets. O'Brien testified that the condition of the property had been an issue since the case began, including a concern about allowing the children to play on and inside the vehicles.

O'Brien testified about three specific incidents involving the children and the vehicles in the yard. The first incident involved the children unattended and playing in one of the vehicles on a hot day. One of the caseworkers, at the home at the time, addressed it with the parties. The second incident occurred the next day, when Brittney was observed sleeping in one of the vehicles on a hot day. The third time, a worker observed the two boys playing in a van with the keys in the ignition while Bob was working on the van. Neither Bob nor Veronica thought it was wrong to leave the children in a vehicle on a hot day or that any of these instances were dangerous for the children.

O'Brien testified that he had not been to the property since July 2018 and that he had heard from others involved in the case that Bob had rectified some of the safety issues on the property since that time.

O'Brien indicated that he had not seen any improvement in Bob's ability to parent the children. He also stated that he had seen improvement in Veronica's ability to parent, in that she had been responsive to some services. However, he worried whether the improvement was sustainable due to her low cognitive level. O'Brien stated that the case plan goals have remained the same throughout the case and have not been met.

Breanna Bird was the caseworker from January to May 2018, during the time that O'Brien was not assigned to the case. Bird testified that Bob expressed his anger toward O'Brien and made accusations against the foster parents and the family support workers. He was inconsistent in following redirection from family support workers and would argue with them about their suggestions.

In regard to Veronica, Bird testified that she was good at attending to Brittney's needs, but struggled if she had to attend to the needs of more than two children. Bird stated that she did not see enough progress to recommend reunification of the children with the parents.

Lucinda Tanner, a pediatric physician assistant, examined the children on December 29, 2016, after their removal from the home, and saw them again on April 20, 2017. She testified that when she first examined Becka, she could not speak, she had no change in expression, and Tanner was unable to get her to engage in anything. Tanner opined that Becka was a victim of child neglect and medical neglect and that she presented as a traumatized child. Thomas and Robert both had notable speech delays and had not received immunizations. Tanner was concerned about the children because of their speech delays and their inability to communicate, which she found particularly concerning in regard to Becka, who was 5 years old, and Robert, who was 3 years old. She also opined that Becka, Robert, and Thomas were all neglected.

Tanner testified that when she saw the children in April 2017, after they had been out of the family home for 4 months, they were very different. Their communication skills had improved, they were more interactive, and there was a change in their demeanor. She was "[p]leasantly surprised" with the changes she observed.

The testimony of the initial foster mother, given at a previous hearing, was entered into evidence. She testified that when the children came to live with her in December 2016, Becka, Robert, and Thomas had respiratory infections and Thomas was

dehydrated. Becka, Robert, and Thomas communicated with each other using "their own language," which she described as them "us[ing] their vowel sounds but no consonant sounds." With everyone else, the children were nonverbal. They did not interact with the foster parents or the other children in the home, and they did not play with toys. The initial foster mother testified that Robert and Thomas would just sit on the floor and that Becka would pace back and forth. At mealtime, they would eat with their hands and did not know how to use eating utensils. They also did not know how to drink out of a cup. At bedtime, Becka, Robert, and Thomas would scream and throw tantrums.

The foster placement changed in June 2017, in part because of a telephone call involving the initial foster mother and Bob in which Bob was making demands, and also because Bob had learned where she lived and she was worried he would come to the house and disrupt things for his children and the other children in the home.

The children's new foster mother testified that when the children came to live with her in June 2017, Becka was almost 6 years old and she was unable to talk using words. The children would "grunt, screech, scream" to communicate with each other and "kind of had . . . their own language." They also barked like dogs. They were aggressive, threw tantrums, slobbered, and chewed on objects, such as the corner of a chair. The new foster mother also testified that they did not know how to use eating utensils or how to drink out of a cup without a lid. Becka would also defecate outside.

The new foster mother testified that at the time of trial, the children were "normal" children. She stated that they behave well and are respectful. They sit at the table to eat. Becka does chores and is "very proud" to have some responsibility. The new foster mother testified that she is able to handle all the children herself; their behaviors are not such that she needs help taking care of them.

The new foster mother testified that Bob's actions have made her concerned for her safety. She testified that although Bob has not threatened her verbally, he has "postured" to her, taken pictures of her vehicle, stared her down, and stood in front of the path where she was walking so she had to go around him. About a month before trial, Robert told her that Bob "was going to shoot [her]."

Dr. Gage Stermensky, a licensed clinical psychologist, performed an evaluation of Bob and Veronica in July 2017 to assess their parental capacity to meet the children's needs. Stermensky diagnosed Bob with paranoid personality disorder, with an indication of narcissistic traits. In his assessment, Stermensky found that Bob "struggles with accountability and is quick to blame others." He also "easily justifies his behavior through paranoid and cynical means," and has a "distrust and suspiciousness of others resulting in interpreting their actions as malevolent." Stermensky testified that Bob's paranoia interferes with his ability to work with State agencies and individuals trying to offer him assistance. His paranoia also affects his ability to meet the safety and welfare needs of his children, because those needs often involve community resources, such as schools and doctors, and Bob does not trust such resources. Stermensky concluded that Bob lacked "parental capacity abilities" at the time of the evaluation. He concluded at trial that long-term interventions would be necessary for Bob to parent and that he would need to find "more amicable and open ways to trust and work with . . . individuals for the best interest[s] of the children."

In regard to Veronica, Stermensky determined that her general cognitive ability is in the extremely low range; her verbal comprehension and perceptual reasoning are both in the borderline range; her ability to sustain attention, concentrate, and exert mental control is in the extremely low range; and her ability to process simple or routine visual material without making errors is in the low average range. Her cognitive limitations were severe enough to prevent her

from completing some activities associated with "normative living," such as employment and meeting daily living needs. Stermensky determined that Veronica met the diagnostic criteria for an intellectual disability. He opined that based on her cognitive and intellectual ability, she lacked the capacity to provide sufficient care for her children independently. He testified that someone with Veronica's diagnosis would have a problem being able to assess risk to their children and could "struggle in confidence and setting boundaries with others." He further testified that Veronica's "desperation for contact may motivate dependency on others and increase vulnerability through exploitation."

Lori Rodriquez-Fletcher, a child-parent psychotherapist, started therapeutic visits with the family in July 2017 and started individual therapy with Bob in October 2017. The therapeutic visits continued until June 2018. She testified that Bob had made some progress in therapy, but that he struggles implementing what he has learned when dealing with people outside her office. She testified that Bob continued to struggle with making accusations against other people, had paranoid thoughts, and had problems appropriately showing his frustration and stress.

Rodriquez-Fletcher testified that some family therapeutic sessions went well and that others were chaotic. She stated that at the last family session, she had to redirect Bob for confronting the foster father. At the same session, she had to call the foster parents to come get the children because Bob and Veronica could not control the children.

Rodriquez-Fletcher testified that Veronica genuinely wants to parent the children and did the best she could at the therapeutic visits, but she struggled because of her cognitive impairments which affect her ability to process things and act accordingly. She further stated that Veronica gets easily flustered and overwhelmed. Rodriquez-Fletcher was asked if Veronica was able to care for all five children by herself, and she indicated she was not.

Joan Schwan is a licensed independent mental health practitioner and also the clinical supervisor for an intensive family preservation program. Intensive family preservation workers provided services for this family for 11 weeks prior to trial and were in the home 4 to 12 hours each week. There was a therapist and a "skill builder" assigned to work with Bob and Veronica. Schwan testified that there had been little to no progress with the techniques the intensive family preservation workers were trying to implement with Bob. She stated that his personality disorder "blocks his insight and judgment into what's really going on," making it difficult for him to accept responsibility, to accept feedback without arguing, and to put his children's safety above his own need to be right.

In regard to Veronica, Schwan testified that she tried to implement the strategies the "skill builder" had asked her to do, but Bob would undermine her. Schwan testified that although Veronica had moved out of the family home a few weeks before trial, based on her dependency disorder, she was likely to allow either Bob back into her life or someone else who would meet her dependency needs. Schwan acknowledged that Veronica's moving out was a good step toward becoming independent, but that becoming independent and being able to parent the children were "two completely different things."

Schwan testified that Bob does not have the capacity to parent the children because nothing had been corrected in the past 1½ years. In regard to Veronica, she testified that the deficits that need to be corrected have not been. When Schwan was asked if reunification was achievable in the near future, she responded that because there had been no change in the parents' behavior in the past 1½ years, she did not believe anything would change in the future.

Amanda Walter is a co-owner of Optimal Family Preservation (OFP), a company that provided transportation and visitation supervision for the family. In addition to owning the business, Walter also supervises the family support

workers she employs, reviews all their reports, and attends team meetings with families. She testified that OFP started working with Bob, Veronica, and their children in September 2017 and did so up until the time of trial.

Walter testified that she has seen minimal progress by Bob during the time OFP has worked with the family. She stated that based on her review of the workers' reports, Bob is often on the telephone during visits, and he takes a nap during almost every visit, thereby preventing him from assisting with the children. She stated that the workers were still having to redirect both parents on a frequent basis and that there were safety concerns due to dangerous items outside and around the home, as well as Bob's failure to make sure the children are safe. Walter testified that Bob's aggressive behavior continued throughout OFP's involvement in the case. She testified that Bob sometimes argues with the workers when he is redirected or does not respond to redirection at all. Bob accused Walter's husband, who is a family support worker for OFP, of being a "drunk" and has accused other workers of destroying property and stealing property. She also testified that workers have felt unsafe because of Bob's "abrasive behavior," which would upset the children at times. Based on the reports of the workers, Bob's abrasiveness, paranoia, distrust, and accusatory statements had increased during the time OFP has worked with the family.

Walter testified that Veronica was nurturing and had a close bond with the children. She testified that Veronica had been open to suggestions and redirection. She tried hard to meet the children's needs and did well with the younger children. However, she struggled with disciplining and enforcing rules with the older children. Walter also testified that Bob overrides Veronica when she tries to implement discipline or rules. Walter further testified that it would be difficult for Veronica to parent all five children on a continual basis.

Walter's husband, who is a co-owner of OFP, had been a family support worker with the family since September 2017

and had been supervising visitations two times per week. He testified that when supervising visitation, he spent a lot of time watching for safety hazards. For example, he testified that Bob took three of the children with him on a one-seat tractor with no cab, and with a 6- to 8-foot sickle mower blade attached with no guard on it. He testified that this could not be safe for the three children. He told Bob it was irresponsible to take the children on the tractor, but he did not listen. Other safety concerns included a utility truck that was on the property, as well as a toy car that Bob put a 12-volt car battery in that was accessible to the children. Bob would also burn trash in the furnace in the basement. Walter's husband acknowledged that in the month before trial, there had been significant improvement in the safety concerns that were outside in the yard.

Walter's husband also testified that at the last visit before trial, Brittney had a fever and he told Bob to give her Tylenol, and Bob refused. Walter's husband ended the visit as a result. He further testified that recently, Bob instructed the workers that they cannot drive through a second gate on the property that leads to the house. This requires the workers to get the children out of the vehicle at a location farther from the house, where there is cow manure.

Walter's husband also testified that Bob takes a nap during nearly every visit and spends a large amount of time on the telephone, rather than spending time with his children. He testified that during these times, Veronica would be left to handle all five children herself, which was a struggle for her and would result in a family support worker helping her with the parenting.

He testified that Bob ignores his suggestions or redirection and that Veronica listens to the suggestions, but does not have the power to change anything. He testified that Bob will let Veronica discipline the children, but then he will undermine her decision and tell the children something else.

The court-appointed special advocate for the children in this case testified that she has been involved with the case since before the children were removed from the home. She testified that the children's speech, the way they play, and their socialization has greatly improved since she first started working with the children.

She testified that she had concerns for the safety of the children at the family home. She testified that she observed the children playing in the vehicles in the yard, as well as on a utility truck that the children would climb up and not be able to get back down. She also stated that on the property was an old freezer, batteries, a sickle mower blade, and a pile of wood and leaves close to the basement door which could attract rodents and snakes.

When the court-appointed special advocate was asked if she had seen changes in Bob and Veronica's parenting skills, she stated that there were times when it seemed Bob had changed, but then the next time she saw him, his behavior was the same as it was in the beginning. Such behavior included yelling, screaming, calling the workers names, and being on the telephone. She acknowledged that he had moved the vehicles off the property, but noted that it took him 19 months to do so. In regard to Veronica, she testified that Veronica does well with Brandy and Brittney, the youngest two children, but that she does not have much interaction with the three older children.

Bob testified that he had made some mistakes in regard to parenting the children, but that they were not all his fault. He implied that a support worker put a clip in the gun that was found in the closet. He did not believe that either incident when his children were in a hot vehicle was a dangerous situation, and he believed his children were safe when riding on the tractor. He also denied threatening any of the workers involved with the case.

Veronica testified that she moved out of the home she shared with Bob about 3 weeks before trial. She stated that

her relationship with Bob had been "great," but she moved out of the home "[f]or the children's sake." She further explained that she moved out in hopes of getting the children back and not having her parental rights terminated. Veronica did not have a job and relied on Bob for financial support during their relationship. Approximately 1 or 2 months before trial, she applied for Social Security disability benefits. She does not have a drivers' license. She most recently took the test in April 2018 to obtain a driver's license, but she did not pass.

Veronica admitted that she did not think she could handle caring for all five children by herself at the time of trial. Veronica believed that with the help of her family she could adequately care for the children. She had talked to her father about the possibility of her moving in with him in Wisconsin, along with the five children, and she said he was "open to it." She had not been to Wisconsin to visit family in at least 3 years.

Following trial, the court found that statutory grounds to terminate Bob's and Veronica's parental rights existed pursuant to § 43-292(2), (3), (5), (6), and (7) and that termination was in the children's best interests.

## III. ASSIGNMENTS OF ERROR

Bob assigns, restated, that the juvenile court erred in (1) admitting exhibit 361 into evidence because it violated his due process rights, as well as his right to cross-examine witnesses, and (2) finding that it was in the best interests of the children to terminate his parental rights.

Veronica cross-appealed, assigning, restated, that the juvenile court erred in (1) finding that the State presented clear and convincing evidence that statutory grounds for termination existed under § 43-292(2), (3), (5), (6), and (7); (2) finding that there was sufficient evidence to show that she was an unfit parent; and (3) finding that termination of her parental rights was in the best interests of the children.

## 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. When the evidence is in conflict, however, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another. *In re Interest of LeVanta S.*, 295 Neb. 151, 887 N.W.2d 502 (2016).

## V. ANALYSIS

### 1. Admission of Exhibit 361

Bob first assigns that the juvenile court erred in admitting exhibit 361 into evidence because it violated his due process rights, as well as his right to cross-examine witnesses. This exhibit is a compilation of notes and reports written by OFP family support workers who supervised visitations and observed the family. The exhibit was received into evidence over objection, under the business records exception to the hearsay rule. See Neb. Rev. Stat. § 27-803(5)(a) (Reissue 2016). It was admitted during the testimony of Walter, a co-owner of OFP, who testified that she oversees OFP's programs, reviews the reports submitted by the workers, files all documentation, and is the recordkeeper of the company. She testified that she compiled the reports contained in exhibit 361 and that the OFP documents are maintained in the ordinary course of its business.

[2,3] We note that the Nebraska Evidence Rules do not apply in cases involving the termination of parental rights. *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. *In re Interest of Destiny A. et al., supra*.

[4,5] Rather than the formal rules of evidence, we evaluate the admission of evidence in termination of parental rights cases using a due process analysis. *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (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 Rebecka P., supra*.

In the instant case, the record reflects that both Bob and Veronica received proper notice of the termination hearing and that during the termination hearing, both were represented by their respective counsel. Bob and Veronica were given a reasonable opportunity to refute or defend against the grounds alleged for termination of their parental rights and had a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence in regard to the termination. Although Bob contends that exhibit 361 contains reports from family support workers who did not testify at trial and that therefore, he could not cross-examine them, many of the OFP family support workers did testify, as well as Walter who supervised them all. Further, the reports of the family support workers who did not testify primarily contained more of the same information in regard to Bob's behavior, safety concerns, and lack of progress.

Having conducted a de novo review of the record, we find that the juvenile court employed fundamentally fair procedures during the proceedings and that exhibit 361 was properly considered by the juvenile court. As previously stated, the exhibit was admitted under the business records exception to the hearsay rules, and although the evidence rules do not apply in cases involving the termination of parental rights, there was sufficient foundation for admission of the exhibit

under the business records exception. We find no merit to Bob's first assignment of error.

### 2. Termination of Bob's Parental Rights

[6] For a juvenile court to terminate parental rights under § 43-292, it must find that one or more of the statutory grounds listed in this section have been satisfied and that such termination is in the child's best interests. *In re Interest of Kenna S.*, 17 Neb. App. 544, 766 N.W.2d 424 (2009). See *In re Interest of Xavier H.*, 274 Neb. 331, 740 N.W.2d 13 (2007). The State must prove these facts by clear and convincing evidence. *In re Interest of Kenna S., supra*. See *In re Interest of Xavier H., supra*.

#### (a) Statutory Grounds for Termination

The juvenile court found that the State had presented clear and convincing evidence to satisfy § 43-292(2), (3), (5), (6), and (7). Bob does not challenge the juvenile court's finding that statutory grounds to terminate had been met. However, because our review is de novo, we address this requirement for termination of parental rights.

[7,8] Section 43-292(7) allows for termination when the juvenile has been in an out-of-home placement for 15 or more months of the most recent 22 months. It operates mechanically and, unlike the other subsections of the statute, does not require the State to adduce evidence of any specific fault on the part of a parent. *In re Interest of Kenna S., supra*. In a case of termination of parental rights based on § 43-292(7), the protection afforded the rights of the parent comes in the best interests step of the analysis. *Id.*

Here, it is undisputed that the children have been in out-of-home placement for 15 or more months of the most recent 22 months. The children were removed from Bob and Veronica's home on December 16, 2016. The State filed its motion for termination of parental rights on July 31, 2018, and the termination trial was held in August 2018. The children remained

out of the home since their removal in December 2016. At the time of trial, the children had been out of the home for 20 months. Thus, the statutory requirement for removal under § 43-292(7) has been met.

[9] 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). Because the State presented clear and convincing evidence that the children had been in an out-of-home placement for 15 or more months of the most recent 22 months, statutory grounds for termination of Bob's parental rights exists.

(b) Best Interests

[10-13] Bob assigns that the juvenile court erred in finding that it was in the children's best interests to terminate his parental rights. In addition to proving a statutory ground, the State must show that termination of parental rights is in the best interests of the child. See *In re Interest of Jahon S.*, 291 Neb. 97, 864 N.W.2d 228 (2015). A parent's right to raise his or her child is constitutionally protected; so before a court may terminate parental rights, the State must show that the parent is unfit. *Id.* 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. *Id.* 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 the child's well-being. *Id.*

[14,15] 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. *Id.* 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. *In re Interest of Joseph S. et al.*, 291 Neb. 953, 870 N.W.2d 141 (2015).

[16] In cases where termination of parental rights is based on § 43-292(7), the Nebraska Supreme Court has held that appellate courts must be particularly diligent in their de novo review of whether termination of parental rights is in fact in the child's best interests. See *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005).

This family first became involved with the Department in 2013, and it was again investigated in 2015 based on two intakes. Becka, Robert, and Thomas were subsequently adjudicated in the present case in February 2016, and Brandy in April 2017. Between February 2016 and the time of trial in August 2018, the Department has provided the family with numerous services in an effort to achieve case plan goals and keep the family together. However, there has been little to no change in Bob's behavior, attitude, and willingness to change. The record is replete with evidence that Bob has been uncooperative with the services offered and the people providing the services. He continued to argue with the workers, yell at them, intimidate them, and make subtle threats against them. He also made accusations against the service providers and the foster parents. When redirected by a worker, he either argued with the worker about the suggestion made or simply ignored the redirection. There was evidence that at the time of trial, the workers were still frequently trying to redirect Bob. He made the service providers feel unsafe, so much so that two of them obtained protection orders against him. There was evidence that there had been little to no progress with

the techniques OFP was trying to implement in the 11 weeks before trial.

Before the children were removed in December 2016, they received little medical care. They were not taken to the doctor, and three of the four children had no immunizations. When they were removed, Becka, Robert, and Thomas all had respiratory infections and Thomas was dehydrated. The children were also developmentally behind. Becka, who was 5 years old at the time of removal, could not talk, and the others had speech delays and had their own version of a language that they used to communicate with each other. They did not know how to use eating utensils or drink out of a cup without a lid. During their time in foster care, the children have made great progress. Tanner, a pediatric physician assistant, testified that after the children were out of the home for only 4 months, their communication skills had improved, they were more interactive, and she saw a change in their demeanor.

Throughout the case, there have been safety concerns. The vehicles and other items outside the house that were accessible to the children had always been an issue. Some of the vehicles had been moved at the time of trial, but as one witness pointed out, it took Bob 19 months to do so. Bob also took three of the children with him on a one-seat tractor with no cab, and with a sickle mower blade attached with no guard on it. Other safety concerns included the parents' letting the children play or sleep in one of the vehicles on a hot day. The second time this happened was after the caseworker had addressed the safety issue with the parents the day before. There was also evidence that three guns were located on the property the month before trial. Two were located in a vehicle, and the other was in a closet in the house and was loaded. The guns were located after the Department had been working with the family on safety and other issues for over 2 years. The evidence was clear that at the time of trial, Bob still did not recognize certain safety hazards.

[17] 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.*, 291 Neb. 20, 863 N.W.2d 803 (2015). Based on the evidence presented, there has been no change in Bob's behavior over the course of the case, and based on his diagnosis of paranoid personality disorder, he was unlikely to change in the future. The case plan goals had remained the same throughout the case and had not been met, and there had been no improvement in Bob's ability to parent.

[18] Further, 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 Octavio B. et al.*, 290 Neb. 589, 861 N.W.2d 415 (2015). Becka, Robert, Thomas, and Brandy have been in foster care since December 2016. They deserve stability in their lives and should not be suspended in foster care when Bob is unable or unwilling to rehabilitate himself. Accordingly, we find there was clear and convincing evidence to show that Bob was unfit and that terminating his parental rights was in the children's best interests.

### 3. Termination of Veronica's Parental Rights

As a preliminary matter, we note that Veronica failed to comply with the rules regarding cross-appeals. See Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2014). Bob was the only party to file a notice of appeal, and therefore, he was the appellant. However, pursuant to Neb. Ct. R. App. P. § 2-101(C) (rev. 2014), once a notice of appeal is filed, all other parties become appellees and can file a cross-appeal. Here, Veronica properly designated herself as an appellee and filed a "Brief of Appellee on Cross Appeal." As a cross-appellant, Veronica was required to comply with the rules on cross-appeals, including the requirement that she designate on the cover of her

brief that it is a cross-appeal, and set forth her cross-appeal in a separate division of the brief titled "Brief on Cross-Appeal." See § 2-109(D)(4). Veronica properly designated the cover of her brief as a cross-appeal, but she did not set forth her cross-appeal in a separate division of the brief. Other than the cover, she prepared her brief as though she was an appellant and not an appellee and cross-appellant. This court, in *In re Interest of Chloe P.*, 21 Neb. App. 456, 840 N.W.2d 549 (2013), declined to award the father any affirmative relief due to his failure to follow the foregoing briefing rule. In that case, the father correctly designated himself as an appellee on his brief. In his brief, he assigned errors and sought affirmative relief; however, there was no designation of a cross-appeal on the cover of his brief, nor was a cross-appeal set forth in a separate division of the brief as required by § 2-109(D)(4). We found the case to be governed by *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999), in which the Supreme Court declined to consider a father's arguments appealing the termination of his parental rights because he failed to properly designate his arguments as a cross-appeal. In its refusal to consider the father's assignments of error, the court explained that "the appellate courts of this state have always refused to consider a prayer for affirmative relief where such a claim is raised in a brief designated as that of an appellee," *id*. at 146, 602 N.W.2d at 451. The court further explained that appellate courts "have repeatedly indicated that a cross-appeal must be properly designated, pursuant to [§ 2-10]9(D)(4), if affirmative relief is to be obtained." *In re Interest of Natasha H. & Sierra H.*, 258 Neb. at 145, 602 N.W.2d at 450.

The instant case is partially distinguishable from *In re Interest of Chloe P., supra*, and *In re Interest of Natasha H. & Sierra H., supra*, in that Veronica properly designated the cover of her brief as a cross-appeal. However, her brief did not contain a separate section for the cross-appeal as also required by § 2-109(D)(4). Rather, her brief was generally prepared in

the form of an appellant's brief and did not separately respond to Robert's appellant's brief other than accepting his statement of the basis of jurisdiction and statement of the case. Although Veronica's brief violates the portion of the rule requiring a separate section for a cross-appeal, because the form and presentation of her assignments of error conform with the rules applicable to an appellant's brief, we may consider the arguments raised in her brief. See, *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (1994); *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990).

Accordingly, we will consider Veronica's arguments on appeal.

### (a) Statutory Basis for Termination

Veronica assigns that the juvenile court erred in finding that the State presented clear and convincing evidence that statutory grounds for termination existed under § 43-292(2), (3), (5), (6), and (7). As discussed above, the children were in an out-of-home placement for 15 or more months of the most recent 22 months and, therefore, termination of Veronica's parental rights was proved under § 43-292(7).

### (b) Best Interests

Veronica next assigns that the juvenile court erred in finding that there was sufficient evidence to show that she was an unfit parent and that termination of her rights was in the best interests of the children. We disagree. As previously set forth in the best interests analysis in regard to Bob, the children had received little to no medical care before they were removed from the parental home. At the time of removal, the three oldest children had respiratory infections and Thomas was dehydrated. The children were also developmentally behind, especially in regard to verbal skills. Further, there had been numerous safety concerns throughout the case involving items on the property and the parents' ability to recognize these hazards.

Specific to Veronica, the evidence showed that her general cognitive ability is in the extremely low range. Her cognitive limitations were severe enough to prevent her from completing some activities associated with "normative living," such as employment and meeting daily living needs. Stermensky, a licensed clinical psychologist, determined that Veronica had an intellectual disability and lacked the capacity to provide sufficient care for her children by herself. Rodriquez-Fletcher, a child-parent psychotherapist, agreed that Veronica was unable to care for all her children by herself. She testified that although Veronica wants to parent the children and was doing the best she could when working with service providers, she would get flustered and overwhelmed. Family support workers would often have to step in and help with the parenting at times when Veronica was trying to handle the children by herself during visits.

Veronica was able to care for Brandy and Brittney's needs, but struggled if she had to attend to the needs of more than two children. Walters, a co-owner of OFP, testified that Veronica also struggled with disciplining and enforcing rules with the oldest three children. Walters testified that it would be difficult for Veronica to parent all five of her children on a continual basis. Further, Veronica admitted at trial that she did not believe she could care for all five children by herself.

The evidence also showed that Bob made all the parenting decisions and that Veronica would simply do what he said. If she tried to discipline or make a decision in regard to the children, Bob would undermine her. At the time of trial, Veronica had moved out of the family home and was no longer living with Bob because she thought it would help her get the children back. However, she had only moved out about 3 weeks before the termination trial. Further, there was evidence that based on her dependency on others, she was likely to allow Bob back into her life or find someone else to meet her dependency needs, which also made her vulnerable to exploitation.

We find there was clear and convincing evidence to demonstrate that Veronica was unfit and that terminating her parental rights was in the children's best interests.

## VI. CONCLUSION

We conclude the court did not err in admitting exhibit 361 into evidence. We also conclude the State proved by clear and convincing evidence that grounds for termination of Bob's and Veronica's parental rights existed under § 43-292(7) and that termination of their parental rights is in the children's best interests. Accordingly, the juvenile court's order is affirmed.

Affirmed.

# State of Nebraska, appellee, v. Shantrell A. Hickey, appellant.

933 N.W.2d 891

Filed August 13, 2019. No. A-18-351.

1. **Constitutional Law: Witnesses: Appeal and Error.** An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and reviews the underlying factual determinations for clear error.
2. **Rules of Evidence: Appeal and Error.** 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. ____: ____. 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. **Constitutional Law: Trial: Rules of Evidence: Hearsay.** Where "testimonial" statements are at issue, the Confrontation Clause demands that such out-of-court hearsay statements be admitted at trial only if the declarant is unavailable and there had been a prior opportunity for cross-examination.
5. **Criminal Law: Appeal and Error.** Harmless error jurisprudence recognizes that not all trial errors, even those of constitutional magnitude, entitle a criminal defendant to the reversal of an adverse trial result.
6. **Convictions: Appeal and Error.** It is only prejudicial error, that is, error which cannot be said to be harmless beyond a reasonable doubt, which requires a reversal.
7. **Evidence: Words and Phrases.** Cumulative evidence means evidence tending to prove the same point of which other evidence has been offered.

8. **Rules of Evidence: Testimony.** Under Neb. Rev. Stat. §§ 27-701 and 27-702 (Reissue 2016), opinion testimony, whether by a lay or expert witness, is permissible only if it is helpful to the trier of fact in making a determination of a fact in issue.
9. **Rules of Evidence: Proof.** Under what is commonly and incorrectly referred to as the "best evidence rule," in order to prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required.
10. ____: ____. The "original writings rule" applies only if the party offering the evidence is seeking to prove the contents of a writing, recording, or photograph.
11. **Constitutional Law: Rules of the Supreme Court: Courts: Statutes.** Strict compliance with Neb. Ct. R. App. P. § 2-109(E) (rev. 2014) is necessary whenever a litigant challenges the constitutionality of a statute, regardless of how that constitutional challenge may be characterized.
12. **Criminal Law: Evidence: New Trial: Appeal and Error.** Upon finding reversible error in a criminal trial, an appellate court must determine whether the total evidence admitted by the district court, erroneously or not, was sufficient to sustain a guilty verdict.
13. **Evidence: New Trial: Double Jeopardy: Appeal and Error.** If evidence is not sufficient to sustain a verdict after an appellate court finds reversible error, then double jeopardy forbids a remand for a new trial.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Reversed and remanded for a new trial.

Joe Nigro, Lancaster County Public Defender, and Nathan J. Sohriakoff for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Riedmann, Arterburn, and Welch, Judges.

Riedmann, Judge.

## INTRODUCTION

Shantrell A. Hickey appeals his convictions in the district court for Lancaster County of discharge of a firearm near a vehicle or building and use of a firearm to commit a felony. We find that the district court erred in admitting into evidence at trial testimonial statements from a police interrogation.

Therefore, we reverse the convictions and remand the cause for a new trial.

## BACKGROUND

Hickey was charged with discharge of a firearm near a vehicle or building and use of a firearm to commit a felony as a result of a shooting that occurred in Lincoln, Nebraska, on February 21, 2017. Callers to the 911 emergency dispatch service that evening reported hearing gunshots, but the Lincoln police officers who responded to the area were unable to determine where the shooting had occurred. Two days later, bullet casings were found in the parking lot of a gas station in the area where the gunshots were heard. Lincoln police then discovered that the shooting had been captured on the surveillance camera at the gas station. The surveillance video depicts a white car pulling up near another vehicle parked at the gas station. The shooter emerges from the passenger side of the back seat of the white car and begins firing a gun at the other vehicle as it pulls away and leaves the parking lot.

After viewing the video, police officers were able to identify the white car and locate its registered owner. The owner was ultimately arrested, read his *Miranda* rights, and interviewed at the police station. During the interrogation by police, he admitted that he was driving the white car at the time of the shooting and implicated Hickey as the shooter. He also identified Hickey's brother as another occupant of the car at the time of the shooting.

The matter proceeded to a jury trial in October 2017. The jury was unable to reach a verdict, however, and the district court declared a mistrial.

A second jury trial was held in February 2018. The video of the shooting was received into evidence at trial and played for the jury. Lincoln police officer Maxwell Hubka, the primary investigator on the case, explained that upon viewing the video, he immediately identified Hickey as the shooter. He explained that he recognized Hickey because at the time

of the shooting, he had known Hickey for approximately 14 months, had met him "ten plus times," and had "talked to him face to face numerous times." He noted that he recognized Hickey's facial features at a certain point in the video where the shooter's face is more visible. Hubka testified that he was additionally able to recognize Hickey because of the way he moved; his clothing, height, weight, build, and facial appearance; his earring; his hairstyle; and the other people present in the video.

Similarly, Lincoln police officer Steven Berry testified that he had been familiar with Hickey for approximately 3 years before the shooting. He has observed Hickey in photographs and videos posted to social media pages and met Hickey in person on more than one occasion. Berry explained that therefore he was familiar with Hickey's voice, walk and movement, clothing, hairstyle, family, and associates. Upon viewing the video, Berry was able to identify Hickey "pretty quickly" given his familiarity with Hickey and the other people depicted in the video. Hickey objected to the testimony of Hubka and Berry identifying him as the shooter on the video, but the district court overruled the objections.

The State also called the driver of the white car to testify at trial, first outside the presence of the jury and then in front of the jury. The driver repeatedly refused to answer questions regarding the shooting, despite an order from the court that he do so; therefore, the district court held him in contempt of court and determined that he was unavailable as a witness pursuant to Neb. Rev. Stat. § 27-804(1)(b) (Reissue 2016). As a result of the driver's unavailability, the State offered into evidence portions of the statements he made during his police interrogation. Hickey objected on Confrontation Clause and hearsay grounds, but his objections were overruled.

The statements were received into evidence in the form of five clips of the video recording of the police interrogation, which were played for the jury at trial. In the clips, the driver admitted that he was driving his white car during the

shooting, that Hickey and his brother were in the car with him, and that Hickey was the shooter.

Hickey and his brother both testified at trial, and they each denied that Hickey was the shooter. Hickey's brother said that he was the shooter and that Hickey was not in the car or at the scene of the shooting. Hickey denied being at the scene.

At the conclusion of evidence and after deliberating, the jury found Hickey guilty of both counts. He was sentenced to consecutive terms of imprisonment of 10 to 25 years. Hickey appeals.

## ASSIGNMENTS OF ERROR

Hickey assigns, restated, that the district court erred in (1) admitting the driver's statements into evidence in violation of the Confrontation Clause, (2) admitting the driver's statements into evidence under an exception to the hearsay rule, (3) denying Hickey's proffered jury instructions, (4) applying unconstitutional special legislation and finding Hickey guilty under Neb. Rev. Stat. § 28-1212.04 (Reissue 2016), (5) allowing Hubka and Berry to identify Hickey as the shooter shown in the surveillance video, and (6) finding sufficient evidence to support the convictions.

## STANDARD OF REVIEW

[1] An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and reviews the underlying factual determinations for clear error. *State v. Smith*, 286 Neb. 856, 839 N.W.2d 333 (2013).

[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. 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*.

## ANALYSIS

*Confrontation Clause.*

Hickey argues that the district court erred in admitting into evidence the driver's statements because they violate his right of confrontation. We agree.

[4] The Confrontation Clause, U.S. Const. amend. VI, provides, in relevant part: "'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .'" *State v. Fischer*, 272 Neb. 963, 968, 726 N.W.2d 176, 181 (2007). In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the U.S. Supreme Court held that where "testimonial" statements are at issue, the Confrontation Clause demands that such out-of-court hearsay statements be admitted at trial only if the declarant is unavailable and there had been a prior opportunity for cross-examination.

Although the U.S. Supreme Court declined to provide a comprehensive definition of "testimonial," it stated that testimonial statements include, at a minimum, prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and police interrogations. See *Crawford v. Washington, supra*. See, also, *State v. Fischer, supra*. Despite the lack of a precise definition, the Court concluded that a statement made by the petitioner's wife was testimonial because she made the statement while under police interrogation, and the questioning that generated her statement—which was made and recorded while she was in police custody, after having been given *Miranda* warnings as a possible suspect herself—qualified as testimonial under any conceivable definition of an interrogation. See *id*. Later, in *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the Court similarly concluded that statements made during a police interrogation are testimonial when the circumstances objectively indicate

that there is no ongoing emergency and the primary purpose of the interrogation is to prove past events potentially relevant to later criminal prosecution.

Similar circumstances are present in the instant case. The police interrogation of the driver took place days after the shooting occurred, and thus, there was no ongoing emergency. The driver was questioned as a possible suspect himself at the police station after agreeing to waive his *Miranda* rights. The purpose of the interview was to gain information as to who was involved in the shooting, information potentially relevant to later prosecution of those involved. The driver's statements are therefore testimonial and admissible at trial only if he was unavailable as a witness and there had been a prior opportunity for cross-examination.

It is undisputed that the driver was unavailable as a witness at trial under § 27-804(1)(b). However, Hickey had no prior opportunity to cross-examine the driver, because the driver's statements were made during a police interrogation, at which Hickey was not present, and the driver was not otherwise subjected to cross-examination at a pretrial deposition or hearing. Therefore, as Hickey argues and the State concedes, the district court erred in admitting the driver's statements into evidence at trial because doing so violated Hickey's rights under the Confrontation Clause. Based on this finding, we need not address whether the driver's statements were also inadmissible hearsay.

[5,6] Our inquiry does not end here, however, because Confrontation Clause violations are subject to harmless error analysis. See *State v. Hood*, 301 Neb. 207, 917 N.W.2d 880 (2018). See, also, *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). Our harmless error jurisprudence recognizes that not all trial errors, even those of constitutional magnitude, entitle a criminal defendant to the reversal of an adverse trial result. *State v. Hood, supra*. It is only prejudicial error, that is, error which cannot be said to be harmless beyond a reasonable doubt, which requires a reversal.

*Id*. When determining whether an alleged error is so prejudicial as to justify reversal, courts generally consider whether the error, in light of the totality of the record, influenced the outcome of the case. *Id*.

[7] Generally, the erroneous admission of evidence is not reversible error if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding of the trier of fact. *State v. Ramirez*, 287 Neb. 356, 842 N.W.2d 694 (2014). Cumulative evidence means evidence tending to prove the same point of which other evidence has been offered. *Id*.

Even in circumstances where erroneously admitted evidence is cumulative of other properly admitted evidence, the Nebraska Supreme Court has recognized the differing weight a witness' testimony may have depending upon his or her relationship with the party against whom he or she is testifying. See *Simon v. Drake*, 285 Neb. 784, 829 N.W.2d 686 (2013). In *Simon v. Drake*, a medical malpractice action, the defendant was allowed to elicit testimony from one of the plaintiff's treating physicians that the needle size used by the defendant was within the range of the proper needle size for the procedure at issue. The treating physician had not been designated as an expert. The trial court found this to be harmless error, and on appeal, this court agreed.

Upon further review, the Nebraska Supreme Court reversed. It reasoned that the treating physician's testimony was not substantially similar to the testimony of the parties' designated experts because "[c]ompared to the testimony of a hired expert, a juror was likely to give great weight to [the treating physician's] opinion because he was [the plaintiff's] treating physician and testifying as an expert against his own patient." *Id*. at 794, 829 N.W.2d at 693. The court went on to explain that the relationship between a patient and a treating physician was one of confidence and trust and that therefore, the jury would have given significant weight to that testimony. The court stated that it could not conclude that the weight the jury likely would have given to the treating physician's opinions

was not the "tipping point" for finding in favor of the defendant, especially since the defendant's only expert conceded he would have used a different needle size. *Id*. at 796, 829 N.W.2d at 694.

In the present case, the driver's statements were cumulative of the testimony by Hubka and Berry in the sense that these three witnesses all identified Hickey as the shooter. The difference is that Hubka and Berry identified Hickey by observing the surveillance video and rendering their opinions that the person depicted in the video was Hickey. In contrast, the driver was present at the scene when the shooting occurred and was driving the vehicle from which the shooter emerged. His testimony was based on his firsthand observation of the shooting, as opposed to making an identification on the video, and he was the only witness who claimed to have personally seen Hickey at the scene of the shooting. Additionally, given that the shooter emerged from the driver's vehicle, the driver had, at a minimum, a personal relationship with the shooter and was implicating someone with whom he was friendly, facts to which the jury would likely give significant weight.

The U.S. Supreme Court has similarly declined to find the erroneous admission of testimony, even when cumulative, was harmless when such testimony addressed the only factual issue in the case. In *Hawkins v. United States*, 358 U.S. 74, 79 S. Ct. 136, 3 L. Ed. 2d 125 (1958), the U.S. Supreme Court reversed the petitioner's conviction for transporting a woman between states for the purpose of prostitution, holding that the district court erred by allowing the government to use the petitioner's wife as a witness against him. The Supreme Court noted that the wife's testimony supported the government on "the only factual issue in the case," which was whether the petitioner's dominant purpose in making the trip was to facilitate the woman's practice of prostitution. *Id.*, 358 U.S. at 79. The government urged the Supreme Court to find that the error was harmless, but the Court declined to do so, stating that "we cannot be sure that [the wife's testimony,] though in part cumulative,

did not tip the scales against petitioner on the close and vital issue of whether his prime motivation in making the interstate trip" was to facilitate prostitution. *Id.*, 358 U.S. at 80.

Likewise in the instant case, we cannot say that the driver's statements were not the "tipping point" for the jury finding that Hickey was the shooter, particularly given that the only issue for the jury to decide was whether Hickey was the person depicted in the video committing the crime, and the shooter's identity is not entirely clear from the video. Although Hubka and Berry offered their opinions that Hickey was the shooter based on their observation of the video and familiarity with Hickey, the driver of the white car was the only witness present at the scene who placed Hickey at the scene as well. Accordingly, we conclude that the State failed to prove beyond a reasonable doubt that the admission of the driver's statements was harmless error, and we therefore reverse the convictions.

*Lay Witness Opinion.*

Although the foregoing determination resolves this appeal, we nonetheless consider other assignments of error presenting issues which are likely to reoccur in the new trial we must order, as further explained below. See *State v. Edwards*, 286 Neb. 404, 837 N.W.2d 81 (2013) (appellate court may, at its discretion, discuss issues unnecessary to disposition of appeal where those issues are likely to recur during further proceedings).

Hickey asserts that the district court erred in allowing Hubka and Berry to identify him on the surveillance video. He claims that such identification invaded the province of the jury and was an improper lay witness opinion. We find no error in the admission of this testimony.

[8] Under Neb. Rev. Stat. § 27-701 (Reissue 2016), if the witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is rationally based on the perception of the witness and helpful to a clear understanding

of his or her testimony or the determination of a fact in issue. "The '"ultimate issue"' rule was an evidentiary rule in many jurisdictions that prohibited witnesses from giving opinions or conclusions on an ultimate fact in issue because such testimony, it was believed, '"usurps the function" or "invades the province" of the jury.'" *State v. Rocha*, 295 Neb. 716, 732, 890 N.W.2d 178, 194 (2017). The ultimate issue rule was abolished in Nebraska by Neb. Rev. Stat. § 27-704 (Reissue 2016), which provides that testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. *State v. Rocha, supra*. Under § 27-704, the basic approach to opinions, lay and expert, is to admit them when helpful to the trier of fact. *State v. Rocha, supra*. But the abolition of the ultimate issue rule does not lower the bar so as to admit all opinions, because under § 27-701 and Neb. Rev. Stat. § 27-702 (Reissue 2016), opinion testimony, whether by a lay or expert witness, is permissible only if it is helpful to the trier of fact in making a determination of a fact in issue. See *State v. Rocha, supra*.

Because Nebraska has abolished the ultimate issue rule, the opinion testimony of Hubka and Berry was not inadmissible because it invaded the province of the jury. However, we must decide whether such testimony was "otherwise admissible" under § 27-704, or in other words, whether the testimony was properly admitted as lay witness opinion testimony pursuant to § 27-701. Nebraska has essentially adopted Fed. R. Evid. 701 and 702. See *State v. Rocha, supra*. We therefore look to the federal courts, which apply federal rules 701 and 702.

The U.S. Court of Appeals for the Eighth Circuit has said that "'[u]nder Federal Rule of Evidence 701, "[a] witness's opinion concerning the identity of a person depicted in a surveillance photograph is admissible if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury."'" *U.S. v. Sanchez*, 789 F.3d 827, 837 (8th Cir. 2015). Relevant

considerations include whether the witness was familiar with the defendant's appearance around the time that the surveillance photograph was taken and whether the surveillance photograph made it difficult for the jury to make a positive identification of the defendant. *Id*. In *Sanchez*, a special agent of the U.S. Drug Enforcement Administration set up a controlled buy of drugs from the defendant and video recorded the transaction. At trial, the agent involved identified the defendant on the video, and the defendant objected to the identification, which the trial court overruled. On appeal, the Eighth Circuit held that given the relatively low quality of the footage and the agent's extensive surveillance of the defendant during and around the time of the controlled buy, it was clear that the agent was more likely to correctly identify the defendant from the footage than was the jury. Therefore, it held that the trial court did not abuse its discretion in allowing the testimony to identify the persons depicted in the video footage.

Similarly, in *U.S. v. Anderson*, 783 F.3d 727 (8th Cir. 2015), agents with the Bureau of Alcohol, Tobacco, Firearms and Explosives investigated an explosion and fire at a restaurant. The investigation focused on identifying individuals depicted in surveillance videos from the restaurant and determining their roles in the scheme. After receiving information that led to identifying one of the three defendants in the case, a bureau agent installed a pole camera outside of that defendant's residence, which was in place for approximately 2 years. In reviewing the footage from this camera, the agent became familiar with the appearance of that defendant, as well as his vehicle, and observed another defendant visit him on several occasions. At trial, the agent identified those two defendants in the surveillance video from the restaurant. On appeal, the defendants acknowledged that they did not object to the identification at trial. In reviewing for plain error, the Eighth Circuit found none, noting that the agent's observations of the defendants was much closer in time than the jury's observations more than 4 years after the fire, and the agent was very

familiar with the appearance of each defendant after reviewing surveillance footage of them from the pole camera. The court also noted that the fact that the surveillance footage in which the agent identified the defendants captured events that occurred at night further bolstered the helpfulness of his identification testimony.

The federal courts focus on the "helpfulness" requirement of federal rule 701, finding that it is satisfied as to lay opinions of video or photographic evidence only where the witness is better able to observe, understand, or interpret the contents of the video or photograph than the jury; this principle is well-settled under federal appellate jurisprudence. See, e.g., *U.S. v. Fulton*, 837 F.3d 281 (3d Cir. 2016); *U.S. v. Houston*, 813 F.3d 282 (6th Cir. 2016); *U.S. v. Mendiola*, 707 F.3d 735 (7th Cir. 2013); *U.S. v. Rodríguez-Adorno*, 695 F.3d 32 (1st Cir. 2012); *U.S. v. Contreras*, 536 F.3d 1167 (10th Cir. 2008); *U.S. v. Pierce*, 136 F.3d 770 (11th Cir. 1998); *Young v. U.S.*, 111 A.3d 13 (D.C. 2015).

In most jurisdictions, a showing of sustained contact and/or special knowledge of the defendant is not a prerequisite to a lay witness' giving identification testimony, but, rather, the witness need only have sufficient contact with the defendant to achieve a level of familiarity that renders the lay opinion helpful. See, e.g., *U.S. v. Holmes*, 229 F.3d 782 (9th Cir. 2000). This is because, as the 10th Circuit recognized in *U.S. v. Contreras, supra*, a witness' familiarity with the defendant offers the jury a more sophisticated identification than it could make on its own, and in that case, because the witness had repeated interactions with the defendant, she could identify him based on many factors that would not be apparent to a jury viewing the defendant only in a courtroom setting. The 10th Circuit specifically observed that

> "testimony by those who knew defendants over a period of time and in a variety of circumstances offers to the jury a perspective it could not acquire in its limited exposure to defendants. Human features develop in the mind's eye

> over time. These witnesses had interacted with defendants in a way the jury could not, and in natural settings that gave them a greater appreciation of defendants' normal appearance. Thus, their testimony provided the jury with the opinion of those whose exposure was not limited to three days in a sterile courtroom setting."

*Id*. at 1170-71.

In the present case, the district court did not abuse its discretion in concluding that the officers' identifications of Hickey on the video were helpful to the jury based on the officers' history with Hickey and familiarity with him, as well as the quality of the video. Although the jury viewed the video of the shooting, the shooter's face is not readily identifiable, and thus, lay witness opinion testimony would be helpful to the jury to identify the shooter. Hubka explained that prior to the day of the shooting, he had known Hickey for approximately 14 months, met him "ten plus times," and had "talked to him face to face numerous times." He had also observed Hickey on social media. He explained that he has had extended in-person conversations with Hickey and was familiar with his voice, body, height, weight, walk, hairstyle, family, and acquaintances. Hubka was able to identify Hickey's facial features at a certain point in the video and also recognized him by the way he moved; his clothing, height, weight, and build; his earring; the way his hair was styled; and the other people in the video. He testified that "within seconds" of viewing the video, he identified Hickey as the shooter.

Likewise, Berry testified that he had been familiar with Hickey for approximately 3 years before the shooting. He has observed Hickey on social media, including in photographs and videos. He explained that he has met Hickey in person on more than one occasion and was familiar with his voice, walk and movement, clothing, hairstyle, family, and associates. Upon viewing the video, Berry was able to identify Hickey "pretty quickly" because of his familiarity with him and the

other people depicted in the video. Given the officers' history and familiarity with Hickey, their ability to readily identify him on the video, and the fact that the video was recorded at night and is not entirely clear, we find that allowing Hubka and Berry to identify Hickey as the shooter in the video was not an abuse of discretion.

[9,10] To the extent Hickey argues that the opinion testimony also violated the best evidence rule, we do not agree. "Under what is commonly and incorrectly referred to as the 'best evidence rule,' in order to prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required." *State v. Savage*, 301 Neb. 873, 888, 920 N.W.2d 692, 705 (2018). This "'"original writings" rule'" applies only if the party offering the evidence is seeking to prove the contents of a writing, recording, or photograph. *Id*. Under Neb. Rev. Stat. § 27-1001(3) (Reissue 2016), defining an original under the rule, if data is stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original. *State v. Savage, supra*.

Identifying physical characteristics do not constitute the content of a communication, and thus, the officers' identification of individuals depicted in the video had no role in proving the content of the recording. See *U.S. v. Mendiola*, 707 F.3d 735 (7th Cir. 2013). Accordingly, allowing the officers' opinion testimony did not violate the best evidence rule.

*Unconstitutional Special Legislation.*

[11] Hickey contends that § 28-1212.04, the statute criminalizing the discharge of a firearm near a vehicle or building, is unconstitutional special legislation. However, Hickey did not file notice of a constitutional question as required by Neb. Ct. R. App. P. § 2-109(E) (rev. 2014). Section 2-109(E) requires that a party presenting a case involving the federal or state constitutionality of a statute must file and serve notice

thereof with the Supreme Court Clerk by a separate written notice or by notice in a petition to bypass at the time of filing such party's brief. See *State v. Epp*, 299 Neb. 703, 910 N.W.2d 91 (2018). Strict compliance with § 2-109(E) is necessary whenever a litigant challenges the constitutionality of a statute, regardless of how that constitutional challenge may be characterized. *Id*. Because Hickey did not comply with § 2-109(E), we decline to address this argument.

*Double Jeopardy.*

[12,13] Having found reversible error in the admission of the driver's statements, we must determine whether the totality of the evidence admitted by the district court was sufficient to sustain Hickey's convictions. Upon finding reversible error in a criminal trial, an appellate court must determine whether the total evidence admitted by the district court, erroneously or not, was sufficient to sustain a guilty verdict. *State v. Draper*, 289 Neb. 777, 857 N.W.2d 334 (2015). If it was not, then double jeopardy forbids a remand for a new trial. *Id*. After reviewing the record, we find that the evidence presented at trial, including the erroneously admitted evidence, was sufficient to support Hickey's convictions. Accordingly, we conclude that double jeopardy does not preclude a new trial.

*Remaining Assignments of Error.*

Because we have reversed Hickey's convictions, we need not reach his assigned errors regarding the denial of several proposed jury instructions. These issues are either not likely to recur on remand or must be evaluated in the context of a particular trial, and therefore, review of the court's rulings in this trial would not necessarily determine how the court should rule in a new trial. See *State v. Abram*, 284 Neb. 55, 815 N.W.2d 897 (2012). We therefore do not consider Hickey's remaining assignments of error.

## CONCLUSION

We conclude that the district court's admission of the driver's statements into evidence at trial was prejudicial error. As a result, we reverse the convictions and remand the cause to the district court for a new trial.

Reversed and remanded for a new trial.

# Kregg Scott Rickert, appellant, v. Melissa Ring Rickert, now known as Melissa Ring Walker, appellee.

934 N.W.2d 384

Filed August 27, 2019. No. A-18-628.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law that an appellate court resolves independently of the trial court.
2. **Trial: Appeal and Error.** The decision of whether to grant a motion to stay a trial is vested in the discretion of the trial court, and its decision will not be overturned on appeal absent an abuse of that 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. **Armed Forces: Federal Acts: Final Orders: Appeal and Error.** The denial of a stay under the Servicemembers Civil Relief Act is a final, appealable order.
5. **Armed Forces: Federal Acts: Intent.** The purpose of the Servicemembers Civil Relief Act is to suspend enforcement of civil liabilities of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the nation.
6. **Armed Forces: Federal Acts.** The Servicemembers Civil Relief Act is not to be used as a sword against persons with legitimate claims, and a court must give equitable consideration of the rights of parties to the end that their respective interests may be properly conserved.
7. **Armed Forces: Federal Acts: Judgments: Appeal and Error.** An appellate court reviews whether an application for stay met the statutory requirements of the Servicemembers Civil Relief Act independent of the district court's findings.

8. **Courts: Actions.** Courts inherently possess the power to stay civil proceedings when required by the interests of justice.
9. **Actions: Proof.** The burden of establishing that a proceeding should be stayed rests on the party seeking the stay.
10. **Trial.** In deciding whether to stay a trial, the trial court should balance the competing needs of the parties, taking into account, among other things, the interest of the courts, the probability that proceeding will work a constitutional violation on the movant, the presence or absence of hardship or inequity, and the burden of proof.
11. **Armed Forces: Federal Acts: Appeal and Error.** It is within the discretion of the trial court to grant a stay if the movant does not comply with the requirements of the Servicemembers Civil Relief Act.
12. **Child Custody: Final Orders: Appeal and Error.** A temporary order of custody is not a final, appealable order.
13. **Armed Forces: Federal Acts: Child Custody.** The grant of temporary custody must be considered separately from a denial of stay under the Servicemembers Civil Relief Act.

Appeal from the District Court for Lancaster County: Susan I. Strong, Judge. Affirmed.

Matt Catlett, of Law Office of Matt Catlett, for appellant.

Adam R. Little, of Ballew Hazen, P.C., L.L.O., for appellee.

Riedmann, Arterburn, and Welch, Judges.

Riedmann, Judge.

## I. INTRODUCTION

Kregg Scott Rickert appeals the temporary grant of legal and physical custody of his minor child to the child's mother, Melissa Ring Rickert, now known as Melissa Ring Walker. Kregg alleges that the Lancaster County District Court erred when it overruled his application for stay under the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. § 3901 et seq. (Supp. V 2017). We affirm the order of the district court.

## II. BACKGROUND

Kregg and Melissa were married in Lincoln in 2010. The couple had one child during their marriage, a son born in 2013. Both Kregg and Melissa were members of the Armed Forces

of the United States, and both were stationed in Okinawa, Japan, in 2014. In 2015, the parties agreed to a separation agreement, whereby Kregg received sole physical custody of the child and the parents had joint legal custody. The Lancaster County District Court entered a decree of dissolution in March 2016, encapsulating the separation agreement.

In 2017, Melissa filed a complaint to modify the decree in which she sought physical custody of the child because Kregg was being relocated to Virginia and she was being relocated to California. She amended her complaint in June 2018, stating that both parties had been relocated as anticipated and seeking physical custody and removal of the minor child to California. Two days later, Melissa filed a notice to take deposition and request for production of documents, seeking to depose Kregg on June 21. She also served a subpoena duces tecum upon Kregg to obtain certain documents to be delivered on June 25.

Kregg obtained new counsel in early June 2018 who filed several motions in response to Melissa's requests, including a motion to dismiss Melissa's complaint, a motion to quash subpoena duces tecum, and an objection to Melissa's notice to take deposition. A hearing was held on June 19.

At the hearing, Kregg's counsel argued that Kregg should not have to appear for a deposition on June 21, 2018. Kregg's counsel stated:

> [Kregg] is an active duty service member. There are provisions of federal law that allow a party who is a service member to apply for a stay, up to 90 days, is the law. We're not doing that here today, we're just asking the Court to sustain the motion for protective order and not require [Kregg] to appear on June 21st . . . .

Later in the hearing, the following exchange occurred:

> THE COURT: But you understand we do have trial on [June] 25th.
>
> [Kregg's counsel]: No, I don't understand that.
>
> . . . .

> [Kregg's counsel]: There's no order for trial. There's a — written, signed, filed, endorsed by the clerk with a date stamp saying that there's going to be a trial on June 25th, I checked the public court file, there's nothing that says that. . . .
>
> THE COURT: All right. Well, you weren't party to the last conference that we had; [Melissa's counsel] was, and I think we all decided that . . . we would still go forward with the trial on the 25th.

After the exchange with the court, Kregg's counsel continued to argue that there was not an order stating trial would be held on June 25, 2018. The court overruled Kregg's objection to the notice to take deposition, as well as his motion to quash the subpoena duces tecum, and stated, "We will go forward with the trial on June 25th and 26th."

Kregg did not appear for his deposition, and a hearing was held on June 22, 2018, on Melissa's motion for discovery sanctions. Neither Kregg nor his counsel attended the hearing. At the hearing, Melissa's attorney requested that as a sanction the court approve a list of questions prepared by her that it would deem admitted. In support of her motion, she offered emails she received from Kregg's attorney, advising her that Kregg would not be appearing for the scheduled deposition on June 21 but that Kregg's deposition could be taken on Sunday, June 24. Melissa's attorney rejected that offer because alternate arrangements had been made with the court reporter for a deposition on Saturday, June 23. In response, Kregg's attorney offered to make him available for a telephonic deposition on Saturday, June 23.

The court noted that Kregg failed to comply with Melissa's notice of deposition and the court's order overruling his objection to that notice. Consequently, it granted Melissa's requested sanctions and entered an order accordingly that day.

At 10:14 p.m. on June 22, 2018, Kregg filed an application for stay under § 3932 of the SCRA. As a part of his application for stay, Kregg filed a letter from the "Commanding

Officer, USS Arlington (LPD 24),” which stated in relevant part:

> 1. The USS ARLINGTON (LPD 24) shall be underway the whole month of June 2018. Chief Warrant Officer 2 Kregg Rickert is a member of this command and shall embark with this unit. This letter constitutes a military order to deploy pursuant to 50 U.S.C. Appx 535(i)(1), the Servicemembers Civil Relief Act (SCRA).
>
> 2. The SCRA provides our servicemembers the ability to focus on the command’s mission by addressing civil matters that could present financial and legal challenges to individual readiness. Your sacrifice in releasing the servicemember from this contractual obligation is greatly appreciated and is balanced by the servicemembers sacrifice in serving our country.

Kregg also attached a letter which stated:

> I am currently in military service with the United States Armed Forces. Specifically, I am a Chief Warrant Officer 2 of the United States Marine Corps (“USMC”). The USMC is a component of the U.S. Department of Navy. Currently I am embedded in the USS Arlington (LPD-24), a Navy amphibious warfare ship. The USS Arlington’s homeport is Naval Station Norfolk in Norfolk, Virginia. The USS Arlington is underway during the entire month of June 2018. This materially affects my ability to appear in the subject proceeding during the month of June 2018. I could appear between July 10, 2018, and July 31, 2018.

Melissa filed an objection to Kregg’s application for stay and a motion for temporary custody of the minor child.

The court addressed Kregg’s application for stay and Melissa’s motion for temporary custody on June 25, 2018, the date that had been set for trial. In response to the court’s question as to why he waited until the eve of trial to inform the court that Kregg was unavailable for the month of June, Kregg’s counsel stated, “Because I don’t think [Kregg] knew

there was a trial . . . and I didn't know there was a trial." Kregg's counsel further stated that Kregg's former attorney did not notify him of a trial date.

Melissa's counsel argued that Kregg's application for stay did not comply with the SCRA statutory requirements, because the letter from his alleged commanding officer did not state that Kregg's current military duty prevented his appearance and that military leave was not authorized for Kregg. She further argued that Kregg's counsel had informed her that Kregg was available for a deposition the day before trial.

Kregg's counsel responded that when he emailed Melissa's counsel about Kregg's availability for a deposition, he did so without confirming Kregg's availability and was not aware that Kregg was unavailable due to his military service. The court took testimony from Melissa regarding her objection to the application for stay and her motion for temporary custody of the minor child. Melissa testified that Kregg had a "FaceTime" parenting call with the minor child on June 21, 2018, and appeared to be at his girlfriend's house because the minor child was heard talking to the girlfriend's dog. Melissa also testified that Kregg indicated to her that he would not be deployed until the fall of 2018.

The court denied the application for stay and granted Melissa temporary legal and physical custody of the minor child. In a subsequent written order denying Kregg's application for stay, the court found that the application was untimely and interposed in bad faith for purposes of delay and harassment. The order stated that the evidence indicated that Kregg was not on board the USS Arlington because Kregg's attorney offered a date of June 24, 2018, for a deposition, it was apparent that Kregg was not on the ship during his "FaceTime" call with the minor child a few days earlier, and Kregg informed Melissa that he would next be deployed in the fall. Furthermore, the court's order stated that trial was scheduled by counsel in the court's chambers on May 18, to accommodate both parties, because they were "stationed on opposite coasts of the

country." Finally, the court determined that Kregg's application for stay did not comply with the requirements of the SCRA, namely because the letter from his commanding officer did not state that his current military duty prevented his appearance and that military leave was not authorized. Kregg timely appealed the court's denial of his application for stay and its order awarding temporary custody of the minor child to Melissa.

## III. ASSIGNMENTS OF ERROR

Kregg assigns, restated, that the district court erred in (1) finding that his application for stay did not satisfy the statutory requirements under the SCRA, (2) denying his application for stay even if it did not satisfy the statutory requirements, (3) considering information extrinsic to his application for stay, and (4) denying him procedural due process.

## IV. STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law that an appellate court resolves independently of the trial court. *Connolly v. Connolly*, 299 Neb. 103, 907 N.W.2d 693 (2018).

[2,3] The decision of whether to grant a motion to stay a trial is vested in the discretion of the trial court, and its decision will not be overturned on appeal absent an abuse of that discretion. See *Schuessler v. Benchmark Mktg. & Consulting*, 243 Neb. 425, 500 N.W.2d 529 (1993). 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).

## V. ANALYSIS

### 1. District Court Did Not Err in Denying Kregg's Application for Stay

Kregg argues that the district court erred in overruling his application for stay under the SCRA after determining that it

did not meet the statutory requirements. Kregg further alleges that the district court erred in refusing to grant his application for stay even if it did not meet the statutory requirements. After reviewing the record, we find that the district court did not err in refusing to stay the proceedings.

[4] We note at the outset that although the court denied the application for stay, it did not take testimony on Melissa's modification petition, nor did it rule on it; rather, it addressed only her motion for temporary orders. In essence, Kregg received the continuance he was requesting. However, the denial of a stay under the SCRA is a final, appealable order. *Carmicheal v. Rollins*, 280 Neb. 59, 783 N.W.2d 763 (2010). *Carmicheal* presented a similar situation in which the application for stay was denied and the court entered a temporary order regarding custody. Because the Nebraska Supreme Court proceeded to address the decision denying the application for stay, we follow the same course.

### (a) Kregg's Application for Stay Did Not Satisfy SCRA Requirements

Kregg asserts that his application for stay complied with the requirements of the SCRA and that thus, the district court erred in overruling it. We disagree.

[5,6] The purpose of the SCRA is to suspend enforcement of civil liabilities of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the nation. *Engstrom v. First Nat. Bank of Eagle Lake*, 47 F.3d 1459 (5th Cir. 1995). Nevertheless, the SCRA "is not to be used as a sword against persons with legitimate claims," and a court must give equitable consideration of the rights of parties to the end that their respective interests may be properly conserved. See *id*. at 1462.

Section 3932(a) states that "[t]his section applies to any civil action or proceeding, including any child custody proceeding, in which the plaintiff or defendant at the time of filing an application under this section . . . (1) is in military

service or is within 90 days after termination of or release from military service . . . .” Section 3932(b) provides that a servicemember can request a stay under § 3932 at any stage before final judgment in a civil proceeding to which the servicemember is a party. See *Carmicheal v. Rollins, supra*. Upon application by the servicemember for a stay, the court “‘shall . . . stay the action for a period of not less than 90 days, if the conditions in paragraph (2) are met.’” *Id*. at 63, 783 N.W.2d at 766-67.

In order to qualify for a stay of the proceedings, the servicemember shall include a “letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember’s ability to appear and stating a date when the servicemember will be available to appear.” § 3932(b)(2)(A). The servicemember is also required to include a “letter or other communication from the servicemember’s commanding officer stating that the servicemember’s current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.” § 3932(b)(2)(B).

[7] Here, we review whether Kregg’s application for stay met the statutory requirements of the SCRA independent of the district court’s findings. See *Connolly v. Connolly*, 299 Neb. 103, 907 N.W.2d 693 (2018). First, it is undisputed that Kregg is a member of the U.S. Marine Corps and that thus, he is eligible for a stay under § 3932(a). Next, Kregg complied with § 3932(b)(2)(A) by including a letter from himself indicating that he was on board the USS Arlington, which was underway the entire month of June 2018. Kregg also stated in his letter that he would be available to appear between July 10 and 31, 2018, thus satisfying the SCRA requirement that he state a date when he will be available to appear.

Despite satisfying § 3932(b)(2)(A), Kregg failed to comply with § 3932(b)(2)(B), because the letter from his commanding officer did not state that his current military duty prevented him from appearing and did not state that military

leave was not authorized. The letter from Kregg's commanding officer states that the USS Arlington "shall be underway the whole month of June 2018" and that Kregg "shall embark with this unit." However, the letter does not specifically state that Kregg's military duty would prevent him from attending the hearing, nor does the letter specify that Kregg is unable to obtain military leave to attend the hearing. Additionally, the letter requests that Kregg be released from his "contractual obligation," not from attendance at a legal proceeding. Therefore, Kregg's application for stay did not comply with the statutory requirements of the SCRA.

While we find no Nebraska cases interpreting these requirements of the SCRA, the Supreme Court held in *Hibbard v. Hibbard*, 230 Neb. 364, 367, 431 N.W.2d 637, 640 (1988), that a "mere showing" that the defendant was in the military service was insufficient to obtain a stay under the SCRA's predecessor act. Other states have similarly held that an application for stay under the SCRA must strictly comply with the statutory requirements of the act. See, *Fazio v. Fazio*, 91 Mass. App. 82, 71 N.E.3d 157 (2017); *In re Marriage of Herridge*, 169 Wash. App. 290, 279 P.3d 956 (2012).

In *In re Marriage of Herridge, supra*, the servicemember failed to state a date upon which he would be available to appear and the letter from his commanding officer did not state whether military leave was available to the servicemember. The Washington appellate court determined that these deficiencies did not entitle him to the mandatory stay. It specifically relied upon amendments to the SCRA that now mandate the specific information in support of the request as contained in § 3932(b)(2) above. The court stated that disregarding these requirements "does not honor the plain words of the statute or recognize Congress's purposes in amending the SCRA. Where Congress has expressly stated that specific information must be included in an application for a mandatory stay, it must be assumed that it meant what it said." *In re Marriage of Herridge*, 169 Wash. App. at 300-01, 279 P.3d at 961.

Likewise, Nebraska appellate courts have required strict compliance with statutory notification schemes. See *Rice v. Bixler*, 289 Neb. 194, 854 N.W.2d 565 (2014) (burdens of dormant mineral statutes were not onerous, thus they should be strictly complied with). See, also, *Kellie v. Lutheran Family & Social Service*, 208 Neb. 767, 305 N.W.2d 874 (1981) (strict compliance with adoption statutes is required); *Linch v. Northport Irr. Dist.*, 14 Neb. App. 842, 717 N.W.2d 522 (2006) (strict compliance with statutory requirements for revival of claim).

Thus, we conclude that because Kregg failed to strictly comply with the requirements of the SCRA, the district court did not err in denying his application for stay.

### (b) District Court Did Not Abuse Its Discretion in Refusing to Grant Kregg's Application for Stay

Kregg also asserts that the district court abused its discretion in failing to grant a stay of the proceedings, even though it found his application for stay under the SCRA to be defective. We disagree.

[8-10] Courts inherently possess the power to stay civil proceedings when required by the interests of justice. *Schuessler v. Benchmark Mktg. & Consulting*, 243 Neb. 425, 500 N.W.2d 529 (1993). The burden of establishing that a proceeding should be stayed rests on the party seeking the stay. *Id*. In deciding whether to stay a trial, the trial court should balance the competing needs of the parties, taking into account, among other things, the interest of the courts, the probability that proceeding will work a constitutional violation on the movant, the presence or absence of hardship or inequity, and the burden of proof. *Id*.

[11] Further, other jurisdictions have held that it is within the discretion of the trial court to grant a stay if the movant does not comply with the requirements of the SCRA. See, *In re Marriage of Bradley*, 282 Kan. 1, 137 P.3d 1030 (2006) (where there is failure to satisfy conditions of SCRA, then

granting of stay is within discretion of trial court); *Fazio v. Fazio*, 91 Mass. App. 82, 71 N.E.3d 157 (2017) (trial judge did not abuse discretion in denying stay following incomplete request for stay under SCRA).

The district court did not abuse its discretion in refusing to grant Kregg's application for stay. In its order overruling Kregg's application for stay, the court found that the application was untimely, interposed in bad faith, and for purposes of delay and harassment. The court determined that the evidence indicated that Kregg was not unavailable due to his military service, primarily because Kregg's attorney offered the day before trial as a date to take Kregg's deposition. Melissa testified that Kregg had a "FaceTime" call with the minor child on June 21, 2018, from his girlfriend's house, and Kregg informed Melissa that he would not be deployed until the fall of 2018. The record supports the court's decision, and we find no abuse of discretion in its decision to deny the stay.

Kregg also makes a plethora of arguments asserting that the district court did not properly set a trial date and that consequently, he did not learn of the trial date until June 19, 2018. Kregg further alleges that, because he did not know of the trial, he did not inform the district court he was unavailable for the month of June. However, the district court indicated that at a May 18 conference in the judge's chambers, trial was set for June 25. The court indicated that trial was set for that date to accommodate both parents, as they were "stationed on opposite coasts of the country." While we do not have a record of the May 18 conference, Melissa's counsel represented to the court that Kregg's former counsel confirmed Kregg's availability for the trial date prior to setting it. Thus, we reject Kregg's argument that the district court failed to properly set a date for trial.

Even if we were to find that the district court erred in failing to grant Kregg's application for stay, Kregg was not prejudiced by the court's error, as we alluded to above. A stay under § 3932(b)(1) of the SCRA must be for at least 90 days.

Kregg requested a stay of the proceedings regarding Melissa's petition to modify the separation agreement between the parties. The court's order explicitly states that "the trial was not held today." However, the court did hear evidence regarding Melissa's motion for a temporary order of child custody. As of the time Kregg filed this appeal, a trial on Melissa's petition for modification of the separation agreement had not been held. Thus, Kregg has received a stay of proceedings far longer than the 90 days mandated by the SCRA; therefore, he was not prejudiced by the court's denial of his application for stay.

### (c) Court Did Not Improperly Consider Evidence Extrinsic to Kregg's Application for Stay

Kregg further asserts that the district court erred in considering evidence extrinsic to his application for stay. We disagree.

Nowhere in the SCRA is it indicated that a court cannot consider evidence beyond a party's application for stay. Likewise, Kregg does not point us to any authority holding that courts cannot consider extrinsic evidence on an application for stay. In *Hibbard v. Hibbard*, 230 Neb. 364, 367, 431 N.W.2d 637, 640 (1988), the Supreme Court stated, "The record before this court does not reflect that [the applicant] presented any competent factual evidence, by way of affidavit or otherwise, in support of the stay." Thus, it appears that the trial court was authorized to receive and consider evidence beyond the application for stay filed by the applicant.

To the extent that Kregg argues that his application for stay complied with the statutory guidelines of the SCRA, the district court considered only his application and the supporting letters in determining that the application did not comply with the SCRA. Additionally, the court did not abuse its discretion in considering extrinsic information, such as communication between counsel for both parties and Melissa's testimony, in determining that Kregg's application for stay should not

be granted. Kregg moved the court to stay the proceedings, Melissa objected to his application, and the court heard evidence on the issue to make an informed ruling. We reject Kregg's argument that the district court erred in considering evidence that was extrinsic to his application for stay.

### 2. Kregg's Remaining Assigned Error

[12,13] Kregg's remaining assigned error, that the district court deprived him of procedural due process, relates primarily to the district court's temporary order granting Melissa legal and physical custody of the minor child. However, a temporary order of custody is not a final, appealable order. *Carmicheal v. Rollins*, 280 Neb. 59, 783 N.W.2d 763 (2010). Additionally, the grant of temporary custody must be considered separately from a denial of stay under the SCRA. See *id.* Generally, only final orders are appealable. *Carney v. Miller*, 287 Neb. 400, 842 N.W.2d 782 (2014). Accordingly, we decline to address Kregg's remaining assigned error.

## VI. CONCLUSION

We find no error in the district court's denial of Kregg's application for stay. Because a temporary order of custody is not a final, appealable order, we do not reach Kregg's other assigned error, and we affirm the decision of the district court.

Affirmed.

# Brandi J. Anderson, appellee and cross-appellant, v. Donald J. Anderson, appellant and cross-appellee.

934 N.W.2d 497

Filed September 3, 2019. No. A-18-754.

1. **Divorce: 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.
2. **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.
3. **Evidence: Appeal and Error.** In a review de novo on the record, an appellate court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue.
4. ____: ____. When 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.
5. **Divorce: Attorney Fees: Appeal and Error.** In an action involving 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.
6. **Divorce: Property Division.** Under Neb. Rev. Stat. § 42-365 (Reissue 2016), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital, setting aside the nonmarital property to the party who brought that property to the marriage. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.

7. ____: ____. The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
8. ____: ____. As a general rule, all property accumulated and acquired by either party during the marriage is part of the marital estate, unless it falls within an exception to the general rule.
9. ____: ____. Exceptions to the rule that all property accumulated and acquired during the marriage is marital property include property accumulated and acquired through gift or inheritance.
10. **Divorce: Property Division: Proof.** The burden of proof to show that property is nonmarital remains with the person making the claim.
11. **Divorce: Property Division.** As a general rule, a spouse should be awarded one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case.
12. **Divorce: Property Division: Words and Phrases.** "Dissipation of marital assets" is defined as one spouse's use of marital property for a selfish purpose unrelated to the marriage at the time when the marriage is undergoing an irretrievable breakdown.
13. **Divorce: Property Division.** Marital assets dissipated by a spouse for purposes unrelated to the marriage should be included in the marital estate in dissolution actions.
14. ____: ____. Debts, like property, ought to also be considered in dividing marital property upon dissolution.
15. ____: ____. When one party's nonmarital debt is repaid with marital funds, the value of the debt repayments ought to reduce that party's property award upon dissolution.
16. **Child Support: Evidence.** Generally, earning capacity should be used to determine a child support obligation only when there is evidence that the parent can realize that capacity through reasonable efforts.
17. **Divorce: Property Division: Alimony.** In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party.
18. ____: ____: ____. In addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 2016), in dividing property and considering alimony upon a dissolution of marriage, a court should consider the income and earning capacity of each party and the general equities of the situation.

19. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. The ultimate criterion is one of reasonableness.
20. ____: ____. An appellate court is not inclined to disturb the trial court's award of alimony unless it is patently unfair on the record.
21. **Visitation.** The trial court has discretion to set a reasonable parenting time schedule.
22. ____. A reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent, and the determination of reasonableness is to be made on a case-by-case basis.
23. ____. Parenting time relates to continuing and fostering the normal parental relationship of the noncustodial parent.
24. ____. The best interests of the children are the primary and paramount considerations in determining and modifying visitation rights.
25. **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.
26. **Divorce: Attorney Fees.** A uniform course of procedure exists in Nebraska for the award of attorney fees in dissolution cases.
27. ____: ____. Attorney fees and costs are often awarded to prevailing parties in dissolution cases as a matter of custom.
28. ____: ____. In awarding attorney fees in a dissolution action, a court shall consider the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services.
29. **Attorney Fees: Affidavits: Evidence.** Where a party seeks to recover attorney fees, the best practice will always be to provide an affidavit or other evidence such as testimony or exhibits. Litigants who do not file such an affidavit or present other evidence risk the loss of attorney fees because of the difficulty of discerning such information from the record alone.

Appeal from the District Court for Hall County: Mark J. Young, Judge. Affirmed as modified.

Mark Porto, of Porto Law Office, for appellant.

Nicholas D. Valle, of Langvardt, Valle & James, P.C., L.L.O., for appellee.

Riedmann, Arterburn, and Welch, Judges.

Arterburn, Judge.

## I. INTRODUCTION

Donald J. Anderson appeals from the decree of dissolution entered in the district court for Hall County, which dissolved his marriage to Brandi J. Anderson. On appeal, Donald challenges the court's property distribution and the calculations of his child support and alimony obligations. On cross-appeal, Brandi challenges the court's visitation schedule, alimony award, and attorney fees determination. For the reasons that follow, we affirm the decision of the district court as to child support, alimony, the visitation schedule, and attorney fees. We modify in part the district court's decision as to property division.

## II. BACKGROUND

Donald and Brandi were married on September 25, 1999, and had three children together: a son, S.A., born in 2006; a daughter born in 2008; and a son born in 2015. After nearly 17 years of marriage, the parties separated in July 2016, and Brandi filed an amended complaint for dissolution of marriage on August 15.

After a hearing on October 14, 2016, the court entered temporary orders that found the children's need for a "significant amount of stability in their lives" made it inappropriate for the court to order joint custody with weekly transitions. Thus, the court gave Brandi temporary legal and physical custody of the children and allowed Donald to have parenting time every other weekend from Friday at 5 p.m. until Sunday at 7 p.m. During the weeks when Donald did not have weekend parenting time, he had 2 hours of parenting time with S.A. and his sister, individually, on one weeknight each. The parties subsequently agreed that Donald's weekend parenting time would

begin on Thursdays instead of Fridays. They also agreed that Donald would have parenting time with all the children on Thursday evenings during weeks when he did not have weekend parenting time. The court also ordered Donald to pay temporary child support of $1,251 per month and temporary spousal support of $1,100 per month.

Trial was held on February 1 and 13, 2018. At trial, Brandi testified that she had obtained a student loan prior to the marriage, a portion of which was repaid during the marriage. In November 2017, the principal balance was $21,785, while interest payments totaled over $31,897 during the loan's lifetime, which began in 1990. The loan financed Brandi's education, which enabled her to become a licensed teacher. Brandi worked as a schoolteacher from the time the parties married in 1999 until 2006, when S.A. was born. When S.A. was born, Brandi quit teaching and began caring for him full time. She testified that no daycare would accept him, because he rarely slept as an infant and cried, screamed, and needed to be rocked nearly constantly for several years. S.A. was later diagnosed with Asperger's syndrome (Asperger's).

S.A. developed violent tendencies and was prone to outbursts if unexpected or unplanned events occurred. Brandi testified that inconsistency in rules and consequences oftentimes led to S.A.'s bad behavior. Jealousy and seeing his siblings receive attention also led to S.A.'s outbursts. S.A. experienced suicidal thoughts, and in April 2017, he began talking about suicide in more detail and began acting out a plan to commit suicide. Brandi admitted S.A. to a hospital at that time.

Brandi offered testimony from a licensed independent mental health practitioner, Joan Schwan, who counseled S.A. from October 2016 through January 2018. Schwan also met the other children briefly. Schwan testified that because S.A. has Asperger's, he needs a calm, structured living environment. She worked with him to process his feelings and handle anger. Schwan said that S.A. needs consistency across both parents' homes and that it was detrimental for him to

view visitations with Donald as more fun because it was just the two of them. After a 5-day visit with Donald, S.A. told Schwan that he had not taken his medications and showered only once during that time. She knew that S.A. had "blow-ups" and "meltdowns" during which he would scream, kick, and hit others, particularly after spending one-on-one visitations with Donald.

Schwan opined that one-on-one visitations were not appropriate for S.A., because he viewed the individual attention as indicating that he was more special than his siblings. Schwan described that S.A. demands increasing amounts of his parents' attention, especially once they respond by giving him attention. Schwan said that because of that attention-seeking cycle, one-on-one visitations may be appropriate for other children but were not appropriate for S.A., because "he plays it" and sees the additional attention as indicating that he is special, which leads to him demanding more time. She testified that it was important for S.A. to see Donald giving time to S.A.'s siblings and to "actually witness that [his sister] is just as important as he is." She testified that her understanding was that S.A. would return from one-on-one visitations with Donald and brag and bully his sister about it. Schwan said that S.A.'s attitude similarly affects his schoolwork and recalled an instance of S.A.'s calling a classmate "a jerk because he wasn't getting his way immediately." Brandi also testified that S.A. returned from visitations with Donald and taunted his siblings but that S.A.'s behavior was much better when he returns from visitations that all the children attend.

Brandi described S.A.'s need for consistent routines and said that he "holds it all together during the school day" but can become volatile for a few hours after school until he gets into a routine again. However, she testified that S.A. does very well in school and had not had any disciplinary problems in school for the past 2 years. Her opposition to individual parenting time with Donald was based on her concern for the number of transfers and disruptions to their routine that

it caused. Brandi testified that she did not want to keep the children from Donald. Donald similarly testified that S.A. does "great in school" and had no more behavioral problems than any other student. Donald said that individual parenting time with S.A. was important to him in order to enjoy quality time together and described that the youngest child requires most of his attention when all the children are together.

Beginning in 2006, when S.A. was born, Donald was the family's sole income earner. Donald worked as a business development manager at a construction company from sometime before the parties were married through 2003. He then worked briefly as a personal banker before beginning to work at Credit Management Services, Inc. (Credit Management), in 2005. Donald left Credit Management in 2013 after having difficulties with his boss and because he was traveling for 7 to 10 nights each month. When he left Credit Management in 2013, he was making an estimated $112,000 per year. From October 2013 through June 2014, Donald worked for an insurance company, earning commission only. He testified that the job required extensive travel and staying in hotels a minimum of three nights per week. Donald began working for Axis Capital, Inc., in 2014, earning a base salary of $45,000 plus commission. When he was promoted in 2015, his base salary was raised to $70,000 plus commission. Tax documents show that the couple earned $132,200 in wages during 2015, the vast majority of which came from Donald's work at Axis Capital. In 2016, after disclosing an affair with a colleague, Donald was demoted and his pay was reduced by $2,000 per month. Donald then left his job with Axis Capital at the end of July, having earned $98,000 from January through July 2016.

Donald then worked for another construction company for 2 months, where his annualized salary was approximately $81,000 before commission. In October 2016, he began working for Providence Capital, which paid him approximately $6,000 per month plus commission during a 120-day probationary

period. He resigned from Providence Capital in February 2017 and returned to Credit Management from March through May 2017. At that time, Credit Management paid Donald an annual salary of $50,000 plus commission, which he said "wasn't significant." His territory included western Nebraska and eastern Kansas, which he said was not conducive to visitations with his children, because the divorce proceedings had begun by that time. When he left Credit Management in May 2017, he started his own firm, while also "actively seeking" other employment. He testified that he made approximately $4,400 through that venture.

In September 2017, Donald began working for Hamilton Telecommunications and remained employed there at the time of trial. Hamilton Telecommunications paid Donald an initial base salary of $55,000 per year plus commission. His base salary would decrease by $5,000 per year as commissions built up, eventually bottoming out at a $35,000 minimum. His salary was projected to grow significantly year to year if he met his sales goals.

In 2007, Donald and Brandi purchased a home together in Grand Island, Nebraska, for $145,000. They added a bedroom and remodeled the master bathroom. Brandi testified that at the time of trial, the home's roof was in "horrible shape" and needed repairs because the area around the chimney leaked when it rained. She said that roof repairs were estimated to cost $12,500. Brandi also testified that the windows were caving in, needed to be propped up, and let cold air blow inside. Brandi offered testimony from a real estate appraiser, who valued the home at $150,000. He testified that his appraisal accounted for the renovations and additions to the home. He also testified that, traditionally, a county assessor's appraisal is supposed to be within 3 to 5 percent of a home's full value and that county assessors do not individually appraise homes and do not make physical inspections of every home.

When the parties refinanced their home mortgage in 2012, an appraisal was required, which valued the home at

$160,000. In 2017, the Hall County assessor valued the home for tax purposes at $171,449. At trial, Donald testified that he believed an accurate valuation of their home was $185,000, which he calculated by assuming that the tax-assessed value was 92 percent of the home's actual value. Donald took issue with the valuation offered by Brandi's expert, because he believed that the expert's appraisal did not accurately reflect the home's square footage, number of rooms, or age and that the homes used for comparison's sake were substantially different. The appraiser, when asked about his report's inaccuracies, said that the errors did not affect his valuation, because his ultimate opinion was based on his physical inspection of the property.

Donald testified that he and Brandi withdrew $20,000 from his Credit Management retirement account in 2008 or 2009 and used some of the funds to repay their home loan. They repaid the withdrawal before Donald's employment with Credit Management ended. He said that the funds were used for home renovations and household items, while also acknowledging that some of the withdrawn funds were used to pay down gambling debts he incurred, but he did not estimate the amount.

In 2014, the parties withdrew approximately $60,000 from retirement accounts to offset decreased income, and Donald acknowledged that "a few thousand dollars" went toward gambling debt. Brandi stated that $2,000 of a $12,000 withdrawal in 2014 was never accounted for and that she assumed it was for gambling, because "[t]hat's his pattern." Donald acknowledged that he spent $570 on gambling in February 2017 and $1,762 on gambling in April 2017 after the parties' separation. Brandi testified that Donald's gambling was an issue throughout their marriage, because they had lost "thousands." She acknowledged that Donald sought help for gambling and secured a church friend to act as his "accountability partner," who met with Donald and went with him "to [his] bookie to cut ties" with him.

Donald also described withdrawing $12,000 from retirement accounts during the summer of 2017 pursuant to an agreement with Brandi. He used the money to catch up on child support, spousal support, and health care payments.

During the marriage, Brandi's grandmother made a number of gifts by checks that were made out to both Donald and her and some made to her alone. Brandi calculated the total of the checks made out to Donald and her jointly as $3,750, while the checks to her alone totaled $20,900. Brandi also acknowledged that Donald's parents gave them approximately $5,000 when they bought their first home.

Brandi testified that her grandmother died "about a week after [Donald] moved out of the house" and that she inherited $7,000 from her grandmother. Shortly thereafter, Brandi's father, who was the personal representative of her grandmother's estate, made gifts to a number of the heirs, including Brandi. Brandi said that the total amount she received was "[r]oughly lower 30's, 30 some thousand."

On July 6, 2018, the court entered a decree dissolving the marriage between Donald and Brandi. The court awarded legal and physical custody of the children to Brandi based on "the difficulties the parties have in communicating and the need for stability of the children (particularly [S.A.])." The court awarded Donald parenting time every other weekend from 5:30 p.m. on Thursdays until 7 p.m. on Sundays. Additionally, on the weeks when Donald did not have weekend parenting time, the court awarded him parenting time with the younger son for 1½ hours on Mondays, with S.A. for 1½ hours on Tuesdays, and with the daughter for 1½ hours on Wednesdays. In awarding Donald one-on-one visitations with each of the children, the court cited the "lack of any evidence from the schools that the visitations were causing [S.A.] increased behavioral problems or any evidence concerning behavioral problems from a party other than [Brandi]." The court found that Schwan's testimony was "unpersuasive" when she opined that one-on-one visitation was not best for S.A.

The court found that the circumstances required using Donald's earning capacity, not actual income, in computing his child support obligation. The court noted that while Donald's changes to lower earning occupations may have been made in good faith, he nonetheless could earn more than he currently was. Additionally, the court held that the children would be seriously impaired as a result of Donald's voluntarily diminished earnings. The court ordered Donald to pay support of $1,503 for three children, $1,302 for two children, and $883 for one child. The court also ordered Donald to pay spousal support of $500 per month for 24 months.

In dividing the parties' property, the court first found that Brandi's expert offered "the most accurate valuation" of the marital home and, thus, valued it at $150,000. The court further found that a $20,000 loan from Donald's IRA account was used to pay gambling debts and, as a matter of equity, "ultimately deprived the marital estate of $20,000 (by virtue of having to be repaid from the marital estate)." Therefore, the court considered that as a $20,000 asset belonging to Donald. Despite a difference of approximately $27,000 in the parties' resulting property division, the court held that no equalization payment from Brandi to Donald was required, because Donald's financial circumstances had resulted in a lower alimony award.

Donald now appeals from the district court's order, and Brandi cross-appeals.

## III. ASSIGNMENTS OF ERROR

Donald alleges that the court erred with respect to its property division in undervaluing the marital home, awarding a $20,000 retirement withdrawal to him as an asset, not accounting for Brandi's student loan payments, and not ordering Brandi to make a property equalization payment. Donald also alleges that the court erred in calculating his child support obligation based on imputed income, not his actual income, and in ordering him to pay spousal support to Brandi.

Brandi alleges on cross-appeal that the court erred in allowing Donald to have one-on-one parenting time with the children, not extending spousal support for longer than 24 months, and not awarding her attorney fees.

## IV. STANDARD OF REVIEW

[1,2] 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. *Westwood v. Darnell*, 299 Neb. 612, 909 N.W.2d 645 (2018). This standard of review applies to the trial court's determinations regarding both division of property and alimony. See *id*. 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. *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016).

[3,4] In a review de novo on the record, an appellate court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue. *Osantowski v. Osantowski*, 298 Neb. 339, 904 N.W.2d 251 (2017). However, when 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. *Id*.

[5] In an action involving 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. *Moore v. Moore*, 302 Neb. 588, 924 N.W.2d 314 (2019).

## V. ANALYSIS

### 1. Property Division

[6,7] Under Neb. Rev. Stat. § 42-365 (Reissue 2016), the equitable division of property is a three-step process. The

first step is to classify the parties' property as marital or nonmarital, setting aside the nonmarital property to the party who brought that property to the marriage. *Despain v. Despain*, 290 Neb. 32, 858 N.W.2d 566 (2015). The second step is to value the marital assets and marital liabilities of the parties. *Id*. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Despain v. Despain, supra*. The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Lorenzen v. Lorenzen*, 294 Neb. 204, 883 N.W.2d 292 (2016).

[8-11] As a general rule, all property accumulated and acquired by either party during the marriage is part of the marital estate, unless it falls within an exception to the general rule. *Westwood v. Darnell, supra*. Such exceptions include property accumulated and acquired through gift or inheritance. *Id*. The burden of proof to show that property is nonmarital remains with the person making the claim. *Id*. As a general rule, a spouse should be awarded one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case. *Osantowski v. Osantowski, supra*.

(a) Home Valuation

With respect to the parties' property division, Donald first argues that the district court erred in accepting Brandi's $150,000 valuation of the marital home over his proposed $185,000 valuation. Brandi argues that the district court did not err in accepting her certified appraiser's valuation of the home after observing his testimony. We find no abuse of discretion by the district court and, thus, affirm its valuation of the parties' marital home.

The appraiser testified that the parties' home was worth $150,000 based on his physical inspection. He acknowledged that his valuation was lower than the county assessor's

valuation and explained that county assessors do not make physical inspections of individual homes. The appraiser also testified that the assessor's valuations are usually not 100 percent of a home's value but are within 3 to 5 percent of the full value. Brandi testified that the home's roof was in "horrible shape" and described issues with the windows and chimney as well, all of which were also observed by her appraiser. Meanwhile, Donald based his opinion on the county assessor's valuation of the home at $171,449, coupled with his belief that the assessor's valuation was only 92 percent of the home's actual value. Based on that assumption, Donald valued the home at $185,000. Donald also noted that the home had been appraised at $160,000 in 2012.

While we recognize that the district court accepted the home's lowest valuation, we cannot find that its decision was an abuse of discretion. The district court benefited from observing testimony from Donald, Brandi, and Brandi's appraiser and then determined that the valuation offered by Brandi's appraiser was the most accurate, particularly given the testimony regarding the home's condition. We give weight to the district court's observations and acceptance of the $150,000 valuation and, thus, affirm the property division with respect to the valuation of the marital home.

(b) IRA Depletion

In dividing the parties' property, the district court allocated an "IRA Loan" valued at $20,000 to Donald, finding that the loan had been used to pay Donald's gambling debts and that its repayment ultimately deprived the marital estate of that value. Donald's arguments on appeal are twofold. First, he argues his gambling expenses were not incurred when the end of the marriage was inevitable and, thus, did not constitute dissipation of marital assets. Second, he argues that the evidence does not show that his gambling losses amounted to $20,000. Brandi argues in reply that Donald's gambling expenses were not incurred for the benefit of the marriage and

that they totaled at least $20,000. We conclude that the district court erred in its property division regarding retirement withdrawals.

[12,13] We begin by reiterating the general rules that all property accumulated and acquired by either party during the marriage is part of the marital estate, unless it falls within an exception to the general rule, and that the burden of proof to show that property is nonmarital remains with the person making the claim. *Westwood v. Darnell*, 299 Neb. 612, 909 N.W.2d 645 (2018). "Dissipation of marital assets" is defined as one spouse's use of marital property for a selfish purpose unrelated to the marriage at the time when the marriage is undergoing an irretrievable breakdown. *Reed v. Reed*, 277 Neb. 391, 763 N.W.2d 686 (2009). As a remedy, marital assets dissipated by a spouse for purposes unrelated to the marriage should be included in the marital estate in dissolution actions. *Id*. The court held in *Reed v. Reed* that disputed bank transfers took place when the marriage was undergoing an irretrievable breakdown, because the transfers were made "specifically *because* [the husband] intended to file for divorce." 277 Neb. at 402, 763 N.W.2d at 695 (emphasis in original).

However, in the present case, there was little evidence that Donald's gambling occurred while the marriage was undergoing an irretrievable breakdown. Although Donald's gambling may have been an issue throughout the marriage, the parties did not separate until 2016, following Donald's affair. Donald testified that a $20,000 loan from his IRA account occurred in 2008 or 2009, 7 or 8 years before the marriage's breakdown. While Donald acknowledged that some of the loan may have been used to pay gambling losses, the evidence indicates that the majority of the proceeds were used for other legitimate purposes. The district court assumed that the $20,000 loan was used to pay Donald's gambling debts and thus assigned it as an asset belonging to him. However, there is little specific evidence that establishes Donald's total gambling debts

during the entirety of the marriage to be $20,000. Even if we were to accept the district court's finding as correct, there is no evidence that the loan or its repayment occurred during a time period in which the marriage was undergoing an irretrievable breakdown.

During questioning from the court, Donald acknowledged that he spent $570 on gambling in February 2017 and $1,762 in April 2017. He also acknowledged that he spent "a few thousand dollars" on gambling in 2014. Similarly, Brandi testified that $2,000 from a withdrawal in 2014 was unaccounted for, which she believed indicated Donald spent the sum on gambling. Therefore, taken together, the record reflects that Donald may have expended approximately $4,300 on gambling. While it may be true that Donald gambled throughout the parties' marriage, leading, in part, to its eventual demise, our record does not reflect that Donald dissipated $20,000 of marital property when the marriage was undergoing an irretrievable breakdown. As such, we find that the district court erred in classifying the $20,000 IRA loan as an asset belonging to Donald.

(c) Student Loan Payments

In dividing the marital estate, the district court held that Brandi's inheritance and the use of marital funds to repay Brandi's student loan debt "cancel each other" and therefore did not include either in the property division. Donald argues on appeal that the district court erred in not accounting for Brandi's premarital student loan debt that was repaid, in part, with marital funds during the marriage. Brandi argues that the marriage benefited from the debt incurred, because the debt enabled her to obtain a teaching license and employment as a teacher from 1999 through 2006. She also argues that the amount of loan repayments was not sufficiently proved and that the gifts and inheritance that she received during the marriage offset the debt repayments, as the district court found. Although our reasoning varies from that of the district court,

we find no abuse of discretion in its ultimate conclusion and, thus, affirm.

[14,15] In dividing marital property, the first step is to classify the parties' property as marital or nonmarital, setting aside the nonmarital property to the party who brought that property to the marriage. *Despain v. Despain*, 290 Neb. 32, 858 N.W.2d 566 (2015). Debts, like property, ought to also be considered in dividing marital property upon dissolution. See *Black v. Black*, 221 Neb. 533, 378 N.W.2d 849 (1985). When one party's nonmarital debt is repaid with marital funds, the value of the debt repayments ought to reduce that party's property award upon dissolution. See *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

In *Wiech v. Wiech*, 23 Neb. App. 370, 871 N.W.2d 570 (2015), the trial court's property division upon dissolution did not account for either spouse's premarital debts that were reduced during the course of the marriage using the parties' wages. The wife had a premarital bankruptcy debt that totaled $56,400, while the husband had an unspecified debt of $3,549.95, which he brought to the marriage. On appeal, the wife contended that she paid her debt using only her wages and that the debt was therefore paid without marital funds. We reiterated the general principle that any income accumulated during a marriage is a marital asset. See *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001). Because the trial court did not account for the parties' premarital debts that were paid with marital funds, we remanded the matter with instructions to offset the wife's portion of the marital estate by $56,400 and to offset the husband's portion of the marital estate by $3,549.95. *Wiech v. Wiech, supra*.

Brandi acknowledges that she brought student loan debt to the marriage. This student loan debt enabled Brandi to work as a schoolteacher, both from 1999 to 2006 at the beginning of the parties' marriage and again upon the parties' separation. Any repayments made after the parties' marriage and prior to separation were made with marital funds. The value of those

repayments should therefore reduce Brandi's share of the property division. See *Gangwish v. Gangwish, supra*. We note, however, that the value of Brandi's premarital debt that was repaid using marital funds was not established during trial. The burden of proving the amount of the reduction of Brandi's nonmarital debt during the marriage was on Donald.

Donald opined that $33,000 of Brandi's premarital debt was repaid during the marriage, based on multiplying what he believed the monthly payment to be, $294, by 120 months, notwithstanding the fact that the parties' marriage lasted for longer than 120 months. In her brief on appeal, Brandi accurately points out there was no evidence that the monthly payment was consistent throughout the loan's life, that payments were made every month, or that the loan was never in deferment. A monthly student loan statement dated October 30, 2017, reveals that a total of $35,643 had been paid in interest and $9,494 had been paid toward the principal of the consolidated loan since its inception in 1990. As of October 30, the remaining balance on the loan was $24,105. However, the evidence at trial did not show what portion had been paid during the course of the marriage. Donald did not introduce any documentation that demonstrated what payments were made during the 9 years the loan existed prior to the marriage or what payments were made during the marriage. We find the evidence adduced by Donald to be insufficient to prove his claim.

The facts of this case are analogous to cases in which a party has attempted to claim a nonmarital asset, but could not do so since they were unable to definitively establish the value of that asset. In *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016), the trial court found that crops in storage and the balance of the husband's bank accounts that held the proceeds of past crop sales as of the date of marriage should not be awarded to him as nonmarital property. The Nebraska Supreme Court affirmed the trial court judgment, finding that the husband had not definitively identified the values of his premarital

assets. As a result, since one cannot trace an unknown value of assets, the court found it to be unreasonable to set off a value of assets that is not proved. See, also, *Osantowski v. Osantowski*, 298 Neb. 339, 904 N.W.2d 251 (2017).

In *Onstot v. Onstot*, 298 Neb. 897, 906 N.W.2d 300 (2018), the husband testified that he purchased the family home 9 years prior to the marriage. He testified to the purchase price and what he believed to be the amount of the original mortgage. He then testified to what he believed to be the value of the home on the date of marriage but provided no evidence regarding the balance of the mortgage at that time. No documentation was provided to confirm his testimony regarding the date of purchase, the purchase price, the amount of the mortgage, or the value of the house at the time of the marriage. The Supreme Court found that the equity in the residence at the time of the parties' marriage would be a nonmarital asset, which, if established, should be set aside to the husband. However, given the lack of documentation that any equity existed at the time of the parties' marriage, the Supreme Court found that the husband failed to meet his burden of proving that the property was a nonmarital asset.

Most recently, in *Burgardt v. Burgardt, ante* p. 57, 926 N.W.2d 452 (2019), the evidence demonstrated that the husband possessed a 401K at the time the parties were married. While the husband testified that the 401K was worth $130,000 at the time the parties were married, he provided no documentation to support his claim. The testimonial evidence raised further questions as to the accuracy of the husband's valuation. Since an initial value could not be determined, it was impossible to determine what, if any, of the 401K was traceable to the time of the divorce. We concluded that since the husband had not proved the initial value of his claimed asset, he had failed to meet his burden of proving that a nonmarital asset still existed.

Here, while we can ascertain that Brandi's student loan is nonmarital, the record before us provides us no way of

knowing how much of the principal and interest paid on the loan was paid during the marriage. Therefore, it is impossible to set off any specific value to Brandi based on marital funds that were used to pay off her student loan debt. We note that Donald's testimony does not match the length of the marriage or the amount of the payment noted on the October 30, 2017, statement. Since we have no evidence which discloses the amount of money paid on the student loan during the marriage, we must find that Donald has failed to meet his burden of proof. As such, though for a different reason than stated by the district court, we find that no amount of payments made on the student loan can be attributed to Brandi as a marital asset.

(d) Equalization Payment

Donald assigns that the district court erred in not ordering Brandi to make an equalization payment based on his contentions addressed above and on the disparate shares of the marital estate that were awarded. We, like Donald, acknowledge that the district court's division of the marital estate does narrowly fall within the general rule that a spouse be awarded one-third to one-half of the parties' assets, because the court awarded approximately 36½ percent of the marital estate to Donald. Our finding above that the district court should not have attributed the $20,000 loan from Donald's retirement account as an asset to Donald requires us to first recalculate the value of the marital estate and then determine what, if any, equalization payment is required to be paid by Brandi.

In the decree, Brandi was awarded net assets of $64,936.67. Donald was awarded net assets of $37,402.57, which, due to our finding above, is reduced to $17,402.57 if no equalization payment is made. Without equalization, Donald's portion of the net marital estate would only constitute approximately 21 percent of the total. We find that amount to be untenable and in need of adjustment. However, we also find that the district court's decision to award Brandi the majority of the marital

estate is supported by the evidence. The major portion of the marital estate granted to Brandi is the marital home, a finding not contested by Donald. Brandi has few liquid assets from which she can pay an equalization payment, particularly given Donald's history of being in arrears on his payment of alimony, child support, and other expenses for the children he was obligated to pay under the temporary order. Brandi will continue to need the marital home for the children's benefit. Thus, we modify the district court's order and direct Brandi to make an equalization payment in the amount of $10,000 in order to bring Donald's share of the marital estate back up to an approximately 33-percent share, thus conforming with the general rule that a spouse should be awarded one-third to one-half of the marital estate.

### 2. Child Support Obligation

Donald argues on appeal that the district court erred in calculating his child support obligation based on his earning capacity instead of his actual income at the time of trial. Brandi argues in reply that imputing a higher income to Donald was appropriate because he voluntarily left more lucrative employment, during which his average annual salary over the past 5 years exceeded $100,000. We agree with the district court and find that imputing a higher income to Donald based on his earning capacity was not an abuse of discretion and, thus, affirm.

[16] The Nebraska Child Support Guidelines state that "[i]f applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities." Neb. Ct. R. § 4-204 (rev. 2016). Use of earning capacity to calculate child support is useful "'"when it appears that the parent is capable of earning more income than is presently being earned."'" *Johnson v. Johnson*, 290 Neb. 838, 848, 862 N.W.2d 740, 749 (2015). Generally, earning capacity should be used to determine a child support obligation only

when there is evidence that the parent can realize that capacity through reasonable efforts. *Id*.

In the present case, Donald's work history shows that he worked a number of jobs in which he earned more than $100,000 per year. In 2013, when Donald left Credit Management, he was earning $112,000 per year. Donald earned a base salary of $70,000 plus commission in 2015 when he worked for Axis Capital, and records showed the couple's income from wages was $132,200 that year, the vast majority of which came from Donald. When he disclosed an affair with a colleague in 2016, his salary was reduced by $2,000 per month. Nevertheless, when Donald voluntarily left Axis Capital, he had earned $98,000 from January through July 2016. Thereafter, Donald worked for a construction company, which paid a base salary of $81,000 per year plus commission, and then he worked for Providence Capital, which paid a base salary of $6,000 per month plus commission. At the time of trial, however, Donald was employed by Hamilton Telecommunications, which paid a base salary of $55,000 per year plus commission. He obtained that job after a brief return to Credit Management, which paid him $50,000 per year plus commission, and a brief stint of self-employment, during which he earned $4,400.

Donald indicated that he left more lucrative employment because he tired of traveling and being away from his children. The evidence does not show the extent of Donald's efforts to obtain more lucrative employment. However, the evidence shows that when Donald maintains a job for more than a year, his income increases substantially by virtue of increased commissions. Much like his past work, Donald's employment with Hamilton Telecommunications at the time of trial was projected to become significantly more lucrative during each subsequent year of employment if he met his sales goals. Based on the historical data contained in the offer letter, Donald has the potential to again have an income exceeding $100,000 per year by his fourth year of employment if he performs according to expectations. We agree with the district court

that Donald's financial position diminished due to his own conduct and decisions to leave more lucrative employment. Given Donald's track record in past sales positions, the self-inflicted nature of his losses of income, and his demonstrated potential to increase his income in his current position, we find no reason to believe that Donald's earning capacity has diminished. We further find that reducing child support would seriously impair the needs of his three children. Accordingly, we find that the district court did not abuse its discretion in relying on Donald's earning capacity in calculating his child support obligation.

### 3. Spousal Support Obligation

Donald argues on appeal that the district court erred in ordering him to pay alimony to Brandi, because they earned similar salaries at the time of trial, he had paid temporary spousal support while the dissolution was pending, and his child support obligation was based on a greater-than-realized income. Brandi argued in reply that alimony was warranted because she had lost out on annual salary increases for the 10 years between S.A.'s birth and their separation that the parties had agreed she would not teach. On cross-appeal, Brandi assigns that the court erred in not ordering Donald to pay her alimony for more than 24 months. We find that the district court did not abuse its discretion in ordering Donald to pay Brandi alimony of $500 for 24 months.

[17,18] "The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate." § 42-365. In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the

custody of each party. *Anderson v. Anderson*, 290 Neb. 530, 861 N.W.2d 113 (2015). In addition to the specific criteria listed in § 42-365, in dividing property and considering alimony upon a dissolution of marriage, a court should consider the income and earning capacity of each party and the general equities of the situation. *Anderson v. Anderson, supra*.

[19,20] In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. The ultimate criterion is one of reasonableness. *Wiedel v. Wiedel*, 300 Neb. 13, 911 N.W.2d 582 (2018). An appellate court is not inclined to disturb the trial court's award of alimony unless it is patently unfair on the record. *Id*.

Here, the district court awarded Brandi alimony of $500 per month for 24 months, effective August 1, 2018, after entry of the decree of dissolution. We do not find the amount awarded to be excessive, as assigned by Donald, nor do we find it to be insufficient, as assigned by Brandi. At the time of trial, Brandi had secured employment as a teacher earning $56,474.50 per year. We recognize that through the parties' joint decision to have Brandi care for the children full time after they were born, she did lose the benefit of annual step salary increases that she would have received had she remained employed as a teacher. However, we also note that by the time the decree was entered, Brandi had already been awarded alimony at the rate of $1,100 per month for 22 months. Based on the duration of the marriage, Brandi's employment, and other economic considerations, we find no abuse of discretion by the district court. The award of $500 per month for an additional 24 months properly balances the countervailing interests of the parties.

### 4. Parenting Time

On cross-appeal, Brandi assigns that the district court erred in finding that it was in the children's best interests to have

individual visitations with Donald. She specifically argues that one-on-one visitations with Donald were inappropriate for S.A. because of his Asperger's. We find that the district court did not abuse its discretion in allowing Donald to have individual parenting time with each of the children.

[21-24] The trial court has discretion to set a reasonable parenting time schedule. *Schmeidler v. Schmeidler*, 25 Neb. App. 802, 912 N.W.2d 278 (2018). A reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent, and the determination of reasonableness is to be made on a case-by-case basis. *State ex rel. Pathammavong v. Pathammavong*, 268 Neb. 1, 679 N.W.2d 749 (2004). Parenting time relates to continuing and fostering the normal parental relationship of the noncustodial parent. *Thompson v. Thompson*, 24 Neb. App. 349, 887 N.W.2d 52 (2016). The best interests of the children are the primary and paramount considerations in determining and modifying visitation rights. *Id*.

In the present case, Brandi argues that Donald's individual parenting time with S.A. is detrimental because it exacerbates symptoms of S.A.'s Asperger's. During trial, Brandi presented evidence that one-on-one visitations with Donald oftentimes preceded S.A.'s outbursts. She also offered testimony from a counselor, who treated S.A. and opined that individual visitations were not in S.A.'s best interests. Donald argued that individual parenting time was important because S.A. required more attention than the other children, thus shortchanging the other children of his attention during visitations with all the children. We note that Brandi did not contend that individual visitations for the two younger children with Donald had been or would be detrimental to the children, nor was there any evidence to support such a contention.

Under our standard of review, we do not supplant the trial court's determinations with our own. We are mindful that the district court had the benefit of observing the counselor testify

in the present case before determining that her testimony was "unpersuasive." The decree, which allows Donald to have individual parenting time with each child, is reasonable and preserves the children's relationships with Donald. We further note that there was no evidence presented that S.A.'s one-on-one visits with Donald resulted in misbehavior or diminished performance at school. Much of the counselor's information regarding repercussions of the visits at home appears to be based on the report of Brandi. Therefore, we must give deference to the finding of the district court which gave little weight to the counselor's testimony. We find no abuse of discretion by the district court in ordering Donald to have individual parenting time with each child and, thus, affirm the court's determinations regarding parenting time.

### 5. Attorney Fees

On cross-appeal, Brandi assigns that the district court erred in denying her request for an award of attorney fees but goes on to argue that the court erred only *if* the division of the marital estate is modified pursuant to Donald's appeal.

[25-28] 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. *Moore v. Moore*, 302 Neb. 588, 924 N.W.2d 314 (2019). A uniform course of procedure exists in Nebraska for the award of attorney fees in dissolution cases. *Id.* Additionally, attorney fees and costs are often awarded to prevailing parties in dissolution cases as a matter of custom. See *id*. See, e.g., *Garza v. Garza*, 288 Neb. 213, 846 N.W.2d 626 (2014). In awarding attorney fees in a dissolution action, a court shall consider the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services. *Id.*

[29] Where a party seeks to recover attorney fees, the best practice will always be to provide an affidavit or other evidence such as testimony or exhibits. *Id*. The filing of an affidavit is not absolutely required, however. *Id*. Litigants who do not file such an affidavit or present other evidence risk the loss of attorney fees because of the difficulty of discerning such information from the record alone. *Id*.

The district court declined to award attorney fees to either party in the present case, noting that an award in favor of Brandi would be inappropriate "given the current relative financial situation of the parties." We conclude that the district court did not err in not awarding attorney fees. Accordingly, we affirm the denial of an award of attorney fees to Brandi.

## VI. CONCLUSION

Based on the foregoing, we affirm the district court's property division with respect to its valuation of the marital home. We further find that Donald failed to prove the amount of money paid from marital funds on Brandi's premarital student loan so as to attribute the amount of any payments made to Brandi as a marital asset. We also affirm the decree with respect to its calculation of Donald's child support and spousal support obligations, parenting time, and attorney fees. However, we find the district court erred in its property division with respect to attributing the 2008 loan taken against Donald's retirement account as an asset to Donald and therefore order Brandi to pay $10,000 to Donald in order to bring the division of the marital estate to a two-thirds to one-third split.

Affirmed as modified.

# Ralston Investment Group, Inc., a Nebraska corporation, et al., appellants, v. David Wenck, appellee.

933 N.W.2d 903

Filed September 17, 2019. No. A-18-718.

1. **Trial: Witnesses.** In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
2. **Judgments: Appeal and Error.** In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
3. ____: ____. In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
4. ____: ____. An appellate court independently reviews questions of law decided by a lower court.
5. **Contracts: Parties: Intent.** A contract is not formed if the parties contemplate that something remains to be done to establish contractual arrangements or if elements are left for future arrangement.
6. **Contracts.** It is a fundamental rule that in order to be binding, an agreement must be definite and certain as to the terms and requirements.
7. **Guaranty: Promissory Notes: Contribution.** A guarantor of a promissory note who has made payment may seek contribution from a coguarantor for that party's proportionate share of the obligation.
8. **Tort-feasors: Liability: Contribution: Compromise and Settlement.** A tort-feasor who enters into a settlement with a claimant is not entitled to recover contribution from another tort-feasor whose liability for the injury or wrongful death is not extinguished by the settlement.
9. ____: ____: ____: ____. In order to recover on a claim for contribution among joint tort-feasors, the following elements must be shown:

(1) There must be a common liability among the party seeking contribution and the parties from whom contribution is sought; (2) the party seeking contribution must have paid more than its pro rata share of the common liability; (3) the party seeking contribution must have extinguished the liability of the parties from whom contribution is sought; and (4) if such liability was extinguished by settlement, the amount paid in settlement must be reasonable.

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

Benjamin M. Belmont, Sean D. Cuddigan, Wm. Oliver Jenkins, and Jake Houlihan, Senior Certified Law Student, of Brodkey, Cuddigan, Peebles, Belmont & Line, L.L.P., for appellants.

Travis W. Tettenborn and Mark A. Grimes, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

Riedmann, Arterburn, and Welch, Judges.

Welch, Judge.

## INTRODUCTION

Ralston Investment Group, Inc. (RIG), and three of its shareholders, James Linhart, Alan Bennett, and Kevin Hitzemann, sued shareholder David Wenck for breach of contract after he failed to contribute capital to RIG and for contribution to reimburse them for allegedly paying more than their proportional share of guaranteed debt to American National Bank (ANB). The court found for Wenck on both counts, and RIG, Linhart, Bennett, and Hitzemann (collectively Appellants) appeal.

## STATEMENT OF FACTS

In January 2004, Linhart, Bennett, Hitzemann, Steve Strong, and Wenck formed RIG, a Nebraska corporation, to build and operate a gas station and convenience store. Linhart, Bennett, Strong, Hitzemann, and Wenck contributed capital to RIG and received stock ownership interests in the following amounts and proportions:

| Investor | Contribution | Ownership Interest |
|---|---|---|
| Linhart | $120,000 | 30% |
| Bennett | $120,000 | 30% |
| Strong | $ 80,000 | 20% |
| Hitzemann | $ 40,000 | 10% |
| Wenck | $ 40,000 | 10% |

The shareholders did not execute bylaws or a shareholder agreement.

After the construction of the gas station and convenience store was completed in early 2005, RIG borrowed $1,421,610 from ANB to provide operating cash for the business. RIG also obtained a $50,000 line of credit from ANB. The parties testified that each shareholder guaranteed the operating loan and line of credit at the rate of 125 percent of their ownership interest percentage in RIG, which equates to the amounts shown in the table below. These amounts were reflected in the written guaranty agreements received into evidence with the exception of those of Strong, whose written guaranties were not offered nor received into evidence, and Wenck's line of credit guaranty, which the parties testified could not be located:

| Investor | Amount Guaranteed on $1.4M Note | Amount Guaranteed on Line of Credit | Total Amount Guaranteed |
|---|---|---|---|
| Linhart | $533,103.75 | $18,750 | $551,853.75 |
| Bennett | $533,103.75 | $18,750 | $551,853.75 |
| Strong | $355,402.50 | $12,500 | $367,902.50 |
| Hitzemann | $177,701.25 | $ 6,250 | $183,951.25 |
| Wenck | $177,701.25 | $ 6,250 | $183,951.25 |

The written guaranty agreements specifically indicated that the respective shareholders unconditionally guaranteed to pay the indebtedness incurred by RIG owing to ANB up to the stated sum listed above, but do not reference a pro rata rate or basis upon which the guaranteed sums were determined.

In 2006, RIG experienced cash shortfalls. Linhart, Bennett, and Hitzemann testified that, in order to address RIG's cash

needs, in 2006, the parties met and orally agreed that when RIG needed additional cash, the parties would be obligated to contribute necessary cash to RIG in proportion to their ownership interests in RIG. In contrast, Wenck testified that the parties' oral agreement was to address RIG's capital needs on an ongoing basis, but that he never agreed to make ongoing, obligatory cash contributions to RIG in connection with all future requests for capital calls, or "cash calls." Instead, Wenck testified that, on a case-by-case basis, if RIG needed cash, he would attempt to contribute cash in proportion to his ownership interest if he could, but that he never agreed to be permanently obligated on all future cash calls. Wenck further testified that, in 2006, he separately met with his own counsel and was advised he was not legally obligated to make capital contributions on future cash calls but could do so on a voluntary basis.

The parties collectively agreed that they first agreed to contribute $100,000 to RIG in 2006 with each party, including Wenck, contributing proportionately to their ownership interests in RIG. The parties likewise agreed that all shareholders contributed, with the exception of Strong, who, in 2006, sold his ownership interest in RIG to Hitzemann and Wenck, with Hitzemann and Wenck each purchasing half of Strong's 20-percent interest in RIG. In connection with the purchase price for Strong's interest in RIG, instead of paying Strong, Hitzemann and Wenck each paid $10,000 of the purchase price to RIG to cover Strong's unpaid share of the capital contribution. The purchase agreement governing Strong's sale of his interest in RIG did not reference Strong's personal guaranty with ANB, nor did the agreement reference Hitzemann's or Wenck's assuming any of Strong's liabilities. The parties offered no evidence governing whether Strong's personal guaranties with ANB were extinguished as a part of the transaction.

RIG was never profitable for any significant length of time. Between 2006 and 2014, the shareholders made several more capital calls and Wenck contributed to some of them;

however, over the life of RIG, he was $60,264.51 short of contributing his proportional ownership interest in relation to Linhart, Bennett, and Hitzemann, who made capital contributions in accordance with their ownership interests in RIG. In June 2014, RIG sold the gas station and convenience store and the proceeds of the sale were applied toward paying the debt RIG owed to ANB.

On August 14, 2014, ANB sent a letter to the four then-current shareholders stating that the unpaid balance of RIG's two loans, after applying the net sale proceeds of the gas station and convenience store, was $828,479.47. Additionally, ANB advised that there was a prepayment penalty of $15,431.59 which ANB offered to waive if one or more of the guarantors voluntarily paid the balance. ANB stated it would prefer to make arrangements to satisfy the debt with the group rather than pursuing the matter individually; however, ANB also reminded the current shareholders of their maximum guaranteed obligations on RIG's then-current outstanding obligations to ANB and of ANB's right to pursue each individual up to the amount of their full personal guaranteed sums.

On September 18, 2014, ANB sent the four current shareholders a demand letter stating that RIG was in default and owed $848,343.53. On October 31, Wenck individually settled his guaranteed obligation to ANB in the amount of $80,000 by agreeing to make a $1,000 downpayment and by agreeing to make 79 monthly payments of $1,000 thereafter for the following 79 months. Under the terms of the settlement agreement, Wenck would not be fully released from his full guaranteed obligation to ANB until he made all 80 payments. The settlement agreement provided that should Wenck fail to make any required payment obligation, ANB reserved the right to terminate the agreement and pursue Wenck's full guaranteed obligation to ANB. At the time of trial, Wenck believed he had made roughly half of his 80 payments. The relevant portions of the settlement agreement will be set forth in the analysis portion of this opinion.

In November 2014, ANB brought an action against Appellants on the debt. The three shareholders made an initial tender payment of $773,788.09, which Hitzemann testified was made in order to stop interest from accruing. In December 2015, Linhart, Bennett, and Hitzemann settled the remainder of the debt for $44,000. The relevant portions of the settlement agreement will be set forth in the analysis portion of this opinion. The following is the total settlement amount each shareholder paid, or in Wenck's case, was to pay, to ANB:

| **Shareholder** | **Amount Paid to ANB** |
|---|---|
| Linhart | $316,918.42 |
| Bennett | $316,918.42 |
| Hitzemann | $183,951.25 |
| Wenck | $ 80,000.00 |

The record is unclear regarding the exact amount RIG owed to ANB at the time of the settlement agreement between ANB and Appellants or how much debt was contingently forgiven by ANB as part of the final settlement.

In July 2016, Appellants filed a complaint against Wenck seeking contribution from Wenck for allegedly overpaying their allocable share of guaranteed debt to ANB. The complaint also alleged that by failing to make capital contributions in proportion to his ownership interest, Wenck had breached a contract with RIG, and that Wenck owed RIG for his remaining share of the capital contributions.

The court held a bench trial on May 10 and 11, 2018, and found for Wenck on both counts. Regarding contribution, the court found that no party had paid more than their pro rata share of the original debt and that Linhart, Bennett, and Hitzemann's settlement with ANB had not extinguished Wenck's liability to ANB. Regarding the breach of contract claim, the court found that the terms of the alleged oral contract to contribute capital to RIG were not sufficiently specific to show a meeting of the minds and, alternatively, the alleged oral contract was unenforceable because it violated the statute of frauds. Accordingly, the court entered judgment for Wenck.

## ASSIGNMENTS OF ERROR

Appellants' assignments of error, combined and restated, are that the district court erred in denying their claims for breach of contract and for contribution.

## STANDARD OF REVIEW

[1-3] In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. See *Liljestrand v. Dell Enters.*, 287 Neb. 242, 842 N.W.2d 575 (2014). In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Hooper v. Freedom Fin. Group*, 280 Neb. 111, 784 N.W.2d 437 (2010). See, also, *Black v. Brooks*, 285 Neb. 440, 827 N.W.2d 256 (2013). In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Black v. Brooks, supra*.

[4] An appellate court independently reviews questions of law decided by a lower court. *Jacobs Engr. Group v. ConAgra Foods*, 301 Neb. 38, 917 N.W.2d 435 (2018).

## ANALYSIS

### Breach of Contract

Appellants contend that Wenck breached his contract by failing to make all capital contributions to RIG in proportion to his ownership interest in RIG when the other investors made capital contributions to RIG. Appellants' contract claim is based upon a meeting allegedly held in 2006 in which the shareholders discussed RIG's need for cash. Under Appellants' version of the agreement, a contract was formed during that 2006 meeting whereby the parties agreed to make future cash contributions in proportion to their respective ownership interests in RIG whenever the shareholders agreed RIG was

in need of cash. Appellants' theory of the case is based upon a single agreement stemming from a 2006 meeting and is to be distinguished from a claim that, from time to time, Wenck agreed to make specific capital contributions but failed to do so. Conversely, Wenck claims he agreed to a contribution in 2006, made that contribution, and agreed he would participate in future contributions if he was able, but never agreed to make all future cash contributions whenever cash was needed by RIG.

[5,6] To create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract. *Gibbons Ranches v. Bailey*, 289 Neb. 949, 857 N.W.2d 808 (2015). A contract is not formed if the parties contemplate that something remains to be done to establish contractual arrangements or if elements are left for future arrangement. *Id*. It is a fundamental rule that in order to be binding, an agreement must be definite and certain as to the terms and requirements. *MBH, Inc. v. John Otte Oil & Propane*, 15 Neb. App. 341, 727 N.W.2d 238 (2007).

The trial court, in its role as fact finder, determined that there was insufficient evidence adduced to conclude that a contract which obligated the parties to contribute to all future cash calls was formed. As the trial court noted, Appellants did not provide any evidence of certain key terms of the alleged contract, including but not limited to, how the need for capital contributions was to be determined in the future. The question of whether a 2006 oral contract was formed by the parties was a question of fact. In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Black v. Brooks*, 285 Neb. 440, 827 N.W.2d 256 (2013).

Here, Wenck's version of what took place during the 2006 meeting among the parties was certainly reasonable. Wenck testified that in connection with the then-current cash situation involving RIG, he separately consulted with his counsel

and learned that he was not legally obligated to make future cash contributions to RIG and that future contributions were voluntary. Wenck testified he had to borrow the initial $40,000 he invested in RIG and agreed that he would contribute in the future if he was financially able to do so, but that he did not, and could not, agree to make a blanket agreement to make all future cash contributions whenever RIG needed cash. There was likewise a sparse amount of evidence of what a cash call would look like, including but not limited to, whether cash calls were to be dictated by the board or the shareholders, what percentage vote was needed, or other important parameters that would typically be associated with raising cash for a business. The trial court was not clearly wrong in finding that Appellants failed to prove the terms or formula of an alleged 2006 oral contract to perpetually contribute funding to RIG. Thus, this assignment of error fails. Because we find Appellants failed to prove the formation of an alleged oral contract in 2006, we need not address the court's alternate finding that the alleged oral contract was unenforceable because it violated the statute of frauds.

### Contribution

Appellants next argue that the district court erred in finding that they could not recover under their contribution cause of action. In so finding, the court first found that neither Linhart, Bennett, nor Hitzemann paid more than the amount stated in his personal guaranty to ANB in connection with their settlement with ANB and none paid more than their "pro-rata share of the initial guaranteed corporate debt, based on his ownership interest in RIG." The court held that "[b]ecause no individual shareholder paid more than his pro-rata share of the initial guaranteed corporate debt, none may seek contribution from any other." Second, the court found:

> [Appellants] have further failed to prove that [Wenck's] liability to ANB has been extinguished by their payments to ANB. [Wenck] settled his guaranty obligation to

> ANB, and [Wenck] has yet to pay the settlement in full, and should [Wenck] default in his settlement agreement with ANB, there is nothing to stop ANB from seeking [Wenck's] total liability under his personal guaranty to ANB. None of [Wenck's] liability to ANB has been extinguished by any of [Appellants].
>
> The Court therefore finds that [Appellants] have failed to prove their [contribution] cause of action of their Complaint.

Appellants argue that both of the court's findings are erroneous.

The concepts discussed by the court stem from pronouncements by the Nebraska Supreme Court in *Exchange Elevator Company v. Marshall*, 147 Neb. 48, 22 N.W.2d 403 (1946); *Rodehorst v. Gartner*, 266 Neb. 842, 669 N.W.2d 679 (2003); and *Estate of Powell v. Montange*, 277 Neb. 846, 765 N.W.2d 496 (2009). In *Exchange Elevator Company v. Marshall, supra*, the Nebraska Supreme Court outlined the general rule of contribution involving joint debtors. The Supreme Court held:

> The rule likewise is stated: "Unless otherwise agreed, a person who has discharged more than his proportionate share of a duty owed by himself and another as to which, between the two, neither had a prior duty of performance, is entitled to contribution from the other, except where the payor is barred by the wrongful nature of his conduct." And "The rule applies where two or more persons sign a note as makers for their joint benefit . . . ." Restatement of the Law, Restitution, § 81, p. 360. See, also, 10 C. J. S., Bills and Notes, § 37, p. 466. "Every joint debtor who has been compelled to pay more than his share of the common debt has the right of contribution from each of his codebtors." 18 C. J. S., Contribution, § 9, p. 12. See, 13 C. J., Contribution, § 13, p. 826. We have stated the rule as follows: ". . . in equity a surety paying a judgment against himself and his principal is entitled to be subrogated to the rights of the original creditor, and to

have the judgment assigned to him or to some one else for his benefit." Kramer v. Bankers' Surety Co., 90 Neb. 301, 133 N.W. 427.

The rule as to the amount that can be recovered where contribution is sought has been stated by the authorities. "A person who has discharged more than his proportionate share of a duty owed by himself and another, as to which neither of the two had a prior duty of performance, and who is entitled to contribution from the other under the rules stated in sections 81-84, is entitled to reimbursement, limited (a) to the proportionate amount of his net outlay properly expended . . . . A surety or other co-obligor becoming such without the fault of a co-obligor is entitled to no more by way of contribution than will put him on an equality of loss with others in view of his share of the obligation undertaken. This is true even though he obtains an assignment from the creditor . . . . In the first case he may be entitled to proportionate reimbursement only to the extent that payment to the creditor diminishes the debt of the other . . . ." Restatement of the Law, Restitution, § 85, p. 375. "A party who has made a partial payment is not entitled to contribution, even though the others have paid nothing, until his own payment exceeds his proportionate share of the whole debt, and he is then entitled to collect a proportionate share only of the excess, from each party, the proportionate share in each case being determined by dividing the total sum in question among the number of solvent parties within the jurisdiction of the court." 5 Pomeroy, Equity Jurisprudence (2 ed.), § 2341, p. 5178. "This right of contribution is one which belongs to one of two or more joint obligors. It is a right which grows out of the relation of the parties to the contract. It is a right given to protect one of the joint obligors in the event he has been compelled to discharge the whole debt, or more than his proportionate part of the

> whole debt. The right of contribution is an individual and personal right. It grows out of what the individual himself does. It is a right which accrues to one or more individuals (out of the whole number bound) who pay the debt for which they are all bound. Each one paying is entitled to recover from the others the amount which he has paid in excess of his own proportionate part. His right to recover is dependent upon the excess which he himself pays. In other words, the act is individual, and the right of contribution is individual. The right of contribution rests upon an implied contract to repay, which contract the law itself implies from the relationship of the parties." 2 Story, Equity Jurisprudence (14 ed.), § 648, p. 63.

*Exchange Elevator Co. v. Marshall*, 147 Neb. 48, 60-62, 22 N.W.2d 403, 410-11 (1946).

[7] In *Rodehorst v. Gartner*, 266 Neb. 842, 848-50, 669 N.W.2d 679, 685 (2003), the Nebraska Supreme Court explained:

> A guaranty is a collateral undertaking by one person to answer for the payment of a debt or the performance of some contract or duty in case of the default of another person who is liable for such payment or performance in the first instance. *Northern Bank v. Dowd, supra*; *Chiles, Heider & Co. v. Pawnee Meadows*, 217 Neb. 315, 350 N.W.2d 1 (1984). . . .
>
> . . . In *Mandolfo v. Chudy, supra*, we held that under *Exchange Elevator Company v. Marshall*, 147 Neb. 48, 22 N.W.2d 403 (1946), a guarantor of a promissory note who had made payment could seek contribution from a coguarantor for that party's proportionate share of the obligation.

[8,9] In further defining the right of contribution, albeit in the context of joint tort-feasors, the Nebraska Supreme Court stated in *Estate of Powell v. Montange*, 277 Neb. 846, 851, 765 N.W.2d 496, 500-01 (2009):

> Although this court has recognized a right of contribution among joint tort-feasors who share a common liability, we have not specifically addressed whether a tort-feasor who enters into a settlement with the claimant can recover contribution from another tort-feasor whose liability for the injury or wrongful death is not extinguished by the settlement.

Noting that the Nebraska Legislature had not established rules of contribution among joint tort-feasors, the court in *Estate of Powell* analyzed provisions from the Uniform Contribution Among Tortfeasors Act (UCATA), 12 U.L.A. § 1 et seq. (2008), or versions of the UCATA adopted in a number of states. In doing so, the court in *Estate of Powell* stated that in addition to the UCATA corresponding with the Nebraska Supreme Court's general recognition of a right to contribution,

> the UCATA also places limits on the right of contribution. Only a tort-feasor who has paid more than his or her pro rata share of the common liability may seek contribution, and recovery is limited to the amount paid in excess of his or her pro rata share. No tort-feasor is compelled to make contribution beyond his or her own pro rata share of the entire liability. UCATA § 1(b), 12 U.L.A. 201. This also corresponds with our requirement set forth in *Royal Indemnity*.
>
> The right of contribution is not available in all instances or circumstances. The UCATA places restrictions on contribution if a settlement has been entered into. "A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable." UCATA § 1(d), 12 U.L.A. at 202.

277 Neb. at 851-52, 765 N.W.2d at 501. After reviewing this and other authorities, the court ultimately held:

> We now hold that in order to recover on a claim for contribution among joint tort-feasors, the following

> elements must be shown: (1) There must be a common liability among the party seeking contribution and the parties from whom contribution is sought; (2) the party seeking contribution must have paid more than its pro rata share of the common liability; (3) the party seeking contribution must have extinguished the liability of the parties from whom contribution is sought; and (4) if such liability was extinguished by settlement, the amount paid in settlement must be reasonable.

*Id.* at 855-56, 765 N.W.2d at 504.

Although the court in *Estate of Powell* defined these elements in connection with claims of contribution among joint tort-feasors, the principles apply equally to claims of contribution among codebtors. But applying those principles here has led to confusion among the litigants. Although both Wenck and Appellants recognize that a party cannot pursue contribution until he or she has paid more than his or her "pro rata share of the common liability," there is disagreement on how that applies in the context of coguarantors. Where, as here, the coguarantors guaranteed a specific amount of the original underlying debt, the questions become: What is their pro rata share of the common liability? Is their pro rata share a percentage of their personally guaranteed amount in relation to the total personally guaranteed debt of all guarantors? Is their pro rata share their percentage ownership in the corporation? Is the "common liability" the original debt, the debt obligation remaining on the original debt, or the settlement amount when the common liability is extinguished by settlement? How are these issues to be resolved when the parties do not have a separate agreement allocating these rights and obligations among them? The parties spend a significant amount of time in their briefs arguing for different application of these principles; however, we need not address those arguments here, because we find that on this record, the parties seeking contribution failed to extinguish the liability of Wenck, the party from whom contribution was sought.

The parties' original guaranties were for the following amounts:

| | Original $1,421,610 Debt: Amount Personally Guaranteed | $50,000 Line of Credit: Amount Personally Guaranteed | Percent in Relation to Guarantors | Percent in Relation to Original Debt |
|---|---|---|---|---|
| Linhart | $ 533,103.75 | $18,750 | 30% | 37.5% |
| Bennett | 533,103.75 | 18,750 | 30% | 37.5% |
| Strong | 355,402.50 | 12,500 | 20% | 25.0% |
| Hitzemann | 177,701.25 | 6,250 | 10% | 12.5% |
| Wenck | 177,701.25 | 6,250 | 10% | 12.5% |
| Amount Guaranteed | $1,777,012.50 | $62,500 | 100% | 125.0% |

In formulating this summary, we first note that Strong's personal guaranty was not made part of the record, and we list his personally guaranteed dollar amount based upon unrefuted oral testimony that he personally guaranteed 125 percent of his 20-percent interest in relation to the original corporate debt of $1,421,610 and the line of credit of $50,000. Accordingly, although each original investor guaranteed a higher percentage interest in the original corporate debt and the line of credit than their ownership percentage interest in RIG, their personal guaranties in relation to each other were the same as their ownership interest in RIG. We next note that the record is devoid of what happened to Strong's guaranty when he sold his ownership interest to Hitzemann and Wenck in 2006. Although Hitzemann and Wenck each purchased half of Strong's 20-percent ownership interest in RIG, neither assumed Strong's debt obligations, and the record is completely silent as to whether Strong remained a guarantor to ANB following the sale of his ownership interest to Hitzemann and Wenck.

Following the sale of Strong's ownership interest, and after the business was sold and the proceeds applied to the outstanding corporate debt, there remained a deficiency on the corporate debt which ANB desired to pursue. In August 2014,

ANB sent a letter to Linhart, Bennett, Hitzemann, and Wenck, but not Strong, stating that the then-unpaid balance of RIG's two loans, after application of the net sale proceeds of the collateral, was $828,479.47, which sum did not include a prepayment penalty of $15,431.59. In the letter, ANB stated it would prefer to make arrangements to satisfy the debt as a group rather than pursuing the matter individually, but the letter reminded the group of their maximum guaranteed individual amounts and ANB's right to pursue each individual up to the amount of his full personal guaranty.

In September 2014, the group received a demand letter requesting the then-outstanding balance of $848,343.53. Subsequent to that letter, Wenck settled with ANB for the sum of $80,000 subject to a payment plan to be discussed below.

On November 14, 2014, ANB filed a lawsuit against Appellants for $871,334. Linhart, Bennett, and Hitzemann made a tender payment of $773,788.09 in order to reduce accruing interest. One year later, in December 2015, Appellants settled the lawsuit for another $44,000, for a total of $817,778.09. Between the two payments, Linhart and Bennett each contributed $316,918.42 and Hitzemann contributed $183,951.25 toward the settlement. In July 2016, Linhart, Bennett, and Hitzemann filed a complaint against Wenck seeking contribution from Wenck in the amount of $99,557.61.

Critical to our analysis here are the terms of ANB's settlements with Wenck and Appellants. Under the terms of ANB's settlement with Wenck, Wenck was to pay $1,000 upon execution of the agreement and make 79 consecutive monthly payments of $1,000 each, commencing December 1, 2014. Wenck's $80,000 settlement was less than his guaranteed sum to ANB of $183,951. Notably, the settlement agreement stated:

> 3. **Release of Wenck**. Upon receipt of the total sum of $80,000.00, Lender will fully and finally release, acquit and forever discharge Wenck from all claims, liabilities, damages, actions, causes of actions of any kind and of

every nature whatsoever which Wenck ever had, or may have, whether known or unknown, regarding any indebtedness now owing by Wenck to Lender.

4. **Default procedures**.

. . . .

b. Consequences of Default. In the event that Wenck defaults in payment of the monthly installments as provided herein and fails to timely cure after notice any such defaults, Lender may in its sole discretion terminate this Agreement without further notice to Wenck. Upon termination, the obligations of Wenck on his guarantees of the RIG loans shall be fully reinstated; and Lender shall be entitled to immediately pursue recovery from Wenck by all lawful means, including an action at law on his Commercial Guaranty(s) of the loans of RIG, for the entire remaining outstanding balances unpaid on the RIG Loans, limited however to the extent of Wenck's aggregate guarantee liabilityof [sic] $183,951, as reduced by payments received by Lender under the terms of this Agreement.

As such, ANB reserved its right to pursue any deficiency in RIG's loan obligation up to Wenck's full guaranteed amount if he defaulted on any payment obligation.

In its December 2015 settlement agreement with Appellants, ANB further stated:

4. Upon timely receipt of payment of the Settlement Amount of $44,000.00 from the Majority Guarantors, the Bank, the Ralston Group, and Majority Guarantors shall execute a stipulated motion to dismiss the action filed in the District Court of Douglas County, Nebraska, and entitled, *American National Bank vs. Ralston Investment Group, Inc., Alan D. Bennett, James B. Linhart, and Kevin J. Hitzemann* (Case No. CI 14-8883), in the following manner:

a) All claims asserted by the Bank in its Second Amended Complaint against the Majority Guarantors,

> together with all Counterclaims asserted by the Majority Guarantors shall be dismissed with prejudice; and
>
> b) All claims asserted by the Bank in its Second Amended Complaint against the Ralston Group shall be dismissed without prejudice, and the Bank shall retain the original Promissory Notes of the Ralston Group. The Bank expressly reserves and preserves all claims that it has against shareholder David Wenck under the Wenck Agreement and Commercial Guaranty of the Ralston Group Loans executed and delivered to the Bank by David Wenck.

The settlement agreement does not expressly state how much of the outstanding indebtedness was being released as part of the $44,000 settlement between ANB and Appellants, and it is not possible to calculate the exact number from the record before this court. That said, whatever the number, ANB expressed its right in both settlement agreements to pursue that contingently forgiven sum against Wenck up to the full amount of his guaranty if he ever defaulted on any of his payment obligations. At the time of trial, Wenck had completed only about half of his payments under the terms of his settlement agreement. Taken together, it is clear that Appellants, the parties seeking contribution, failed to extinguish the liability of the party from whom contribution was sought. Thus, no matter how the parties' pro rata share of the common liability is calculated, Appellants failed to establish a critical element to recover on their claim of contribution. Following their settlement with Appellants, ANB reserved the right to pursue a claim against Wenck up to the full amount of his personal guaranty, and Wenck was not obligated to contribute beyond his pro rata share of the entire liability which remained possible here with ANB reserving its rights against him. See *Estate of Powell v. Montange*, 277 Neb. 846, 765 N.W.2d 496 (2009). Because Appellants failed to extinguish the liability of Wenck to ANB with their settlement, we hold the court did not err in denying Appellants their contribution claim.

## CONCLUSION

We hold that the district court was not clearly wrong in finding that there was no oral contract formed among the parties requiring them to fund all future capital contributions to RIG. We further hold that the district court did not err in finding that Appellants have no right of contribution against Wenck, because they did not extinguish Wenck's liability to ANB in connection with their settlement. Both assignments of error fail, and we affirm the order of the district court.

Affirmed.

# In re Trust Created by Henry F. Augustin, deceased. Scott Augustin, appellee, v. Kirtus Augustin, Trustee, appellant, and Rocky Augustin, appellee.

# In re Trust Created by Norval H. Augustin, deceased. Scott Augustin, appellee, v. Rocky Augustin and Kirtus Augustin, individually and as Cotrustees, appellants.

# In re Trust Created by Henry F. Augustin, deceased. Kirtus Augustin, Trustee, appellant, and Rocky Augustin, appellee, v. Scott Augustin, appellee.

# In re Trusts Created by Elnora Augustin and Norval H. Augustin, deceased. Kirtus Augustin and Rocky Augustin, individually and as Cotrustees, appellants, v. Scott Augustin, individually and as Cotrustee, appellee.

935 N.W.2d 493

Filed September 24, 2019. Nos. A-16-1182 through A-16-1185.

1. **Trusts: Equity: Appeal and Error.** Absent an equity question, an appellate court reviews trust administration matters for error appearing on the record; but where an equity question is presented, appellate review of that issue is de novo 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. **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 concerning the matters at issue.
4. **Wills: Trusts.** The interpretation of the words in a will or a trust presents a question of law.
5. **Trusts.** Removal of a trustee under the Nebraska Uniform Trust Code is a special proceeding and affects a substantial right.
6. **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. Indispensable parties are parties whose interest is such that a final decree cannot be entered without affecting them or that termination of controversy in their absence would be inconsistent with equity.
7. **Parties.** The inclusion of a necessary party is within the trial court's discretion. However, there is no discretion as to the inclusion of an indispensable party.
8. **Parties: Words and Phrases.** All persons interested in the contract or property involved in an action are necessary parties, whereas all persons whose interests therein may be affected by a decree in equity are indispensable parties.
9. **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.
10. **Trusts: Jurisdiction: Parties.** A court does not have subject matter jurisdiction over a request to terminate a trust or remove a trustee in the absence of an indispensable party.
11. **Equity.** Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue.
12. **Trusts.** A trust terminates at the time at which it becomes the duty of the trustee to wind up administration of the trust, and not at the time when that winding up period is actually accomplished.
13. **Trusts: Time.** The Nebraska Uniform Trust Code provides statutory options for a trustee to seek relief during the winding up period following the expiration or termination of a trust by its own terms.
14. **Trusts.** Regardless of how a trust may terminate, Neb. Rev. Stat. § 30-3836(b) (Reissue 2016) authorizes a trustee or beneficiary to

commence a proceeding to approve or disapprove a proposed modification or termination under Neb. Rev. Stat. §§ 30-3837 to 30-3842 (Reissue 2016).

15. **Trusts: Courts: Equity: Jurisdiction.** County courts may apply equitable principles to matters within probate jurisdiction, including trusts, and such courts have full power to make orders, judgments, and decrees and to take all other actions necessary and proper to administer justice in the matters which come before them.
16. **Trusts: Time.** The period for winding up the trust is the period after the time for termination of the trust has arrived and before the trust is terminated by the distribution of the trust property.
17. **Trusts: Intent.** The objective of the rule allowing judicial modification or deviation and the intended consequences of its application are not to disregard the intention of a settlor. The objective is to give effect to what the settlor's intent probably would have been had the circumstances in question been anticipated.
18. **Trusts: Courts.** The Nebraska Uniform Trust Code allows a beneficiary or trustee to petition a county court to consider modification or termination of a trust which has expired or terminated pursuant to its own terms but remains in the winding up period, including the possible modification of or deviation from dispositive terms.
19. **Trusts.** When a trustee unduly delays distributions from a trust, the trustee has breached a duty of care owed to a beneficiary, and the violation of that duty is a breach of trust.
20. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
21. **Trusts.** A trust which is revocable when made remains revocable during the settlor's lifetime; however, a revocable trust necessarily becomes irrevocable upon the settlor's death.
22. **Trusts: Courts.** Neb. Rev. Stat. § 30-3837 (Reissue 2016) authorizes a court to modify a trust without the consent of all beneficiaries, but it can only do so if the modification is not inconsistent with a material purpose of the trust and any nonconsenting beneficiary would be adequately protected.
23. **Trusts: Courts: Equity.** Neb. Rev. Stat. § 30-3838 (Reissue 2016) broadens the court's ability to apply equitable deviation to modify a trust.
24. **Trusts: Courts: Equity: Intent.** The application of equitable deviation allows a court to modify the dispositive provisions of a trust as well

as its administrative terms. The purpose of equitable deviation is not to disregard the settlor's intent but to modify inopportune details to effectuate better the settlor's broader purpose.

25. **Trusts: Intent.** Under the equitable deviation doctrine, the objective is not to disregard the intention of the settlor, but to give effect to what the settlor's intent probably would have been had the circumstances in question been anticipated.

Appeals from the County Court for Polk County: Stephen R.W. Twiss, Judge. Affirmed in part, vacated in part, and in part reversed and remanded for further proceedings.

Richard A. DeWitt and David J. Skalka, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C., for appellants.

Jacqueline M. Tessendorf and Ryan G. Tessendorf, of Tessendorf and Tessendorf, P.C., for appellee Scott Augustin.

Riedmann and Bishop, Judges.

Bishop, Judge.

## I. INTRODUCTION

Brothers Kirtus Augustin and Rocky Augustin were opposing parties to their younger brother, Scott Augustin, in five separate lawsuits filed in the county court for Polk County. Scott was the initiator of two actions in which he sought to terminate family trusts, remove the trustees, order an accounting, and have certain farmland distributed in accordance with specific language in the trusts and their father's will. Kirtus and Rocky were the initiators of two actions in which they sought to modify the trusts based on an alleged agreement between the brothers to preserve the farmland in the trusts or in a business entity for another 10 years so they could continue their joint farming operation or, alternatively, to distribute the farmland in separate parcels in fee simple title rather than as tenants in common. They filed a separate action seeking amounts due from Scott for his share of costs associated with the joint farming operation.

Kirtus and Rocky appeal from the county court's decision as to four of those actions, in which the county court concluded in each case that (1) the trusts had terminated by their own terms upon the death of the brothers' father; (2) there was insufficient evidence to modify the trusts, and further, the brothers' sister, Pamela Shorney (Pamela), was a necessary party for any modification action; (3) Scott did not file his actions with unclean hands; (4) there was no agreement to continue the farming operation another 10 years; (5) there was a breach of trust by the trustees; (6) it was necessary to remove the trustees, order an accounting, and appoint a successor trustee; and (7) statutory language permitted the trustees to allocate the property other than as tenants in common, but there was insufficient evidence to approve the division of the disputed farmland as proposed by Kirtus and Rocky.

The five lawsuits were consolidated for trial, and the four appeals have been consolidated for disposition in this court. We affirm in part, vacate in part, and in part reverse and remand for further proceedings.

## II. BACKGROUND

Kirtus, Rocky, and Scott farmed with their father, Norval H. Augustin, until his death in April 2010, and they maintained a joint farming operation for a period of time thereafter. Norval's father, Henry F. Augustin, died in 1989, and Norval's wife, Elnora Augustin, died in 2001. In addition to their own separate properties, the brothers jointly farmed over 500 acres of land held in the trusts established by their grandfather and their parents. Scott, the youngest of the brothers, wanted to farm independently of his brothers following their father's death; he wanted the farmland that had been held in trust for the three brothers to be distributed so that he could do that. However, Kirtus and Rocky wanted to continue the joint farming operation and leave the real property at issue in the trusts or hold it in a separate business entity for another 10 years. Alternatively, rather than distribute the farmland to the

brothers as tenants in common as indicated in the trusts and by appointment in their father's will, they wanted to distribute the disputed farmland in separate parcels titled in fee simple and equitably allocate those parcels between them. In July 2015, after further problems developed between the brothers, the underlying lawsuits were filed. Their sister, Pamela, was not named as a party in any of the litigation, nor did she participate in the consolidated trial. Kirtus, Rocky, Scott, and Pamela will be collectively referred to as "the siblings."

### 1. Trusts

The trusts involved in the present appeals are (1) the grandfather's trust, titled the "Henry F. Augustin Revocable Trust (Amended and Restated)," executed on January 7, 1980, and amended on December 30, 1981, and June 7, 1987 (Henry Trust); (2) the father's trust, titled the "Norval H. Augustin Amended and Restated Revocable Trust," executed on January 27, 1993, and amended on March 8, 1995, and August 25, 1999 (Norval Trust); and the mother's trust, titled the "Elnora Augustin Amended and Restated Revocable Trust," dated January 27, 1993 (Elnora Trust).

#### (a) Henry Trust

Kirtus is the sole trustee of the Henry Trust; the siblings are beneficiaries of this trust. The real estate in the Henry Trust relevant here includes an 80-acre parcel (Henry 80) and a 160-acre parcel. The Henry Trust authorized Norval to exercise a limited power of appointment with regard to these properties, which Norval did through his "Last Will and Testament of Norval H. Augustin" and his "First Codicil to Will of Norval H. Augustin" (First Codicil). In the First Codicil, Norval "appoint[ed] the entire interest . . . in the real property legally described as [the Henry 80] in equal shares, outright and free of trust, to my three sons, KIRTUS, ROCKY and SCOTT . . . , or their issue per stirpes." Norval then appointed the 160-acre parcel to Kirtus and Pamela as trustees, with the property to be held for Pamela's benefit during her

lifetime, and upon her death, the land would be transferred in equal shares to her then-living issue. Norval further authorized Kirtus and Pamela to distribute the 160-acre property outright and free of trust to Pamela if they, as trustees of that parcel, determined the trust was no longer necessary, appropriate, or in Pamela's best interests, and "the trust shall thereupon terminate." The 160-acre parcel was not at issue in the underlying proceedings, and only the Henry 80 in which the brothers were given equal shares, "outright and free of trust," was at issue. The Henry 80 is immediately south and adjacent to another 80-acre parcel contained in the Norval Trust and the Elnora Trust. The parties referred to the Henry 80 and the 80 acres immediately north of it as the "Homeplace"; however, our reference to the Homeplace will mean the 80 acres contained only in the Norval Trust and the Elnora Trust.

(b) Norval Trust and Elnora Trust

The Norval Trust and the Elnora Trust were mirror trusts, meaning the language in the trusts was identical except for one referencing Norval and the other referencing Elnora. Each trust contained an undivided one-half interest in the real property at issue here, separate from the Henry 80. Upon the death of the first spouse (in this case, Elnora), two trusts were created for the surviving spouse (Norval): "The Marital Trust" and "The Family Trust." The Marital Trust was to be composed of cash, securities, and other property having a value equal to the maximum marital deduction, but adjustable for other tax purposes. The Family Trust was to consist of the balance of the trust estate after assets were selected for The Marital Trust. The surviving spouse was to receive all the net income from The Marital Trust. The surviving spouse also had the authority to reach the principal in the trust, as well as withdraw all or part of the principal in The Marital Trust. Upon the surviving spouse's death, the entire remaining principal of The Marital Trust was to be paid over, conveyed, and distributed

in the manner the surviving spouse may have appointed in his or her will. If the power of appointment was not exercised, then the entire remaining principal of The Marital Trust was to be used to first pay taxes from the increased value resulting from the inclusion of The Marital Estate assets in the surviving spouse's estate, and the balance was to be added to and become part of The Family Trust; it was to be administered as if it had been an original part of The Family Trust. The Family Trust was to be held for the benefit of the surviving spouse and the children primarily for medical care, education, support, and maintenance. Upon the surviving spouse's death, the entire remaining principal of The Family Trust was to be paid over, conveyed, and distributed in accordance with the surviving spouse's power of appointment in his or her will, and any remaining property was to be distributed as set forth thereafter, which we address below. The three brothers were named cotrustees of the trusts; and according to the trusts, "the vote of the Trustees for any action . . . must be by majority action of the Trustees." The siblings are all remainder beneficiaries under the trusts, but only the brothers are beneficiaries of the farmland at issue.

The parties referred to the disputed farmland as "Big Jisa," "Little Jisa," "Homeplace," and "Staroscik." These four properties are all located in Polk County, Nebraska, on two sections of land (Section 6 and Section 7). Section 6 is directly north of Section 7. Big Jisa consists of 160 acres in the northwest quarter section of Section 6. Little Jisa consists of 80 acres immediately south of Big Jisa. Staroscik consists of the northwest quarter (160 acres) of Section 7; Kirtus lives in the southwest corner of Staroscik. The Homeplace consists of 80 acres located in the north half of the southeast quarter of Section 7. As previously noted, the Henry 80 is immediately south of the Homeplace. And although not at issue here, there are another 80 acres immediately north of the Homeplace owned by RKS Farms, Inc., a company owned by the brothers for the purpose of running their joint farming operation.

The Norval Trust and the Elnora Trust provided each of the siblings with specific parcels of real property: Kirtus received a small tract of land on Staroscik, Rocky received a small tract of land on Little Jisa, and Scott received land separate from the trust ground at issue which, according to Scott, was "roughly a mile and a half" south of the Homeplace. Pamela was also granted an acre of land. The trusts then directed that "[a]ll other farmland held by the Trust shall be distributed to the three sons of the Grantor in equal shares as tenants in common." Each trust then states, "The remainder of the Trust property shall be distributed in equal shares to the Grantor's children, outright and free of trust." There is nothing in the record to indicate that prior to his death, Norval exercised any power of appointment granted to him with regard to the Elnora Trust. Therefore, the terms of the Elnora Trust and the terms of the Norval Trust control the distribution of the disputed farmland.

### 2. July 2011 Meeting

On June 15, 2011, attorney Richard A. DeWitt sent the brothers a letter regarding "Norval Augustin Trust Administration." The letter described the remaining steps to finalize the inheritance tax process and inquired about the division of personal property. DeWitt indicated that "[u]pon completion of these items, administration of the Trust can be completed and the Trust assets (basically farmland) can be distributed." The letter goes on to state, "As written, the Trust provides for distribution of farmland to each of you in undivided one-third interests." DeWitt recommended either the brothers divide the farmland into separate parcels such that each brother would own 100 percent of his parcel or, alternatively, the brothers could form a limited liability company with equal interests and the farmland could be transferred into that company. DeWitt reminded the brothers that as trustees, they each had an equal say in the administration of the trust, and that decisions could be made by a "two-thirds majority vote."

The brothers and their wives met at DeWitt's office on July 12, 2011. According to Scott, after some initial small talk about "dishes and stuff," Scott brought up getting the land out of the trust and splitting it up, and "they immediately got hostile about that and we were arguing about that back and forth." Scott claimed that Rocky "slid . . . over this LLC, which we knew nothing about," and Rocky told them they had to sign it. Scott said he told them he and his wife would not sign it but would take it home and take it to their lawyer to look over. Meanwhile, they continued to talk about "the LLC" and what they wanted in it. Scott acknowledged that his brothers expressed wanting to continue farming the trust ground for 10 years, but at no time did Scott agree to farm together for another 10 years. Kirtus testified that Scott and Scott's wife said they wanted to farm for 5 more years and then retire; Kirtus told them he wanted to farm for 20 years. Kirtus proposed that they go with a 10-year agreement, and he testified that he believed Scott agreed with farming 10 years before splitting up the trust ground. According to Kirtus, "We was going to continue farming for ten more years and then after the ten years, we was going to divide the ground up and the machinery. That is what I believed when we walked out of that door." Rocky testified that "Kirt[us] stood up and he come up with an idea of wanting to farm for 20 years, but that was too much. So, we come up with a plan of doing it for ten years. And everyone in there did agree to this." Both of the older brothers acknowledged that there was nothing in writing about a 10-year agreement.

According to DeWitt, there were two areas of discussion at the July 2011 meeting in his office: finalizing the division of tangible personal property and "what [were] we going to do with the land going forward." DeWitt recalled that Scott expressed a desire to farm independently and farm with his son. Scott wanted to have "individual ownership of his share of the farmland." Kirtus and Rocky were concerned that doing that would "force them out of farming, because there wouldn't

be economical units left if there was a forced breakup at that time." There was then discussion of "when would they be ready to retire." Kirtus said in maybe 20 years, and "Scott said that's too long. And then ten years was suggested." DeWitt recalled that Scott said "he could live with ten" and that "Rocky and Kirtus said they could live with ten." DeWitt believed the three brothers had reached an agreement to continue farming for 10 years and then divide it up. DeWitt stated he had not yet prepared a limited liability company operating agreement for that meeting; his letter to the brothers, which enclosed a draft operating agreement, was dated December 7, 2011. That letter referred to special provisions they had discussed, including a commitment to retain ownership of the farmland for 10 years and a commitment at the end of 10 years to sell the farmland. DeWitt thought that Kirtus and Rocky had signed the operating agreement, but that Scott had not.

Following the July 2011 meeting at DeWitt's office, Scott and his wife talked about buying their own farm equipment, and later "that fall," Scott spent approximately $900,000 for his own farm equipment. Scott started farming with his son in 2012. With the exception of 1 year, Scott continued to pay his one-third share of input expenses for farming the trust property, and he received his one-third share of the grain harvested. Scott, however, discontinued paying his one-third share of the annual personal property and real estate taxes for the trust property after 2011.

### 3. Lawsuits

As conflict between the brothers escalated, Scott filed a petition pursuant to the Nebraska Uniform Trust Code (NUTC), Neb. Rev. Stat. §§ 30-3801 to 30-38,110 (Reissue 2016 & Cum. Supp. 2018), in July 2015 to terminate the Henry Trust (cases Nos. PR15-18 in county court and A-16-1182 on appeal). He claimed that he had made repeated demands to terminate the trust, to distribute trust assets, and for a full accounting. He alleged the trust had not been administered

effectively, including the failure to distribute the Henry 80 to the beneficiaries. Scott requested that "the Co-Trustees" be removed (only Kirtus was trustee) and that a successor trustee be appointed. He asked for the distribution of all trust assets, a full accounting, the termination of the trust, and for attorney fees and costs.

Scott also filed a petition to terminate the Norval Trust (cases Nos. PR15-19 in county court and A-16-1183 on appeal), which was subsequently amended to include the Elnora Trust. His allegations and requests for relief were similar to those claimed in the Henry Trust action.

In October 2015, Kirtus and Rocky filed a petition to modify the Henry Trust (cases Nos. PR15-25 in county court and A-16-1184 on appeal). The petition acknowledged that Norval appointed the entire interest in the Henry 80 in equal shares, outright and free of trust, to the brothers. However, the petition requested that the court enforce an "agreement and partnership" between the brothers related to this property, and to modify the trust to continue to own and administer the property until December 31, 2021, or to transfer ownership of the property "to the parties' partnership to be held and not further transferred until December 31, 2021." Alternatively, the petition sought the court's authorization to allow Kirtus, as trustee, to distribute to Scott "sole fee simple title to a portion of the [Henry 80] having a value equal to approximately one-third of the value of the entirety . . . in full satisfaction of his beneficial interest in the Trust's real estate."

Kirtus and Rocky also filed a petition to modify or declare rights to the Norval Trust and the Elnora Trust (cases Nos. PR15-26 in county court and A-16-1185 on appeal). This petition contained allegations similar to those contained in their Henry Trust action, and also sought modification of the trusts to hold the properties in these trusts or transfer ownership to "the parties' partnership" until December 31, 2021. Alternatively, it sought an order declaring that the terms of the trusts authorized the trustees to distribute sole fee simple

title of the real estate to individual beneficiaries, as well as an order permitting the trustees to do so.

Also in October 2015, Kirtus, Rocky, and RKS Farms filed a complaint in the county court against Scott (case No. CI15-156) alleging that the brothers were "parties to an oral cash-rent year-to-year farm lease" with the Norval Trust and the Elnora Trust, which requires the brothers to annually pay the trusts "an amount equal to the real estate taxes and expenses" related to the trusts. At the time of the complaint, it was alleged that Scott had failed to pay to the trusts $31,895.30, which was his one-third share of the real estate taxes owed to the trusts that he stopped paying in 2011. The complaint further requested that the court declare void a notice to terminate that Scott had delivered to Kirtus, Rocky, and RKS Farms. The notice was given "for the purpose of terminating" their "tenancy" and stated that they were to "vacate and surrender possession" to Scott. The properties listed included lands held by the trusts and RKS Farms.

### 4. Relationship Problems

Scott testified at trial that he asked his brothers if they could split up the trust ground after their father passed away because he wanted to make his own decisions on how to farm it and make improvements so he could "make more money with the same piece of ground." When he asked Rocky about it, Rocky would get "hostile" toward Scott and verbally abuse him until Scott "back[ed] off and let it go."

Scott paid the cash rent due for the trust ground in 2010. The rent consisted of whatever was due for real estate and personal property taxes. Scott did not pay the 2011 or subsequent years' rent because it was "the only leverage [he] had" to "break the land up." He was concerned that if he paid the rent, his brothers would "use it against [him]" to suggest he was "going along with all this all the time." But Scott did not like "the way this [was] working." Scott was willing to pay the rent as soon as the ground was split up. Funds for his

share of the 2011 through 2014 taxes had been placed into his attorney's trust account. On cross-examination, Scott acknowledged that the trust had to pay his share of the rent and that if it had not, the taxes would have become delinquent, the county treasurer would have charged 14-percent interest, and the land could have gone into foreclosure. However, Scott's position was that "there was enough money in the trust to more than take care of that." According to Scott, as of October 6, 2015, the Norval Trust bank account balance was $142,727. Scott stated that he and his siblings were all beneficiaries of that account and therefore were each entitled to 25 percent of that balance. Scott testified that he asked either Kirtus or Rocky for his share of the money in that account, but he was never paid his share.

In 2015, the year the lawsuits were filed, further issues arose between the parties. Kirtus explained at trial that RKS Farms is a corporation owned by the three brothers, started back in 1977. They would run all the expenses of their farming operation through RKS Farms, which would then pay the bills and then bill each brother. Scott's wife had been preparing grain settlement spreadsheets for RKS Farms from 2007 until the end of 2014, after which the "books disappeared." Kirtus testified that he and Rocky took that responsibility away from Scott's wife in January 2015 because she would not give them the information they needed, such as "what was in the bins." She would take all the receipts home and "we'd never see them again." Kirtus said he made sure Scott still received financial and accounting information for the joint farming operation and RKS Farms; he gave him a copy of all the receipts for RKS Farms, bank statements, and receipts and bills every month. Kirtus acknowledged that in January 2015, he went into Norval's house and "removed all of the books and the computer"; he had not notified Scott and his wife that he had "a problem with how they were keeping the books." Kirtus testified that he and Scott "always got along," but that "Scott and Rock[y] had issues."

On another occasion, Scott was unable to get into the shop located on the Homeplace. The locks on the shop, house, and fuel pump had been changed, as well as a padlock on a shed they were renting. Scott was unable to get his "equipment or machinery out of those shops." According to Scott, his brothers "always made sure that they had something in the way or they had the keys." They removed the keys out of the tractors and pickups; Scott "never had access to the equipment anymore" and could no longer access the fuel barrels on the Homeplace. In the summer of 2015, when Scott tried to get grain from the grain bins located on trust property, his brothers refused to give him the keys to his own truck and the auger that Scott needed to haul his grain out. It was at this time that, according to Scott, Rocky tore Scott's shirt and "slapped [him] around." Kirtus and Rocky denied there was ever a physical altercation between Rocky and Scott. After DeWitt made the brothers give Scott keys to the house again later in the summer, the brothers changed the security code on the shed so that when Scott opened the door, an alarm would go off. Kirtus testified that they changed the security code so that if something came up missing in the shop, they "wouldn't go blame Scott for it." Also, according to Kirtus, the security code was not on during the day, just in the evenings. Scott testified that he did not think his father would have expected him "to put up with this," because "[l]ife is just too short."

Kirtus acknowledged changing the lock on the Homeplace shop, but claimed Scott could have asked for a new key but did not. He agreed the shop was trust property. He also acknowledged changing the security code; he did not provide Scott the new code because "he never asked." Kirtus also acknowledged changing the locks on the fuel barrels, which were also owned by the trust. He claimed, that like the shop lock, the lock was old and needed to be changed. He agreed that he did not give Scott the keys to the locks until he was told by his attorney to do so, but claimed that if Scott had asked, he would have given the keys to him.

Scott acknowledged that in August 2015, he unilaterally closed the RKS Farms checking account. He explained that he did this because of a $90,000 "rolling loan" the brothers could get through the account and that Scott would have no control over such a loan. Scott did not notify his brothers in advance that he was closing the account because he did not want to take the risk of them borrowing $90,000, with Scott then being liable for it. That same month, Scott also delivered a "Notice of Termination" to his brothers and RKS Farms. It directed them to vacate and surrender possession to the various trust properties "at the end of the lease term," and it stated that the notice was being given to them "for the purpose of terminating [their] tenancy." Scott acknowledged receiving his share of the grain and not paying for his share of rent and expenses, but he claimed this was necessary because if he paid the rent he owed, that would somehow be used against him.

### 5. Expert Witnesses

#### (a) Jeffrey Pirruccello

Jeffrey Pirruccello, a tax lawyer and shareholder with an Omaha, Nebraska, law firm, testified on Scott's behalf. He holds an "inactive CPA certificate," and his primary practice areas include tax, as well as estate planning and estate administration. At the time of trial, he had been practicing law for almost 40 years. Pirruccello had reviewed the Henry Trust, the Norval Trust, the Elnora Trust, and Norval's will and codicil. He explained the difference between a mandatory distribution of property using language such as "'shall be distributed'" and language retaining property for the benefit of a beneficiary, as used in an "ongoing or continuing trust." Pirruccello testified that the Norval Trust and the Elnora Trust were "mirror trusts" in that the language in the trusts was identical except for one referencing Norval and the other referencing Elnora.

Referring to page 8 of each parent's trust, Pirruccello said there was a mandatory distribution of "other unspecified farmland after specific farmland had been addressed to the three

sons as tenants in common." He pointed out the distinction in Norval's will and First Codicil where he exercises his power of appointment (for the lands in the Henry Trust) between the "ongoing, continuing trust for land for the daughter [Pamela] as well as an outright distribution of land from the grandfather's estate." Pirruccello noted that when wills and trust instruments say "'shall distribute,'" or words to that effect, that means it is to be distributed "immediately upon death or subject to administration or it can be upon some contingency, but that essentially means, as here, that it would be outright, free and clear of trust to the recipients that are designated."

Pirruccello also testified that when property is transferred by a trust, it is not itself a taxable event. He stated, "[T]he mere transfer of property by operation of law at the death from the decedent to a beneficiary is not a taxable transaction. It's not a sale or exchange." He also discussed "like-kind exchanges" for property distributed from a trust. As an example, he agreed that if real estate is transferred from a trust to three people as tenants in common and is then sold, each of those tenants in common would owe one-third of the tax incurred from the sale unless one or more of them took action to set up a "like-kind exchange."

(b) DeWitt

DeWitt testified that he graduated from law school in 1975 and began working for the Augustin family "[a]lmost right out of law school." In addition to testifying about the July 2011 meeting and his preparation of the limited liability company operating agreement, DeWitt said the general benefits and purposes of the types of revocable trusts used for Henry, Norval, and Elnora was "[b]y and large, probate avoidance," and "to take optimum use of the federal estate tax, marital deduction and credit with the objective of eliminating any federal estate tax at the death of the first spouse to die and deferring all the tax on the combined estates until the death of the survivor." DeWitt testified that it "is typical of farm

families" to have a "strong desire to focus on preserving the family farm to keep it in the family and pass down from one generation to the next. It's kind of a way of life almost more than economics."

(c) Carmen Standley

Carmen Standley testified on behalf of Kirtus and Rocky. She is a Nebraska licensed certified public accountant and is a shareholder at a Lincoln, Nebraska, company where she has worked for 18 years. Standley has prepared RKS Farms' tax returns, Kirtus' and Rocky's corporate and personal tax returns, and the trusts' tax returns. Standley was asked to assume certain values for the trusts' real estate in order to calculate an approximate income tax liability in the event the properties were transferred to the brothers as tenants in common and then sold in a partition sale. She used values of $1.6 million for the Henry 80 and the Homeplace (respectively, basis of $68,000 and $319,375), $1.884 million for Big Jisa and Little Jisa (basis of $652,000), and $1.244 million for Staroscik (basis of $423,000). Assuming the fair market values and basis for each property as noted, Standley calculated that the sale of the trust properties would result in a capital gain of $3,265,625. She calculated this to result in an $822,975 total tax liability, or $274,325 per brother.

6. Proposals for Splitting Land

It was Scott's position at trial that if he did not get the Homeplace, he was going to pursue his partition action (already filed in district court) and have all of the trust ground sold. Scott initially suggested to his brothers that he take the entirety of Big Jisa and Little Jisa, which was more than one-third of the trusts' real estate. He was willing to "pay the difference." Kirtus remembered this, and he also remembered telling Scott he did not want to break the trust up. Scott subsequently proposed that he receive the Homeplace, the Henry 80, and the 80 acres owned by RKS Farms, which is adjacent to the Homeplace.

According to Kirtus, age 58 at trial, the brothers have been farming together since 1978. He wanted to farm for another 20 years. Rocky, age 60 at trial, wanted to continue farming another 10 to 15 years. Kirtus said that if Scott "was to sell this, Rock and I would be out of a job." Kirtus admitted that prior to Scott's filing any lawsuits, Scott had told him he wanted to "'break up the trust.'" But it was Kirtus' position that their father, Norval, would have wanted the three of them to continue farming. According to Kirtus, Norval "would have told us, you guys, get your head out of your — and get together and you can make it work. This is dumb." Kirtus testified that he did not want to transfer the trust property out as tenants in common because his father and grandfather wanted "to keep this farm ground in the family." However, Kirtus said that if the court determined he had the authority or granted him the authority, he would distribute Big Jisa (160 acres) to Scott (estimated value of $1.28 million). They would sell Little Jisa and use proceeds from that sale to equalize what would be owed to Scott in light of the value of the remaining properties that Kirtus and Rocky would be keeping. After paying an equalization to Scott from the Little Jisa proceeds, the remaining Little Jisa moneys would be divided equally. According to Kirtus' calculations, he and Rocky would be keeping the Henry 80, the Homeplace, and Staroscik for a total value of $2.844 million, or $1.422 million each. Rocky acknowledged that the Homeplace and the Henry 80 have the best ground of all the property held in the trusts.

### 7. Reopening of Case

Trial took place on February 29 and March 1, 2016. Scott filed a "Motion to Reopen Case and Present Additional Evidence" on May 16; the matter was heard on June 9. Scott testified that following trial, he drove by Kirtus' place and saw survey stakes. Scott subsequently learned that Kirtus had recorded a trustee's deed on March 1 (the second day of trial). It had been signed by Kirtus on December 29, 2015. The deed gave Kirtus title to approximately 3 acres of trust real estate

consisting of irrigated farm ground adjacent to Kirtus' house. Kirtus claimed, by affidavit, that he purchased the tract for $17,500 on January 7, 2016, and that the purchase price was based on an appraisal. Kirtus attached only one page of the appraisal to his affidavit, and it indicates that the 3 acres are certified irrigated land, but that the client requested that it be called dryland for purposes of the appraisal. Kirtus' affidavit indicated that Rocky approved the transaction; however, Rocky did not participate in the execution of the trustee's deed—only Kirtus had signed the deed.

### 8. County Court's Order

On December 2, 2016, the county court entered an identical 16-page order in each of the five consolidated cases. The order first addressed Kirtus and Rocky's claim that Scott should be barred from any relief on the basis of "unclean hands" because Scott refused to pay rent, sent an unauthorized "Notice of Termination," closed the RKS Farms' checking account without notice, and failed to pay his share of 2015 farm expenses. The county court found that "Scott's actions were not fraudulent, illegal, or unconscionable under the circumstances," and therefore, he did not act with "unclean hands."

The county court next pointed out that pursuant to § 30-3836(a) of the NUTC, a trust can terminate or expire pursuant to its terms, and that a trustee is required to distribute the trust property to the designated beneficiaries upon the termination of the trust. It concluded that the Henry Trust, Norval's will and First Codicil, the Norval Trust, and the Elnora Trust clearly state that all assets of the trusts were to be distributed upon the death of Norval. The court stated, "Following the distribution of all of the assets of the Trusts, there would be no purpose of the Trusts remaining to be achieved. As such, the Trusts terminated upon the death of Norval . . . pursuant to section 30-3836(a) of the NUTC."

The county court then discussed the older brothers' request that the court modify the trusts to follow the terms of the

alleged agreement between the brothers during the July 2011 meeting to continue farming the trust real estate for 10 more years. The court concluded:

> The evidence shows that Scott did not agree to modify the Trusts to defer distribution of the real estate for ten years or to continue to farm the trust real estate with his brothers for ten years. . . . If there was an oral agreement with clear, satisfactory, and unequivocal terms that Kirtus and Rocky now seek to enforce, there was no reason for DeWitt to draft a limited liability company agreement after the meeting. . . . The evidence was clear that Scott did not sign the operating agreement drafted by DeWitt. Kirtus confirmed that Scott has wanted to terminate the Trusts since 2011. . . . In addition, even if the court was convinced that [the brothers] had agreed to modify the Trusts, there was no evidence presented to the court that the fourth beneficiary of the Trusts, Pamela . . . , had consented to the modifications as required by section 30-3837(b).

Regarding the request by Kirtus and Rocky to modify the trusts to authorize distribution of sole fee simple title to separate parcels of the real estate to individual beneficiaries (rather than distribute the property as tenants in common), the court concluded modification was not necessary, finding:

> Notwithstanding the terms of Article XI of the Norval and Elnora Trusts, section 30-3881[(a)](22) of the NUTC authorizes a trustee to "make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation." As such, the requested relief is already authorized under the NUTC.
>
> Pursuant to the dispositive provisions of the Norval and Elnora Trusts and the First Codicil to Norval's Will, it is clear that Norval wanted his three sons treated equally with respect to the distribution of farm real estate

> and personal property used in the farm operation. To the extent a request to modify the Trusts was made by Kirtus or Rocky with regard to the distribution proposal made by Kirtus at trial, the court finds that there is not sufficient evidence upon which the court can determine the equality of the proposal. As such, the request to modify the Trusts to approve the distribution proposal is denied.

Regarding Scott's requests to remove trustees, the county court found that the brothers, as cotrustees of the Norval Trust and the Elnora Trust, and Kirtus, as trustee of the Henry Trust, "have failed to prudently administer the Trusts" and that the trusts terminated upon the death of Norval in April 2010. It went on to state that the cotrustees failed to distribute the assets of the trusts and wind up the administration of the trusts. The court further found:

> In addition, the evidence reflects that Kirtus and Rocky have abused their majority control over the affairs of the Norval and Elnora Trusts and that Kirtus has abused his control over the affairs of the Henry Trust in violation of the duty of impartiality by failing to manage and distribute the trust property with due regard for the interests of all of the beneficiaries. Their personal interest in continuing the farming operation has clearly been favored over their duties as trustees.
>
> Kirtus has violated the duty of loyalty with regard to the sale of a three acre tract of real estate located on a parcel held in the Norval and Elnora Trusts to himself. The Trustee's Deed was executed by Kirtus, as Trustee, on December 29, 2015, but not recorded until March 1, 2016. Not only was the conveyance made without any notice to Scott, a Co-Trustee, and beneficiary of both Trusts, it appears that the purchase price may not be the fair market value of the real estate. . . . In addition, although Kirtus claims that Rocky approved the transaction, the Trustee's Deed was not executed by a majority of the Co-Trustees.

The county court concluded that Kirtus "has committed a series of breaches that justify his removal as the Trustee of the Henry Trust." The court removed Kirtus as trustee of the Henry Trust and ordered him "to account, and to deliver the Trust property within his possession as Trustee, to the Successor Trustee within thirty (30) days of the appointment of the Successor Trustee."

The county court also found that there was a lack of cooperation among the cotrustees of the Norval Trust and the Elnora Trust justifying their removal. The court stated:

> Although the evidence supports a finding that the Co-Trustees have committed a series of breaches that justify removal, it is not necessary for the court to find that the lack of cooperation involves a breach of trust. . . . The evidence clearly shows that the administration of the Norval and Elnora Trusts has been affected by the inability of the Co-Trustees to get along and work together in their personal lives and in the administration of the Trusts.

Kirtus, Rocky, and Scott were removed as cotrustees and ordered "to account, and to deliver the Trust property within their possession as Co-Trustees, to the Successor Trustee within thirty (30) days of the appointment of the Successor Trustee."

Regarding the appointment of a successor trustee, the county court stated:

> Pursuant to the removal of Kirtus as Trustee of the Henry Trust and the removal of Kirtus, Rocky, and Scott as Co-Trustees of the Norval and Elnora Trusts as ordered herein, a vacancy in the trusteeship of the Trusts exists under section 30-3860 of the NUTC. . . . The Trusts at issue do not designate a Successor Trustee under the present circumstances. As such, the next order of priority would be by unanimous agreement of the qualified beneficiaries. The qualified beneficiaries of the Trusts are Kirtus, Rocky, Scott, and Pamela . . . . In the event the qualified beneficiaries are unable to unanimously agree

> to a person to be appointed as Successor Trustee by the court, the court will determine the person to be appointed Successor Trustee of the Trusts at issue.

The county court noted that Pamela was not given notice of the present proceedings and that as a qualified beneficiary, she was entitled to notice and an opportunity to be heard regarding the appointment of a successor trustee; a later hearing was scheduled for that purpose.

As to the case not appealed, the county court entered judgment in favor of the Norval Trust and against Scott for $41,692.30 for his share of rent and personal property taxes for 2011 through 2015, with interest to accrue at 2.498 percent. Also, with regard to the "Notice of Termination" Scott sent in August 2015 to Rocky, Kirtus, and RKS Farms purporting to terminate their leases with the trust real estate, the court concluded Scott was not authorized to do so and thus found such notice to be "void and of no effect."

## III. ASSIGNMENTS OF ERROR

In cases Nos. A-16-1182 (case No. PR15-18) and A-16-1184 (case No. PR15-25), Kirtus appeals from the two underlying actions related to the Henry Trust. In cases Nos. A-16-1183 (case No. PR15-19) and A-16-1185 (case No. PR15-26), Kirtus and Rocky appeal from the two underlying actions related to the Norval Trust and the Elnora Trust. The errors assigned on appeal in each case can be consolidated and restated as claims that the county court erred by (1) terminating the trusts, ordering the distribution of assets other than real estate, and removing the trustees without notice being given to Pamela, a beneficiary of all the trusts; (2) failing to find Scott was barred from obtaining equitable relief on the basis of unclean hands; (3) terminating the trusts; (4) failing to find that the brothers entered into an agreement to continue farming together for 10 years before distributing the trusts' real estate, and thus, the court erred in failing to modify the trusts as requested; (5) finding a breach of trust and removing

the trustees and ordering them to account for and deliver trust property to a successor trustee; and (6) determining there was insufficient evidence to order an equitable distribution of the real estate.

Unless otherwise indicated, references to appellants' and appellee's briefs will be to page numbers contained in submissions filed under case No. A-16-1183.

## IV. STANDARD OF REVIEW

[1-3] Absent an equity question, an appellate court reviews trust administration matters for error appearing on the record; but where an equity question is presented, appellate review of that issue is de novo on the record. *In re Henry B. Wilson, Jr., Revocable Trust*, 300 Neb. 455, 915 N.W.2d 50 (2018). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*. In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions concerning the matters at issue. *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009).

[4] The interpretation of the words in a will or a trust presents a question of law. *In re Estate of Forgey*, 298 Neb. 865, 906 N.W.2d 618 (2018).

## V. ANALYSIS

### 1. Jurisdiction

These appeals arise from actions brought pursuant to the NUTC, § 30-3801 et seq. As an initial matter, we note that Scott filed a motion for summary dismissal of these appeals; he claimed this court lacked jurisdiction because the county court's December 2, 2016, order did not dispose of all the issues and was therefore not a final, appealable order. We overruled the motion without prejudice to consider the jurisdiction issue following briefing and submission to the court.

In support of his position, Scott relies on *In re Conservatorship of Abbott*, 295 Neb. 510, 890 N.W.2d 469 (2017). In that case, reference is made to an unpublished case from this court docketed as case No. A-15-968, in which a county court entered an order stating that a party would be removed as successor trustee upon the appointment of a new successor trustee. The Supreme Court noted that this court dismissed the appeal from the trust case for lack of jurisdiction, "no doubt for the lack of a final order because of the reserved appointment of a successor trustee." *In re Conservatorship of Abbott*, 295 Neb. at 518, 890 N.W.2d at 478. The circumstances in *In re Conservatorship of Abbott* are distinguishable from the present cases because, here, the trustees were immediately removed in the December 2, 2016, order, and a trustee vacancy was immediately created; however, in *In re Conservatorship of Abbott*, the trustee was not immediately removed and would remain trustee until the appointment of a successor trustee.

[5] We find *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005), to be more instructive. In that case, a county court removed an individual as trustee, and the individual did not timely appeal from that order. Rather, the former trustee waited several months until further action was taken by the county court and another order was subsequently entered. The Nebraska Supreme Court held that the removal of a trustee under the NUTC is a special proceeding and that further, the removal of a trustee under §§ 30-3814 and 30-3862 affects a substantial right. The Supreme Court stated:

> We have held that a proceeding under Neb. Rev. Stat. § 30-2454 (Reissue 1995) to remove a personal representative for cause is a special proceeding within the meaning of § 25-1902 and therefore is a final order and is appealable, even though it may not terminate the action or constitute a final disposition of the case. . . . "[G]iven the scope of the personal representative's power over the interests of the beneficiaries and

> other interested parties in an estate, the right conferred by § 30-2454 to petition the county court to remove the personal representative for cause is a substantial right." [Citation omitted.] The same can be said of proceedings to remove a trustee.

*In re Trust of Rosenberg*, 269 Neb. at 315, 693 N.W.2d at 504. Therefore, the Supreme Court concluded that the order removing the trustee in *In re Trust of Rosenberg* was a final order and that the former trustee's attempt to appeal her removal was not timely because she did not file her appeal within 30 days of the order removing her as trustee.

In the present matters, the county court removed Kirtus as trustee of the Henry Trust and removed Kirtus, Rocky, and Scott as cotrustees of the Norval Trust and the Elnora Trust, immediately upon entry of the December 2, 2016, order. The county court stated that these removals resulted in a vacancy in the trusteeship of the trusts under § 30-3860. In accordance with *In re Trust of Rosenberg, supra*, we conclude that the county court's December 2 order resolved all issues, including the immediate removal of the trustees, and was a final, appealable order.

### 2. Was Pamela Necessary Party?

Kirtus and Rocky claim that the county court had jurisdiction to interpret the trusts regarding the real estate at issue and obligations on distributions of that real estate, as well as their claim regarding the 10-year farming agreement. However, they contend that without their sister, Pamela, being a party to the proceedings, the court did not have jurisdiction over Scott's requests to terminate the trusts and remove the trustees. They argue, "[Pamela] undisputedly does not have an interest in the Trusts' real estate at issue, but she definitely has an interest in the Trusts' administration. She further has an interest in the Trusts' personal property." Brief for appellants at 28. Kirtus and Rocky point out that they raised this issue at the commencement of trial, suggesting to the county court that

the requests for relief regarding the trusts' real estate and modifications to the trusts regarding real estate were properly before the court, but not Scott's requests to terminate the trusts, remove trustees, or distribute personal property because Pamela was an interested party as to those issues but was not given notice.

We agree with Kirtus and Rocky that certain, but not all, matters litigated and determined by the county court required including Pamela as an indispensable party. Neb. Rev. Stat. § 25-323 (Reissue 2016) is entitled "Necessary parties; brought into suit; procedure." Section 25-323 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.

[6-8] The language of § 25-323 tracks the traditional distinction between necessary and indispensable parties. *Midwest Renewable Energy v. American Engr. Testing*, 296 Neb. 73, 894 N.W.2d 221 (2017). The Nebraska Supreme Court addressed that distinction, explaining:

> "'"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[.] "Indispensable parties[]" [are parties] whose interest is such that a final decree cannot be entered without affecting them, or that termination of controversy in their absence would be inconsistent with equity.'
>
> ". . . The inclusion of a necessary party is within the trial court's discretion. . . . However, there is no discretion as to the inclusion of an indispensable party."

*Id*. at 90, 894 N.W.2d at 236. Therefore, the first clause of § 25-323 makes the inclusion of necessary parties discretionary when a controversy of interest to them is severable from

their rights. See *Midwest Renewable Energy v. American Engr. Testing, supra*. "The second clause, however, mandates the district court order indispensable parties be brought into the controversy." *Id.* at 90, 894 N.W.2d at 236. All persons interested in the contract or property involved in an action are necessary parties, whereas all persons whose interests therein may be affected by a decree in equity are indispensable parties. See *Midwest Renewable Energy v. American Engr. Testing, supra*.

[9] The absence of an indispensable party to a controversy deprives the court of subject matter jurisdiction to determine the controversy and cannot be waived. *Id.* 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 court, an appellate court will remand the cause for the purpose of having such parties brought in. See *id*. 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. *Id*.

We conclude that even if Pamela may have been a necessary party in matters related specifically to the farmland in dispute, she was not an indispensable party. Therefore, requiring her to be included in the proceedings for such matters was discretionary to the county court. See *Midwest Renewable Energy v. American Engr. Testing, supra*. Pamela's interest under all trusts was sufficiently separable from the controversies related to the disputed farmland at issue in the underlying lawsuits, and her rights were sufficiently protected without being a party to those specific controversies. It was not an abuse of discretion for the county court to proceed without Pamela as a party and to make determinations as to

(1) the interpretation of the trusts and other issues specific to the disputed farmland in which Pamela had no interest, (2) whether Scott filed his actions with unclean hands, (3) whether the trustees breached their duties with regard to their handling of the disputed farmland, (4) whether the brothers reached an agreement as to the disputed farmland, and (5) whether the brothers could distribute the disputed farmland in separate parcels in fee simple rather than as tenants in common. The court's determination of these litigated issues could be reached without impacting Pamela's rights under the trusts, other than, as discussed later, any modification of the trusts that would delay distribution of her interests or possibly diminish those interests. Pamela had no interest in the division or ownership of the disputed farmland and had no apparent involvement in how the trustees administered or managed the disputed farmland. Thus, any determinations made in that regard would not have required her presence nor impacted her rights under the trusts. The county court had jurisdiction over such matters, and we will therefore address the errors assigned related to the court's determinations as to those particular issues.

[10] On the other hand, we conclude that Pamela, as a qualified beneficiary of all trusts at issue, was an indispensable party with regard to (1) Scott's request to terminate the trusts and (2) his request to remove the trustees (along with associated requests for accounting and appointment of successor trustee). The absence of an indispensable party to a controversy deprives the court of subject matter jurisdiction to determine the controversy, and it cannot be waived. *Midwest Renewable Energy v. American Engr. Testing*, 296 Neb. 73, 894 N.W.2d 221 (2017). A court does not have subject matter jurisdiction over a request to terminate a trust or remove a trustee in the absence of an indispensable party; thus, the county court lacked jurisdiction over these requests. See, *Markham v. Fay*, 74 F.3d 1347 (1st Cir. 1996) (generally, beneficiaries are indispensable parties in actions seeking to collect tax or

other debt from trust corpus or seeking to terminate trust, and exception exists when trustee represents beneficiaries' interests fully and without conflict); *Koch v. Koch*, 226 Neb. 305, 411 N.W.2d 319 (1987) (real property conveyed to father as trustee for his minor children required inclusion of minor children as necessary parties in litigation involving real property in which they had interest); *Roth v. Lehmann*, 741 S.W.2d 860 (Mo. App. 1987) (ordering removal of trustee impacts rights of each beneficiary, and beneficiaries are necessary parties to suit seeking such removal); 76 Am. Jur. 2d *Trusts* § 603 (2016) (whether beneficiaries of trust are necessary parties to suit may depend upon terms of trust and effect of suit on their equitable interests, and nature of particular suit is one of principle elements bearing on whether it is necessary to make beneficiaries parties).

While the county court correctly determined that Pamela would be necessary to the process of appointing a successor trustee, she should have also been included and provided an opportunity to be heard with regard to Scott's requests for a court order terminating the trusts and removing the trustees, as well as the related requests for an accounting, appointment of a successor trustee, and delivery of trust property to a successor trustee when appointed. There was no evidence before the court regarding the status of Pamela's real estate interest under the Henry Trust (as appointed in First Codicil), and the evidence suggests she had not yet received her remainder interest from her parents' trusts. Therefore, a court order terminating the trusts, removing the trustees, ordering an accounting, and appointing a successor trustee could have a prejudicial effect on Pamela's interests through additional delays and costs which could adversely impact her remaining interests in the trusts. Pamela's interest in the trusts should be taken into account by the county court when determining the best option available to it to address the breach of trust between the brothers (addressed later). See § 30-3890 (remedies for breach of trust include, among other things, compelling performance;

compelling trustee to redress breach by paying money, restoring property, or other means; ordering accounting; appointing special fiduciary; suspending trustee; removing trustee; and ordering any other appropriate relief).

Because Pamela was an indispensable party as to Scott's requests to terminate the trusts, remove the trustees, order an accounting, and appoint a successor trustee, but was not brought into the proceedings, the county court was without subject matter jurisdiction to address these particular matters. We are mindful, however, that the county court did not enter an order terminating the trusts; rather, it merely interpreted the trusts as terminating by their own terms. As we discuss later, such an interpretation was within the court's jurisdiction. Therefore, as to those matters over which it did not have jurisdiction, we vacate those portions of the county court's order which (1) removed Kirtus as trustee of the Henry Trust, (2) removed the three brothers as trustees of the Norval Trust and the Elnora Trust, (3) ordered an accounting for the trusts and delivery of trust property to a successor trustee once appointed, (4) created a vacancy in the trusteeships, and (5) directed the appointment of a successor trustee. As discussed later in this opinion, we agree with the county court that a breach of trust occurred in relation specifically to the disputed farmland; Pamela was not a necessary or indispensable party to that controversy. However, on remand, any determination with regard to an appropriate remedy for that breach of trust must include Pamela as a party (cannot be waived) and an opportunity to be heard (discretionary to Pamela).

We now address the errors Kirtus and Rocky assign to the county court's order over which the county court had jurisdiction.

### 3. Unclean Hands

Kirtus and Rocky argued to the county court that Scott should have been barred from relief under the doctrine of unclean hands; they raise the same issue on appeal. Although

we have concluded the county court did not have jurisdiction to address some of the relief requested by Scott, his other claims, related to distribution of the disputed farmland as tenants in common and the breach of trust by the trustees as to that farmland, were appropriate for consideration by the county court. We therefore consider this assigned error.

[11] Under the doctrine of unclean hands, "a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue." *Farmington Woods Homeowners Assn. v. Wolf*, 284 Neb. 280, 289, 817 N.W.2d 758, 767 (2012). "Generally, conduct which forms a basis for a finding of unclean hands must be willful in nature and be considered fraudulent, illegal, or unconscionable." *Id*.

We agree with the county court that Scott did not act with unclean hands. While it is understandable that Scott's conduct in some instances may have been frustrating to his older brothers, or perhaps unfairly burdened them, it was not fraudulent or illegal, nor so reprehensible that it could be deemed unconscionable. Scott explained his reasoning for not paying his share of the taxes owed on the disputed property, which could be used against his position that he wanted to farm separately, and he testified that the amounts to cover those taxes had been set aside in his attorney's trust account. Plus, he was owed a one-quarter distribution of the Norval Trust bank account ($142,727), which had not yet been disbursed and could have been used to cover his share of those taxes. With regard to his issuance of the "Notice of Termination," while he was without authority to do so, it is evident that this was done out of frustration when Scott was otherwise unable to receive the distribution of farmland to which he was entitled under the plain language of the trusts and the First Codicil. And as for closing the brothers' joint farming bank account without notice to his older brothers, while perhaps not advisable, Scott's explanation was not unreasonable (concern about brothers' ability to access $90,000 "rolling loan").

### 4. County Court's Interpretation of Trusts

We have already explained that the county court was without subject matter jurisdiction to entertain Scott's requests to formally terminate all trusts, since Pamela was an indispensable party on such matters and had not been included in the underlying actions. However, as acknowledged by Kirtus and Rocky, the county court did have "jurisdiction to interpret the Trusts regarding [the disputed] real estate" and to "direct resolution" as to the trustees' "power and obligations on distribution of [the disputed] real estate." Brief for appellants at 29. Likewise, it was also appropriate for the county court to review and interpret the content of the trust documents to determine whether Scott was entitled to the distribution of the disputed farmland, as he alleged in his petitions, and whether that farmland should have been expeditiously distributed upon Norval's death.

As set forth by statute, a "judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights." § 30-3812(c). The NUTC was enacted in 2003 and became operative on January 1, 2005, and except as otherwise provided in the NUTC, it applies to all trusts created before, on, or after the operative date and all judicial proceedings concerning trusts commenced after the operative date. See *In re Trust Created by Isvik*, 274 Neb. 525, 741 N.W.2d 638 (2007). Also, "[t]he common law of trusts and principles of equity supplement the [NUTC], except to the extent modified by the code or another statute of this state." § 30-3806. See, e.g., *In re Trust of Hrnicek*, 280 Neb. 898, 792 N.W.2d 143 (2010) (although NUTC did not contain specific remedy of retention as allowed in probate code, right of retainer lies in equity, and § 30-3806 provides for common law of trusts and principles of equity).

In considering the county court's interpretation of the trusts, we note that the NUTC states that "a trust terminates to

the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve." § 30-3836(a). As observed by the county court, the NUTC provides that "upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes." § 30-3882(b).

The county court concluded that pursuant to the express terms of the trusts,

> it is clear that all of the assets of the Trusts were to be distributed upon the death of Norval . . . . Following distribution of all of the assets of the Trusts, there would be no purpose of the Trusts remaining to be achieved. As such, the Trusts terminated upon the death of Norval . . . pursuant to section 30-3836(a) of the NUTC.

Notably, the county court did not formally order the termination of the trusts as requested by Scott; rather, based upon its interpretation of the trusts' content, the court concluded the trusts had terminated by their own terms upon Norval's death.

[12] The interpretation of the words in a will or a trust presents a question of law. *In re Estate of Forgey*, 298 Neb. 865, 906 N.W.2d 618 (2018). We agree with the county court's conclusion that all assets of the trusts were to be distributed upon Norval's death, and thus, the trusts terminated by their own terms upon his death. Recently, the Nebraska Supreme Court pointed out that a trust's termination is not determined by the final distribution of trust property. In *In re Estate of Barger*, 303 Neb. 817, 931 N.W.2d 660 (2019), the settlor of a family trust was still alive at the time a court order was entered terminating the family trust. However, the stock certificates of two corporations used by the settlor for the family farming operation were never transferred from the terminated trust back to the settlor. It was argued that the trust was not

terminated, since the trustees had not transferred the property to the settlor prior to her death. The Nebraska Supreme Court disagreed, stating that "[a] trust terminates at the time at which it becomes the duty of the trustee to wind up administration of the trust, and not at the time when that winding up period is actually accomplished." *Id*. at 838, 931 N.W.2d at 676. Further, "After a trust has been terminated, a trustee must expeditiously exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it." *Id*. at 838-39, 931 N.W.2d at 676. Therefore, after a trust terminates, a trustee continues to "have a nonbeneficial interest in the trust for timely winding up the trust and distributing its assets." *Id*. at 839, 931 N.W.2d at 676. But after the trust is terminated, a trustee's powers are "limited to those that are reasonable and appropriate to the expeditious distribution of the trust property and preserving the trust property pending the winding up and distribution of that property." *Id*. See, also, *Ovrevik v. Ovrevik*, 242 Ga. App. 95, 527 S.E.2d 586 (2000) (distribution of trust property is entirely separate matter from fulfillment of purpose of trust; having determined purpose of trust was fulfilled, court properly terminated trust and ordered distribution of trust property in accordance with terms of trust).

In the present case, there is no question the disputed farmland was to be distributed upon Norval's death. Norval's First Codicil appointed the Henry 80 "in equal shares, outright and free of trust, to [his] three sons, KIRTUS, ROCKY and SCOTT." The Norval Trust (as mirrored in the Elnora Trust) set forth specific distributions of real estate to each child, and then it stated that "[a]ll other farmland held by the Trust shall be distributed to the three sons of the Grantor in equal shares as tenants in common" and that "[t]he remainder of the Trust property shall be distributed in equal shares to the Grantor's children, outright and free of trust." The Henry Trust (second Amendment, article III, paragraph 5(b)) also stated that subject to any appointment made by Norval, then upon the death

of Henry, his wife, and Norval, "the trustee shall distribute the Trust assets, as then constituted, in equal shares to [Norval's] children or their issue per stirpes." By the express language of the First Codicil and the trusts, the disputed farmland (and remainder of all trust property) should have been distributed in accordance with these terms upon Norval's death. Therefore, all trusts at issue terminated by their own terms upon Norval's death, and at that time, it became the duty of the trustees to wind up the administration of the trust. See *In re Estate of Barger*, 303 Neb. 817, 931 N.W.2d 660 (2019).

[13-15] Having agreed with the county court's interpretation that the trusts terminated by their own terms upon Norval's death, we now consider whether the trustees' powers during the winding up and distribution period authorized them to seek a modification of the trusts or the alternative relief they sought. In other words, when a trust has terminated by its own terms but remains in the winding up period with the trust property not yet distributed, can that trust be modified based upon an agreement of the beneficiaries or, in certain circumstances, even without such an agreement? We conclude the NUTC provides statutory options for a trustee to seek such relief during the winding up period following the expiration or termination of a trust by its own terms. To explain, we first return to the full text of § 30-3836, which provides as follows:

> (UTC 410)(a) In addition to the methods of termination prescribed by sections 30-3837 to 30-3840, a trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.
>
> (b) A proceeding to approve or disapprove a proposed modification or termination under sections 30-3837 to 30-3842, or trust combination or division under section 30-3843, may be commenced by a trustee or beneficiary. The settlor of a charitable trust may maintain a proceeding to modify the trust under section 30-3839.

Notably, within § 30-3836(a), it indicates that a trust can terminate to the extent it expires pursuant to its own terms or it can be terminated by the court as provided by §§ 30-3837 to 30-3840; however, regardless of how a trust may terminate, § 30-3836(b) authorizes a trustee or beneficiary to commence a proceeding to approve or disapprove a proposed modification or termination under §§ 30-3837 to 30-3842. There is no language in § 30-3836 to suggest that a trust which terminates by its own terms, but which remains in the winding up period, is not eligible for relief under the statutory options identified in § 30-3836(b), specifically, § 30-3837 (modification or termination of noncharitable irrevocable trust by consent), § 30-3838 (modification or termination because of unanticipated circumstances or inability to administer trust effectively), § 30-3839 (cy pres), § 30-3840 (modification or termination of uneconomic trust), § 30-3841 (reformation to correct mistakes), and § 30-3842 (modification to achieve settlor's tax objectives). In fact, the need to compel termination, or to request modification or application of other equitable principles, may not be discovered or become necessary until after a settlor's death while the trust is in the winding up period and before the final distribution of trust property. See, e.g., *In re Estate of Forgey*, 298 Neb. 865, 883, 906 N.W.2d 618, 633 (2018) (trust called for distribution of trust assets upon death of grantor, but trustee failed to do so for 20 years; in fashioning a remedy, Nebraska Supreme Court noted that county courts may apply equitable principles to matters within probate jurisdiction, including trusts, and that "[s]uch courts have full power to make orders, judgments, and decrees and to take all other actions necessary and proper to administer justice in the matters which come before them").

[16] We note that the ability to apply equitable principles or modify or terminate a trust after a trust has terminated by its own terms is also supported by the Restatement (Second) Trusts § 344, comment *a*. at 191 (1959), which provides:

> By "the time for the termination of the trust" is meant the time at which it becomes the duty of the trustee to wind up the trust. Ordinarily this time is at the expiration of the period for which the trust is created. . . . Although the time for the termination of the trust has arrived in accordance with the terms of the trust, the trustee does not thereby necessarily cease to be the trustee, but he continues to be trustee until the trust is finally wound up. *The period for winding up the trust is the period after the time for termination of the trust has arrived and before the trust is terminated by the distribution of the trust property.* This period may properly be longer or shorter, depending upon the circumstances. Where the estate is large, where property not readily saleable has to be sold, where the ascertainment of the beneficiaries entitled to distribution or the amounts to which they are entitled is difficult, the period of winding up the trust may properly be longer than it would be in the absence of these circumstances.

(Emphasis supplied.) See, also, *Estate of Nicholas*, 177 Cal. App. 3d 1071, 223 Cal. Rptr. 410 (1986) (trust continues for purpose of winding up; period for winding up trust is period after time for termination has arrived and before trust is terminated by distribution of trust property; and winding up process involves distribution and conveyance of trust property to those entitled to it). Restated, a trust may expire or terminate by its own terms, thereby triggering the period for winding up the trust; the winding up period continues to exist until the trust is fully terminated by distribution of the trust property. If, as in this case, the trustees fail to distribute the property once the purpose of the trust was fulfilled, a court can enter an order fully terminating the trust with directions to distribute the trust property in accordance with the terms of the trust, see *Ovrevik v. Ovrevik*, 242 Ga. App. 95, 527 S.E.2d 586 (2000), or, if appropriate, enter an order modifying (or reforming) the

trust terms, see §§ 30-3837 to 30-3842. However, as discussed previously, due to Pamela not being included as a party, the county court did not have jurisdiction to enter an order terminating the trusts and directing distribution of the trusts' assets, nor an order modifying the trusts.

[17] We also note that the Restatement (Third) of Trusts § 66 (2003) provides that if a trustee knows or should know of circumstances that justify judicial action to modify an administrative or distributive provision of a trust because of circumstances not anticipated by the settlor, the trustee has a duty to petition the court for appropriate modification of or deviation from the terms of the trust. The possible imposition of such a duty on a trustee further supports permitting a trustee to seek modification under § 30-3838 even in those instances where a trust may have terminated or expired by its own terms, but is still pending the winding up and distribution of trust property. Further, "The objective of the rule allowing judicial modification (or deviation) and the intended consequences of its application are not to disregard the intention of a settlor. The objective is to give effect to what the settlor's intent probably would have been had the circumstances in question been anticipated." Restatement (Third), *supra*, § 66, comment *a*. at 493. Keeping in mind that the Uniform Trust Code was "drafted contemporaneously" with the drafting of the Restatement (Third) of Trusts, see Ronald R. Volkmer, *The Nebraska Uniform Trust Code: Nebraska Trust Law in Transition*, 37 Creighton L. Rev. 61, 64 (2003), we do not read the NUTC to exclude from possible modification or termination those trusts which may have terminated by their own terms but remain in the winding up period awaiting the final distribution and conveyance of trust property.

[18] Accordingly, we agree with the county court's interpretation that the trusts terminated by their own terms. We also conclude that the NUTC allows a beneficiary or trustee to petition a county court to consider modification or termination of a trust which has expired or terminated pursuant to

its own terms but remains in the winding up period, including the possible modification of or deviation from dispositive terms, as was sought here. We therefore proceed to address the remaining errors assigned by Kirtus and Rocky related to their requests to modify or deviate from the trusts' terms, as well as the error they assign to the county court's determination that they committed a serious breach of trust in their duties as trustees.

### 5. Agreement to Continue Farming Operations

The older brothers were aware that Scott wanted the disputed farmland distributed and allocated among them, including that he was withholding payment of his share of the rent (taxes) until the land was split up. However, Kirtus and Rocky contend that the disputed real estate had not been distributed because they believed there was a 10-year agreement with Scott "to maintain the real estate in trust and farm it with him." Brief for appellants at 32. But to maintain the disputed farmland in the trusts contrary to the language of the trusts and the First Codicil would have required modification of the trusts, which was not previously done, nor was it capable of being done in the present cases because Pamela was not a party. However, Kirtus and Rocky argue that "an agreement regarding the real estate alone . . . did not require [Pamela's] approval." Brief for appellants at 38. We agree that the brothers, without Pamela's involvement, could have distributed the land to their "partnership" or to a newly formed limited liability company as their lawyer advised. But there was no evidence they did either. We agree with the county court that the "evidence was clear that Scott did not sign the operating agreement drafted by DeWitt." Not only did they not sign the proposed operating agreement, and thus, there was no indication of an agreement to run it as a limited liability company, but they never distributed the land at all, and thus, they also demonstrated there was never an intention by all to run it as

a partnership. Because they kept the disputed farmland in the trusts, the only viable argument would have been that they agreed to modify the trusts to keep the farmland in the trusts for another 10 years, which they could not have done in July 2011 without Pamela's consent (discussed further later) and could not have done in the present matter without Pamela included as a party. We find no error by the county court in its conclusion on these matters.

### 6. Breach of Trust

Kirtus and Rocky contend that their "prior conduct and reaction to Scott's underlying petitions herein in no way provide facts that justify the county court finding that they committed a 'serious breach of trust' supporting their removal under . . . § 30-3862." Brief for appellants at 32. As previously discussed, the county court was without subject matter jurisdiction to remove the trustees because Pamela was an indispensable party to such an action in light of her interest in the trusts. This leaves for our consideration only the issue of whether the county court properly determined the brothers breached their duties as trustees with regard to their actions specific to the disputed farmland. We find no error in the county court's findings and conclusions on this limited issue.

In its order, the county court pointed out that all the trustees failed to distribute assets and wind up the administration of the trusts and that therefore, they failed to prudently administer the trusts. Again, because Pamela was not a party to these proceedings, these findings by the county court are limited to matters pertaining to the disputed farmland. Keeping that in mind, we note that the county court found that "Kirtus and Rocky have abused their majority control" over their parents' trusts and Kirtus "abused his control" over the Henry Trust "in violation of the duty of impartiality by failing to manage and distribute the trust property with due regard for the interests of all of the beneficiaries. Their personal interest

in continuing the farming operation has clearly been favored over their duties as trustees."

The county court also found that Kirtus violated the duty of loyalty regarding the sale to himself of the 3-acre tract of land held in the parents' trusts. The 3-acre tract was within the Staroscik parcel and was adjacent to the 1½ acres already owned by Kirtus on the southwest corner of that property. A trustee's deed was executed by Kirtus on December 29, 2015, and recorded on March 1, 2016, which was the second day of trial. The conveyance was made without notice to Scott, and the purchase price was based on an appraisal in which the 3 acres of irrigated land was appraised as dryland, upon Kirtus' request. And although Kirtus claimed Rocky approved the transaction, the trustee's deed was not executed by a majority of the cotrustees. The court also found that there was a lack of cooperation among the cotrustees and that the administration of the parents' trusts was affected by the inability of the cotrustees "to get along and work together in their personal lives and in the administration of the Trusts."

Even if the older brothers initially believed there was an agreement to keep the disputed farmland in the trusts or otherwise for another 10 years, the evidence did not support that Scott agreed, nor that Pamela consented, to such a modification of the trusts. Further, the older brothers' behaviors toward Scott (changing locks and security codes, removing keys from equipment and trucks, removing books and computer from Norval's home, and taking over Scott's wife's bookkeeping responsibilities); Rocky's aggressive behavior toward Scott; and Scott's actions toward them (not paying his share of real estate and personal property taxes, closing joint bank account, and delivering termination notice) should have dispelled any notion that there was any basis to delay distributing the trusts' property and winding up the trusts.

[19] A trustee breaches a duty of care if he unduly delays distributions. See *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009). "A violation by a trustee of a duty the

trustee owes to a beneficiary is a breach of trust." § 30-3890(a). Thus, when a trustee unduly delays distributions from a trust, the trustee has breached a duty of care owed to a beneficiary, and the violation of that duty is a breach of trust. Accordingly, as to matters pertaining to the disputed farmland only, we find no error in the county court's determination that a breach of trust occurred by Kirtus as trustee of the Henry Trust and the three brothers as trustees for their parents' trusts. These findings and conclusions specific to a breach of trust involving the disputed farmland can be considered in the context of the trustees' actions with regard to the entirety of the trusts' administration upon remand, with Pamela joined in such proceedings. When considered in that context and with all qualified beneficiaries participating, an appropriate remedy can be determined.

### 7. Equitable Distribution of Real Estate

This issue is at the heart of each of the four cases on appeal before this court. Scott filed his actions seeking the distribution of the disputed farmland so that he could independently farm with his son. Having been unable to reach an agreement with his older brothers as to how to divide the farmland in which they each owned an undivided one-third interest, he filed his lawsuits, including a separate district court action to partition the land. Kirtus and Rocky were concerned that a partition action would necessarily force the sale of the disputed farmland (valued at $4.728 million total) and require the payment of hefty capital gains taxes ($822,975 total or $274,325 per brother); they believed this would "force them out of farming"—something their father would not have anticipated or desired. As noted by DeWitt, it "is typical of farm families" to have a "strong desire to focus on preserving the family farm to keep it in the family and pass down from one generation to the next. It's kind of a way of life almost more than economics." Kirtus and Rocky filed their actions seeking an order

modifying the trusts or otherwise declaring their authority to equitably distribute the farmland to each brother as separate parcels with fee simple title, along with cash to equalize distributions where needed.

In the petitions filed by Kirtus and Rocky, in addition to the matters already discussed regarding modifying the trusts to maintain the disputed property in the trusts (or business entity) for another 10 years, they alternatively sought approval from the county court to modify the manner in which the disputed farmland could be distributed. They sought approval to equitably allocate the farmland by distributing separate parcels of land to the brothers in fee simple title rather than distributing the properties as tenants in common. As they note on appeal, in the event "their 10-year agreement was not upheld" by the county court, they alternatively presented a "proposal for equitable distribution of a separate parcel to Scott and some cash." Brief for appellants at 39. The proposal was based on market values of the disputed properties, and it provided each of the brothers "an approximate equal amount of real estate but additional cash to Scott to make up the difference in values." *Id*. Kirtus and Rocky contend that their proposal "effectuates as best as possible their ancestors' intent to keep the farm in the family and avoid an unnecessary almost-$900,000 tax obligation to the brothers." *Id*. The county court declined to approve the proposal based on insufficient evidence, and the older brothers contend it was error for the court to not say what "was missing" and to have "at least acknowledged" that their proposal "would be a distribution consistent with the terms of the Trusts and the law." *Id*.

Kirtus and Rocky relied upon two statutory provisions in the NUTC to support their request to allow the trustees to distribute the disputed farmland as separate parcels in fee simple title: (1) § 30-3837 (modification or termination of noncharitable irrevocable trust by consent) and (2) § 30-3838 (modification or termination because of unanticipated circumstances or inability to administer trust effectively). Alternatively, they

also sought confirmation from the court that the NUTC and the language of the trusts authorized them to distribute the disputed farmland as they proposed. The county court determined it was unnecessary to consider any modification to the trusts because it concluded, in essence, that § 30-3881(a)(22) permitted the trustees to distribute the property other than as tenants in common and that this could be done without modification of the trusts. Therefore, the county court did not consider Kirtus and Rocky's request for relief under either § 30-3837 or § 30-3838. Further, the county court was unwilling to approve Kirtus and Rocky's proposed allocation and equalization based on insufficient evidence. For the reasons that follow, we reverse, and remand for further proceedings on this issue.

### (a) Conclusion That Modification Was Unnecessary

The county court stated that Kirtus and Rocky's request to modify the trusts to authorize distribution of sole fee simple title and specific parcels of real estate to individual beneficiaries was not necessary, explaining:

> The requested modifications are not necessary. Notwithstanding the terms of Article XI [trustee powers] of the Norval and Elnora Trusts, section 30-3881[(a)](22) of the NUTC authorizes a trustee to "make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation." As such, the requested relief is already authorized under the NUTC.
>
> Pursuant to the dispositive provisions of the Norval and Elnora Trusts and the First Codicil to Norval's Will, it is clear that Norval wanted his three sons treated equally with respect to the distribution of farm real estate and personal property used in the farm operation. To the extent a request to modify the Trusts was made by Kirtus and Rocky with regard to the distribution proposal made

> by Kirtus at trial, the court finds that there is not sufficient evidence upon which the court can determine the equality of the proposal. As such, the request to modify the Trusts to approve the distribution proposal is denied.

It appears the county court concluded that notwithstanding the powers granted to the trustees under article XI of the parents' trusts, § 30-3881(a)(22) gave the trustees authority to distribute the disputed farmland in a manner contrary to the express language of the dispositive provisions of the trusts, and that they could do so without a formal request to modify. Article XI of the Norval Trust and the Elnora Trust contains the "Long Form of Powers for Trustee," authorizing the trustee specific powers (set forth in subparts (1) through (29)), along with any "other rights, powers, authority and privileges granted by any other provision of this Trust Agreement or by statute or general rules of law." The county court concluded that § 30-3881 gave the trustees the authority to distribute the disputed farmland other than as tenants in common and that therefore, the "requested modifications [were] not necessary." Section 30-3881(a) states, in relevant part:

> Without limiting the authority conferred by section 30-3880, a trustee may:
>
> . . . .
>
> (22) on distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation.

We disagree with the county court's interpretation that § 30-3881(a)(22) can be applied to the disputed farmland in this matter without a modification proceeding or possibly a nonjudicial settlement agreement (described further below), when the language of the trusts and the First Codicil specifically set forth how the disputed farmland was to be distributed. The language of the parents' trusts with regard to the disputed

real estate is clear. Article VIII(3)(f) states, "All other farmland held by the Trust shall be distributed to the three sons of the Grantor in equal shares as tenants in common." And the First Codicil appointed the Henry 80 to the three brothers "in equal shares, outright and free of trust."

To distribute the disputed farmland other than as tenants in common would have required the consent of the three brothers who were the named beneficiaries of that property; a nonjudicial settlement agreement may have been an option under those circumstances. The NUTC provides that "interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust" so long as "it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under the [NUTC] or other applicable law." § 30-3811(b) and (c). Matters that may be resolved by a nonjudicial settlement agreement include, for example, "the interpretation or construction of the terms of the trust" and "the grant to a trustee of any necessary or desirable power." § 30-3811(d)(1) and (3). Therefore, with the three brothers' consent through a nonjudicial settlement agreement, and so long as the agreement did not violate a material purpose of the trust and contained terms the court could otherwise properly approve as provided under the NUTC, the trustees could allocate the properties in separate parcels in fee simple title and make adjustments for differences in value as permitted by § 30-3881(a)(22) and article XI of the trusts. Any interested person can request the court to approve such an agreement and "determine whether the agreement contains terms and conditions the court could have properly approved," § 30-3811(e), such as under the modification statutes we discuss below. See, also, Unif. Trust Code § 111, comment, 7D U.L.A. 101, 102 (2018) (comment notes that while Uniform Trust Code recognizes that court may intervene in administration of trust to extent its jurisdiction is invoked by interested persons or as otherwise provided by law, "resolution of disputes by nonjudicial means is encouraged").

However, without the consent of the three brothers to enter into such an agreement under the requirements of § 30-3811 discussed above, it was necessary for the trustees to seek court approval, as Kirtus and Rocky did, to modify the pertinent dispositive provisions in the trusts and the First Codicil. Since there was no consent to change those dispositive provisions, modification was necessary to effectuate an allocation of the properties other than as tenants in common, or "equal shares," as directed by the pertinent instruments.

[20] Although Scott did not raise this issue in a cross-appeal, plain error may be noted by an appellate court on its own motion. See *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007). 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*. The county court's erroneous interpretation of § 30-3881(a)(22) as applied here amounts to plain error; this portion of the county court's order is reversed.

### (b) Modification Pursuant to § 30-3837(b) or § 30-3838

[21] The NUTC provides a basis for modification of a noncharitable irrevocable trust under § 30-3837 upon consent of all of the beneficiaries so long as the modification is not inconsistent with a material purpose of the trust; or, if all of the beneficiaries do not consent, a modification may still be approved under certain circumstances. We pause to note that while § 30-3837 refers to a noncharitable irrevocable trust, and the trusts at issue here were revocable when made, the statute's application is nevertheless appropriate because of the death of the last surviving grantor/settlor, Norval. A trust which is revocable when made remains revocable during the settlor's lifetime; however, a revocable trust necessarily

becomes irrevocable upon the settlor's death. See Unif. Trust Code § 604, comment, 7D U.L.A. 232 (2018) (comment notes this section regarding revocable trust only applies to revocable trust that becomes irrevocable by reason of settlor's death). See, also, § 30-3880(c) (regarding trustee's responsibility to satisfy medical assistance claims for trustor whose "revocable trust . . . has become irrevocable by reason of the death of the trustor"); *Grueff v. Vito*, 229 Md. App. 353, 145 A.3d 86 (2016) (settlor's death rendered revocable trust irrevocable); *Jameson v. Bain*, 693 S.W.2d 676 (Tex. App. 1985) (when valid inter vivos revocable trust is not revoked during lifetime of trustor, it becomes irrevocable upon his death, terminates, and becomes enforceable by beneficiary).

We first note that § 30-3837(a) is not applicable because it can only apply while the settlor is still alive; it requires the consent of the settlor. See *In re Trust of Shire*, 299 Neb. 25, 907 N.W.2d 263 (2018) (§ 30-3837(a) not applicable because it requires consent of settlor who was deceased). As relevant here, § 30-3837(b) then states:

> A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.

Section 30-3837(e) further states:

> If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection (a) or (b) of this section, the modification or termination may be approved by the court if the court is satisfied that:
>
> (1) if all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and
>
> (2) the interests of a beneficiary who does not consent will be adequately protected.

[22] Although § 30-3837(e) authorizes a court to modify a trust without the consent of all beneficiaries, it can only do so if the modification is not inconsistent with a material purpose of the trust and any nonconsenting beneficiary would be adequately protected. See § 30-3837(b) and (e). This basis for modifying the dispositive terms related to the disputed farmland was not considered by the county court because of its reliance instead on § 30-3881(a)(22), which we have determined to be erroneous. Thus, we remand the cause for further proceedings for the county court to consider whether § 30-3837(b) and (e) may permit Kirtus and Rocky to change the manner of distribution of the disputed farmland from ownership as tenants in common of all the property to separate parcels owned in fee simple.

[23-25] Likewise, § 30-3838 offers another alternative for modification; it states, in relevant part:

> (UTC 412)(a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

The comments to the Uniform Trust Code provide some guidance as to this particular statute. See *In re Trust Created by Fenske*, 303 Neb. 430, 930 N.W.2d 43 (2019) (comments to Uniform Trust Code provide some guidance, and Legislature directly referred to sections of code when adopting it, thereby incorporating those comments). See, also, Unif. Trust Code § 106, comment, 7D U.L.A. 85, 86 (2018) (comment notes that statutory text of Uniform Trust Code is "also supplemented by these Comments, which, like the Comments to any Uniform Act, may be relied on as a guide for interpretation"). Section 30-3838 broadens the court's ability to apply equitable deviation to modify a trust. See Unif. Trust Code, *supra*, § 412, comment, 7D U.L.A. at 168 (comment notes application

of equitable deviation and that subsection (a) allows court to modify dispositive provisions of trust as well as its administrative terms; "purpose of the 'equitable deviation' authorized by subsection (a) is not to disregard the settlor's intent but to modify inopportune details to effectuate better the settlor's broader purpose"). While it is necessary that there be circumstances not anticipated by the settlor before the court may grant relief under § 30-3838(a), the circumstances may have been in existence when the trust was created. See Unif. Trust Code § 412, *supra*. Under the "'equitable deviation'" doctrine, the objective is not to disregard the intention of the settlor, but to give effect to what the settlor's intent probably would have been had the circumstances in question been anticipated. See Restatement (Third) of Trusts § 66, comment *a*. at 493 (2003). Upon a finding of unanticipated circumstances, the court must further determine whether a proposed modification or deviation would tend to advance or detract from the trust purposes; this inquiry is likely to involve a somewhat subjective process of attempting to infer the relevant purpose or purposes of a trust from the general tenor of its provisions and from the nature of the beneficial interests, together with the family or personal relationships involved in the trust. See Restatement (Third), *supra*, § 66, comment *b*.

The older brothers contend their father "would not have wanted the family farm sold" and would have "expected his sons to work out their disputes between them and carry on with farming together." Brief for appellants at 15. They suggest that if their father expected the land would be sold rather than farmed, he would not have left Pamela "out of sharing the proceeds of that sale." *Id*. In other words, the older brothers suggest that unanticipated circumstances have arisen which warrant modification, or deviation, as to how the disputed farmland should be distributed and that such a modification should be in accordance with their father's probable intention that the brothers continue farming together—or at least keep the farmland in the family. Again, the county court

did not address Kirtus and Rocky's request for relief pursuant to § 30-3838, and it should do so on remand, keeping in mind the principles of equitable deviation set forth above.

## VI. CONCLUSION

We affirm the county court's order in all respects except as follows:

We vacate, for lack of jurisdiction, those portions of the county court's order (1) removing the trustees, (2) ordering an accounting and delivery of trust property to a successor trustee upon appointment, (3) declaring that a vacancy was created in the trusteeship of the trusts, and (4) determining that a successor trustee should be appointed.

We reverse the county court's determination that § 30-3881(a)(22) gave the trustees the authority, without modification of the trusts, to distribute the disputed farmland other than as tenants in common; we therefore remand the cause for consideration of Kirtus and Rocky's request for modification of the trusts pursuant to §§ 30-3837(b) and (e) and 30-3838.

Although we affirm the county court's determination that the trustees engaged in a breach of trust specific to the disputed farmland, the issue of an appropriate remedy for that breach of trust is remanded for further consideration once Pamela is included as a party.

Affirmed in part, vacated in part, and in part reversed and remanded for further proceedings.

Welch, Judge, participating on briefs.

# Halina Picard, appellee, v. P & C Group 1, Inc., doing business as Camaco, LLC, and Hartford Fire Insurance Company, appellants.

934 N.W.2d 394

Filed October 1, 2019. No. A-18-207.

1. **Workers' Compensation: Appeal and Error.** 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. **Workers' Compensation: Proof.** A claimant is entitled to an award under the Nebraska Workers' Compensation Act for a work-related injury disability if the claimant shows, by a preponderance of evidence, that the claimant sustained the injury and disability proximately caused by an accident which arose out of and in the course of the claimant's employment, even though a preexisting disability or condition had combined with the present work-related injury to produce the disability for which the claimant seeks an award.
4. **Workers' Compensation.** To be apportionable, an impairment must have been independently producing some degree of disability before the accident, and must be continuing to operate as a source of disability after the accident.
5. **Workers' Compensation: Words and Phrases.** In terms of the test for determining when apportionment is appropriate, the term "disability" contemplates impairment of earning capacity, not functional disability.

6. **Workers' Compensation.** Absent a statute requiring apportionment, the doctrine of apportionment is not applicable.
7. **Workers' Compensation: Intent.** The principal purpose of the Nebraska Workers' Compensation Act is to provide an injured worker with prompt relief from the adverse economic effects caused by a work-related injury or occupational disease.
8. **Workers' Compensation: Attorney Fees: Penalties and Forfeitures: Time.** Neb. Rev. Stat. § 48-125 (Cum. Supp. 2016) authorizes a 50-percent penalty payment for waiting time involving delinquent payment of compensation and attorney fees, where there is no reasonable controversy regarding an employee's claim for workers' compensation.
9. **Workers' Compensation: Attorney Fees.** Whether a reasonable controversy exists pertinent to Neb. Rev. Stat. § 48-125 (Cum. Supp. 2016) is a question of fact.
10. **Workers' Compensation: Attorney Fees: Words and Phrases: Appeal and Error.** A reasonable controversy may exist (1) if there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the compensation court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part.

Appeal from the Workers' Compensation Court. Julie A. Martin, Judge. Affirmed in part, and in part reversed and vacated.

Jessica R. Voelker, of Law Office of Steven G. Piland, for appellants.

Lee S. Loudon and Joseph A. Huckleberry, of Law Office of Lee S. Loudon, P.C, L.L.O., for appellee.

Riedmann, Bishop, and Welch, Judges.

Welch, Judge.

## INTRODUCTION

P & C Group 1, Inc., doing business as Camaco, LLC (P&C Group), and Hartford Fire Insurance Company (Appellants)

appeal from an order of the Nebraska Workers' Compensation Court awarding Halina Picard compensation for a 75-percent loss of earning capacity due to a 2012 work-related accident and for a 55-percent loss of earning capacity due to a 2015 work-related accident, with no reduction in the second award due to apportionment from the first award. For the reasons set forth herein, we affirm in part, and in part reverse and vacate the award of attorney fees, penalties, and costs.

## STATEMENT OF FACTS

Since 1989, Picard has worked as a production worker for P&C Group in a variety of positions. In April 2012, her duties included loading and unloading parts from robotic welders and stocking parts. On April 24, Picard felt a severe pain in both hands causing her to drop the parts that she was holding. She informed her supervisor and sought medical treatment. She was referred to Dr. Jeffrey Tiedeman, who performed surgery on her wrists in June. Dr. Tiedeman eventually released Picard to work with permanent restrictions.

In September 2015, Picard was working at P&C Group in a position that accommodated her permanent restrictions. On September 9, Picard experienced severe back pain as she bent over to pick up parts. She testified that she was almost unable to walk and sought medical attention. She was referred to Dr. Geoffrey McCullen, who eventually performed surgery on her back. Following her surgery, Picard returned to work at P&C Group and, up until the time of trial, had performed the same job she performed prior to her September 2015 injury.

Picard filed two claims against P&C Group and its insurer, Hartford Fire Insurance Company, relating to the injuries she received while working for P&C Group in 2012 and 2015. These cases were consolidated by the Workers' Compensation Court. Trial in this matter was held in December 2017.

At the time of trial, Picard was 62 years old. She testified that she was born in Poland, attended "[e]ighth grade school and five year college," and had worked selling jewelry in

Poland. In 1982, she moved to the United States, and in 1987, she obtained a job assembling electronics. After this job, she worked for P&C Group for a few months before being laid off. She then found a job labeling boxes and meat in a meat-packing plant. In 1989, Picard was rehired by P&C Group and worked there through the time of trial.

### Medical Evidence

After the April 2012 injury, Dr. Tiedeman diagnosed Picard with bilateral carpal tunnel syndrome, and in June, he performed a carpal tunnel release surgery on her wrists. After some temporary restrictions, Dr. Tiedeman placed Picard on a permanent restriction of lifting no more than 5 pounds and recommended that she do no more than occasional work above shoulder level. In October, Dr. Tiedeman wrote that, in his opinion, Picard had reached maximum medical improvement and had a 10-percent permanent partial impairment of each hand.

In November 2017, a doctor performed an independent medical evaluation of Picard's carpal tunnel condition on behalf of P&C Group. He opined that the symptoms in Picard's hands would not improve significantly. He agreed that Picard should be restricted to lifting no more than 5 pounds and recommended a restriction that Picard "avoid use of vibratory tools."

After Picard's September 2015 injury, Dr. McCullen diagnosed her with a herniated disk and performed a microdiskectomy operation on her spine. Dr. McCullen assigned permanent restrictions to Picard of no bending to the floor; only occasional bending, squatting, or twisting; and no lifting greater than 10 pounds. Dr. McCullen clarified that "[t]he restrictions above are for the spine," not the hands, and stated that Picard could continue in her then-current position at P&C Group. Dr. McCullen opined within a reasonable degree of medical certainty that Picard suffered a 13-percent impairment of the whole body.

### Stipulations Prior to Trial

Prior to trial, the parties stipulated to matters relevant to this appeal. Regarding the 2012 accident involving Picard's wrists, the parties stipulated that (1) Picard's average weekly wage at the time of her injury was $694.12; (2) P&C Group paid Picard temporary total disability benefits for 7⅐ weeks from June 18 through 25, 2012, and January 7 through February 10, 2013, at the rate of $462.75 totaling $3,503.68; (3) P&C Group paid Picard permanent partial disability benefits totaling $18,817.19 and is entitled to a credit for the permanent partial disability benefits paid; (4) if Picard's 2012 injury to her hands is compensated as a scheduled member injury under Neb. Rev. Stat. § 48-121(3) (Reissue 2010), a 10-percent impairment to Picard's bilateral hands equates to 35 total weeks (175 weeks × 10 percent × 2). At the rate of $462.75, Picard would be entitled to $16,196.25 if the court finds that Picard is not entitled to permanent partial disability benefits based upon her loss of earning power. As such, the parties stipulated that regarding Picard's 2012 injury, the genuinely controverted issues to be resolved by the court at the time of trial relevant to this appeal were (1) whether Picard was adequately compensated for her April 24, 2012, injuries with a scheduled member injury award, or (2) whether Picard was entitled to additional compensation for loss of earning power benefits as a result of suffering more than one scheduled member injury from one accident.

The parties then stipulated to the following regarding the 2015 accident involving Picard's back: (1) that Picard suffered an accident and injury on September 9, 2015, and (2) that P&C Group has paid 12 weeks of temporary total disability from June 24 through September 15, 2016, at the rate of $403.55 totaling $4,035.50. The parties further stipulated that regarding Picard's 2015 injury, the genuinely controverted issues to be resolved by the court at the time of trial and relevant to this appeal were (1) whether Picard suffered any loss of earning power as a result of the September 9, 2015, accident;

(2) whether Picard was entitled to apportion any loss of earning power benefits attributable to the April 24, 2012, accident and injury toward any benefits that may be due and owing for loss of earning power for the September 9, 2015, accident; and (3) whether Picard is entitled to penalties, attorney fees, and interest for P&C Group's failure to pay any permanent disability benefits for loss of earning power.

## Vocational Evidence

In addition to the above-stated stipulations, the parties stipulated to having Kim Rhen perform a loss of earning capacity analysis in connection with Picard's 2015 injury. Based on the restrictions that Dr. McCullen assigned for Picard's back, Rhen estimated Picard's total loss of earning capacity from the 2015 injury to be 50 percent—or 55 percent if still employed at P&C Group. Rhen provided two possibilities, because there was a dispute regarding Picard's average weekly wage. Rhen was then appointed by the court to perform a vocational evaluation for Picard's 2012 injury. Based on the restrictions that Dr. Tiedeman assigned for Picard's carpal tunnel syndrome, Rhen estimated Picard's total loss of earning capacity from the 2012 injury at 60 percent if still employed at P&C Group. Rhen found that the restrictions from either of Picard's two injuries were independently sufficient to make Picard unemployable outside of P&C Group, but she believed that Picard was competitively employed at P&C Group. Rhen also noted that the higher earning capacity loss for the 2012 injury was because Picard had a higher average weekly wage before the 2012 injury.

After Picard's first injury, she was no longer eligible for overtime. After each injury, she continued to receive yearly raises to her hourly pay similar to uninjured employees and has not had her hourly pay reduced. Upon Picard's completion of her shift at work, someone on the next shift performs the same job functions she performs. There are eight other jobs at P&C Group that Picard could transfer to and perform with

no accommodations or assistance, as well as other jobs for which P&C Group could accommodate her. Picard testified that she had worked in her current position for over 3 years and had not received any negative performance reviews, been demoted, or had her pay reduced. She has been satisfied with P&C Group and plans to continue employment there.

### Compensation Court Order

In February 2018, the Workers' Compensation Court issued an award following trial on the consolidated matters. As to Picard's 2012 injury, the court stated:

> [P&C Group contends that Picard] has been adequately compensated for her injuries based upon the 10 percent bilateral hand impairment. [Picard] argues she is entitled to compensation in the form of a loss of earnings capacity assessment under *Neb. Rev. Stat.* § 48-121(3), which provides: "If, in the compensation court's discretion, compensation benefits payable for a loss or loss of use of more than one member or parts of more than one member set forth in this subdivision, resulting from the same accident or illness, do not adequately compensate the employee for such loss or loss of use and such loss or loss of use results in at least a thirty percent loss of earning capacity, the compensation court shall, upon the request of the employee, determine the employee's loss of earning capacity consistent with the process for such determination under subdivision (1) or (2) of this section, and in such a case the employee shall not be entitled to compensation under this subdivision." Based upon the written evidence, her permanent work restrictions, and the testimony of [Picard], the Court finds . . . Picard has not been adequately compensated for the injuries to her hands under the schedule established in *Neb. Rev. Stat.* §48-121(3).
>
> . . . .

> . . . Thus, based upon the testimony of the witnesses, the written evidence submitted herein, and the factors set forth under *Sidel*, it is this Court's own factual finding that [Picard] has suffered a 75 percent loss of earning power as a result of the accident and injury of April 24, 2012, which entitles her to the sum of $347.06 per week for 292 3/7 weeks.

As to the 2015 injury, the court found:

> After considering all the written evidence, [Picard's] testimony, her current employability, the Court's own observations, together with the various factors used to determine loss of earning capacity as set forth in *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 288 N.W.2d 482 (1980), the Court adopts the opinions of the agreed-upon counselor and finds [Picard] has a loss of earning capacity of 55 percent as a result of the accident and injury of September 9, 2015, which entitles her to the sum of $229.01 per week for 288 weeks.

In addressing P&C Group's request for apportionment, the court held:

> [Appellants assert that] any loss of earning capacity assigned to [Picard] for the 2015 accident should be apportioned. "To be apportionable, an impairment must have been independently producing some degree of disability before an accident and must be continuing to operate as a source of disability after the accident. *Jacob v. Columbia Ins. Group*, 2 Neb. App. 473, 491, 511 N.W.2d 211, 221 (1994) (quoting 2 Arthur Larson, The Law of Workmen's Compensation § 59.22(c) (1993)). The term "disability" contemplates impairment of earning capacity, not functional disability. *Cummings v. Omaha Public Schools*, 6 Neb. App. 478, 486, 574 N.W.2d 533, 539 (1998). The problem with apportionment typically occurs between an employer and an employee when disability from a prior injury contributes to a claimant's total disability

following a subsequent injury. *Martinez-Najarro v. IBP, Inc.*, 12 Neb. App. 504, 678 N.W.2d 114 (2004).

After further quoting from *Martinez-Najarro v. IBP, inc.*, 12 Neb. App. 504, 678 N.W.2d 114 (2004), and later in the opinion, the court ultimately held:

> The undersigned will admit to being perplexed by [Appellants'] argument. They are claiming apportionment for the back claim but at the same time arguing [Picard's] carpal tunnel injuries should be compensated as scheduled member injuries. Apportionment is only appropriate when the employee has already been compensated for a disability in terms of a loss of earnings. *Martinez* at 510, 678 N.W.2d 114, 121. According to the evidence, . . . Picard was not paid for a loss of earnings for the 2012 claim. Additionally, . . . Picard's injuries are to different parts of her body—hands and low back. As with Martinez, she still would have sustained a loss of earnings for her back irrespective of her bilateral carpal tunnel injuries. *Id*. Apportionment is not appropriate under the facts of the present case.

Finally, the court awarded Picard $20,000 in attorney fees relating to the 2015 injury. The court specifically found that there was no reasonable controversy governing the substance of the 2015 award and that therefore, the attorney fees, penalties, and interest provisions of Neb. Rev. Stat. § 48-125 (Cum. Supp. 2016) were applicable. Appellants now appeal.

## ASSIGNMENTS OF ERROR

Appellants contend that the trial court erred (1) in finding that apportionment does not apply, (2) in assessing loss of earning power to the September 2015 injury, and (3) in awarding attorney fees and penalties.

## STANDARD OF REVIEW

[1,2] 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. See *Gimple v. Student Transp. of America*, 300 Neb. 708, 915 N.W.2d 606 (2018). 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*.

## ANALYSIS

This case presents the issue of the interrelation of successive workers' compensation injuries and awards. As it relates to this appeal, the Workers' Compensation Court held that (1) Picard was entitled to a body as a whole award (lost earning capacity) for the bilateral injuries to her wrists in 2012, (2) Picard was entitled to a body as a whole award for injury to her back in 2015, (3) the court's 2015 award for Picard's back should not be reduced because of Picard's 2012 injuries or the court's award for Picard's wrists, and (4) Picard was entitled to an award of attorney fees and costs under these circumstances.

Appellants do not challenge the court's finding that Picard was entitled to a body as a whole award for the bilateral injuries to her wrists in 2012. Instead, they argue that the court erred in not apportioning the 2015 award as a result of its 2012 award or, in the alternative, that the court erred in finding the permanent physical limitations from Picard's 2012 wrist injuries do not impact the 2015 award. We will address these arguments independently.

### Apportionment

Appellants first argue that the court erred in failing to apportion the disability benefits awarded for the 2015 accident

with the disability benefits awarded for the 2012 accident. This argument requires us to determine whether a prior body as a whole injury resulting in compensation for lost earning capacity should be apportioned with an award for a successive body as a whole injury, albeit when the successive injury is to a different part of the body.

[3] In order to properly analyze this issue, we begin with a review of prior case law in the areas of successive injuries. In *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990), the Nebraska Supreme Court considered whether an employee's preexisting back condition should diminish a disability award when the employee's back injury was later aggravated resulting in further disability. In finding that the preexisting condition of the employee's back injury should not reduce his recovery, the court held:

> [A] claimant is entitled to an award under the [Nebraska] Workers' Compensation Act for a work-related injury disability if the claimant shows, by a preponderance of evidence, that the claimant sustained the injury and disability proximately caused by an accident which arose out of and in the course of the claimant's employment, even though a preexisting disability or condition had combined with the present work-related injury to produce the disability for which the claimant seeks an award. *Spangler v. State*, 233 Neb. 790, 448 N.W.2d 145 (1989); *Cole v. Cushman Motor Works*, 159 Neb. 97, 65 N.W.2d 330 (1954); *Tucker v. Paxton & Gallagher Co.*, 153 Neb. 1, 43 N.W.2d 522 (1950). Thus, allocation of disability attributable to a work-related injury and disability attributable to an antecedent or preexisting disability or condition which may or may not be work-related is irrelevant in this case inasmuch as there is no claim against the Second Injury Fund.

*Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. at 473, 461 N.W.2d at 575.

In *Cummings v. Omaha Public Schools*, 6 Neb. App. 478, 574 N.W.2d 533 (1998), this court considered whether the rule espoused in *Heiliger* applied similarly when the aggravated preexisting condition involved a body as a whole injury which was previously compensated under workers' compensation laws. In *Cummings*, the employee suffered a back injury in 1984 for which he was compensated for lost earning capacity relating thereto. From 1992 through 1994, the employee exacerbated his back injury during the course and scope of his employment, for which he made a separate workers' compensation claim. Unlike in *Heiliger*, the Workers' Compensation Court in *Cummings* apportioned the claimant's recovery between the previously compensated injury and the new injuries.

In affirming the award, this court reasoned that neither *Heiliger v. Walters & Heiliger Electric, Inc., supra*, nor *Jacob v. Columbia Ins. Group*, 2 Neb. App. 473, 511 N.W.2d 211 (1994), "prohibit apportioning a claimant's recovery for disability between a prior, compensated injury to the body as a whole and a subsequent compensable injury to the body as a whole." *Cummings v. Omaha Public Schools*, 6 Neb. App. at 485, 574 N.W.2d at 539. In reaching this conclusion, this court first distinguished *Heiliger* in saying:

> *Heiliger* is distinguishable from the present case, however, because the claimant in *Heiliger* had not been compensated for the prior injury or the disability resulting therefrom. As such, *Heiliger* does not stand for the proposition that a claimant who has once received compensation for disability occasioned by a prior injury is entitled to be compensated again for the original disability when a subsequent injury exacerbates the prior disability.

*Cummings v. Omaha Public Schools*, 6 Neb. App. at 485, 574 N.W.2d at 539.

[4,5] The *Cummings* court further distinguished *Jacob v. Columbia Ins. Group, supra*, in stating:

> In *Jacob v. Columbia Ins. Group, supra*, this court discussed apportionment and applied apportionment to a factual situation involving injuries to separate but related members, rather than injuries to the body as a whole. We held that "'[t]o be apportionable, then, an impairment must have been independently producing some degree of disability before the accident, and must be continuing to operate as a source of disability after the accident.'" 2 Neb. App. at 491, 511 N.W.2d at 221. In terms of this test for determining when apportionment is appropriate, the term "disability" contemplates impairment of earning capacity, not functional disability. *Id.* Additionally, we noted that the problem of apportionment may be encountered between an employer and an employee when disability from a prior injury contributes to a claimant's total disability following a subsequent injury. *Id.*
>
> On the facts of *Jacob*, we held that it was not appropriate to apportion a claimant's disability between a prior work-related accident where the claimant lost a finger and a subsequent work-related accident where he essentially lost his entire hand. Because both injuries were injuries to members, rather than injuries to the body as a whole, the claimant did not suffer any disability in terms of loss of earning capacity, as distinguished from functional disability, from the prior injury, and the award which he received for the prior injury did not need to be deducted from the disability benefits for which he was entitled as a result of the subsequent injury. See *id.*

*Cummings v. Omaha Public Schools*, 6 Neb. App. 478, 485-86, 574 N.W.2d 533, 539-40 (1998).

We held in *Cummings*, after applying the facts in that case to the "test established in *Jacob* for determining the appropriateness of apportionment," that

> the compensation court did not err in apportioning Cummings' disability between the prior, compensated

> injury and the subsequent series of injuries. Cummings' prior back injury independently produced some degree of lost earning capacity, as indicated by his prior award of benefits for a 25-percent loss of earning capacity resulting from the prior accident. Additionally, the prior disability is continuing to act as a source of lost earning capacity even after the subsequent series of accidents.
>
> As such, because Cummings was already compensated for the prior disability, he is not entitled to receive compensation now beyond whatever additional disability can be attributed to the subsequent series of injuries or its aggravation of his prior condition. He is not entitled to be compensated again for the original 25-percent disability caused by the prior injury. The evidence in the record uniformly indicates that Cummings is entitled to benefits for a 5-percent loss of earning capacity caused by the subsequent series of injuries and its aggravation of his prior condition.

6 Neb. App. at 486-87, 574 N.W.2d at 540.

Having addressed apportionment in connection with a previously uncompensated body as a whole injury aggravated in a successive work-related accident in *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990); a previously compensated member injury followed by a successive work-related member injury in *Jacob v. Columbia Ins. Group*, 2 Neb. App. 473, 511 N.W.2d 211 (1994); and a previously compensated body as a whole injury aggravated in a successive work-related accident in *Cummings v. Omaha Public Schools, supra*, this court had occasion to review a previously uncompensated member injury followed by a successive body as a whole injury in *Martinez-Najarro v. IBP, inc.*, 12 Neb. App. 504, 678 N.W.2d 114 (2004). In *Martinez-Najarro*, an employee suffered a shoulder injury in 1997 resulting in a 34-pound lifting restriction; however, the record did not establish whether he was previously compensated for that injury. In 1999, the employee suffered a work-related hernia, a body as a

whole injury for which he was given a 30-pound lifting restriction and for which he sought compensation. The Workers' Compensation Court apportioned the disabilities relating to the injuries and awarded the employee only a 5-percent loss of earning power, reasoning that the prior 34-pound lifting restriction from the prior shoulder injury provided the bulk of his lost earning power and that little additional disability was caused by the hernia.

In reversing the award, we noted that, like *Heiliger v. Walters & Heiliger Electric, Inc., supra*, the preexisting shoulder condition of the employee was not previously compensated as a whole body injury (at least record did not establish prior compensation) thereby distinguishing *Martinez-Najarro v. IBP, inc., supra*, from *Cummings v. Omaha Public Schools, supra*. Additionally, like *Jacob v. Columbia Ins. Group, supra*, the preexisting shoulder condition of the employee would be a scheduled member injury under the workers' compensation statutes, meaning the employee, even if compensated, would have been compensated for a scheduled member injury and not compensated for lost earning capacity. *Martinez-Najarro v. IBP, inc., supra*. See, also, *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 810, 635 N.W.2d 439, 448 (2001) (holding that, because claimant's injuries were scheduled member injuries, not injuries to "body as a whole," any loss of earning capacity claimant may have sustained was irrelevant to computing his compensation).

Notwithstanding the holding in *Martinez-Najarro*, in dicta, this court also noted:

> Martinez' injuries were to different parts of his body. According to *Jacob*, the usual apportionment statute would entitle Martinez to compensation for a disability that would have existed if the prior injury had not occurred. Even if Martinez had not had a prior 34-pound lifting restriction from his shoulder injury, his hernia still would have resulted in a 30-pound lifting restriction. The two injuries were not related, so the second

> injury would not have been less had the first injury not occurred.

*Martinez-Najarro*, 12 Neb. App. at 513, 678 N.W.2d at 123.

Based upon this language, the Workers' Compensation Court in the case at bar stated in its award governing the 2015 injury:

> [In *Martinez-Najarro*,] IBP argued the award should be apportioned since Martinez's prior disability continued to operate as a source of disability at the time of the second injury. The Court [of Appeals] rejected this argument because Martinez's injuries were to different parts of his body, stating "[e]ven if Martinez had not had a prior 34-pound lifting restriction from his shoulder injury, his hernia still would have resulted in a 30-pound lifting restriction. The two injuries were not related, so the second injury would not have been less had the first injury not occurred. Furthermore, there is no evidence that Martinez was compensated for the injury which gave rise to his prior 34-pound lifting restriction." *Id*. at 513, 678 N.W.2d 114, 123.
>
> . . . Apportionment is only appropriate when the employee has already been compensated for a disability in terms of a loss of earnings. *Martinez* at 510, 678 N.W.2d 114, 121. According to the evidence, . . . Picard was not paid for a loss of earnings for the 2012 claim. Additionally, . . . Picard's injuries are to different parts of her body—hands and low back. As with Martinez, she still would have sustained a loss of earnings for her back irrespective of her bilateral carpal tunnel injuries. *Id*. Apportionment is not appropriate under the facts of the present case.

In determining whether apportionment is applicable to these facts, we must first determine the definition of apportionment. Although our prior case law does not appear to clearly define it, we note a statement we made in *Jacob v. Columbia Ins. Group*, 2 Neb. App. 473, 511 N.W.2d 211 (1994). There, we

stated: "The parties agree that the question before the court is really one of whether Nebraska is an apportionment state. We are unable to find any cases holding that Nebraska is or is not an apportionment state." *Id*. at 490, 511 N.W.2d at 221. We then went on to quote from Prof. Arthur Larson, a notable academic on workers' compensation law. In doing so, we noted Professor Larson's discussion of cases from other jurisdictions governing the issue of apportionment, including the following:

> "The problem of apportionment of a compensable loss is encountered in three principal forms: between successive employers or carriers, when the final disability is traceable to exposures or incidents under two or more of them; between an employer and a Second Injury fund, when a preexisting condition covered by the Fund is involved; and between an employer and the employee himself, when a prior personal disability contributes to the final disabling result." 2 Arthur Larson, The Law of Workmen's Compensation § 59.20 at 10-492.337 to 10-492.339 (1993).

*Jacob*, 2 Neb. App. at 490, 511 N.W.2d at 221. We then quoted Professor Larson's continuing analysis on apportionment:

> "Note, however, that this combining of a prior nondisabling condition and a later work-connected injury may produce compensable aggravated disability even though the one does not act directly upon the other. For example . . . . It will be observed that the courts in these cases define preexisting disability, not as functional disability, but as disability in the compensation sense of impairment of earning capacity. This approach is put to its sharpest test when the prior impairment was in the form of loss of specific members covered by the schedule. For example, when a claimant, although he had earlier lost three fingers of his left hand, had continued to work at regular employment, and then lost his entire left hand, he was held entitled to compensation for the hand

> without deduction for the schedule value of the fingers." [2 Arthur Larson, The Law of Workmen's Compensation] at § 59.22(c) at 10-492.394 to 10-492.395.

*Jacob*, 2 Neb. App. at 490-91, 511 N.W.2d at 221. We finally quoted the following observation from Professor Larson's work:

> "This is correct under the usual apportionment statute, which allows compensation for the disability that would have existed if the prior injury had not occurred, since the final effect of loss of the hand itself is the same whether several fingers were previously missing or not. . . .
>
> "To be apportionable, then, an impairment must have been independently producing some degree of disability before the accident, and must be continuing to operate as a source of disability after the accident." [2 Arthur Larson, The Law of Workmen's Compensation] at 10-492.396 to 10-492.397.

*Jacob*, 2 Neb. App. at 491, 511 N.W.2d at 221.

We then concluded in *Jacob v. Columbia Ins. Group*, 2 Neb. App. 473, 511 N.W.2d 211 (1994), that because the original injury did not continue to produce disability before the second accident, the claimant was entitled to compensation for the second injury without any deduction for the first. That said, we never answered the direct question posed earlier in the opinion, i.e., whether Nebraska is an apportionment state. Instead, we concluded that in states that have apportionment statutes, the scenario in *Jacob* would not produce apportionment anyway, and therefore, under the facts in *Jacob*, apportionment was not appropriate.

[6] We are now asked to determine whether apportionment is appropriate to successive injuries to different parts of the body when the former injury was a compensated injury to the body as a whole and the subsequent injury is a compensable injury to the body as a whole. The difficulty in determining whether apportionment should apply lies in the fact that Nebraska does not have an apportionment statute.

In summarizing the law governing apportionment, Professor Larson noted in assessing his own statement governing the law of apportionment, that "'[t]his is correct under the usual apportionment statute . . . .'" *Jacob*, 2 Neb. App. at 491, 511 N.W.2d at 221. But it is difficult to assign a definition to apportionment when the definition differs by state statute and Nebraska has no such statute. We note that Professor Larson's workers' compensation treatise indicates that "[i]n the absence of an apportionment statute, the general rule is that the employer becomes liable for the entire disability resulting from a compensable accident." 8 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 90.01 at 90-2 (2017). We further note that although Nebraska did formerly have an apportionment statute which provided for apportionment in connection with the Second Injury Fund, and that a Second Injury Fund is one of the "three principal forms" of apportionment discussed by Professor Larson, that statute applies only to "injuries occurring before December 1, 1997." Neb. Rev. Stat. § 48-128 (Reissue 2010). Finally, we note that in *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 473, 461 N.W.2d 565, 575 (1990), after reviewing the facts to determine whether apportionment should apply, the Nebraska Supreme Court stated, "allocation of disability attributable to a work-related injury and disability attributable to an antecedent or preexisting disability or condition which may or may not be work-related is irrelevant in this case inasmuch as there is no claim against the Second Injury Fund." We read the Supreme Court's statement in *Heiliger* to be a manifestation of the general rule as provided by Professor Larson. That is, absent a statute requiring apportionment, the doctrine of apportionment is not applicable.

Accordingly, we hold that because Nebraska does not have an apportionment statute, apportionment is not appropriate to the case at bar. We further note that applying Professor Larson's summarization of "'the usual apportionment statute,'" apportionment would not apply to these facts because, with an

injury to a different body part, the second injury and resulting disability would have existed regardless of whether the prior injury occurred. As such, although on different grounds, we affirm the Workers' Compensation Court's decision not to apportion Picard's second injury award with the first.

### Failure to Assess Loss of Earning Power

Appellants next argue that the court erred in assessing Picard's lost earning power from the second injury by simply ignoring Picard's lost earning power and condition related to the first injury—which continued to act as a source of disability at the time of her second injury. We note that P&C Group does not appeal the compensation court's determination of a 75-percent loss of earning capacity as a result of Picard's 2012 injury. We thus affirm the compensation court's order related to the 2012 injury and loss of earning award. We proceed to consider the impact, if any, of the continuing disability which resulted in the 2012 loss of earning capacity award when determining a loss of earning capacity resulting from Picard's 2015 injury.

Part of the difficulty in this case lies with the fact that the 2012 claim for the injury to Picard's hands was consolidated and tried together with the 2015 claim for the injury to Picard's back. In fact, Rhen was asked to perform her lost earning capacity analysis in connection with the 2015 injury before being asked by the court to perform a similar analysis for the 2012 injury. As a result, it appears that Rhen made her assessment of lost earning capacity for 2015 without taking into account any continuing disability from the 2012 injury. That fact is reflected in the following colloquy:

> Q. Okay. So is it fair to say that the back injury did not change the loss of earning power, given that [Picard] remains in that same position that she held at the time that she was placed at maximum medical improvement for the wrist injuries and given that five-pound restriction?

> [Picard's counsel:] Objection, calls for a legal conclusion.
>
> A. I'm not sure how to answer that. I went ahead and — like I said, I received the information kind of in reverse order. The second one came before the first one. So when I completed the original report dated January 23rd, I was taking the information that I had in front of me at that time and providing an opinion based upon that.

Appellants properly note that after Picard's 2012 injuries to her hands and her bilateral carpal tunnel release surgeries, as well as prior to her 2015 back surgery, Picard was assigned a permanent restriction of not lifting over 5 pounds and was no longer allowed to work overtime for her employer. She was moved to a job that accommodated those medical restrictions. As a result, Rhen, the court-appointed vocational rehabilitation counselor, opined that Picard was unemployable outside of her present employment and suffered a 60-percent loss of earning power if she remained employed with P&C Group. Based upon this evidence, the Workers' Compensation Court assigned Picard a 75-percent loss of earning capacity related to the 2012 injuries and compensated Picard for her loss of earning power on that basis.

Appellants then note that Picard, while working with the job assignment and restrictions from her first accident, suffered her back injury in 2015. Following her back surgery, Picard was assigned a 10-pound lifting restriction along with restrictions for repetitive bending, squatting, and twisting. As a result, and without considering medical or functional data from the first accident, Rhen indicated that if Picard remained employed with P&C Group, she would have a 50- to 55-percent loss of earning power, but that if Picard did not remain so employed, her lost earning capacity was 100 percent. Picard's doctor even acknowledged that Picard did not need additional accommodation at work following her back injury, given that there were restrictions in place following

her hand injuries and that Picard worked regularly following her medical release.

Appellants argue that because Picard's lifting restriction from her 2012 injuries to her hands was greater than the lifting restrictions from the 2015 injury to her back, and because Picard did not need any additional accommodations at work for the second injury given the restrictions from the first, the evidence demonstrates there was no additional lost earning power from the second injury.

When determining how to properly calculate compensation for Picard's 2015 back injury, an injury to her body as a whole, our analysis begins with the controlling compensation statute, § 48-121 (Reissue 2010). Section 48-121(2) provides, in pertinent part:

> For disability partial in character, except the particular cases mentioned in subdivision (3) of this section, the compensation shall be sixty-six and two-thirds percent of the difference between *the wages received at the time of the injury and the earning power of the employee thereafter*, but such compensation shall not be more than the maximum weekly income benefit specified in section 48-121.01.

(Emphasis supplied.)

Here, the Workers' Compensation Court recognized that apportionment was not appropriate, but then appeared to assess Picard's lost earning power from the 2015 back injury as if the 2012 injury did not exist. By the time of the 2015 injury, Picard was making wages for her job subject to the limitations and restrictions from her first injury, for which the compensation court awarded her a 75-percent loss of earning capacity. Her restrictions and reduced earning capacity from her 2012 injury to her wrists continued to be in effect at the time of her 2015 injury to her back. Notably, the 2015 injury did not result in any additional lifting restrictions which were not already in place prior to the 2015 injury. In short, it appears that because the court correctly concluded that

apportionment was not applicable, it disregarded any disability from the first accident in assessing lost earnings from the second, resulting in the court's ordering an additional award for a 55-percent loss of earning capacity.

Although Appellants argue that Picard's earning power was not further reduced as a result of her 2015 back injury, due to her permanent lifting restrictions resulting from her 2012 injuries to her wrists, we are mindful of our court's prior statement in *Martinez-Najarro v. IBP, inc.*, 12 Neb. App. 504, 678 N.W.2d 114 (2004). In *Martinez-Najarro*, we separately decided the matter on the basis that the prior injury was not compensated and the prior injury was to a scheduled member; however, we noted in dicta, "Even if [the claimant] had not had a prior 34-pound lifting restriction from his shoulder injury, his hernia still would have resulted in a 30-pound lifting restriction. The two injuries were not related, so the second injury would not have been less had the first injury not occurred." 12 Neb. App. at 513, 678 N.W.2d at 123. Although our court made that statement in relation to explaining why injuries to separate body parts do not invoke the doctrine of apportionment, it equally applies to Appellants' argument here.

[7] As the Nebraska Supreme Court noted in *Risor v. Nebraska Boiler*, 274 Neb. 906, 912, 744 N.W.2d 693, 698 (2008), "The principal purpose of the [Nebraska Workers' Compensation] Act is to provide an injured worker with prompt relief from the adverse economic effects caused by a work-related injury or occupational disease." Section 48-121 provides that "[t]he following schedule of compensation is hereby established for injuries resulting in disability . . . ." If we were to find that Picard was not entitled to compensation because her earning power, diminished by the current injury, was not compensable due to malingering, similar restrictions from a different injury, Picard would be denied compensation for her current injury. We believe the better reasoned interpretation of § 48-121(2) requires that the court review Picard's lost earning

power from the current injury independent of any limitations from a prior dissimilar compensable injury. As such, albeit for a different reason, we affirm the Workers' Compensation Court's finding that the 2015 injury and impact on Picard's lost earning power should be assessed independently of any limitations from Picard's 2012 injury.

### Attorney Fees and Penalties

[8-10] Finally, we address Appellants' contention that the court erred in awarding Picard attorney fees, penalties, and interest relating to the 2015 injury. In making the award, the court held there was no reasonable controversy governing the substance of the 2015 award and that therefore, the attorney fee, penalties, and interest provisions of § 48-125 were applicable. As the Nebraska Supreme Court noted in *McBee v. Goodyear Tire & Rubber Co.*, 255 Neb. 903, 908-09, 587 N.W.2d 687, 692 (1999):

> As construed by this court, Neb. Rev. Stat. § 48-125 (Reissue 1993) authorizes a 50-percent penalty payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy regarding an employee's claim for workers' compensation. *Musil v. J.A. Baldwin Manuf. Co.*, 233 Neb. 901, 448 N.W.2d 591 (1989); *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987). Whether a reasonable controversy exists pertinent to § 48-125 is a question of fact. *Starks v. Cornhusker Packing Co., supra*; *U S West Communications v. Taborski, supra.* In *Mendoza v. Omaha Meat Processors, supra*, this court adopted guidelines to aid courts in determining whether a reasonable controversy exists. A reasonable controversy may exist (1) if there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or

(2) if the properly adduced evidence would support reasonable but opposite conclusions by the compensation court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part. *U S West Communications v. Taborski, supra*; *Kerkman v. Weidner Williams Roofing Co.*, 250 Neb. 70, 547 N.W.2d 152 (1996); *Mendoza v. Omaha Meat Processors, supra.* Under the *Mendoza* test, when there is some conflict in the medical testimony adduced at trial, reasonable but opposite conclusions could be reached by the compensation court. As such, this indicates the presence of a reasonable controversy. *Kerkman v. Weidner Williams Roofing Co., supra.* See, also, *Tlamka v. Goodyear Tire & Rubber Co.*, 225 Neb. 789, 408 N.W.2d 291 (1987) (no reasonable controversy existed when all medical testimony agreed that claimant's condition was probably caused by his industrial accident).

Because of the lack of clarity in our prior authority governing the applicability of apportionment and/or considerations in determining an award for successive compensated body as a whole injuries, we disagree that there was no reasonable controversy here. Accordingly, we reverse and vacate that portion of the award granting Picard attorney fees, penalties, and costs.

## CONCLUSION

In sum, we affirm the Workers' Compensation Court's awards for Picard's 2012 and 2015 injuries. However, we reverse and vacate the court's award of attorney fees, penalties, and interest provisions relating to the 2015 award.

Affirmed in part, and in part reversed and vacated.

# Fo Ge Investments LLC, appellant, v. First American Title and First American Title Insurance Company, appellees.

935 N.W.2d 245

Filed October 1, 2019. No. A-18-693.

1. **Summary Judgment.** Summary judgment is to be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.
2. ____. Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **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.
4. **Insurance: Contracts.** An insurance policy should be considered as any other contract and be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning.
5. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.
6. **Insurance: Contracts: Claims: Proof.** To establish a claim for bad faith, a plaintiff must show an absence of a reasonable basis for denying the benefits of the insurance policy and the insurer's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.
7. **Title: Insurance: Agents.** Title insurance companies and their agents are required to exercise the degree of skill and knowledge normally possessed by members of the profession in good standing concerning preliminary title information which is transmitted to their customers.

8. **Summary Judgment: Motions for Continuance: Affidavits.** As a prerequisite for a continuance, additional time, or other relief, a party is required to submit an affidavit stating a reasonable excuse or good cause for the party's inability to oppose a summary judgment motion.
9. **Summary Judgment: Motions for Continuance.** In ruling on a request for a continuance or additional time in which to respond to a motion for summary judgment, a court may consider the complexity of the lawsuit, the complications encountered in litigation, and the availability of evidence justifying opposition to the motion.
10. **Motions for Continuance: Appeal and Error.** A trial court's grant or denial of a continuance will be reviewed for an abuse of discretion.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Affirmed.

Douglas W. Ruge, of Douglas W. Ruge & Associates, P.C., L.L.O., for appellant.

Brian D. Nolan and Elizabeth Gasaway, of Nolan, Olson & Stryker, P.C., L.L.O., for appellees.

Riedmann, Arterburn, and Welch, Judges.

Arterburn, Judge.

## I. INTRODUCTION

Fo Ge Investments LLC (FoGe) appeals from an order granting summary judgment in favor of First American Title and First American Title Insurance Company (collectively First American), which order was entered by the district court for Douglas County. FoGe contends that there are questions of material fact with respect to its breach of contract and negligence claims and that summary judgment was premature. For the reasons that follow, we affirm the district court's order granting summary judgment in favor of First American.

## II. BACKGROUND

FoGe purchased three tracts of real estate located in Council Bluffs, Iowa, from Legacy Group, L.L.C. Manager Ryan Barry signed the sales contract on behalf of Legacy Group on

September 25, 2006. The sales contract included a provision regarding an existing loan involving Barry:

> 2) Title to be conveyed "subject to" the existing loan with First National Bank of Wahoo, Nebraska. Seller to pay all installments due on or before the closing, in addition to pro-rations as set forth above. Buyer to make payments following the closing, but Seller not to be released from liability under the subject loan. The exact principal balance remaining to be paid, after deducting the principal portion([s]) of any payments now due, as shall be paid by the Seller, is estimated at between $250,000 . . . and $251,000 . . . , in which range the Buyer finds acceptable, excepting that no advances or add-ons to the subject loan shall be made prior to closing.

This existing loan was reflected by a $272,000 promissory note dated August 7, 2002, between Barry, as borrower, and First National Bank of Wahoo, as lender. A purchase money mortgage was executed between Barry and First National Bank of Wahoo on the same date.

First American conducted a title search with respect to the subject property and issued a title commitment to FoGe effective August 31, 2006. The commitment set forth specific exclusions from coverage, including, "14. Mortgage executed by . . . Barry, in favor of First National Bank of Wahoo, dated August 7, 2002, filed August 21, 2002 in Book 103 at Page 13626, Records, Pottawattamie County, Iowa, securing the principal amount of $272,000.00. (Parcels 1, 2, and 3)[.]" Thereafter, First American issued a title insurance policy to FoGe, which was dated January 29, 2007. On the first page, the policy states, in part:

> SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, FIRST AMERICAN TITLE INSURANCE COMPANY . . . [i]nsures, as of Date

> of Policy . . . against loss or damage . . . sustained or incurred by the insured by reason of:
>
> . . . .
>
> 2. Any defect in or lien or encumbrance on the title[.]

In "Schedule B," the policy set forth "Special Exceptions" from coverage, including, "13. Mortgage executed by . . . Barry, in favor of First National Bank of Wahoo, dated August 7, 2002, filed August 21, 2002 in Book 103 at Page 13626, Records, Pottawattamie County, Iowa, securing the principal amount of $272,000.00. (Parcels 1, 2, and 3)[.]" The policy also included other exclusions from coverage, including, "3. Defects, liens, encumbrances, adverse claims or other matters: (a) created suffered, assumed or agreed to by the insured claimant[.]" Additionally, the policy contained conditions and stipulations, including, in relevant part:

> **3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT.**
>
> The insured shall notify the Company promptly in writing . . . (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy . . . . If prompt notice shall not be given to the Company, then as to the insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

A promissory note dated December 7, 2006, shows that Barry again borrowed from First National Bank of Wahoo, this time for the sum of $31,469. The promissory note shows that this debt was secured by the assignment of a life insurance policy.

According to the complaint filed at the inception of the case and the affidavit of Marvin Thomason, the managing member of FoGe, submitted in opposition to the motion for summary judgment, Barry made payments on the second promissory note of $31,469 for many years before eventually defaulting. Upon Barry's default, First National Bank of Wahoo foreclosed on the subject property, citing the mortgage's cross-default provisions according to Thomason. The district court for Pottawattamie County, Iowa, entered an order foreclosing on the subject property on July 11, 2016, holding that all right, title, and interest of First National Bank of Wahoo was senior and superior to any right, title, or interest held by FoGe. We note that the foreclosure decree does not indicate that the nonpayment of the second note or any cross-default provision was the basis for finding that a default had occurred. The Iowa court cited only the original 2002 note and mortgage as being in default. Approximately 1 year after the foreclosure decree was entered, FoGe notified First American by letter dated July 28, 2017, that it believed First American was required to indemnify FoGe for any losses or defense of title in the foreclosure matter.

On October 16, 2017, FoGe filed a complaint against First American in the district court for Douglas County, asserting breach of contract and negligence claims. FoGe alleged that First American refused to ensure marketable title and acted in bad faith in not defending title. FoGe also alleged that First American was negligent in not discovering the December 2006 loan.

First American filed a motion for summary judgment on April 3, 2018. At a hearing on the motion for summary judgment on May 14, five exhibits were admitted and the parties stipulated to the admission of a sixth exhibit at a later time. Exhibit 1 is an affidavit of First American's senior claims counsel with the commitment for title insurance and the policy of title insurance attached. Exhibit 2 is the foreclosure decree entered by the Iowa court. Exhibit 3 is the claim letter sent by

FoGe's counsel to First American on July 28, 2017. Exhibits 4 and 6 are affidavits signed by Thomason, the managing member of FoGe. Attached to exhibit 4 is the original 2002 promissory note and mortgage between Barry and First National Bank of Wahoo, the 2006 promissory note from Barry to First National Bank of Wahoo, and an additional copy of the title insurance policy. Attached to exhibit 6 is First American's response dated September 19, 2017, to FoGe's claim. Exhibit 5 consists of the affidavit of FoGe's counsel with an attachment that includes answers to discovery requests and documents attached thereto.

At the close of the hearing, the parties made brief arguments and reserved time to submit briefs. On June 14, 2018, the court entered summary judgment and dismissed FoGe's complaint with prejudice. In a one-page order, the court found that "no genuine issues of material fact exist and, therefore, the motion for summary judgment of [First American] should be sustained." The court then dismissed the complaint with prejudice.

FoGe appeals from the entry of summary judgment.

## III. ASSIGNMENTS OF ERROR

FoGe assigns, restated, that the district court erred in entering summary judgment in favor of First American when questions of material fact existed with respect to its breach of contract and negligence claims. FoGe also assigns that summary judgment was premature.

## IV. STANDARD OF REVIEW

[1-3] Summary judgment is to be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Wintroub v. Nationstar Mortgage*, 303 Neb. 15, 927 N.W.2d 19 (2019). Under this standard of review, summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to

any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Id*. In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id*.

## V. ANALYSIS

### 1. Breach of Contract Claims

FoGe argues that the district court erred in granting summary judgment in favor of First American on its breach of contract claims. Specifically, FoGe argues that questions of material fact exist with respect to First American's obligation to provide coverage under the plain language of the insurance policy, the adequacy and timing of FoGe's notice to First American, and whether First American denied coverage in bad faith.

#### (a) First American's Contractual Obligation

FoGe first contends that a question of material fact exists with respect to First American's obligation to perform under the plain language of the insurance policy and whether First American breached that agreement by not compensating FoGe for its losses incurred through foreclosure. In response, First American argues that policy exceptions and exclusions apply, warranting its nonperformance.

The title insurance policy issued by First American included a provision excluding coverage for losses incurred with respect to the "Mortgage executed by . . . Barry, in favor of First National Bank of Wahoo, dated August 7, 2002 . . . ." Thus, it is clear from the policy's plain language that First American had no obligation to compensate FoGe for losses with respect to the mortgage.

However, FoGe contends that the foreclosure was not due to any default on the 2002 note that was secured by the

mortgage, but, rather, was due to Barry's default on the 2006 note. FoGe contends that a cross-default provision in the mortgage allowed First National Bank of Wahoo to foreclose based on Barry's default. FoGe argues that the policy does not include a specific exception or exclusion referencing this second promissory note and that, by extension, First American therefore insured against loss or damage arising from that second note, namely the loss incurred by virtue of the foreclosure under the alleged cross-default provision contained in the original mortgage. We note that this second debt was not secured by the subject property under the terms of the note itself, however. Instead, the only security mentioned is a life insurance policy. Nevertheless, FoGe alleges that Barry's eventual default on the 2006 promissory note allowed First National Bank of Wahoo to foreclose on the property by virtue of a cross-default provision contained within the August 2002 mortgage.

We first note that it is questionable whether the record provided actually supports FoGe's argument. Although the affidavit of Thomason states that the basis for the foreclosure was the default by Barry on the 2006 promissory note and the cross-default clause contained in the mortgage, the foreclosure decree entered by the Iowa court makes no reference to such a basis. In fact, the decree references a principal balance of $464,690.71 on the 2002 note, with additional accrued interest due of $87,390.12 as the debt owed. Moreover, it is difficult to discern from the mortgage itself where the alleged cross-default provision is located. This may be due to the poor quality of the copy of the mortgage attached to the exhibits.

[4] Even if we accept Thomason's allegations as true, however, summary judgment would still be proper in favor of First American. An insurance policy should be considered as any other contract and be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning. *Allstate Ins. Co. v. Farmers Mut. Ins. Co.*, 233 Neb.

248, 444 N.W.2d 676 (1989). Here, the title insurance policy clearly excluded any loss or damage which arose by reason of the mortgage executed by Barry in favor of First National Bank of Wahoo, which mortgage was dated August 7, 2002. That mortgage is the instrument upon which foreclosure was granted by the Iowa court.

FoGe argues that because the language of the exception specifically provides that the mortgage secures the principal amount of $272,000, the amount of the original 2002 note, it does not apply to the 2006 note, which was in the amount of $31,469. We disagree. Even if a default on the 2006 note was the basis for foreclosure, it was still the 2002 mortgage that was being foreclosed. That mortgage was a known lien at the time the title insurance policy was issued and a specific exception was made. The language that identified $272,000 as being the principal amount secured merely gives a more specific description of the mortgage. It does not limit in any way what is being excluded. The 2002 mortgage was foreclosed, and the exception in the policy applied to that mortgage. As such, the district court correctly found that no material issue of fact existed as to the contract claim and granted summary judgment to First American.

(b) FoGe's Notice to First American

[5] Having found above that First American was entitled to summary judgment on FoGe's contract claim, we need not address whether FoGe's failure to provide First American with notice of the foreclosure action was prejudicial to First American's interests. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *City of Sidney v. Municipal Energy Agency of Neb.*, 301 Neb. 147, 917 N.W.2d 826 (2018).

(c) Bad Faith Denial of Coverage

[6] FoGe next argues that First American denied coverage in bad faith. First American argues that it cannot be held liable in

an action based on bad faith, because it had multiple reasonable bases to deny FoGe's claim. To establish a claim for bad faith, a plaintiff must show an absence of a reasonable basis for denying the benefits of the insurance policy and the insurer's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. *Williams v. Allstate Indemnity Co.*, 266 Neb. 794, 669 N.W.2d 455 (2003). First American's denial of FoGe's claim reflects the issues discussed herein, particularly the exclusion of the 2002 mortgage. Because FoGe did not show an absence of a reasonable basis for First American's denying benefits of the insurance policy, FoGe cannot establish a claim for bad faith. Accordingly, summary judgment of FoGe's breach of contract claims was appropriate.

### 2. Negligence Claim

[7] FoGe contends that the district court erred in entering summary judgment with respect to its negligence claim against First American for failing to discover and report the second loan that Barry obtained. We disagree. Title insurance companies and their agents are required to exercise the degree of skill and knowledge normally possessed by members of the profession in good standing concerning preliminary title information which is transmitted to their customers. See *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997). However, this duty is not that of a guarantor, but instead is a duty of reasonable care. See *id*.

Here, the second loan, taken out shortly before the title commitment was made, by its own terms was not secured by the subject property. It was simply a promissory note. Moreover, according to the affidavit of Thomason, he became aware of Barry's need for the 2006 loan prior to the closing of the sale. According to Thomason, Barry needed the loan to pay off past due property taxes. Thomason "made it clear" that FoGe would not pay the taxes. According to Thomason, Barry then obtained the needed loan from First National Bank of Wahoo. Therefore, it is clear FoGe was aware of the 2006

loan, as well as the existing 2002 loan, that it was assuming payments on and the mortgage which secured it. The title to the subject property was identified as being subject to the disclosed mortgage. On these facts, we, like the district court, can find no basis for finding that a material issue of fact exists as to any breach of duty on First American's part.

### 3. Timing of Entry of Order on Summary Judgment

FoGe argues that the court prematurely entered summary judgment while it was attempting to locate title and escrow files and secure a standard of care expert witness with respect to the second loan. First American argues in reply that summary judgment was timely entered because it was clear from the face of the pleadings that FoGe could not establish its claims. We find that the timing of summary judgment in this matter was not improper.

[8-10] Neb. Rev. Stat. § 25-1335 (Reissue 2016) safeguards against an improvident or premature grant of summary judgment:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

As a prerequisite for a continuance, additional time, or other relief, a party is required to submit an affidavit stating a reasonable excuse or good cause for the party's inability to oppose a summary judgment motion. See *Gaytan v. Wal-Mart*, 289 Neb. 49, 853 N.W.2d 181 (2014). The affidavit need not contain evidence going to the merits of the case, but must explain why the party is presently unable to offer evidence essential to justify opposition to the motion for summary judgment. *Id*. In ruling on a request for a continuance or additional

time in which to respond to a motion for summary judgment, a court may consider the complexity of the lawsuit, the complications encountered in litigation, and the availability of evidence justifying opposition to the motion. *Id*. The court may also consider whether the party has been dilatory in completing discovery and preparing for trial. *Id*. A trial court's grant or denial of a continuance will be reviewed for an abuse of discretion. *Id*.

An affidavit signed by counsel for FoGe stated that a grant of summary judgment would be premature because FoGe had not yet received from First American a copy of the title and closing files maintained by First American. However, the affidavit does not describe why the title and escrow files were necessary to defend against First American's motion for summary judgment. Additionally, the affidavit noted that FoGe would want to depose the "Defendants," although the affidavit did not indicate which specific persons were sought for depositions. The affidavit also stated that FoGe was in the process of interviewing standard of care experts with respect to its negligence claim against First American. Thus, through affidavit, FoGe did raise issues encompassed by § 25-1335. We note that FoGe did not file an actual motion to continue or make an oral motion on the record.

Above, we found that FoGe's negligence claim is not supported by the record, particularly given FoGe's own knowledge of the language contained in the 2006 promissory note and the 2002 mortgage. As such, we cannot find that FoGe's request seeking additional time to find a standard of care expert to support its negligence claim was good cause for its inability to oppose the summary judgment motion. FoGe's claim that it needed a copy of the title and closing files from First American did not persuade the district court, because the court entered summary judgment notwithstanding FoGe's affidavit. Neither in its affidavit nor briefs on appeal did FoGe elucidate what additional information it thought could be found in the files that would support its negligence claims. An affidavit

"should specifically identify the relevant information that will be obtained with additional time and indicate some basis for the conclusion that the sought information actually exists." *Lombardo v. Sedlacek*, 299 Neb. 400, 416-17, 908 N.W.2d 630, 643 (2018). Accordingly, we find that the district court did not abuse its discretion in not continuing the matter and, instead, entering summary judgment.

## VI. CONCLUSION

Based on the record presented on appeal, we find no error in the district court's findings that no issues of material fact existed and that First American's motion for summary judgment ought to be sustained. We also find that the district court did not abuse its discretion by entering its order on summary judgment without allowing additional time for discovery.

Affirmed.

# Thomas M. Russell and Pamela J. Russell, appellants, v. Franklin County, Nebraska, appellee.

934 N.W.2d 517

Filed October 15, 2019. No. A-18-827.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the 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. **Constitutional Law: Eminent Domain: Damages.** The words "or damaged" in Neb. Const. art. I, § 21, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property.
4. ____: ____: ____. Neb. Const. art. I, § 21, broadens the entitlement for just compensation beyond property that is actually "taken" by the governmental entity and includes compensation for property that is damaged in the sense that the market value of the property has been diminished even if the property is not actually taken.

Appeal from the District Court for Franklin County, Stephen R. Illingworth, Judge, on appeal thereto from the County Court for Franklin County, Timothy E. Hoeft, Judge. Judgment of District Court affirmed.

Matthew D. Hammes and Cristina Fackler, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellants.

Brandy R. Johnson, of Governmental Law, L.L.C., and Henry Schenker, Franklin County Attorney, for appellee.

Pirtle and Bishop, Judges.

Pirtle, Judge.

## INTRODUCTION

Thomas M. Russell and Pamela J. Russell brought an inverse condemnation action against Franklin County, Nebraska (the County), after the County cut down trees on the Russells' property. The district court for Franklin County granted the County's motions in limine to exclude testimony of the Russells' expert witnesses and granted its motion for summary judgment. Based on the reasons that follow, we affirm.

## BACKGROUND

The Russells own 164 acres of rural property in Franklin County. The property consists of 43 acres of cropland, and the remaining 121 acres is pastureland used for "cattle feeding, . . . hunting, bird watching and photography," as well as gathering morel mushrooms. There is no residence on the property, and the only buildings there are a utility shed and a garage. Thomas' parents owned the land before he did, and it had been owned by his family for 47 or 48 years.

On December 4, 2015, Michael Ingram, the highway superintendent for the County, sent an email to Thomas seeking permission to cut down trees in a certain area of the Russells' property for the purpose of improving visibility for drivers on a county road adjacent to the Russells' property. A map was attached to Ingram's email identifying the area where the County wanted to remove the trees. Thomas discussed the request with his parents, because he did not want them to be upset if trees were removed. Thomas then told Ingram he could proceed with removing the trees in the area identified on the map.

County employees subsequently began cutting down and excavating trees on the Russells' property. However, they did

not remove trees from the area the County had identified and had received permission from Thomas to remove. Instead, the county employees cut down and uprooted 67 trees on two other locations on the property, exceeding the scope of the permission given by Thomas. The two areas affected totaled 1.67 acres.

Around December 13, 2015, Thomas' mother called Thomas because she was upset about the location of the trees removed. Thomas called Ingram and told him to stop cutting any more trees until he could take a look at where the County had been working. On December 14, Ingram sent an email to Thomas apologizing for "upsetting" the family, admitting that the County encroached further than it originally planned, and explaining the County's plans for removal of more trees. On December 15, Thomas informed Ingram that he would not allow the County to remove any more trees on his property.

In January 2017, the Russells filed a "Petition for Inverse Condemnation" against the County in Franklin County Court, alleging an unlawful taking of their property for a public use, and because they had not received just compensation therefor, they sought damages and other relief using the procedures set forth in Neb. Rev. Stat. § 76-705 et seq. (Reissue 2018). Thereafter, appraisers were appointed and a return of appraisers was filed setting forth the damages sustained by the Russells. Unsatisfied with the damages set by the appraisers, the Russells filed a petition in Franklin County District Court seeking just compensation for the trees that were unlawfully taken.

Both parties designated experts to give opinions on how damages should be measured and the amount of damages sustained. Both parties filed motions in limine seeking to exclude the testimony of the opposing party's expert—each side claiming the other's expert was applying an incorrect measure of damages.

The County then filed a motion for summary judgment alleging that there was neither a genuine issue of material fact

as to the market value of the Russells' property either before or after the "'taking'" by the County, nor that the County "'took'" a temporary easement by exceeding the scope of permission they had from the Russells to cut down or remove trees from their property.

A summary judgment hearing followed. At the hearing, five exhibits were offered and received into evidence without objection, subject to the motions in limine that were filed by both parties with respect to expert testimony. Exhibit 1 was the deposition of Thomas; exhibit 2 was the deposition of Ingram; exhibit 3 was the deposition of Cody Gerdes, the County's expert; exhibit 4 contained all the exhibits utilized at the depositions of Thomas, Ingram, and Gerdes; and exhibit 5 was the deposition of Jack Phillips, one of the Russells' experts, and the exhibits utilized at that deposition.

The evidence showed that Gerdes, the County's expert, was a Nebraska licensed and certified real estate appraiser who focused on commercial and agricultural properties. Gerdes visually examined the Russells' property and conducted an appraisal analysis. In his analysis, Gerdes used comparable market sales of similar rural properties in the area that had cropland, pastureland, and native trees. He determined that the highest potential value and best use of the Russells' property was agricultural use.

Gerdes then evaluated the property based on its highest potential value and determined the difference in the fair market value of the Russells' land before and after the County's taking of trees on the property. He determined that the Russells' entire property before the taking had a value of $338,600. Thomas did not disagree with Gerdes' valuation. Gerdes further determined that the property had a value of $338,400 after the taking. Therefore, he determined that the damages to the property, based on market data comparisons, amounted to $200.

Phillips, one of the Russells' experts, was a registered consulting arborist. He used a "Trunk Formula Method" of tree

appraisal to determine the value of the trees that were cut down or removed. This was done by measuring the stumps of the 45 trees that were cut down and estimating the size of the other 22 smaller trees that were removed by excavation based on the size of the holes where the trees had been located. He determined that the appraised value of the 45 trees with stumps remaining was $99,990 and that the appraised value of the excavated trees was $4,026, totaling $104,016.

The Russells had two other individuals provide them with estimates in regard to the claimed losses or damages for which they wanted to be compensated. A salesperson from a nursery and garden center estimated a "replacement cost" of $24,053.75 to plant 25 non-native trees. The species of trees used in the estimated cost were not the same species of trees that were removed from the Russells' property. Thomas also obtained an estimate from a representative of an excavating company in the amount of $46,700 for clean up of the trees that were cut down and removal of the remaining tree stumps.

The district court effectively granted the County's motions in limine, denied the Russells' motions in limine, and granted the County's summary judgment motion. The court determined that the County conceded it exceeded the authority to which the County and Thomas had originally agreed to and that the only disputed issue in the case was the measure of damages. The court stated that the Russells pled their case under the eminent domain statutes but were now arguing the case as an unlawful destruction of trees or as a negligence action, which are causes of actions that should be filed under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 2012 & Cum. Supp. 2018). The court found that the case of *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998), was the applicable case in regard to the measure of damages and that the only admissible relevant evidence on the appropriate measure of damages was Gerdes' appraisal, which determined damages to be $200. The district court granted

the County's motion for summary judgment finding that there were no other material issues of fact. It also awarded the Russells $200 in damages for the taking.

## ASSIGNMENTS OF ERROR

The Russells assign, restated, that the district court erred in (1) granting the County's motion for summary judgment and failing to apply, as a matter of law, the proper measure of damages; (2) determining as a matter of law that the damages they sought were based on an unlawful destruction of trees or negligence action that can only be recovered in an action filed under the Political Subdivisions Tort Claims Act; and (3) granting the County's motions in limine and denying the Russells' motions in limine, based on the court's use of the wrong measure of damages.

## STANDARD OF REVIEW

[1,2] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Wehrer v. Dynamic Life Therapy & Wellness*, 302 Neb. 1025, 926 N.W.2d 107 (2019). In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

## ANALYSIS

The Russells assign three assignments of error, all of which relate to the same argument: The court applied the wrong measure of damages. Accordingly, we address all three assignments simultaneously. However, as a preliminary matter, also before us is the County's motion to strike pages 24 through 42 of the supplemental transcript, as well as all references to the

county court appraisers' opinions in the Russells' brief, and to exclude these matters from consideration on this appeal.

The present appeal is from the district court's order granting summary judgment in favor of the County. The evidence before the district court in deciding the County's motion for summary judgment did not include the materials at pages 24 through 42 of the supplemental transcript that are the subject of this motion to strike. In addition, pages 24 through 42 of the supplemental transcript are not "[t]he pleadings upon which the case was tried . . ." as contemplated by Neb. Ct. R. App. P. § 2-104(A)(1)(a), nor any of the other materials specified by such rule as to be included in a transcript on appeal. We agree with the County, and therefore, we grant the County's motion and strike pages 24 through 42 of the supplemental transcript which are outside the record presented to us from the district court.

The district court found that the proper method of determining damages was the measure of damages applied in eminent domain cases, that is, that the Russells were entitled to recover the fair market value of the property taken, as well as any decrease in the fair market value caused by the governmental taking. The Russells contend that such measure of damages is only for situations where the County has permanently taken land from a landowner. They argue that the proper method of determining damages is the cost of reasonable restoration of the property to its preexisting condition or to a condition as close as reasonably feasible. They further contend that because the court adopted and applied the wrong measure of damages, it further erred in granting the County's motions in limine and denying the Russells' motions in limine.

Section 76-705 provides:

> If any condemner shall have taken or *damaged property for public use* without instituting condemnation proceedings, the condemnee, in addition to any other available remedy, may file a petition with the county judge

> of the county where the property or some part thereof is situated to have the damages ascertained and determined.

(Emphasis supplied.)

Article I, § 21, of the Nebraska Constitution provides that "[t]he property of no person shall be taken or damaged for public use without just compensation therefor."

No one disputes that the County removed trees on the Russells' property for a public use, that is, to improve visibility upon a county road adjacent to the Russells' property. There is also no dispute that 67 trees were removed from two locations, neither of which was the location the Russells had given permission to the County to remove trees from, and that the area affected consisted of 1.67 acres.

[3,4] The Nebraska Supreme Court has stated that the words "or damaged" in Neb. Const. art. I, § 21, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property. *Strom v. City of Oakland*, 255 Neb. 210, 583 N.W.2d 311 (1998). The Nebraska constitutional clause broadens the entitlement for just compensation beyond property that is actually "taken" by the governmental entity and includes compensation for property that is damaged in the sense that the market value of the property has been diminished even if the property is not actually taken. *Henderson v. City of Columbus*, 285 Neb. 482, 827 N.W.2d 486 (2013). Section 76-705 also includes compensation for property that is damaged, in addition to property that is taken.

In determining the appropriate measure of damages, the district court relied on *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998). In *Walkenhorst*, the State acquired, through its power of eminent domain, two strips of the appellants' property in order to reconstruct a highway. The property was pastureland and cultivated cropland, and it included a shelterbelt containing six rows of trees which extended for approximately ½ mile. The State acquired fee title, three permanent easements, and a temporary easement to parts of the

appellants' property. A jury awarded the appellants $9,991, and they appealed. The appellants argued that the shelterbelt of trees located on property taken by the State constituted property separate and apart from the land and that they were entitled to compensation for the shelterbelt in addition to any compensation granted for the taking of the land.

The Supreme Court noted that it has consistently held that the damages in an eminent domain case are measured based on market value, whether it be fair market value of the property actually acquired or the decrease in market value of the remaining property.

The *Walkenhorst* court concluded:

> [T]he [appellants'] claim that they should be compensated separately for the value of the trees is without merit, for *vegetation is generally not to be valued separately* and then added to the value of the underlying land in a summation approach. [Citations omitted.] The [appellants] cannot be compensated for the value of the shelterbelt as a shelterbelt; instead, *the only relevant inquiry is how the presence of the shelterbelt on the condemned land affects the fair market value of the land taken.*

253 Neb. at 992, 573 N.W.2d at 481 (emphasis supplied).

We agree with the district court that *Walkenhorst* is applicable to the present case and provides the appropriate measure of damages. In *Walkenhorst*, the appellants wanted to be compensated separately for the value of the trees in addition to any compensation granted for the taking of the land. In the present case, while there was no permanent taking of any land, the Russells argue that they should be compensated based on the value of the 67 trees that were removed. The Supreme Court stated that vegetation is not to be valued separately and is only considered to the extent that its presence affected the fair market value of the land. Accordingly, the district court did not err in determining that the appropriate measure of damages is the difference in the fair market value of the land before and after the taking.

The Russells argue that the court erred in relying on *Walkenhorst* because it involved the measure of damages applicable to permanent damages sustained by a landowner when the county has actually "taken" the land of a landowner, as opposed to temporarily damaging property where the damage can be repaired and restored. The Russells contend that *Keitges v. VanDermeulen*, 240 Neb. 580, 483 N.W.2d 137 (1992), is the controlling case as it sets out the measure of damages for instances when temporary damages occur where the land can be returned to its prior condition. In *Keitges*, the plaintiffs sued their neighbors to recover damages for the destruction of trees, shrubs, and vegetation on their property when the neighbor attempted to clear a path for the construction of a fence between the two adjoining properties. The petition alleged two causes of action: willful trespass and negligent trespass. A jury found that defendant's trespass was not willful and returned a verdict in the plaintiffs' favor.

On appeal, the question presented was whether a plaintiff is entitled to recover the cost of restoring trees and vegetation on land which he holds for residential or recreational purposes when a portion of the natural woods is destroyed. The Supreme Court held:

> [I]n an action for compensatory damages for cutting, destroying, and damaging trees and other growth, and for related damage to the land, when the owner of land intends to use the property for residential or recreational purposes according to his personal tastes and wishes, the owner is not limited to the difference in value of the property before and after the damage or to the stumpage or other commercial value of the timber. Instead, he may recover as damages the cost of reasonable restoration of his property to its preexisting condition or to a condition as close as reasonably feasible. However, the award for such damage may not exceed the market value of the property immediately preceding the damage.

> See *"L" Investments, Ltd. v. Lynch*, 212 Neb. 319, 322 N.W.2d 651 (1982).

*Keitges*, 240 Neb. at 589-90, 483 N.W.2d at 143.

The court in *Keitges* found that the record showed the plaintiffs used their land for residential and recreational use. Therefore, the court concluded that the plaintiffs were entitled to recover the cost of replacing trees and vegetation damaged or destroyed by the defendant and that they must be allowed to present evidence of the feasibility and cost of such restoration.

The Russells contend that the damage caused by the County to the trees and the land can be restored and that the measure of damages should be the fair and reasonable cost and expense of restoration. They claim that the cost of the damage, to include the value and restoration of the trees and the cost to remove the stumps, totals $150,716.

The *Keitges* case can be distinguished, because it did not involve land taken or damages for public use, but, rather, was a lawsuit between two landowners. The plaintiffs brought tort actions, specifically willful and negligent trespass, against the defendant, where compensatory damages could have been sought and recovered. The present matter is not a tort action. The Russells never asserted any cause of action for negligence against the County. As the district court found in its order, the Russells pled their case under the eminent domain statutes but wanted to recover damages as if the case was one for unlawful destruction of trees or negligence, which are tort actions.

Further, there was no evidence that the Russells intended to "use the property for residential or recreational purposes according to [their] personal tastes and wishes." See *Keitges*, 240 Neb. 580, 589, 483 N.W.2d 137, 143 (1992). There was no house on the property and no evidence that the Russells had any intent of ever building a house. There was some evidence that the property was used at times for "hunting, bird watching and photography," as well as gathering morel

mushrooms, but there was no evidence as to how often these activities occurred or that this was the primary use. The property was also used for "cattle feeding."

Finally, the measure of damages set forth in *Keitges* cannot apply in the present case, because the cost of repair is only recoverable if the cost does not exceed the market value of the property immediately preceding the damage. The Russells claim the total cost of repair is $150,716 for the damaged 1.67 acres of land. The damaged 1.67 acres consists of approximately 1 percent of the entire 164-acre parcel. They do not dispute that the entire 164 acres were valued at $338,600 before the damage. Therefore, the predamaged value of the affected area was $3,386 (1 percent of $338,600). The estimated cost of repair greatly exceeds the predamaged market value of the damaged property. Accordingly, the measure of damages set forth in *Keitges* is not available to the Russells.

The Russells also contend that *Kula v. Prososki*, 228 Neb. 692, 424 N.W.2d 117 (1988), is instructive because it involved temporary damages to land that could be returned to its prior condition. In *Kula*, the plaintiff landowner brought an action against adjoining landowners and Nance County seeking injunctive relief and damages resulting from obstruction to flow of surface waters off the plaintiff's property. The damages included crop replanting and treatment of the land to eliminate the chemicals and salt on the land resulting from the ponding of water. On appeal, the Supreme Court determined that the situation was one involving temporary damage and that therefore, the rule relating to the measure of damages as being the difference in the market value of the land before and after the damage, where there has been no taking, refers to permanent damage and is inapplicable in this situation. The Supreme Court held that where the land damaged can be returned to its prior condition by treatment, grading, or otherwise, the damage is temporary and the landowner is entitled to such expenses as part of his or her damages.

The Russells contend that, like in the *Kula* case, their damages are temporary and they are entitled to recover expenses necessary to return the property to its prior condition. However, we again note that *Kula* is distinguishable from the present case in that *Kula* was not an eminent domain case, but, rather, it involved returning the property to its prior condition, which included crop replanting and treatment to eliminate chemicals and salt on the land. Returning the property to its prior condition in the present case involves replacing trees, some very large, that have naturally grown over numerous years in a wooded area. The removal of these trees is not temporary in the same sense as crops that are damaged.

In addition, the evidence from the Russells' three experts did not relate to returning the property to its prior condition. Phillips appraised the value of the 67 trees that were cut down and excavated, but he did not give an estimate of what it would cost to replace the trees. The salesperson from the nursery and garden center estimated a "replacement cost" of $24,053.75 to plant 25 trees, but there were 67 removed. Also, the species of trees used in the estimated cost were not the same species of trees that were removed from the Russells' property. The representative from the excavating company gave an estimate for clean up of the trees that were cut down and removal of the remaining tree stumps. These are not "replacement costs."

We conclude that the district court applied the correct measure of damages—the difference in the fair market value of the land before and after the taking. Gerdes was the only expert who provided relevant and admissible evidence on the correct measure of damages, concluding that the damages were $200. The testimony of the Russells' witnesses was irrelevant in that it was based on the wrong measure of damages. Therefore, we further conclude that the court did not err in granting the County's motions in limine and denying the Russells' motions in limine.

## CONCLUSION

We conclude that the district court did not err in granting the County's motion for summary judgment and in awarding the Russells $200 in damages.

Affirmed.

Moore, Chief Judge, participating on briefs.

Bishop, Judge, dissenting.

I respectfully disagree with the majority that *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998), controls the proper measure of damages to be used in the present matter. *Walkenhorst* involved an actual "taking" of land; that is not the case here. When considering compensation for a taking that does not involve an actual physical taking of land, but only damage to the property, the Nebraska Supreme Court has applied a different measure of damages depending on whether the damages are temporary or permanent. In this case, the damage done to the Russells' land was fixable to a degree and was thus temporary, not permanent. That distinction and applicable measure of damages was not considered by the district court when entering summary judgment, and therefore, I would reverse, and remand for further proceedings.

As noted, I do not see *Walkenhorst* being applicable to the facts here. *Walkenhorst* involved the governmental taking of private property for public use, and the question was whether a shelterbelt of trees on the taken land should be separately compensated in addition to the taken land; the Nebraska Supreme Court said no. Compensation was to be based upon the fair market value before and after the taking of the real property. Here, there was no real property physically taken; rather, the Russells' land was damaged by the removal of the trees for public use. Therefore, I do not read *Walkenhorst* as controlling the outcome here.

The Russells contend that the appropriate measure of damages for the removal of the trees from their property can be found in *Keitges v. VanDermeulen*, 240 Neb. 580, 483

N.W.2d 137 (1992), which involved an action for compensatory damages for the cutting, destroying, and damaging of trees and other growth not limited to the difference in value of the property before and after the damage. The *Keitges* court held that damages may be recovered for the cost of reasonable restoration of property to its preexisting condition or to a condition as close as reasonably feasible and that in such circumstances, evidence relating to the land's diminution in value has no relevance. However, as noted by the majority, the measure of damages used in *Keitges* was based upon the landowners' filing an action in negligence against another landowner, rather than through an inverse condemnation claim against a government body, as in the present matter. The Russells did not file a negligence action against the County in this case, and thus, I agree with the majority that *Keitges* can be distinguished on that basis. If this had been a negligence action against the County pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 2012 & Cum. Supp. 2018), perhaps the measure of damages applied in *Keitges* would have relevance here. That is not to say the damages described in *Keitges* would necessarily be inapplicable here, but that issue need not be decided for reasons discussed next.

The Russells also direct us to *Kula v. Prososki*, 228 Neb. 692, 424 N.W.2d 117 (1988) (*Kula II*), as authority for the proper measure of damages for the circumstances present here. I find this case to be more applicable than *Walkenhorst* as to what measure of damages to apply when real property is physically damaged, but not taken, for public use. In order to more fully understand the final analysis in *Kula II*, it is helpful to look at the original appeal filed in that case. In *Kula v. Prososki*, 219 Neb. 626, 365 N.W.2d 441 (1985) (*Kula I*), the Nebraska Supreme Court noted that the plaintiff, E. James Kula, sued adjoining landowners and Nance County for injunctive relief and damages. Kula claimed that

the adjoining landowners filled in a natural watercourse, causing surface waters to back onto his land, and that the county raised an adjoining highway and installed inadequate culverts which caused floodwaters to dam on to his land; Kula incurred damages as a result. See *id*. The district court granted injunctive relief, but as for damages, it concluded that Kula failed to comply with the Political Subdivisions Tort Claims Act and that the action had not been properly brought as an inverse condemnation case. On appeal, Kula claimed it was error for the district court to not award damages "for the alleged wrongful taking of his property by Nance County." *Kula I*, 219 Neb. at 628, 375 N.W.2d at 442. The Nebraska Supreme Court observed that the district court's reference to the fact that Kula did not file a proper inverse condemnation action likely meant that Kula did not first file an action under Neb. Rev. Stat. § 76-705 (Reissue 2018) in the county court to have the damages ascertained and determined. The Supreme Court agreed that the procedure under § 76-705 was not followed, but then pointed out Kula's rights under Neb. Const. art. I, § 21 (property of no person shall be taken or damaged for public use without just compensation), and stated that "[w]hen private property has been damaged for public use, the owner is entitled to seek compensation in a direct action under that constitutional provision." *Kula I*, 219 Neb. at 628, 375 N.W.2d at 443. The court further stated:

> That section of the Constitution is self-executing, and legislative action is not necessary to make the remedy available. . . . The fact that the plaintiff could have sued in tort under the Political Subdivision Tort Claims Act does not preclude him from proceeding in a direct action for damages under the Constitution. . . .
>
> Additionally, a landowner is not precluded from bringing an action for a mandatory injunction against public authorities to prevent damage to the owner's land caused by a public improvement when the public authorities

> have declined to exercise their right of eminent domain. Also, the plaintiff had the right to join with his action for equitable relief his claim for temporary damages.

*Kula I*, 219 Neb. at 629, 375 N.W.2d at 443 (citations omitted).

Importantly, the Supreme Court stated, "It is not indispensable that the constitutional provision be set out or its existence alleged in the petition stating the cause of action." *Id*. "All that is necessary is that the litigant allege and prove facts constituting a cause of action because of it. . . . Therefore, it is necessary to consider both the pleadings and evidence to determine whether a cause of action for property damaged for a public use existed." *Id*. Because the district court failed to consider Kula's claim for damages in *Kula I*, the Supreme Court reversed, and remanded for further proceedings.

When the case returned on appeal following remand, the Nebraska Supreme Court observed that the case had been previously reversed and remanded "for further proceedings to consider the issue of damages under Neb. Const. art. I, § 21," and that an award was entered in Kula's favor. See *Kula II, supra*. Nance County appealed, and Kula cross-appealed. Nance County complained that the district court did not use the proper measure of damages; Kula complained that the award of damages was inadequate. The Supreme Court first pointed out that since there was nothing in the record to the contrary, "we assume in deciding this case that the order relating to the installation of the culvert eliminated future damages. Therefore, we are dealing with a situation involving temporary damage." *Id*. at 694, 424 N.W.2d at 119. The Supreme Court then stated:

> Accordingly, the County's reliance on the rule relating to the measure of damages as being the difference in the market value of the land before and after the damage, where there has been no taking, cited in *Beach v. City of Fairbury*, 207 Neb. 836, 301 N.W.2d 584 (1981), refers to permanent damage and is inapplicable in this situation.

> Where land, no part of which is taken, temporarily suffers damage compensable under Neb. Const. art. I, § 21, "'the measure of compensation is not the market value but the value of the use for the period damaged.'" [Citations omitted.] If the land is cropland, the best test of the value of its use is the value of the crops which could and would have been grown upon the land.

*Kula II*, 228 Neb. at 694-95, 424 N.W.2d at 119.

The Nebraska Supreme Court goes on to discuss factors to consider in ascertaining damages to crops, and then it also discusses how to address additional expenses incurred by reason of the County's action, such as replanting expenses and treatment of the land to eliminate chemical problems and salt caused by the ponding of water. The Supreme Court then holds that "where the land damaged can be returned to its prior condition by treatment, grading, or otherwise, the damage is temporary and the landowner is entitled to such expenses as part of his or her damages." *Kula II*, 228 Neb. at 697-98, 424 N.W.2d at 121.

In *Kula II*, because there was no evidence that the damage to the property would reoccur, it was deemed temporary, rather than permanent damage, and compensation could be awarded to return the property to its prior condition, including replanting expenses and other treatments necessary to return it to its prior condition. On the other hand, *Quest v. East Omaha Drainage Dist.*, 155 Neb. 538, 52 N.W.2d 417 (1952), stands for the proposition that when real property is not physically taken, but is *permanently* damaged, the measure of damages is based on the change in market value. *Quest* involved the excavation for public use of a lot adjacent to the plaintiff's property, which excavation materially depreciated the market value of the plaintiff's property and restricted its use. The excavation in the adjacent lot resulted in the creation of a 40-foot cliff, dust blowing up the cliff into the plaintiff's house, dust and litter blowing into the yard, wind blowing roofing and shingles off the side of the house, pools of stagnant water causing

mosquito problems, and swallows nesting in the cliff. And although the excavated area was fenced, children got under the fence and fires were started in the area. In that case, restoring the plaintiff's property to its prior condition before the adjacent lot was excavated was obviously not an option and thus the damage was permanent. As a result, the appropriate measure of damages was the difference in market value of the property. The Nebraska Supreme Court stated, "Where land is not taken, the measure of damages is the difference in market value before and after the damaging, taking into consideration the uses to which the land was put and for which it is reasonably suitable." *Id.* at 544, 52 N.W.2d at 421. The Supreme Court determined that the plaintiff was entitled to have the issue of damages submitted to a jury.

The circumstance in *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998), seems inapplicable to the present case, because *Walkenhorst* involved the actual physical taking of land, which is not the circumstance here. Also, *Quest, supra*, seems inapplicable; even though no land was physically taken, the damage from the neighboring lot was ongoing and permanent, and therefore, restoration of the plaintiff's property to its prior condition was not an option. Thus, I conclude *Kula II, supra*, controls the measure of damages in this case, which would allow for the consideration of costs to restore the property to its prior condition. To the extent it could be applied (which cannot be determined in this dissent), *Keitges v. VanDermeulen*, 240 Neb. 580, 483 N.W.2d 137 (1992), offers guidance when considering compensatory damages for cutting, destroying, and damaging trees, specifically that the damages would include the cost of reasonable restoration of the property to its preexisting condition or a condition as close as reasonably feasible.

The majority distinguishes *Kula II* on the basis that it "was not an eminent domain case, but, rather, it involved returning the property to its prior condition, which included crop replanting and treatment to eliminate chemicals and salt on

the land." Although *Kula II* was not initially filed pursuant to § 76-705, as the Russells did here, it nevertheless similarly involved a landowner's right to compensation under our state's constitution when a person's property is damaged for public use. The majority also determines that "[r]eturning the property to its prior condition in the present case involves replacing trees, some very large," and that "removal of these trees is not temporary in the same sense as crops that are damaged." However, just as crops can be destroyed and replanted, so can trees; admittedly, the restoration of trees will necessarily be a slower, less precise process. And while the restoration cannot be exact, compensation to allow for reasonable restoration is appropriate. The majority further states that the evidence from the Russells' three experts did not relate to returning the property to its prior condition. However, that evidence was deemed "inadmissible" by the district court and was never considered given the district court's conclusion that the measure of damages in *Walkenhorst, supra*, applied. Nevertheless, the district court's order did acknowledge that Williams' testimony went to the "cost of replacing the trees" and that Philips' testimony went to damages "based on a reproduction/restoration cost analysis."

"If the fact is established that property has been damaged for public use, the owner is entitled to compensation." *Quest v. East Omaha Drainage Dist.*, 155 Neb. 538, 544, 52 N.W.2d 417, 421 (1952). There is no question the Russells sustained damage to their real property by the actions of a government body for a public use purpose. In my view, the facts of this case warrant a measure of damages appropriate for real property not physically taken, but which has sustained temporary damage which can be restored, at least to some degree, to its prior condition, as described in *Kula II, supra*.

As a final note, I address the majority's exclusion of portions of the supplemental transcript supplied on appeal. When a party appeals an appraiser's award from the county court to the district court, Neb. Rev. Stat. § 76-717 (Reissue 2018)

provides that the county judge shall prepare and transmit to the clerk of the district court a duly certified transcript of "all proceedings" concerning the land at issue. While evidence of the damages assessed by appraisers in the county court proceeding is not substantive evidence in a de novo trial in the district court to determine the landowner's damages caused by eminent domain, see *Rose v. Lincoln*, 223 Neb. 148, 388 N.W.2d 127 (1986), I am not entirely clear as to why the majority sustained the County's motion to strike pages 24 to 42 of the supplemental transcript in the appeal to this court. Those pages include, for example, the "Return of Appraisers," which would appear to have been appropriately contained in a transcript of "all proceedings" as required by statute. Regardless, the inclusion or exclusion of those pages does not impact the majority's opinion, nor this dissent, in any way.

# State of Nebraska, appellee, v. Eleazar Z. Garcia, also known as Eleazar Garcia-Zuniga, appellant.

936 N.W.2d 1

Filed October 22, 2019. No. A-18-661.

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 whether the undisputed facts contained within the record are 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. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
5. **Sentences: Waiver: Appeal and Error.** Generally, where no objection is made at a sentencing hearing when a defendant is provided an opportunity to do so, any claimed error is waived and is not preserved for appellate review.
6. **Appeal and Error.** An appellate court may find plain error 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.
7. **Rules of the Supreme Court: Interpreters.** Pursuant to Neb. Rev. Stat. § 25-2405 (Reissue 2016), a court interpreter is not required to recite an

oath at the beginning of each proceeding if already certified under the rules of the Nebraska Supreme Court.

8. **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.
9. ____. An appellate court does not consider errors which are argued but not assigned.
10. **Effectiveness of Counsel.** As a matter of law, counsel cannot be ineffective for failing to raise a meritless argument.
11. **Sentences: Time.** A sentence validly imposed takes effect from the time it is pronounced.
12. **Sentences.** When a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed.
13. **Judgments: Records.** When there is a conflict between the record of a judgment and the verbatim record of the proceedings in open court, the latter prevails.
14. **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 a 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.
15. **Sentences.** In determining a sentence to be imposed, relevant factors customarily considered and applied are 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.
16. ____. 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.
17. **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 in order to preserve such claim. Once raised, the appellate court will determine whether the record on appeal is sufficient to review the merits of the ineffective performance claims.
18. **Effectiveness of Counsel: Records: Proof: Appeal and Error.** 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.

19. **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 has the burden to show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.
20. **Effectiveness of Counsel: Pleas.** In a plea context, deficiency depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases.
21. **Convictions: Effectiveness of Counsel: Pleas: Proof.** When a conviction is based upon a guilty or no contest plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.
22. **Pleas.** To support a finding that a defendant has entered a guilty plea freely, intelligently, voluntarily, and understandingly, a court must inform a defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. The record must also establish a factual basis for the plea and that the defendant knew the range of penalties for the crime charged.
23. **Effectiveness of Counsel: Proof: Appeal and Error.** 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.

Appeal from the District Court for Sarpy County: George A. Thompson, Judge. Affirmed as modified, and cause remanded with directions.

Thomas P. Strigenz, Sarpy County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Pirtle, Bishop, and Arterburn, Judges.

Bishop, Judge.

## INTRODUCTION

Eleazar Z. Garcia, also known as Eleazar Garcia-Zuniga, entered guilty pleas to charges of second degree assault and use of a weapon to commit a felony. The Sarpy County District Court orally sentenced Garcia to 15 to 20 years' imprisonment for his conviction of second degree assault and 5 to 10 years' imprisonment for his conviction of use of a weapon to commit a felony. The latter sentence was to run consecutive to his sentence for second degree assault. Garcia claims his pleas were not intelligently and understandingly made because the district court failed to ensure statutes pertaining to interpreters were followed. He also claims that the district court abused its discretion in imposing excessive sentences and that his trial counsel was ineffective. We affirm Garcia's convictions and sentences. However, because the district court's oral pronouncement of the sentences does not match its written order, we remand the matter with directions to modify the written sentencing order to reflect the district court's oral pronouncement.

## BACKGROUND

In September 2017, the State filed a criminal complaint in the county court for Sarpy County, charging Garcia with one count each of attempted first degree murder, first degree sexual assault, and first degree assault. In October, the State filed an amended criminal complaint, charging Garcia with one count each of attempted second degree murder, use of a weapon to commit a felony, and terroristic threats. A journal entry and order of the county court from October shows that Garcia "require[d] an Interpreter for Spanish" and a "Court Certified" interpreter appeared at a hearing, that Garcia waived his right to a preliminary hearing on the counts as amended, and that he was bound over to the district court on those counts.

In November 2017, the State charged Garcia by information in the district court with the same counts brought under the prior amended criminal complaint. After a continuance of

trial at Garcia's request, trial was set for June 2018. A plea hearing took place on March 19, at which a self-identified "certified court interpreter" entered her appearance. Garcia answered affirmatively when the district court asked him if he could understand what the court was saying to him with the aid of the court interpreter. The district court granted the State's request for leave to file an amended information, pursuant to a plea agreement, to charge Garcia with second degree assault (count 1) and use of a weapon to commit a felony (count 2); the State filed the amended information. Garcia waived the 24-hour notice and reading of the amended information and entered pleas of guilty to both counts. The State provided the following factual basis:

> On September 2nd, 2017[,] officers responded to Bergan Mercy Hospital emergency room in reference to a woman who had a cut on her neck saying her boyfriend had caused that.
>
> Officers made contact with . . . Garcia [sic]. Stated that the . . . boyfriend, . . . Garcia had been arguing the evening before. She stated she proceeded to [an address on] Harvest Hills Drive in Sarpy County, Nebraska. At that time she made contact with [Garcia's] niece . . . who was also present. [The victim] also made contact with [Garcia's sister]. They were in the living room talking about the relationship. [The victim] said she was sitting on the edge of the couch near at [sic] the kitchen. [Garcia's sister] was standing at the top of the stairs. And [Garcia's niece] was standing by the entrance to the kitchen. [Garcia] was outside talking to an unidentified Hispanic male. She said [Garcia] then came in and overheard [the victim] talking about taking the car and some money and leaving [Garcia]. At that time [Garcia] got angry and started yelling at her. Then, according to [the victim], as well as [Garcia's niece], [Garcia] got quiet and calmly walked into the kitchen, walked back out of the kitchen. He went up to [the victim], grabbed her by

> the hair, pulled her head to the side and started attempting to cut her neck with the knife. According to [the victim], he stated you're going to stay here, I'm going to kill you. Those three parties then with the assistance of the unidentified male at some point were able to remove [Garcia] from [the victim] and take the knife from him. [Garcia] then left the scene.

Defense counsel had nothing to add to the State's factual basis. The State then noted that "when [Garcia] went into the kitchen [the victim] and [Garcia's niece] stated initially they didn't see a knife. But after he started to cut her, they noticed that he did have a knife, knife in his hand." Defense counsel had no objection to that further factual basis. The district court found beyond a reasonable doubt that Garcia understood the nature of the charges and the possible sentences; that Garcia's pleas were accurate and made freely, knowingly, intelligently, and voluntarily; and that there was a factual basis for Garcia's pleas. The district court accepted Garcia's pleas and found him guilty of both counts.

Garcia's sentencing hearing took place in June 2018, at which a self-identified "State Certified Spanish interpreter" appeared. This was a different individual than the interpreter who had been present for the plea hearing. At the close of the sentencing hearing, the district court sentenced Garcia to 15 to 20 years' imprisonment on his conviction of second degree assault and 5 to 10 years' imprisonment on his conviction of use of a weapon to commit a felony (to run consecutive to his sentence for second degree assault). Garcia was given 245 days' credit for time served.

Garcia appeals.

## ASSIGNMENTS OF ERROR

Garcia claims, restated and reordered, that (1) his pleas were not intelligently and understandingly made because the district court failed to ensure statutes pertaining to interpreters were followed, (2) the district court abused its discretion

by imposing excessive sentences, and (3) his trial counsel was ineffective.

## 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. Leahy*, 301 Neb. 228, 917 N.W.2d 895 (2018).

[2,3] Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law. *State v. Golyar*, 301 Neb. 488, 919 N.W.2d 133 (2018). In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are 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*.

## ANALYSIS

### Qualifications of Interpreters

[4,5] Garcia assigns as error that the district court erred by failing to ensure interpreter statutes were followed. We note that a similar argument was recently made by an appellant in another case before this court. See *State v. Lastor*, No. A-19-221, 2019 WL 3729723 (Neb. App. Aug. 1, 2019) (not selected for posting to court website). Here, Garcia argues that the district court "needed to make sure the Interpreter was certified under the rules of the Supreme Court **and** has taken the prescribed oath of office." Brief for appellant at 14. He assigns as error that his plea was not "intelligently and understandingly made." He argues generally about the content and purpose of the interpreter statutes and then suggests that this court should "review the record for plain error on this issue." *Id*. at 15. Garcia presumably requests a plain error review because he did not object to any matter concerning either interpreter during the plea or sentencing hearings,

even though there were opportunities to do so at both hearings (e.g., after each interpreter stated her appearance on the record). Additionally, when asked by the district court during the sentencing hearing whether there was any reason sentencing could not proceed, Garcia's trial counsel responded, "No." Having made no pertinent and timely objections during those hearings, his claim on appeal with respect to each interpreter is waived and is not preserved for appellate review. See, *State v. Swindle*, 300 Neb. 734, 915 N.W.2d 795 (2018) (failure to make timely objection waives right to assert prejudicial error on appeal); *State v. Pereira*, 284 Neb. 982, 824 N.W.2d 706 (2013) (generally, where no objection is made at sentencing hearing when defendant is provided opportunity to do so, any claimed error is waived and is not preserved for appellate review).

[6] Further, we do not find the issue qualifies as plain error. See *State v. Munoz*, 303 Neb. 69, 927 N.W.2d 25 (2019) (appellate court may find plain error on appeal when error unasserted or uncomplained of at trial, but plainly evident from record, prejudicially affects litigant's substantial right and, if uncorrected, would result in damage to integrity, reputation, and fairness of judicial process). We see no substantial right of Garcia's prejudicially affected by the district court's acceptance, without further inquiry, of the interpreters' representations that they were certified interpreters. Nebraska law requires the appointment of an interpreter in a court proceeding when the defendant is unable to communicate the English language. See Neb. Rev. Stat. §§ 25-2401 to 25-2407 (Reissue 2016). "[S]ections 25-2401 to 25-2407 provide a procedure for the appointment of such interpreters to avoid injustice and to assist such persons in their own defense." § 25-2401. Section 25-2405 states that every interpreter,

> except those certified under the rules of the Supreme Court and who have taken the prescribed oath of office . . . shall take an oath that he or she will, to the best of his or her skill and judgment, make a true interpretation

> to such person unable to communicate the English language . . . .

Interpreters certified under the rules of the Nebraska Supreme Court are subject to an ethical code and must take an interpreter oath. See, Neb. Ct. R. § 6-703 (rev. 2014) (interpreters serving pursuant to court rules "shall have read the Code of Professional Responsibility for Interpreters" and shall have taken "the Interpreter Oath"); Neb. Ct. R. § 6-705 (rev. 2018) (certified court interpreter requirements). Also, a statewide register of interpreters is maintained and published which lists interpreters by their level of certification. See Neb. Ct. R. § 6-702 (rev. 2018) (interpreter register).

[7] Garcia acknowledges in the "Statement of Facts" section of his brief that a Spanish-speaking interpreter assisted him during his plea hearing and that the interpreter entered an appearance as a "'certified Court interpreter.'" Brief for appellant at 8. Garcia again acknowledges that an interpreter was provided at his sentencing hearing and that the interpreter entered an appearance as a "'State certified Spanish interpreter.'" *Id*. at 9. However, he argues that "since no oath was given" to the interpreter, the district court needed to make sure the interpreter was certified under the rules of the Nebraska Supreme Court and had taken the prescribed oath of office. *Id*. at 14. Garcia cites to no authority to support that a trial court must engage in some type of courtroom confirmation when an interpreter represents to the court that he or she is a certified court interpreter. We conclude that pursuant to § 25-2405, a court interpreter is not required to recite an oath at the beginning of each proceeding if already certified under the rules of the Nebraska Supreme Court. Further, a trial court can accept, without further inquiry, an interpreter's representation that he or she is a certified court interpreter. We find no plain error by the district court's acceptance, without further inquiry, of the representations made by the interpreters in this case that they were certified interpreters and, thus, were not required to be administered an oath prior to the proceedings.

[8-10] Under this same argument section of his brief, Garcia also states he "would reassert his arguments made in the above error at law in support of his claim that he received ineffective assistance of counsel such that his trial counsel did not make sure he freely, intelligently, voluntarily, and understandingly enter[ed] a guilty plea." Brief for appellant at 14-15. However, to the extent Garcia's assertion here is that trial counsel was deficient for failing to make objections related to the certification of the court interpreters, Garcia did not assign this as an error in the "Assignments of Error" section of his brief where he set forth his claims of ineffective assistance of trial counsel. 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. Jenkins*, 303 Neb. 676, 931 N.W.2d 851 (2019). An appellate court does not consider errors which are argued but not assigned. *State v. Dill*, 300 Neb. 344, 913 N.W.2d 470 (2018). Regardless, we have already concluded there was no plain error by the district court's acceptance, without further inquiry, of the interpreters' representations that they were certified (and therefore not required to take an oath at the proceedings). As a matter of law, counsel cannot be ineffective for failing to raise a meritless argument. *State v. Schwaderer*, 296 Neb. 932, 898 N.W.2d 318 (2017).

## Excessive Sentences

Although not raised by the parties, before reaching Garcia's claim that the district court abused its discretion in imposing excessive sentences upon him, we note that the written sentencing order differs from the district court's oral sentencing pronouncement. The district court orally sentenced Garcia on "Count I," second degree assault, to 15 to 20 years' imprisonment, and on "[C]ount II," use of a weapon to commit a felony, to "a period of not less than 5 years, nor more than 10 years." The written sentencing order shows sentence

terms on two counts (one sentence of imprisonment of 15 to 20 years and another of 5 to 10 years), but each are written as sentences associated with "Count 1," and, thus, each purport to refer to Garcia's conviction for second degree assault. But it is evident that the discrepancy was an unintended error, as "Count 2" is accurately referenced elsewhere in the sentencing order.

[11-13] A sentence validly imposed takes effect from the time it is pronounced. *State v. Lessley*, 301 Neb. 734, 919 N.W.2d 884 (2018). When a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed. *Id.* When there is a conflict between the record of a judgment and the verbatim record of the proceedings in open court, the latter prevails. *State v. Lantz*, 21 Neb. App. 679, 842 N.W.2d 216 (2014). During the sentencing hearing, the district court orally ordered that Garcia's sentence on "Count I," second degree assault, was 15 to 20 years' imprisonment, and his sentence on "[C]ount II," use of a weapon to commit a felony, was 5 to 10 years' imprisonment. Pursuant to law, the district court's oral pronouncement controls.

Garcia was convicted of second degree assault, a Class IIA felony, under Neb. Rev. Stat. § 28-309 (Reissue 2016), and use of a weapon (other than a firearm) to commit a felony, a Class II felony, under Neb. Rev. Stat. § 28-1205(1) (Reissue 2016). A Class IIA felony is punishable by up to 20 years' imprisonment. See Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2018). A Class II felony is punishable by 1 to 50 years' imprisonment. *Id.* Garcia was sentenced to 15 to 20 years' imprisonment for second degree assault and 5 to 10 years' imprisonment for use of a weapon to commit a felony. His sentence for use of a weapon to commit a felony was ordered to run consecutive to his sentence for second degree assault, and he was given 245 days' credit for time served. His sentences are within the statutory range.

[14-16] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a 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. Leahy*, 301 Neb. 228, 917 N.W.2d 895 (2018). In determining a sentence to be imposed, relevant factors customarily considered and applied are 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. *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. *Id.*

A presentence investigation report (PSR) shows Garcia was 39 years old at the time of sentencing. He attended high school in Mexico, but did not graduate. At the time of the PSR, Garcia was unemployed due to his incarceration, but he reported having been previously employed by a trucking company. The PSR shows several charges on Garcia's criminal record that took place in either Illinois or Iowa and for which the disposition is unknown, including "DWI/Causing Injury" (two charges in different years), "Battery/Bodily Harm," "DWI," and "Criminal Damage/Fire/Expl. $300-$10,000." He was extradited at some point after being charged with "Inadmissible Alien" in Illinois in 2008. His convictions include the following: disorderly conduct (2012, fine); attempted possession of controlled substance and domestic assault, intentionally causing bodily injury to intimate partner (2013, 148 days' jail for each); and "DUS" and failure to appear (2013, fine for each). In October 2017, after committing his present offenses, Garcia was extradited on a "Fugitive From Justice" offense out of Iowa.

The PSR shows the probation officer's conclusion that Garcia's criminal history appears to be directly or indirectly related to alcohol abuse. When asked about his behavior with alcohol, Garcia indicated "he goes through a 'personality change' and admits that he is quite aggressive." When asked about what he is like sober, Garcia indicated "he does not say much, however does become angry from time to time and that is when he begins drinking." The PSR states Garcia "readily admits" he has a problem with alcohol. A "Simple Screening Instrument" shows Garcia was a "moderate to high degree of risk for alcohol or drug abuse." An "Adult Probation Substance Abuse Questionnaire" shows Garcia's truthfulness was in the low risk range and that he scored in the "problem-max percentile" for the categories of alcohol, drugs, violence, antisocial, aggressiveness, and stress coping.

The PSR indicates that during his interview, Garcia admitted he had a "'problem'" and that he "was so angry that he 'tried to kill her.'" Garcia said he thought he should be in jail due to his present aggressive behavior. Due to the nature of the offenses, a "Domestic Violence Offender Matrix" was administered to Garcia to assess the appropriateness of specialized community supervision. Garcia scored in the high risk range of the matrix. The probation officer wrote that Garcia had never been diagnosed with antisocial personality disorder but that he "displays some associated traits and behaviors." The probation officer's opinion was that Garcia's mental status was questionable because during the interview "he expresse[d] a significant amount of guilt and shame for his behavior . . . and felt that jail at this point was the safest place for him."

A "Level of Service/Case Management Inventory" shows Garcia scored in the high risk range to reoffend. He scored as a low risk in the domains of criminal history, education/employment, family/marital, procriminal attitude/orientation, and antisocial pattern; high risk in the leisure/recreation and alcohol/drug problem domains; and very high risk in the "companions" domain. The probation officer made no

recommendations in regard to sentencing but offered specific recommendations in the event the district court wished to place Garcia on a term of probation.

During the sentencing hearing, defense counsel noted Garcia was an undocumented worker so there was a "great likelihood" that after the case he would be federally indicted for illegal reentry and "would be looking at an additional 60 months," or would "likely" be deported. Defense counsel highlighted that Garcia acknowledged he had "a real problem with alcohol" and pointed out his low risk scores on the "Level of Service/Case Management Inventory." Defense counsel found it unusual in "a case like this" to see Garcia had "demonstrated a lot of guilt and shame as noted by the probation officer." Defense counsel requested a "total sentence of 15 to 20," adding "this clearly is not a probation case. He is going to be deported afterwards, and we think that total sentence would be appropriate given where he is in his acceptance and his feelings about this situation." According to defense counsel, imprisonment was appropriate for Garcia to serve his "debt to society and address those mental health issues before he gets deported."

In a letter from Garcia to the district court judge, Garcia said he took "full ownership" of his actions and knew what he did was wrong. He stated in the letter that anytime he had had "trouble it has been due to alcohol" and that he was "going to get the help in prison that [he] need[s]." Garcia spoke during the sentencing hearing, stating he was "very sorry about all of this, for the damage that [he] caused to many people that love [him]." He hoped "the best" for the victim, that she could "redo her life," and stated the victim was "always in [his] prayers." He asked for mercy and reiterated he was "really sorry."

The State pointed out that present at the time of Garcia's offenses were three 2-year-old children (including Garcia's daughter), a 10-year-old child, and a 13-year-old child, as well as the victim and Garcia's "mother" (it was actually his sister) and niece. The State reported that the victim and Garcia's niece "both said they were terrified of the situation of what

happened." The State noted Garcia's substance abuse questionnaire scores, his score in the high risk range of the domestic violence matrix, and his prior domestic violence assault conviction. The State requested a "straight sentence."

The district court said it had a chance to review the PSR and "noted some of the comments" it had heard during the sentencing hearing. The district court found the facts of the case "disturbing to say the least." The court agreed with Garcia's trial counsel that alcohol was a factor. However, the court found it had to "counter" that with the "high scores[,] prior criminal history, and the nature and circumstances of the offense[s]." In reviewing those factors, it said it found imprisonment necessary for the protection of the public because the risk is substantial that Garcia will engage in additional criminal conduct if placed on probation.

On appeal, Garcia asserts that the district court abused its discretion "by giving the crime substantial weight," brief for appellant at 16, even though in his letter to the court he had indicated awareness of the seriousness of his actions underlying his convictions. He offers a conclusory argument that probation would not depreciate the seriousness of his offenses, although he concedes the district court found otherwise. He contends that the PSR shows "several factors, which mitigate in favor of [a] lower sentence to include probation," but does not explain which factors he is referring to or his reasoning for that belief. Brief for appellant at 18.

As the State notes, "even [Garcia's] trial counsel did not believe that probation was appropriate." Brief for appellee at 7. Garcia's letter and the PSR indicate that, at least around the time of sentencing, Garcia himself believed imprisonment suited him best. The PSR covered all of the relevant sentencing factors as set forth in *State v. Leahy*, 301 Neb. 228, 917 N.W.2d 895 (2018), and the record does not show that the district court relied on any inappropriate consideration in imposing Garcia's sentences. The record supports the district court's sentencing of Garcia. Also, the district court correctly ordered

Garcia's sentence for use of a weapon to commit a felony to be served consecutively to his other sentence as is required under § 28-1205(3). We find the district court did not abuse its discretion in sentencing Garcia, but as noted previously, the district court's oral pronouncement controls.

## Ineffective Assistance of Counsel

[17,18] Garcia claims his trial counsel was ineffective. His counsel for this direct appeal differs from his trial counsel. 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 in order to preserve such claim. *State v. Spang*, 302 Neb. 285, 923 N.W.2d 59 (2019). Once raised, the appellate court will determine whether the record on appeal is sufficient to review the merits of the ineffective performance claims. *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*.

[19-21] 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 has the burden to show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *State v. Spang, supra*. In a plea context, deficiency depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. *State v. Blaha*, 303 Neb. 415, 929 N.W.2d 494 (2019). When a conviction is based upon a guilty or no contest plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty. *Id*.

Garcia assigns as error that his trial counsel was ineffective "based upon his guilty pleas not being voluntary, knowingly, and intelligently made due to the lack of communication, lack of explanation of the law, and exertion of undue pressure by trial counsel." All of his claims relate to the entry of his pleas.

[22] To support a finding that a defendant has entered a guilty plea freely, intelligently, voluntarily, and understandingly, a court must inform a defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. *State v. Lane*, 299 Neb. 170, 907 N.W.2d 737 (2018). The record must also establish a factual basis for the plea and that the defendant knew the range of penalties for the crime charged. *Id.*

Garcia does not specifically raise any of the factors set forth above in *Lane* as a basis for his ineffective assistance claims related to his guilty pleas. Rather, he asserts that

> he was not able to discuss fully with his trial counsel about the terms of the plea agreement, the facts thereon, specifically the victim who was named in the Information, the fact that he had a Motion to Discharge outstanding and that if he pled No Contest, no ruling would be made on the Motion nor would he be able to appeal a detrimental decision.

Brief for appellant at 12. The first part of that assertion appears to relate to his claim in his assignment of error regarding "lack of communication" regarding the terms of the plea agreement and the factual basis upon which it was based. The second part of the assertion appears to relate to his claim in his assignment of error regarding "lack of explanation of the law," which seems to be connected to an alleged outstanding motion to discharge. He also asserts that the record on direct appeal "might be sufficient to address his claim of being subjected to pressure on a level and to the extent to render his guilty pleas

invalid." *Id*. at 13. This appears to relate to his claim in his assignment of error regarding "exertion of undue pressure by trial counsel." Garcia then states:

> The record is devoid [of] whether [Garcia] had enough time to speak to his attorney. Ultimately, the record, as a whole, indicates that [Garcia] did not knowingly, voluntarily and intelligently plead no contest to the charges but [Garcia] would also state that testimony from himself and his attorneys of their discussions off the record and evidence extrinsic to the record most likely is necessary to address his contentions.

*Id*. at 13. This again appears to broadly relate to the claim in his assignment of error regarding "lack of communication." We will address Garcia's claims of ineffective assistance of trial counsel in the following order: (1) the lack of communication regarding the plea agreement and the factual basis upon which it was based, (2) the lack of explanation of the law related to an alleged outstanding motion to discharge, and (3) the exertion of undue pressure by trial counsel.

As to his allegation of trial counsel's lack of communication regarding the plea agreement and the factual basis upon which it was based, Garcia asserts he "was not able to discuss fully with his trial counsel about the terms of the plea agreement, the facts thereon, specifically the victim who was named in the Information." Brief for appellant at 12. He also argues the "record is devoid [of] whether [he] had enough time to speak to his attorney." *Id.* at 13. The record is sufficient to decide this claim.

At the outset of the plea hearing, the district court specifically informed Garcia that if at any point in time he had questions, he should "feel free to ask the Court or [he could] meet with [his] attorneys." Garcia responded, "Okay." To the extent Garcia believed he needed more time to speak with his attorney before entering his pleas, the court made it clear it would make that time available. During the plea hearing, the State recited the terms of the intended plea agreement: charging

Garcia with one count of second degree assault and one count of use of a weapon to commit a felony (Garcia was expected to plead guilty to each count) and withholding filing of "any associated sexual assault charges." Defense counsel stated the intended plea agreement also dismissed the count of terroristic threats. The State provided its factual basis (which identified the victim and witnesses), as set forth previously. The district court asked Garcia if he agreed that "the State could present that evidence at trial" and that it "would support the conviction for the crime charged that you're pleading guilty to?" Garcia responded, "Yes." Also, as previously discussed, there was an interpreter present at the plea hearing. Garcia answered affirmatively when asked if he could understand what the district court was saying to him with the aid of that interpreter. And although Garcia complains of the interpreter's qualifications on appeal, he does not dispute the accuracy of interpretations of statements and questioning or contend that he did not understand what was said during the proceedings. Notably, the district court directly asked Garcia if the plea negotiations had been fully set out on the record for him. Garcia responded, "Yes." Regardless of the extent of his trial counsel's communication with him before entering his pleas, the record shows Garcia was informed of the contemplated plea agreement and the State's factual basis. He was provided further opportunity to speak with his attorney at the time of the plea hearing, and he never made such a request. Garcia does not provide any explanation for why further communication with his attorney was necessary before entering his plea, and there is nothing in the record to suggest that if he had been able to speak further with his attorney, he would have insisted on going to trial rather than pleading guilty. This claim of ineffective assistance of counsel fails.

Regarding his claim that there was a lack of explanation of the law related to an alleged outstanding motion to discharge and pleading "No Contest," brief for appellant at 12, we note that the pleas in the present case were guilty pleas and there

is no motion to discharge filed or ruled upon in our record. As the State contends, "counsel cannot be ineffective for not explaining how a guilty plea would affect a motion that was never filed." Brief for appellee at 5. We agree. This claim of ineffective assistance of counsel also fails.

[23] As to his final claim, Garcia does not allege with any particularity the basis for his claim related to trial counsel's exertion of undue pressure upon him. 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. *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015). By definition, a claim insufficiently stated is no different than a claim not stated at all. *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014). Therefore, if insufficiently stated, an assignment of error and accompanying argument will not prevent the procedural bar accompanying the failure to raise all known or apparent claims of ineffective assistance of trial counsel. *Id*. Accordingly, Garcia's claim about his trial counsel's alleged exertion of undue pressure is not preserved for later review.

## CONCLUSION

For the foregoing reasons, we affirm Garcia's convictions. We also affirm Garcia's sentences. However, the matter is remanded with directions to modify the written sentencing order to reflect the district court's oral pronouncement of 15 to 20 years' imprisonment on "Count I," second degree assault, and 5 to 10 years' imprisonment on "[C]ount II," use of a weapon to commit a felony. In all other respects, the judgment of the district court is affirmed.

Affirmed as modified, and cause remanded with directions.

# State of Nebraska, appellee, v. Daejerron L. Valentine, appellant.

936 N.W.2d 16

Filed October 29, 2019. No. A-18-902.

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. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** An officer's stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation has occurred.
3. **Search and Seizure: Warrantless Searches: Motor Vehicles.** Searches and seizures must not be unreasonable, and searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions, including the automobile exception.
4. **Search and Seizure: Warrantless Searches: Probable Cause: Motor Vehicles.** The automobile exception to the warrant requirement applies when a vehicle is readily mobile and there is probable cause to believe that contraband or evidence of a crime will be found in the vehicle.
5. **Search and Seizure: Warrantless Searches: Probable Cause: Motor Vehicles: Police Officers and Sheriffs: Controlled Substances.** Officers with sufficient training and experience who detect the odor of marijuana emanating from a vehicle have probable cause on that basis alone to search the vehicle under the automobile exception to the warrant requirement.

6. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
7. **Statutes: Legislature: Intent.** The fundamental objective of statutory interpretation is to ascertain and carry out the Legislature's intent.
8. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
9. **Statutes: Legislature: Intent.** Only if a statute is ambiguous or if the words of a particular clause, taken literally, would plainly contradict other clauses of the same statute, lead to some manifest absurdity, to some consequences which a court sees plainly could not have been intended, or to a result manifestly against the general term, scope, and purpose of the law, may the court apply the rules of construction to ascertain the meaning and intent of the lawgiver.
10. **Statutes.** A statute is ambiguous if it is susceptible of more than one reasonable interpretation, meaning that a court could reasonably interpret the statute either way.
11. **Statutes: Legislature: Intent.** An appellate court can examine an act's legislative history if a statute is ambiguous or requires interpretation.
12. **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.
13. **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.
14. **Jury Instructions: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, 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.
15. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
16. **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.

Appeal from the District Court for Douglas County: Duane C. Dougherty, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Jessica C. West for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

Riedmann, Bishop, and Arterburn, Judges.

Arterburn, Judge.

## I. INTRODUCTION

Following a jury trial, Daejerron L. Valentine was convicted of possession of a deadly weapon by a prohibited person and possession of marijuana. Valentine appeals from his convictions. On appeal, he challenges the district court's failure to suppress evidence seized during a traffic stop of his vehicle and the district court's interpretation of Neb. Rev. Stat. § 28-1206 (Supp. 2017), which delineates the elements of the offense of possession of a deadly weapon by a prohibited person. Valentine also argues that the district court erred in giving certain jury instructions and refusing his proposed jury instructions. Following our review of the record, we affirm Valentine's convictions.

## II. BACKGROUND

On July 25, 2018, the State filed an amended information charging Valentine with one count of possession with intent to distribute marijuana, in violation of Neb. Rev. Stat. § 28-416 (Cum. Supp. 2018), and one count of possession of a deadly weapon (firearm) by a prohibited person, second offense, in violation of § 28-1206. The charges against Valentine stem from a traffic stop of his vehicle which occurred on October 12, 2017.

On the evening of October 12, 2017, Patrick Dempsey, an Omaha Police Department detective assigned to the "gang

suppression unit," was on patrol in the northeast part of Omaha, Nebraska, in a marked police cruiser with his partner. At approximately 10:30 p.m., Dempsey observed the passenger side of a white vehicle driving in front of him near the intersection of 23d and Sprague Streets. Dempsey believed that the tint on the windows of the vehicle was too dark and, thus, constituted a traffic violation. During Dempsey's trial testimony, he explained that the tint on the rear side windows of a vehicle is permitted to be darker than the tint on the front side windows of a vehicle. As such, he testified that if the tint on the front side windows matches the tint on the back side windows, the tint on the front side windows is probably darker than is permitted. Dempsey observed that the tint on the windows of the vehicle was all the same color and appeared to Dempsey to be darker than is permitted. In addition, Dempsey could not observe anyone in the vehicle because of the dark color of the tint. Dempsey explained that if a vehicle has the correct tint in the front, a person should be able to observe the occupants inside the vehicle through the front side windows.

Because of Dempsey's belief that the tint on the windows of the vehicle was darker than what is permitted, he initiated a traffic stop. At the point that Dempsey was approaching the vehicle on the driver's side, he was able to observe that there was only one occupant. That occupant was later identified as Valentine. Valentine rolled down the window on the driver's side of the vehicle and spoke with Dempsey. While Dempsey was speaking with Valentine, he detected the strong odor of burnt marijuana coming from the vehicle. As a result of Dempsey's observation, he asked Valentine to step out of the vehicle. Dempsey also asked Valentine if he had been smoking marijuana in the vehicle. Valentine denied smoking marijuana himself, but did admit that he had a friend who had smoked marijuana in the vehicle.

Dempsey conducted a search of Valentine's person, but did not locate any marijuana. Dempsey then conducted a search

of the vehicle. In the center console between the front seats, Dempsey located two baggies of a substance which subsequent testing revealed was marijuana. One baggie contained 18.8 grams of marijuana and one baggie contained 9.196 grams of marijuana. As such, the total weight of marijuana found in the baggies was 27.996 grams, or just under 1 ounce. Also in the center console, Dempsey located "a working digital scale" and two empty baggies similar to those which contained the marijuana.

When Dempsey searched the front passenger door of the vehicle, he located a gun hidden beneath the control panel for the door's window and locking mechanism. When he searched the trunk of the vehicle, Dempsey located $240 in cash hidden in a tennis shoe and an opened box of baggies which were similar to those which contained the marijuana. After conducting the search of the vehicle, Dempsey tested the window tint and discovered that the front side windows were darker than is permitted by law. Ultimately, Valentine was placed under arrest and transported to police headquarters.

In July 2018, trial was held. During the trial, Dempsey testified regarding the traffic stop and subsequent search of Valentine's vehicle which had occurred on October 12, 2017. In conjunction with Dempsey's testimony, the State offered into evidence the video obtained from Dempsey's "body-worn camera" which depicted the traffic stop and the subsequent search. The video depicts Dempsey's initial observations of Valentine's vehicle prior to the traffic stop, his interactions with Valentine, and his detailed search of Valentine's vehicle. In particular, the video portrays Dempsey's discovery of the gun which was hidden in the front passenger door. After Dempsey opens the passenger door, he searches a compartment at the base of the door, but finds nothing of evidentiary value. He then pulls, without much force, on the control panel for the door's window and locking mechanism, and the control panel easily comes off of the door to reveal a "void" in the vehicle's door. Dempsey testified that "[t]here was nothing attaching

[the control panel] other than the cord." Inside the void, a gun is readily visible.

During Dempsey's trial testimony, he opines that given everything that he found in Valentine's vehicle, including the marijuana, the gun, the digital scale, the cash, and the baggies, that Valentine intended to distribute the marijuana. Dempsey noted that he did not find any items in the vehicle which would indicate that Valentine, himself, had smoked or was planning on smoking the marijuana.

The State presented evidence at trial to prove that the gun found in Valentine's vehicle was loaded and in working order. DNA testing conducted on the gun revealed that Valentine could not be excluded as the major contributor to the DNA found on the gun. The probability of an individual not related to Valentine matching the DNA profile from the gun is approximately 1 in 26.8 septillion. The parties stipulated that Valentine has previously been convicted of a felony.

At the close of the evidence, the jury found Valentine guilty of possession of marijuana, less than 1 ounce, a lesser-included offense of possession of marijuana with the intent to distribute, as the State charged in its amended information. The jury also found Valentine guilty of possession of a deadly weapon by a prohibited person. The district court subsequently sentenced Valentine to a $300 fine on his conviction for possession of marijuana. The court found that Valentine's conviction for possession of a deadly weapon by a prohibited person was a second offense and sentenced him to 20 to 20 years' imprisonment plus 1 day on that conviction.

Valentine appeals from his convictions.

## III. ASSIGNMENTS OF ERROR

On appeal, Valentine assigns that the district court erred in (1) overruling his motion to suppress evidence seized as a result of the traffic stop because there was not probable cause to stop his vehicle and because the search of his entire vehicle was not reasonable or supported by probable cause;

(2) incorrectly interpreting § 28-1206, as it read at the time of his arrest; and (3) giving improper jury instructions.

## IV. ANALYSIS

### 1. Motion to Suppress Evidence

#### (a) Additional Background

Prior to trial, Valentine filed a motion to suppress the evidence obtained as a result of the search of his vehicle. After a hearing, where Dempsey testified in detail regarding the traffic stop and the subsequent search of Valentine's vehicle, the district court denied the motion to suppress, finding that "all of the officers' actions that evening were appropriate and in accordance with Nebraska law." Subsequently, Valentine's original counsel withdrew from the case and another attorney was appointed to represent him. Valentine's second attorney filed a motion asking the court to reconsider its ruling on the motion to suppress and to "reopen the evidentiary hearing to allow defense counsel to re-cross examine State's witnesses and to present . . . newly discovered evidence." The district court granted Valentine's request, and a new evidentiary hearing on the motion to suppress was held.

At the second evidentiary hearing, Dempsey again testified regarding the traffic stop and the subsequent search of Valentine's vehicle. In addition to the details provided in the background section above, Dempsey provided more specific details at this hearing regarding the search of Valentine's vehicle. Dempsey explained that he commonly checks the control panel on a vehicle's doors during his searches because, in his experience, it is common for people to hide drugs or guns in that location. He testified that once that control panel is removed, there is a "little hidden compartment" inside the door. Dempsey also indicated that during the course of the stop of Valentine's vehicle, he received information from other officers that they had been looking for Valentine because they believed him to be selling marijuana and to be armed with a

gun. Dempsey indicated that he did not have this information prior to initiating the traffic stop of Valentine.

At the close of the hearing, Valentine's counsel argued first that all of the evidence seized during the search of Valentine's vehicle should be suppressed because "it's questionable whether or not [police] really were pulling him over for a window tint violation." Counsel suggested that Dempsey would have been unable to observe a window tint violation "at 11:00 at night with very little lighting." Counsel also argued that the evidence seized from the vehicle after the marijuana was found in the center console should be suppressed because the search went "beyond the scope of the . . . traffic stop."

The district court again overruled Valentine's motion to suppress the evidence seized during the search of his vehicle. The court reiterated its previous finding that "all of the officers' actions [on the] evening [of the traffic stop] were appropriate and in accordance with Nebraska law." Valentine challenges the district court's decision to overrule his motion to suppress evidence.

(b) 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. Nunez*, 299 Neb. 340, 907 N.W.2d 913 (2018).

(c) Traffic Stop Was Unlawful

Valentine asserts that the district court erred in overruling his motion to suppress all of the evidence seized during the traffic stop because there was not probable cause to stop his vehicle. We disagree with his contention.

[2] An officer's stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation has occurred. *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008). Traffic violations, no matter how minor, create probable cause to stop the driver of a vehicle. *Id*. Neb. Rev. Stat. § 60-6,257 (Reissue 2010) provides, in relevant part:

> (1) It shall be unlawful for a person to drive a motor vehicle required to be registered in this state upon a highway:
>
> (a) If the windows in such motor vehicle are tinted so that the driver's clear view through the windshield or side or rear windows is reduced or the ability to see into the motor vehicle is substantially impaired;
>
> (b) If the windshield has any sunscreening material that is not clear and transparent below the AS-1 line or if it has a sunscreening material that is red, yellow, or amber in color above the AS-1 line;
>
> (c) If the front side windows have any sunscreening or other transparent material that has a luminous reflectance of more than thirty-five percent or has light transmission of less than thirty-five percent; [or]
>
> (d) If the rear window or side windows behind the front seat have sunscreening or other transparent material that has a luminous reflectance of more than thirty-five percent or has light transmission of less than twenty percent except for the rear window or side windows behind the front seat on a multipurpose vehicle, van, or bus[.]

Dempsey initiated a traffic stop of Valentine's vehicle due to his suspicion that the tint on the side windows of the vehicle was too dark pursuant to § 60-6,257. On appeal, Valentine challenges the stop of his vehicle, arguing that Dempsey did not use an "objective basis" in determining that the side windows were too darkly tinted. Brief for appellant at 15.

Contrary to Valentine's argument on appeal, Dempsey testified that he relied on two objective bases in forming his

suspicion that Valentine's tint was too dark. First, Dempsey explained that the tint color on the front side windows appeared to be the same as that on the rear side windows. Pursuant to § 60-6,257(1)(c) and (d), the tint on the front side windows is required to be lighter than the tint on the rear side windows. When Dempsey observed that the windows on Valentine's vehicle had all the same color of tint, he suspected the tint on the front side windows was too dark.

Additionally, Dempsey testified that the tint on the vehicle's windows was so dark that he could not readily observe anyone in the vehicle. Dempsey explained that if a vehicle has tint in compliance with § 60-6,257(1), police should be able to "almost see somebody in the vehicle." Here, Dempsey testified that he was unable to observe an occupant in the vehicle until he had gotten out of his police cruiser and was approaching Valentine's vehicle. Section 60-6,257(1)(a) provides that it is unlawful to have tint on a vehicle's windows which "substantially impair[s]" the ability to see into the vehicle.

Valentine takes issue with Dempsey's testimony that the tint on the vehicle's windows impaired his ability to see inside the vehicle. Valentine points to a small part of Dempsey's testimony from the initial suppression hearing. After Dempsey specifically testified that he could not see anyone in the vehicle due to the dark color of tint, he indicated that he initiated a traffic stop of Valentine's vehicle and made contact with Valentine who was the lone occupant. The prosecutor then asked Dempsey, "Now, at that time, because of the tinted windows, were you able to see if there was more than one person in the car?" Dempsey responded affirmatively. Although Valentine directs us to this testimony in an attempt to prove that Dempsey could, in fact, see into the vehicle through the tint before the traffic stop was made, we read this testimony differently. In the context of the question and Dempsey's response in his previous answer, his testimony indicates that he could see that there was one occupant in Valentine's vehicle only after he had initiated the traffic stop. This testimony is

consistent with Dempsey's initial testimony, as well as his later explanation that he could see an occupant of the vehicle only after he got out of his police cruiser and began approaching Valentine's vehicle. Ultimately, we conclude Dempsey clearly testified that when he stopped Valentine's vehicle, he did so, in part, because the tint on the vehicle's windows was so dark he could not see anyone inside.

Based upon our reading of the record, we find that the district court did not err in overruling Valentine's motion to suppress evidence on the basis that there was no probable cause to initiate a traffic stop of his vehicle. The State presented sufficient evidence to establish that Dempsey reasonably believed that Valentine had committed a traffic violation by operating a motor vehicle which had windows that were tinted darker than is permitted by § 60-6,257. In reaching our conclusion, we note that Dempsey's subsequent testing of Valentine's windows revealed that the front side windows were, in fact, not in compliance with the requirements of § 60-6,257(1)(a).

(d) Search of Passenger Door

Valentine also asserts that the district court erred in failing to suppress the evidence found in the vehicle subsequent to the location of the marijuana in the center console. In his brief, Valentine explains that because the probable cause to search the vehicle arose from Dempsey's smelling the odor of burnt marijuana, once the marijuana "was successfully located," Dempsey "did not have probable cause to believe that contraband was hidden in any other part of the automobile and, thus, a search of the entire vehicle was without probable cause and was unreasonable under the [F]ourth [A]mendment." Brief for appellant at 19. Again, we disagree with Valentine's contention.

[3] Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures. *State v. Seckinger*, 301 Neb. 963, 920 N.W.2d 842 (2018). The ultimate touchstone

is one of reasonableness. *Id*. Searches and seizures must not be unreasonable, and searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions, including the automobile exception. See *id*.

[4] The automobile exception to the warrant requirement applies when a vehicle is readily mobile and there is probable cause to believe that contraband or evidence of a crime will be found in the vehicle. *Id*. A vehicle is readily mobile whenever it is not located on private property and is capable or apparently capable of being driven on the roads or highways. *Id*.

[5] The Nebraska Supreme Court has consistently held that officers with sufficient training and experience who detect the odor of marijuana emanating from a vehicle have probable cause on that basis alone to search the vehicle under the automobile exception to the warrant requirement. *Id.* See, e.g., *State v. Watts*, 209 Neb. 371, 307 N.W.2d 816 (1981); *State v. Ruzicka*, 202 Neb. 257, 274 N.W.2d 873 (1979); *State v. Daly*, 202 Neb. 217, 274 N.W.2d 557 (1979); *State v. Benson*, 198 Neb. 14, 251 N.W.2d 659 (1977). Accord *State v. Reha*, 12 Neb. App. 767, 686 N.W.2d 80 (2004). Additionally, in *State v. Watts, supra*, the Supreme Court rejected an argument that once law enforcement discovered marijuana in the vehicle, the search must end unless there were additional facts to suggest contraband may be found elsewhere in the vehicle. The court stated:

> [I]t [is] just as logical to conclude that the finding of the small amount of marijuana in the passenger compartment, after being told by the defendant that none existed, simply served to substantiate the officer's suspicions and furnish additional probable cause to make a complete search of the automobile. Having found a quantity of illicit drugs in one part of the automobile does not sensibly suggest the probability that no more such substance is present.

*Id*. at 374, 307 N.W.2d at 819.

Given that Dempsey detected the odor of marijuana emanating from Valentine's vehicle, he had probable cause to search the entire vehicle, even after he had located the baggies of marijuana in the vehicle's center console. Dempsey's discovery of marijuana in the vehicle "served to substantiate [his] suspicions and furnish additional probable cause to make a complete search of the automobile." See *id*. The district court did not err in overruling Valentine's motion to suppress the evidence found in Dempsey's thorough search of the vehicle.

### 2. Interpretation of § 28-1206

#### (a) Additional Background

After Valentine's first attorney withdrew from the case, Valentine's second attorney requested that Valentine be permitted to withdraw his plea of not guilty. The court granted this request. Counsel then filed a motion to quash, arguing that the language used within the information did not comply with the language of § 28-1206, which delineated the elements of possession of a firearm by a prohibited person, as that statute existed on October 12, 2017.

In the information, the State alleged:

> On or about 12 October 2017, in Douglas County, Nebraska, [Valentine] did then and there unlawfully possess a deadly weapon to wit: a firearm and has previously been convicted of a felony, is a fugitive from justice, or is the subject of a current and validly issued domestic violence protection order and is knowingly violating such order, or has been convicted within the past seven years of a misdemeanor crime of domestic violence . . . .

Valentine asserts that this language is not consistent with the language of § 28-1206 as it existed on October 12, 2017. At that time, § 28-1206 read as follows:

> (1) A person commits the offense of possession of a deadly weapon by a prohibited person if he or she:
>
> (a) Possesses a firearm, a knife, or brass or iron knuckles and he or she:

> (i) Has previously been convicted of a felony;
>
> (ii) Is a fugitive from justice;
>
> (iii) Is the subject of a current and validly issued domestic violence protection order, harassment protection order, or sexual assault protection order and is knowingly violating such order[.]

Essentially, Valentine argued that because the word "or" did not appear anywhere between subsections (1)(a)(i), (1)(a)(ii), or (1)(a)(iii) of § 28-1206, that in order for an individual to be defined as a "prohibited person," he or she must be at the same time a previously convicted felon, a fugitive from justice, and subject to a current or validly issued domestic violence or harassment protection order.

To the contrary, the State argued that § 28-1206, as it appeared in October 2017, was ambiguous because there was neither an "and" nor an "or" between subsections (1)(a)(i), (1)(a)(ii), or (1)(a)(iii). The State urged the district court to consider the legislative history surrounding this statutory section, which the State offered into evidence over Valentine's relevance objections, in determining how to interpret § 28-1206.

The legislative history reveals that in April 2017, § 28-1206 was amended in order to provide an exemption to the Nebraska Criminal Code regarding possession of deadly weapons by exempting archery equipment and knives intended for recreational purposes. In addition, it added those individuals who are subject to harassment protection orders to the list of those prohibited from weapon possession under the criminal code. However, in amending the statutory language for these specific purposes, the Legislature inadvertently left out an "or" between subsections (1)(a)(i), (1)(a)(ii), and (1)(a)(iii). This omission was rectified in January 2018. The current version of § 28-1206 is identical to the one that existed in October 2017, except there is an "or" between subsections (1)(a)(ii) and (1)(a)(iii), such that in order for an individual to be defined as a "prohibited person," he or she must be

either a previously convicted felon, a fugitive from justice, or subject to a current and validly issued domestic violence or harassment protection order. See § 28-1206 (Cum. Supp. 2018).

The district court overruled Valentine's motion to quash, finding that the information correctly defined the elements of possession of a deadly weapon by a prohibited person. In a written order, the court found that § 28-1206, as it appeared in October 2017, was ambiguous because "it could be argued that it is likely that the Legislature intended the word 'or' to be present within the statute as much as it is likely that the Legislature intended the word 'and' to be present within the statute." And, that because the statutory language was ambiguous, the court could review the legislative history in order to resolve the ambiguity. The district court stated:

> This Court is in agreement with the State that to interpret the statute as suggested and argued by [Valentine] would lead to a manifest absurdity, to consequences which this Court sees plainly could not have been intended and further to result manifestly against the general term, scope, and purpose of Neb. Rev. Stat. §28-1206. The Court interprets the statute as if the disjunctive "or" existed between subsections a(ii) and a(iii). Thus, requiring a "prohibited person" to be only one of the elements, not all of them.

Valentine subsequently renewed his argument with respect to the elements necessary to prove him guilty of possession of a deadly weapon by a prohibited person when he made a motion to dismiss at the close of the State's case. Valentine's counsel argued:

> The statute specifically requires the State to prove beyond a reasonable doubt that . . . Valentine was not only a convicted felon, but also, in order to be a prohibited person, he needed to have an active protection order which he was violating as well as have an active — be a fugitive from justice.

> The State, obviously, has presented no evidence that there was an active warrant against . . . Valentine at the time of the stop. They produced no evidence that there was an active protection order against him or that he was in violation of that. So they have failed to meet their burden under the law as it was written and applies to . . . Valentine in this case for these charges on October 12, 2017.

The district court denied Valentine's motion to dismiss, citing its previous rationale in denying his motion to quash.

On appeal, Valentine argues that the district court erred in interpreting § 28-1206, as it existed in October 2017, to define a "prohibited person" as someone who is a convicted felon, who is a fugitive from justice, or who is subject to a current domestic violence or harassment protection order, rather than as someone who fits into all three categories simultaneously. Valentine asserts that the district court's erroneous interpretation of § 28-1206 denied him due process and caused him to be convicted of the crime of possession of a deadly weapon by a prohibited person when there was insufficient evidence presented to prove his guilt. Upon our review, we do not agree with Valentine's assertions. Rather, we agree with the district court's interpretation of § 28-1206, as it existed in October 2017.

(b) Standard of Review

[6] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination. *State v. Lovvorn*, 303 Neb. 844, 932 N.W.2d 64 (2019).

(c) Analysis

Valentine's assertions that he was denied due process and convicted of possession of a deadly weapon by a prohibited person when there was insufficient evidence presented to prove his guilt both center on the correct interpretation of § 28-1206, as it existed in October 2017. As such, we

must first analyze the appropriate statutory interpretation of this section.

[7-10] The fundamental objective of statutory interpretation is to ascertain and carry out the Legislature's intent. *State v. McColery*, 301 Neb. 516, 919 N.W.2d 153 (2018). Statutory language is to be given its plain and ordinary meaning. *State v. Garcia*, 301 Neb. 912, 920 N.W.2d 708 (2018). Only if a statute is ambiguous or if the words of a particular clause, taken literally, would plainly contradict other clauses of the same statute, lead to some manifest absurdity, to some consequences which a court sees plainly could not have been intended, or to a result manifestly against the general term, scope, and purpose of the law, may the court apply the rules of construction to ascertain the meaning and intent of the lawgiver. *State v. Frederick*, 291 Neb. 243, 864 N.W.2d 681 (2015). A statute is ambiguous if it is susceptible of more than one reasonable interpretation, meaning that a court could reasonably interpret the statute either way. *State v. McColery, supra*.

The district court found that the language of § 28-1206, as it appeared in October 2017 was ambiguous because there was neither an "and" nor an "or" between subsections (1)(a)(i), (1)(a)(ii), and (1)(a)(iii). We agree with the district court's finding. The plain meaning of the statute as it then existed is not readily discernible because the language is susceptible to more than one reasonable interpretation. Specifically, it is not clear from the language of the statute if the Legislature intended to define a prohibited person as someone who is a convicted felon, who is a fugitive from justice, or who is subject to a current domestic violence or harassment protection order, or if it intended to define a prohibited person as someone who fits into all three categories simultaneously. And, as the district court noted in its order, "it could be argued that it is likely that the Legislature intended the word 'or' to be present within the statute as much as it is likely that the Legislature intended the word 'and' to be present within the statute."

[11] Given that we have found the language of § 28-1206, as it existed in October 2017, to be ambiguous, we turn to the legislative history to aid in our interpretation. An appellate court can examine an act's legislative history if a statute is ambiguous or requires interpretation. *State v. McColery, supra*. As we discussed more thoroughly above, the legislative history surrounding the 2017 and 2018 revisions to § 28-1206 clearly indicates that the Legislature intended that a prohibited person be defined as someone who met only one of the three criteria listed in subsections (1)(a)(i), (1)(a)(ii), and (1)(a)(iii).

Prior to the 2017 revisions to the statute, § 28-1206 clearly defined a prohibited person as someone who met only one of the criteria listed. See § 28-1206 (Reissue 2016). The Legislature revised § 28-1206 in 2017 in order to provide an exemption within the Nebraska Criminal Code regarding possession of deadly weapons by exempting archery equipment and knives intended for recreational purposes. The Legislature also added those individuals who are subject to harassment protection orders to the list of those prohibited from weapon possession under the criminal code. Nowhere in the legislative history of § 28-1206 is there any indication that the Legislature intended to change the definition of a prohibited person to include only those individuals who met all three criteria listed in subsections (1)(a)(i), (1)(a)(ii), and (1)(a)(iii) simultaneously. In addition, the removal of the word "or" between subsections (1)(a)(ii) and (1)(a)(iii) was clearly unintended, as the Legislature amended § 28-1206, effective July 19, 2018, to correct this "typographical error." See Introducer's Statement of Intent, L.B. 848, Judiciary Committee, 105th Leg., 2d Sess. (Jan. 19, 2018).

We agree with the district court that § 28-1206, as it appeared in October 2017, should be interpreted as if the disjunctive "or" existed between subsections (1)(a)(ii) and (1)(a)(iii). Thus, § 28-1206 defines a "prohibited person" as someone who meets one of the listed elements, not all of

them. Given our interpretation of the statutory language, we do not find that Valentine's right to due process was violated or that he was convicted of being a prohibited person in possession of a deadly weapon without sufficient evidence. A concealed firearm bearing Valentine's DNA was located in the vehicle he was driving, and the parties stipulated that Valentine was previously convicted of a felony.

### 3. Jury Instructions

Valentine asserts that the district court erred by failing to properly instruct the jury prior to its deliberations. Specifically, Valentine claims that the district court erred by improperly instructing the jury regarding the elements and requisite intent necessary to find Valentine guilty of possession of a deadly weapon by a prohibited person and regarding the definition of the term "possession."

We address each of these claims in turn.

#### (a) Standard of Review

[12] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision. *State v. Bigelow*, 303 Neb. 729, 931 N.W.2d 842 (2019).

#### (b) Jury Instruction No. 3

Valentine first argues that the district court erred in giving jury instruction No. 3, which delineated the charges brought against Valentine by the State. In particular, Valentine takes issue with the district court's recitation of the charge of possession of a deadly weapon by a prohibited person. Valentine's argument mirrors the argument he made with regard to the district court's interpretation of § 28-1206, as it appeared in October 2017. Valentine asserts that the court should have inserted an "and" between subsections (1)(a)(i), (1)(a)(ii), and (1)(a)(iii), rather than an "or," based on Valentine's assertion that in October 2017, § 28-1206 required that the State prove that Valentine had previously been convicted of a felony,

was a fugitive from justice, and was the subject of a current protection order. As we discussed above, § 28-1206 requires only that Valentine be either a convicted felon, a fugitive from justice, or subject to a current protection order, not all three. As such, Valentine's assertion regarding jury instruction No. 3 must fail. The district court correctly instructed the jury regarding the charge of possession of a deadly weapon by a prohibited person when it included an "or" between subsections (1)(a)(ii) and (1)(a)(iii) of § 28-1206.

(c) Jury Instruction No. 6

Valentine next asserts that the district court erred in giving jury instruction No. 6, which delineated the specific elements the State needed to prove in order for the jury to find Valentine guilty of possession of a deadly weapon by a prohibited person. The portion of jury instruction No. 6 at issue reads as follows:

> The elements of the crime of Possession of a Deadly Weapon (Firearm) by a Prohibited Person, as charged in Count 2 of the Information, are:
>
> 1. That the defendant did possess a deadly weapon to [sic] specifically: a firearm; and
>
> 2. That the Defendant did so on or about October 12, 2017 in Douglas County, Nebraska; and
>
> 3. That the Defendant had previously been convicted of a felony.

Valentine requested that the court change jury instruction No. 6 such that "instead of reading 'the defendant did possess a deadly weapon,'" it would read, "'the defendant did knowingly or intentionally possess a deadly weapon.'" Brief for appellant at 26. The district court declined to make this change, noting that jury instruction No. 9, which provided a definition of "possession," included "the language that [Valentine] is requesting."

[13,14] 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. Swindle*, 300 Neb. 734, 915 N.W.2d 795 (2018). 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*.

Jury instruction No. 6 delineates the elements of possession of a deadly weapon by a prohibited person using the exact language contained within § 28-1206. The Supreme Court has held that "[i]n giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute." *State v. Swindle*, 300 Neb. at 744, 915 N.W.2d at 805. The court explained that although the law does not require that a jury instruction track the exact language of the statute, using the specific language of a statute is an effective means of implementing the intent of the Legislature. *State v. Swindle, supra*. Given that the district court utilized the statutory language in instructing the jury on the elements of possession of a deadly weapon by a prohibited person, we cannot say that the court erred in giving jury instruction No. 6.

Moreover, we note that Valentine cannot show that he was in any way prejudiced by the district court's decision to give jury instruction No. 6 without the amendments requested by Valentine. When looking at the jury instructions as a whole, it is clear that jury instruction No. 9 explains the requisite intent necessary to establish whether Valentine was in possession of the deadly weapon. As such, jury instruction No. 9 provides the information that Valentine asked the district court to include in jury instruction No. 6. Accordingly, it is clear that the jury was adequately instructed regarding the elements of possession of a deadly weapon by a prohibited person.

(d) Jury Instruction No. 9

Finally, Valentine asserts that the district court erred in giving jury instruction No. 9, which, as we explained above,

provides a definition of the term "possession." The portion of jury instruction No. 9 at issue reads as follows: "'Possession' means either knowingly having it on one's person or knowing of the object's presence and having control over the object." Valentine submitted a proposed jury instruction No. 9 which changed the definition of the term "possession" as follows: "'Possession' of a firearm means knowingly having it on one's person or knowing of the object's presence and having control over the object. Proximity, standing alone, is insufficient to prove possession." The district court refused to give Valentine's proposed jury instruction.

[15] 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. Bigelow*, 303 Neb. 729, 931 N.W.2d 842 (2019).

[16] Here, the district court used a pattern jury instruction regarding the definition of possession. See NJI2d Crim. 4.2. 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. Morgan*, 286 Neb. 556, 837 N.W.2d 543 (2013). In fact, recently, in *State v. Castellanos*, 26 Neb. App. 310, 918 N.W.2d 345 (2018), this court upheld a jury instruction defining possession which was directly patterned after NJI2d Crim. 4.2. In *Castellanos*, the defendant requested that the district court include the following language when instructing the jury regarding the definition of possession: "'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.'" 26 Neb. App. at 326, 918 N.W.2d at 358. The defendant also requested that the court instruct the jury as follows: "'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."'" *Id*. We affirmed the district court's decision to rely on the pattern jury instruction defining the term "possession" rather than using the defendant's proposed definition.

As in *State v. Castellanos, supra*, Valentine asked the district court to depart from the pattern jury instruction and provide the jury with a more detailed definition of possession. Although Valentine's proposed jury instruction No. 9 was not an incorrect statement of the law, Valentine cannot show that he was prejudiced by the district court's refusal of his proposed jury instruction. When the instructions given are considered together, it is clear that the district court properly instructed the jury on the definition of the term "possession," and the court did not err in refusing to give Valentine's proposed jury instruction.

## V. CONCLUSION

We conclude that the district court did not err in overruling Valentine's motion to suppress, in interpreting § 28-1206, or in instructing the jury. Accordingly, Valentine's convictions and sentences are affirmed.

Affirmed.

# State of Nebraska, appellee, v. William J. Nelson, appellant.

936 N.W.2d 32

Filed October 29, 2019. No. A-18-998.

1. **Sentences: Appeal and Error.** Appellate courts do not disturb sentences imposed within the statutory limits absent an abuse of discretion by the trial court.
2. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents 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.
3. **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.
4. **Sentences.** When imposing a sentence, the sentencing court is to 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.
5. **Sentences: Judgments.** The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life.
6. **Sentences.** It is the minimum portion of an indeterminate sentence which measures its severity.
7. ____. In the event of a discrepancy between an oral pronouncement of sentence and the written order of the sentence, the oral pronouncement controls.

8. **Courts: Sentences: Appeal and Error.** Where a portion of the court's oral pronouncement is invalid and another portion is valid, an appellate court has the authority to modify or revise the sentence by removing the invalid or erroneous portion.

Appeal from the District Court for Madison County: James G. Kube, Judge. Affirmed.

Chelsey R. Hartner, Chief Deputy Madison County Public Defender, and Barbara J. Masilko for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Riedmann, Arterburn, and Welch, Judges.

Welch, Judge.

## I. INTRODUCTION

William J. Nelson appeals his plea-based conviction for first degree sexual assault and the sentence imposed thereon. He contends that the sentence imposed was excessive and that the district court erred regarding the determination that his offense was an "aggravated offense" pursuant to Nebraska's Sex Offender Registration Act (SORA). Specifically, he claims that the aggravated offense determination must be made by a jury regarding community supervision and that the evidence did not support the district court's determination the offense constituted an aggravated offense relating to lifetime registration. We find that the sentence imposed was not excessive, and we affirm the court's written sentencing order which was different than the court's oral pronouncement of Nelson's sentence. Accordingly, we affirm.

## II. STATEMENT OF FACTS

In June 2018, the victim told a law enforcement officer that in March 2016, several months before she turned 16 years of age, she had started an ongoing sexual relationship with Nelson, who was her half-sister's then-husband. The victim stated that she tried to end the relationship many times but

that when she did so, Nelson always threatened to kill himself. Nelson admitted to law enforcement that he had a sexual relationship with the victim from the time she was 15 years of age until as recently as 2 months prior to the law enforcement interview.

Pursuant to a plea agreement, Nelson pled guilty to first degree sexual assault. See Neb. Rev. Stat. § 28-319 (Reissue 2016). As part of the plea agreement, the State agreed not to bring further charges. The State provided a factual basis setting forth that between the dates of July 17, 2015, and July 16, 2016, Nelson engaged in sexual intercourse with the victim starting when she was 15 years of age and he was over 19 years of age.

At the sentencing hearing, the court inquired into Nelson's life and into his relationship with the victim. Nelson told the court he was divorced and had a 6-year-old daughter who lived with her mother, he suffered from depression, and he thought about killing himself rather than living as a convicted sex offender. After repeated questioning on the subject, Nelson admitted that during the time of his sexual relationship with the victim, his suicidal ideation was largely to manipulate the victim to keep their relationship secret. At the hearing, the victim and her mother read prepared statements. The victim stated that she and Nelson confided in each other, she thought they loved each other, and they did not care about the consequences of their conduct. She stated that she soon realized she was "blinded by love and manipulation." The victim stated that Nelson cheated on her, lied to her, and secretly took pictures of her in "vulnerable situations" in order to blackmail her into not telling her family about their relationship. The county attorney later clarified that the victim was mostly nude in these pictures. The victim stated that Nelson "made [her] feel so worthless" that she considered suicide. The victim's mother said that Nelson made advances on the victim's friends and got their telephone numbers to make the victim jealous.

The court stated that Nelson's decision to take responsibility was not remarkable, because the evidence against him was so clear. The court noted the lengths that Nelson had gone to in order to keep his relationship with the victim a secret and opined that Nelson seemed to have had a total disregard for the consequences to the victim. The court sentenced Nelson to 20 to 25 years' imprisonment with credit for 98 days served. The court further found by oral pronouncements that pursuant to SORA, the offense was an aggravated offense requiring lifetime community supervision and lifetime sex offender registration; however, the court's subsequent September 21, 2018, journal entry setting forth Nelson's sentence did not make reference to either lifetime community supervision or lifetime sex offender registration. Nelson timely appeals and is represented on appeal by the same counsel as represented him in the district court.

## III. ASSIGNMENTS OF ERROR

Nelson's assignments of error, consolidated and restated, are that the district court erred (1) in imposing an excessive sentence and (2) in determining that his offense was an aggravated offense pursuant to SORA for purposes of the lifetime sex offender registration requirement and in making the aggravated offense determination for the purposes of the lifetime community supervision requirement when said determination must be made by a jury.

## IV. STANDARD OF REVIEW

[1] Appellate courts do not disturb sentences imposed within the statutory limits absent an abuse of discretion by the trial court. See *State v. Meduna*, 18 Neb. App. 818, 794 N.W.2d 160 (2011).

[2] Statutory interpretation presents 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. *State v. Hamilton*, 277 Neb. 593,

763 N.W.2d 731 (2009); *State v. Kresha*, 25 Neb. App. 543, 909 N.W.2d 93 (2018).

## V. ANALYSIS

### 1. Excessive Sentence

Nelson first contends that the sentence imposed was excessive. First degree sexual assault is a Class II felony punishable by 1 to 50 years' imprisonment. See, Neb. Rev. Stat. § 28-105 (Reissue 2016); § 28-319 (first degree sexual assault). Nelson was sentenced to 20 to 25 years' imprisonment which is within the statutory sentencing range.

[3-5] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Wofford*, 298 Neb. 412, 904 N.W.2d 649 (2017). When imposing a sentence, the sentencing court is to 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. *Id*. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life. *Id*.

At the time the presentence report was prepared, Nelson was 26 years of age. During the presentence report interview, Nelson reported that his relationship with the victim began fairly innocently, but in March 2016, he and the victim began having sexual intercourse. Nelson reported that in 2018, he threatened to commit suicide if the victim told her mother about their relationship. Nelson also expressed "intense romantic feelings" for the victim and did not recognize the

harm their relationship had caused the victim. Nelson stated that he deserved his current situation "'because I did it. There's no point in fighting something you did. It's the legal requirement they have to do for what I did. It was consensual. I understand because of [the victim's] age, it is what it is. I deserve to be in here. I know that.'" He also noted, "'Last I heard from [the victim], she loved me and I loved her. I was heartbroken when I got in here. Now I'm frustrated. All I want to know is what happened.'" The probation officer described Nelson as having a disregard for the effects of the relationship on others.

[6] Nelson has displayed an inability to comprehend the seriousness and inappropriate nature of his actions toward the victim. Although Nelson claimed to take responsibility for his actions, the judge noted that he only did so when the State had clear evidence against him. Nelson clearly attempted to maintain his inappropriate relationship with the victim through manipulation, blackmail, and threatening suicide. We further note that the minimum portion of Nelson's sentence is 20 years' imprisonment. It is the minimum portion of an indeterminate sentence which measures its severity. *State v. Haynie*, 239 Neb. 478, 476 N.W.2d 905 (1991); *State v. Tillman*, 1 Neb. App. 585, 511 N.W.2d 128 (1993). Based on the aforementioned factors, the sentence imposed was not an abuse of discretion.

### 2. Aggravated Offense

Nelson next assigns that the district court erred in finding that he was subject to the lifetime community supervision and lifetime sex offender registration requirements. The district court found by oral pronouncement that the offense was an aggravated offense requiring lifetime community supervision and lifetime registration; however, the court's subsequent September 21, 2018, journal entry setting forth Nelson's sentence did not refer to either lifetime community supervision or lifetime registration. Nelson argues that if the oral

pronouncement governs over the written journal entry, the district court's oral statement was in error. The State concedes that the oral statement was in error, but argues that the written journal entry governs over the oral pronouncement. We hold that because that portion of the district court's oral pronouncement referring to lifetime community supervision and lifetime registration was invalid, the written journal entry which corrected the error governs over the oral pronouncement, and that the written journal entry was a correct statement of the law.

The Nebraska Supreme Court generally outlined the application of SORA, prior to its amendment, in *State v. Payan*, 277 Neb. 663, 667-68, 765 N.W.2d 192, 198-99 (2009):

> SORA applies to any person who pleads guilty to or is found guilty of certain listed offenses, including sexual assault as defined by § 28-319 or Neb. Rev. Stat. § 28-320 (Reissue 2008). SORA includes a general requirement that persons convicted of these listed offenses must register with the sheriff of the county in which he or she resides during any period of supervised release, probation, or parole and "for a period of ten years after the date of discharge from probation, parole, or supervised release or release from incarceration, whichever date is most recent."
>
> Certain sex offenders, however, are subject to a lifetime registration requirement. Section 29-4005(2) provides: "A person required to register under section 29-4003 shall be required to register under [SORA] for the rest of his or her life if the offense creating the obligation to register is an aggravated offense, if the person has a prior conviction for a registrable offense, or if the person is required to register as a sex offender for the rest of his or her life under the laws of another state, territory, commonwealth, or other jurisdiction of the United States. A sentencing court shall make that fact part of the sentencing order." The lifetime community supervision provisions of

> § 83-174.03 incorporate and mirror the lifetime registration provisions of SORA. According to § 83-174.03(1), a defendant who commits an aggravated offense as defined by SORA "shall, upon completion of his or her term of incarceration or release from civil commitment, be supervised in the community by the Office of Parole Administration for the remainder of his or her life."

In determining whether an aggravated offense occurred for purposes of lifetime community supervision and lifetime registration, the Nebraska Supreme Court in *State v. Payan, supra*, described different considerations. For purposes of lifetime supervision, the Supreme Court stated:

> We hold that where the facts necessary to establish an aggravated offense as defined by SORA are not specifically included in the elements of the offense of which the defendant is convicted, such facts must be specifically found by the jury in order to impose lifetime community supervision under § 83-174.03 as a term of the sentence.

*State v. Payan*, 277 Neb. at 675-76, 765 N.W.2d at 204.

Conversely, for purposes of lifetime registration, the Supreme Court stated:

> We recently rejected a similar contention in *State v. Hamilton*, [277 Neb. 593, 763 N.W.2d 731 (2009),] concluding that under SORA, a sentencing judge need not consider only the elements of an offense in determining whether an aggravated offense as defined in § 29-4005(4)(a) has been committed. Instead, the court may make this determination based upon information contained in the record.

*State v. Payan*, 277 Neb. at 668-69, 765 N.W.2d at 199. The *Payan* court separately held: "We specifically note that the finding of an aggravated offense need not be made by a jury if utilized only to impose the nonpunitive lifetime registration requirements of SORA." 277 Neb. at 676, 765 N.W.2d at 204.

Because lifetime community supervision and lifetime registration involve separate considerations, and because the Legislature has amended SORA following the Supreme Court's rulings in *State v. Payan, supra*, and *State v. Hamilton*, 277 Neb. 593, 763 N.W.2d 731 (2009), we discuss those considerations separately.

(a) Lifetime Community Supervision

As we stated before, in relation to lifetime community supervision, where the facts necessary to establish an aggravated offense defined by SORA are not specifically included in the elements of the offense for which the defendant is convicted, such facts must be specifically found by a jury.

For the purposes of SORA, the term "aggravated offense" is now defined as

> any registrable offense under section 29-4003 which involves the penetration of, direct genital touching of, oral to anal contact with, or oral to genital contact with (a) a victim age thirteen years or older without the consent of the victim, (b) a victim under the age of thirteen years, or (c) a victim who the sex offender knew or should have known was mentally or physically incapable of resisting or appraising the nature of his or her conduct.

Neb. Rev. Stat. § 29-4001.01(1) (Reissue 2016).

Here, Nelson was convicted of violating § 28-319. Section 28-319(1) has as its elements the following:

> Any person who subjects another person to sexual penetration (a) without the consent of the victim, (b) who knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct, or (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.

Nelson pled to a violation of § 28-319 because, according to the factual basis provided, Nelson subjected the victim to

sexual penetration when she was at least 12 years of age but less than 16 years of age.

Because the term "aggravated offense" as defined by § 29-4001.01(1) is not a specifically included element of § 28-319 under the circumstances pled by Nelson in this case (Nelson did not plead to lack of consent by the victim), in order for lifetime community supervision to apply, a jury would need to find facts sufficient to find that Nelson had committed an aggravated offense or Nelson would have had to separately plead to it. Here, a jury did not find that the victim, who was over 13 years of age, did not consent to the sexual act which is a definitional requirement for an aggravated offense involving a victim 13 years of age or older. Nor, under these facts, did Nelson specifically plead to an aggravated offense by pleading guilty to a violation of § 28-319. Accordingly, if the oral pronouncement of the court governs over the written journal entry, a matter we will later address, the court erred by orally pronouncing that Nelson was subject to lifetime community supervision under Neb. Rev. Stat. § 83-174.03 (Reissue 2014).

(b) Lifetime Registration

In finding that a trial court and not a jury could separately determine whether an aggravated offense occurred, the Nebraska Supreme Court relied upon the language of SORA prior to its amendment. In *State v. Payan*, 277 Neb. 663, 668, 765 N.W.2d 192, 199 (2009), the Nebraska Supreme Court quoted from the provisions of SORA set forth in Neb. Rev. Stat. § 29-4005(2) (Reissue 2008) prior to its amendment:

> "A person required to register under section 29-4003 shall be required to register under [SORA] for the rest of his or her life if the offense creating the obligation to register is an aggravated offense, if the person has a prior conviction for a registrable offense, or if the person is required to register as a sex offender for the rest of his or her life under the laws of another state, territory, commonwealth, or other jurisdiction of the United

> States. A sentencing court shall make that fact part of the sentencing order."

In construing that language and the language of § 29-4005(3)(a), the Nebraska Supreme Court held:

> We do not find the meaning of § 29-4005(2) to be quite so clear. The second sentence of that subsection refers to the existence of an aggravated offense or other grounds for lifetime registration as a "fact" which is to be made a part of the sentencing order. This suggests that some factfinding is necessary, and we have stated that the statute "require[s] the court, as part of the sentence, to determine if the defendant committed an aggravated offense." Had the Legislature intended that the "fact" of penetration for purposes of an aggravated offense determination should be derived solely from the elements of the offense, it could have used specific language to that effect. For example, the Legislature has enacted a statute providing that an offender may be required to submit to a human immunodeficiency virus antibody or antigen test if he or she has been convicted of certain specified offenses "or any other offense under Nebraska law when sexual contact or sexual penetration is an element of the offense." We conclude that § 29-4005(2) is ambiguous as to whether the sentencing court may make a factual finding in determining that the offense committed by a particular defendant under § 29-4005(4)(a) "involves the penetration of . . . a victim under the age of twelve years" for purposes of determining the existence of an aggravated offense under SORA. Accordingly, the statute is open to construction.

*State v. Hamilton*, 277 Neb. 593, 599-600, 763 N.W.2d 731, 736 (2009). After reviewing the language of the statute, the Supreme Court ultimately held:

> We therefore conclude that under SORA, a sentencing judge need not consider only the elements of an offense in determining whether an aggravated offense as defined

> in § 29-4005(4)(a) has been committed. Instead, the court may make this determination based upon information contained in the record, including the factual basis for a plea-based conviction and information contained in the presentence report. To the extent that [*State v.*] *Mastne*[, 15 Neb. App. 280, 725 N.W.2d 862 (2006),] holds otherwise, it is disapproved.

*State v. Hamilton*, 277 Neb. at 602, 763 N.W.2d at 738.

Following the Nebraska Supreme Court's pronouncements in *State v. Payan, supra*, and *State v. Hamilton, supra*, the Legislature amended SORA. In addition to changing the definition of the term "aggravated offense" and moving that definition to § 29-4001.01(1), the Legislature significantly amended the language in § 29-4005(2). The Legislature moved the operative language governing the duration of registration under SORA to § 29-4005(1) and replaced the former language of § 29-4005(2) with the following language in Neb. Rev. Stat. § 29-4005 (Reissue 2016):

> (1)(a) Except as provided in subsection (2) of this section, any person to whom [SORA] applies shall be required to register during any period of supervised release, probation, or parole and shall continue to comply with [SORA] for the period of time after the date of discharge from probation, parole, or supervised release or release from incarceration, whichever date is most recent, as set forth in subdivision (b) of this subsection. A sex offender shall keep the registration current for the full registration period but shall not be subject to verification procedures during any time the sex offender is in custody or under an inpatient civil commitment, unless the sex offender is allowed a reduction in his or her registration period under subsection (2) of this section.
>
> (b) The full registration period is as follows:
>
> (i) Fifteen years, if the sex offender was convicted of a registrable offense under section 29-4003 not punishable by imprisonment for more than one year;

(ii) Twenty-five years, if the sex offender was convicted of a registrable offense under section 29-4003 punishable by imprisonment for more than one year; or

(iii) Life, if the sex offender was convicted of a registrable offense under section 29-4003 punishable by imprisonment for more than one year and was convicted of an aggravated offense or had a prior sex offense conviction or has been determined to be a lifetime registrant in another state, territory, commonwealth, or other jurisdiction of the United States, by the United States Government, by court-martial or other military tribunal, or by a foreign jurisdiction.

Accordingly, following the Legislature's amendment of SORA, particularly in adding the phrase "and was convicted of an aggravated offense" in § 29-4005(1)(b)(iii), the Legislature clearly eliminated the court's role in separately determining the fact of whether an aggravated offense occurred by reviewing the record and limited the inquiry as to whether the defendant has been convicted of an aggravated offense (or otherwise qualified based upon conviction of a prior offense or is a lifetime registrant in another jurisdiction). Further, the Legislature repealed the last sentence in § 29-4005(2) (Reissue 2008) formerly requiring that "[a] sentencing court shall make that fact part of the sentencing order." Instead, the Legislature replaced that language with Neb. Rev. Stat. § 29-4007 (Reissue 2016), which provides in part:

(1) When sentencing a person convicted of a registrable offense under section 29-4003, the court shall:

(a) Provide written notification of the duty to register under [SORA] at the time of sentencing to any defendant who has pled guilty or has been found guilty of a registrable offense under section 29-4003. The written notification shall:

(i) Inform the defendant of whether or not he or she is subject to [SORA], the duration of time he or she will be subject to [SORA], and that he or she shall report

> to a location designated by the Nebraska State Patrol for purposes of accepting such registration within three working days after the date of the written notification to register.

(We note that some provisions of SORA have been amended in 2019, but those amendments do not apply to the instant case.)

As such, the court's duty to make a finding of fact in the sentencing order has been replaced with its obligation to provide a written notification which consists of the contents set forth in § 29-4007(1). Here, in its oral pronouncement, the court made reference to lifetime registration as part of its sentencing order. The court erred in so including this pronouncement as part of the order.

(c) Which Order Controls

[7,8] As we stated before, in its oral pronouncement of Nelson's sentence, the court stated that Nelson was subject to the lifetime community supervision requirement of § 83-174.03 and the lifetime registration requirement of SORA. As we explained above, those pronouncements were invalid. However, in its written order, the court made no reference to either lifetime community supervision or lifetime registration requirements and made reference only to Nelson's sentence. This was a proper sentence. It is well-settled that in the event of a discrepancy between an oral pronouncement of sentence and the written order of the sentence, the oral pronouncement controls. *State v. Erb*, 6 Neb. App. 672, 576 N.W.2d 839 (1998). That said, in cases where, as here, a portion of the court's oral pronouncement is invalid and another portion is valid, an appellate court has the authority to modify or revise the sentence by removing the invalid or erroneous portion. See *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015) (where portion of sentence is valid and portion is invalid or erroneous, court has authority to modify or revise sentence by removing invalid or erroneous portion of sentence if remaining portion of sentence constitutes complete valid sentence). Although those portions

of the court's oral pronouncement that Nelson was subject to lifetime community supervision and lifetime registration were invalid—because the court modified its written order to remove those provisions—the court's written order controls over the invalid oral pronouncement. The written order of the trial court is affirmed.

## VI. CONCLUSION

Having determined that the district court's written order regarding Nelson's sentence controls, we affirm Nelson's conviction and sentence.

Affirmed.

# Doris Ostwald et al., appellees, v. Wayne Harold Beck, appellant.

935 N.W.2d 641

Filed November 5, 2019. No. A-18-647.

1. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Easements: Equity.** An adjudication of rights with respect to an easement is an equitable action.
3. **Declaratory Judgments: Equity: Appeal and Error.** In reviewing an equity action for a declaratory judgment, an appellate court decides factual issues de novo on the record and reaches conclusions independent of the trial court. But when credible evidence is in conflict on material issues of fact, the court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
4. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.
5. **Injunction: Motions to Vacate.** When the circumstances and situation of the parties have changed so that it would be just and equitable to vacate or modify a permanent injunction, the court which granted the injunction may vacate or modify it upon motion.
6. **Injunction: Proof.** The burden is on the party seeking modification of a permanent injunction to show a change in circumstance or situation sufficient to warrant such modification.
7. **Easements: Abandonment: Intent: Proof.** The fact that an easement holder finds a more convenient alternative route instead of using the easement does not deprive the easement holder of the easement that

remains for the holder's use and enjoyment whenever the holder has occasion to use the right.

Appeal from the District Court for Dodge County: Geoffrey C. Hall, Judge. Affirmed as modified.

Matthew M. Munderloh, of Johnson & Mock, P.C., L.L.O., for appellant.

Blake E. Johnson and Paul A. Lembrick, of Bruning Law Group, for appellees.

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

Pirtle, Judge.

## INTRODUCTION

Wayne Harold Beck appeals from an order of the district court for Dodge County which declared that Wayne's property remained subject to an easement established in 1977 and which enjoined Wayne from interfering with the use and enjoyment of the easement by Doris Ostwald (Doris), Vernon Vodvarka, and Becky Vodvarka (collectively appellees). Based on the reasons that follow, we affirm as modified.

## BACKGROUND

Since 1975, Doris has owned a 40-acre tract of land (the Ostwald 40) used for farming and located in Dodge County, Nebraska. The location of the Ostwald 40 is described as the "Northwest quarter of the Northeast quarter (NW1/4NE1/4), Section 13, Township 20 North, Range 5, East of the 6th P.M." Vernon and Becky rent the Ostwald 40 from Doris and have been farming it for 35 years.

Wayne owns two tracts of land situated directly south and southwest of the Ostwald 40, described as the "Southwest quarter of the Northeast quarter (SW1/4NE1/4)" and the "Southeast [q]uarter of the Northwest quarter (SE1/4NW1/4)" of "Section 13, Township 20 North, Range 5[,] East of the

6th P.M." The trial court referred to the southwest quarter of the northeast quarter as the "South Beck Property," because it was directly south of the Ostwald 40, and the southeast quarter of the northwest quarter as the "Southwest Beck Property," because it was southwest of the Ostwald 40. This land was previously owned by Harold Beck and Ruth Beck, Wayne's parents. Wayne acquired the property by deed of distribution in 2007. Wayne's son, Curtis Beck, farms the property owned by Wayne.

In 1976, Doris filed a petition against Harold and Ruth alleging that she had acquired an easement by prescription of a road on the Southwest Beck property. The petition alleged that the Ostwald 40 was landlocked and that the road on Harold and Ruth's property was the only way for Doris to access her property.

In 1977, the district court for Dodge County entered a judgment finding that Doris, her agents, and her assigns,

> have an easement, eighteen (18) feet in width, for purposes of ingress and egress, running north and south along the East edge of the Southeast quarter of the Northwest quarter (SE¼NW¼), Section 13, Township 20 North, Range 5, East of the 6th P.M., Dodge County, Nebraska [the Southwest Beck property].

It further ordered that Harold, Ruth, and their agents and employees were "perpetually enjoined and restrained from hindering or interfering with" the use of the easement by Doris and her agents and assigns.

In the 1990's, Doris inherited and became the record owner of additional property situated directly north of the Ostwald 40, described as the "Southeast Quarter (SE ¼) of Section Twelve (12), Township Twenty (20) North, Range Five (5), East of the 6th P.M., Dodge County, Nebraska" (the Ostwald 160). The Ostwald 160 is adjacent to a county road and shares a common boundary with the Ostwald 40. Vernon and Becky do not rent or farm the Ostwald 160; it is rented and farmed by a different tenant.

In March 2017, appellees filed the present action seeking a declaratory judgment that the Southwest Beck property remains subject to the easement ordered in 1977. They also sought injunctive relief to bar Wayne, and any of his agents or employees, successors, or assigns, from interfering with the use and enjoyment of the easement. Appellees claimed Wayne had intentionally obstructed their use of the easement, particularly during planting and harvest season.

Wayne counterclaimed, arguing that the court should vacate the 1977 injunction due to a material change in circumstances occurring subsequent to its entry. Specifically, he alleged that the Ostwald 40 is no longer "landlocked," because it is accessible by and through the Ostwald 160, and that it is no longer necessary or appropriate for appellees to access the Ostwald 40 through any portion of Harold and Ruth's property. Alternatively, Wayne requested that he and his lessees, invitees, and successors be allowed to irrigate over the easement if the court determined that his property remained subject to the easement. Wayne also alleged a cause of action for trespass, but withdrew this cause of action at trial.

Trial was held in February 2018. The evidence established that Doris had acquired additional property since the 1977 judgment—the Ostwald 160—which made it possible to access the Ostwald 40 without using the easement. Doris testified that the Ostwald 40 can be accessed through the Ostwald 160. Vernon testified that he used the Ostwald 160 during harvest season in 2016 and 2017 to access the Ostwald 40 because Wayne or his son, Curtis, had blocked access to the easement. Vernon testified that the route taken through the Ostwald 160 is located on a wetland, making it difficult to get vehicles across it without getting stuck. He also testified that the route across the Ostwald 160 does not extend all the way to the Ostwald 40; he has to cross farm ground before reaching the Ostwald 40. Vernon further testified that improvements would have to be made to the route before it could be used as regular access to the Ostwald 40. He added

that the route through the Ostwald 160 is part of a restricted wetland and would require approval by the Natural Resources Conservation Service before any changes to the land could be made.

Doris testified that the reason for the 1976 action was because the Ostwald 40 was landlocked; there was no public road to access it. She testified that after the easement was established in 1977, she and her tenants have continually used the easement to access the Ostwald 40 and were still doing so at the time of trial to the extent they could.

Vernon testified that he has always accessed the Ostwald 40 using the easement during the 35 years he had farmed the property and that he enters the Ostwald 40 at its southwest corner as provided in the 1977 judgment. Vernon further stated that he had to "carve a corner" to reach the southwest corner of the Ostwald 40, which meant going outside the boundaries of the easement. He testified that is how the Ostwald 40 has always been accessed.

The evidence also showed that Wayne or Curtis had blocked or hindered appellees' use of the easement at various times. For example, Vernon testified that in 2017, a tractor was parked at the end of the easement preventing access to the easement. He testified that there had been other obstructions blocking the easement in previous years. He testified that Wayne's interference with the easement has created complications in getting crops timely planted and harvested in the Ostwald 40. Doris and Vernon both testified that they have tried to persuade Wayne and Curtis to stop such conduct, to no avail.

Curtis claimed that he had not done anything to intentionally interfere with appellees' use of the easement. He denied parking a tractor in the easement in May 2017, but admitted that he had parked it in such a way that it prevented appellees from accessing the Ostwald 40 through the southwest corner of the field.

Curtis also testified that he had an irrigation pivot near the easement which sprays over the easement, sometimes making

the easement inaccessible or difficult to access because it is wet or muddy. He stated that he was worried about not being able to use the pivot if the easement was enforced.

Following trial, the court entered an order reaffirming the 1977 judgment, making it clear that Wayne, his agents, or employees are permanently enjoined from engaging in any actions which interfere with appellees' lawful right to use the easement, which includes reasonable ingress and egress to the Ostwald 40. The court stated that Wayne is allowed to irrigate "over and on the easement" and that this irrigation does not constitute an interference of the easement. The court additionally stated that appellees have the lawful right to use the easement described by the court in the 1977 judgment, which it further clarified as

> a road 18 feet in width, running north and south along the east edge of the Southwest Beck Property and continuing to a northeasterly direction, thereby to allow ingress and egress of the Ostwald Property at its southwest corner by crossing the northwest corner of the South Beck Property.

The trial court also dismissed Wayne's counterclaim.

## ASSIGNMENTS OF ERROR

Wayne assigns that the trial court erred in (1) awarding appellees injunctive relief and permanently enjoining him and his agents from interfering with the easement awarded in 1977, (2) failing to vacate the 1977 injunction due to a material change in circumstances—Doris' acquisition of other property, and (3) awarding declaratory relief to appellees by reaffirming the existence of the 1977 easement to include a portion of property never before included and the scope and description of which are uncertain.

## STANDARD OF REVIEW

[1] An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *Homestead*

*Estates Homeowners Assn. v. Jones*, 278 Neb. 149, 768 N.W.2d 436 (2009).

[2,3] An adjudication of rights with respect to an easement is an equitable action. *Id*. In reviewing an equity action for a declaratory judgment, an appellate court decides factual issues de novo on the record and reaches conclusions independent of the trial court. *Id*. But when credible evidence is in conflict on material issues of fact, the court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Id.*

[4] An action for injunction sounds in equity. On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. *Lambert v. Holmberg*, 271 Neb. 443, 712 N.W.2d 268 (2006).

## ANALYSIS

Wayne first assigns that the trial court erred in awarding appellees injunctive relief. However, the trial court did not award appellees any injunctive relief that did not already exist in the 1977 judgment. The court noted that the 1977 judgment provides for a permanent injunction against interference with the easement. It further stated that the question before it was whether the 1977 judgment continued to bind Wayne, and it determined that it did. The evidence showed that Wayne acquired the property by deed of distribution in 2007, and the deed expressly provided that the real estate in the conveyance is "subject to easements and restrictions of record." The easement granted by the 1977 judgment was recorded in January 1977. Wayne does not dispute that the easement passed by conveyance. Accordingly, the trial court reaffirmed the 1977 judgment, making it clear that Wayne, his agents, or employees are permanently enjoined from engaging in any actions which interfere with appellees' lawful right to use the easement. An injunction was already in place; the court simply reaffirmed it.

Wayne next assigns that the trial court should have vacated the 1977 injunction as requested in his counterclaim, because the easement is no longer necessary. He contends that the Ostwald 40 is "no longer landlocked," because appellees can access it by going through the Ostwald 160, and that therefore, there is no reason for the easement to continue.

[5,6] When the circumstances and situation of the parties have changed so that it would be just and equitable to vacate or modify a permanent injunction, the court which granted the injunction may vacate or modify it upon motion. *Latenser v. Intercessors of the Lamb, Inc.*, 250 Neb. 789, 553 N.W.2d 458 (1996). The burden is on the party seeking modification of a permanent injunction to show a change in circumstance or situation sufficient to warrant such modification. *Id.* Wayne alleges that Doris' acquisition of the Ostwald 160 is a material change in circumstances sufficient to vacate the injunction entered in 1977.

The evidence showed that Doris and her tenants have used the easement continually since it was granted in 1977. They continued to use it up to the time of trial when it was not restricted by Wayne or Curtis. The only reason Vernon used the Ostwald 160 to access the Ostwald 40 was because the easement was inaccessible. Vernon testified that the route he has used across the Ostwald 160 is not a route that could be used regularly or permanently. He testified that it is part of a wetland, making it hard to use without getting stuck. Further, the route does not extend all the way to the Ostwald 40, but, rather, it requires crossing over farmland. Vernon also testified that the route would need work before it could be used regularly and the Natural Resources Conservation Service would have to approve any changes.

[7] We conclude that Wayne has failed to show a change in circumstances to warrant vacating the 1977 injunction. The Nebraska Supreme Court has stated: "'[T]he fact that the easement holder finds a more convenient alternative route does not deprive the easement holder of the easement that

remains for the holder's use and enjoyment whenever the holder has occasion to use the right.'" *Mueller v. Bohannon*, 256 Neb. 286, 296-97, 589 N.W.2d 852, 860 (1999), quoting *Jackvony v. Poncelet*, 584 A.2d 1112 (R.I. 1991). In this case, the alternate route is not more convenient, but, rather, it is less convenient and more difficult to use. Accordingly, appellees should not be deprived of the easement and should be able to use it without Wayne's hindering or interfering with their use. The trial court did not err in failing to vacate the injunction.

Wayne next assigns that the trial court erred by expanding the easement to include a portion of his property that was not included in the easement awarded in 1977 and, further, by not adequately describing the property or the scope of the easement.

The 1977 judgment stated that Doris, her agents, and her assigns are "entitled to use the aforesaid roadway along the East edge of the Southeast quarter of the Northwest quarter (SE¼NW¼), Section 13 . . . and to enter the above property owned by [Doris] at its southwest corner." In the present case, the trial court held that appellees have the lawful right to use the easement described in the 1977 judgment, which it

> further clarified . . . as a road 18 feet in width, running north and south along the east edge of the Southwest Beck Property and continuing to a northeasterly direction, thereby to allow ingress and egress of the Ostwald Property at its southwest corner by crossing the northwest corner of the South Beck Property.

As previously stated, the court referred to the southeast quarter of the northwest quarter of Section 13 as the "Southwest Beck Property," and the southwest quarter of the northeast quarter of Section 13 as the "South Beck Property."

Wayne contends that the property subject to the easement awarded in the 1977 judgment is all within the southeast quarter of the northwest quarter, or the Southwest Beck Property. Wayne argues the court erred when it expanded the easement

to include the northwest corner of the southwest quarter of the northeast quarter, or the South Beck Property, as this property was not included in the 1977 judgment and appellees have no legal right to use such property. He further contends that appellees did not plead or prove any entitlement to use any additional property outside of what was described in the 1977 judgment.

Vernon testified that to enter the Ostwald 40 at its southwest corner as provided in the easement, he has to leave the easement and cross a portion of Wayne's other property. He testified that is the way he has always accessed the Ostwald 40. Based on the evidence, the other land Vernon would be crossing would be the South Beck Property. However, appellees asked the court only to reaffirm the 1977 judgment. Neither party asked the court to modify the existing easement to include additional property not included in the 1977 judgment. We conclude that the trial court erred in expanding the scope of the easement. Accordingly, we modify the court's order to state that appellees have the lawful right to use the easement as described in the 1977 judgment.

## CONCLUSION

We conclude that the trial court did not err in failing to vacate the 1977 injunction, but did err in expanding the scope of the easement to include property not included in the 1977 judgment. Accordingly, we modify the court's description of the easement to reflect the 1977 judgment.

Affirmed as modified.

# In re Application No. C-4981 of Beau Toben. Windstream Communications, Inc., appellant, v. Nebraska Public Service Commission et al., appellees.

936 N.W.2d 365

Filed November 19, 2019. No. A-19-054.

1. **Public Service Commission: Appeal and Error.** Under Neb. Rev. Stat. § 75-136(2) (Reissue 2018), an appellate court reviews an order of the Nebraska Public Service Commission de novo on the record.
2. **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 concerning the matters at issue.
3. **Administrative Law: Appeal and Error.** When an appellate court makes a de novo review, it does not mean that the court ignores the findings of fact made by the agency and the fact that the agency saw and heard the witnesses who appeared at its hearing. Where the evidence is in conflict, the appellate court will consider and may give weight to the fact that the agency hearing examiner observed the witnesses and accepted one version of the facts rather than another.
4. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
5. ____: ____. In examining the language of a statute, its 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.** A court may inquire into legislative history when a statute is open to construction because its terms require interpretation or may reasonably be considered ambiguous.
7. **Statutes: Appeal and Error.** When construing a statute, an appellate court must look to the statute's purpose and give to the statute a

reasonable construction which best achieves that purpose, rather than a construction which would defeat it.

8. **Statutes: Intent: Appeal and Error.** In construing a statute, an appellate court looks to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served.
9. **Statutes: Appeal and Error.** An appellate court construes statutes relating to the same subject matter together to maintain a sensible and consistent scheme, so that effect is given to every provision.
10. **Administrative Law: Appeal and Error.** It is appropriate, even under a de novo standard of review, to adhere to the common practice among appellate courts to afford appropriate deference to the findings of the agency before which the record was created.

Appeal from the Public Service Commission. Affirmed.

Blake E. Johnson and Katherine J. Spohn, of Bruning Law Group, for appellant.

Douglas J. Peterson, Attorney General, and L. Jay Bartel for appellee Nebraska Public Service Commission.

Riedmann, Bishop, and Arterburn, Judges.

Bishop, Judge.

## INTRODUCTION

Beau Toben filed an application with the Nebraska Public Service Commission (PSC) seeking advanced telecommunications service, or broadband service, for a home he was building a few miles west of Doniphan, Nebraska. Toben claimed he was not receiving, and would not within a reasonable time receive, such service through the "Hansen Exchange" of Windstream Communications, Inc. (Windstream). He wished to modify his exchange service area so he could receive such service from the "Doniphan Exchange" of Hamilton Telecommunications (Hamilton). The PSC granted Toben's application to revise the exchange boundaries. Windstream appeals, claiming the PSC was not authorized to grant the application because the evidence showed that Windstream would provide reasonable advanced telecommunications service within a reasonable

time pursuant to Neb. Rev. Stat. § 86-136(1) (Reissue 2014). We affirm.

## BACKGROUND

On April 18, 2018, Toben, pro se, filed an application with the PSC, alleging he resided within Windstream's Hansen Exchange, but he wished to receive advanced telecommunications service from Hamilton's Doniphan Exchange. The PSC notified Windstream and Hamilton of Toben's application. Hamilton consented to Toben's request to be served by its Doniphan Exchange at no direct cost for construction and installation; Windstream objected because it had plans to deploy broadband service and "serve [Toben] within a reasonable period of time." A hearing took place before the PSC in November 2018. Toben appeared pro se, Windstream appeared with counsel, and a representative appeared on behalf of the PSC. Hamilton did not appear. A summary of the evidence from the hearing follows.

Toben testified that he did not have any service from Windstream (or any other local exchange carrier) for a new house he was building a few miles west of Doniphan. There were neither any Windstream lines buried there, nor "land service." He offered photographs of Windstream's equipment (presumably on his property) showing "line boxes" for their telephone service that "had been in disrepair for the last years [and] nobody has ever serviced [them]." He cited the "lack of maintenance or advancements to the services in [his] area" as one reason for his application. Toben hoped to move into his house by the end of 2018, but indicated installation of broadband service may interfere with finishing the yard and "dirt work" if "things" would have to be buried under his house. At the time of the hearing, Toben said, "[W]here I live I have Hamilton," and he had internet service through Hamilton. According to Toben, Hamilton "buried fiber optics to the area" in 2016, which was why he applied for the boundary change to his new home. He testified, "We are building a

new house where there is currently not any service," which he clarified meant no service from anyone, including Hamilton. Toben had contacted Hamilton, and "they [were] willing to provide [him] with Internet service," but Toben acknowledged such service was not currently available through Hamilton. Toben said Hamilton was willing to provide him with internet service and that it could offer speeds of "Ten Mbps." Toben was "hoping to be moved in [to the new house] by the end of the year [2018]." When asked where he was currently living, he indicated he was at his parents' address "while we are building our house."

Regarding his communications with Windstream, Toben said he was told that he would not be able to receive "land service," only (fixed) wireless service; Windstream explained in an email to Toben that "fixed wireless" is a system to provide "high speed internet" by way of a "point to multi-point wireless technology that uses radio frequencies." Toben had not had any experience with fixed wireless service, but was willing to give it a "chance." However, he did not receive service "in the time that was promised." Windstream had indicated in a July 13, 2018, email to Toben that it expected to complete its project to provide fixed wireless service to Toben's area in "the first few weeks of September 2018." On July 20, Windstream sent an email about servicing Toben's new house with "the fixed wireless solution" and was "hopeful" to avoid a hearing if possible. On July 26, Toben emailed the PSC asking to postpone a hearing scheduled in August so he could "see if the fixed wireless system that Windstream has planned will be sufficient." In September, Toben contacted Windstream and was told someone would "get back to [him] within a couple of days." After he did not hear from Windstream, Toben rescheduled the hearing.

Brad Hedrick, Windstream's president of operations for Nebraska and four other states, testified that Windstream wanted to expand its broadband services across rural service areas. He explained that Windstream's fixed wireless

technology was a "much improved version over what other providers ha[d] deployed in these areas in the past." Windstream's fixed wireless system had not been deployed anywhere in Nebraska yet.

Windstream intended to serve Toben with fixed wireless service. Hedrick stated that Toben's new house address was within Windstream's Hansen Exchange, but Windstream had yet to complete two towers in the "Doniphan-Hansen area" that would allow Toben to receive service. Once completed, those towers would provide a service range extending out in a radius of about 4 or 5 miles and would allow a "75 to 100 Mbps download." Although Toben had concerns about Windstream's radius because his house "falls on the furthest boundary" of the Hansen Exchange, Hedrick testified that "RF engineering experts" said that Toben would receive "at least 75 Mbps."

Hedrick explained why service had been delayed beyond the initial September timeframe provided to Toben. Hedrick identified two "governmental delays," one of which was related to a rules change by the Federal Communications Commission, but that issue had since been resolved. The outstanding issue, which Windstream was notified of about 2 weeks before the PSC hearing, concerned a zoning dispute with Adams County regarding Windstream's permit application to place poles, or towers, throughout that county. The dispute was about the "location of the site" and whether it was within the "zone or cone of influence of the Hastings Airport." If so, there were alternatives, such as changing the location of the pole or adding "lighting" to the site. According to Hedrick, Windstream was "hopeful" to resolve that issue "soon" and to "deploy service by the end of the year" but that was "not a guarantee." He admitted it was "in the realm of possibility" that the issue could end up in the court system on appeal.

Once the zoning issue was "sorted out," Windstream could begin building and equipping tower sites. Hedrick indicated that Windstream intended to complete other tower

sites (in addition to those in the "Doniphan-Hansen area") with fixed wireless service in the "Sutton exchange [and] the Juniata exchange"; "it would be beneficial to [Windstream] if [it] could do them all at the same time." He thought Harvard, Nebraska, would be the first area to deploy (not the "Doniphan-Hansen area") as it was "approved" the same day as the PSC hearing. Windstream had not yet advertised broadband to Doniphan customers "because it would have been premature since [it did not] have any capability to provide service yet" and the "unknown issue [it was] dealing with in Adams County."

On December 18, 2018, the PSC issued its order. It noted that Hamilton and Windstream are local exchange carriers holding certificates of public convenience and necessity to provide local exchange service in their respective territories. The PSC found that Toben was not receiving, and would not receive within a reasonable time, advanced telecommunications capability service from Windstream. The PSC further found that the revision of the exchange service area was economically sound and would not impair the capabilities of the telecommunications companies affected by the change to serve their subscribers. It acknowledged Toben's willingness to pay construction and other costs related to the boundary change but found that Hamilton was willing to pay those costs. The PSC concluded that the requirements of § 86-136 were met. Therefore, it granted Toben's application and ordered that the exchange boundaries of Hamilton's Doniphan Exchange and Windstream's Hansen Exchange be revised (as detailed in maps attached to the order) in such a way as to allow Toben to receive advanced telecommunications capability service from Hamilton's Doniphan Exchange.

Windstream appeals.

## ASSIGNMENT OF ERROR

Windstream claims the PSC erred by determining Toben would not receive reasonable advanced telecommunications

capability service within a reasonable time absent a change of Windstream's Hansen Exchange boundary.

## STANDARD OF REVIEW

[1-3] Under Neb. Rev. Stat. § 75-136(2) (Reissue 2018), an appellate court reviews an order of the PSC de novo on the record. *In re Application No. B-1829*, 293 Neb. 485, 880 N.W.2d 51 (2016). 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 concerning the matters at issue. *Id.* When an appellate court makes a de novo review, it does not mean that the court ignores the findings of fact made by the agency and the fact that the agency saw and heard the witnesses who appeared at its hearing. *In re Application No. OP-0003*, 303 Neb. 872, 932 N.W.2d 653 (2019). Where the evidence is in conflict, the appellate court will consider and may give weight to the fact that the agency hearing examiner observed the witnesses and accepted one version of the facts rather than another. See *id.*

[4] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court. See *In re Application of City of Minden*, 282 Neb. 926, 811 N.W.2d 659 (2011).

## ANALYSIS

The Nebraska Telecommunications Regulation Act is codified at Neb. Rev. Stat. §§ 86-101 through 86-165 (Reissue 2014 & Cum. Supp. 2018). It was passed to fulfill several policies, including to maintain and advance the efficiency and availability of telecommunications services. See § 86-102. As relevant here, § 86-135(1) states, "Any person may file an application with the [PSC] to obtain advanced telecommunications capability service furnished by a telecommunications company in the local exchange area adjacent to the local exchange area in which the applicant resides." "Advanced telecommunications capability service means high-speed, broadband telecommunications capability provided by a local

exchange carrier that enables users to originate and receive high-quality voice, data, graphics, and video communications using any technology." § 86-103.01. A "[l]ocal exchange area" is a "territorial unit established by a telecommunications company for the administration of telecommunications service within a specific area generally encompassing a city or village and its environs as described in maps filed with and approved by the [PSC]." § 86-115. There must be a hearing before the PSC if all of the "directly affected" telecommunications companies involved do not consent to an application. § 86-135(2).

Section 86-136 provides that upon the completion of the hearing on an application made pursuant to § 86-135 (if a hearing is required), the PSC may grant the application, in whole or in part, if the evidence establishes each of the following:

> (1) That such applicant is not receiving, and will not within a reasonable time receive, reasonable advanced telecommunications capability service from the telecommunications company which furnishes telecommunications service in the local exchange area in which the applicant resides;
>
> (2) That the revision of the exchange service area required to grant the application is economically sound, will not impair the capability of any telecommunications company affected to serve the remaining subscribers in any affected exchanges, and will not impose an undue and unreasonable technological or engineering burden on any affected telecommunications company; and
>
> (3) That the applicant is willing and, unless waived by the affected telecommunications company, will pay such construction and other costs and rates as are fair and equitable and will reimburse the affected telecommunications company for any undepreciated investment in existing property as determined by the [PSC]. The amount of any payment by the applicant for construction and other costs associated with providing service to the applicant

> may be negotiated between the applicant and the affected telecommunications company.

On appeal, Windstream takes issue only with whether § 86-136(1) set forth above was satisfied—specifically, whether advanced telecommunications capability service would be available to Toben within a reasonable time. Windstream claims it would have been able to provide such service to Toben within a reasonable time.

Although not raised by the parties, nor addressed by the PSC in its order, we initially observe that at the time Toben completed his application in April 2018 and at the time of the PSC hearing in November, Toben was residing at his parents' home within Hamilton's Doniphan Exchange. He was not yet residing at the home being built within Windstream's Hansen Exchange. Section 86-135(1) permits a person to file an application with the PSC to seek service from a telecommunications company in the local exchange area adjacent to the local exchange area *in which the applicant resides*. Therefore, in order for the PSC to have concluded as it did, it would necessarily have had to interpret the words "the local exchange area in which the applicant resides" to include property an applicant presently owns and on which the applicant does not presently reside, but has demonstrated an intent to reside on such property in the future. At the PSC hearing, questions were asked about Toben's current residence. Toben acknowledged he was still living in Doniphan, in the Hamilton exchange, but anticipated moving to his new residence in the Windstream exchange at the end of 2018. He testified that he was currently receiving internet service through Hamilton, but that "nobody" provided internet service to the location where he was building his new house. It is evident that at the time of his application and at the time of the PSC hearing, Toben was still residing in Hamilton's Doniphan Exchange. There is also no dispute that when Toben begins residing in the house being built a few miles west of Doniphan, he will then be residing in Windstream's Hansen Exchange; Hedrick agreed

that "[Toben's] new address for the house they are building is within the [Windstream] Hansen exchange." Therefore, the PSC necessarily interpreted the words "the local exchange area *in which the applicant resides*" to include property an applicant presently owns and on which the applicant does not presently reside, but has demonstrated an intent to reside on such property in the future. At the hearing before the PSC, Windstream did not take issue with the fact that Toben did not yet reside on the property in its Hansen Exchange—nor is that issue raised on appeal. Accordingly, it is not necessary for this court to address whether this particular statutory language was properly applied; rather, we address only whether the PSC correctly found that Toben was not receiving, and would not receive within a reasonable time, advanced telecommunications capability service from Windstream for his property within Windstream's Hansen Exchange as set forth in § 86-136(1).

We first observe that the Legislature recently amended § 86-136(1) as follows (new language underscored; former language struck through):

> (1) That such applicant is not receiving, and at the time of the application is not able to receive, ~~will not within a reasonable time receive, reasonable~~ advanced telecommunications capability service from the telecommunications company which furnishes telecommunications service in the local exchange area in which the applicant resides.

2019 Neb. Laws, L.B. 268, § 1 (effective September 1, 2019).

Thus, the issue of what might constitute a reasonable time for a local exchange to make advanced telecommunications capability service available to an applicant residing in its exchange is possibly an issue of last impression. As of its September 1, 2019, effective date, the amended § 86-136(1) places the focus on when the application to change exchange boundaries is filed rather than whether service can be made available within a reasonable time.

As pertinent here, Windstream argues it could fulfill the reasonable time requirement because of plans to provide service by the end of 2018. It asserts that despite unexpected delays, it demonstrated "good faith efforts to provide Toben with internet service quickly" and had "executable designs and plans to build the required service towers." Brief for appellant at 8. But the PSC argues that the record shows "Windstream failed to meet its own promised time frame to provide service." Brief for appellee at 8.

[5] Neither party directs us to a prior appellate case that has had to interpret the meaning of "within a reasonable time" under § 86-136(1) (Reissue 2014), and we find none. We are thus faced with a case of first, and possibly last, impression, although Windstream's brief does indicate there may be other cases of a similar nature pending on appeal: "*In re Application of Skrdlant*, No. A18-877, and *In re Application of Poppe*, No. A18-878." See brief for appellant at 1. In examining the language of a statute, its 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. *AT&T Communications v. Nebraska Public Serv. Comm.*, 283 Neb. 204, 811 N.W.2d 666 (2012). While we agree with Windstream that the statutory language "'within a reasonable time'" is "forward-looking," reply brief for appellant at 2, it is nevertheless open to interpretation. On the face of § 86-136(1) alone, there is no plain and ordinary meaning to define the parameters of "within a reasonable time." And the phrase is not defined in any relevant definition section in the Nebraska Telecommunications Regulation Act. See § 86-103 (definitions found in §§ 86-103.01 to 86-121).

[6-9] A court may inquire into legislative history when a statute is open to construction because its terms require interpretation or may reasonably be considered ambiguous. See *Salem Grain Co. v. City of Falls City*, 302 Neb. 548, 924 N.W.2d 678 (2019). When construing a statute, an appellate

court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *TracFone Wireless v. Nebraska Pub. Serv. Comm.*, 279 Neb. 426, 778 N.W.2d 452 (2010). An appellate court looks to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served. *Id*. And an appellate court construes statutes relating to the same subject matter together to maintain a sensible and consistent scheme, so that effect is given to every provision. *Id.*

Section 86-136(1) was originally located at Neb. Rev. Stat. § 75-613(1) (Cum. Supp. 1969). In 1969, the Legislature established a process under Neb. Rev. Stat. §§ 75-612 to 75-615 (Cum. Supp. 1969) for applicants who were not receiving and would not "within a reasonable time" receive reasonably adequate exchange telephone service from the company furnishing such service in the exchange service area in which the applicants resided or operated. See § 75-613(1). See, also, 1969 Neb. Laws, ch. 601, § 2, p. 2457. There is nothing enlightening in the corresponding legislative history about the Legislature's decision to use "within a reasonable time" as part of the standard for § 75-613(1). Even if there were, the facts at hand involve the question of how long is too long to wait to obtain broadband service, not merely telephone service—the subject technology in 1969.

The version of § 86-136(1) at issue here was established in 2012, pursuant to 2012 Neb. Laws, L.B. 715. Before that amendment, the PSC could order a boundary change based only on the "quality of the voice-grade [(landline telephone)] service the customer [was] receiving." See Introducer's Statement of Intent, L.B. 715, Transportation and Telecommunications Committee, 102d Leg., 2d Sess. (Feb. 13, 2012). The 2012 amendment updated boundary change provisions so that an application for a change is based on "broadband service." *Id.* See, also, L.B. 715, § 3 (advanced telecommunications capability service definition added); *id.*, §§ 4 to 7 (term

added elsewhere to reflect application was for broadband service). The phrase "within a reasonable time" in § 86-136(1) remained unchanged. L.B. 715, § 5. Clearly, the Legislature's amendments were meant to account for technological advancements, and it did not find it necessary (at least at that time) to amend the language at issue here. Compare L.B. 715, with 2019 Neb. Laws, L.B. 268, § 1 (replacing "within a reasonable time receive" in § 86-136(1) with "at the time of the application is not able to receive").

At a preliminary hearing on L.B. 715, counsel for the Transportation and Telecommunications Committee said:

> The state has experienced situations where a customer on one side of a boundary line receives high-speed broadband with one provider, while the provider on the other side of the boundary line does not offer broadband to another customer. Although these two customers live in close proximity to each other, the one with inadequate service is being held hostage by the outdated statute from receiving broadband from the one provider on the other side of the boundary line.

Transportation and Telecommunications Committee Hearing, L.B. 715, 102d Leg., 2d Sess. 2 (Feb. 13, 2012). Counsel asserted, "In a large geographic state with a sparse population, broadband has become a necessity to Nebraska." *Id.* During floor debate, the chairperson of the committee reiterated that exact statement. See Floor Debate, L.B. 715, 102d Leg., 2d Sess. 17 (Mar. 21, 2012). The chairperson also pointed out, "Broadband is the service customers want, and in many rural areas it is not available." *Id.*

While the legislative materials for L.B. 715 do not provide insight about the phrase "within a reasonable time" under § 86-136(1), the phrase remaining intact shows that, at least at that time, the Legislature preferred to leave the matter to the PSC's discretion to analyze on a case-by-case basis. See, also, *In re Application No. OP-0003*, 303 Neb. 872, 932 N.W.2d 653 (2019) (even under de novo standard of review,

it is appropriate to adhere to common practice among appellate courts to afford appropriate deference to findings of agency before which record was created). In its order in the present case, the PSC stated, "given the utility and necessity of access to broadband internet in today's world, even short delays may present significant inconveniences and challenges to Nebraska residents." The PSC related that the length of time it would consider to be reasonable within the context of §§ 86-135 to 86-138 was "relatively short" and "certainly shorter than the nearly eight months [Toben's] docket [had] been pending."

We agree with the PSC's determination that the timeframe at issue here did not meet the requirement of "within a reasonable time." Windstream was on notice of Toben's application in April 2018. In July, Toben asked for a continuance of the August hearing because Windstream represented that it expected to complete the project in Toben's area in September. Windstream failed to meet that deadline, and at the time of the hearing in November, the timeline was no more apparent due to unexpected zoning delays involving Adams County. Although Hedrick estimated the project would be completed by the end of the year, he acknowledged that was "not a guarantee." Windstream's zoning dispute was a relatively new delay; how fast it could be resolved (and whether resolution would impact the project) was vague. There was also evidence the Harvard project would take priority over the Doniphan-Hansen project, although it was not clear if or how that might delay the estimated goal to have service available to Toben at the end of 2018.

Windstream argues there was no evidence about the "quality of Hamilton's service or timeframe for its deployment." Brief for appellant at 7. However, the pertinent statutory language does not require such evidence. Section 86-136(1) relates to whether an applicant is receiving or will receive within a reasonable time broadband service "from the telecommunications company which furnishes telecommunications service

in the local exchange area in which the applicant resides"; it unambiguously refers solely to the applicant's current telecommunications company, the one whose territory covers the area where the applicant resides. See *AT&T Communications v. Nebraska Public Serv. Comm.*, 283 Neb. 204, 811 N.W.2d 666 (2012) (language of statute is to be given its plain and ordinary meaning). The record supports that the requirements of § 86-136(1) were met, although as noted previously, we do not address whether the "local exchange area in which the applicant resides" includes property upon which an applicant presently owns and on which the applicant does not presently reside, but has demonstrated an intent to reside on such property in the future. Also, we need not address whether the other two elements of § 86-136 were satisfied, because Windstream does not dispute the PSC's conclusions under § 86-136(2) or § 86-136(3).

Finally, Windstream argues that it was not necessary to modify Windstream's Hansen Exchange so that Hamilton could provide Toben service. Although Windstream did not specifically assign this as an error, it did generally assign error to the PSC's determination that Toben would not receive reasonable advanced telecommunications capability service within a reasonable time "absent a change of Windstream's Hansen Exchange boundary." The PSC disagrees there was any error on this basis, arguing, "Whether Hamilton could or could not provide service without a boundary change is irrelevant, as a change in exchange area boundaries is required by the statute when the PSC finds the evidence warrants granting the application." Brief for appellee at 11. Although we do not agree that the statute *requires* the PSC to make a boundary change, see § 86-136 ("the commission may grant the application . . . if the evidence establishes the following"), we agree with the PSC that whether Hamilton could have provided service to Toben without a boundary change is not relevant to the PSC's decision. Section 86-136 does not contain language that would preclude a boundary change simply because

an adjacent local exchange could provide service without a boundary change. While there are other factors for the PSC to consider besides whether service can be made available within a reasonable time, see § 86-136(2) (requires consideration of whether revision of exchange service area is economically sound) and § 86-136(3) (requires consideration of costs of construction and rates), as noted previously, Windstream has not challenged the PSC's order as to either of those statutory factors.

## CONCLUSION

Under our de novo review, we affirm the December 18, 2018, order of the PSC granting Toben's application to modify his exchange service area from Windstream's Hansen Exchange to Hamilton's Doniphan Exchange.

Affirmed.

# Laura B. Schnackel, appellee and cross-appellant, v. Gregory R. Schnackel, appellant and cross-appellee.

937 N.W.2d 234

Filed November 26, 2019. No. A-18-428.

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. **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.
3. **Property Division.** Equitable property division under Neb. Rev. Stat. § 42-365 (Reissue 2016) is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and determine the marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
4. **Divorce: Property Division.** As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule.
5. **Taxation: Corporations: Words and Phrases.** Subchapter S is a tax status designed to tax corporate income on a pass-through basis to shareholders of a small business corporation.
6. **Taxation: Corporations.** Since a subchapter S corporation is not taxed on its earnings, the various income, expense, loss, credit, and other tax items pass through and are taxable to or deductible by shareholders in a manner analogous to that which is applicable to partners.
7. **Property Division.** With some exceptions, the marital estate does not include property acquired by one of the parties through gift or inheritance.

8. **Property Division: Proof.** The burden of proof to show that property is nonmarital remains with the person making the claim.
9. **Property Division: Words and Phrases.** Dissipation of marital assets is generally defined as one spouse's use of marital property for a selfish purpose unrelated to the marriage at the time when the marriage is undergoing an irretrievable breakdown.
10. **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.
11. **Divorce: Appeal and Error.** In a de novo review of a judgment in marriage dissolution proceedings, when the evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
12. **Divorce: Property Division.** When marital assets are dissipated by a spouse for purposes unrelated to the marriage, the remedy is to include the dissipated assets in the marital estate in dissolution actions.
13. **Property Division.** As a general rule, a spouse should be awarded one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case.
14. **Divorce: Property Division: Alimony.** In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party. In addition, a court should consider the income and earning capacity of each party and the general equities of the situation.
15. **Alimony.** The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate.
16. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. The ultimate criterion is one of reasonableness.
17. **Child Support: Rules of the Supreme Court.** The Nebraska Child Support Guidelines do not apply if the parties have no minor children.
18. **Divorce: Property Division: Alimony.** The statutory criteria for dividing property and awarding alimony overlap, but the two serve different purposes and courts should consider them separately.

19. **Alimony.** Alimony should not be used to equalize the incomes of the parties or punish one of the parties, but disparity in income or potential income may partially justify an award of alimony.
20. **Judgments.** A court has discretion to require reasonable security for an obligor's current or delinquent support obligations when compelling circumstances require it.
21. **Judgments: Alimony: Child Support.** An order requiring security to be given is a somewhat extraordinary and drastic remedy, and therefore, reasonable security for payment of alimony, child support, or monetary judgments should only be invoked when compelling circumstances require it.
22. **Divorce: Property Division: Presumptions.** Accrued investment earnings or appreciation of nonmarital assets during the marriage are presumed marital unless the party seeking the classification of the growth as nonmarital proves that (1) the growth is readily identifiable and traceable to the nonmarital portion of the account and (2) the growth is not due to the active efforts of either spouse.
23. **Divorce: Property Division.** The active appreciation rule sets forth the relevant test to determine to what extent marital efforts caused any part of the appreciation or income.

Appeal from the District Court for Douglas County: Horacio J. Wheelock, Judge. Affirmed as modified.

Michael W. Milone and Mark J. Milone, of Koukol & Johnson, L.L.C., for appellant.

Edward D. Hotz, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellee.

Riedmann, Bishop, and Arterburn, Judges.

Riedmann, Judge.

## I. INTRODUCTION

Gregory R. Schnackel (Greg) appeals, and Laura B. Schnackel cross-appeals, the order of the district court for Douglas County which dissolved the parties' marriage, valued and divided the marital estate, and awarded alimony and child support to Laura. For the reasons that follow, we affirm the district court's order as modified.

## II. BACKGROUND

Greg and Laura were married in 1985 and had two children during the marriage. The older child had reached the age of majority before dissolution proceedings began, but the younger child had not. However, he turned 19 years old during the pendency of this appeal.

Laura filed a complaint for dissolution of marriage in July 2016. Trial was held over the course of several days in October 2017 and February 2018. The parties amassed significant assets during their marriage, and the record in this case is voluminous. Trial culminated in an extremely thorough, well-supported 96-page amended decree, plus attachments, by the district court. We briefly summarize the evidence presented at trial here and will include additional facts below as necessary to address the issues raised on appeal and cross-appeal.

After graduating from college in 1984, Greg began working for an engineering company owned and operated by his father, Dale Schnackel. In 1994, Dale created a partnership and gave Greg a 50-percent interest in it. In 2000, Dale transferred the remaining 50-percent interest in the partnership to Greg at a value of $106,750. As will be discussed below, there is a dispute as to whether the 2000 transfer from Dale to Greg was a gift or a purchase. After Greg gained control of the partnership, he transferred all of its interests into a newly formed Nebraska corporation, and in 2007, he changed the name of the corporation to Schnackel Engineers, Inc. (SEI).

AEA Integration, Inc. (AEA), was formed in 2003, and Greg is the president and sole shareholder. AEA is in the process of developing software to be used by SEI. SEI is currently AEA's only customer, and through 2016, SEI had spent approximately $7.5 million in development costs for AEA. The software is not ready for use outside of SEI, and Greg estimated that it would not be ready for at least 5 more years.

Greg and Laura each called an expert witness to testify at trial as to the valuation of SEI and AEA. In the amended decree, the district court found both experts to be credible

but determined that the testimony, methodology, and conclusions of Laura's expert, Matthew Stadler, were more truthful, credible, and reliable than that of Greg's expert. This determination is not challenged on appeal. Stadler opined that as of June 30, 2017, SEI had a value of $3,267,900. He testified that AEA had no separate value because it had no income or revenue and was completely dependent upon SEI.

In 2006, Greg purchased a condominium in New York City to use while working in New York. SEI paid the $28,000 monthly rent for the condominium. Greg sold the condominium in 2017 and leased a different New York apartment for $11,000 per month.

Greg met another woman, Julia Weiss (Julia), in New York around 2010. Around this time, Greg was working in New York an average of 150 to 180 days per year. In September 2013, Greg told Julia that he wanted to marry her, and they began a sexual affair at that time. In order to conceal the affair from Laura, Greg opened a separate credit card account, referred to throughout the record as the "9779 account." Greg used the 9779 account to charge purchases related to Julia. Greg spent substantial amounts of money on Julia, providing gifts of jewelry to her, taking her on trips, giving her cash, paying her credit card bill, and buying clothes and shoes for her.

Laura discovered the affair in April 2015, and she and Greg began attending marriage counseling in June. After just a few sessions, the counseling transitioned to divorce counseling because Greg said he was unwilling to end his relationship with Julia. Despite this, Greg continued to live at the marital residence and sleep in the marital bedroom, until Laura "demoted" him to a bedroom in the basement in June 2016. Greg moved out of the marital home on August 28, 2016.

The amended decree was entered in March 2018. As relevant to this appeal, the district court valued and divided the marital portion of SEI, finding that after subtracting the present value of the 1994 gift from Dale to Greg, SEI had a total

marital value of $3,096,828.80. Of this amount, $1 million was awarded to Laura's share of the marital estate, and the remaining $2,096,928.80 was attributed to Greg's portion.

The court concluded that Greg dissipated a total of $3.5 million in marital assets in connection with his spending on Julia and that Laura dissipated $146,000 in marital assets, and it divided those amounts accordingly. Greg was ordered to pay alimony to Laura of $7,500 per month for 120 months. Laura inherited funds during the marriage, and the district court awarded Greg half of the total marital gains of her inheritance. The parties were ordered to sell two condominiums they own in Florida and Greg's classic car collection in order to pay off marital debt. Based on its calculations and division of the marital estate, the district court determined that a total equalization payment was owed to Laura of $1,664,741 and ordered Greg to make payments to Laura of $8,670.52 per month for 192 months. Additional details will be provided below. Greg now appeals, and Laura cross-appeals.

## III. ASSIGNMENTS OF ERROR

On appeal, Greg assigns that the district court erred in (1) valuing and dividing the marital estate, (2) its analysis and findings regarding dissipation of marital assets, (3) its alimony award, and (4) issuing postdecree orders.

On cross-appeal, Laura assigns that the district court erred in classifying the appreciation of her inherited funds as a marital asset.

## 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. *Stephens v. Stephens*, 297 Neb. 188, 899 N.W.2d 582 (2017). 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. Property Division

[3] In his first assigned error, Greg asserts that the district court committed several errors regarding the classification, valuation, and/or division of marital property. Equitable property division under Neb. Rev. Stat. § 42-365 (Reissue 2016) is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and determine the marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Stephens v. Stephens, supra*.

#### (a) Necessary Parties

Greg first alleges that the district court erred in dividing AEA's assets. He claims that because AEA was not made a party to the action, a necessary party was absent, and that the district court therefore lacked the authority to divide AEA's assets. Greg does not cite any Nebraska authority to support his position, and we have found none. To the contrary, in previous dissolution of marriage actions, this court and the Nebraska Supreme Court have addressed the valuation of a business and treatment of the business as a marital asset without requiring that the business be brought in as a party to the case. See, e.g., *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003); *Logan v. Logan*, 22 Neb. App. 667, 859 N.W.2d 886 (2015). We therefore reject this argument.

#### (b) AEA's Future Profits and Stock

Greg makes several additional arguments regarding the district court's treatment of AEA. In summary, he claims the court should not have divided AEA's future profits between

the parties and should not have awarded Laura 50 percent of AEA's issued and outstanding stock.

Greg owns 100 percent of the 1,000 outstanding shares of AEA capital stock. AEA's articles of incorporation specify that AEA has the authority to issue 10,000 shares of capital stock. In the amended decree, the district court awarded Laura 50 percent of all issued and outstanding capital stock in AEA, or 500 shares. In addition, the amended decree required that Greg and/or SEI pay all of AEA's future research and development costs and that upon AEA's making a profit, Greg is entitled to recover all expenses he paid personally or through SEI as of the date of the amended decree forward, and any profits after expenses have been repaid are to be divided equally between Greg and Laura.

[4] Greg first argues that AEA's future profits should not be considered marital property because they were not earned during the marriage and are too speculative to quantify. As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000).

The Nebraska Supreme Court has previously addressed whether a trial court erred when it treated future compensation due to a husband as marital property. In *Bergmeier v. Bergmeier*, 296 Neb. 440, 894 N.W.2d 266 (2017), the husband began working for an insurance company during the marriage, and according to an agreement between him and the company, upon termination of the agreement and certain contingencies being met, he was entitled to two forms of termination payments. The trial court treated both types of payments as marital assets and divided them equally between the parties.

On appeal, the husband argued that the payments should have been classified as nonmarital property, because at the time the decree was entered, it was uncertain whether he would actually receive the payments and, if so, what the value of the payments would be. The Supreme Court in *Bergmeier*

noted that although the husband did not have an indefeasible right to the payments, he did have an accrued contractual right subject only to minimal qualifying conditions, recognizing that the husband may choose to squander the contractual right or forfeit it by violating certain provisions in the contract. However, the Supreme Court determined that these factors should not affect the payments' status as marital property. The Supreme Court was persuaded that the contract, which was acquired during the marriage, had a substantial value and was properly considered as part of the marital estate.

The Supreme Court in *Bergmeier* observed that other jurisdictions have determined that termination payments under the same contract have no value for division as marital property, because the actual value of the contract depends on the activities of the husband that occur after the marriage has been dissolved. But the Supreme Court decided that this fact did not lead to the conclusion that the wife should be denied any interest whatsoever in a substantial asset which was acquired during the marriage. Accordingly, the Supreme Court held that the trial court did not err when it determined that the payments were marital property. The Supreme Court did, however, conclude that the trial court abused its discretion when it assigned a specific value to the payments and awarded the wife 50 percent of that value.

Likewise, in the present case, although it is not certain that AEA will earn a profit in the future, and whether it does so is within Greg's control, these factors do not require the conclusion that any future profits are not marital property. To the contrary, AEA was formed during the marriage and more than $7.5 million in marital assets have been invested into the company. According to Laura's expert, AEA has no current value independent of SEI, which the district court properly treated as a marital asset.

In *Bergmeier v. Bergmeier*, 296 Neb. 440, 894 N.W.2d 266 (2017), the Supreme Court found error in assigning a value to the termination payments because, inter alia, the value chosen

was stale, it was not warranted by the facts, and the actual value depended on factors that had not yet occurred, such as the date of the husband's termination and total sales for the 12 months immediately preceding his termination. The court also determined that it was an abuse of discretion to award the wife 50 percent of the termination payments because payments to her are dependent on the amount of time the husband will have been in a working relationship with the insurance company both during and after the marriage when the husband starts receiving the termination payments. As to how to calculate what percentage of the termination payments the wife should receive, the Supreme Court looked to divorce cases involving pensions, noting that the marital estate includes only the portion of the pension which is earned during the marriage and that contributions to pensions before marriage or after dissolution are not assets of the marital estate.

Here, the district court did not assign a value to the future profits. And we find *Bergmeier* distinguishable in this respect, because in the present case, AEA has not yet earned a profit, but the parties have invested significant marital assets into the company. In addition, Greg is permitted to recover any additional research and development costs invested by SEI or Greg before dividing future profits with Laura. Based on the record before us, we conclude that the district court did not abuse its discretion in awarding Laura half of the corporation's future profits after Greg's recoupment of future research and development costs.

We also find no abuse of discretion in awarding Laura 50 percent of the issued and outstanding shares of AEA. The record does not include a copy of AEA's bylaws, so it is unclear what rights those 500 shares give to Laura or whether Greg has the ability to issue additional shares to himself in order to retain the majority ownership of AEA. But under the Nebraska Model Business Corporation Act, Neb. Rev. Stat. § 21-201 et seq. (Cum. Supp. 2018), ownership of the shares grants certain rights to Laura, such as the right to receive

the corporation's annual financial documents (§ 21-2,227), the right to inspect and copy records of the corporation (§ 21-2,222), and the right to commence a derivative action on behalf of the corporation (§ 21-276). Given that Laura is entitled to a portion of AEA's future profits, she may want or need to exercise these rights in the future.

Greg argues that awarding Laura stock in AEA is contrary to established Nebraska law that disfavors awards of jointly owned property. While such practice may be disfavored, it is not prohibited. See, e.g., *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004) (remanding with directions to award wife seven shares of stock in family corporation owned by former in-laws with remainder awarded to husband). For the reasons stated above, we find no abuse of discretion in the court's decision to award Laura 500 shares of AEA.

(c) Marvel Schnackel's Transfers

Greg claims that the district court erred in its treatment of money given to SEI by his mother, Marvel Schnackel. During the marriage, Marvel transferred significant amounts of money to SEI. The transfers were made by Greg, using his power of attorney over Marvel's personal and financial affairs. A revolving promissory note between SEI and Marvel for $1 million was received into evidence at trial. The note was executed after the initial transfer occurred, was backdated, and did not include Marvel's signature.

According to Stadler, the parties' accountant told him that the funds from Marvel were classified as loans to SEI for tax purposes, and thus, Stadler treated the money extended by Marvel as a contribution to capital. Based on Stadler's classification, the district court also treated Marvel's extension of money as a contribution of capital to SEI rather than as a loan from Marvel to SEI.

Greg argues that the court had the option of classifying the money as either a loan to SEI or a gift to Greg personally. We find no abuse of discretion in the treatment of these funds.

In *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000), the husband argued that a share of stock in his family corporation that he received during the marriage was a gift from his parents, rather than a purchase made with marital funds. The husband testified at trial that he and his father negotiated an agreement in which he became the owner of one share of the corporation's stock, and a letter from an attorney was received into evidence wherein the attorney opined that the stock should be purchased by the husband. A stock purchase agreement received into evidence referred to the husband as a buyer and the husband's father as a seller. Despite this evidence, the husband and his mother testified at trial that the stock was a gift. The trial court found that the stock was marital property.

The husband appealed in *Heald*, arguing that the trial court erred in failing to treat the stock as a gift, thereby excluding it from the marital estate. The Supreme Court disagreed, noting that although both the husband and his mother testified that the stock was a gift, the stock purchase agreement, the attorney letter, and the wife's testimony suggested otherwise. Upon its de novo review, the Supreme Court considered and gave weight to the fact that the trial court heard and observed the witnesses and accepted the wife's testimony and the related inferences from the evidence. The court therefore concluded that the trial court did not err in including the stock in the marital estate.

[5,6] Likewise, in the instant case, there was evidence from which the district court could have concluded that the funds from Marvel were loans to SEI which were intended to be repaid, but there was also evidence which would support a contrary conclusion. SEI is a subchapter S corporation owned 100 percent by Greg. Subchapter S is a tax status designed to tax corporate income on a pass-through basis to shareholders of a small business corporation. *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003). Since a subchapter S corporation is not taxed on its earnings, the various income, expense, loss,

credit, and other tax items pass through and are taxable to or deductible by shareholders in a manner analogous to that which is applicable to partners. *Id*. Greg testified that the funds received from Marvel were loans and that interest on the loans was accrued and owing. As the district court noted, Greg used his power of attorney over Marvel to transfer the money and later issued a backdated promissory note.

The accountant who prepares the parties' tax returns told Stadler that the funds from Marvel were treated as loans for tax purposes to avoid treating them as capital gain income subject to taxes. The fact that the funds were treated as loans for tax purposes does not mandate similar treatment here. Stadler explained that he treated the transaction as Marvel's giving money to Greg, as the sole owner of a subchapter S corporation, who then transferred the money into SEI. Stadler noted that in several instances, SEI's general ledger depicts transfers of the amounts purportedly from Marvel as coming from Greg directly. In conducting our de novo review, we give weight to the district court's consideration of the conflicting evidence and conclude that the court did not abuse its discretion in its treatment of the funds received from Marvel.

(d) Dale's Transfers

[7,8] Greg also challenges the district court's failure to classify two transfers received from Dale as gifts. It is well-established that as a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule. See, e.g., *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000). With some exceptions, the marital estate does not include property acquired by one of the parties through gift or inheritance. *Id*. The burden of proof to show that property is nonmarital remains with the person making the claim. *Id*. Thus, the burden was on Greg here to prove that the transfers from Dale were gifts.

Greg asserts that funds totaling $100,000 received from Dale in 2009 should have been considered as gifts to him. The district court observed that Greg transferred $100,000 to SEI in three separate transfers in 2009, from the proceeds of funds from Dale. The evidence indicates that Greg received a total of $140,000 from Dale and Marvel in 2009 and that he transferred $100,000 of the funds into SEI. Greg testified that the remaining $40,000 was used to pay marital expenses and that although his parents loaned him money, they forgave the loans. The district court, noting the testimony from the parties' accountant that the $100,000 was never withdrawn from SEI and was presently part of SEI's existing capital, decided that, consistent with its treatment of funds from Marvel, it would treat the $100,000 as contributions of capital to SEI. As in our analysis above concerning the transfers from Marvel, we likewise find no abuse of discretion in the district court's decision to treat the funds from Dale as capital contributions rather than gifts.

Greg also argues that the 2000 transaction in which he acquired the remaining 50-percent interest in what is now known as SEI should have been classified as a gift from Dale. Greg testified at trial that effective January 1, 2000, he purchased the remaining 50-percent interest in the company now known as SEI from Dale. According to Greg, he and Dale agreed that Greg would pay Dale $106,750 and sign a promissory note, but the note was never signed and Greg never paid. Greg said that he and Dale "arranged a deal whereby [Dale] would effectively sell the company to [Greg] at $106,750 and then forgive that loan, so effecting a transfer of the firm without tax implications." Despite this agreement, according to Greg, no promissory note was prepared and he never paid the purchase price; instead, part of the arrangement was that in order for Dale to "gift" the company to Greg, Dale would forgive the purported debt. Greg acknowledged that there was nothing in writing to indicate that the $106,750 debt was forgiven, and the $106,750 figure was not recorded

in any government filing, state or federal. Greg said that he would not know whether Dale paid income taxes on the forgiven debt.

In the amended decree, the district court observed that Greg agreed to sign a promissory note to pay Dale for the interest, but that a note was never executed and Greg never paid Dale for the remaining 50 percent of the partnership. The court noted that there was no evidence to corroborate a finding that the interest was a gift from Dale to Greg; rather, the court found that Dale and Greg had a deal based upon consideration. The court therefore found that Greg failed to prove that the interest he received in SEI was a gift, and as a result, it was treated as marital property. Given the conflicting evidence presented as to this issue, we cannot find that the district court abused its discretion in concluding that Greg failed to meet his burden of proving that the interest he acquired in SEI was a gift.

(e) Liquidation of Property

Greg next asserts that the district court erred in ordering him to sell his classic car collection and the Florida condominiums. He argues that it is unclear that liquidation was fair, reasonable, and necessary to ensure an equitable division of marital property.

In the amended decree, the district court noted that according to Greg and the parties' accountant, Greg and Laura will potentially have additional tax liabilities due in the future, which the court ordered to be paid equally between the parties out of an escrow account they used to pay marital obligations during the pendency of the dissolution proceedings. For example, the parties potentially owe an additional $423,517 in federal taxes and $84,703 in interest as a result of an Internal Revenue Service audit, which the parties have appealed, and the appeal remains pending. Depending on the results of the appeal of the audit, the parties may owe approximately $145,000 in additional taxes for 2015 and $75,000 for 2016.

Greg and Laura owe $363,800 in capital gain taxes due to selling the New York condominium in 2017. Additional taxes resulting from the sale of certain stock will be due in 2018 in an amount of at least $655,815. And finally, the parties will potentially owe capital gain taxes in the amount of $2.4 million related to a separate stock that will be liquidated.

The district court specifically ordered that the proceeds from the sale of the classic car collection and the Florida condominiums be used to pay off the parties' joint tax liabilities and debts. As of January 30, 2018, the escrow account had a balance of $292.63. Given the extent of the potential tax obligations compared to the balance of the escrow account, we find no abuse of discretion in requiring Greg to sell property in order to satisfy marital debts.

#### (f) Treatment of $605,000 Loan

In his final argument regarding the division of property, Greg claims that the district court double counted a $605,000 payable by SEI. He notes that the court considered the payable to be a marital asset and divided it equally between the parties but failed to subtract its value from SEI's total business valuation.

In late 2017 and early 2018, SEI borrowed a total of $605,000 from the parties' escrow account, and during that same time period, Greg borrowed money from SEI. The district court recognized that Stadler's valuation of SEI was made as of June 30, 2017, and that the $605,000 in loans were made after that date. Thus, the business valuation of SEI does not take into consideration the $605,000, and we therefore disagree with Greg that this amount was double counted in the marital estate.

### 2. Dissipation of Marital Assets

#### (a) Date Marriage Was Irretrievably Broken

Greg first asserts that the district court abused its discretion in determining that the marriage was undergoing an

irretrievable breakdown for dissipation purposes in September 2013. We disagree.

[9] Dissipation of marital assets is generally defined as one spouse's use of marital property for a selfish purpose unrelated to the marriage at the time when the marriage is undergoing an irretrievable breakdown. *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001). Although Nebraska case law does not precisely define when a marriage is undergoing an irretrievable breakdown, this court has previously declined to conclude that such breakdown can be found only when the parties are estranged or have separated. See *Malin v. Loynachan*, 15 Neb. App. 706, 736 N.W.2d 390 (2007).

In considering this issue, an Illinois appellate court determined that dissipation should be calculated from when the parties' marriage begins to undergo an irreconcilable breakdown, not from a date after which it is irreconcilably broken, because dissipation occurs at a time that the marriage is *undergoing* an irreconcilable breakdown. See *In re Marriage of Holthaus*, 387 Ill. App. 3d 367, 899 N.E.2d 355, 326 Ill. Dec. 138 (2008). Thus, dissipation can ordinarily be found based on conduct that occurred prior to the parties' separation or the filing of a dissolution petition. See, *In re Marriage of Harding*, 189 Ill. App. 3d 663, 545 N.E.2d 459, 136 Ill. Dec. 935 (1989); *In re Marriage of Rai*, 189 Ill. App. 3d 559, 545 N.E.2d 446, 136 Ill. Dec. 922 (1989). Although the Illinois court used the term "irreconcilable breakdown" rather than the term "irretrievable breakdown," it has noted more recently that the terms have been used interchangeably and that any attempt to distinguish them in a dissipation context is a distinction without a difference. See *In re Marriage of Romano*, 2012 IL App (2d) 091339, 968 N.E.2d 115, 360 Ill. Dec. 36 (2012).

Thus, here, the question for the district court was when Greg and Laura's marriage began to undergo an irretrievable breakdown. Greg urges us to find that the facts support a different, much later, date than that used by the district court.

He admits that his affair with Julia began in September 2013, but emphasizes that he took extensive steps at that time to conceal it from Laura and argues that the marriage was not irretrievably broken until he left the marital home in August 2016. We initially note that this position is inconsistent with the position Greg took at trial. There, he argued that as a matter of law, the date that the marriage was irretrievably broken was July 1, 2015, the time when marriage counseling transitioned to divorce counseling.

Regardless, based on the record before us, we find no abuse of discretion in the district court's conclusion that the marriage began undergoing an irretrievable breakdown in September 2013. At that time, Greg began a sexual affair, which he intended to maintain despite the fact that he was married. Greg expressed this intention when, during one of the early sessions of marriage counseling, he indicated his unwillingness to end the affair. At trial, Greg testified that he did not file for divorce from Laura, because he was afraid that Julia would leave him, and that he decided he wanted to continue the marriage and have an affair with Julia. In other words, Greg admitted that he "wanted [to have his] cake" and "eat it, too." He also admitted that he told Julia that he wanted to marry her in September 2013. At that same time, he opened the 9779 account in order to hide purchases related to Julia from Laura and began spending extravagant amounts of money on Julia, including clothing; jewelry; travel; education, medical, and dental expenses; and her separate credit card payments.

The fact that Greg was able to hide the affair from Laura until April 2015 is of no consequence. According to one treatise, "expenditures [on] paramours are almost always treated as dissipation." 2 Brett R. Turner, Equitable Distribution of Property § 6:106 at 831 (4th ed. 2019). The evidence establishes that Laura was not willing to stay in the marriage if Greg continued to see Julia, and Greg made clear that was his intent. Although the parties briefly attended marriage

counseling, once Greg iterated his intention of maintaining his relationship with Julia, counseling transitioned to divorce counseling and the parties began trying to reach an agreement on how to divide their marital property while maintaining the appearance of the marriage for the sake of their children. The situation was not one of a casual affair without benefit of forethought; rather, Greg's actions and intentions were inconsistent with a commitment to his marriage early on in the affair. Accordingly, we find that the district court did not abuse its discretion in concluding that the marriage began undergoing an irretrievable breakdown in September 2013.

(b) Improper Theory

Greg asserts that the district court relied upon an improper standard of "'abandonment of the marriage'" as opposed to the proper standard of "'irretrievable breakdown of the marriage.'" Brief for appellant at 44 (emphasis omitted). We do not agree that the court used an improper standard. The district court specifically recognized that "[i]n determining the date after which expenses relating to Julia are to be classified as dissipated marital assets for purposes unrelated to the marriage, the [c]ourt must determine when the marriage was irretrievably broken." The court also relied on appropriate Nebraska case law discussing dissipation of marital assets, including *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001), and *Malin v. Loynachan*, 15 Neb. App. 706, 736 N.W.2d 390 (2007), as well as *Reed v. Reed*, 277 Neb. 391, 763 N.W.2d 686 (2009), which iterate the proper standard. As such, we disagree that the court used an improper standard by which to determine dissipation of marital assets.

(c) Hearsay Testimony

[10] Greg argues that the district court erred in overruling his hearsay objection regarding a conversation he had with his older child in August 2013. This argument was not specifically assigned as error, however, and we therefore decline to 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. *Chafin v. Wisconsin Province Society of Jesus*, 301 Neb. 94, 917 N.W.2d 821 (2018).

Even if we were to consider this argument, assuming without deciding that the district court erred in overruling Greg's hearsay objection, any reliance by the court on the conversation in its dissipation analysis was harmless error. As discussed above, the district court's determination that the marriage was undergoing an irretrievable breakdown in September 2013 was not an abuse of discretion. This is true without considering Greg's conversation with his older child. As detailed above, Greg began a sexual affair with Julia in September 2013, proposed to her, and began spending significant amounts of money on her. As such, any error related to the court's reliance upon what Greg argues was hearsay testimony was harmless.

(d) Calculation of Dissipated Assets

Greg's final argument with respect to dissipation of marital assets is that the district court's calculations are incorrect and unsupported by the evidence. He claims that the court's dissipation analysis failed to give him credit for legitimate business and marital expenditures and that instead, the court adopted Laura's evidence as to dissipation rather than his evidence, which he claims was more credible.

Although no published Nebraska cases specifically articulate the burden of proof with regard to dissipation of marital assets, our case law appears to place the initial burden on the party alleging dissipation, and after sufficient evidence is produced, the burden shifts to the dissipating spouse to prove that the funds were spent for marital purposes. See, *Harris v. Harris, supra*; *Brunges v. Brunges*, 260 Neb. 660, 619 N.W.2d 456 (2000). This is consistent with the standard set forth in a legal treatise, which provides that a party alleging dissipation of marital property has the initial burden of production

and persuasion. 27C C.J.S. Divorce § 998 (2016). See, also, 2 Brett R. Turner, Equitable Distribution of Property § 6:105 (4th ed. 2019). The waste and dissipation of marital assets must be established by a preponderance of the evidence. 27C C.J.S., *supra*. After a party establishes a prima facie case that monies have been dissipated, the burden shifts to the party who spent the money to produce evidence sufficient to show that the expenditures were appropriate. *Id*. The spouse charged with dissipation bears the burden of establishing by clear and convincing evidence how the funds were spent. *Id*. Vague and general testimony that marital assets were used for marital expenses is inadequate to meet the spouse's burden to show by clear and specific evidence how the funds were spent, and the trial court is required to find dissipation when the spouse charged with dissipation fails to meet that burden. *Id*.

Following this standard in the present case, the district court concluded that Laura proved by a preponderance of the evidence Greg dissipated marital assets at a time when the marriage was undergoing an irretrievable breakdown and that Greg failed to establish by clear and convincing evidence the missing funds were spent on a purpose related to the marriage. Both parties offered into evidence detailed exhibits outlining Greg's spending from the 9779 account. The district court relied on Laura's exhibits in the amended decree when it detailed its findings regarding dissipation. On appeal, Greg argues that his evidence was more credible than Laura's.

[11] In our de novo review of a judgment in marriage dissolution proceedings, when the evidence is in conflict, we consider, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Burcham v. Burcham*, 24 Neb. App. 323, 886 N.W.2d 536 (2016). Here, we give weight to the fact that the district court observed the testimony of both Greg and Laura and considered the evidence presented by each party, finding Laura's to be more credible than Greg's.

The court had before it bank records and summaries of the expenditures compiled by each party, but even Greg could not recall the exact purpose of each expenditure from the 9779 account.

The district court determined that Greg dissipated $3.5 million in marital assets and that Laura dissipated $146,000 in marital assets, for a net total amount of dissipated assets of $3,354,000. Thus, each party's marital portion of dissipated assets equaled $1,677,000. The court ordered that $1,413,208.30 in Greg's 401K account be transferred to Laura as payment for Laura's marital portion of the dissipated assets. And in order to offset any potential "accounting gray areas" in which funds may have been spent for a marital purpose, the court declined to order an equalization payment from Greg to Laura of the remaining $263,791.70. Given the foregoing, we find no error in the district court's reliance on Laura's evidence rather than Greg's.

Greg also asserts that the district court erred in its calculation of the amount of cash he provided to Julia, arguing that the evidence shows he provided her with amounts ranging from $20 to $4,000 per month, rather than the $6,000 per month figure calculated by the district court. This argument is consistent with Greg's testimony at trial. However, Laura testified that Greg told her that when he would withdraw $9,000 in cash per month, he would give $6,000 to Julia and keep the remaining $3,000 in cash for himself. Again, we give weight to the district court's assessment of the credibility of the evidence and find no error in its reliance on Laura's testimony rather than Greg's.

Greg additionally claims that his exhibit detailing the expenditures from the 9779 account includes some transactions which he was unable to identify and that therefore, Laura failed to meet her burden of proving that those expenditures were for a nonmarital purpose. Greg, himself, admitted that he opened the 9779 account without Laura's knowledge in order to hide purchases from her and that a significant portion of

the purchases related to his affair with Julia. Thus, the district court did not abuse its discretion in finding that this evidence was sufficient to meet Laura's burden of proving by a preponderance of the evidence that the unidentified expenditures were also for Julia.

Similarly, Greg points to a total of $564,510.62 depicted on one of his exhibits which he identified at trial as not related to dissipation. And he also correctly observes that the district court miscalculated the amount of total cash dissipated; the total when multiplying $6,000 per month by 46 months equals $276,000, rather than the $296,000 total the district court calculated. Using these adjusted numbers, Greg calculates the amount of total dissipated assets as $2,489,661.57, rather than the $3.5 million calculated by the district court.

[12,13] When marital assets are dissipated by a spouse for purposes unrelated to the marriage, the remedy is to include the dissipated assets in the marital estate in dissolution actions. See *Reed v. Reed*, 277 Neb. 391, 763 N.W.2d 686 (2009). As a general rule, a spouse should be awarded one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case. *Osantowski v. Osantowski*, 298 Neb. 339, 904 N.W.2d 251 (2017).

The district court determined that the total net amount of dissipated marital assets was $3,354,000. Even if we accept Greg's adjusted total of dissipated assets of $2,489,661.57 and subtract the $146,000 for Laura's dissipation, we are left with a net total of $2,343,661.57 in dissipated assets. Laura's award of the $1,413,208.30 in Greg's 401K represents approximately 60 percent of the total dissipated assets, which remains within the general rule that each spouse receive approximately one-third to one-half of the marital estate. For these reasons, we conclude that the district court did not abuse its discretion in its calculation of the dissipated marital assets.

### 3. Alimony

[14] On appeal, Greg challenges certain aspects of the district court's alimony award. In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party. *Wiedel v. Wiedel*, 300 Neb. 13, 911 N.W.2d 582 (2018). In addition, a court should consider the income and earning capacity of each party and the general equities of the situation. *Id*.

[15,16] The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate. *Id*. In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Id*. The ultimate criterion is one of reasonableness. *Id*. An appellate court is not inclined to disturb the trial court's award of alimony unless it is patently unfair on the record. *Id*.

#### (a) Calculation of Income and Ability to Pay

Greg first argues that the district court abused its discretion in its alimony award by improperly calculating his income and ability to pay. He claims that based on these erroneous calculations, the alimony award was in excess of his ability to pay and drives his net income below the poverty threshold set forth in the Nebraska Child Support Guidelines.

[17] In a case involving minor children, the amount of alimony must not force the obligor's net income below the poverty line unless the court specifically finds that such an

award is warranted. See *Gress v. Gress*, 274 Neb. 686, 743 N.W.2d 67 (2007). The Nebraska Child Support Guidelines do not apply, however, where the parties do not have any minor children to support. See *Binder v. Binder*, 291 Neb. 255, 864 N.W.2d 689 (2015). The child support guidelines require courts to make a detailed calculation of the parties' income and expenses, but in *Binder*, the Supreme Court stated that it was wary of grafting the guidelines' method of calculating net income onto cases involving only alimony and reiterated that there is no mathematical formula by which alimony awards can be precisely determined. See *id*.

In the present case, although the district court calculated and ordered child support for the parties' younger child, that child has now reached the age of majority and Greg is no longer required to pay child support. Thus, this case involves only the payment of alimony, and there is no specific method by which to calculate the parties' incomes for alimony purposes.

The district court calculated Greg's monthly income by using an annual salary of $174,874, as reported on his recent tax return, and dividing that into monthly income of $14,572.83. The court also added $28,000 per month, which is the amount of monthly rent for the New York condominium, because the parties' accountant testified that he considered that amount to be income attributable to Greg, for a total income of $42,572.83 per month. Greg argues that the district court's inclusion of the New York condominium rent was erroneous because the condominium had been sold by the time trial was held and his monthly income is limited to the $14,572 he earns from SEI.

When looking at the parties' financial picture as a whole, we find no abuse of discretion in the district court's conclusion that Greg had the ability to pay $7,500 per month in alimony. It is undisputed that Greg generally earns an annual salary of approximately $200,000 per year from SEI. According to the parties' tax returns, their adjusted gross income in 2013 was $2,318,772; in 2014, it was $1,246,009;

in 2015, it was $11,360,171; and in 2016, it was $1,961,952. Laura stopped earning income when the parties' younger child was born, and thus, these earnings are all attributable to Greg and the parties' businesses and investments. Although Greg correctly points out that the New York condominium had been sold before trial began, the parties' accountant agreed that the amount of rent should be considered part of Greg's income. And it is clear from the record that Greg has additional funds at his disposal beyond his salary from SEI, even after the parties separated and Greg was paying temporary alimony and child support to Laura.

For example, in September 2017, Greg made a $50,000 payment on his 9779 account, which both he and Julia continued to use for personal expenditures throughout 2016 and 2017. He also made a $50,000 payment on the account in December 2017. For each month from January through August 2017, Greg made a payment toward Julia's separate credit card for amounts between $3,750 and $7,500 per month. According to Greg's own evidence, he spent $127,752.83 on Julia between August 28, 2016, and October 5, 2017. And on a personal financial statement Greg completed in April 2017, he indicated that he had various credit cards that he paid off monthly at a total of $78,000. We therefore reject Greg's argument that the amount of alimony awarded exceeded his ability to pay.

(b) Excessive Alimony

Greg also claims that the alimony awarded in this case was excessive when considering the property awarded to Laura and ignores the primary purpose of an alimony award in Nebraska—to provide for an economically disadvantaged spouse for enough time to become self-sufficient. We find no abuse of discretion in the alimony award.

[18] The statutory criteria for dividing property and awarding alimony overlap, but the two serve different purposes and courts should consider them separately. *Brozek v. Brozek*, 292

Neb. 681, 874 N.W.2d 17 (2016). The purpose of a property division is to distribute the marital assets equitably between the parties. *Id*. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in § 42-365 make it appropriate. *Brozek v. Brozek, supra*. We therefore consider the alimony award separate from the marital property awarded to each party.

When considering the alimony factors set forth above, we observe that the parties were married for more than 30 years and raised two children together. After their second child was born, Laura forewent her career and stayed home to raise the children. She later worked for SEI during the marriage, but was not paid for her work. Laura currently has an active dietician license, and the court found that her earning capacity was approximately $40,000 per year.

[19] Alimony should not be used to equalize the incomes of the parties or punish one of the parties, but disparity in income or potential income may partially justify an award of alimony. See *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004). In *Kelly v. Kelly*, 246 Neb. 55, 65, 516 N.W.2d 612, 618 (1994), the Supreme Court addressed an alimony award where there was a disparity between the parties' incomes, stating:

> It is important to recognize that although the wife is fortunate enough to be able to reenter her career, her income potential is approximately a third of that of the husband. The district court's alimony award tends to even out that disparity and provides the wife with the means to partially recapture the standard of living that she and the husband jointly put together during their 19 years of marriage. Under the circumstances, the district court's award cannot be said to have constituted an abuse of discretion.

Likewise, here, although Laura has the potential to reenter the workforce and earn a living, her earning potential is

significantly less than Greg's. In fact, according to the district court's income calculations, Greg earns more per month than Laura could potentially earn in 1 year. Moreover, the parties had a long-term marriage, during which they enjoyed a certain standard of living. As in *Kelly v. Kelly, supra*, the alimony awarded to Laura will allow her to partially recapture that standard of living, while assisting her in maintaining marital property awarded to her such as the marital home. When considering the factors related to an alimony award, we conclude that the district court's alimony award was not an abuse of discretion.

(c) Alimony Security

Greg contends that the district court erred in awarding Laura a security interest in Greg's real estate and stock in SEI and AEA to provide security for the monetary obligations he owes to Laura. We conclude that the district court did not abuse its discretion in this respect.

[20,21] A court has discretion to require reasonable security for an obligor's current or delinquent support obligations when compelling circumstances require it. *Davis v. Davis*, 275 Neb. 944, 750 N.W.2d 696 (2008). An order requiring security to be given is a somewhat extraordinary and drastic remedy, and therefore, reasonable security for payment of alimony, child support, or monetary judgments should only be invoked when compelling circumstances require it. See *Lacey v. Lacey*, 215 Neb. 162, 337 N.W.2d 740 (1983).

In *Brockman v. Brockman*, 264 Neb. 106, 646 N.W.2d 594 (2002), the Supreme Court considered whether the trial court abused its discretion in ordering a husband to set aside part of a workers' compensation award as security for his child support obligation. The evidence presented at the dissolution trial reflected that the husband had ceased employment after settling a workers' compensation case and had spent approximately $24,000 within 1 month of receiving around $62,000 in settlement proceeds. Thus, given the possibility that the

husband would exhaust the settlement proceeds and then be unwilling or unable to pay his child support, the Supreme Court concluded that the trial court did not abuse its discretion in ordering the husband to set aside a portion of the settlement proceeds as security for his child support obligation.

Similarly, the record in this case reflects that although Greg has substantial assets at his disposal, he continued spending money at a high rate during the pendency of the dissolution proceedings, including on Julia and other discretionary expenses. As noted above, he conceded that he spent more than $127,000 solely on Julia between August 2016 and October 2017. Given that Greg was ordered to pay to Laura $7,500 per month in alimony for 120 months and an equalization payment of $8,670.52 per month for 192 months, the record supports a possibility that Greg could become unable to satisfy these obligations in the future. Accordingly, the district court did not abuse its discretion in awarding Laura a security interest to secure Greg's obligations to her.

### 4. Postdecree Order

Greg assigns that the district court's postdecree order is unauthorized by statute and constitutes an abuse of discretion. We find that we do not have jurisdiction over this order, because it was entered after the notice of appeal was filed.

Greg filed his notice of appeal on April 26, 2018, appealing from the "Amended Decree of Dissolution of Marriage entered March 30, 2018." On May 1, Laura filed a motion for support pending appeal pursuant to Neb. Rev. Stat. § 42-351(2) (Reissue 2016). She sought spousal support, child support, and either the monthly mortgage payment and real estate taxes on the marital home or the monthly equalization payment as ordered by the court in its amended decree. Following a hearing, the district court entered an order granting Laura spousal support pending appeal in the amount of $7,500 per month, child support in the amount of $1,998 per month until the minor child reached the age of majority, and a monthly

payment of $8,670.52 as ordered in the amended decree. No notice of appeal was filed following this order.

Section 42-351(2) provides that the trial court shall retain jurisdiction of domestic relations actions during an appeal for purposes of entering orders "regarding support, custody, parenting time, visitation, or other access, orders shown to be necessary to allow the use of property or to prevent the irreparable harm to or loss of property during the pendency of such appeal, or other appropriate orders in aid of the appeal process." We recognize that the Supreme Court has reviewed postdecree orders on appeal. See, e.g., *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016); *Jessen v. Jessen*, 259 Neb. 644, 611 N.W.2d 834 (2000); *Olson v. Olson*, 195 Neb. 8, 236 N.W.2d 618 (1975). However, in *Jessen v. Jessen, supra*, and *Olson v. Olson, supra*, the postdecree orders were filed prior to the notice of appeal being filed. And in *Brozek v. Brozek, supra*, although the postdecree order was entered after the notice of appeal was filed, the appellant filed a separate notice of appeal after the postdecree order was entered and sought consolidation of the two appeals.

Neb. Rev. Stat. § 25-1912 (Supp. 2017) requires that a notice of appeal be filed within 30 days of the "judgment, decree, or final order." Section 25-1912(2) provides for relation forward of a notice of appeal or docket fee only when it is filed or deposited after the announcement of a decision or final order, but before entry of the judgment. Here, there was no announcement of a decision or final order on the postdecree motion prior to the filing of the notice of appeal; therefore, the original notice of appeal does not encompass the postdecree order. Because Greg has not properly appealed from this postdecree order, we lack jurisdiction to address an assignment of error relating to it.

### 5. Appreciation of Laura's Inherited Funds

On cross-appeal, Laura asserts that the district court abused its discretion in treating the appreciation of her nonmarital

stock as a marital asset. She argues that there were no active efforts taken in managing the stock, but, rather, the appreciation was passive because it was due to market forces and not any substantial effort from her or Greg.

Greg claims that Laura failed to properly cross-appeal and that we are therefore limited to a review for plain error. Greg correctly notes that the rules of appellate practice mandate the manner in which a party may raise a cross-appeal. See Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2014). Section 2-109 provides that a brief on cross-appeal must be structured as an appellant's brief and include, among other things, a separate section for assignments of error. If a party's brief does not include a separate section for assignments of error, an appellate court may proceed as though the party failed to file a brief or, alternatively, may examine the proceedings for plain error. See *Steffy v. Steffy*, 287 Neb. 529, 843 N.W.2d 655 (2014).

Here, Laura's initial brief failed to specifically assign any errors on cross-appeal. However, she sought and received this court's permission to file a replacement brief. Her replacement brief complies with all of the requirements of § 2-109, including a specific assignments of error section. Because her replacement brief replaces her original brief and complies with the rules, she has properly asserted a cross-appeal, and we therefore proceed to address the error raised in her brief.

[22] The question before us is whether the district court abused its discretion in treating the appreciation of stock purchased using Laura's nonmarital funds as a marital asset. Accrued investment earnings or appreciation of nonmarital assets during the marriage are presumed marital unless the party seeking the classification of the growth as nonmarital proves that (1) the growth is readily identifiable and traceable to the nonmarital portion of the account and (2) the growth is not due to the active efforts of either spouse. See *Stephens v. Stephens*, 297 Neb. 188, 899 N.W.2d 582 (2017).

The Supreme Court addressed a similar issue in *Coufal v. Coufal*, 291 Neb. 378, 866 N.W.2d 74 (2015). There, the

question was whether the increase in value of the premarital portion of a retirement account should be considered as part of the marital estate. In order to determine what portion of the retirement account was nonmarital property, the Supreme Court examined to what extent the appreciation in the separate premarital portion of the retirement account was caused by the efforts of either spouse. The court recognized that in that context, it had previously held that where appreciation of a wife's separate asset was due principally to inflation and market forces and not to any "'significant efforts'" by the husband, the appreciation should not have been included in the marital estate. *Id*. at 383, 866 N.W.2d at 78, citing *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982).

Likewise, the court in *Coufal* noted that in *Buche v. Buche*, 228 Neb. 624, 423 N.W.2d 488 (1988), it had held that certain shares of stock should not have been included in the marital estate, because the parties were married 3 years after the husband began receiving stock; neither spouse contributed money to acquire the stock; the wife did not contribute to the improvement or operation of the stock, nor significantly care for the property during the marriage; and the stock was readily identifiable and traceable to the husband. The Supreme Court commented that in these decisions, some level of indirect or direct effort was required by the nontitled spouse—not just inflation or market forces—in order to include the increase in value in the marital estate. *Coufal v. Coufal, supra*.

The Supreme Court in *Coufal* also recognized that other courts have reached similar conclusions, including in *Baker v. Baker*, 753 N.W.2d 644 (Minn. 2008), where the Minnesota Supreme Court held that where a husband did not devote significant effort to managing his retirement funds and no significant effort was diverted from the marriage to generate the increase in the account, the appreciation in the nonmarital portion of the funds remained separate property. The court in *Baker* noted that in determining whether the appreciation in

the value of a nonmarital investment is marital or nonmarital, it looks to whether or not the appreciation is the result of active management of the investment, classifying active appreciation as marital property and passive appreciation as nonmarital property. There, the activity of the husband with respect to the accounts consisted of selecting and occasionally changing investment advisors; authorizing money managers to make discretionary decisions about the investments; retaining discretion to direct investments but exercising that discretion on only one occasion; and declining to withdraw from the funds although they were available as liquid assets. The court in *Baker* posed the question as to how else the husband could have invested his premarital retirement funds so as to ensure that their appreciation during the marriage would remain nonmarital before concluding that based on the record before it, the husband's role in the investments was insufficient to render active the appreciation in the value of the overall portfolio.

[23] Ultimately, the Supreme Court, in *Coufal v. Coufal*, 291 Neb. 378, 866 N.W.2d 74 (2015), held that the appreciation was nonmarital, because it was not caused by the direct or indirect efforts of either spouse. More recently, the Supreme Court observed that other jurisdictions have reached a remarkable degree of consensus that appreciation or income of separate property is marital property to the extent that it was caused by marital funds or marital efforts. See *Stephens v. Stephens*, 297 Neb. 188, 899 N.W.2d 582 (2017). The active appreciation rule sets forth the relevant test to determine to what extent marital efforts caused any part of the appreciation or income. *Id*. Appreciation caused by marital contributions is known as active appreciation, and it constitutes marital property in the first instance. *Id*. In contrast, passive appreciation is appreciation caused by separate contributions and nonmarital forces. *Id*. And most states, by statute or case law, define marital contribution broadly to include the efforts of either the owning or the nonowning spouse. *Id*.

In the present case, Laura received her first inheritance from her mother in 2011. She initially placed the inherited stocks and cash in a TD Ameritrade account, but later in 2011, she decided to buy different stock and transfer funds into a mutual fund. She subsequently inherited an additional sum and deposited it into the mutual fund. We do not find these one-time transfers that Laura made during the 6-year period from the time of inheritance until the time of trial to constitute active efforts sufficient to render the appreciation in value a marital asset. Similar to the question posed by the Minnesota Supreme Court, our concluding that Laura's actions constitute active efforts would lead to the question of how a spouse could ever invest inherited funds so as to ensure that their appreciation during the marriage would remain nonmarital. Accordingly, we hold that the district court abused its discretion in classifying the appreciation of Laura's nonmarital funds as a marital asset.

The district court determined that there was $291,407.41 in active appreciation in stocks and $225,820.88 in active appreciation in the mutual fund. There was an additional $172,631.95 of securities and cash transferred into Laura's TD Ameritrade account, but Laura was unable to adequately explain the source of these funds. The district court thus concluded that Laura failed to meet her burden of proving that these funds were separate property. Accordingly, the court classified the sum of all of these amounts, $689,860.24, as marital property and awarded Greg 50 percent of the value for a total of $344,930.12.

Our conclusion mandates only that the active appreciation of the stocks and mutual fund is excluded from the marital estate, but that the $172,631.95 in funds from unknown sources remains classified as marital property. We therefore modify the amended decree to award Greg half of the marital portion of these assets, or $86,315.97.

This modification also necessitates a modification to the equalization payment due from Greg to Laura. We note a

small typographical error in the district court's final equalization payment: the court ordered Greg to pay a rounded total of $1,664,741 to Laura, but according to the court's calculations, the correct total should be $1,664,714.05, rounded to $1,664,714. When modifying the marital portion of Laura's inheritance as explained above, the total equalization payment due from Greg to Laura becomes $1,923,328.20. Dividing that amount by 192 months as the district court did results in a monthly payment owed from Greg to Laura of $10,017.33. The amended decree is therefore modified to reflect these figures.

## VI. CONCLUSION

As discussed above, we conclude that the district court abused its discretion in finding that the appreciation on Laura's inherited funds was marital property, and we modify the amended decree as explained above. We otherwise affirm.

Affirmed as modified.

# State of Nebraska, appellee, v. Theodore T. Lillard, appellant.

937 N.W.2d 1

Filed November 26, 2019. No. A-18-964.

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. **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. **Sentences: Probation and Parole.** If a defendant was previously subject to parole under preexisting sentences and subsequently sentenced in other cases either concurrently or consecutively to the prior sentences, Neb. Rev. Stat. § 24-2204.02(4) (Reissue 2016) prevents the defendant from being subject to postrelease supervision.
4. **Sentences: Words and Phrases.** A determinate sentence is a single term of years and an indeterminate sentence is either a minimum term and maximum term or a range of time for which a defendant is to be incarcerated, even if the minimum and maximum number are the same.
5. **Appeal and Error.** An appellate court is not obligated to engage in analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Douglas County: Patricia A. Lamberty, Judge, Retired. Sentences vacated, and cause remanded for resentencing.

Andrea Finegan McChesney, of McChesney Law, for appellant.

Theodore T. Lillard, pro se.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

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

Pirtle, Judge.

## INTRODUCTION

Theodore T. Lillard appeals from his plea-based convictions and sentences for operating a motor vehicle during revocation and driving under the influence (DUI), fourth offense, in the district court for Douglas County. He alleges error by the court in the sentences it imposed. Based on the reasons that follow, we vacate Lillard's sentences and remand the cause for resentencing.

## BACKGROUND

Lillard pled no contest to operating a motor vehicle during revocation, a Class IV felony, and DUI. The DUI conviction was enhanced to a fourth offense, making it a Class IIIA felony. Following a plea hearing, the court accepted Lillard's no contest pleas and found him guilty of the charges. The trial court subsequently sentenced Lillard to 2 years' imprisonment for operating a motor vehicle during revocation and 3 years' imprisonment, plus 18 months' postrelease supervision and 15 years' license revocation for the DUI, fourth offense, conviction. The terms of incarceration were ordered to be served concurrently.

Following sentencing, Lillard filed a verified motion for an order nunc pro tunc alleging that he was improperly sentenced to postrelease supervision and that the Nebraska Department of Correctional Services had erroneously calculated his sentences to run consecutively, rather than concurrently as ordered by the court. Lillard filed his notice of appeal 4 days after filing the motion.

## ASSIGNMENTS OF ERROR

Lillard assigns that the trial court erred in (1) sentencing him to 18 months' postrelease supervision in violation of Neb.

Rev. Stat. § 28-105(7) (Reissue 2016); (2) imposing excessive sentences; (3) failing to state whether the current sentences should be served concurrently or consecutively with sentences he was already serving, as required by Neb. Rev. Stat. § 29-2204(6)(c) (Reissue 2016); and (4) failing to set a hearing on his verified motion for an order nunc pro tunc.

## STANDARD OF REVIEW

[1,2] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Blaha*, 303 Neb. 415, 929 N.W.2d 494 (2019). 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

Lillard assigns that the trial court erred in sentencing him to postrelease supervision in violation of § 28-105(7) and consequently, abused its discretion in imposing excessive sentences. The State agrees that postrelease supervision was not allowed by § 28-105(7).

Lillard's sentence for DUI, fourth offense, a Class IIIA felony, included 18 months' postrelease supervision. Section 28-105(7) provides:

> Any person who is sentenced to imprisonment for a Class III, IIIA, or IV felony committed prior to August 30, 2015, and sentenced concurrently or consecutively to imprisonment for a Class III, IIIA, or IV felony committed on or after August 30, 2015, shall not be subject to post-release supervision pursuant to subsection (1) of this section.

In addition, subsection (6) of § 28-105 provides:

> Any person who is sentenced to imprisonment for a Class I, IA, IB, IC, ID, II, or IIA felony and sentenced concurrently or consecutively to imprisonment for a Class III,

> IIIA, or IV felony shall not be subject to post-release supervision pursuant to subsection (1) of this section.

The current offenses were committed in 2018. Lillard claims that he was still serving prior sentences from felonies committed in 2011 and 2013 when he was sentenced in this case and that therefore, based on § 28-105(7), postrelease supervision could not be imposed. Lillard's criminal history shows that he was convicted of multiple felonies prior to 2015. His criminal history does not state the specific class of these prior felonies; however, all of them would fall under either § 28-105(6) or (7) such that postrelease supervision was not allowed for the present offenses.

The State further relies on Neb. Rev. Stat. § 29-2204.02(4) (Reissue 2016), which applies to sentences for Class III, IIIA, or IV felonies, to support both parties' position that postrelease supervision was not authorized. Section 29-2204.02(4) states:

> For any sentence of imprisonment for a Class III, IIIA, or IV felony for an offense committed on or after August 30, 2015, imposed consecutively or concurrently with (a) a sentence for a Class III, IIIA, or IV felony for an offense committed prior to August 30, 2015, or (b) a sentence of imprisonment for a Class I, IA, IB, IC, ID, II, or IIA felony, *the court shall impose an indeterminate sentence* within the applicable range in section 28-105 *that does not include a period of post-release supervision*, in accordance with the process set forth in section 29-2204.

(Emphasis supplied.)

Section 29-2204.02(4) is applicable only if we consider Lillard's sentences for his prior felony convictions. We did not find any cases that applied § 29-2204.02(4) to preexisting sentences. Existing case law has applied the provision only to multiple sentences being imposed at the same time. However, based on the plain reading of § 29-2204.02(4), we see no reason why it would not apply in a situation such as the present case where sentences are imposed and the defendant is

serving preexisting sentences. We are guided by Neb. Rev. Stat. § 83-1,135.02(3) (Cum. Supp. 2016) which provides that § 29-2204.02 applies to all committed offenders under sentence, on parole, or on probation on or after April 20, 2016, and to all persons sentenced on and after such date.

[3] Section 29-2204.02(4) was added by 2016 Neb. Laws, L.B. 1094. In *State v. Artis*, 296 Neb. 172, 181, 893 N.W.2d 421, 429 (2017), *modified on denial of rehearing* 296 Neb. 606, 894 N.W.2d 349 (2017), the Supreme Court noted that L.B. 1094 was a "'"clean-up"'" bill and was intended to eliminate some unintended effects of 2015 Neb. Laws, L.B. 605. One of those unintended effects was the possibility that a defendant who was sentenced consecutively or concurrently to multiple crimes would be subject to both parole and postrelease supervision. According to the legislative history, § 29-2204.02 was amended to prevent that situation and also to clarify that good time should not apply to postrelease supervision. Committee Statement, L.B. 1094, Judiciary Committee, 104th Leg., 2d Sess. (Feb. 4, 2016). Accordingly, if a defendant was previously subject to parole under preexisting sentences and subsequently sentenced in other cases either concurrently or consecutively to the prior sentences, § 24-2204.02(4) prevents the defendant from being subject to postrelease supervision. We agree with the State that based on § 29-2204.02(4), Lillard could not be sentenced to postrelease supervision.

[4] In addition to the court's error in sentencing Lillard to postrelease supervision, the State also contends that based on § 29-2204.02(4), the court erred in imposing determinate sentences, rather than indeterminate sentences. The trial court sentenced Lillard to 2 years' imprisonment for operating a motor vehicle during revocation and 3 years' imprisonment for DUI, fourth offense. See *State v. Vanness*, 300 Neb. 159, 912 N.W.2d 736 (2018) (determinate sentence is single term of years and indeterminate sentence is either minimum term and maximum term or range of time for which defendant is

to be incarcerated, even if minimum and maximum number are same). The State contends that Lillard was still serving indeterminate sentences from several prior felony convictions when he was sentenced in this case and that therefore, the trial court was required to impose indeterminate sentences. Lillard's criminal record shows that he received indeterminate sentences on his prior convictions. Therefore, we agree with the State that based on § 29-2204.02(4), the determinate sentences imposed in this case are unauthorized and invalid.

Finally, "the process set forth in section 29-2204" that is referenced in § 29-2204.02(4) includes a provision which states: "If the court imposes more than one sentence upon an offender or imposes a sentence upon an offender who is at that time serving another sentence, the court shall state whether the sentences are to be concurrent or consecutive." § 29-2204(6)(c). Lillard assigns that the trial court erred in failing to state whether the sentences in the present case should be served concurrently or consecutively with Lillard's previous sentences. The court stated that the sentences it imposed were to be served concurrently, but it did not state whether the sentences were to be served concurrently or consecutively with the sentences Lillard was already serving. Based on § 29-2204.02(4) and § 29-2204(6)(c), we agree that the court was required to determine whether Lillard's sentences were concurrent or consecutive to his previous sentences and that the court failed to do so.

We conclude that the trial court erred in sentencing Lillard to postrelease supervision, in imposing determinate sentences, and in failing to state whether his sentences in the present case were concurrent or consecutive to his previous sentences. Therefore, we vacate Lillard's sentences and remand the cause to the trial court for resentencing consistent with this opinion.

Lillard's final assignment of error is that the trial court erred in failing to set a hearing on his verified motion for an order nunc pro tunc. Lillard filed the motion after sentencing and

4 days before filing his notice of appeal. He alleged that he was improperly sentenced to postrelease supervision, although he referenced a different statute than he does now, and alleged that the Nebraska Department of Correctional Services had erroneously calculated his sentences to run consecutively, rather than concurrently as ordered by the court. The trial court did not rule on the motion.

[5] We conclude that because we are vacating Lillard's sentences and remanding the cause for resentencing, the errors complained of in Lillard's verified motion for an order nunc pro tunc will be addressed at that time. We need not address this assignment of error further. See *State v. Huston*, 298 Neb. 323, 903 N.W.2d 907 (2017) (appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

## CONCLUSION

We conclude that the trial court erred in the sentences it imposed against Lillard. Accordingly, we vacate Lillard's sentences and remand the cause for resentencing consistent with this opinion.

Sentences vacated, and cause remanded for resentencing.

# In re Interest of Steven S., Jr., et al., children under 18 years of age. State of Nebraska, appellee and cross-appellee, v. Steven S., Sr., appellant, and Jennette S., appellee and cross-appellant.

936 N.W.2d 762

Filed December 10, 2019. Nos. A-18-1183 through A-18-1185.

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.** Neb. Rev. Stat. § 43-292 (Reissue 2016) 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. **Parent and Child: Child Custody.** A parent's failure to provide an environment to which his or her children can return can establish substantial, continual, and repeated neglect.
4. **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.
5. **Parental Rights: Proof.** Under Neb. Rev. Stat. § 43-292 (Reissue 2016), once the State shows that statutory grounds for termination of parental rights exist, the State must then show that termination is in the best interests of the child.
6. **Parental Rights: Presumptions: Proof.** A child's best interests are presumed to be served by having a relationship with his or her parent. This

presumption is overcome only when the State has proved that the parent is unfit.

7. **Constitutional Law: Parental Rights: Words and Phrases.** 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 has caused, or probably will result in, detriment to a child's well-being.
8. **Rules of the Supreme Court: Appeal and Error.** A cross-appellant is required to comply with the rules on cross-appeals, including the requirement that the cross-appellant designate on the cover of his or her brief that it is a cross-appeal, and set forth the cross-appeal in a separate division of the brief entitled "Brief on Cross-Appeal."
9. ____: ____. An appellate court may consider a party's cross-appeal, even though the party's brief violated Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2014) requiring a separate section for a cross-appeal, where the form and presentation of the assignments of error in the party's brief conformed with Neb. Ct. R. App. P. § 2-109(D)(1) (rev. 2014), which applies to an appellant's brief.

Appeals from the County Court for Scotts Bluff County: Kris D. Mickey, Judge. Affirmed.

Gretchen Traw, Deputy Scotts Bluff County Public Defender, for appellant.

Rhonda R. Flower, of Law Office of Rhonda R. Flower, for appellee.

Riedmann, Bishop, and Arterburn, Judges.

Per Curiam.

## I. INTRODUCTION

Steven S., Sr., appeals, and Jennette S. cross-appeals, from an order entered by the Scotts Bluff County Court, sitting as a juvenile court, which terminated their parental rights to their three minor children: Steven S., Jr. (Steven Jr.) (case No. A-18-1183), Aodhan S. (case No. A-18-1184), and Genevive S. (case No. A-18-1185). We consolidate these three appeals for disposition, and we affirm the order of the juvenile court.

## II. BACKGROUND

### 1. Procedural Background

Steven and Jennette are the natural parents of Steven Jr., born in September 2005; Genevive, born in October 2011; and Aodhan, born in May 2013. Steven and Jennette are married, but by the time of the hearing on the State's motions to terminate their parental rights, they were living separately.

The current proceedings involving this family were initiated in October 2017. However, this is not the first time the family has been involved with either the juvenile court or the Department of Health and Human Services (the Department). In fact, the family has a lengthy history with the Department. In 2000, the Department was contacted twice regarding Steven and Jennette's treatment of an older son, who is not a subject of the current proceedings. Both reports indicated that Steven and Jennette were neglecting the older son, who was then an infant, by failing to properly feed him, failing to bathe him, and failing to obtain necessary medical care for him. In 2001, Steven and Jennette's older daughter, who is also not a subject of the current proceedings, was removed from their care after she was taken to the hospital and tested positive for opiates and marijuana. These children are no longer in the custody of Steven and Jennette.

In 2006, the Department received a report that Steven and Jennette were neglecting Steven Jr., who was then 1 year old. The reporter indicated that the family home was "in a very bad state and [was] very dirty with cat and dog feces in the house." In 2011, Steven and Jennette's niece, who was living with them, reported that both Steven and Jennette were physically abusive to her. She had injuries consistent with her reports. Testimony from the termination hearing revealed that Steven was ultimately convicted of sexually abusing the niece and was jailed for 1 year.

From 2013 to 2016, the Department received four additional reports regarding Steven and Jennette. Each of these reports

indicated that Steven and Jennette were neglecting Steven Jr., Genevive, and Aodhan by not bathing the children, not providing a clean and safe home environment, and not obtaining necessary medical care for them. After each of these reports, the Department provided services to assist the family. In March 2017, 6 months prior to the initiation of the current court proceedings, the Department received another report regarding Steven and Jennette's neglect of the children. This report indicated that Aodhan was not receiving necessary medical care and that the children smelled of urine and body odor.

On October 6, 2017, the current proceedings were initiated when the State filed petitions alleging that Steven Jr., Genevive, and Aodhan were within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016) due to the fault or habits of Steven and Jennette. We note that at the time the petitions were filed, the family was still receiving assistance from the Department based on previous issues of neglect.

Also on October 6, 2017, the State filed motions asking that the children immediately be placed in the custody of the Department. In support of the motions, the State provided an affidavit authored by a deputy with the Scotts Bluff County sheriff's office. The affidavit indicated that the deputy visited the family home on October 6, after the Department had received another report regarding Steven and Jennette's neglect of the children. The deputy stated that upon his arrival at the home, he "was almost immediately overwhelmed with the smell of ammonia, the source of which appeared to be cat urine." The deputy observed numerous dirty dishes and dirty laundry scattered throughout the house. In addition, there were cat feces on the floor and on some of the laundry. The deputy indicated that "this [w]as one of the worst homes he has been in while working for the Sheriff's Department." The deputy believed that the children needed to be removed from the home for their safety. Ultimately, the juvenile court granted the State's motions for temporary custody, placing the children in the custody of the Department and outside of Steven and

Jennette's home. The children have remained outside of their parents' home since October 6.

Subsequent to the State's filing the original petitions, the State filed amended petitions on November 17, 2017. In the amended petitions, the State alleged that the children were at risk for harm because they lacked safe and sanitary housing and because Steven was currently incarcerated and unable to care for the children. Steven ultimately admitted that portion of the amended petition which alleged that the children were at risk for harm due to his continued incarceration. Jennette ultimately admitted that portion of the amended petition which alleged that the children were at risk for harm because she was not providing them with safe and sanitary living conditions. Given the parents' admissions, the juvenile court found Steven Jr., Genevive, and Aodhan to be within the meaning of § 43-247(3)(a).

A disposition hearing was held on January 9, 2018. We note that the record from this hearing reflects that Jennette was present at the hearing, but because she had been recently arrested and jailed, she appeared at the hearing "in custody." Jennette had apparently been charged with child abuse; however, the exact circumstances surrounding this charge are not discussed in our record. Steven was also present at the hearing, because he was no longer incarcerated.

At the hearing, the juvenile court ordered that Steven and Jennette comply with the case plan recommended by the Department. That case plan included directives for both Steven and Jennette to participate in a psychological evaluation and a parenting assessment; to take steps to maintain a clean and safe home environment, including working with a family support worker; and to attend supervised parenting time with the children and demonstrate age-appropriate supervision for each child. The Department indicated that prior to the hearing, both Steven and Jennette had participated in a psychological evaluation and a parenting assessment. The parties noted that they were awaiting the results of that testing.

A review hearing was held in April 2018. At this hearing, Steven and Jennette were ordered to "follow the recommendations of the comprehensive parental capacity evaluations." These recommendations included participating with individual and family counseling and medication management. A subsequent review hearing was held in July 2018. At this hearing, the juvenile court changed the permanency goal from reunification to adoption with a concurrent goal of reunification. Steven and Jennette were again ordered to comply with the Department's case plan.

On July 20, 2018, the State filed motions to terminate Steven's and Jennette's parental rights. In the motions, the State alleged that termination was appropriate pursuant to Neb. Rev. Stat. § 43-292(2), (6), and (9) (Reissue 2016). The State also alleged that termination of Steven's and Jennette's parental rights was in the best interests of the children.

### 2. Termination Hearing Evidence

A hearing on the termination motions was held on September 27, 2018. At the hearing, the State called six witnesses to testify, including two Department caseworkers who had been assigned to the family's case, the clinical psychologist who conducted a psychological evaluation and a parenting assessment for both Steven and Jennette, Genevive and Aodhan's therapist, and Genevive and Aodhan's foster mother. The State's witnesses largely testified regarding Steven's and Jennette's failure to make any progress toward becoming appropriate parents for the children. Neither Steven nor Jennette fully took advantage of the rehabilitative services they were offered and ordered to complete. The witnesses also testified regarding the children's severe behavioral problems and the progress the children have made while living apart from their parents in foster care. In addition to the State's witnesses, Jennette called three witnesses to testify on her behalf. Each of these witnesses indicated that Jennette appeared to be an involved mother who had a bond with her children.

(a) Evidence Regarding Steven

As we mentioned above, in October 2017, when the current proceedings were initiated, Steven was in jail. Evidence in our record indicates that his incarceration was the result of being convicted of writing bad checks. When Steven was released, he lived with Jennette. However, at the July 2018 review hearing, both Steven and Jennette testified that they were no longer living together. Jennette indicated that she told Steven to leave her home because he was not working and she no longer wanted to support him. Steven indicated that he was homeless and was sleeping in a tent which he pitched in various locations, including, on occasion, Jennette's backyard. Despite not having adequate housing for himself or for his children, Steven expressed that his primary desire was to obtain a vehicle.

Steven was unemployed from the time of his release from jail through at least July 2018 when he obtained part-time employment. At the review hearing held in July, Steven testified that although he had applied for various jobs, he struggled with finding employment that would accommodate his scheduled visitation with the children. We note that by this time in the proceedings, Steven had visitation with the children only on weekends. The Department assisted both Steven and Jennette financially with such expenses as utilities, gas, and their telephones, but even with this assistance, they were unable to meet their own basic needs.

During the pendency of the juvenile court proceedings, Steven failed to consistently participate with family support services. He also failed to demonstrate his participation in individual therapy, despite his reports that he started attending therapy in July 2018. The only service that Steven consistently took advantage of was supervised visitation with the children. However, the Department had concerns about statements made by Steven to the children during the visitation sessions. In addition, because of Steven's and Jennette's living situations, the visits never took place in their home. The visits with

Genevive and Aodhan took place at a visitation center, and the visits with Steven Jr. took place in a motel room, because he had been placed in a foster home in Omaha, Nebraska.

By the time of the termination hearing, Steven and Jennette saw their children every other weekend. They would have a visit with Genevive and Aodhan every other weekend and would have a visit with Steven Jr. on alternating weekends. Both of the Department caseworkers assigned to the case testified that during visits with the children, Steven and Jennette failed to follow through with disciplining the children, despite their behaviors, and as a result, struggled to control the children. They also spent a great deal of time looking at their telephones instead of interacting with the children and were sometimes not fully prepared with everything necessary to care for the children. Steven had to be repeatedly prompted to change Aodhan's diapers prior to the time he became potty trained. When asked, Steven and Jennette both indicated their belief that visits with the children were going well.

The results of Steven's psychological evaluation and parenting assessment further indicated the deficiencies in his parenting abilities. Dr. Gage Stermensky, the clinical psychologist who performed the evaluations on Steven, testified at the termination hearing that based upon the results of his evaluations, he believed that Steven currently lacked the ability to sufficiently care for his children. Stermensky testified that Steven suffered from bipolar disorder, antisocial personality disorder, and anxiety disorder. Antisocial personality disorder in particular can cause impulsivity and difficulty with being taught new skills or with being supervised. Furthermore, Stermensky said that Steven lacked insight into how his behaviors and actions impacted his children and that he lacked empathy for others and displayed an inability to meet his basic needs.

Stermensky opined that Steven would benefit from both behavioral therapy and medication compliance. Steven informed Stermensky that he was not currently taking any

medication because he could not afford to pay for the prescriptions. Stermensky indicated that there are programs available which provide assistance with the cost of prescriptions for mental health issues. Stermensky testified that ultimately, Steven's prognosis was "guarded" in that Stermensky had concerns about whether Steven would ever gain the capacity to be an appropriate parent. Such concerns included Steven's lengthy history of involvement with the Department without any significant or maintained improvements. Stermensky noted that even with the Department's help, Steven was still unable to meet his own basic needs. And, Stermensky questioned whether Steven would ever be able to meet his children's needs. Stermensky testified that given Steven's history, he would need to demonstrate improvement over a lengthy period of time, rather than just for a few months, prior to any change in his status with regard to the children.

There was evidence presented by the State's witnesses regarding allegations that Steven either had sexually abused Genevive or was grooming her for such sexual abuse. Genevive's foster mother, Susan M., testified that Genevive had disclosed multiple instances of sexual abuse, including reports of Steven's touching her with his penis and Jennette's taking pictures of her when she was not wearing any clothes. Susan also testified that Genevive displays sexualized behaviors, including masturbating "all the time." Similarly, Genevive's therapist, Mandy Price, testified at the termination hearing that Genevive had displayed sexualized behavior at school in addition to in her foster home. For example, Genevive wrote a letter to a high school football player expressing her desire to have a sexual relationship with him. Price testified that in her opinion, 6-year-old Genevive was able to describe sexual intercourse at a level "probably above the normal developmental stage." Genevive reported to Price, completely unprompted and "out of the blue," that Steven had touched her on her bottom with his penis. When Genevive made this report, she asked Price not to tell anyone about this information and she said she did

not want to disclose any further information about the incident. Price testified that she did not believe that Genevive's disclosures were the result of anyone "coaching" her about what to say.

While both Steven and Jennette denied the allegations of sexual abuse during the current proceedings, Jennette had previously reported her own concerns about Steven's relationship with Genevive. When Genevive was younger, Jennette took Genevive to the hospital with concerns that Steven was molesting her because he took too long to change her diapers. And, during a prior court proceeding, Jennette asked that Steven have only supervised visits with Genevive because of concerns that he was sexually abusing her. Moreover, as we noted above, Steven had previously been convicted of sexually abusing his young niece.

(b) Evidence Regarding Jennette

The children were initially removed from the family home due to its unsanitary and unsafe condition. Throughout the proceedings, Jennette had made some efforts to improve the home; however, by the time of the termination hearing, the condition of the home remained an issue. Jennette did pay to fix some of the subflooring in the home, to fix water damage present on the ceiling, and to build an enclosed porch. However, a "[v]ery potent" smell still existed in the home. The most recent Department caseworker, Abbie Wiebesiek, described the smell as consisting of "cat urine [and] old garbage." In addition, in February and March 2018, there was no electricity in the home and it was very cold. Wiebesiek testified that she had not visited the home since June because Jennette was no longer being cooperative about allowing her to walk through the home. In fact, Jennette essentially cut off contact with the Department in June after she was informed that the State was seeking termination of her parental rights.

Additionally, there was evidence that Jennette had a boyfriend who appeared to be living at her home. Jennette acknowledged

that Steven Jr. did not like her boyfriend. There was also evidence that the boyfriend was "aggressive" toward Steven Jr. and regularly used marijuana. Wiebesiek indicated that there was a "strange relationship dynamic" between Jennette, Steven, and Jennette's boyfriend.

Jennette acquired full-time employment in March 2018. Around this same time, she worked with family support to establish a budget for her monthly income so that she could pay for improvements to the family's home, help pay for travel to Omaha to visit Steven Jr., and save for the future. However, in July 2018, Jennette voluntarily terminated her employment, with no explanation. Jennette lied to the Department for the next 3 months about her employment status—she continued to report that she was employed, when she was not.

Jennette attended visitations with her children on a fairly consistent basis. However, as we discussed above, Jennette's behavior during the visitations was not always appropriate. She and Steven struggled to control the children, failed to consistently discipline them, and spent a great deal of time looking at their telephones. In addition to this behavior, Jennette would often speak with the children about inappropriate topics, including her relationship with Steven and the problems they were having as a couple.

Stermensky, who also completed a psychological evaluation and parenting assessment on Jennette, testified that she currently lacked the ability to sufficiently care for her children. Stermensky indicated that Jennette suffered from schizoaffective disorder, bipolar type. He explained that this disorder can cause disorganized thinking, a diminished ability to meet hygienic needs, manic and depressive episodes, and hallucinations. In addition, Jennette reported having poor coping skills and amplified psychosis and decompensation when she is experiencing a stressful situation. Stermensky indicated that Jennette did not recognize the full extent of her mental health symptoms or how those symptoms impacted the home environment.

Stermensky believed that medication compliance and therapy could mitigate Jennette's symptoms significantly and improve her ability to effectively parent her children. However, during her evaluation, Jennette told Stermensky that she had not "liked" the medications so she had stopped taking them. As a result, Jennette had not had any treatment for her disorder in an extended period of time. Stermensky recommended that Jennette engage in a long-term treatment program and that her visitation with the children be limited to therapeutic interactions.

Ultimately, Stermensky had serious concerns about Jennette's ability to gain the capacity needed to effectively parent her children. He noted that Jennette had been receiving assistance from the Department for quite some time, but had been unable to show any marked improvement in her parenting abilities. Stermensky stated, "The best predictor of, you know, future behavior is past behavior." He also noted that he had concerns about Jennette's relationship with her boyfriend and how that relationship may affect her ability to parent. Stermensky indicated that Jennette may allow individuals to be a part of her and her children's lives, even when that would not be in the children's best interests.

Evidence in the record indicated that after Jennette's evaluations with Stermensky, she affirmatively stated that she was participating in individual counseling. However, she failed to ever provide proof of her attendance. In addition, there was no evidence to indicate that she was taking any medication for her mental health problems. The record also indicated that by the time of the termination hearing, Jennette was reporting that she was pregnant again.

Jennette called three of her own witnesses to testify at the termination hearing. Two of these witnesses were workers who had visited the family's home to assist with the children's education and behavioral issues, prior to the children's removal in October 2017. Each of these witnesses testified that Jennette was very involved with the assistance programs

and was cooperative with their efforts. The witnesses testified that all of the children appeared bonded with Jennette. Each of the witnesses also indicated that the family's home had a strong smell and that keeping the home clean and sanitary was something that had to be addressed on more than one occasion. Jennette's third witness was a visitation worker who observed Jennette with Genevive and Aodhan after their removal. This witness testified that Jennette had demonstrated positive parenting skills and that the two younger children appeared to be bonded to Jennette. The witness also indicated that he had seen an improvement in the visits over time—the visits were calmer and the children were listening better and fighting less.

(c) Evidence Regarding Children's Behavioral Issues

The State presented evidence focused on the children's behavioral issues and the improvements they have made while living in foster care. Steven Jr. has been diagnosed with Sturge-Weber syndrome, which causes seizures, developmental delays, and lower cognitive functioning. When the children were initially removed from Steven and Jennette's home in October 2017, they were all placed in the same foster home with Susan. Susan testified at the termination hearing that when Steven Jr. first arrived at her home, he had "[a] lot" of specialized needs. He would have "fits" if he did not get his way. Although he was 12 years old, he would still have accidents by urinating on himself. In addition, he was violent toward Genevive and Aodhan, hitting, kicking, and pinching them. He also threatened to harm everyone in his foster home. Susan described Steven Jr. as functioning more at the level of a 5 or 6 year old than a 12 year old. He was unable to meet any of his basic needs. Almost immediately after being placed in Susan's home, Steven Jr. needed to be hospitalized as a result of his seizures and the need to regulate his antiseizure medication.

After a month with Susan, Steven Jr. moved to a more specialized foster home in Omaha. Since his move, he had

made some improvements in his behavior, but he continued to be "very easily frustrated" and to have accidents where he urinated or defecated on himself. These problems were particularly prevalent both during and after Steven Jr.'s visits with his parents. Steven Jr.'s foster mother in Omaha enrolled Steven Jr. in special education classes and was working with him on learning to read.

In addition to the sexualized behavior exhibited by Genevive, she was described as being bossy, controlling, and untruthful. While Genevive had made improvements in her behavior during her time in foster care, she struggled after visits with her parents. Genevive had nightmares for 3 or 4 days after every visit. During these nightmares, she would wake up screaming. Genevive described these nightmares to Price, indicating that in the dreams Jennette would appear as a "monster" or would be "shooting people." Price testified that the consistency and regularity of the nightmares was concerning.

At the time of his removal in October 2017, Aodhan was 4 years old, but was not yet potty trained and was unable to speak well. Susan testified that Aodhan's behavior was "horrible." He reacted physically when he was told "no," including biting, hitting, kicking, and scratching. He called people derogatory names but, in other respects, he still acted younger than his age. Susan testified that Aodhan was also abusive to animals. She caught him attempting to drown one of the family's puppies and a couple of their cats. Price, who also acted as Aodhan's therapist for a few months, diagnosed him as suffering from an adjustment disorder.

In the time Aodhan had been in foster care, Susan testified that his behaviors had improved. She said he was calmer, was less physical when angry, and accepted discipline and redirection. In fact, Price testified that she decreased the frequency of Aodhan's therapy visits. However, after visits with his parents, Aodhan would "fight[]" in his sleep and ask to sleep with his foster father for comfort. In addition, he would regress in his

potty training, be more violent, use inappropriate language, and revert to acting younger than his age.

### 3. Juvenile Court's Order

On December 14, 2018, the juvenile court entered an order terminating Steven's and Jennette's parental rights to Steven Jr., Genevive, and Aodhan. The court found that the State had proved that termination of Steven's and Jennette's parental rights was warranted pursuant to § 43-292(2) and (6) and that termination was in the children's best interests. In the order, the court found:

> [I]n these cases, the system has run out of reasonable options and the prospects are dim that additional time will be of any benefit. Both parents have shown they are unwilling or incapable of rehabilitating themselves in the foreseeable future to properly parent these children. The system cannot and should not allow children to languish in foster care waiting to see if a parent will mature.

The court also specifically found "clear and convincing evidence exists that the parental circumstances and conditions at issue in these cases are long-standing and have existed over the course of many years." Additionally, while the court noted that the parents' efforts to consistently participate in supervised visitations with their children during the pendency of the proceedings was "commendable," the court ultimately found that "being a parent requires more than attending every other weekend visitations and necessitates acquiring the wherewithal to be a consistent, positive presence for a child's everyday basic needs, something far different than the parenting described in these cases."

Steven appeals, and Jennette cross-appeals, from the juvenile court's order.

## III. ASSIGNMENTS OF ERROR

On appeal, Steven alleges that the juvenile court erred in finding that there was sufficient evidence to prove (1) the

relevant statutory grounds for termination of his parental rights and (2) that termination of his parental rights was in the children's best interests.

On cross-appeal, Jennette also alleges that the juvenile court erred in finding that there was sufficient evidence to prove (1) the relevant statutory grounds for termination of her parental rights and (2) that termination of her parental rights was in the children's best interests.

## 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 Ryder J.*, 283 Neb. 318, 809 N.W.2d 255 (2012). When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *Id.*

## V. ANALYSIS

### 1. Steven's Appeal

#### (a) Statutory Factors

[2] The bases for termination of parental rights in Nebraska are codified in § 43-292. Section 43-292 provides 11 separate conditions, any one of which can serve as the basis for the termination of parental rights when coupled with evidence that termination is in the best interests of the child. *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010).

In its order terminating Steven's parental rights to Steven Jr., Genevive, and Aodhan, the juvenile court found that the State had presented clear and convincing evidence to satisfy § 43-292(2) and (6). The relevant portions of § 43-292 provide as follows:

> 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; [and]
>
> . . . .
>
> (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.

[3] In his brief on appeal, Steven asserts that the juvenile court erred in finding that termination of his parental rights was warranted pursuant to § 43-292(2) or (6). Contrary to Steven's assertions, upon our de novo review of the record, we find that the State presented clear and convincing evidence to prove that termination of Steven's parental rights to his three children was warranted pursuant to § 43-292(2). The evidence presented at the termination hearing revealed that Steven had failed to provide his children with necessary parental care and protection for a significant period of time. Additionally, Steven had failed to put himself in a position to achieve reunification after his children were removed from his care. A parent's failure to provide an environment to which his or her children can return can establish substantial, continual, and repeated neglect. See *In re Interest of Joseph S. et al.*, 291 Neb. 953, 870 N.W.2d 141 (2015).

Steven's children, Steven Jr., Genevive, and Aodhan, were placed in the custody of the Department and outside of Steven's home for approximately 10 months prior to the time the State filed its motion to terminate Steven's parental rights in July 2018. During that 10 months, Steven failed to obtain appropriate housing. While he initially resided in the family

home with Jennette, by the time of the termination hearing, he was homeless. He lived in a tent and traveled from backyard to backyard. Despite his tenuous living situation, Steven remained unemployed through July 2018, when the motion to terminate his parental rights was filed. And, although he had obtained some employment, it was only part-time work. Steven had expressed to the Department caseworkers that his primary goal was to obtain a vehicle, not a house. According to the Department caseworkers who worked with Steven, he had demonstrated that he was incapable of providing for even his own basic needs. As such, it was clear that he was not capable of providing for the extensive needs of his children, who, because of their behavioral issues, need a great deal of routine and structure.

Also during the 10 months prior to the filing of the motion to terminate his parental rights, Steven failed to participate in individual therapy and failed to demonstrate compliance with necessary medication management for his mental health issues. Stermensky opined that without such intervention, Steven would remain incapable of being an appropriate parent to his children. Steven also did not take full advantage of the family support worker available to assist him in meeting his basic needs.

Even when Steven was physically present with the children during visitations, he often neglected their needs. Evidence presented at the termination hearing revealed that Steven needed to be prompted to change Aodhan's diapers. He also failed to bring necessary supplies to visitations and spent a great deal of time looking at his telephone, rather than engaging with his children.

In our review of the record, we find sufficient evidence to demonstrate that, notwithstanding Steven's release from jail, his circumstances have remained virtually unchanged from the time of the children's removal in October 2017 to the time the State filed its motion to terminate his rights in July 2018. In fact, in some respects, Steven's circumstances have declined

since October 2017. He had made virtually no progress toward becoming an adequate parent for his children, despite the efforts of the Department and the juvenile court. Moreover, we note that Steven had a lengthy history of involvement with the Department and the juvenile court, but he had not yet demonstrated an ability to maintain any sort of long-term progress toward becoming an adequate parent even with years of assistance. Steven had not demonstrated that he could provide the children with the stability that they so desperately need. Steven had simply failed to provide an environment to which his children could return, and he had substantially, continuously, and repeatedly neglected Steven Jr., Genevive, and Aodhan.

Upon our de novo review of the record, we agree with the juvenile court's finding that the State presented sufficient evidence to demonstrate that Steven had substantially and continuously or repeatedly neglected and refused to give Steven Jr., Genevive, and Aodhan necessary parental care and protection pursuant to § 43-292(2). We find that the juvenile court did not err in finding that termination of Steven's parental rights was warranted pursuant to § 43-292(2).

[4] 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 Justin H. et al.*, 18 Neb. App. 718, 791 N.W.2d 765 (2010). Therefore, this court need not review termination under § 43-292(6).

Once a statutory basis for termination has been proved, the next inquiry is whether termination of parental rights is in the children's best interests.

(b) Best Interests

[5-7] Under § 43-292, once the State shows that statutory grounds for termination of parental rights exist, the State

must then show that termination is in the best interests of the child. *In re Interest of Ryder J.*, 283 Neb. 318, 809 N.W.2d 255 (2012). A child's best interests are presumed to be served by having a relationship with his or her parent. *In re Interest of Isabel P. et al.*, 293 Neb. 62, 875 N.W.2d 848 (2016). This presumption is overcome only when the State has proved that the parent is unfit. *Id*. 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 has caused, or probably will result in, detriment to a child's well-being. *Id*. The best interests analysis and the parental fitness analysis are fact-intensive inquiries. *Id*. And while both are separate inquiries, each examines essentially the same underlying facts as the other. *Id.*

In his brief on appeal, Steven argues that the State failed to present sufficient evidence to prove that termination of his parental rights was in the children's best interests. He asserts that the evidence presented at the termination hearing revealed that he had a "strong bond" with his children and that his relationship with them was "beneficial." Brief for appellant at 19. Upon our de novo review of the record, we cannot agree with Steven's characterization of the evidence presented at the termination hearing. While there was limited evidence which suggested that the children enjoyed visits with Steven, the overwhelming evidence demonstrated that Steven's relationship with the children was harmful to them, and certainly not beneficial.

As we discussed more thoroughly above, each of the children have rather significant behavioral issues. During the pendency of these proceedings while the children resided in foster care, many of the children's behaviors improved or disappeared. However, whenever the children had visits with their parents, the children regressed and their behaviors

worsened. Steven Jr. would urinate or defecate on himself either during or immediately after his visits with his parents. Genevive would have nightmares for 3 or 4 days after each visit. Similarly, Aodhan would struggle to sleep after visits. He would "fight[]" in his sleep and ask to sleep with his foster father for comfort. In addition, Aodhan would act out more after visits, including acting younger than his age and using inappropriate language. The children's negative reactions to visits coupled with the recommendations of the professionals involved with this case resulted in Steven's visitation with the children never transitioning from fully supervised visits. Moreover, by the end of the proceedings, Steven was still only seeing his children every other weekend. We agree with the juvenile court's statement that being a parent requires more than attending brief visitations with the children every other weekend. Such limited time with the children does little to demonstrate either Steven's parenting abilities or the strength of his bond with his children.

Throughout the proceedings, Steven demonstrated an unwillingness or an inability to take steps toward improving his housing situation, his financial circumstances, or his mental health. As a result of Steven's failure to make any progress on these goals, he was no closer to achieving reunification with his children than he was at the start of the proceedings in October 2017. At the termination hearing, Wiebesiek testified that termination of Steven's parental rights was in the children's best interests for multiple reasons:

> For lack of case plan progress and continued concerns with sexual abuse. [Steven has] had two other children removed from the home that have been adopted. There's been prior investigations throughout every child's life, including one that wasn't [Steven's] own child. There ha[s] been a criminal charge of the sexual abuse for another child.
>
> . . . .

> [There has been no] [f]inancial and housing stability and [Steven is unable] to meet [Steven Jr.'s] needs especially.

Wiebesiek also testified that Steven had not demonstrated any consistent progress or stability.

Based upon our review of the record, we agree with Wiebesiek's testimony that termination of Steven's parental rights was in all three children's best interests. The children should no longer have to wait for Steven to put them ahead of his own needs and wants. They should no longer have to wait for Steven to decide to make improvements to his current situation. The evidence presented revealed that Steven was not a fit parent for his children and that he was not capable of becoming a fit parent any time in the near future. The children need, and deserve, permanency. As such, we affirm the decision of the juvenile court which found that termination of Steven's parental rights was in Steven Jr.'s, Genevive's, and Aodhan's best interests.

### 2. Jennette's Cross-Appeal

At the outset, we note that Jennette failed to comply with the rules regarding cross-appeals. See Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2014). Steven was the first party to file a notice of appeal, and therefore, he was the appellant. However, pursuant to Neb. Ct. R. App. P. § 2-101(C) (rev. 2015), once a notice of appeal is filed, all other parties become appellees and can file a cross-appeal. Here, Jennette properly designated herself as an appellee and as a cross-appellant when she filed a "BRIEF OF APPELLEE/CROSS APPELLANT."

[8] As a cross-appellant, Jennette was required to comply with the rules on cross-appeals, including the requirement that she designate on the cover of her brief that it is a cross-appeal, and set forth her cross-appeal in a separate division of the brief entitled "Brief on Cross-Appeal." See § 2-109(D)(4). On her brief's cover, Jennette does not specifically indicate that the brief contains a cross-appeal; however, she does title

her brief as "BRIEF OF APPELLEE/CROSS APPELLANT, JENNETTE S[.]" Other than the cover, Jennette prepared her brief as though she was an appellant, and while it does not conform to § 2-109(D)(4) ("shall be set forth in a separate division of the brief" entitled "Brief on Cross-Appeal"), it is prepared consistent with § 2-109(D)(1) (requirements for brief of appellant). Given Jennette's failure to fully comply with § 2-109(D)(4), we must determine whether her brief sufficiently complies with our appellate court rules in order for this court to consider her assigned errors or, alternatively, whether we should limit our examination of the record for plain error only or provide no review at all. See, e.g., *In re Interest of Justine J. & Sylissa J.*, 288 Neb. 607, 849 N.W.2d 509 (2014) (holding that where brief of party fails to comply with mandate of § 2-109(D), appellate court may proceed as though party failed to file brief or, alternatively, may examine proceedings for plain error). We conclude that Jennette's brief has complied with the rules for an appellant's brief which seeks affirmative relief, and the cover of her brief states she is a "CROSS APPELLANT," thus notifying this court from the outset that she is seeking affirmative relief. Her notification that affirmative relief is being sought is critical to our decision, as we discuss next.

Recently, in *In re Interest of Becka P. et al., ante* p. 489, 933 N.W.2d 873 (2019), this court considered the arguments of an appellee and cross-appellant, despite the lack of full compliance with § 2-109(D)(4). In *In re Interest of Becka P. et al.*, the juvenile court terminated the parental rights of both parents. The father filed the only notice of appeal and was thus the appellant. This court noted that all other parties became appellees and could file a cross-appeal. The mother filed a "'Brief of Appellee on Cross Appeal,'" but otherwise, prepared her brief in the form of an appellant's brief and did not separately respond to the father's appellant's brief other than to accept his statement of the basis of jurisdiction and statement of the case. *In re Interest of Becka P. et al., ante* at 511,

933 N.W.2d at 889. This court stated: "Although [the mother's] brief violates the portion of the rule requiring a separate section for a cross-appeal, because the form and presentation of her assignments of error conform with the rules applicable to an appellant's brief, we may consider the arguments raised in her brief." *Id*. at 513, 933 N.W.2d at 890. In support, this court cited to *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (1994) (appellee designated himself on cover of brief as appellant rather than as appellee/cross-appellant), and *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990) (appellees designated themselves on cover of briefs as appellants rather than as appellees and cross-appellants).

In *Knaub v. Knaub, supra*, an ex-husband sought to modify child support and alimony; the district court dismissed his action and assessed attorney fees against the ex-husband and his attorney based on the action being frivolous. The attorney filed the first notice of appeal in his own behalf (challenging sanctions), followed by the ex-husband filing a notice of appeal. The Nebraska Supreme Court pointed out that the attorney became the appellant and that the ex-husband was thus an appellee. The Supreme Court observed that the ex-husband

> failed to designate his brief as a cross-appeal and failed to set forth a separate section within his brief titled "Brief on Cross-Appeal." Although this violates our rule regarding the presentation of a cross-appeal, the form and presentation of [the ex-husband's] assignments of error conform with the rules applicable to an appellant's brief.

*Id*. at 175-76, 512 N.W.2d at 127. The Supreme Court proceeded to consider the ex-husband's arguments raised in his brief.

In *In re Interest of Becka P. et al., supra*, this court also distinguished *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999), and *In re Interest of Chloe P.*, 21 Neb. App. 456, 840 N.W.2d 549 (2013); both cases involved juvenile court proceedings from which each parent appealed

from a final order. In *In re Interest of Natasha H. & Sierra H.*, 258 Neb. at 144, 602 N.W.2d at 450, the father was the second parent to file a notice of appeal; he titled his brief as "'Brief of Appellee.'" The Supreme Court noted that the father was "not merely resisting the claims of the appellant," but was "seeking affirmative relief." *In re Interest of Natasha H. & Sierra H.*, 258 Neb. at 144, 602 N.W.2d at 450. The Supreme Court cited to several cases for the proposition that a cross-appeal must be properly designated if affirmative relief is to be obtained, but also cited to *Knaub v. Knaub, supra*, and *In re Application A-16642, supra*, as cases where it had considered assigned errors even though the appellee or cross-appellant had "mistakenly" designated themselves as appellants. *In re Interest of Natasha H. & Sierra H.*, 258 Neb. at 145, 602 N.W.2d at 450. The Supreme Court stated that the factor distinguishing *Knaub v. Knaub, supra*, and *In re Application A-16642, supra*, from the case before it was that in those two cases "a party who was an appellee and should have cross-appealed mistakenly designated itself as an appellant, rather than as a cross-appellant," whereas in the case before it, "the party that should have cross-appealed designated itself as an appellee, yet still sought affirmative relief." *In re Interest of Natasha H. & Sierra H.*, 258 Neb. at 146, 602 N.W.2d at 451. The court went on to state:

> In short, *the appellate courts of this state have always refused to consider a prayer for affirmative relief where such a claim is raised in a brief designated as that of an appellee.* We have, in the past, decided to entertain a procedurally defective cross-appeal only where such cross-appeal has been mistakenly asserted as an appellant's brief. Even this is a matter left solely to the discretion of the courts and does not imply a willingness to consider such defective appeals in the future.
>
> Parties wishing to secure appellate review of their claims for relief must be aware of, and abide by, the rules of this court and the Court of Appeals in presenting such

> claims. Any party who fails to properly identify and present its claim does so at its peril. See *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998). [The father] has not complied with the rules of this court in the instant case, and we decline to waive those rules on his behalf.

*In re Interest of Natasha H. & Sierra H.*, 258 Neb. at 146-47, 602 N.W.2d at 451 (emphasis supplied).

In *In re Interest of Chloe P.*, 21 Neb. App. at 470, 840 N.W.2d at 560, the father was the second to file a notice of appeal and he titled his brief as "'Brief of Appellee.'" Although the father assigned errors and sought affirmative relief, he did not designate a cross-appeal on the cover of his brief, nor did he set forth a separate division of the brief designated as a cross-appeal. Relying on *In re Interest of Natasha H. & Sierra H., supra*, this court declined to waive the rules and address the father's assigned errors (noting, however, that the father's assigned error challenging the juvenile court's adjudication order was addressed in the section responding to the mother's assigned error on the same issue).

The key distinction in the above-cited cases is whether the cover and content of the brief puts an appellate court on notice that a party is seeking affirmative relief, whether identifying as an appellant or a cross-appellant. Designation only as an appellee does not provide such notification. Further, if an appellee and cross-appellant's position aligns with the appellant's position, as is often the case in juvenile court adjudications and parental termination cases, there is usually no reason to separately respond as an appellee. Thus, if the cover of a brief is sufficiently labeled to put the appellate court on notice that affirmative relief is being sought, the absence of a separately divided section in the brief designated "Brief on Cross-Appeal" may not necessarily preclude full review so long as there is compliance with the rules pertinent to the content of an appellant's brief. See § 2-109(D). However, if an appellee and cross-appellant does respond to an appellant's assigned errors, a separately divided section titled "Brief on Cross-Appeal"

would be necessary. We caution, however, that while an appellate court may decide to waive strict adherence to the briefing rules under such circumstances, it is not required to do so. As indicated earlier, a party who fails to comply with the appellate court rules does so at his or her peril. See *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999). Depending on the particulars of each case, failure to comply with the mandate of § 2-109(D) may result in an appellate court proceeding as though the party failed to file a brief or, alternatively, proceeding on a plain error review only. See *In re Interest of Justine J. & Sylissa J.*, 288 Neb. 607, 849 N.W.2d 509 (2014).

[9] In the present matter, Jennette, like the mother in *In re Interest of Becka P. et al., ante* p. 489, 933 N.W.2d 873 (2019), noted her desire to cross-appeal from the juvenile court's decision by her designation as "CROSS APPELLANT" on the cover of her brief. Jennette also properly assigned errors and raised her arguments on appeal in a manner consistent with the requirements for an appellant's brief as provided in § 2-109(D)(1). As in *In re Interest of Becka P. et al.*, Jennette did not include a separately divided section titled "Brief on Cross-Appeal" because she did not respond to the arguments raised by the appellant as would typically be seen in an appellee's brief. Accordingly, we conclude Jennette sufficiently put this court on notice that she was seeking affirmative relief by designating herself as a cross-appellant on the cover of her brief and preparing it in compliance with § 2-109(D)(1); we therefore waive the requirement that the cross-appeal be set forth in a separate section of the brief when no appellee's brief responding to the appellant's arguments is filed. An appellate court may consider a party's cross-appeal, even though the party's brief violated § 2-109(D)(4) requiring a separate section for a cross-appeal, where the form and presentation of the assignments of error in the party's brief conformed with § 2-109(D)(1), which applies to an appellant's brief.

We now consider the errors assigned in Jennette's brief.

(a) Statutory Factors

Jennette asserts that the juvenile court erred in finding that termination of her parental rights was warranted pursuant to § 43-292(2) or (6). Contrary to Jennette's assertions, upon our de novo review of the record, we find that the State presented clear and convincing evidence to prove that termination of Jennette's parental rights to her three children was warranted pursuant to § 43-292(2). As in our analysis of Steven's challenge to the statutory factors to support termination of his parental rights, we find that the evidence presented at the hearing revealed that Jennette had failed to provide her children with necessary parental care and protection for a significant period of time. She had also failed to put herself in a position to achieve reunification after her children were removed from her care.

During the 10 months the children were placed outside of Jennette's care, she failed to adequately renovate her home. By the time of the termination hearing, the home remained unsafe, unsanitary, and inappropriate for the children. There was evidence that Jennette had made efforts to fix the problems with the home, and at one point, she was even setting aside money in her budget to make renovations. However, Jennette's efforts in this regard seemed to taper off during the summer of 2018, when Jennette voluntarily terminated her employment for an unknown reason. Without a steady stream of income, it was unclear how Jennette planned to maintain and renovate the home so that it could be made appropriate for the children.

Additionally, there was evidence presented at the hearing that Jennette's boyfriend was either living with her at her home or was present at the home often. There was also evidence that the children did not like Jennette's boyfriend and that the boyfriend had been "aggressive" toward Steven Jr. Jennette's choice to continue to have her boyfriend in her life and in her home despite the objections of both her children and the Department was concerning, especially in light of

Stermensky's belief that Jennette may allow individuals to be a part of her and her children's lives, even when that would not be in the children's best interests.

Also during the 10 months prior to the filing of the motion to terminate her parental rights, Jennette failed to demonstrate compliance with any sort of mental health treatment plan. She indicated to Stermensky that she was unwilling to take necessary medications. She also failed to prove that she was attending individual therapy. Stermensky indicated that medication compliance and therapy could improve Jennette's ability to effectively parent her children. Her failure to take advantage of the treatment available to her demonstrated an unwillingness to make improvements in her own life for the sake of her children.

Perhaps because of her ongoing mental health problems, Jennette had demonstrated a long-term inability to care for her children's basic needs, including their medical care. Both Steven Jr. and Aodhan suffered from significant physical ailments while in Jennette's custody, and the Department became involved with the family multiple times as a result of Jennette's failure to obtain necessary medical care and failure to keep the children clean and safe. Despite the years of assistance provided to Jennette by the Department, she failed to demonstrate any sustained improvement in either her parenting skills or her ability to maintain a sanitary and safe home environment. Moreover, evidence presented at the hearing revealed that Jennette had previously had her parental rights to two older children terminated as a result of her neglect of their needs.

During the pendency of the current court proceedings, Jennette attended visitation with the children on a regular basis. However, as was the case with Steven, Jennette did not always act appropriately during the visits. She routinely discussed inappropriate topics with the children. She was often unable to control the children's behaviors and provided inconsistent discipline. She did not give the children her full

attention, even during the limited opportunities she had to see them.

As the termination hearing approached, Jennette stopped cooperating with the Department and its attempts to assist her. Jennette lied to her caseworker about quitting her job. Jennette pretended to be employed for months after she left her job. Jennette also stopped letting the caseworker visit her home. In both January and February 2018, Jennette was jailed on charges of child abuse.

In our review of the record, we find sufficient evidence to demonstrate that Jennette made very little progress toward reunification with her children from the time of their removal in October 2017 to the time the State filed its motion to terminate her parental rights in July 2018. Jennette had demonstrated an inability to provide the children with safety and stability. She could not provide them with safe and appropriate housing. She was not employed. She had chosen to live with someone who did not have a positive relationship with the children. Moreover, despite the numerous services offered to Jennette by the Department, both during the current proceedings and over the last decade, Jennette had demonstrated an unwillingness to take the necessary steps to improve her parenting abilities.

Upon our de novo review of the record, we agree with the juvenile court's finding that the State presented sufficient evidence to demonstrate that Jennette had substantially and continuously or repeatedly neglected and refused to give Steven Jr., Genevive, and Aodhan necessary parental care and protection pursuant to § 43-292(2). As such, we turn to our analysis of whether termination of Jennette's parental rights was in the children's best interests.

(b) Best Interests

In her brief on appeal, Jennette argues that the juvenile court erred in finding that termination of her parental rights was in the children's best interests. She asserts that she has a strong

bond with the children and that "she has made improvements in her parenting skills that can be used to provide for the needs of her children." Brief for appellee on cross-appeal at 14. Upon our review, we affirm the decision of the juvenile court that termination of Jennette's parental rights was in the children's best interests.

Jennette did present evidence which demonstrated that she made attempts to be involved in her children's education and that the children appeared content with Jennette. However, the overwhelming evidence presented at the hearing revealed that Jennette's continued relationship with the children was detrimental to their well-being. As we discussed in our analysis of Steven's appeal, the children had significant behavioral issues when they were removed from Jennette's care. During the children's time in foster care, their behaviors improved somewhat. Despite this improvement, the children regressed dramatically after visits with their parents. Genevive, in particular, appeared to react very negatively to seeing Jennette. Genevive would have nightmares after visits. In these nightmares, Jennette would appear as a "monster" or would be "shooting people." By the time of the termination hearing, Jennette was seeing her children for a brief period of time every other weekend. Such limited contact with the children and with such negative behaviors occurring after that contact was not indicative of a strong bond between Jennette and the children.

Despite Jennette's contentions in her brief on appeal, the evidence presented at the hearing did not reveal that she had made progress toward becoming an appropriate and effective parent. Jennette did obtain employment during the court proceedings. However, by the time of the hearing, she had voluntarily terminated this employment. Jennette had made some improvements on her home, but not enough improvements to make it a safe or sanitary living environment. Jennette failed to follow the recommendations of Stermensky and did not address her mental health problems. She was jailed twice on

charges of child abuse. She chose to continue a relationship with a man who did not get along with her children. Taken together, the evidence presented revealed that Jennette's circumstances had remained virtually unchanged since the initiation of the court proceedings.

At the termination hearing, Wiebesiek testified that Jennette had made poor progress since the removal of her children. Wiebesiek explained that Jennette had made no improvements in parenting skills and failed to follow through with the tenets of the court-ordered case plan. Wiebesiek opined that termination of Jennette's parental rights was in the children's best interests.

Based upon our review of the evidence, we agree with Wiebesiek's opinion that termination of Jennette's parental rights was in all three children's best interests. The children should no longer have to wait for Jennette to put them ahead of her own needs and wants. Jennette is currently not a fit parent, and given her lengthy history of involvement with the Department, it appears that she will not become a fit and capable parent any time in the near future. We affirm the decision of the juvenile court which found that termination of Jennette's parental rights was in Steven Jr.'s Genevive's, and Aodhan's best interests.

## VI. CONCLUSION

We conclude that the State proved statutory grounds for termination of Steven's and Jennette's parental rights to Steven Jr., Genevive, and Aodhan and proved that termination is in the children's best interests. As such, we affirm the decision of the juvenile court.

Affirmed.

Arterburn, Judge, concurring.

I agree with the analysis in the court's opinion as to Steven's appeal. I also agree that the evidence presented at the termination hearing was sufficient to support the county court's

determination that Jennette's parental rights should be terminated. However, I disagree with the manner in which the majority herein has reached its decision. I take this position based on my reading of the case law relating to the issue of compliance with Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2014), case law that should, in my opinion, be reexamined.

The decision to terminate a mother's or father's parental rights is among the most serious and difficult decisions a court is called upon to make. Unfortunately, the appellate courts of this state have frequently been asked to weigh whether a person's fundamental right to parent their child should be affected by procedurally deficient briefs filed on behalf of that parent. This scenario frequently occurs when the second parent to seek appellate review of a trial court's decision to terminate parental rights fails to follow the requirements of § 2-109(D)(4). In cases decided by this court in 2018, and thus far in 2019, there have been at least six occasions where the second parent to file a notice of appeal and/or brief did not follow the requirements of the rule.

Before proceeding, I must make mention of appellate counsel's obligation to be conversant with the Nebraska Court Rules of Appellate Practice. Our Supreme Court has warned parties that those who fail to abide by these court rules do so at their own peril. Despite this warning, this issue continues to arise repeatedly in termination of parental rights cases.

Part of the confusion may lie in the fact that in most termination cases, the interests of the father and mother are not adverse. As a result, the second parent to appeal in essence has no response or argument with the appellant's contentions, so there is no obvious need to write a responsive brief. That parent is more akin to an appellant than an appellee. Interestingly, Neb. Rev. Stat. § 25-1913 (Reissue 2016) provides that the party asking for reversal, vacation, or modification of a final order is to be designated as appellant, and the adverse party is to be designated as appellee. In termination cases, the term "appellant" more correctly describes the second

parent to either file their notice of appeal or their brief. That person is clearly seeking reversal of the trial court's order, and typically, the only parties that are adverse to their interests are the State and/or the guardian ad litem. Even given this potential confusion, however, there is ample case law warning of the consequences of failing to follow the rules of appellate practice.

Section 2-109(D)(4) provides:

> Where the brief of appellee presents a cross-appeal, it shall be noted on the cover of the brief and it shall be set forth in a separate division of the brief. This division shall be headed "Brief on Cross-Appeal" and shall be prepared in the same manner and under the same rules as the brief of appellant.

Our Supreme Court addressed this issue in *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999). In that case, the parental rights of both parents were terminated by the trial court. The father's notice of appeal was filed after the mother's notice of appeal. His brief was titled as "'Brief of Appellee.'" *In re Interest of Natasha H. & Sierra H.*, 258 Neb. at 144, 602 N.W.2d at 450. The court noted that the father was indeed an appellee as provided by § 25-1913. However, since the father was seeking affirmative relief, he was required to follow the dictates of the court rule. The court stated, "The appellate courts of this state have repeatedly indicated that a cross-appeal must be properly designated, pursuant to rule 9D(4) [now § 2-109(D)(4)], if affirmative relief is to be obtained." *In re Interest of Natasha H. & Sierra H.*, 258 Neb. at 145, 602 N.W.2d at 450. Since no cross-appeal was properly designated, the court refused to consider the father's claim for relief. The court acknowledged that cases had arisen where the court did entertain procedurally defective cross-appeals where those cross-appeals had been mistakenly asserted as an appellant's brief, but noted that this matter is left solely to the discretion of the courts and "does not imply a willingness to consider such defective appeals in the future."

*Id.* at 147, 602 N.W.2d at 451. See, also, *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (1994); *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990). The court concluded by stating: "Parties wishing to secure appellate review of their claims for relief must be aware of and abide by, the rules of this court and the Court of Appeals in presenting such claims." *In re Interest of Natasha H. & Sierra H.*, 258 Neb. at 147, 602 N.W.2d at 451. The court then declined to waive the rules on the father's behalf.

This court considered a similar case in *In re Interest of Chloe P.*, 21 Neb. App. 456, 840 N.W.2d 549 (2013). In *In re Interest of Chloe P.*, after the father filed his notice of appeal, the appellate clerk notified him that his notice would be treated as a second notice of appeal and referred him to Neb. Ct. R. App. P. § 2-101(C) (rev. 2015). The father correctly designated himself as an appellee, but failed to follow the instructions of § 2-101(C) which direct an appellee to follow the requirements set forth in § 2-109(D)(4). In that case, we held:

> Based upon our court rules, [the father], as an appellee, was required to identify his cross-appeal on the cover of his brief and in a separate section in compliance with § 2-109(D)(4). As in *In re Interest of Natasha H. & Sierra H., supra*, we decline to waive the rules on his behalf and to award him affirmative relief.

*In re Interest of Chloe P.*, 21 Neb. App. at 472, 840 N.W.2d at 561.

Most recently, this court addressed a case wherein the mother (who filed her brief after the father filed his notice of appeal) failed to comply with § 2-109(D)(4). *In re Interest of Becka P. et al., ante* p. 489, 933 N.W.2d 873 (2019). The mother properly designated herself as an appellee. On the cover of her brief, she wrote "'Brief of Appellee on Cross Appeal.'" *In re Interest of Becka P. et al., ante* at 511, 933 N.W.2d at 889. However, she did not set forth her cross-appeal in a separate section of the brief. Rather, her brief was written simply as if she was an appellant. The court distinguished the

case from *In re Interest of Chloe P., supra*, and *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999), finding that even though there was not a separate section for the cross-appeal, as is required by § 2-109(D)(4), "because the form and presentation of her assignments of error conform with the rules applicable to an appellant's brief, we may consider the arguments raised in her brief." *In re Interest of Becka P. et al., ante* at 513, 933 N.W.2d at 890 (citing *Knaub v. Knaub, supra*, and *In re Application A-16642, supra*). Though this appears to be at least a partial waiver of the rule, the court did not utilize any language of waiver.

The majority opinion of the court in this case follows the precedent set in *In re Interest of Becka P. et al., supra*. Here, the cover of Jennette's brief designates her as an appellee and a cross-appellant and designates the brief as "Brief of Appellee/Cross Appellant." As such, this case is essentially on all fours with *In re Interest of Becka P. et al.*, and according to that precedent, Jennette's assignments of error should be addressed on the merits. While I agree that Jennette deserves to have a full analysis of her case on the merits, I believe that the precedent set in *In re Interest of Becka P. et al.* may run afoul of the holding in *In re Interest of Natasha H. & Sierra H.*, and certainly departs from the holding in *In re Interest of Chloe P.*, which requires compliance with all aspects of § 2-109(D)(4).

The holding in *In re Interest of Becka P. et al., supra*, moves the line a bit farther toward easing compliance with our court rule without fully waiving the rule. Under *In re Interest of Chloe P.*, 21 Neb. App. 456, 840 N.W.2d 549 (2013), we required that the cross-appeal be identified on the cover of the brief *and* that a separate section devoted to the cross-appeal as prescribed by the court rule be included. Under *In re Interest of Becka P. et al.*, the requirement of a separate section is no longer needed so long as the form of the brief and presentation of assignments of error conform to the rules of an appellant's brief under § 2-109(D)(1). The difficulty with this

finding (aside from its potential conflict with the holding in *In re Interest of Natasha H. & Sierra H.*) is that it simply trades one fine line for another.

As our case law stands now, if the second parent to file an appeal or brief were to designate himself or herself only as an appellee (or perhaps as an appellant), without designating the brief as a cross-appeal, we would find that that parent had run afoul of the rule and would not hear his or her case on the merits even if the brief otherwise fully complied with the rules applicable to an appellant's brief. At best, we may give them plain error review. See, e.g., *In re Interest of Justine J. & Sylissa J.*, 288 Neb. 607, 849 N.W.2d 509 (2014) (holding that where brief of party fails to comply with mandate of § 2-109(D), appellate court may proceed as though party failed to file brief or, alternatively, may examine proceedings for plain error); *In re Interest of Samantha L. & Jasmine L.*, 286 Neb. 778, 839 N.W.2d 265 (2013). However, if the second parent were to designate his or her brief as a cross-appeal on the cover, and present us with an otherwise identical brief, that parent would receive a full review. In other words, full review may depend on whether the word "cross" is found somewhere on the cover of the brief in conjunction with the words "appeal" or "appellant."

This fine line raises the question of whether § 2-109(D)(4) should be strictly applied at all to termination of parental rights cases. Should the decision of whether a father's or mother's right to parent his or her child potentially turn on whether one simple word appears on the cover of a brief? In the present case, the ultimate result would not change. Whether we review Jennette's claims on the merits, conduct a plain error analysis, or simply refuse to review the matter due to noncompliance with the rule, we would affirm the termination of Jennette's parental rights. That will not be true of every case, however.

For this reason, I cannot join in the final section of the opinion of the court regarding Jennette's cross-appeal. In my

view, we have two paths that can be followed: (1) strictly follow prior case law and require full compliance with our court rule as was done in *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999), and as this court did in *In re Interest of Chloe P., supra*, or (2) simply exercise our discretion and waive the rule as is also authorized by *In re Interest of Natasha H. & Sierra H.* Given the fundamental nature of a person's right to parent their child, I favor the latter so long as the brief complies with the rules governing an appellant's brief. I do not believe that gradually cutting back on the enforcement of § 2-109(D)(4) as prescribed by *In re Interest of Becka P. et al., ante* p. 489, 933 N.W.2d 873 (2019), and followed herein, promotes clarity in the law or will result in a just result for all parents whose parental rights hang in the balance. In this case, Jennette's brief does meet the requirements of an appellant's brief under § 2-109(D)(1). She is seeking reversal of a final order. Her interests are not adverse to those of Steven. As defined by § 25-1913, she is an appellant. Considering these factors in conjunction with the fundamental right a person has to parent their children, I believe the better course would be to simply waive all of the requirements of § 2-109(D)(4) as the pertinent case law allows us to do.

Andrew J. Olson, appellee,
v. Kirsti M. Olson,
appellant.
937 N.W.2d 260

Filed December 10, 2019. No. A-18-1210.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.
2. **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. **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.
4. ____: ____. 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.
5. **Divorce: Child Custody.** When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests.
6. **Child Custody.** When both parents are found to be fit, the inquiry for the court is the best interests of the children.

7. ____. The paramount consideration in determining child custody is the best interests of the children.
8. ____. Neb. Rev. Stat. § 43-2923 (Reissue 2016) of Nebraska's Parenting Act sets forth a nonexhaustive list of factors to be considered in determining the best interests of a child in regard to custody.
9. ____. The best interests factors of Neb. Rev. Stat. § 43-2923 (Reissue 2016) include the relationship of the minor child to each parent; the desires and wishes of the minor child; the general health, welfare, and social behavior of the minor child; credible evidence of abuse inflicted on any family or household member; and credible evidence of child abuse or neglect or domestic intimate partner abuse.
10. ____. 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.
11. ____. In child custody cases where the minor child's preference was given significant consideration, the child was usually over 10 years of age.
12. ____. In addition to the "best interests" factors listed in Neb. Rev. Stat. § 43-2923 (Reissue 2016), a court making a child custody determination may consider matters such as the moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; and the parental capacity to provide physical care and satisfy the educational needs of the child.
13. ____. In child custody cases, the preference of a mature, responsible, intelligent minor child regarding his or her custody should be given consideration, but should not be controlling.
14. **Evidence: Appeal and Error.** When evidence is in conflict, 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.
15. **Child Custody: Proof.** Generally, before a court will permit the removal of a minor child from the jurisdiction, the custodial parent must satisfy the court that there is a legitimate reason for leaving the state and that it is in the minor child's best interests to continue to live with that parent.
16. **Child Custody: Visitation.** In determining whether removal to another jurisdiction is in the children's best interests, the trial court evaluates three considerations: (1) each parent's motives for seeking or opposing

the move, (2) the potential that the move holds for enhancing the quality of life for the children and the custodial parent, and (3) the impact such a move will have on contact between the children and the noncustodial parent.

17. **Child Custody.** Removal jurisprudence has been applied most frequently when a custodial parent requests permission to remove a child from the state and custody has already been established.
18. ____. In determining the potential that removal to another jurisdiction holds for enhancing the quality of life of the children and the custodial parent, a court should evaluate 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 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.

Appeal from the District Court for Polk County: Rachel A. Daugherty, Judge. Affirmed in part, and in part reversed and vacated.

Eddy M. Rodell for appellant.

Steffanie J. Garner Kotik for appellee.

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

Pirtle, Judge.

## I. INTRODUCTION

Kirsti M. Olson appeals from the order of the district court for Polk County entered on November 26, 2018. The order dissolved her marriage to Andrew J. Olson and awarded the parties joint legal custody of their minor child, Lukas Olson. The court awarded Andrew physical custody of Lukas and granted him permission to remove Lukas from Nebraska to Minnesota.

For the reasons that follow, we affirm in part, and in part reverse and vacate.

## II. BACKGROUND

Kirsti and Andrew married in April 2003 in Minneapolis, Minnesota, and later separated in 2007 or 2008 (we note there was inconsistent testimony as to the precise year). The parties had one child by marriage, Lukas, who was born in 2004. Soon after the parties separated, Kirsti moved back to Nebraska with Lukas, who was then almost 4 years old. Throughout the separation, Lukas resided with Kirsti in Nebraska, with her and Andrew attempting to work out summer and holiday visits for Lukas in Minnesota with Andrew.

Andrew filed a complaint for dissolution of the parties' marriage in the district court for Polk County in August 2017. The complaint requested dissolution of marriage, division of property, and custody of Lukas. At the time of the complaint, Andrew had continued to reside in Minnesota and no prior custody determination had been made. While the complaint did not specifically state such, Andrew also sought to remove Lukas from the State of Nebraska. In September 2017, Kirsti filed an answer and counterclaim seeking both temporary and permanent custody of Lukas, child support, and alimony. The matter was tried before the district court on November 20, 2018.

At trial, because Kirsti was self-represented, the minor child, Lukas, then 14 years old, testified in chambers with only the judge and the court-appointed guardian ad litem present. Lukas testified that he had been attending middle school in Lincoln, Nebraska, since the second half of the previous school year and was previously involved in cross country, track, and soccer until he stopped due to foot injuries. Lukas further testified that he usually earned grades of A's and B's in school. Prior to attending middle school in Lincoln, Lukas attended elementary school in Osceola, Nebraska; was temporarily homeschooled by Kirsti until near the end of his fifth

grade year; and then remained in public school while living in Osceola.

Lukas previously lived with his mother and grandparents but later moved with Kirsti to his uncle's home in Columbus, Nebraska, when he was 13 years old, where he briefly attended seventh grade. He testified that his mother had been unemployed and staying home because she was "sick most of the time" before she saved up enough money for an apartment and found a job. At that point, Kirsti and Lukas moved to Lincoln where they remained up until trial.

Lukas testified that he lived with his younger half brother (who is not Andrew's biological son) and that the two would "fight a lot," but he would often let him into his room "so that he [could] watch videos on YouTube using [Lukas'] hot spot." Lukas noted that while living with his mother, he did not have internet, which made it difficult for him to do his homework. Lukas said that he would often call his father, Andrew, in order to get help with his homework and that Andrew provided him with a cell phone and "hot spot." Lukas had his own room at his mother's home, and he said that he would likewise have his own bedroom at his father's house and that there would "probably be more space there."

Lukas testified that when he stayed at his father's house, it was the two of them and his father's fiance, Carla Perdew (Carlie); occasionally, one of Carlie's children from a previous marriage would also be there. At his father's house, Lukas played games, ate out often, and visited his grandparents and cousins whom he did not see often. Lukas testified that he had several family members in Nebraska, including two uncles, cousins, and his maternal grandparents, whom he "[got] along with . . . great."

Lukas further testified that both his parents had spoken negatively about each other, but he more frequently heard negative comments from his mother. He noted that this made him "feel really bad for [his] dad and just [made him] feel really uncomfortable." He also testified that he frequently

called his father on his cell phone and that sometimes when he got mad at his mother, she would take his cell phone away to prevent him from talking poorly about her to his father. On one occasion, Lukas overheard a discussion about a previous conversation where his mother threatened his father that she would not bring Lukas to visit without receiving money from him for travel expenses for her, Lukas, and Lukas' younger half brother.

When specifically asked if he had an opinion on where he wished to live, Lukas testified that he would like to live with his father during the school year and visit his mother on holidays and during the summer. He noted that he thought his father could "support [him] just a little bit better than Mom can," had a more stable income, and did not yell at him. Lukas then stated that he thought living with his mother was "hazardous" because she was a "hoarder" and the home was dirty with clutter and animal waste. He testified that the cats had urinated on his mattress, on his clothes, and in his closet, and that he often could still smell it. On one occasion, Lukas went to school and when another student mentioned a smell, Lukas smelled his coat and discovered there was cat urine on it. Lukas testified that the environment at his father's house was "[v]ery clean" and that he was not nervous about switching schools because he had "already done it like two times."

Andrew testified that he had resided in Minnesota since he was 17 and that he remained there throughout his entire marriage to Kirsti. Andrew testified that during his marriage to Kirsti, she gave birth to two children, but that only Lukas was his biological son. Around 2008, Kirsti and Andrew separated but remained legally married. Andrew testified that he was employed by the Federal Reserve Bank of Minneapolis where he had worked in technical support for the last 7 years. He worked overnights Thursday through Sunday, and most of his work was done from home with one required office visit approximately every 3 weeks. Andrew testified that despite his work schedule, he would nevertheless be available

to Lukas in the evenings if granted custody. Andrew's pay was between $23 and $24 per hour, and he worked 40 hours per week.

Andrew testified that he provided health insurance for Lukas, that he voluntarily provided financial support to Kirsti for Lukas, that he and his parents had paid for most of Lukas' involvement in extracurricular activities, and that he and his parents exclusively paid for travel expenses for Andrew to see Lukas.

As to his relationship with Lukas, Andrew testified that he spoke with Lukas frequently on the cell phone and that they "certainly communicate every week." When Lukas would visit, the two would "take [the] dog out," visit family, go to movies, and play games. Andrew noted that if Lukas were to come reside with him, there would be opportunities to participate in activities such as taekwondo and soccer, and that he would provide the finances and share information regarding any competitions or events with Kirsti.

Andrew testified that he had several family members living nearby, including his parents, who had a close relationship with Lukas and were "always glad to see him" when he visited. He also noted that Lukas' relationship with Carlie was also good. Andrew went on to testify about his home, that he and Carlie kept the place very clean, and that Lukas would have his own room there.

Andrew testified that he had concerns about Lukas' health with Kirsti because her apartment was "unsanitary" and that he believed her parenting style was "almost dictatorship in style." Andrew believed that Kirsti's use of chores as punishment was not healthy. Andrew testified that up until recently, he was unaware of most medical updates with Lukas, including discussion of the possibility Lukas may have attention deficit disorder. He also had not been given access to resources to check on Lukas' progress in school.

Andrew testified that there had been many instances where Kirsti had attempted to limit Lukas' communication with him

and that she often required Lukas to talk on speakerphone so she could hear what the two talk about. He noted that Lukas was free to contact Kirsti while visiting him.

On cross-examination, Andrew denied ever agreeing that Carlie's child from a previous marriage and Lukas would "never meet again" after an "incident" when Lukas was 6 years old. He further denied ever making a death threat to his previous ex-wife. He testified that he had in fact made Kirsti aware of his attention deficit disorder diagnosis as a child despite Kirsti's insistence that he had only told her about it recently. Andrew further clarified previous statements regarding his relationship with his sister in stating that they were "not extremely close, [but] we're not distant." Andrew denied any current recreational drug use. He further explained that he had removed toxic relationships from his life and had friendships with coworkers. Andrew denied that Carlie ever used drugs or had a drug conviction. He further denied ever counseling Lukas to "bad mouth" Kirsti. Andrew denied ever neglecting family events to play video games. He also denied signing a document giving up parental rights to his child from a previous marriage.

Andrew went on to testify that he wanted to see Lukas have the opportunity to succeed, have access to extracurricular activities, develop a friend base, and "have a chance to grow up with the influence of his father for once in his life" outside of the controlling environment he believed was experienced with Kirsti. He further explained that he would utilize parental discipline through discussion and restrictions rather than punishment through chores. Andrew stated his belief that it was not a parent's responsibility to ensure their child interacts with others, but rather a child would "develop their own friend base."

Andrew's father testified that he spoke with his son a couple times a month and that he and his wife were able to see Lukas once or twice when he came to visit Andrew. He testified that he had no concerns with the cleanliness of Andrew's home. He

went on to testify that Andrew's relationship with Lukas was a "warm, easy-going, comfortable relationship" and that he had no concerns about Andrew's parenting style. Andrew's father noted that he and his wife had previously provided financial support for Lukas by purchasing him a computer, plane tickets, and providing additional funds so Lukas could participate in extracurricular activities. He noted that on one prior occasion, Kirsti had unexpectedly called and said Lukas would not be on a plane to Minneapolis after they were already on the way to the airport to pick him up. He further testified that Lukas and Carlie seemed to "get along comfortably."

Andrew's mother testified that she and Andrew frequently texted each other and that they saw each other in-person a couple of times a month, on average. She testified that she enjoyed "going out," reading, and doing activities with Lukas. She noted that Andrew and Lukas had good interaction while together and that she had no concerns. Andrew's mother testified she and her husband assisted with financial support for Lukas because they "felt that Lukas needed to have extra opportunities and involvement other than just the school."

Andrew's fiance, Carlie, testified that she had resided with Andrew for the past 10 years and that her children had occasionally stayed there when Lukas visited. She testified that she did not have any felony or other criminal convictions. She went on to testify that both her and Andrew ensured Lukas was taking care of his hygiene, but it was mostly Andrew who did so. Carlie described Andrew's relationship with Lukas as being "two peas in a pod" and that her personal relationship with Lukas was "great" despite not doing much together. She testified that she supported Lukas' coming to live with her and Andrew full-time and that Andrew was able to provide a positive environment for Lukas.

On cross-examination, Carlie testified that her daughter had previously stayed with her and Andrew at times when Lukas was visiting and that Lukas may have had to sleep on the couch one night because there were not enough beds. She

testified that she remembered an incident between Lukas and her son, when Lukas was 6 years old, where the two were "horse playing," but that the two have largely been kept apart since then and the event was misunderstood.

In her case in chief, Kirsti offered several exhibits, including Lukas' report cards; notes from recent doctor, dentist, and eye appointments; and recent pay stubs. She also introduced a signed statement detailing her observations and care of Lukas over the years and both her and Lukas' relationship with Andrew.

Kirsti explained the photographs of her apartment that were introduced, noting that the closet of her apartment was left exclusively for the pets because otherwise they would "tear up the whole house." She explained that the clutter and mess in the pictures was only temporary and that the condition of the apartment was not usually like that. She testified that she had a "problem with organization" and that certain areas of the apartment needed to be better organized. Kirsti testified that she hardly drank alcohol but Lukas did not like it when she did. She also noted that her new job was difficult and was the cause of a lot of the mess in her apartment. She explained that Lukas liked things clean, so she regularly had him clean his room because "he's happier when it's clean."

Kirsti testified that she was happy Lukas wanted to spend quality time with Andrew but that she believed she had done a good job parenting him and allowed Lukas to regularly contact Andrew. She testified that throughout their relationship, Andrew had ongoing issues with his previous wife regarding visitation and child support of another child, and that this required Kirsti to support them while she was pregnant with Lukas. She testified that Andrew once made a comment to her about his ex-wife stating, "If you leave me, I'm going to kill [my ex-wife]," and that this made her afraid when they separated.

Kirsti testified that 5 or 6 months after their separation, Andrew began making voluntary child support payments. She

noted that since she moved to Nebraska, it had been more difficult to schedule visits between Andrew and Lukas, but the two largely worked it out. She testified that toward the end of their relationship, Andrew treated her poorly, causing her to become depressed, and that he frequently "spent all his time playing video games."

She testified that when Lukas was in fourth grade and fifth grade, he was struggling to get homework done so she decided to homeschool him temporarily, and that he had since done well in school. She noted that her parents had been supportive and that she and Lukas often visited nearby family. She testified that the decision to move to Lincoln was made because she wanted Lukas to have more of an opportunity to make friends and she needed more opportunities for work. She noted that Andrew's parents had helped out financially with travel costs for Lukas to visit Andrew in Minnesota, but that they rarely initiated contact when Lukas was with her in Nebraska. She also testified that when Lukas was younger, Andrew was far less proactive in reaching out to talk to Lukas, and that he had become more interested as Lukas had gotten older.

Kirsti addressed her concerns with Lukas' living with Andrew's fiance, Carlie, namely because she did not know her very well. She explained that she believed Carlie prioritized her own children over Lukas. For example, when Carlie's daughter visited at the same time as Lukas, he was forced to sleep on the couch. When Carlie's oldest daughter got married, Kirsti did not receive any child support around that time, which she believed to be because of the wedding costs. She testified about an incident between Carlie's son and Lukas when they were younger and that law enforcement was involved but no charges were ever filed.

On cross-examination, Kirsti was asked about the photographs of her apartment and she explained that she believed Lukas intentionally took the photographs to make her "look bad." She added that the photographs did not accurately

reflect the day-to-day condition of the apartment. She went on to testify that she very rarely limited Lukas' cell phone access and that she usually did so only when he was spending too much time on the cell phone "watching YouTube videos." On the rare occasion Kirsti had limited Lukas' cell phone calls with Andrew, she noted that it was because they had been "talk[ing] for so long" and she had somewhere she needed to be with Lukas. She testified that she was trying to get Lukas involved in more extracurricular activities but that he was often "burnt out," so balancing activities and school was difficult. Kirsti testified that she moved to Nebraska to be close to her family and that Andrew gave his permission for her to move.

The court questioned Kirsti about her pets and their history of urinating on Lukas' bed and clothing. Kirsti noted that she cleaned the mattress extensively and "the smell is gone" and that the animals had "gotten better." She noted that she was "undecided" on whether "to get rid of the cats."

Although the district court found that Lukas had done well with Kirsti, it nevertheless found that his overall quality of life would be improved living with Andrew. The court awarded Andrew physical custody of Lukas, subject to reasonable parenting time with Kirsti. The court further amended the proposed parenting plan regarding Kirsti's summer parenting time. This appeal followed.

## III. ASSIGNMENTS OF ERROR

Kirsti asserts the district court erred by (1) awarding Andrew sole physical custody of their child; (2) allowing Andrew to remove the child from the State of Nebraska "without performing a removal analysis"; and (3) allowing her only extended summer parenting time with the child in odd-numbered years, rather than every year.

## IV. STANDARD OF REVIEW

[1] In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's

determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion. *Mamot v. Mamot*, 283 Neb. 659, 813 N.W.2d 440 (2012).

[2] 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. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002).

[3] 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. Determination of Custody

Kirsti's first assignment of error is that the district court erred by awarding Andrew sole physical custody of Lukas. Kirsti's primary assertion is that the court improperly rested a majority of its decision on the desires and wishes of Lukas, who testified that he would prefer to live with Andrew.

[4-6] 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, supra*. When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests. *Maska v. Maska*, 274 Neb. 629, 742 N.W.2d 492 (2007). When both parents are found to be fit, the inquiry for the court is the best interests of the

children. *Id*. Here, both parties concede, and the district court agreed, that both parents were fit for the custody and care of Lukas.

[7-11] The paramount consideration in determining child custody is the best interests of the children. *Donald v. Donald*, 296 Neb. 123, 892 N.W.2d 100 (2017). Neb. Rev. Stat. § 43-2923 (Reissue 2016) of Nebraska's Parenting Act sets forth a nonexhaustive list of factors to be considered in determining the best interests of a child in regard to custody. *Floerchinger v. Floerchinger*, 24 Neb. App. 120, 883 N.W.2d 419 (2016). Such factors include the relationship of the minor child to each parent; the desires and wishes of the minor child; the general health, welfare, and social behavior of the minor child; credible evidence of abuse inflicted on any family or household member; and credible evidence of child abuse or neglect or domestic intimate partner abuse. See *id*. (citing § 43-2923(6)(b)). With regard to the desires of the child, the statute provides that courts should consider such "regardless of chronological age, when such desires and wishes are based on sound reasoning." § 43-2923(6)(b). 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. *Floerchinger v. Floerchinger, supra* (citing *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002), and *Adams v. Adams*, 13 Neb. App. 276, 691 N.W.2d 541 (2005)). The Supreme Court has also found that in cases where the minor child's preference was given significant consideration, the child was usually over 10 years of age. *Floerchinger v. Floerchinger, supra* (citing *Vogel v. Vogel, supra*).

[12] In addition to the factors of § 43-2923, the Supreme Court has held that a court may also consider

> matters such as the moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship

> between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; and the parental capacity to provide physical care and satisfy the educational needs of the child.

*Schrag v. Spear*, 290 Neb. 98, 112, 858 N.W.2d 865, 877 (2015) (citing *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996)).

[13] Kirsti argues that in awarding physical custody of Lukas to Andrew, the district court abused its discretion by placing too much of an emphasis on Lukas' preferences, and not enough on the current living conditions with her and the fact she had been Lukas' primary caregiver for over 10 years. We disagree. While it is true we have held that "the preference of a mature, responsible, intelligent minor child regarding his or her custody should be given consideration, but [not] that it should be controlling," and that other factors are to be considered under the direction of § 42-2923, see *Adams v. Adams*, 13 Neb. App. at 286, 691 N.W.2d at 549, nothing in the record of the present case indicates the district court abused its discretion by failing to consider the other factors required by statute.

[14] The district court specifically laid out the best interests factors of § 43-2923(6) and relevant case law. Although the district court did not address each factor individually in the decree, the record indicates it adequately weighed the evidence before it and gave consideration to factors such as the unclean living conditions at Kirsti's apartment (particularly the presence of urine and feces from the animals), the comparative living arrangements at both Kirsti's and Andrew's homes, the relationship Lukas has with his father versus the sometimes tense relationship with his mother, and Kirsti's occasionally controlling parenting style. The court found no credible evidence of abuse by either parent. The district court's order also considered testimony by Kirsti regarding Andrew's

obsession with video games while the two were together, Andrew's previous drinking habits and marijuana use, and an instance where Andrew made a comment about his previous ex-wife that Kirsti found to be threatening. When evidence is in conflict, 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. *Floerchinger v. Floerchinger*, 24 Neb. App. 120, 883 N.W.2d 419 (2016). The district court also acknowledged, and considered, the fact that Kirsti had adequately provided for Lukas and his educational and emotional needs since she and Andrew separated nearly 10 years earlier. The district court was entitled to weigh all the evidence before it in conducting a best interests analysis.

Furthermore, the district court did not abuse its discretion by placing significant weight on Lukas' desires. When asked whether he had a preference on whether to live with his father or continue living with his mother, Lukas stated that he would prefer to live with his father. When asked the reasons for his preference, Lukas indicated that he still wanted to see his mother and his younger half brother during breaks but thought his father could support him better because "[h]e has more stable income [and] doesn't ever yell at [him]." He indicated that his father was able to help him with homework and that he did not want "to live in such a hazardous environment anymore." When asked why the environment with his mother was "hazardous," he noted that she was a "hoarder," the apartment was not clean, his mother would lose things, and it caused him "stress[]." Further, Lukas had previously testified that he had a good relationship with his father and Carlie and that he was not concerned about switching schools because he had previously done so and the adjustment was "pretty easy."

This is not a case where the minor child was unable to articulate an intelligent rationale for preferring to reside with one parent over the other. In *Wild v. Wild*, 15 Neb. App. 717, 746, 737 N.W.2d 882, 904 (2007), this court held the minor

child's preferences were not entitled to significant weight because she was unable to provide a "'reasonable and persuasive reason[] for her decision.'" When asked why she preferred to live with her mother, the child responded, "'Uhm, because I think it's, uhm — I think it's a good choice because, uhm, I think I'll be safer there than here.'" *Id.* at 745, 737 N.W.2d at 904. When asked to explain why she felt that way, the child testified, "'It's just a feeling that I get sometimes.'" *Id*. Here, as detailed above, Lukas clearly articulated a reasonable basis for his preference.

The district court was entitled to give significant consideration to Lukas' preferences, and it did not abuse its discretion in doing so. At the time of trial, Lukas was 14 years old, and the district court specifically found him to be "super bright," "really smart," and "very articulate." In its order, the district court noted that "Lukas was very mature in his reasoning and his desires were well thought out." Because the district court was entitled to give Lukas' preferences consideration, and adequately considered the other factors of § 43-2923, we hold that the district court did not abuse its discretion in awarding Andrew physical custody of Lukas.

### 2. Removal of Minor Child

Kirsti next argues that the district court erred in permitting Andrew to remove Lukas from the State of Nebraska. Kirsti asserts that the district court was required, and failed, to perform a removal analysis as set forth in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), in determining whether removal of the minor child was appropriate. The district court in this case noted in its decree:

> To a certain extent, I do think I'll do some type of *Farnsworth* analysis. Even though the child lived in Minnesota when the parents were together, the child moved here. It's still a removal from the state and I think I have to take that analysis into consideration, and I think the evidence . . . addresses those items.

For the reasons that follow, we find that the district court, to the extent it was required to, did conduct an appropriate *Farnsworth* analysis under the circumstances and that it was not in error to award Andrew custody and permit Lukas to move with Andrew to his home in Minnesota.

[15,16] In *Farnsworth v. Farnsworth, supra*, the Supreme Court established a detailed two-step process required before a custodial parent is permitted to remove a child from the State of Nebraska. The custodial parent must satisfy the court that there is a legitimate reason for leaving the state and that it is in the minor child's best interests to continue to live with that parent. *Hiller v. Hiller*, 23 Neb. App. 768, 876 N.W.2d 685 (2016) (citing *Farnsworth v. Farnsworth, supra*). In determining whether removal to another jurisdiction is in the children's best interests, the trial court evaluates three considerations: (1) each parent's motives for seeking or opposing the move, (2) the potential that the move holds for enhancing the quality of life for the children and the custodial parent, and (3) the impact such a move will have on contact between the children and the noncustodial parent. *Hiller v. Hiller, supra* (citing *Bird v. Bird*, 22 Neb. App. 334, 853 N.W.2d 16 (2014)). Under the second "quality of life" prong, the Supreme Court enumerated nine factors to be taken into consideration. See *Farnsworth v. Farnsworth, supra*. Three years after *Farnsworth*, the Supreme Court reaffirmed its removal analysis in *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002), in a proceeding to modify the parties' prior decree of dissolution. In *Vogel*, the mother sought permission to remove her minor children from the State of Nebraska to the State of Virginia, where her new husband had recently been transferred by the U.S. Air Force.

[17] Removal jurisprudence has been applied most frequently when a custodial parent requests permission to remove a child from the state and custody has already been established. *Hiller v. Hiller, supra*. Notably, this court has applied the *Farnsworth* removal analysis in situations where a prior

custody determination has not been established. See, e.g., *Kashyap v. Kashyap*, 26 Neb. App. 511, 921 N.W.2d 835 (2018) (dissolution proceeding where temporary custody order had been established with mother and father was stationed out-of-state); *Hiller v. Hiller, supra* (dissolution proceeding where both parties resided in Nebraska at time of proceeding); *Rommers v. Rommers*, 22 Neb. App. 606, 858 N.W.2d 607 (2014) (dissolution proceeding where mother left Nebraska with child prior to filing of dissolution complaint).

In *Rommers*, the parties were before the court on a dissolution action whereby both parties sought custody of the minor child. Prior to the initiation of the dissolution and custody action in Nebraska, the mother had moved with the child to the State of Arizona without the father's knowledge. In reversing the district court's determination that *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), was inapplicable, we held:

> If the Nebraska court system were to allow litigants to mesh original custody determinations and removal determinations in such a way as has occurred in this case, it would allow parents to leave the state with children before any filing occurred and without any repercussions and would allow parents to avoid any scrutiny under a removal analysis. The trial court should have first entered an order regarding custody and then conducted a proper *Farnsworth* removal analysis, which would take into account an appropriate parenting plan in accordance with the custody determination and decision regarding removal . . . .

*Rommers v. Rommers*, 22 Neb. App. at 617, 858 N.W.2d at 616.

Under *Farnsworth*, we first consider whether the custodial parent has a legitimate reason for leaving the state. Here, there is no dispute that Andrew has a legitimate reason for "leaving" the state, and this issue was conceded by Kirsti's counsel during oral argument. Prior to this action, Andrew

had been living in Minnesota since he was 17 years old, and both Kirsti and Lukas lived there with him prior to moving to Nebraska.

Under *Farnsworth*, the court next considers the child's best interests. 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. *Kashyap v. Kashyap, supra*. See, also, *Farnsworth v. Farnsworth, supra*.

(a) Each Parent's Motives

The first consideration is each parent's motives for seeking or opposing the move. Both parties concede that there are legitimate reasons for seeking and opposing the move of Lukas to Minnesota. Andrew has lived in Minnesota throughout most of his life. Kirsti has been living in Nebraska for the last 10 years. Both parties are employed in their respective home states. Therefore, we find that both parties have legitimate reasons to seek or oppose the move.

(b) Quality of Life

[18] Under the second consideration, the Supreme Court has enumerated nine factors to determine whether the proposed move will enhance the quality of life of the child and the custodial parent. See *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). Those factors to be considered are as follows: (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 construed as setting out a hierarchy of factors. *Id*. Depending on the circumstances of a particular case, any one factor or combination of factors may be variously weighted. *Id*. We will address each of these nine factors in turn.

*(i) Emotional, Physical, and Developmental Needs*

Our first consideration in assessing the extent the move would enhance the minor child's quality of life is the impact it would have on the child's emotional, physical, and developmental needs. The evidence presented shows that Lukas has had a history of attention issues (namely attention deficit disorder) but has improved significantly over time in Kirsti's care and now performs well in school. Nothing in the record suggests that Lukas would not continue to thrive in this regard under Andrew's care; in fact, Lukas testified that Andrew often was available by cell phone to help Lukas with his homework. While Kirsti has adequately provided for Lukas physically in terms of food, medical care, shelter, and the like, there was evidence that her apartment was disorganized and unclean and that the cats had urinated on Lukas' mattress, on his clothes, and in his closet on multiple occasions. Lukas testified that the environment at his mother's apartment was "hazardous." Andrew testified that Lukas had commented to him that fumes from the animals had often made him feel sick.

Emotionally, Lukas has a close relationship with both parents. However, there is testimony that Kirsti's parenting style

is sometimes controlling and that she will impose chores as punishment, will take away Lukas' cell phone if she believes he is talking negatively about her to Andrew, and will often talk negatively about Andrew herself. Overall, this factor weighs slightly in favor of removal.

*(ii) Child's Opinion or Preference*

As discussed previously in the custody discussion of this opinion, Lukas expressed a preference to live with his father and provided several well-thought-out reasons for his preference. This factor weighs in favor of removal.

*(iii) Enhancement of Relocating Parent's Income or Employment*

Both Kirsti and Andrew are already employed in their respective states and are not seeking removal to pursue alternative employment opportunities. Both parties concede, and we agree, that because this is an initial custody determination, this is a nonfactor and is neutral.

*(iv) Degree to Which Housing or Living Conditions Would Be Improved*

The evidence shows that Lukas enjoys having his own room at both Andrew's home in Minnesota and Kirsti's apartment in Nebraska. The district court found, and the evidence shows, that Kirsti's apartment is generally unclean and disorganized. The presence of three animals, which have a history of urinating in Lukas' room and on his clothing and mattress, adds to the uncleanliness. Andrew currently makes between $23 and $24 per hour and works full time. Kirsti currently earns $12 per hour and works full time; however, she has had periods of unemployment while Lukas was in her care. Lukas testified that he believed Andrew could support him "just a little bit better" than Kirsti could. Based on the evidence comparing the conditions of their respective homes and employment, and the testimony that Lukas preferred a clean environment and

referred to Kirsti's home as "hazardous," this factor weighs in favor of removal.

*(v) Existence of Educational Advantages*

At the time of trial, Lukas was attending eighth grade at a Lincoln middle school and was performing well, receiving grades of A's and B's in his classes. While there was no evidence presented suggesting the quality of education available in Minnesota, there was also no evidence suggesting that it would be inferior to what Lukas has received in Nebraska. Lukas overcame much of his attention issues after a brief period of homeschooling by Kirsti, and he receives significant help with his homework over the cell phone from Andrew. This factor is neutral.

*(vi) Quality of Relationship Between Child and Each Parent*

The lower court found, and the evidence suggests, that Lukas has maintained a close relationship with both of his parents. While Lukas has been in Kirsti's custody since he was around 4 years old, he has also established a close relationship with Andrew through regular communication and visits. While Lukas has the occasional disagreement with Kirsti, his relationship with both parents is overall healthy and loving. This factor is neutral.

*(vii) Strength of Child's Ties to Present Community and Extended Family*

Lukas has lived with Kirsti for around 10 years and has developed a close relationship with his maternal grandparents, whom he lived with for approximately 5 years while in Nebraska. While living with Kirsti, Lukas has also lived with his younger half brother, and although the two occasionally fight, they appear to have a normal sibling relationship. Lukas has also maintained a relationship with his maternal uncles and cousins. On Andrew's side of the family, Lukas has been able to establish a close relationship with his extended family.

When Lukas visits Andrew in Minnesota, he often does activities with his grandparents and has gotten to know his older half brother. Lukas testified that he would like to see his paternal grandparents and cousins more frequently.

While Lukas has lived in Nebraska for most of his life, he has made several moves and attended a number of schools in that time. Lukas testified that switching to a new school does not make him nervous because he had already done so more than once.

The record reflects that Lukas is fortunate enough to have a close and loving relationship with both his maternal and paternal extended family. While a move to Minnesota would decrease Lukas' connections to his maternal relatives, it would allow the opportunity to improve relationships with his paternal relatives. This factor is neutral.

*(viii) Likelihood That Allowing or Denying Move Would Antagonize Hostilities Between Parties*

The district court correctly noted that both parties have a close relationship with Lukas, and Kirsti and Andrew have been able to work together to coordinate opportunities for Lukas to visit Andrew in Minnesota. There is no evidence that allowing or denying the move would antagonize the parties. This factor is neutral.

*(ix) Well-Being of Custodial Parent*

The final "'quality of life'" factor listed in *Farnsworth v. Farnsworth*, 257 Neb. 242, 250, 597 N.W.2d 592, 598 (1999), is consideration of 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.* at 251, 597 N.W.2d at 599. Accord *Hiller v. Hiller*, 23 Neb. App. 768, 876 N.W.2d 685 (2016). This factor focuses largely on "how the proposed new living conditions and employment impact the well-being of the custodial

parent." *Id*. at 789, 876 N.W.2d at 699. Because this is a case where the parties have been living and working in their respective states for several years, and neither party is seeking to relocate with the child, this is a nonfactor and is neutral.

*(x) Conclusion Regarding Quality of Life*

After our review of the record, we find that the district court was correct in finding that both parties are fit and capable parents. We also note that the court-appointed guardian ad litem for Lukas likewise found both Kirsti and Andrew to be fit and capable parents and expressed his belief that it would be in Lukas' best interests to award custody in accordance with his preference. Furthermore, after reviewing the evidence in light of the *Farnsworth* factors, we find that, although Lukas has done well under Kirsti's care, removal would enhance his quality of life.

(c) Impact on Noncustodial Parent's Visitation

When, as here, the parties live hundreds of miles apart, there will undoubtedly be an effect on the noncustodial parent's visitation. However, Kirsti and Andrew have worked amicably to make the arrangement work and to facilitate visitation for the last 10 years. Regardless of whether or not removal is granted, Lukas will necessarily spend time traveling between the two homes. Permitting removal, therefore, would not increase the amount of time Lukas is required to travel or increasingly burden the parties to arrange visitation as they have previously done.

(d) Conclusion on Best Interests

A de novo review of the record shows that both parties have a legitimate reason for seeking or opposing the move and that permitting removal would enhance the quality of life of Lukas. While the move will surely affect the amount of time Kirsti spends with Lukas, the parties have been able to work out a

visitation schedule in the past, and the district court imposed an appropriate parenting plan to facilitate organized visits. The record demonstrates sufficient evidence that it is in Lukas' best interests to move from Nebraska to Minnesota and that it was not in error for the district court to determine such.

### 3. Modification of Summer Parenting Time

Kirsti's final assignment of error is that the district court erred in modifying the portion of time allotted to her for summer parenting time within the proposed parenting plan without any explanation for the modification. Both parties, and this court, agree.

At trial, Andrew offered to the court as an exhibit a proposed parenting plan. In the event that Andrew was granted custody of Lukas, the plan called for Kirsti to have extended parenting time every summer with the parties alternating which half of the summer they would receive. In even-numbered years, Kirsti would have parenting time from mid-July until just prior to the start of the school year. In odd-numbered years, Kirsti would have from June 15 until July 30. In its decree, the district court noted it had modified the proposed parenting plan "by changing the portion of the summer parenting time." This change, which can be seen in the modified parenting plan attached to the decree, shows the court crossed off the portion of the plan reading: "In the even-numbered years, the mother's summer parenting time shall begin at noon on the ____ day of July and conclude at noon on the Friday immediately prior to the first day of school." Section 43-2923(4) provides that "[i]f the court rejects a parenting plan, the court shall provide written findings as to why the parenting plan is not in the best interests of the child." The district court gave no explanation for the modification, or why it would be in the best interests of Lukas, and we cannot see one evident from the record. Because the parties do not dispute, and we see no reason that Kirsti should not be granted extended parenting time every

summer, we reverse and vacate the modification to the summer parenting time provision of the proposed parenting plan and reinstate such without modification.

## VI. CONCLUSION

We conclude that the district court did not err in awarding custody of Lukas to Andrew and allowing Andrew to remove Lukas to the State of Minnesota. We reverse and vacate the modification to the summer parenting time provision of the proposed parenting plan and reinstate such without modification.

Affirmed in part, and in part reversed and vacated.

# Dr. Robert McEwen, appellant, v. Nebraska State College System, appellee.

936 N.W.2d 786

Filed December 17, 2019. No. A-17-638.

1. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
2. **Contracts.** The interpretation of a contract and whether the contract is ambiguous are questions of law.
3. ____. In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.
4. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
5. **Contracts.** When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them.
6. ____. The fact that the parties have suggested opposing meanings of a disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.
7. ____. A contract must receive a reasonable construction, and a court must construe it as a whole and, if possible, give effect to every part of the contract.
8. ____. Whatever the construction of a particular clause of a contract, standing alone, may be, it must be read in connection with other clauses.
9. **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 Dawes County: Derek C. Weimer, Judge. Affirmed.

Howard P. Olsen, Jr., and Adam A. Hoesing, of Simmons Olsen Law Firm, P.C., for appellant.

George E. Martin III and Leigh Campbell Joyce, of Baird Holm, L.L.P., for appellee.

Riedmann, Bishop, and Arterburn, Judges.

Riedmann, Judge.

## INTRODUCTION

Dr. Robert McEwen appeals the decision of the district court for Dawes County which overruled his petition in error challenging the termination of his employment. On appeal, he alleges that the court's decision was erroneous because the Nebraska State College System (NSCS) failed to comply with a contractually required provision prior to terminating his employment. Finding no merit to this argument, we affirm.

## BACKGROUND

McEwen was a tenured professor at Chadron State College (CSC). He and NSCS were members of the State College Education Association, which was a party to a collective bargaining agreement (the CBA) effective from July 1, 2015, through June 30, 2017. Under the CBA, faculty members, tenured and nontenured, may be dismissed for just cause. Section 17.3 of the CBA provided, "Prior to giving a faculty member notice of a recommendation for dismissal, the Dean shall meet privately and discuss the recommendation with the faculty member. The matter may be reconciled by mutual consent."

In the fall of 2015, one of McEwen's students filed a formal complaint against McEwen with CSC's administration alleging discrimination. The associate vice president of human resources at CSC, Anne DeMersseman, began an investigation into the complaint. In October, Dr. Charles Snare, the vice president for academic affairs at CSC, and Dr. James Margetts, a dean at CSC who oversaw McEwen, authored a

letter to McEwen outlining the concerns raised in the complaint and subsequent investigation. A meeting concerning the complaint was held on October 30, and McEwen, Snare, Margetts, and DeMersseman attended, as well as an auditor for McEwen due to his hearing difficulties. Snare, Margetts, and DeMersseman discussed the matter after the meeting and decided to recommend dismissal of McEwen.

A second meeting was held on November 10, 2015. McEwen, Snare, and Margetts attended the meeting, which was held in Margetts' office. Margetts requested Snare's presence as a witness, but Snare did not speak at all during the meeting. Margetts informed McEwen that he was recommending McEwen's dismissal and offered him the opportunity to resign rather than be subject to dismissal. Upon the advice of his union representative, McEwen declined to comment, and at the end of the meeting, which lasted approximately 5 minutes, Margetts provided McEwen a copy of the letter recommending his dismissal.

Subsequently, the president of CSC sent written notice of the recommendation to McEwen. Pursuant to procedure set forth by the CBA, McEwen requested a hearing before an advisory committee. Prior to the hearing, McEwen filed a motion for reinstatement and dismissal of recommendation of dismissal. The motion alleged, in part, that CSC had not complied with the requirements of section 17.3 of the CBA. The advisory committee denied the motion. The audio-recorded hearing took place in February 2016; evidence was presented, witnesses testified, and the recording was transcribed. At the conclusion of the hearing, McEwen renewed his motion. The motion was again denied. The advisory committee unanimously found that just cause for McEwen's dismissal existed and recommended the termination of his employment.

The president of CSC sent to McEwen a written letter dated March 16, 2016, in which he affirmed the findings and recommendations of the advisory committee and discharged McEwen's employment. McEwen then made a

written request to NSCS' chancellor requesting a hearing before NSCS' board of trustees. In a response letter, the chancellor denied McEwen's request for a hearing, thereby finalizing the discharge.

On May 17, 2016, McEwen filed a petition in error in the district court. He alleged that he had been wrongfully terminated from his position as a tenured professor at CSC. As relevant to this appeal, he asserted that NSCS failed to follow the procedure set forth in section 17.3 of the CBA. Specifically, he claimed that section 17.3 mandated a "private" meeting between McEwen and Margetts and that because Snare was also present at the November 10, 2015, meeting, it did not satisfy section 17.3's requirements.

The district court disagreed, finding that the November 10, 2015, meeting satisfied the requirements of section 17.3. The court found that the term "private" required some restriction to participation in and observance of the occurrence, and it found that that standard was satisfied when the November 10 meeting took place in a private office, behind "'closed doors,'" and with no verbatim record kept. The court erroneously found that an auditor for McEwen was present at the meeting in addition to McEwen, Snare, and Margetts, but noted that neither the auditor nor Snare actively participated in the meeting. The court therefore overruled McEwen's petition in error.

McEwen filed a motion for new trial or, in the alternative, an order to vacate the judgment. In its order denying the motion, the district court recognized that it had made a factual error in its prior order in that an auditor was not present at the November 10, 2015, meeting. However, the court concluded that this factual error did not mandate a vacation of its previous order; thus, it denied McEwen's motion to vacate. The motion for new trial was also denied.

McEwen then filed a notice of appeal. This court summarily dismissed the appeal for lack of jurisdiction, finding that McEwen's motion for new trial did not toll the time to file

a notice of appeal and that McEwen's notice of appeal was not timely filed. On petition for further review, the Nebraska Supreme Court, overruling prior precedent, determined that Neb. Rev. Stat. § 25-1329 (Reissue 2016) applies to a judgment of a district court acting as an intermediate appellate court. See *McEwen v. Nebraska State College Sys.*, 303 Neb. 552, 931 N.W.2d 120 (2019). Consequently, it concluded that McEwen's alternative motion to vacate qualified as a motion to alter or amend a judgment; therefore, his notice of appeal was timely. *Id*. Accordingly, the Supreme Court reversed the summary dismissal of the appeal and remanded the cause to this court for further proceedings. *Id.* We now proceed to address the merits of the appeal.

## ASSIGNMENT OF ERROR

McEwen assigns, consolidated and restated, that the district court erred in overruling his petition in error because NSCS failed to meet the requirements of section 17.3 of the CBA.

## STANDARD OF REVIEW

[1,2] We independently review questions of law decided by a lower court. *Timberlake v. Douglas County*, 291 Neb. 387, 865 N.W.2d 788 (2015). The interpretation of a contract and whether the contract is ambiguous are questions of law. *Id*.

## ANALYSIS

McEwen alleges that NSCS failed to follow section 17.3 of the CBA, which requires that the Dean "meet privately" with him to discuss the recommendation for dismissal. McEwen argues that the term "privately" mandates a "one-on-one" meeting between him and Margetts and that he never received his private meeting prior to his dismissal, because Snare was present at the November 10, 2015, meeting. See brief for appellant at 22. NSCS claims that McEwen's definition of the term "privately" is too narrow and that rather than limiting the number of attendants at the meeting, the term requires a "'non-public'" or "'off-the-record'" meeting. See brief for

appellee at 13. Thus, the issue before us is the meaning of the term "privately" as used in section 17.3.

[3-6] In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous. *Gibbons Ranches v. Bailey*, 289 Neb. 949, 857 N.W.2d 808 (2015). A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Id*. When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them. *Id*. The fact that the parties have suggested opposing meanings of a disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous. *Id*.

Although the parties have suggested conflicting interpretations in the present case, neither party suggests that the contract is ambiguous, and we find that it is not. As such, we give the term "privately" its plain and ordinary meaning.

The Supreme Court has often turned to dictionaries to ascertain a word's plain and ordinary meaning. See *State v. Gilliam*, 292 Neb. 770, 874 N.W.2d 48 (2016). See, also, *Stick v. City of Omaha*, 289 Neb. 752, 857 N.W.2d 561 (2015); *Rodehorst Bros. v. City of Norfolk Bd. of Adjustment*, 287 Neb. 779, 844 N.W.2d 755 (2014); *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004); *Payless Bldg. Ctr. v. Wilmoth*, 254 Neb. 998, 581 N.W.2d 420 (1998). The American Heritage Dictionary of the English Language 1396 (4th ed. 2000) defines "private" as "[s]ecluded from the sight, presence, or intrusion of others"; "[n]ot available for public use, control, or participation"; "[n]ot for public knowledge or disclosure; secret"; and "[n]ot appropriate for use or display in public; intimate." Similarly, Black's Law Dictionary 1448 (11th ed. 2019) defines "private" as "[o]f, relating to, or involving an individual, as opposed to the public or the government" and "[c]onfidential; secret."

When considering these definitions, we conclude that the term "privately" as used in section 17.3 is defined more broadly as NSCS suggests. Rather than allowing only two participants, the term means that the meeting is not public. This interpretation of the term is supported when considering the remainder of the CBA.

[7,8] A contract must receive a reasonable construction, and a court must construe it as a whole and, if possible, give effect to every part of the contract. *Labenz v. Labenz*, 291 Neb. 455, 866 N.W.2d 88 (2015). Whatever the construction of a particular clause of a contract, standing alone, may be, it must be read in connection with other clauses. *Id*.

When reading section 17.3 with the sections that follow, we understand that by requiring the dean to meet "privately" with the faculty member, it allows the attendants of the meeting to discuss a personnel matter in confidence and attempt an amicable resolution. If they are unable to resolve the matter, the faculty member is given written notice of the recommendation for dismissal. According to the CBA, the faculty member may then request a hearing before an advisory committee, where evidence is presented and witnesses testify, and the hearing may be transcribed by a court reporter upon request by any party. Thus, when considering additional sections of the CBA, rather than requiring a one-on-one meeting between the dean and the faculty member, we interpret the private nature of the section 17.3 meeting to stand in contrast to the more public nature of the hearing before the advisory committee, giving the faculty member the chance to resolve the matter behind closed doors first before it is addressed to a committee and in front of witnesses.

When considering this definition, we conclude that the November 10, 2015, meeting satisfied the requirements of section 17.3. The meeting was held in Margetts' office, and there was no verbatim record kept of the meeting. Snare attended as a witness but did not say anything during the meeting. Margetts informed McEwen that he was recommending

dismissal and offered him the opportunity to resign rather than be subject to dismissal. Upon the advice of his union representative, McEwen declined to comment. The meeting lasted approximately 5 minutes, and at the conclusion, Margetts gave McEwen a copy of the letter recommending his dismissal. Thus, the meeting was held in private and off the record, and it was attended by just three people, only two of whom participated. In addition, the meeting allowed McEwen the opportunity to reconcile the matter by mutual consent should he have chosen to do so. Accordingly, the district court properly concluded that NSCS complied with the requirements of section 17.3, and thus, the court did not err in overruling the petition in error on that basis.

[9] McEwen raises two additional arguments on appeal. He first asserts that section 17.3 is a substantive rule, as opposed to a procedural rule, and argues that because NSCS failed to follow the requirements of this section, its actions are arbitrary and capricious and subject to reversal. In addition, and in the alternative to the preceding argument, he claims that section 17.3 imposed a contractual duty that NSCS was required to follow before it could exercise termination rights under the CBA. Both of these arguments, however, are premised on a finding that a section 17.3 private meeting was never held. Because we have concluded that McEwen was afforded his rights under section 17.3, we need not address his additional arguments. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Greenwood v. J.J. Hooligan's*, 297 Neb. 435, 899 N.W.2d 905 (2017).

## CONCLUSION

We conclude that the requirements of section 17.3 of the CBA were satisfied in this case and that therefore, the district court did not err in overruling McEwen's petition in error. We therefore affirm.

Affirmed.

# Michael Bauer, appellant, v. Genesis Healthcare Group, appellee.

937 N.W.2d 492

Filed December 17, 2019. No. A-18-1212.

1. **Workers' Compensation: Notice: Appeal and Error.** Where the underlying facts are undisputed, or if disputed, the factual finding of the trial court was not clearly erroneous, the question of whether Neb. Rev. Stat. § 48-133 (Reissue 2010) bars the claim is a question of law upon which the appellate court must make a determination independent of that of the trial court.
2. **Workers' Compensation: Notice.** Neb. Rev. Stat. § 48-133 (Reissue 2010) contemplates a situation where an employer has notice or knowledge sufficient to lead a reasonable person to conclude that an employee's injury is potentially compensable and that, therefore, the employer should investigate the matter further.
3. ____: ____. The purposes of the notice requirement of Neb. Rev. Stat. § 48-133 (Reissue 2010) are to enable the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury and to facilitate the earliest possible investigation of the facts surrounding the injury.
4. **Words and Phrases.** "Practicable" generally means capable of being done, effected, or put into practice with the available means, i.e., feasible.
5. **Workers' Compensation: Notice: Words and Phrases.** The meaning of "as soon as practicable" under Neb. Rev. Stat. § 48-133 (Reissue 2010) depends upon the particular facts and circumstances of the case.

Appeal from the Workers' Compensation Court: J. Michael Fitzgerald, Judge. Affirmed.

Christopher R. Miller and Mark P. Grell, of Miller Grell Law Group, P.C., L.L.O., for appellant.

Jason A. Kidd, of Engles, Ketcham, Olson & Keith, P.C., for appellee.

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

Welch, Judge.

## INTRODUCTION

In this workers' compensation case, Michael Bauer filed a claim for benefits against Genesis Healthcare Group (Genesis), concerning a shoulder injury he experienced while working as a physical therapy assistant. A trial judge of the Workers' Compensation Court determined that Bauer failed to give the required notice of injury to Genesis "as soon as practicable" after the occurrence and dismissed Bauer's petition. Bauer appeals the dismissal of his petition, arguing that the trial court erred in finding that he failed to give Genesis notice of his injury as soon as was practicable. Having determined, as a matter of law, that the trial court correctly determined that Bauer failed to give Genesis notice "as soon as practicable" as required by Neb. Rev. Stat. § 48-133 (Reissue 2010), we affirm the trial court's dismissal of Bauer's petition.

## STATEMENT OF FACTS

On September 15, 2017, Bauer was employed by Genesis as a director of rehabilitation and as a physical therapy assistant. On that date, while assisting a patient in a wheelchair, Bauer felt a "sharp pain" and a "sudden pop" in his right shoulder together with a "burning kind of numbness" that went down his right arm. Bauer testified that he told his coworker that he "'tore a muscle or something'" and was advised to file a report. Bauer did not immediately file a report. He testified that he was concerned about his job status and did not want to "rock the boat" by reporting the injury. Instead, he testified that he believed he could handle it on his own. Later that day, Bauer went to the gym to try to work out his arm. The following weekend, Bauer canceled a planned trip to a Nebraska football game, placed ice on the impacted area, and utilized a

set of pulleys at his home to work on his range of motion. Due to his ability to set his own work schedule, Bauer placed himself on light duty for the week following the incident.

On September 25, 2017, Bauer was informed by his employer that he was being placed on administrative leave and instructed that his position might be eliminated but that he would be considered for other director of rehabilitation positions in the state if one should become available. Bauer testified that, at that time, his arm was still sore, but he continued to believe he had a minor sprain or strain. He continued to try and rehabilitate his injury by pursuing aquatic therapy on his own.

Bauer testified that on October 1, 2017, while working at his family farm and attaching a blade to a tractor, he felt pain and a "pop" in the same shoulder. He testified that he was being "hardheaded" about seeing a doctor, but at the urging of his wife, he first sought treatment for his shoulder on October 6 at a clinic in McCook, Nebraska. At the clinic, he was examined by a physician assistant, who stated in her medical note: "The onset of the shoulder pain has been sudden following an incident not at work and has been occurring in a persistent pattern for 5 days. The course has been without change. The shoulder pain is severe. The shoulder pain is characterized as a sharp stabbing." The physician assistant suggested that Bauer have a CT scan of the shoulder and that Bauer contact an orthopedic surgeon.

Bauer made an appointment to see Dr. Jeffrey Tiedeman, an orthopedic surgeon in Omaha, Nebraska. In his office notes governing the visit on October 20, 2017, Dr. Tiedeman indicated Bauer "was injured when he was putting a blade on the back of his tractor on 10-1-17. He felt a pop in his shoulder and a burning sensation that radiated from the shoulder all [the] way down to his hand." The note of the visit also indicated, "[Bauer] wasn't experiencing any significant problems with his shoulder before this episode." At trial, Bauer stated that he did not initially tell Dr. Tiedeman about any work

injury. Bauer stated that he purposefully misled his doctors to avoid his employer's discovering his work injury.

Following the visit, Dr. Tiedeman opined that Bauer was injured when he was putting a blade on the back of his tractor. His impression was that Bauer had suffered a "[r]otator cuff tear right shoulder with possible associated biceps tendinopathy." He then recommended a CT scan with an arthrogram component in order to obtain "better definition" governing the status of the rotator cuff.

Bauer testified that on Friday, October 20, 2017, following his appointment with Dr. Tiedeman, he called Genesis to report the injury but was unable to reach the appropriate person. He then reported the injury on Monday, October 23, and filed a written report the following day.

The CT scan was performed on October 30, 2017. The radiologist's impression was that there was no evidence of a rotator cuff tear or retraction, there was a "[m]edial subluxation of the biceps tendon with superficial partial tear and suspected overlying subscapularis tendon tear," and there was an "anterior capsular laxity with evidence of multidirectional instability possibly with small intra-articular loose body and partial tear/laxity of the middle glenohumeral ligament." After Dr. Tiedeman reviewed the CT scan on November 3, he opined that there "did not appear to be any full-thickness tear of the rotator cuff," but he noted "some subluxation of the biceps tendon and likely a partial-thickness tear of the upper border of the subscapularis."

After Bauer returned to Dr. Tiedeman on November 20, 2017, for a followup evaluation, Dr. Tiedeman diagnosed a "[b]iceps tendon subluxation with rotator cuff tendinopathy right shoulder." Dr. Tiedeman stated that they could manage the symptoms conservatively or pursue a surgical approach. At this visit, Bauer advised Dr. Tiedeman, for the first time, that Bauer believed he may have actually injured his shoulder initially in mid-September when he was "lifting a patient at work."

On April 4, 2018, Dr. Tiedeman opined that "more likely than not," the work accident caused or contributed to Bauer's right shoulder injury.

Following the trial, the court found that Bauer injured his right shoulder in an accident arising out of and in the course of his employment with Genesis on September 15, 2017. However, the court found that Bauer did not provide notice of the injury to Genesis "as soon as practicable" as required by § 48-133 and dismissed the case. Bauer appeals.

## ASSIGNMENT OF ERROR

Bauer contends that the Workers' Compensation Court erred in finding that he failed to give Genesis notice of his injury as soon as was practicable.

## STANDARD OF REVIEW

Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2018), 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. *Greenwood v. J.J. Hooligan's*, 297 Neb. 435, 899 N.W.2d 905 (2017).

[1] Where the underlying facts are undisputed, or if disputed, the factual finding of the trial court was not clearly erroneous, the question of whether § 48-133 bars the claim is a question of law upon which the appellate court must make a determination independent of that of the trial court. *Unger v. Olsen's Ag. Lab.*, 19 Neb. App. 459, 809 N.W.2d 813 (2012).

## ANALYSIS

Section 48-133 provides, in relevant part:

> 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 . . . . Want of such written notice shall not be a bar to proceedings under the Nebraska Workers' Compensation Act, if it be shown that the employer had notice or knowledge of the injury.

As such, the trial court correctly dismissed Bauer's claim if it correctly found that Bauer did not report his injury suffered on September 15, 2017, to his employer "as soon as practicable." This court had occasion to examine the meaning of the phrase "as soon as practicable" in *Williamson v. Werner Enters.*, 12 Neb. App. 642, 682 N.W.2d 723 (2004). In *Williamson*, we noted:

> The requirement that notice be given "as soon as practicable" has been a part of the workers' compensation statutes since their inception in 1913. See Rev. Stat. § 3674 (1913). In discussing the requirements of § 3674, the Nebraska Supreme Court stated in *Good v. City of Omaha*, 102 Neb. 654, 655-56, 168 N.W. 639 (1918): "[T]he requirement of the statute is only what a person acting in good faith would be likely to do without a statute. One receiving an injury, for which he expects to hold another liable, would feel called upon, as soon as practicable after receiving the injury, to give the other notice of it, and would feel called upon, as soon as he knew the nature and extent of his injury, to make his demand for compensation. In courts of justice, the good faith of a claim is always more or less discredited by the fact that no immediate demand was made or that prosecution was long delayed. The employer is entitled to an early demand, so that he may know the nature and amount of the claim; may settle it, if possible, or, if not, may investigate the facts and preserve his evidence."

12 Neb. App. at 646, 682 N.W.2d at 727.

[2,3] We further stated in *Williamson*:

> The Nebraska Supreme Court stated in *Scott v. Pepsi Cola Co.*, 249 Neb. 60, 65, 541 N.W.2d 49, 53 (1995), that "[§] 48-133 [(Reissue 1993)] contemplates a situation where an employer has notice or knowledge sufficient to lead a reasonable person to conclude that an employee's injury is potentially compensable and that, therefore, the employer should investigate the matter further." The *Scott* court also stated that a lack of prejudice is not an exception to the requirement of notice under § 48-133. The purposes of the notice requirement are "[f]irst, to enable the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury; and second, to facilitate the earliest possible investigation of the facts surrounding the injury." 7 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 126.01 (2003).

12 Neb. App. at 648, 682 N.W.2d at 728.

In *Williamson*, we reviewed authority from other jurisdictions analyzing the phrase "as soon as practicable" and cited extensively to a Kentucky Court of Appeals' case, where that court concluded that an employee's notice provided 54 days after the employee's injury was not provided "as soon as practicable":

> "[I]t is our view that that part of the statute requiring notice of an injury to be given as soon as practicable is as mandatory in its nature as it is in requiring notice at all, and if there is delay in giving notice, the burden is upon the injured person to show that it was not practicable to give notice sooner. While the rule of liberal construction will be applied to the workmen's compensation statutes, yet, liberal construction does not mean total disregard for the statute, or repeal of it under the guise of construction. And furthermore, it must not be forgotten that the very nature of appellant's injury was such that [the injury] needed immediate attention. Hernia is a

> progressive injury and will increase with time. Whether or not appellant's hernia was an old one or a fresh one sustained at the time he claims was indeed of much importance to appellee, since, if it was of the former class, appellee would not have been liable. And, if appellant had received immediate treatment, his disability, in all reasonable probability, might have been lessened if not entirely cured. Appellee was entitled to the benefit of an early opportunity to ascertain whether appellant sustained the hernia at the time claimed by him or whether it existed previous[ly] thereto, and also an opportunity to have him treated in an effort to cure, or, at the least, minimize the extent of his disability."

12 Neb. App. at 649, 682 N.W.2d at 729, quoting *Buckles v. Kroger Grocery & Baking Co.*, 280 Ky. 644, 134 S.W.2d 221 (1939).

Here, there is no dispute of fact in the record as it relates to the timing of the accident, injuries, and reporting. Bauer sustained the first injury to his shoulder on September 15, 2017, while assisting a patient in a wheelchair. Bauer admittedly did not report the injury to Genesis and intentionally did not report the work-related accident until October 23, which was after he injured the same shoulder in a non-work-related farm accident, after he had been placed on administrative leave, and after, he argues, he first realized his injury was more serious than he originally thought. Accordingly, we must now independently determine, as a matter of law, whether under these facts, Bauer reported the September 15 injury "as soon as practicable."

[4] We are mindful of our various pronouncements in *Williamson v. Werner Enters.*, 12 Neb. App. 642, 652, 682 N.W.2d 723, 731 (2004), including the dictionary definition of the word "'[p]racticable'" as generally meaning "capable of being done, effected, or put into practice with the available means, i.e., feasible. Webster's Encyclopedic Unabridged Dictionary of the English Language 1127 (1989)." We are

also mindful of our ultimate holding in *Williamson*, where we said:

> Viewed in the light most favorable to Werner, the facts show that Williamson experienced an unusual event. He promptly perceived substantial pain that he connected with the event. Within days, he sought chiropractic treatment. The chiropractic record shows that Williamson attributed the pain to the event. Even if we assume that a liberal construction requires allowance of some time between that perception and the first instance of reporting, the period from December to May exceeds the outer limit of any reasonable delay. Williamson presented no evidence showing that it was not "practicable" to give notice to Werner soon after he sought chiropractic treatment for severe pain that he attributed to the incident. We conclude that it was practicable to report the injury within a reasonable time after Williamson sought chiropractic treatment for the perceived pain which he related to the load-shifting incident and that Williamson failed to do so. The trial court correctly determined that Williamson failed to give notice as soon as practicable.

12 Neb. App. at 653, 682 N.W.2d at 731-32.

We likewise reach the same conclusion here. Although we are somewhat troubled by the shorter length of time between the September 15, 2017, accident and the October 23 report, we note that Bauer, an experienced physical therapy assistant, perceived an immediate injury to his shoulder which he sustained while assisting a patient in a wheelchair on September 15. Although Bauer argues that he did not perceive the injury to be serious, he attributed significant pain and numbness from it, canceled weekend plans to treat it, attempted to personally rehabilitate it, and changed his own work schedule to accommodate it. By his own admission, Bauer intentionally chose to not report the injury not because it was not practicable, but because he did not want to "rock the boat." In fact, he decided to report it only after being placed on administrative

leave and only after further injury to his shoulder on October 1 following the period of time when he could have reported the first injury and chose not to. In finding that Bauer's report was not "as soon as practicable," we again refer to our quote from Professor Larson in *Williamson*:

> The purposes of the notice requirement are "[f]irst, to enable the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury; and second, to facilitate the earliest possible investigation of the facts surrounding the injury." 7 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 126.01 (2003).

12 Neb. App. at 648, 682 N.W.2d at 728. Here, under these facts, Genesis was potentially compromised by Bauer's decision not to report his injury. First, had Bauer reported his injury and sought treatment, a medical professional could have examined the nature and extent of the injury and perhaps cautioned Bauer against the type of use which resulted in the October 1, 2017, injury. Second, Genesis would have been in a better position to investigate the nature and extent of the injury on September 15 and better able to defend against Bauer's claim first reported after the October 1 farm injury. Genesis was compromised by not having an opportunity to review the injury prior to October 1. Accordingly, it is not the specific length of time in reporting the injury here (just over 30 days) which results in our findings, but the nature of all the circumstances which dictate the result. We conclude that it was practicable for Bauer to report his injury within a reasonable period of time following his September 15 injury and that he failed to do so. Consequently, the trial court correctly determined that Bauer failed to give notice to Genesis "as soon as practicable."

[5] The dissent argues that "the majority appears to establish a new 'fixed time' for reporting a workplace injury based on the special knowledge of a particular plaintiff in a case, shortening the 'as soon as practicable' requirement from

4 months to a number of days." However, as this court previously held in construing the meaning of the phrase "as soon as practicable":

> The Nebraska Supreme Court considered an analogous question in *Cobbey v. Buchanan,* 48 Neb. 391, 67 N.W. 176 (1896), where the court determined that the meaning of the term "necessaries" cannot be fixed by a general rule applicable to all cases and that the question of the term's meaning is a mixed one of law and fact to be determined in each case from the particular facts and circumstances of the case. Here, the trial court reached its determination after weighing credibility and determining which version of the facts to accept. Just as the meaning of "necessaries" depends upon the particular facts and circumstances, so does the meaning of "as soon as practicable."

*Williamson v. Werner Enters.*, 12 Neb. App. 642, 652, 682 N.W.2d 723, 731 (2004).

Accordingly, the question is not about how many days, weeks, or months elapse from the time of the injury until the reporting date, but whether the claimant reported the injury "as soon as practicable" under the specific facts and circumstances of this case. In that regard, the dissent makes mention of Bauer's failure to report his injury so as not to "rock the boat" in relation to his tenuous employment and his lack of medical diagnosis as being factors which support a finding that it was not "practicable" for Bauer to report his injury to his employer until October 23, 2017. We discuss these factors independently.

First, although we are sympathetic to Bauer's apparent tenuous employment situation at the time that he was injured, we do not construe Bauer's perception of the instability of his employment as impacting the "practicability" of reporting the incident. As we stated in *Williamson*:

> "Practicable" generally means capable of being done, effected, or put into practice with the available means, i.e., feasible. Webster's Encyclopedic Unabridged

> Dictionary of the English Language 1127 (1989). It has also been described as meaning possible or feasible, able to be done, or capable of being put into practice. *Id.*

12 Neb. App. at 652, 682 N.W.2d at 731.

Second, the dissent suggests "I think the 'practicability' language in § 48-133 is workable in all situations by considering the reasonableness of the employee's actions in seeking treatment, in conjunction with some medical pronouncement of the seriousness of the injury which includes a course of treatment." Although we recognize that there has to be a degree of injury which places the employee on notice that he or she is injured, we disagree that the word "practicable" necessarily incorporates notions of treatment or medical pronouncement. Instead the question is whether, under the facts and circumstances of each case, the claimant reported the injury "as soon as practicable."

We see this case as similar to *Williamson, supra*, where we ultimately held that the worker's experiencing of an unusual event where he promptly perceived substantial pain that he connected with the event for which he sought chiropractic treatment in which he related pain to the event was sufficient to place him on notice of his injury and triggered his reporting requirement "as soon as practicable" thereafter.

Likewise, here, Bauer injured himself on September 15, 2017; knew he injured himself; promptly perceived pain which he connected with the event; and engaged in self-treatment activities to rehabilitate himself. Although he did not seek medical assistance right away, he testified that even after he aggravated the injury, he was reluctant to seek medical treatment because he was being "hardheaded." Importantly, Bauer specifically testified that he did not then report the incident, not because he did not deem himself injured, but because he did not want to "rock the boat." Stated differently, under these facts, Bauer admittedly failed to report the work-related injury to his employer (and even delayed reporting the work-related event to his doctors for a period of time once he sought

treatment) not because it was not feasible, but because of his conscious decision not to. Under these specific facts, we find Bauer failed to report his injury "as soon as practicable."

## CONCLUSION

Having determined as a matter of law that the trial court correctly found that Bauer failed to give his employer, Genesis, notice "as soon as practicable" as required by § 48-133, we affirm the trial court's dismissal of Bauer's petition.

Affirmed.

Pirtle, Judge, dissenting.

There is an old saying in the law: "Difficult cases make bad law." This case is a prime example of that. For the reasons that follow, I respectfully dissent from the majority's determination that the trial court correctly denied benefits to Bauer for failing to notify his employer of his workplace injury "as soon as practicable" as required by Neb. Rev. Stat. § 48-133 (Reissue 2010). Furthermore, the majority appears to establish a new "fixed time" for reporting a workplace injury based on the special knowledge of a particular plaintiff in a case, shortening the "as soon as practicable" requirement from 4 months to a number of days. See, § 48-133; *Williamson v. Werner Enters.*, 12 Neb. App. 642, 682 N.W.2d 723 (2004).

The majority's finding is especially harsh when all the facts and circumstances surrounding Bauer's failure to report the incident immediately and his reluctance to "rock the boat" are fully understood. Bauer had reason to believe that ever since the spring of 2017, his employment was in jeopardy and his decision to try to rehabilitate himself was a hedge against retaliation and possible termination. Bauer testified his manager was under investigation by corporate human resources officials for some sort of misconduct. Bauer was asked to submit to an interview as part of the investigation. Initially, Bauer refused, telling the corporate officials that he was afraid anything he said would "[get] back to" his manager, which

he feared would result in some sort of workplace retaliation. The corporate officials reassured Bauer they would keep his confidences, but "within three weeks [his manager's] demeanor [toward him] changed dramatically." In July, she gave him an unfavorable performance report, and then, she "wrote [him] up," alleging Bauer had failed to provide coverage for his post. Bauer testified he did not want to report the workplace injury initially because he was afraid the natural consequence of the report under these conditions would be loss of employment.

On September 25, 2017, which was 10 days after his injury, Bauer was summoned to meet with the manager he had been interviewed about in the spring. During this meeting, Bauer was placed on administrative leave. Bauer was under the impression it was a money-saving move, since the manager said she would perform Bauer's duties as well as her own. But 2 weeks after being placed on leave, Bauer became aware the company had hired a new person to do the job Bauer had been doing. If this was a wrongful discharge case of some type, Bauer would be entitled to an inference that if he had reported the incident on the day it happened, and if the administrative leave and the hiring of a new person followed closely thereafter, reporting the accident was causally connected to his loss of employment.

By the time Bauer sought treatment for his injury, he had already been placed on administrative leave but had not yet learned his job had been given to someone new. In fact, he was still waiting for a call to return to work, since the manager said "the phone could ring anytime," and he had not been fired. Bauer testified he feared attributing the injury to the workplace would "rock the boat" and impair his chances of being brought back to work.

Bauer learned he had been replaced about 2 weeks after September 25, 2017. His first appointment with the orthopedic surgeon was on October 20, and on October 23, Bauer reported the injury to Genesis. Until that point, Bauer thought

he could rehabilitate himself using weights, pulleys, and aqua therapy. I appreciate Bauer's reluctance to report the injury on the day it happened and his unwillingness to attribute the injury to the workplace when seeking treatment. I interpret his silence as self-preservation through October 23, rather than some devious, intentional withholding of information designed to prejudice the employer as the majority suggests. By then, even though he still did not know the seriousness of the injury, he had nothing to lose by reporting the injury, since he had been replaced and had started talking to other potential employers.

I am also troubled by the majority's narrowing of the timeframe for reporting workplace injuries for workers with specialized knowledge, since it may just be a matter of the "right case" which narrows the reporting period for a worker without such awareness. Since Bauer is an experienced physical therapy assistant, the new rule for reporting for a plaintiff like Bauer is "immediately." This standard is unfair given the "beneficent purpose" and the "consistently . . . liberal construction" of the Nebraska Workers' Compensation Act and the uniqueness of every plaintiff and every injury. See *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 431, 657 N.W.2d 634, 640 (2003).

I note with interest that *Williamson v. Werner Enters.*, 12 Neb. App. 642, 682 N.W.2d 723 (2004), was also a split decision. The dissent analyzes § 48-133 in its past and present form as evidence of a legislative intent that courts be flexible in their application of "practicability" to different injuries and different bodies. Prior to its present language, § 48-133 included a provision that required not only a reporting "as soon as practicable" but also that "the claim for compensation with respect to such injury shall have been made within six months after the occurrence." § 48-133 (1943). In 1977, this 6-month provision was removed, leaving the statement first included in 1917 that "all disputed claims for compensation or benefits shall be first submitted" to the workers'

compensation court. See § 48-133 (Reissue 1978). In addition to deleting the requirement that employees file a claim within 6 months, the Legislature changed § 48-133 by adopting 1977 Neb. Laws, L.B. 144, and extending the time in which employees have to file a petition from 1 year to 2 years. These changes give us an insight into the ongoing liberal interpretation of all aspects of the workers' compensation law. See *Williamson, supra*. And in floor debate in support of L.B. 144, the sponsor, Senator Bill Brennan, said: "A person can't report an accident until he has knowledge of the seriousness of the accident." Floor Debate, L.B. 144, 85th Leg., 1st Sess. 537 (Feb. 15, 1977).

In my judgment, even with his special knowledge and experience, Bauer did not appreciate the significance of his injury until November 20, 2017. At that point, Bauer learned he had suffered a "[b]iceps tendon subluxation with rotator cuff tendinopathy," which could be managed conservatively or resolved surgically. But by then, Genesis had already been on notice of the injury for a month, a mere 38 days from the date of the accident. Bauer had given sufficient notice to Genesis for it to do its own investigation and to get up to speed with any treatment recommendations.

My interpretation of the legislative message at the time *Williamson* was decided was as follows:

> 6 months from the date of injury to the date of the report could be too short a timeframe in some situations, so that portion of the statute should come out, but a claimant must be sure to file a petition with the compensation court within 2 years of the incident, even if the seriousness of the injury is still unknown.

I construe § 43-133 the same way today. The Legislature has had plenty of opportunity to further restrict the reporting requirements in the years since the *Williamson* decision when the court concluded that 4-plus months before reporting "exceeds the outer limit of any reasonable delay," but to date it has not done so. 12 Neb. App. at 653, 682 N.W.2d at 732.

I too would have dissented in *Williamson*, since I believe fixing an "outside edge" for reporting an injury is contrary to a determination of what is "practicable." And now, the narrowing of the reporting period so drastically yet again sets a dangerous precedent and upsets the Legislature's intent that § 48-133, and the Nebraska Workers' Compensation Act in its entirety, be construed liberally and in the worker's favor.

I think the "practicability" language in § 48-133 is workable in all situations by considering the reasonableness of the employee's actions in seeking treatment, in conjunction with some medical pronouncement of the seriousness of the injury which includes a course of treatment. The flexibility of the statute when applied to facts in any case, with any kind of plaintiff and any kind of injury, satisfies the purpose of the workers' compensation statutes—to relieve injured workers from the adverse economic effects caused by a work-related injury or occupational disease.

Therefore, I would reverse the decision by the trial court and remand the cause with directions to the trial court to determine the benefits Bauer is entitled to under the law. I believe the trial court was clearly wrong in denying Bauer benefits, and I fear the ramifications of the majority's position will have far-reaching and dire consequences for workers which is contrary to the intent of the Nebraska Workers' Compensation Act. And, I would encourage the Nebraska Supreme Court and/or the Nebraska Legislature to further review and rectify the injustice done by shortening so severely the time for reporting a workplace injury, especially given that two divided Court of Appeals' panels have now created continued uncertainty for current and future litigants and practitioners.

# Dock Kelly III, appellant, v. Cutch, Inc., a Nebraska corporation, doing business as Burger Star Restaurant, and Cutchall Management Company, Inc., appellees.

938 N.W.2d 102

Filed December 31, 2019. No. A-18-761.

1. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, which an appellate court independently decides.
2. **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 failure to give the requested instruction.
3. **Negligence: Jury Instructions: Damages.** A court is required to instruct a jury on damages for the aggravation of a preexisting condition where there is evidence to support a finding that the defendant's negligence had aggravated a preexisting condition.
4. **Damages: Liability.** A defendant, under Nebraska law, can be liable for the total harm to a plaintiff from an accident even though the injury was greater because of the plaintiff's preexisting physical condition than would usually be caused by such an accident.
5. **Expert Witnesses.** Where injuries are objective, expert testimony is not required.
6. **Actions: Negligence: Damages: Proof.** The plaintiff has the burden of proving duty, breach, causation, and resultant harm to recover in a suit in negligence.
7. **Negligence: Damages: Proximate Cause: Proof.** Once the plaintiff presents evidence from which a jury reasonably can find that damages were proximately caused by the tortious act, the burden of apportioning damages resulting from the tort rests squarely on the defendant.

8. **Jury Instructions: Damages.** The apportionment instruction is appropriate where there is evidence of a preexisting condition but the degree to which that condition may have been aggravated could not be determined.
9. ____: ____. In the absence of proof of aggravation, an instruction on apportionment of damages would be inappropriate.

Appeal from the District Court for Douglas County: Leigh Ann Retelsdorf, Judge. Affirmed.

James E. Harris and Britany S. Shotkoski, of Harris & Associates, P.C., L.L.O., and Daniel L. Draisen, of Krause, Moorhead & Draisen, P.A., for appellant.

David D. Ernst and Jeffrey A. Nix, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellees.

Riedmann, Arterburn, and Welch, Judges.

Riedmann, Judge.

## INTRODUCTION

Dock Kelly III appeals a jury verdict in his favor awarding him damages for injuries he sustained in a slip-and-fall accident. On appeal, he alleges that the district court for Douglas County erred in refusing to give his proposed jury instruction on the aggravation of a preexisting condition and failed to properly instruct the jury on the burden of proof on damages. We conclude that Kelly's proposed jury instruction was not warranted by the evidence and that the jury was properly instructed on damages. Therefore, the district court did not err in refusing to give the proposed instruction, and we affirm.

## BACKGROUND

At the time of the slip-and-fall accident, Kelly was a resident of South Carolina and the head wrestling coach at a university located there. On March 10, 2010, Kelly was in Omaha, Nebraska, for a wrestling tournament and went to eat dinner at Burger Star Restaurant, which was owned and

operated by Cutch, Inc., and Cutchall Management Company, Inc. (collectively the appellees). Kelly slipped on a wet floor at the restaurant and fell, sustaining injuries to his left knee and back.

Kelly has a congenital deformity of his right arm, and his right leg was amputated below the knee when he was a child. He was wearing a prosthetic leg at the time of the fall. Despite this, the record indicates that Kelly had no significant health problems prior to his fall, including no history of pain, injury, or limitation with his left knee or back. To the contrary, Kelly was a "NCAA Division I" wrestler and was inducted into the National Wrestling Hall of Fame in 1997. He testified that he never had any problems due to having only one leg.

After falling at the restaurant, Kelly experienced sharp, shooting pain in his lower back as well as pain, weakness, and instability in his left knee. In September 2010, Kelly fell in the shower, resulting in additional injuries to his left knee, including a torn anterior cruciate ligament, torn lateral collateral ligament, frayed and/or torn lateral meniscus, and avulsed lateral hamstring tendon. He had surgery on his left knee in March 2015.

Kelly filed a negligence action against the appellees in 2012, asserting that the appellees created a dangerous condition at the restaurant by mopping the floor and failing to warn its customers of the condition. He filed an amended complaint in 2013.

A jury trial was held in this matter in July 2018. During trial, Kelly proposed a jury instruction on the aggravation of a preexisting condition based on a standard jury instruction. See NJI2d Civ. 4.09. The district court refused to give the instruction. The jury ultimately found in favor of Kelly and awarded him $95,000 in damages. Kelly timely appeals.

## ASSIGNMENTS OF ERROR

Kelly assigns that the district court erred in failing to give his proposed jury instruction on the aggravation of a preexisting condition and in failing to properly instruct the jury regarding the burden of proof on damages.

## STANDARD OF REVIEW

[1] Whether a jury instruction is correct is a question of law, which an appellate court independently decides. *Bank v. Mickels*, 302 Neb. 1009, 926 N.W.2d 97 (2019).

[2] 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 failure to give the requested instruction. *Id*.

## ANALYSIS

*Jury Instruction on Aggravation of Preexisting Condition.*

Kelly argues that the district court erred in refusing to give his proposed jury instruction on the aggravation of a preexisting condition. The jury instruction that Kelly requested stated:

> There is evidence that [Kelly] had a prosthetic right leg prior to the slip and fall of March 10, 2010. [The appellees] are liable only for any damages that you find to be caused by the [appellees'] negligence.
>
> If you cannot separate damages caused by the preexisting condition from those caused by the slip and fall, then the [appellees] are liable for all of those damages.
>
> This is true even if [Kelly's] preexisting condition made him more susceptible to the possibility of ill effects than a normally healthy person would have been, and even if a normally healthy person probably would not have suffered any substantial injury.

The first paragraph of the proposed instruction is the standard jury instruction, NJI2d Civ. 4.09, for determining damages when the plaintiff has a preexisting condition. See *Golnick v. Callender*, 290 Neb. 395, 860 N.W.2d 180 (2015). The second paragraph is frequently called the apportionment instruction. *Id*. It is appropriately used when the jury may be unable to precisely determine which of the plaintiff's damages were not preexisting. *Id*.

[3] The first two paragraphs of Kelly's proposed instruction are a correct statement of the law. See *Ketteler v. Daniel*, 251 Neb. 287, 556 N.W.2d 623 (1996). A court is required to instruct a jury on damages for the aggravation of a preexisting condition where there is evidence to support a finding that the defendant's negligence had aggravated a preexisting condition. See, *Golnick v. Callender, supra*; *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006).

We conclude that the evidence did not warrant instructing the jury on the aggravation of a preexisting condition, because Kelly had no preexisting condition that was aggravated by the March 2010 fall. As a result of the slip-and-fall accident, Kelly sustained injuries to his left knee and back. Although there are references in the record to a history of osteoarthritis in the left knee and scoliosis of the spine, neither condition ever caused Kelly any pain or limitation. Kelly appeared unaware that he had scoliosis and testified that if he did, it never stopped him from doing anything he wanted to do.

In general, Kelly said that he had no history of problems with his knee or back that interfered with his life. And his medical records establish that he had no back or leg pain prior to the March 2010 fall, that his left knee was "highly functional" before the fall, and that he was able to do everything without any disability or limitation. Therefore, because the record lacks evidence of a preexisting condition in Kelly's left knee or back, the first two paragraphs of Kelly's proposed instruction were not warranted by the evidence, and the district court properly refused to so instruct the jury.

[4] The notion embodied by the third paragraph of Kelly's proposed instruction must be given when the plaintiff produces evidence to support the "eggshell-skull" theory, which generally includes evidence of a preexisting condition which predisposes the plaintiff to injury or greater injury than would occur without the preexisting condition. See, *Ketteler v. Daniel, supra*; *Aflague v. Luger*, 8 Neb. App. 150, 589 N.W.2d 177 (1999). While the first two paragraphs of Kelly's proposed

instruction address the question of apportionment of damages, the third paragraph addresses a different matter—"a subtle facet of causation." See *Aflague v. Luger*, 8 Neb. App. at 159, 589 N.W.2d at 183. This paragraph enables a jury to understand that a defendant, under Nebraska law, can be liable for the total harm to a plaintiff from an accident even though the injury was greater because of the plaintiff's preexisting physical condition than would usually be caused by such an accident. *Aflague v. Luger, supra*.

In *Castillo v. Young, supra*, the trial court gave the jury instructions similar to the first two paragraphs of Kelly's proposed instruction, but refused to give the third paragraph on the eggshell-skull theory. The evidence indicated that the plaintiff had broken her jaw several years before she was injured in the operative car accident, but her jaw completely recovered and she had had no symptoms for a number of years prior to the accident. At trial, there was testimony from the plaintiff's treating physician that the accident aggravated a preexisting condition and that the plaintiff was fragile due to her prior injury. Therefore, the Nebraska Supreme Court concluded that the proffered instruction correctly stated the law and was warranted by the evidence offered by the expert witness and that the failure to give the instruction was prejudicial to the plaintiff. It iterated that if a plaintiff has a preexisting condition and the defendant's conduct resulted in greater damages because of that preexisting condition, the defendant is nonetheless liable for all damages proximately caused by the defendant's conduct.

In reaching its decision in *Castillo v. Young, supra*, the Supreme Court relied upon *Ketteler v. Daniel*, 251 Neb. 287, 556 N.W.2d 623 (1996). There, the plaintiff proposed the three-paragraph instruction proffered by Kelly in the instant case, but the trial court declined to give the second and third paragraphs. In reversing that decision, the Supreme Court found that the instruction was warranted by evidence offered by two separate physicians who testified that the plaintiff

suffered from a preexisting condition, fibromyalgia, and that she suffered from back and neck conditions prior to the car accident which were aggravated by the accident.

Subsequently, in *Aflague v. Luger, supra*, this court found that an eggshell-skull instruction was warranted where there was expert testimony that because the plaintiff had suffered a severe head injury in the past, she was more vulnerable to side effects even after relatively minor trauma that might do very little in a person who has never had an injury.

It is clear that under the eggshell-skull theory, a defendant is liable for all damages proximately caused by its conduct even when a plaintiff has a preexisting condition and the defendant's conduct resulted in greater damages because of that preexisting condition. See, *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006); *Aflague v. Luger*, 8 Neb. App. 150, 589 N.W.2d 177 (1999). In other words, the defendant takes the plaintiff as the defendant finds him or her. See *Aflague v. Luger, supra*. The commonality among the aforementioned cases is that the instruction was found to be warranted by the evidence because there was expert testimony that the accident aggravated a preexisting condition, the plaintiff was more susceptible to injury due to a preexisting condition, or the plaintiff was injured more severely than would be expected because of a preexisting condition. This expert testimony was lacking in the instant case.

Despite testimony from Kelly's treating physician and surgeon regarding the injuries he sustained to his left knee, neither testified as to what effect, if any, having a below-the-knee prosthetic on his right side had on his ability to ambulate or function postinjury. His primary care physician testified that a consulting physician, who in December 2010 recommended surgery, reported that Kelly "'walks fine with a prosthesis and gets around well except for the problems he is having with his left leg.'" Kelly identified a problem walking on uneven ground, but that was limited to "instability, a feeling his knee is going to give way and buckle on him and

then it actually does start to give way, buckle and also causes him pain."

After Kelly's surgery in March 2015, his surgeon recommended closely supervised rehabilitation for a couple of weeks due to his other impairments, but as with other patients, his rehabilitation began the day after surgery. His surgeon narrated a videotaped rehabilitation session in which he described Kelly as "non-weightbearing on his left leg[,] which is the leg that we surgically repaired and he's bearing weight on his prosthetic leg on the right side." He explained rehabilitation was "somewhat more difficult than normal" due to Kelly's other issues. Nonetheless, the surgeon expected that Kelly would be able to get down on the ground and demonstrate wrestling moves to college athletes within a year of surgery. Kelly's physical therapy discharge notes reveal that at the time of discharge, he was ambulating with his normal gait, meaning that his ability to walk had returned to the point that it was prior to his fall. He also demonstrated the ability to "transfer back and forth from right to left [without] discrepancy in terms of the use of his legs." Importantly, he was able to "get up off the floor to a standing position without help or difficulty." By November 2015, Kelly was able to go up and down stairs without the use of a handrail. Other than his other abnormalities resulting in a "somewhat more difficult" rehabilitation process, the expert testimony did not suggest that they caused Kelly to suffer any ill effects greater than he would have suffered without a prosthetic leg.

[5] We recognize that where injuries are objective, expert testimony is not required. See, *Storjohn v. Fay*, 246 Neb. 454, 519 N.W.2d 521 (1994); *Hamer v. Henry*, 215 Neb. 805, 341 N.W.2d 322 (1983). Kelly had a below-the-knee amputation of his right leg and a deformity of his right arm which are objective and need no expert testimony to explain their existence. The undisputed evidence, however, established that despite these conditions, Kelly had no pain or limitation and was able

to function properly—if not at an above-average level—considering his athletic accomplishments. Thus, in order to support the necessity of an eggshell-skull jury instruction, evidence was necessary to suggest that due to his conditions, Kelly was more susceptible to injury or was injured worse than someone without his conditions would have been. No such evidence was presented in this case.

Kelly and his lay witnesses testified that following the injury, he was slower, less confident, and had the sensation that his left knee was going to give out. They testified that he was no longer able to get down on the mat and demonstrate moves to his wrestlers. However, there was no testimony that these resultant effects were any different, more severe, or more pronounced than if Kelly did not have a prosthetic leg. In other words, the evidence did not support a conclusion that the left knee injury was not the sole cause of these limitations or that Kelly's right leg amputation contributed or magnified the ill effects of his left knee injury. Although there was testimony that Kelly had difficulty maneuvering stairs, the testimony did not explain whether that was because of his left knee instability or because he does not or cannot bear weight on his prosthetic leg. Given the expert testimony that Kelly was able to shift his weight from leg to leg at the time he was discharged from physical therapy, his insecurity on stairs seems to be a product of his left knee injury, without exacerbation due to his prosthesis. Because there was no testimony describing how his right leg abnormality made his condition worse, it was proper for the district court to refuse Kelly's proposed eggshell-skull jury instruction.

In addition, as discussed above, there are indications in the record that Kelly had osteoarthritis in his left knee and scoliosis of the spine, but the evidence establishes that neither condition caused him any pain or limitation prior to his fall. Kelly's treating physician and his surgeon were each asked whether the underlying osteoarthritis was contributing to Kelly's knee pain after the fall, and they both said it "could" be. However, expert

medical testimony based on "'could'" lacks the definiteness required to prove causation. See *Paulsen v. State*, 249 Neb. 112, 121, 541 N.W.2d 636, 643 (1996). Therefore, we conclude that the evidence did not warrant instructing the jury on the eggshell-skull theory and that the district court did not err in refusing to do so.

*Apportioning Damages.*

In his second assigned error, Kelly argues that by refusing to give his proposed jury instruction, the district court failed to properly instruct the jury on the burden of proof regarding damages. We disagree.

[6,7] The plaintiff has the burden of proving duty, breach, causation, and resultant harm to recover in a suit in negligence. *David v. DeLeon*, 250 Neb. 109, 547 N.W.2d 726 (1996). Once the plaintiff presents evidence from which a jury reasonably can find that damages were proximately caused by the tortious act, the burden of apportioning damages resulting from the tort rests squarely on the defendant. *Id.*

[8,9] The portion of the proposed instruction at issue in this argument would have informed the jury that if it could not separate damages caused by the preexisting condition from those caused by the slip and fall, then the appellees were liable for all of those damages. As explained above, this paragraph is frequently called the apportionment instruction. See *Golnick v. Callender*, 290 Neb. 395, 860 N.W.2d 180 (2015). The apportionment instruction is appropriate where there is evidence of a preexisting condition but the degree to which that condition may have been aggravated could not be determined. *Gustafson v. Burlington Northern RR. Co.*, 252 Neb. 226, 561 N.W.2d 212 (1997). In the absence of proof of aggravation, an instruction on apportionment of damages would be inappropriate. *Id.*

In *Kirchner v. Wilson*, 251 Neb. 56, 554 N.W.2d 782 (1996), the Supreme Court found the apportionment instruction was warranted by the evidence because there was evidence that a

collision aggravated the preexisting degenerative and weakened condition of the plaintiff's lumbar spine but that the degree to which said preexisting condition was aggravated could not be determined. Similarly, in *David v. DeLeon, supra*, the Supreme Court concluded that the apportionment instruction was properly given where the defendant's expert witnesses agreed that a collision aggravated the plaintiff's preexisting injuries, but could not state what portion of the plaintiff's injuries was caused by the collision. The Supreme Court noted that the aggravation instruction prevented the result of a jury's finding that damages were proximately caused by the tortious act, but failing to award damages because it could not demarcate preexisting illnesses from new losses.

As we determined above, the evidence did not support instructing the jury on apportionment of damages, because Kelly had no preexisting injury to his back or left knee. Thus, there was no need for the jury to attempt to separate damages caused by a preexisting condition from those caused by the slip-and-fall accident. And the danger recognized in *David v. DeLeon, supra*, of the jury's failing to award damages because it could not demarcate preexisting illnesses from new losses, was not present here.

In addition, the jury was instructed that the appellees were also liable for any subsequent injury that was the proximate result of the original injury. In other words, the jury was instructed that the appellees were liable for the damages Kelly suffered as a result of the fall in the shower if the jury found that that fall was the proximate result of the slip and fall at the restaurant. As a result, the jury was properly instructed on the burden of proof regarding damages, and therefore, the district court did not err in refusing to give the proposed jury instruction.

The jury posed a question during deliberations, asking: "What does damages mean?" Kelly claims that this question "highlighted" the jury's confusion on the apportionment issue. See brief of appellant at 18. We disagree.

In response to the jury's question, the court directed it to the jury instruction which identified damages as the nature and extent of the injury, including whether the injury was temporary or permanent and whether any resulting disability was partial or total; the reasonable value of the earning capacity that Kelly was reasonably certain to lose in the future; and the physical pain and mental suffering Kelly had experienced and was reasonably certain to experience in the future. Due to reasons not involved in this appeal, damages did not include medical expenses or lost wages. Due to the absence of these two typical elements of damages, it would have been speculation on the part of the court to assume the basis for the jury's question was confusion regarding apportionment.

## CONCLUSION

We conclude that the jury instruction Kelly proposed on the aggravation of a preexisting condition was not warranted by the evidence presented at trial. In addition, the jury was properly instructed on the burden of proof regarding damages. Accordingly, the district court's refusal to give the proposed jury instruction was not erroneous, and we affirm the court's decision.

Affirmed.

# Jose Martinez, appellee, v. International Paper Company, a foreign corporation, and Old Republic Insurance Company, appellants.

937 N.W.2d 875

Filed January 7, 2020. No. A-19-409.

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. ____: ____. Determinations by a trial judge of the 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 compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
4. ____: ____. An appellate court is obligated in compensation court cases to make its own determinations as to questions of law.
5. **Courts: Appeal and Error.** Under the doctrine of stare decisis, lower courts must follow the precedent of higher appellate courts.
6. **Workers' Compensation: Proof.** Under Neb. Rev. Stat. § 48-151(2) (Reissue 2010), an injured worker must satisfy three elements to prove an injury is the result of an accident: (1) The injury must be unexpected or unforeseen, (2) the accident must happen suddenly and violently, and (3) the accident must produce at the time objective symptoms of injury.
7. **Workers' Compensation: Time: Proof: Words and Phrases.** Under Neb. Rev. Stat. § 48-151(2) (Reissue 2010), "suddenly and violently"

does not mean instantaneously and with force; instead, the element is satisfied if the injury occurs at an identifiable point in time, requiring the employee to discontinue employment and seek medical treatment. The time of an accident is sufficiently definite if either the cause is reasonably limited in time or the result materializes at an identifiable point.

8. **Workers' Compensation: Time: Proof.** An employee establishes an identifiable point in time when a repetitive trauma injury occurs if the employee discontinues work and seeks medical treatment; it does not matter how long the discontinuation of employment lasts.
9. **Workers' Compensation.** As the trier of fact, the compensation court is the sole judge of the credibility of witnesses and the weight to be given their testimony.

Appeal from the Workers' Compensation Court: Daniel R. Fridrich, Judge. Affirmed.

Timothy E. Clarke and Eric J. Sutton, of Baylor Evnen, L.L.P., for appellants.

Jamie Gaylene Scholz, of Law Offices of Jamie G. Scholz, P.C., L.L.O., for appellee.

Pirtle, Riedmann, and Welch, Judges.

Riedmann, Judge.

## INTRODUCTION

International Paper Company and Old Republic Insurance Company (collectively International Paper) appeal the Nebraska Workers' Compensation Court's award, finding that Jose Martinez suffered a repetitive trauma injury and awarding him benefits. Based on our review of the record, we affirm.

## BACKGROUND

In February 2018, Martinez filed a petition in the compensation court seeking benefits from International Paper under the Nebraska Workers' Compensation Act. Martinez alleged that he sustained an injury to his right shoulder by performing "repetitive use-type activities" and that he "suffered an acute episode of pain in his right shoulder a few weeks prior to

interrupting his employment and seeking medical treatment on November 9, 2017." A hearing was held on Martinez' petition in February 2019.

At the hearing, Martinez testified that he was currently employed at International Paper Company and had worked for the company for more than 19 years. He indicated that he developed shoulder pain in 2008, but he did not miss work due to the pain—although the pain was consistent and worsening from 2008 until 2017. On November 8, 2017, Martinez felt a sharp pain in his right shoulder, his right arm "locked," and he could not move it. He indicated that the pain he experienced was worse than previous pain and that it prevented him from even lying on his shoulder that night. Martinez testified that his shoulder had locked in place before November 8, but it always loosened up; however, on that occasion, it did not.

Martinez informed his supervisor before his shift the next day that he could not work, and he was taken to see a doctor on November 9, 2017. He underwent an MRI that same day, and it was discovered that he had a tear of his right rotator cuff. Following this, he returned to work at International Paper Company, but was placed on "lighter-duty work." Martinez met with Dr. Scott Reynolds in December, and it was decided that Martinez would undergo surgery to repair his rotator cuff. Reynolds performed the surgery in January 2018, and then Martinez underwent physical therapy, returning to work in April.

On cross-examination, Martinez testified that he started feeling pain in his shoulder in 2008 and that his pain continued to get worse until he saw Reynolds in November 2017. He testified that he had felt locking and limitations in movement in his arm prior to the incident on November 8, but the pain was severe enough on that date that he needed to see a doctor. Martinez admitted to seeing his family physician in September 2017 for his annual physical. At that appointment, he informed his doctor that he was having pain in his

shoulder. Martinez was also questioned regarding prior intake forms he filled out in November and December, as well as prior to his physical therapy in January 2018. On each form, he indicated that he had been having shoulder pain for a long period of time and that there was not a specific injury that occurred prior to his visits.

Following the hearing, the compensation court issued a detailed order awarding Martinez temporary and permanent disability benefits for his shoulder injury. The court noted that Martinez advanced two alternate theories of recovery during trial, one alleging that an acute accident happened on November 8, 2017, and one alleging that his shoulder injury was the result of repetitive job duties, which manifested itself on November 9. The court found that Martinez did not suffer an acute accident on November 8; however, it did find that Martinez suffered a repetitive trauma accident on November 9. Prior to analyzing Martinez' repetitive trauma injury, the court explained the relevant case law for that type of injury and analyzed Martinez' injury under the test enunciated in *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). The court also noted that there were discrepancies between Reynolds' causation report, which was offered into evidence at the hearing, and Martinez' testimony; however, the court remained persuaded by the report and issued an award in favor of Martinez. International Paper timely appealed.

## ASSIGNMENTS OF ERROR

International Paper assigns, restated and reordered, that the compensation court erred (1) as a matter of law in applying the test enunciated in *Dawes v. Wittrock Sandblasting & Painting, supra*, rather than the limited test provided in *Maxson v. Michael Todd & Co.*, 238 Neb. 209, 469 N.W.2d 542 (1991), *disapproved, Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999), and *Vencil v. Valmont Indus.*, 239 Neb. 31, 473 N.W.2d 409 (1991), *disapproved, Jordan*

*v. Morrill County, supra*; (2) in concluding that Martinez suffered a compensable repetitive trauma injury arising out of and in the course and scope of his employment; and (3) in relying on Reynolds' causation opinion.

## STANDARD OF REVIEW

[1] A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Potter v. McCulla*, 288 Neb. 741, 851 N.W.2d 94 (2014).

[2,3] Determinations by a trial judge of the 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. *Kaiser v. Metropolitan Util. Dist.*, 26 Neb. App. 38, 916 N.W.2d 448 (2018). On appellate review, the factual findings made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.*

[4] An appellate court is obligated in compensation court cases to make its own determinations as to questions of law. *Larsen v. D B Feedyards*, 264 Neb. 483, 648 N.W.2d 306 (2002).

## ANALYSIS

### *Appropriate Test for Repetitive Trauma Injuries.*

International Paper argues that the compensation court erred in analyzing Martinez' repetitive trauma injury under the test enunciated by the Nebraska Supreme Court in *Dawes v. Wittrock Sandblasting & Painting, supra*. International Paper alleges Martinez' injury should have been analyzed under the test prior to *Dawes*, which was provided in *Maxson*

*v. Michael Todd & Co., supra*, and *Vencil v. Valmont Indus., supra*. We disagree.

To adequately address International Paper's argument, we will first briefly describe the relevant case law surrounding repetitive trauma injuries and lay out how the Supreme Court has addressed such complaints.

In 1991, the Supreme Court decided *Maxson v. Michael Todd & Co., supra*, and *Vencil v. Valmont Indus., supra*, both of which addressed repetitive trauma injuries. In *Maxson*, a divided Supreme Court affirmed the trial court's finding that an employee was not entitled to workers' compensation benefits for his injury. The court analyzed the employee's ongoing shoulder pain under the statutory definition of an accident, which is defined as an "'unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.'" *Maxson v. Michael Todd & Co.*, 238 Neb. 209, 211, 469 N.W.2d 542, 544 (1991), *disapproved, Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999). The court then cited to its rule from *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982), stating that an accident is "sudden and violent" if the injury occurs at an identifiable point in time requiring the employee to discontinue employment and seek medical treatment. *Maxson*, 238 Neb. at 212, 469 N.W.2d at 544. The court held, however, that the compensation court correctly concluded that "the cumulative effects of repeated work-related trauma which do not at an identifiable moment produce objective symptoms requiring, *within a reasonably limited period of time*, medical attention and the interruption or discontinuance of employment are not the product of an accidental injury." *Id.* at 213, 469 N.W.2d at 545 (emphasis supplied).

In *Vencil v. Valmont Indus.*, 239 Neb. 31, 473 N.W.2d 409 (1991), *disapproved, Jordan v. Morrill County, supra*, a divided Supreme Court once again affirmed the compensation court's denial of an employee's claim for workers'

compensation benefits for his back pain. The court conducted the same analysis as was done in *Maxson v. Michael Todd & Co., supra*, and again held that "[t]he cumulative effects of repeated work-related trauma which do not at an identifiable moment produce objective symptoms requiring, within a reasonably limited period of time, medical attention and the interruption or discontinuance of employment are not the product of an accidental injury . . . ." *Vencil v. Valmont Indus.*, 239 Neb. at 32, 473 N.W.2d at 411.

In 1999, the Supreme Court again addressed repetitive trauma injuries in *Jordan v. Morrill County, supra*. In *Jordan*, the compensation court awarded the employee benefits, finding that he suffered a repetitive trauma injury. The compensation court review panel reversed the single judge's decision, finding that the employee did not interrupt or discontinue his employment to seek medical treatment. *Id*. Although the Supreme Court affirmed the review panel's decision, it did so because the employee did not interrupt his employment when he sought medical treatment. *Id*. The Supreme Court clarified that "[f]or purposes of the Nebraska Workers' Compensation Act, 'suddenly and violently' does not mean instantaneously and with force, but, rather, the element is satisfied if the injury occurs at an identifiable point in time requiring the employee to discontinue employment and seek medical treatment." *Jordan v. Morrill County*, 258 Neb. at 389, 603 N.W.2d at 419. The court concluded by specifically disapproving *Maxson v. Michael Todd & Co., supra*, and *Vencil v. Valmont Indus., supra*, on the grounds that "interruption of employment" means only discontinuation of employment. *Jordan v. Morrill County*, 258 Neb. at 390, 603 N.W.2d at 419.

The court next addressed the issue in 2003 in its wide-ranging opinion in *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). The court cited to the rule iterated above in *Jordan v. Morrill County, supra*, that an accident occurs

"'suddenly and violently'" if the injury occurs at an identifiable point. *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. at 555, 667 N.W.2d at 192. The court expanded on the rule, stating, "We have stated that most jurisdictions regard the time of an accident as sufficiently definite, for purposes of proving [suddenly and violently], 'if either the cause is reasonably limited in time *or the result materializes at an identifiable point*. . . .'" *Id*. at 556, 667 N.W.2d at 193 (emphasis in original). The court then found that the record supported the finding that the employee's injury occurred at an identifiable point in time and, thus, was compensable under *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999).

The Supreme Court applied the rule enunciated in *Dawes* numerous times in the following years. In *Swoboda v. Volkman Plumbing*, 269 Neb. 20, 29, 690 N.W.2d 166, 173 (2004), the court addressed the employee's repetitive trauma injury under the "disjunctive" test provided for in *Dawes* and found that the employee's injury materialized at an identifiable point in time, which occurred when he sought medical treatment for his injured shoulders and then discontinued his employment. The disjunctive test was also applied in *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009), where the court found that the employee's hearing loss materialized at an identifiable point in time.

Finally, in *Potter v. McCulla*, 288 Neb. 741, 748, 851 N.W.2d 94, 100 (2014), the parties agreed that the employee's injury happened "'suddenly and violently'" and the only question was which of several successive employers were liable. The court focused on defining the identifiable point at which an injury manifests itself, and in doing so, it refused to adopt tests used by other jurisdictions regarding repetitive trauma injuries. It reaffirmed its prior holdings that a repetitive trauma injury manifests on the date that the employee has both sought medical treatment and missed work due to the injury.

[5] After considering the above case law, it is clear that the Supreme Court considers whether a repetitive trauma injury

is compensable under the test described in *Dawes v. Wittrock Sandblasting & Painting, supra*, and its progeny, and not the limited test provided for in *Maxson v. Michael Todd & Co.*, 238 Neb. 209, 469 N.W.2d 542 (1991), *disapproved, Jordan v. Morrill County, supra*, and *Vencil v. Valmont Indus.*, 239 Neb. 31, 473 N.W.2d 409 (1991), *disapproved, Jordan v. Morrill County, supra*. International Paper argues that the facts of the present case are more similar to the facts of *Maxson* and *Vencil* and that it is better public policy to deploy the test enunciated in *Maxson* and *Vencil*. However, under the doctrine of stare decisis, lower courts must follow the precedent of higher appellate courts. See *Sanford v. Clear Channel Broadcasting*, 14 Neb. App. 908, 719 N.W.2d 312 (2006) (vertical stare decisis compels lower courts to follow strictly decisions rendered by courts of higher rank within the same judicial system). Accordingly, we find that the compensation court did not err as a matter of law in analyzing Martinez' repetitive trauma injury under the test enunciated in *Dawes v. Wittrock Sandblasting & Painting, supra*, and its progeny.

*Martinez' Repetitive Trauma Injury.*

Having concluded that the compensation court used the correct test to analyze Martinez' injury, we find that the court did not err in determining that he suffered a compensable repetitive trauma injury.

[6] The Nebraska Workers' Compensation Act defines an accident as "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." Neb. Rev. Stat. § 48-151(2) (Reissue 2010). Accord *Risor v. Nebraska Boiler, supra*. Under § 48-151(2), an injured worker must satisfy three elements to prove an injury is the result of an accident: (1) The injury must be unexpected or unforeseen, (2) the accident must happen suddenly and violently, and (3) the accident must produce at the time objective symptoms of

injury. *Risor v. Nebraska Boiler, supra*. Only the second element is in dispute in this appeal.

[7,8] Under § 48-151(2), "suddenly and violently" does not mean instantaneously and with force; instead, the element is satisfied if the injury occurs at an identifiable point in time, requiring the employee to discontinue employment and seek medical treatment. *Risor v. Nebraska Boiler, supra*. The time of an accident is sufficiently definite if either the cause is reasonably limited in time or the result materializes at an identifiable point. *Id*. An employee establishes an identifiable point in time when a repetitive trauma injury occurs if the employee discontinues work and seeks medical treatment; it does not matter how long the discontinuation of employment lasts. See *Vonderschmidt v. Sur-Gro*, 262 Neb. 551, 635 N.W.2d 405 (2001).

Here, Martinez suffered a repetitive trauma injury that materialized at an identifiable point. Martinez testified that he felt a sharp pain in his shoulder and that his shoulder then locked up on November 8, 2017. When he returned to work the next day, he informed his supervisor that he could not work, and he was taken to see the doctor. Following his doctor visit on November 9, Martinez was placed on light duty at work and did not use his right arm. Martinez then missed work following his surgery to repair his shoulder. Because Martinez discontinued his employment and sought medical treatment for his right shoulder on November 9, his repetitive trauma injury materialized at an identifiable point in time.

On appeal, International Paper asserts that November 9, 2017, was not a significant date; instead, it was an "arbitrarily chosen date concocted as an alternative theory of recovery." Brief for appellants at 21. International Paper further asserts that Martinez experienced no new symptoms on November 9 and that his shoulder pain had been present since 2008. While Martinez did testify that his shoulder pain began in 2008 and continued until 2017, his testimony indicated that the only time that he had to miss work to seek medical treatment

for his shoulder was on November 9. Therefore, contrary to International Paper's assertion otherwise, November 9 was a significant date because it is the date that Martinez disrupted his employment to seek medical treatment for his shoulder.

International Paper also alleges that Martinez sought medical attention for his shoulder prior to November 9, 2017, and that he indicated to his medical providers his pain was constant and worsening from 2008 to 2017. Martinez testified that he saw his family physician in September for his annual physical and that he mentioned he was experiencing shoulder pain at that time. He denied that he saw his doctor because of his shoulder pain. Further, there is no indication in the record that Martinez disrupted his work to see his family physician in September. Moreover, as iterated above, Martinez sought medical treatment for his shoulder pain on November 9, when his pain became unbearable. Accordingly, under the appropriate test for repetitive trauma injuries, Martinez' injury materialized on November 9.

Based on the record, the compensation court's determination that Martinez suffered a compensable repetitive trauma injury was not clearly wrong.

*Reynolds' Report.*

International Paper also argues that the compensation court erred in relying on Reynolds' causation report because it contained errors which made it unreliable. We disagree.

International Paper asserts that Reynolds' report was not credible because it contained the incorrect date of Martinez' injury and incorrectly identified his injury as an acute injury, which was contrary to Martinez' testimony. In his causation report, Reynolds stated:

> [Martinez] mentioned he had had some occasional soreness off and on over the years with a lot of repetitive use-type activities at work. However, he had an acute episode roughly six weeks earlier, which does correspond

to the November 9, 2017, date when all of the sudden he had an increase in pain from an activity at work.

[9] At the hearing, Martinez testified that he had continuous and worsening pain in his shoulder dating back to 2008. Martinez also testified that he felt a sharp pain in his shoulder on November 8, 2017. Thus, International Paper is correct that Reynolds' report is inconsistent with Martinez' testimony. However, the compensation court noted the discrepancies in Reynolds' report and still found the report persuasive enough to carry Martinez' burden of proof and persuasion. As the trier of fact, the compensation court is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002). We defer to the court's determination and find no error in its reliance on Reynolds' causation report.

## CONCLUSION

After reviewing the record, we conclude that the compensation court applied the appropriate test in analyzing Martinez' repetitive trauma injury. The court did not err in finding that Martinez suffered a repetitive trauma injury, and it did not err in relying on Reynolds' causation report. We therefore affirm the award of the compensation court.

Affirmed.

# State of Nebraska on behalf of Maci Jane Waters, a minor child, appellee, v. Mark Lawrence Bentley, appellant, Pamela D. Waters, appellee, and Debra S. Waters, intervenor-appellee.

938 N.W.2d 357

Filed January 14, 2020. No. A-19-099.

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. ____: ____. 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.
4. **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.
5. ____: ____. 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.
6. ____: ____. The parental superior right to child custody protects not only the parent's right to companionship, care, custody, and management of

his or her child, but also protects the child's reciprocal right to be raised and nurtured by a biological or adoptive parent.

7. **Constitutional Law: Parent and Child.** Establishment and continuance of the parent-child relationship is the most fundamental right a child possesses to be equated in importance with personal liberty and the most basic constitutional rights.
8. **Child Custody: Parental Rights.** 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.
9. ____: ____. Unlike biological and adoptive parenthood, the status of in loco parentis is temporary, flexible, and capable of being both suspended and reinstated. In loco parentis status alone does not eclipse the superior nature of the parental preference doctrine in custody disputes.
10. **Parental Rights.** Parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection.
11. **Child Custody: Parental Rights.** Allowing a third party to take custody, even for a significant period of time, is not the equivalent to forfeiting parental preference.
12. ____: ____. The courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right.
13. **Child Custody: Parental Rights: Proof.** Clear and convincing evidence of substantial, continuous, and repeated neglect of a child must be shown in order to overcome the parent's superior right.
14. **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 Adams County: Stephen R. Illingworth, Judge. Reversed and remanded with directions.

Shane M. Cochran, of Snyder, Hilliard & Cochran, L.L.O., for appellant.

Adam R. Little, of Ballew Hazen, P.C., L.L.O., for appellee.

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

Bishop, Judge.

## INTRODUCTION

Mark Lawrence Bentley is the biological father of Maci Jane Waters, a minor child, and he appeals from an order of the Adams County District Court granting sole legal and physical custody of Maci to Maci's maternal grandmother, Debra S. Waters, subject to parenting time for Mark. Mark challenges the district court's determination that a parental preference was inapplicable to him and that the custody award was in Maci's best interests. We conclude the district court abused its discretion when it did not recognize Mark's superior right to custody of Maci under the parental preference doctrine. We reverse the order of the district court and remand the cause with directions.

## BACKGROUND

Pamela D. Waters and Mark engaged in sexual intercourse at least one time in the summer of 2010. Mark said he first met Pamela in June and saw her three times that month. They had one telephone conversation thereafter, which Mark indicated took place in October, relating to Pamela's discovery that she was pregnant. The content of the exchange between Pamela and Mark on that call is in dispute and is discussed further in our analysis. According to Mark, he was in the Army at that time and was deployed to Iraq, leaving Nebraska that November; he was gone for about 1 year. The record reflects that after the October telephone call, Pamela and Mark did not speak to each other again until after this action began.

Pamela gave birth to Maci in March 2011. According to Pamela and Debra, who is Pamela's adoptive mother, Maci lived with Pamela from birth until Maci was 3 years old. Debra said she babysat Maci often, starting from when Maci was 3 months old. Pamela decided to allow Maci to live with Debra full time sometime in 2014, due to issues with Pamela's health (i.e., seizures) and her living environment at that time. Pamela admittedly had a history of marijuana use

and diagnoses of "ADD [and] ADHD," "bonding attachment disorder," and "grand mal seizures"; Debra said Pamela also had "fetal alcohol effects" that "presented with some mild retardation." Debra and Pamela claimed that Debra received a power of attorney over Maci in 2014, but Pamela indicated that it expired in December 2016. Debra stated that Maci remained in her care after being placed with her in 2014, except for a few weeks in 2016 when Maci stayed with Pamela. In 2015, Debra twice took Maci to a licensed psychologist with an emphasis in pediatrics, Dr. Jody Lieske. Debra took Maci to Dr. Lieske because of an allegation against an unknown male related to a time when Maci was in Pamela's care. Also, Debra had concerns of how "clingy" Maci had been to her and the "trust issues" she thought Maci exhibited. Debra wanted to make sure Maci was adjusting well to her "situation." Sometime that year, Pamela gave birth to another child, who was 3 years old at the time of trial; Pamela said she had joint custody of that child with the child's father, but she ended her relationship with him 2 years before her trial testimony in this case. Pamela said Maci had known the father of Pamela's younger child "since [Maci] was born." Pamela tried to be involved in Maci's life as much as possible since Maci went to live with Debra. Pamela said her visits with Maci were supervised.

At the time of trial, Debra was 64 years old, was self-employed, was widowed, and lived in Hastings, Nebraska, with her mother and Maci, who was then 7 years old. She had been a foster parent to seven children, two of whom had "special needs" and she adopted (including Pamela). Debra also had two sons who had children of their own. Pamela, who was 33 years old at the time of trial, had lived in Harvard, Nebraska, for about 1½ years and had not lived at Debra's house for 12 years. Debra's other adopted child lived in Grand Island, Nebraska, with an "extended family host" and stayed with Debra every other weekend.

Mark, who was 31 years old at the time of trial, married Margarita Bentley in October 2014. They lived in Miller, Nebraska, on a family farm with Margarita's 8-year-old child from a prior dating relationship. Margarita had custody of her child subject to the parenting time of her child's father, which was every other weekend during the school year. Testimony from Margarita and her child's father indicated that Margarita and Mark have a positive relationship with her child's father and his wife, and vice versa. Margarita believed that Mark was "very good" with her child, having come into her child's life when she was 2 years old, and that Mark treated her child like she was his own child. In the past, Mark worked for his father on the farm, but as of June 2018, he worked for a power management corporation. Margarita worked at a salon in Kearney, Nebraska.

The record reflects that Pamela had to identify fathers for her children to fill out an application for what her trial counsel referred to only as "ADC." On December 29, 2016, the State filed a complaint against Pamela and Mark to establish support on Maci's behalf, alleging that Mark was Maci's biological father (genetic testing showed "probability of paternity of ninety-nine percent or more"). The State sought determination of Mark as Maci's father and an order that Pamela and Mark had a duty to pay support for Maci and that Pamela and/or Mark had to provide health insurance or pay cash medical support for Maci. Mark filed a voluntary appearance that same day. About a month later, Mark filed a motion in which he alleged that it was in Maci's best interests that he be awarded temporary custody of her, subject to Pamela's and Debra's "visitation" as appropriate. That same day, Mark filed an answer, admitting to being Maci's biological father. He asked for a determination of the same and asked for, among other things, child support. He also submitted a cross-complaint for full custody of Maci and the same or related relief also sought under his answer.

In February 2017, a child support referee filed a report with recommendations regarding the State's complaint. As relevant, the referee recommended an order that Mark is Maci's father and was to pay $595 monthly in child support and $98 monthly in cash medical support and that Pamela was to pay $50 monthly in child support, with the obligations to begin on March 1. On March 16, the district court adopted as its order the referee's report and recommendations.

After her two sessions in 2015, Maci regularly attended counseling with Dr. Lieske from 2016 through 2018. Records from her sessions from 2015 to 2018 were accepted into evidence during trial. Mark, Margarita, and her child first met Maci on March 23, 2017, at Dr. Lieske's office in Hastings. Debra was there too. Although there is a counseling record for it, Dr. Lieske said it was only a "meet and greet." At Debra's discretion, Mark had monthly visits with Maci in April, May, and June; Mark and Debra coordinated during each visit to plan Mark's next visit.

In May 2017, Mark filed a motion for default judgment against Pamela and for entry of relief sought in his motion for temporary custody, termination of his child support obligation, and entry of a parenting plan. On June 20, there was a hearing on the motion for default judgment; Pamela did not appear. Mark testified about the delay in establishing his paternity. He said he had submitted to paternity testing as soon as he received a letter from the State in October 2016. Maci was residing with Debra, and Pamela's time with Maci was "very limited." Mark believed Debra wanted to "keep" Maci. The district court was concerned because Debra did not receive notice of the hearing. The court questioned whether Maci was ready for "this" given her age and residence with Debra. The court was "not comfortable" with Mark's request for custody, because he "just started this in March" and because it "could be a very traumatic experience" for a 6-year-old child. The court withheld a custody ruling until after evidence was presented about whether it was in Maci's

best interests to "take her away from [Debra]." But the court agreed to enter a temporary parenting plan. On June 22, 2017, Mark was awarded parenting time with Maci on every other Saturday from 10 a.m. to 5 p.m., beginning July 1. Mark was ordered to work with Debra to increase his parenting time until further court order.

In September 2017, Debra filed a complaint for leave to intervene in the action. She alleged that she stood in loco parentis to Maci. She asked for an order granting her the continued care, custody, and control of Maci or, in the alternative, that it was in Maci's best interests to maintain a significant and beneficial relationship with her. In March 2018, with Mark's stipulation, Debra was appointed as the guardian of Maci in an action in the county court for Adams County; in a separate filing, the parties stipulated (1) that Debra would be allowed to be Maci's guardian as long as she retained custody of Maci in the action in the district court and (2) that if the district court changed custody from Debra to Mark, Debra's guardianship would terminate upon such order.

In May 2018, Mark filed a motion for 6 weeks of extended summer parenting time, spread out into 2-week intervals. He said that he had exercised the parenting time granted to him under the prior order. He said that in October 2017, the parties entered mediation and agreed to increase his parenting time to every other weekend from Friday at 6 p.m. to Sunday at 3 p.m.; he claimed he had exercised that parenting time since that October. Mark said he had also had extended parenting time for 1 week over "Christmas time" in 2017. In an order filed in June 2018, the district court noted that the parties had stipulated to parenting time to the date of trial and that therefore, Mark's motion was continued until trial. Mark later testified that preceding trial, he saw Maci for "a week to about nine days, off and on" over the summer of 2018.

Trial took place on July 11 and 12 and August 24, 2018. On July 12, the parties stipulated that Mark would have extended summer parenting time from July 13 through 18 and from

July 27 through August 5 with the regular weekend parenting time schedule to commence again on August 17; the court accepted the stipulation. During trial, each party offered exhibits that were received into evidence. Mark's evidence also consisted of his own testimony and testimony from Margarita, her child's father, two of Mark's relatives, and Margarita's coworker. Debra's evidence also consisted of her own testimony and testimony from Pamela; Dr. Lieske, who was qualified as an expert witness in the field of psychology; and the extended family host for Debra's other adopted child (not Pamela). Although Mark felt that his parenting time and relationship with Maci had greatly improved over the last year, Dr. Lieske opined that Maci did not have a bonded relationship with Mark but did have a bonded relationship with Debra. Dr. Lieske said that Mark had a "very nice interaction" with Maci but that Maci was a "timid child" and work needed to be done before there could be an established bonded relationship between Maci and Mark. Dr. Lieske did not have a set timeframe for when Maci "would be able to just be with" Mark. Dr. Lieske recommended the continued development of a relationship between Maci and Mark. After the parties each presented evidence, the district court ordered the parties to submit briefs and took the case under advisement.

The district court issued its order on January 8, 2019. The court indicated that Pamela was not considered suitable for custody "due to her mental and physical problems." The court perceived the threshold question before it was whether custody could go to Debra rather than to a "fit parent," Mark. Noting the parental preference doctrine, the court found that Debra stood in loco parentis to Maci. The court found that Mark, "although having knowledge of Pamela's pregnancy," "ignored" the possibility of a child until the State pursued him to establish paternity in late December 2016. The court concluded that there "should not" be a parental preference to Mark because of his "long absence" from Maci's life.

The district court proceeded to conduct a best interests analysis. It determined that Mark had not "forfeited" his parental rights by "total indifference," but, rather, he had "ignor[ed]" his parental responsibilities after being put on notice of the pregnancy in 2010. His relationship with Maci had been "relatively short term" so far. Mark was "a solid citizen and a fit parent." But the court said its "problem" with giving Mark custody "at this time" was that Maci had yet to bond with Mark. The court found that Debra had been and continued to be the constant in Maci's life and that Dr. Lieske's testimony was "compelling" regarding where Maci should be placed. The court noted Debra's age and some of her "health issues" (e.g., she walked with assistance of a cane) but found that they did not lessen her ability to parent Maci. The district court acknowledged Debra's testimony regarding why she believed it was in Maci's best interests to be in her custody, why her relationship with Maci was "more like a parent/child relationship," and the "reluctance" Maci has had about going on some of the visits with Mark. In conclusion, "under a 'best interests' analysis," legal and physical custody of Maci was awarded to Debra "as she has stood In Loco Parentis to [Maci], having raised her since age three . . . . Maci is bonded with Debra and so far not to Mark." The court believed it was in Maci's best interests that Mark receive parenting time to develop a bonded relationship with Maci. The court also noted that "circumstances could change over the years due to Debra's age and health issues."

Mark was given parenting time every other weekend from Friday at 4:30 p.m. to Sunday at 4:30 p.m. and on alternating holidays, extended parenting time during yearly fall and spring breaks, and parenting time for 8 weeks during the summer. He was also granted reasonable telephone contact with Maci during the week. Pamela was not given set parenting time, and her time was to be as agreed upon by the parties and only occur under adult supervision.

The district court further found that there was no evidence that "Debra's religion [was] detrimental to Maci." Debra was permitted to raise Maci in the religion Debra chose. Mark was not to "criticize or sabotage" Maci's upbringing, including her religion, and could not attempt to indoctrinate Maci into his religion. Mark was allowed to take Maci to church when she was in his care. Mark was ordered to continue paying child support as previously ordered. He was to provide medical insurance for Maci. Both parties were held responsible for their own attorney fees.

Mark appeals.

## ASSIGNMENTS OF ERROR

Mark claims, restated, that the district court erred by determining the parental preference doctrine did not apply and it was in Maci's best interests to remain in Debra's care.

## 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. *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015).

[2,3] 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. *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. *Id.*

## ANALYSIS

### Parental Preference Doctrine

[4,5] 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.* Although there may be instances where courts have determined that the best interests of the child defeated the lawful parent's preference, those cases are viewed as being "exceptional." *Id.* at 290, 887 N.W.2d at 718 (providing example from *Gorman v. Gorman*, 400 So. 2d 75 (Fla. App. 1981), where trial court found biological father and ex-stepmother to be fit, but awarded custody of child to ex-stepmother because child felt he never had father because father was often away from home, frequently intoxicated, and physically abused and blamed child for death of natural mother during childbirth).

[6-8] The parental superior right to child custody protects not only the parent's right to companionship, care, custody, and management of his or her child, but also protects the child's reciprocal right to be raised and nurtured by a biological or adoptive parent. *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992). Establishment and continuance of the parent-child relationship is the most fundamental right a child possesses to be equated in importance with personal liberty and the most basic constitutional rights. *Id.* 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 Supreme Court recently provided further insight on the interaction of the best interests of the child standard and the parental preference principle. See *In re Guardianship of K.R.*, 304 Neb. 1, 932 N.W.2d 737 (2019). The Supreme Court cautioned that *Windham v. Griffin, supra*, "cannot be read to stand for the proposition that the parental preference principle will be rebutted in every case in which the nonparent might prevail in a pure best interests comparison." *In re Guardianship of K.R.*, 304 Neb. at 19, 932 N.W.2d at 749.

[9] Also, unlike biological and adoptive parenthood, the status of in loco parentis is temporary, flexible, and capable of being both suspended and reinstated; in loco parentis status alone does not eclipse the superior nature of the parental preference doctrine in custody disputes. See *Windham v. Griffin*, 295 Neb. 279, 887 N.W.2d 710 (2016). See, also, *Farnsworth v. Farnsworth*, 276 Neb. 653, 756 N.W.2d 522 (2008) (district court abused its discretion by focusing solely on best interests of children when granting custody to grandparents; district court should have also considered superior interests of biological father, and facts that indicated children might have more stability if they remained with grandparents did not overcome father's superior rights).

[10-13] Parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection. *Windham v. Griffin, supra*. However, allowing a third party to take custody, even for a significant period of time, is not the equivalent to forfeiting parental preference. *Id.* The courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right. *Farnsworth v. Farnsworth, supra*. Clear and convincing evidence of substantial, continuous, and repeated

neglect of a child must be shown in order to overcome the parent's superior right. *Id*.

### Did Mark Forfeit His Superior Right to Maci's Custody?

Mark argues that the parental preference doctrine should have applied to him because he is fit to parent and he did not forfeit his superior right to custody of Maci. He contends his "rights to custody of [Maci] should trump any claims for custody" over Debra. Brief for appellant at 22. The district court determined that Debra "has stood In Loco Parentis to Maci having raised her since she was three years old." Mark does not assign error to that particular finding, and he acknowledges that "Maci has been with Debra for the last 3 to 4 years and has a bond with Debra." Brief for appellant at 32. However, it is Mark's position that the evidence did not support that he was unfit, nor that he had forfeited his parental rights; accordingly, he claims that he "deserves to have custody of [Maci] pursuant to the parental preference doctrine." *Id*. at 30.

Mark cites to two cases in which this court concluded there was no forfeiture of parental rights, namely, *In re Interest of Eric O. & Shane O.*, 9 Neb. App. 676, 617 N.W.2d 824 (2000), *disapproved on other grounds, In re Interest of Lakota Z. & Jacob H.*, 282 Neb. 584, 804 N.W.2d 174 (2011), and *Mair v. James*, No. A-00-016, 2001 WL 537062 (Neb. App. May 22, 2001) (not designated for permanent publication). Mark contends that if those cases "do not rise to the level of forfeiture, then [this case] should not either." Brief for appellant at 27. See, *In re Interest of Eric O. & Shane O., supra* (no forfeiture although minor children resided with third party for nearly 6 years, several of which were with natural father's consent as evidenced by stipulation to third party's guardianship over children); *Mair v. James, supra* (no forfeiture although minor child lived with third party for about 7 years, father visited child only once after his paternity was

established and in 2 years prior to seeking custody, and father became more than $4,000 delinquent in child support; this court did not find as meaningful father's lack of acknowledgment of paternity prior to entry of paternity decree because even mother was unsure who had fathered child).

Mark also points us to several cases of recognized forfeiture. See, *Nye v. Nye*, 213 Neb. 364, 329 N.W.2d 346 (1983) (natural father's second application for custody denied where, among other things, he removed children without authorization from Nebraska on one occasion and one licensed psychiatrist was of opinion that one child could benefit from termination of visits with father); *Gray v. Hartman*, 181 Neb. 590, 150 N.W.2d 120 (1967) (father separated from mother and moved out of mother's home at least 9 months before divorce petition filed and at least 6 months before child's birth; father claimed to have attempted to exercise parenting time granted to him under divorce decree for first 5 years of child's life but then went about 10 years without seeing child, sending cards or gifts, or asking about child's well-being); *Williams v. Williams*, 161 Neb. 686, 74 N.W.2d 543 (1956) (father not unfit but forfeited his preferential right to the child's custody given his indifference for 8 years and his willingness to allow others to assume parental obligations in his stead); *State on behalf of Combs v. O'Neal*, 11 Neb. App. 890, 662 N.W.2d 231 (2003) (grandmother lived with child for 13 years and raised child for 11½ of those years; natural father said he maintained relationship with child since child's birth, was found to have failed to pay child support for first 9 years of child's life although he knew he fathered the child, and was content with having grandmother raise child until paternity action initiated).

We agree with Mark that the present case is not analogous to those cited cases in which forfeiture overcame a parental preference, nor are the circumstances present here similar to those cases in which there were findings of no forfeiture despite arguably worse facts. However, Debra contends that

the "district court correctly concluded that Mark forfeited his superior right under the parental preference doctrine because he was absent from [Maci's] life for the first six years of her life." Brief for appellee at 8.

It is true that the district court was troubled by the fact that Mark had knowledge that Pamela was pregnant, but "ignored the situation and possibility of a child" until the State filed an action for paternity. Relying on *Jeffrey B. v. Amy L.*, 283 Neb. 940, 814 N.W.2d 737 (2012), and *Williams v. Williams, supra*, the district court concluded that "custody of Maci can be placed with Debra" and that "there should not be a parental preference to [Mark] for custody over [Debra] because of his long absence from Maci's life." The district court explained that Mark had not forfeited his parental rights by total indifference, but that he did ignore his parental responsibilities after being put on notice of the pregnancy in 2010. And although the district court determined that Mark's absence for 6 years "from the life of [Maci] should result in him not receiving custody," the court also determined that Mark had not "totally forfeited his parental rights to where he should not have contact with Maci." Since being contacted by the State, the court acknowledged that Mark "has taken responsibility" and that Mark is "a solid citizen and a fit parent." The court expressed concern, however, that "Maci has yet to bond with Mark" and that the "constant" in Maci's life "has and continues to be [Debra]."

Keeping the parental preference legal principles set forth above in mind, we first note that Mark's fitness as a parent is not at issue. "Debra does not dispute Mark's parental fitness." Brief for appellee at 9. Rather, the focus here is the district court's conclusion that although Mark had not forfeited his parental rights in entirety and maintained a right to have parenting time with Maci, he had forfeited his superior right to have custody of her. The district court relied upon *Jeffrey B. v. Amy L., supra*, and *Williams v. Williams*, 161 Neb. 686, 74 N.W.2d 543 (1956), in reaching its decision to place custody of

Maci with Debra. We therefore consider the circumstances of those cases as applied here.

*Jeffrey B. v. Amy L., supra*, involved a biological father's attempt in 2010 to intervene and vacate a paternity decree entered in 2001 which had legally determined someone else to be the father of the child at issue. The biological father had engaged in a brief sexual relationship with the biological mother between March and June 1999 while he was temporarily working in Omaha, Nebraska; the biological father subsequently returned to St. Louis, Missouri. After the mother learned she was pregnant, she went to St. Louis to meet with the biological father, but he was out of town. The mother did meet with two of his coworkers, and one of them told the biological father that the mother might be pregnant and that she might be seeing someone else. The biological father never considered the possibility that the child could be his. After the child was born, the mother and child lived with a man who the mother and the man believed at the time was the child's biological father. When that relationship ended, a petition to establish paternity was filed by the putative father; a paternity decree legally finding him to be the father was entered in 2001. Although the mother was initially awarded custody of the child, the legally determined father was subsequently awarded custody of the child in 2006. The mother filed a modification action in 2009, and at that point, she contacted the biological father, who agreed to a paternity test. Genetic testing confirmed the likelihood that he was the father, and in May 2010, he moved to intervene in the mother's pending proceeding to modify the paternity decree. The district court permitted the intervention and set aside the paternity decree; the Supreme Court reversed that decision. See *id*.

While we acknowledge that these facts bear some similarity to the present case in terms of a brief sexual relationship followed by the father's receipt of some notification about the mother's pregnancy, there is, however, a key distinguishing legal factor. *Jeffrey B. v. Amy L.*, 283 Neb. 940, 814 N.W.2d

737 (2012), was not a case decided on the parental preference doctrine or best interests. Rather, it involved a paternity decree which had been entered almost a decade earlier and had legally determined another person to be the child's father; the legal issue was whether intervention by the biological father and vacation of a prior paternity decree was appropriate under the circumstances presented in that case. The Supreme Court determined that the biological father could not intervene as a matter of right under Neb. Rev. Stat. § 25-328 (Reissue 2008), because intervention as a matter of right is allowed only before trial begins, not after judgment has been obtained, and in that case, the paternity judgment had been entered almost a decade earlier. See *Jeffrey B. v. Amy L., supra*. Further, the Supreme Court found that there was no statutory basis under Neb. Rev. Stat. § 25-2001(4) (Reissue 2008) to allow the biological father to intervene and seek to have the paternity decree vacated because the biological father did not exercise reasonable diligence to discover the mother was pregnant with his child, and he could not show that the paternity decree was obtained by mistake, neglect, or irregularity, nor could he show that there was unavoidable casualty or misfortune which prevented him from intervening before the paternity decree was entered. See *Jeffrey B. v. Amy L., supra*. The Supreme Court also concluded that there was no equitable basis to allow the biological father to intervene in a child custody modification dispute involving the biological mother and the legally determined father who had previously been awarded custody of the child and with whom the child had been living for approximately 7 years. In the matter before this court, no paternity action and decree determining someone else to be Maci's father preceded the present action. No other person was identified as the child's father, much less legally determined to be the child's father as had occurred in *Jeffrey B. v. Amy L., supra*. In fact, in this case, Pamela testified that she was asked who Maci's father was when she had Maci at the hospital and that she had responded: "I didn't know at the

moment." Maci's birth certificate shows that Pamela did not list anyone as Maci's father, and the only evidence regarding Mark's knowledge of Pamela's pregnancy is the October 2010 telephone call, shortly after which Mark was deployed to Iraq for about a year.

In *Williams v. Williams*, 161 Neb. 686, 74 N.W.2d 543 (1956), the biological father sought custody of his 8-year-old child via a habeas corpus proceeding. The child's mother had died shortly after the child's birth and the child was placed with his paternal grandparents. The fitness of the father was not at issue. Also, the father had visited the child from time to time and made some contributions to support the child. The question considered by the Supreme Court was whether the father forfeited his preferential right to the child's custody given his indifference for 8 years and his willingness to allow others to assume parental obligations in his stead. The Supreme Court concluded the father had forfeited his natural right as a parent "to uproot and destroy the close relationship between the child and the grandparents which he permitted to come into existence with his full approval and consent." *Id*. at 690, 74 N.W.2d at 545. The court observed, "While it is true that a parent has a natural right to the custody of his child, the court is not bound as a matter of law to restore a child to a parent under any and all circumstances." *Id*. Where a "father abandoned the care of his child to his parents for 8 years beginning from the day of its birth, with his full approval and consent, he has forfeited his natural right to the child's custody." *Id*. at 690-91, 74 N.W.2d at 545. Again, the facts in the present matter are quite different. Unlike the father in *Williams v. Williams, supra*, Mark did not turn over the responsibility for Maci's childrearing to Debra; Mark assumed immediate responsibility when he became aware Maci was his child.

The district court relied on the cases just discussed, and it concluded that "there should not be a parental preference to [Mark] for custody over [Debra] because of his long absence

from Maci's life" and that it "must therefore proceed to a best interests analysis to determine custody." To conclude as it did, the district court necessarily was persuaded that the October 2010 telephone conversation between Pamela and Mark was sufficient to put Mark on notice that Pamela could have been pregnant with his child and that Mark had an obligation to follow up with Pamela to determine whether she had a baby and, if so, whether it was Mark's child. In our de novo review of the record, we cannot agree that the record affirmatively establishes that Mark forfeited his superior right to custody based upon his failure to follow up on the October 2010 telephone call. The evidence reveals the following:

Pamela and Mark had a brief sexual relationship in June 2010, with no contact until October of that year. According to Mark, his telephone call with Pamela in October lasted "a few minutes." He first said that the subject of the telephone call was the possibility that Pamela was pregnant. On cross-examination, Mark agreed that Pamela told him she was pregnant. On further questioning by the court, Mark answered that he could not remember Pamela's exact wording, but he agreed that she left him with the impression that she was pregnant. Although at first Mark could not recall what he said to Pamela, he later agreed that he asked her if she thought the child was his. Mark's counsel asked him if he got a definitive answer from that; Mark answered that Pamela was "very upset" and was crying while he was "unable to understand her" and then she hung up. Mark did not know whether the child was his. When asked if he knew if Pamela was seeing other people, Mark responded that his friends in Hastings said "they did see her with other people just in the social environment at the bar and such."

Pamela testified that she had taken three pregnancy tests which were all positive and that she knew she was pregnant before she called Mark. She knew Mark as "Bentley" at that time and indicated she was not sure of his first name back then. She said that during the telephone call, she told Mark she

was pregnant; she "pretty much let him know that[,] because he was the last one [she] was with." Pamela recalled that Mark was confused and that at one point he told her he "didn't want it." She said Mark had told her he was being deployed so that she would not be able to contact him. Pamela said she saw Mark after that at a bar on a "very, very crowded night" and made eye contact with him for a "brief second" and then tried but could not find him. Mark denied or did not recall running into Pamela at a bar after seeing her in June 2010. Maci was born in March 2011. Pamela testified that she was asked who Maci's father was when she had Maci at the hospital and that she had responded: "I didn't know at the moment." Maci's birth certificate shows that Pamela did not list anyone as Maci's father. Pamela admitted that she did not identify a father on Maci's birth certificate because she did not know Mark's first name or thought it was "Ryan" and because she wanted to be sure that the name was correct and about the identity of the father.

As stated previously, Mark was deployed to Iraq and left Nebraska about a month after his telephone call with Pamela in October 2010. Pamela said she tried contacting Mark one time after Maci's birth but never got a response. She did not know if he still had the same telephone number. Following the telephone call in October 2010, Pamela and Mark did not speak to each other again until after this action began. During trial, Pamela agreed that when she applied at some point for what her counsel referred to as "ADC," she identified Mark as the father of one of her children, knowing that his name was "Bentley" and that he was in the military. Mark claimed he first learned he had a child after the State contacted him to submit to a paternity test in October 2016.

Although the record supports the district court's finding that in October 2010 Mark was made aware that Pamela was pregnant, the record does not show that Mark, or even Pamela, at that time conclusively knew that Mark was the father of the child. Even if Mark was "the last one [she] was with,"

as Pamela testified was her reason for telling Mark she was pregnant, that would not have necessarily ruled out other potential fathers. One of the reasons why Pamela did not list a father on Maci's birth certificate was because she wanted to verify Maci's father's identity in general, which indicates her own lack of certainty as to who might be Maci's father. While it would have been prudent for Mark to follow up with Pamela after the one telephone call they had about Pamela's pregnancy, the evidence does not affirmatively show that Mark forfeited his right to custody. See *Farnsworth v. Farnsworth*, 276 Neb. 653, 756 N.W.2d 522 (2008) (courts may not properly deprive parent of custody of minor child unless it is affirmatively shown that such parent is unfit to perform duties imposed by relationship or has forfeited that right). Even when considering only Pamela's testimony, she did not know who the child's father was with any degree of certainty even at the time Maci was born, and she made only one unsuccessful attempt after Maci's birth in March 2011 to try to contact Mark, who had been deployed to Iraq for a year commencing the prior November. Further, the record does not clearly and convincingly demonstrate that Mark's absence from the beginning of Maci's life constituted forfeiture of his parental rights based upon substantial, continuous, and repeated neglect of the child. See *id*. See, also, *In re Interest of Lakota Z. & Jacob H.*, 282 Neb. 584, 590, 804 N.W.2d 174, 180 (2011) (parental preference principle applied in guardianship termination action; individual in opposition to termination of guardianship bears burden of proving by "clear and convincing" evidence that biological or adoptive parent either is unfit or has forfeited his or her right to custody).

The record shows that once Mark was notified about the possibility that Maci was his child and that a paternity test confirmed the same, he discharged his duties of parental care and protection over Maci as he was increasingly permitted. Mark said he was contacted by the State in October 2016, then submitted to a "DNA test . . . right away." The State filed its

complaint in December. In filings submitted in January 2017, Mark admitted he was Maci's biological father and sought custody of Maci. The court ordered that Mark was Maci's biological father on March 16. Mark first met Maci on March 23. With Debra's permission, he had monthly visits with Maci in April, May, and June, all prior to the June hearing on his motion for default judgment after which the district court set a temporary parenting schedule for Mark. As Mark states in his brief, his parenting time has been "steadily increasing" since that time. Brief for appellant at 25. He further states he never missed a weekend of his parenting time, a claim that the record does not refute (disregarding one time in the summer of 2018, when Debra said Mark did not pick up Maci on a Friday as Mark's work schedule was "mixed up" so he picked up Maci the next morning after he got off work—a night shift). Moreover, the child support payment history reports revealed that as of the trial, Mark was current on his child support and cash medical support obligations for Maci. Mark also showed that he had obtained health insurance since the action began and had added Maci to be covered by his health insurance in June 2018.

In sum, Mark is undisputedly a fit parent, and the record does not affirmatively reflect that he forfeited his superior right to custody of Maci, nor is there clear and convincing evidence of substantial, continuous, and repeated neglect of Maci necessary to overcome his parental superior right. The district court abused its discretion when it found otherwise based upon its assessment of Maci's current best interests. See *Farnsworth v. Farnsworth*, 276 Neb. 653, 756 N.W.2d 522 (2008) (district court abused its discretion by focusing solely on best interests of children when granting custody to grandparents; district court should have also considered superior interests of biological father, and facts that indicated children might have more stability if they remained with grandparents did not overcome father's superior rights). While the district court's best interests assessment is understandable

given Maci's existing relationship with Debra, the record does not support that Mark forfeited his superior right to custody, nor is this an instance where the child's best interests defeat Mark's parental preference. There are no exceptional circumstances here which override or rebut Mark's parental preference. See *Windham v. Griffin*, 295 Neb. 279, 887 N.W.2d 710 (2016) (instances where best interests defeat lawful parent's preference are viewed as exceptional, such as father's frequent intoxication, physical abuse, and blaming child for death of natural mother during childbirth). The record demonstrates that once Mark became aware of Maci's existence, he immediately engaged in parenting; the district court found him to be "a solid citizen and a fit parent." Even if the circumstances present in this case support the fact that Debra should have custody under a pure best interests comparison, the parental preference principle has not been rebutted, as discussed above. See *In re Guardianship of K.R.*, 304 Neb. 1, 932 N.W.2d 737 (2019) (parental preference principle will not be rebutted in every case in which nonparent might prevail in pure best interests comparison).

Accordingly, we reverse the district court's January 8, 2019, order and remand the cause with the following directions: Legal and physical custody should be awarded to Mark. Having legal custody means that Mark will have the "authority and responsibility for making fundamental decisions regarding the child's welfare, including choices regarding education and health." Neb. Rev. Stat. § 43-2922(13) (Reissue 2016). See, also, *State on behalf of Kaaden S. v. Jeffery T.*, 303 Neb. 933, 946, 932 N.W.2d 692, 703 (2019) (legal custody gave father "final say on fundamental decisions regarding [child's] welfare, such as where he attends school, his religious upbringing, and how his health and medical needs are met"). Regarding physical custody, Mark will have the "authority and responsibility regarding [Maci's] place of residence and the exertion of continuous parenting time for significant periods of time." § 43-2922(20). Regarding physical custody, we are mindful of

the district court's concerns that "Maci is bonded with Debra and so far not to Mark" and that Maci and Mark "need to work on the relationship so Maci knows Mark is there for her." We also acknowledge the significance of the bond between Maci and Debra, and due consideration must be given to maintaining that relationship. Therefore, on remand, the district court is to develop a parenting plan and visitation schedule that will gradually transition Maci's daily physical custody and care from primarily being with Debra to primarily being with Mark, but preserving appropriate grandparent visitation between Maci and Debra. The district court may, in its discretion, determine whether to hold further evidentiary hearings to obtain input from the parties or other evidence as to a reasonable transitional schedule for Maci.

[14] In light of our decision above, we need not further address Mark's other assigned error concerning the district court's best interests analysis. 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).

## CONCLUSION

For the reasons set forth above, we reverse the January 8, 2019, order of the district court and remand the cause with directions.

Reversed and remanded with directions.

# Maura Alonzo-Baltazar De Mateo, appellant, v. Mateo N. Mateo-Cristobal, appellee.

938 N.W.2d 372

Filed January 14, 2020. No. A-19-351.

1. **Statutes.** Statutory interpretation presents a question of law.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. ____: ____. An appellate court has a duty to determine whether it has jurisdiction over the matter before it irrespective of whether the issue of jurisdiction was raised or considered by the district court.
4. **Appeal and Error.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
5. **Courts: Jurisdiction: Child Custody: Federal Acts.** Courts with jurisdiction over an "initial child custody determination" as that term is used in Neb. Rev. Stat. § 43-1238(a) (Cum. Supp. 2018) also have jurisdiction and authority to make special findings of fact similar to those contemplated by 8 U.S.C. § 1101(a)(27)(J) (2018).
6. **Child Custody: Words and Phrases.** "Child custody proceeding" is defined under Neb. Rev. Stat. § 43-1227(4) (Reissue 2016) as a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue and includes a proceeding for divorce in which the issue of custody or visitation may appear.
7. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.

Appeal from the District Court for Douglas County: Duane C. Dougherty, Judge. Reversed and remanded for further proceedings.

William P. Crawford, of Kendall Law Office, P.C., L.L.O., for appellant.

No appearance for appellee.

Pirtle, Riedmann, and Welch, Judges.

Riedmann, Judge.

## INTRODUCTION

Maura Alonzo-Baltazar De Mateo (De Mateo) appeals the order of the district court for Douglas County which denied her request to make certain special findings related to her children's eligibility to apply for special immigrant juvenile (SIJ) status under 8 U.S.C. § 1101(a)(27)(J) (2018). As explained below, we reverse, and remand for further proceedings.

## BACKGROUND

On June 13, 2018, De Mateo filed a complaint for dissolution of her marriage to Mateo N. Mateo-Cristobal and an order awarding her custody of the parties' children. The complaint alleged that the parties had married in 2010 in Guatemala and that at the time of filing, De Mateo was living in Douglas County, Nebraska, and the whereabouts of Mateo-Cristobal were unknown. De Mateo sought to serve Mateo-Cristobal by publication and simultaneously filed an affidavit in support of her motion for service by publication. She also moved for an order of specific findings necessary to enable the minor children to petition for SIJ status.

De Mateo apparently served Mateo-Cristobal by publication, and the district court determined that service was proper. Mateo-Cristobal never filed a responsive pleading or otherwise participated in the proceeding. After holding a hearing at which De Mateo was the only witness to testify, the district court entered a decree on March 7, 2019, dissolving the parties' marriage and awarding custody of the children to De Mateo. On March 12, the court entered an order denying De Mateo's request for specific findings, because the children

had been awarded to a fit and proper parent, De Mateo, and were in no immediate danger. De Mateo timely appeals to this court.

## ASSIGNMENTS OF ERROR

De Mateo assigns that the district court erred in (1) applying the wrong standard to her request for findings regarding the minor children's eligibility for SIJ status and (2) failing to find that the minor children had been abused or abandoned by Mateo-Cristobal and that it was not in their best interests to be returned to Guatemala.

## STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law. *In re Guardianship of Carlos D.*, 300 Neb. 646, 915 N.W.2d 581 (2018). We independently review questions of law decided by a lower court. *Id.*

## ANALYSIS

[2-4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Mohr v. Mohr*, 22 Neb. App. 772, 859 N.W.2d 377 (2015). This is true irrespective of whether the issue of jurisdiction was raised or considered by the district court. *Id.* Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012).

In *Francisco v. Gonzalez*, 301 Neb. 1045, 921 N.W.2d 350 (2019), the trial court found that service by publication was improper under Neb. Rev. Stat. § 25-520.01 (Reissue 2016) because the plaintiff failed to mail a copy of the published notice to the defendant's last known place of residence or file a postpublication affidavit required by the statute. On appeal, the Nebraska Supreme Court agreed that because the plaintiff failed to comply with § 25-520.01, her constructive service

was improper and the trial court lacked personal jurisdiction over the defendant.

In the present case, De Mateo attempted to effect service by publication. Our record does not include evidence that she mailed a copy of the published notice to Mateo-Cristobal's last known place of residence or filed a postpublication affidavit required by § 25-520.01; however, at the conclusion of the hearing before the district court, the court found that Mateo-Cristobal had been properly served. Unlike in *Francisco v. Gonzalez, supra*, where the trial court had the complete record before it and could ascertain that the affidavits required by § 25-520.01 had not been filed, our record contains only select portions of the transcript. In other words, whether De Mateo complied with the service by publication requirements is not apparent from our record; likewise, any failure to comply is also not plainly evident from the record. Thus, we cannot find plain error regarding service or the district court's exercise of jurisdiction. As such, we turn to the merits of the appeal.

De Mateo argues that the district court erred in denying her motion for specific findings such that her children could apply for SIJ status. We agree to the extent that the court should have either made the special findings she requested if there was sufficient evidence to do so or found that the evidence was insufficient to make the special findings. We express no opinion as to whether De Mateo presented sufficient evidence to satisfy the applicable statutory requirements for special findings related to SIJ status.

SIJ status allows a juvenile immigrant to remain in the United States and apply for lawful permanent resident status. *In re Guardianship of Luis J.*, 300 Neb. 659, 915 N.W.2d 589 (2018). Obtaining the special findings is the first step in the process to achieve SIJ status. *Id*. In pertinent part, 8 U.S.C. § 1101(a)(27)(J) provides that a "special immigrant" is

> an immigrant who is present in the United States—
>
> (i) who has been declared dependent on a juvenile court located in the United States or whom such a court

> has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;
>
> (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and
>
> (iii) in whose case the Secretary of Homeland Security consents to the grant of [SIJ] status[.]

In order to achieve SIJ status, the individual whose custody has been determined must also obtain the judicial determinations listed above from a "juvenile court," as that term is used in the federal provisions. See *In re Guardianship of Carlos D.*, 300 Neb. 646, 915 N.W.2d 581 (2018). Under 8 C.F.R. § 204.11(a) (2019), the term "juvenile court" means "a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles."

[5] The Nebraska Legislature amended Neb. Rev. Stat. § 43-1238(b) (Reissue 2016) in 2018 Neb. Laws, L.B. 670, to clarify that courts with jurisdiction over initial child custody determinations under § 43-1238(a) (Cum. Supp. 2018) also have "jurisdiction and authority" to make special findings of fact similar to those contemplated by 8 U.S.C. § 1101(a)(27)(J). See *In re Guardianship of Carlos D., supra*. Section 43-1238(a) generally deals with child custody determinations which are appropriately raised in a court in Nebraska, and § 43-1238(b) lists the factual findings which can be made by a Nebraska state court with such initial child custody determination authority and the circumstances under which such courts must make such findings. See *In re Guardianship of*

*Carlos D., supra*. Thus, if the district court in the present case had jurisdiction to make an initial child custody determination, it also had jurisdiction and authority to make the special findings of fact requested by De Mateo.

[6] "Child custody proceeding" is defined under Neb. Rev. Stat. § 43-1227(4) (Reissue 2016) as "a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue." The term "[c]hild custody proceeding" includes a proceeding for divorce in which the issue of custody or visitation may appear. *Id*. Under § 43-1238(a), a Nebraska court has jurisdiction to make an initial child custody determination if Nebraska is the home state of the child on the date of the commencement of the proceeding. "Home state" is defined as "the state in which a child lived with a parent or person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding." § 43-1227(7). Here, De Mateo filed the complaint in June 2018, and the complaint alleged that she and the children had resided in Nebraska since January 2016. Thus, Nebraska qualifies as the home state of the children, and the district court had jurisdiction to make an initial child custody determination.

Section 43-1238(b) states:

> (b) Subsection (a) of this section is the exclusive jurisdictional basis for making a child custody determination by a court of this state. In addition to having jurisdiction to make judicial determinations about the custody and care of the child, a court of this state with exclusive jurisdiction under subsection (a) of this section has jurisdiction and authority to make factual findings regarding (1) the abuse, abandonment, or neglect of the child, (2) the nonviability of reunification with at least one of the child's parents due to such abuse, abandonment, neglect, or a similar basis under state law, and (3) whether it would be in the best interests of such child to be removed from the United States to a foreign country,

> including the child's country of origin or last habitual residence. If there is sufficient evidence to support such factual findings, the court shall issue an order containing such findings when requested by one of the parties or upon the court's own motion.

Section 43-1238(b) provides that when requested by one of the parties or upon the court's own motion, such a court "shall issue" an order containing the enumerated findings where there is sufficient evidence. See *In re Guardianship of Carlos D.*, 300 Neb. 646, 915 N.W.2d 581 (2018). In other words, the court shall either make the special findings requested or find that the evidence is insufficient to make the enumerated findings.

In the present case, the district court made an initial child custody determination when it awarded custody of the children to De Mateo. It then, however, denied her motion for specific findings, concluding that "the minor children were awarded to a fit and proper parent, that being [De Mateo,] and are in no immediate danger." This is not a basis for denying a motion for factual findings under § 43-1238(b).

Section 43-1238(b) requires a court to make factual findings related to the abuse, abandonment, or neglect of a child; the nonviability of reunification with at least one of the child's parents due to abuse, abandonment, or neglect; and whether it would be in the child's best interests to be removed from the United States, if requested by a party to do so and sufficient evidence is present to allow a court to make such findings. De Mateo presented evidence related to each of these factual findings at the hearing. The district court, therefore, was required to issue an order making factual findings as to each of the three elements if the evidence was sufficient or to conclude that the evidence was insufficient to support making such findings. Because the court denied the request for specific findings for a reason other than insufficiency of the evidence, we reverse the March 12, 2019, order and remand the cause for further proceedings.

[7] De Mateo also argues that the evidence was sufficient to support findings that Mateo-Cristobal had abused and abandoned the minor children, that the children's reunification with him is nonviable due to this abuse and abandonment, and that it is not in the minor children's best interests to be returned to Guatemala. However, by denying De Mateo's motion for specific findings, the district court did not address these issues. We therefore decline to address the merits of De Mateo's motion. An appellate court will not consider an issue on appeal that was not passed upon by the trial court. *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006).

## CONCLUSION

The district court had jurisdiction under § 43-1238(a) to make an initial child custody determination, and therefore, it also had the authority under § 43-1238(b) to make factual findings regarding the enumerated items where the evidence is sufficient and where the court had been requested to do so. Because the court failed to do so, we reverse the March 12, 2019, order and remand the cause for further proceedings consistent with this opinion based on the existing record.

Reversed and remanded for
further proceedings.

# Richard G. Schuemann and Janice Schuemann, appellants, v. Menard, Inc., doing business as Menards, a foreign corporation doing business in Nebraska, appellee.

938 N.W.2d 378

Filed January 21, 2020. No. A-18-1021.

1. **Jury Instructions.** Whether a jury instruction is correct is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **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.
4. **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.
5. ____: ____. A trial court's decision to admit habit evidence based on opinion under Neb. Rev. Stat. § 27-406 (Reissue 2016) is reviewed for an abuse of discretion.
6. **Negligence: Evidence: Trial.** Before the defense of assumption of risk is submissible to a jury, the evidence must show that the plaintiff (1) knew of the specific danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger that proximately caused the damage.
7. **Negligence.** The doctrine of assumption of risk applies to known dangers and not to those things from which, in possibility, danger may flow.

8. **Jury Instructions: Evidence.** A tendered jury instruction is warranted by the evidence only if there is enough evidence on the issue to produce a genuine issue of material fact for the jury to decide.
9. **Juries: Verdicts.** A jury, by its general verdict, pronounces upon all or any of the issues in favor of either the plaintiff or the defendant.
10. **Juries: Verdicts: Presumptions.** Because a general verdict does not specify the basis for an award, Nebraska law presumes that the winning party prevailed on all issues presented to the jury.
11. **Rules of Evidence.** The rule of completeness allows a party to admit the entirety of an act, declaration, conversation, or writing when the other party admits a part and when the entirety is necessary to make it fully understood.
12. ____. The rule of completeness is concerned with the danger of admitting a statement out of context, but when this danger is not present, it is not an abuse of discretion to refuse to require the production of the remainder or, if it cannot be produced, to exclude all the evidence.
13. **Presumptions: Proof: Words and Phrases.** A rebuttable presumption is generally defined as a presumption that can be overturned upon the showing of sufficient proof.
14. **Presumptions: Words and Phrases.** Nonevidentiary presumptions, commonly referred to as "bursting bubble" presumptions, shift only the burden of production, and if that burden is met, the presumption disappears.
15. **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.

Appeal from the District Court for Sarpy County: Stefanie A. Martinez, Judge. Affirmed.

Theodore R. Boecker, Jr., of Boecker Law, P.C., L.L.O., for appellants.

Robert W. Futhey and Daniel J. Gutman, of Fraser Stryker, P.C., L.L.O., for appellee.

Pirtle, Riedmann, and Welch, Judges.

Riedmann, Judge.

## INTRODUCTION

Richard G. Schuemann and Janice Schuemann sued Menard, Inc., doing business as Menards (Menards), in the district court for Sarpy County for negligence and premises liability after Richard sustained injuries due to the alleged negligence of Menards. A jury found in favor of Menards. The Schuemanns appeal. Finding no error by the district court, we affirm.

## BACKGROUND

On July 1, 2010, the Schuemanns went to the Menards store located in Bellevue, Sarpy County, Nebraska, and purchased a storage shed packaged in a large box. A Menards employee lifted the shed box with a forklift and placed it into the bed of Richard's truck. Once back at their house, the Schuemanns left the box in the truck and took the pieces out of the box individually in order to assemble the shed. At trial, Richard was asked whether he tried to lift the box itself, and he said no, but that each individual piece was heavy. He knew that the contents of the box, before they had been unpacked, were too heavy for him to lift.

The Schuemanns returned to the same Menards store the following day and purchased an identical shed packaged in the same fashion. On that occasion, Richard backed his truck into the loading area of the store. A Menards employee, later identified as Nicholas Moore, took Richard's purchase ticket, and the two men walked over to the shed boxes. Moore pulled a large cart up next to the boxes and got on one side of the box. Richard testified that Moore said they had to pick up the box and put it on the cart and that Moore then started lifting one side of the box. According to Richard, Moore "directed" or "requested" that Richard help pick up the other side of the box. Richard said he felt that he needed to help at that point, because Moore was struggling with the box and Richard thought Moore was going to hurt himself. Richard acknowledged that he could have declined to help lift the

box, but that he did not do so. As Richard started lifting the other side of the box, he suddenly experienced searing pain in his back.

As a result of his back pain, Richard went to a hospital and notified Menards of his injury. Thereafter, he underwent medical treatment for his injuries. On July 1, 2014, the Schuemanns filed a complaint against Menards. They alleged that as a result of the negligence of Menards and its employees, Richard suffered injuries to his back, neck, and shoulder and Janice suffered a loss of consortium for the loss of service and companionship of Richard. Menards' answer raised several affirmative defenses, including assumption of risk.

The matter proceeded to a jury trial in 2018. At trial, Menards offered into evidence an audio recording of a statement Richard made to an adjuster for an insurance company presumably for Menards. Menards offered into evidence only the first 13 minutes 25 seconds of the recorded conversation, redacting the final 3 minutes 32 seconds of the conversation. The recording was received into evidence over the Schuemanns' objection on the rule of completeness. Thereafter, the Schuemanns requested a jury instruction on the rebuttable presumption that the statement had been taken under duress pursuant to Neb. Rev. Stat. § 25-12,125 (Reissue 2016). The district court refused to give the instruction. The jury ultimately found in favor of Menards. The Schuemanns filed a motion for new trial and/or a motion to alter or amend. The motions were denied. The Schuemanns now appeal.

## ASSIGNMENTS OF ERROR

The Schuemanns assign that the district court erred in (1) instructing the jury on the defense of assumption of risk, (2) failing to file and show all refused jury instructions or amendments to instructions resulting in the given instructions, (3) admitting into evidence the audio recording over their objection, (4) refusing to give their proposed jury instruction on the presumption of duress, and (5) failing to sustain their

objections to Moore's testimony on the grounds of foundation and speculation.

## STANDARD OF REVIEW

[1,2] Whether a jury instruction is correct is a question of law. *Rodriguez v. Surgical Assocs.*, 298 Neb. 573, 905 N.W.2d 247 (2018). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

[3,4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules and judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Savage*, 301 Neb. 873, 920 N.W.2d 692 (2018), *modified on denial of rehearing* 302 Neb. 492, 924 N.W.2d 64 (2019). 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.*

[5] A trial court's decision to admit habit evidence based on opinion under Neb. Rev. Stat. § 27-406 (Reissue 2016) is reviewed for an abuse of discretion. *Borley Storage & Transfer Co. v. Whitted*, 271 Neb. 84, 710 N.W.2d 71 (2006).

## ANALYSIS

*Assumption of Risk Instruction.*

The Schuemanns assign that the district court erred in instructing the jury on the defense of assumption of risk, arguing that the instruction was not supported by the evidence because there was no evidence that Richard was apprised of any specific risk of potential injury in helping to lift the box onto the cart.

[6,7] Before the defense of assumption of risk is submissible to a jury, the evidence must show that the plaintiff (1) knew of the specific danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger that proximately

caused the damage. *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000). See, also, Neb. Rev. Stat. § 25-21,185.12 (Reissue 2016). The doctrine of assumption of risk applies a subjective standard, geared to the individual plaintiff and his or her actual comprehension and appreciation of the nature of the danger he or she confronts. *Pleiss v. Barnes, supra*. A plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character, or the danger involved, including the magnitude thereof, and voluntarily accepts the risk. *Id*. The doctrine of assumption of risk applies to *known dangers* and not to those things from which, in possibility, danger may flow. *Id*.

In *Pleiss v. Barnes, supra*, the plaintiff was injured when a ladder on which he was standing flipped, twisted, and started to slide, causing him to fall. The plaintiff testified that he knew that ladders could "'get shaky and fall'" but that he had never seen a ladder "flip, twist, and slide" prior to his injury. *Id*. at 775, 619 N.W.2d at 829. Applying the subjective standard set forth above, the Nebraska Supreme Court recognized that the question was not whether the plaintiff knew that in general ladders could be dangerous, but whether he knew and understood that this particular ladder, either because of its placement or because it was not tied down, created a specific danger that it could flip, twist, and slide, causing him to fall. And where the record did not indicate any such specific knowledge or understanding, the Supreme Court held that the trial court erred in instructing the jury on assumption of risk.

In *Burke v. McKay*, 268 Neb. 14, 679 N.W.2d 418 (2004), an action involving a claim that a rodeo stock provider furnished an unusually dangerous bucking horse to a high school rodeo, the Supreme Court noted that the plaintiff rider's acknowledged familiarity with the general risks of injury inherent in rodeo competition could not form the basis of an assumption of risk defense. However, the Supreme Court concluded that the rider had actual knowledge of the specific danger posed

by the horse because he had observed a previous incident in which a rider was injured when the same horse performed in the same unusual manner which caused his injury.

In the present case, the evidence supports a finding that given Richard's experience with this specific type of shed box on the day prior to his injury, he had actual knowledge of the specific risk. Richard had purchased the same type of shed the day before his injury, and although a Menards employee put the shed box into Richard's truck, Richard said that once he got the box home, he and his wife took the individual pieces out of the box, and that each individual piece was heavy. He knew that the contents of the box, before they had been unpacked, were too heavy for him to lift.

Richard admitted that the following day at Menards, Moore requested that Richard help him lift the box onto the cart and Richard hesitated and said, "[N]o, I don't think I should." In an attempt to impeach Richard, counsel read an excerpt from Richard's deposition in which Richard related his statement to Moore that "'I have a neck injury and I don't think I should lift that.'" Although a subsequent objection was sustained, the testimony was not stricken. We recognize that Richard adduced conflicting evidence tending to prove that he was unaware of the danger of lifting the box; however, determining which party's evidence is credible or not is a question for the jury. See *Higginbotham v. Sukup*, 15 Neb. App. 821, 737 N.W.2d 910 (2007). Richard acknowledged that he could have refused to help lift the box, but decided to assist Moore because it looked like Moore was struggling and Richard was afraid Moore was going to "hurt himself." Richard testified that he, himself, had had "a lot of lower and middle and upper back problems in [his] life."

[8] Given (1) that Richard purchased the same type of shed on July 1, 2010, and knew that because each piece was heavy, the whole box was heavy; (2) that he was hesitant to assist Moore and initially stated he did not think he should; and (3) that he saw Moore struggling to lift the box and was afraid

Moore would hurt himself, the evidence could support a finding that Richard appreciated the specific danger posed by lifting the heavy shed box and the risk of injury. Additionally, Richard acknowledged that he could have declined to help lift the box, and thus, a jury could conclude that he voluntarily exposed himself to the danger. A tendered jury instruction is warranted by the evidence only if there is enough evidence on the issue to produce a genuine issue of material fact for the jury to decide. *Armstrong v. Clarkson College*, 297 Neb. 595, 901 N.W.2d 1 (2017). We therefore find no error in the district court's decision to instruct the jury on assumption of risk.

The Schuemanns also claim that the assumption of risk defense was improperly included in jury instruction No. 11. Menards argues that the Schuemanns did not object on these grounds at trial. At the jury instruction conference, the Schuemanns acquiesced to including affirmative defenses as part of instruction No. 11. But they reiterated their objection that the evidence did not support an assumption of risk instruction, as discussed above. Thus, this issue has been preserved for appeal. But because we have determined that the jury was properly instructed on assumption of risk, we find no error in its inclusion as part of instruction No. 11.

Menards contends that the giving of the assumption of risk instruction was proper, but even if the court erred by instructing the jury as to this affirmative defense, the general verdict rule bars the Schuemanns' challenge. We agree.

[9,10] A jury, by its general verdict, pronounces upon all or any of the issues in favor of either the plaintiff or the defendant. *Facilities Cost Mgmt. Group v. Otoe Cty. Sch. Dist.*, 298 Neb. 777, 906 N.W.2d 1 (2018). Because a general verdict does not specify the basis for an award, Nebraska law presumes that the winning party prevailed on all issues presented to the jury. *Id*.

Applying the general verdict rule here, we presume the jury found in Menards' favor on all issues submitted, including

whether it was negligent and if it maintained its premises in a reasonably safe condition. It is within this framework that we analyze the Schuemanns' assignment of error that the jury was erroneously instructed.

Here, the jury was instructed to consider Menards' affirmative defenses only if it found the Schuemanns had met their burden of proof on their negligence and premises liability claims. Specifically, jury instruction No. 10 stated, "[I]f the [Schuemanns] *have* met this burden of proof on one of their claims, then you must consider [Menards'] affirmative defenses." Under the general verdict rule, we presume the jury determined the negligence and premises liability issues in favor of Menards. Thus, the jury never reached the question of Menards' affirmative defenses, and any alleged error in instructing the jury on the assumption of risk defense would necessarily be harmless. See *Facilities Cost Mgmt. Group v. Otoe Cty. Sch. Dist., supra*. The Schuemanns' assigned error relating to the assumption of risk defense cannot form the basis for reversible error. See *id*.

*Failure to File and Mark Jury Instructions.*

The Schuemanns argue that the district court committed reversible error when it failed to abide by Neb. Rev. Stat. §§ 25-1113 and 25-1114 (Reissue 2016). Section 25-1113 requires that the court write the words "given" or "refused," as the case may be, on the margin of each jury instruction. Under § 25-1114, all instructions requested and given must be filed by the clerk before being read to the jury and shall be preserved as part of the record. The Schuemanns argue that there is no such filing in the present case, and although the instructions contained in the transcript appear to be those that were given to the jury, they are not marked as such.

The record indicates that the Schuemanns did not raise an objection on these statutory grounds at trial. The objection that the instructions were not filed must be made when or

before the instructions are read; otherwise, the objection is waived. See, *Minzer v. Willman Mercantile Co.*, 59 Neb. 410, 81 N.W. 307 (1899); *Fire Ass'n of Philadelphia v. Ruby*, 58 Neb. 730, 79 N.W. 723 (1899). Failure to mark an instruction "'given'" is not available as error, in the absence of an exception on that ground. *Hurlbut v. Proctor*, 88 Neb. 491, 492, 129 N.W. 995, 996 (1911). Because no objection was made to the district court, the Schuemanns are precluded from raising the issue on appeal. We therefore decline to address this assigned error.

*Recorded Conversation.*

The Schuemanns assert that the district court erred in receiving into evidence, over their objection, the audio recording of the statement Richard gave to an insurance adjuster. They claim that they were unaware that the recording Menards was going to offer into evidence at trial was a redacted version of the recording and argue that Menards' failure to offer the entire recording into evidence violates the rule of completeness.

[11,12] The rule of completeness allows a party to admit the entirety of an act, declaration, conversation, or writing when the other party admits a part and when the entirety is necessary to make it fully understood. *State v. Savage*, 301 Neb. 873, 920 N.W.2d 692 (2018), *modified on denial of rehearing* 302 Neb. 492, 924 N.W.2d 64 (2019). See Neb. Rev. Stat. § 27-106 (Reissue 2016). The rule of completeness comes into play when a statement is admitted into evidence out of context. *Nickell v. Russell*, 260 Neb. 1, 614 N.W.2d 349 (2000). Because § 27-106 is concerned with the danger of admitting certain statements taken out of context, additional evidence is admissible only if it qualifies or explains the previous testimony. *Nickell v. Russell, supra*. When this danger is not present, it is not an abuse of discretion to refuse to require the production of the remainder or, if it cannot be produced, to exclude all the evidence. *State v. Savage, supra*.

In the present case, the entire recorded conversation between Richard and the insurance adjuster lasted 16 minutes 57 seconds. Menards offered into evidence the first 13 minutes 25 seconds of the conversation. The Schuemanns objected on the ground of rule of completeness, arguing that it was inappropriate to offer a redacted version. The objection was overruled, and the recording was received into evidence and played for the jury. On appeal, the Schuemanns do not argue that the portion played for the jury was taken out of context or needed additional explanation; rather, they assert that the remaining 3 minutes 32 seconds of the conversation added additional details and bolstered Richard's credibility.

We have listened to the entire recorded conversation and conclude that the admitted portion of the conversation was not taken out of context and that the redacted portion of the conversation does not qualify or explain the admitted portion. Rather, in the minutes of the conversation that were omitted, there is a discussion regarding insurance coverage and Richard's Medicare coverage, which is inadmissible at trial not only by law, see Neb. Rev. Stat. § 27-411 (Reissue 2016) and *Kvamme v. State Farm Mut. Auto. Ins. Co.*, 267 Neb. 703, 677 N.W.2d 122 (2004), but, also, because the district court granted Menards' pretrial motion in limine which prohibited the introduction of any evidence related to insurance coverage. Intertwined with this discussion, Richard made additional statements regarding the incident such as there was no one around to help him and he is sure there would be "videos" of the incident. But because the danger of admitting certain statements out of context is not present here, it was not an abuse of discretion for the district court to decline to exclude the recording offered by Menards.

*Jury Instruction Regarding Duress.*

The Schuemanns argue that the district court erred in refusing to give their proffered jury instruction pursuant to § 25-12,125, because the jury was entitled to know the

statutory presumption that the statement Richard gave to the insurance adjuster was made under duress. We find no error in the court's refusal to so instruct the jury.

Section 25-12,125 provides:

> (1) There shall be a rebuttable presumption that any statement secured from an injured person by an adverse person at any time within thirty days after such injuries were sustained shall have been taken under duress for purposes of a trial of any action for damages for injuries sustained by such person or for the death of such person as the result of such injuries.
>
> (2) The presumption described in subsection (1) of this section may be rebutted by evidence. The presumption shall be deemed rebutted as a matter of law if the adverse person taking the statement discloses to the injured person prior to taking the statement:
>
> (a) Whom he or she represents;
>
> (b) That the injured person may make the statement in the presence of counsel or any other representative; and
>
> (c) That a copy of the statement is available at no cost to the injured person.

There is no dispute that the factors required to rebut the presumption as a matter of law under § 25-12,125(2) were not present here. Thus, in order to rebut the presumption, Menards was required to present evidence that the statement that Richard gave was not made under duress. And because the district court refused the Schuemanns' jury instruction on the statutory presumption, we infer that the court found that sufficient evidence had been presented to rebut the presumption.

[13] A rebuttable presumption is generally defined as a presumption that can be overturned upon the showing of sufficient proof. *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). In most instances, 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. See *id.* See, also, Neb. Rev. Stat. § 27-301 (Reissue 2016).

In Nebraska, we have two types of true presumptions: evidentiary presumptions and nonevidentiary presumptions. NJI2d Civ. 2.14A, comment IV. Evidentiary presumptions are those created by § 27-301, which states, "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." Section 27-301 shifts the burden of persuasion and production, as to a particular issue. See *Hopkins v. Hopkins*, 294 Neb. 417, 883 N.W.2d 363 (2016). With evidentiary presumptions, the jury is instructed as to the effect of the presumption depending upon the evidence presented. See, generally, NJI2d Civ.2.14A through 2.14D.

[14] Nonevidentiary presumptions do not shift the burden of persuasion; rather, they shift the burden of production. *Hopkins v. Hopkins, supra*; NJI2d Civ. 2.14A, comment IV(B). They are commonly referred to as "bursting bubble" presumptions. *Hopkins v. Hopkins, supra*; NJI2d Civ. 2.14A, comment IV(B). Once opposing counsel produces evidence to rebut the presumed fact, the presumption disappears. NJI2d Civ. 2.14A, comment IV(B). It is then left to the jury to determine the credibility of the evidence.

One commentator has identified the rebuttable presumption of § 25-12,125 as not fitting into any category of presumptions, further explaining, "I put this in this category because in so far as I can see this presumption is meaningless." G. Michael Fenner, *Presumptions: 350 Years of Confusion and It Has Come to This*, 25 Creighton L. Rev. 383, 422 (1992). It seems to us that because the presumption contained in § 25-12,125 can be rebutted by evidence, and can be rebutted as a matter of law by certain evidence, it is concerned with the burden of production, and not the burden of persuasion,

making it a nonevidentiary presumption, if it is a presumption at all.

In the present case, the evidence established that the insurance adjuster called Richard on July 6, 2010, 4 days after he sustained his injuries. As can be heard on the recording of the call, Richard was able to follow along and answer questions appropriately. He explained what happened while he was at Menards, volunteered information where appropriate, and did not appear to be confused. Thus, the evidence supports the district court's determination that the presumption of duress had been rebutted by the evidence.

Even though the jury was not instructed on the presumption, the basic facts surrounding the statement were in evidence for the jury's consideration and credibility assessment. As explained in the Nebraska Jury Instructions:

> While the presumption vanishes, the basic facts, that is, the facts that kicked in the presumption, remain in the case. They remain in evidence. And the trier of fact weighs those basic facts exactly as it weighs every other fact in evidence. They can find the basic facts to be true or not. And if they find the basic facts to be true, they can infer therefrom the formerly presumed fact. That is, the weight added when the presumption kicks in is the shift in the burden of production; when the presumption bursts, that weight is removed; nothing else changes. The facts that created the presumption have not vanished and trier-of-fact still considers them for whatever they are worth.

NJI2d Civ. § 2.14A, comment IV(C).

In addition to the evidence detailed above, Richard testified at trial that when the adjuster called, he had just woken up, and that Richard told him he "was on a lot of medication and [he] didn't know exactly how [the call] was going to go." He later reiterated that although it was not included on the recording played for the jury, at the beginning of the call, he told the caller that he had taken a lot of pain pills and he "didn't

know how accurate [he] would be with things." All of these facts were presented to the jury for its consideration in reaching its verdict.

[15] 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. *Rodriguez v. Surgical Assocs.*, 298 Neb. 573, 905 N.W.2d 247 (2018). However, 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.* Because the district court determined that evidence had been presented to rebut the presumption of duress, the Schuemanns' proposed jury instruction was not warranted by the evidence. The court therefore did not err in refusing to give the tendered instruction.

*Objections to Moore's Testimony.*

The Schuemanns assert that the district court erred in overruling their objections to Moore's testimony on the grounds of foundation and speculation. They claim that because Moore admitted that he had no personal recollection of the events involving the Schuemanns, he should have been prohibited from testifying as to what he would or would not have done relative to his interactions with Richard. We find that Moore was properly permitted to testify as to his habit under § 27-406.

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. § 27-406(1). The exercise of judicial discretion is implicit in

determinations of relevancy and admissibility under § 27-406, and as a result, the trial court's decision will not be reversed absent an abuse of discretion. *Hoffart v. Hodge*, 9 Neb. App. 161, 609 N.W.2d 397 (2000). Under § 27-406, the trial court determines whether the predicate evidence necessary to prove conduct by habit has been introduced. Habit may be shown by opinion or specific instances of conduct. *Hoffart v. Hodge, supra*. See § 27-406(2). It is within the trial court's discretion to determine if there is sufficient foundation for a witness to give his or her opinion about an issue in question. *Hoffart v. Hodge, supra*.

The Nebraska appellate courts have previously allowed testimony by witnesses as to their habits in order to prove conformity on a particular occasion. In *Hoffart v. Hodge, supra*, 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 Supreme Court upheld the admission of 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 the present case, Moore testified that he began working at Menards around 2008 or 2009. He worked in the building materials department for approximately 3 years before he was promoted to management and was employed at Menards for a total of 5½ or 6 years. At the beginning of his employment, he received training and guidance on assisting customers and loading and unloading items. He was taught to help

all customers he encountered, particularly if a customer was lifting something that appeared too heavy. He explained that Menards referred to its customers as "guests" and that he was taught to treat customers as if they were guests in his own home. During his employment, he assisted hundreds, if not thousands, of customers and established habits and routines associated with assisting customers, which habits he would use on a general basis.

Although it is undisputed that Moore was the Menards employee who assisted Richard on July 2, 2010, Moore admitted that he did not specifically recall his interactions with Richard. However, he testified over objection that based on the habits and routines that he had established, he did not think he would have told a customer that the customer had to help him load a shed box onto a cart, because doing so would not be consistent with how he treated his guests. He also testified over objection that he believed he would recall if he had been helping a customer and the customer suddenly started limping and visibly experiencing pain, because that is not something he would have typically seen from a customer, and that he would have noticed something was wrong if a customer started limping. He also said that if he had seen a customer in visible pain, he would not have asked the customer for assistance.

Moore's testimony as to his habits when assisting his guests while working at Menards tends to establish how he acted when assisting Richard. Habit evidence makes it more probable that the person acted in a manner consistent with that habit. See *Hoffart v. Hodge*, 9 Neb. App. 161, 609 N.W.2d 397 (2000). Like the witnesses in *Hoffart v. Hodge, supra*, and *Borley Storage & Transfer Co. v. Whitted, supra*, Moore explained that he assisted hundreds, if not thousands, of customers during his employment at Menards and that he could not specifically remember the events at issue here. 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*. The fact that Moore did not specifically remember assisting Richard does not render his testimony inadmissible, because § 27-406 allows proof of habit by opinion. See *Hoffart v. Hodge, supra*. As a result, the district court did not abuse its discretion in overruling the Schuemanns' objections to Moore's testimony.

## CONCLUSION

Having rejected the arguments raised on appeal, we affirm the district court's order.

Affirmed.

# HEADNOTES
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HEADNOTES