

IN THE NEBRASKA COURT OF APPEALS

JESSICA CERRA,
Plaintiff/Appellee

Vs.

ROBERT CERRA,
Defendant/Appellant

APPEAL NO. A-24-726

ON APPEAL FROM THE DISTRICT COURT OF SARPY COUNTY,
NEBRASKA
THE HONORABLE NATHAN B. COX

ANSWER BRIEF BY JESSICA CERRA TO APPEAL BRIEF BY
ROBERT CERRA

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STATEMENT OF JURISDICTION

Neb. Rev. Stat. § [25-1902](#) provides that a final order which may be vacated, modified or reversed includes: an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment; an order in a special proceeding that affects a substantial right; an order affecting a substantial right on a summary judgment action after judgment is ordered; and an order denying a motion for summary judgment if based on the assertion of sovereign immunity or government official immunity.

Under Neb. Rev. Stat. § 25-1911, the Court has jurisdiction over “a judgment rendered or final order made by the district court...” Neb. Rev. Stat. § 42-372, provides that for purposes of appellate review, the decree shall be treated as a final order as soon as it is entered. A Decree of Dissolution of Marriage was entered by the court on September 4, 2024, which is an order affecting a substantial right in an action. As such, the Decree became a final order for purposes of appellate review as soon as it was entered.

STATEMENT OF THE CASE

Appellee, Jessica Maschka, formerly known as Jessica Cerra, (hereinafter “Jessica”) filed a Complaint for Dissolution of Marriage on October 6, 2022. (T2). Appellant, Robert Cerra, (hereinafter “Robert”) filed an Answer and Cross-Complaint on November 7, 2022. (T5). Jessica filed an Amended Complaint on October 13, 2023, which Amended Complaint requested Jessica be granted permission to permanently remove the parties’ minor child, Violet, to the State of Iowa. (T12). Robert filed an Answer to Amended Complaint on October 23, 2023. (T18). Trial was held on this matter on June 14, 2024 and on June 26, 2024. (T31). A Decree of Dissolution of Marriage was entered by the court on September 4, 2024, which Decree dissolved the marriage, equalized the assets and debts of the parties, granted Jessica sole legal and physical custody of Violet, granted Jessica permission to permanently remove Violet to the State of Iowa, and found that Robert had committed acts of domestic violence against Jessica and therefore, the court set forth parenting time pursuant to Neb. Rev. Stat. § 43-2932 to protect Jessica and Violet. (T31-51). Robert filed a Notice of Appeal on September 30, 2024.

1. Issues Tried to the Court

The issues tried by the court included Jessica’s request to dissolve the parties’ marriage, to award child support in accordance

with the child support guidelines, to award Jessica sole legal and physical custody of Violet, to grant Jessica permission to permanently remove Violet to the State of Iowa, for an equitable division of the marital assets, to determine parenting time and for an award of attorney's fees as set forth in her Amended Complaint for Dissolution of Marriage (T1-11).

The court additionally considered Robert's Answer to Amended Complaint in which Robert also requested to dissolve the parties' marriage, for an equitable division of marital assets, parenting time and attorney fees. (T18).

2. How the Issues Were Actually Decided

The Decree of Dissolution of Marriage was entered on September 4, 2024, and set forth the following rulings relevant to this appeal:

- a. Real Estate:** The parties home located at 1205 Potter Street, Bellevue, Nebraska was determined to be a marital asset with equity in the amount of \$97,091.22. (T33). To equalize the marital assets, the home and the equity thereon were awarded solely to Jessica. (T33). Robert's Brief incorrectly sets forth the amount of marital equity in this home as \$147,908.78, which is actually the value of the encumbrance on the home. [Robert's br. at 14.](#)
- b. Vehicles:**
 - i. 2018 Chevrolet Equinox:** This vehicle was determined to have no equity and was awarded to Jessica. (T33-34).
 - ii. 2008 Toyota 4Runner:** This vehicle was valued at \$10,000.00 and was awarded to Robert. (T34).
 - iii. 1991 Toyota 4Runner:** This vehicle was found to have been modified during the marriage, with marital funds,

had a value of \$20,000.00, and was awarded to Robert. (T34).

- iv. **2003 Jayco Camper:** This camper was found to have a value of \$1,000.00 and was awarded to Robert. (T34).

c. Retirement/Investment Accounts:

- i. **Old Dominion 401(k):** This account was found to be marital with a value of \$123,190.67 as of the date of the parties' separation; however, this account had been depleted by Robert who solely utilized those funds. (T34). As such, the value of this account as of the parties' separation was awarded to Robert.
- ii. **Empower IRA:** This account was found to be a marital asset with a value of \$44,663.33 as of the date of the parties' separation; however, this account was also depleted by Robert who solely utilized those funds. (T34). As such the value of this account as of the parties' separation was awarded to Robert.

d. Bank Accounts:

- i. **Cobalt Credit Union account:** This account was found to be a marital with a value as of the date of the parties' separation of \$269.61, which was awarded to Jessica. (T34).
- ii. **Kellogg's Credit Union (checking account):** This account was found to be a marital asset with a value as of the date of the parties' separation of \$576.65, which was awarded to Robert. (T34).
- iii. **Kellogg's Credit Union (share account):** This account was found to be a marital asset with a value as of the date of the parties' separation of \$9,708.69, which was awarded to Robert. (T34).

- e. **Debts:** Each party was awarded the debts solely in their name. (T35).

- f. **Coinbase Account:** The court found that Robert had utilized the Coinbase account for his drug usage, utilizing marital funds

to purchase Coinbase in the total amount of \$17,429.00 from June 2021 until July 2022. (T35). Robert was assessed \$17,429.00 based on his dissipation of marital assets using Coinbase for his drug use.

- g. Domestic Violence Finding:** The court found that based on Robert's criminal convictions involving domestic violence against Jessica, that Robert had committed domestic abuse within the scope of Neb. Rev. Stat. § 43-2932 and the court entered a Parenting Plan pursuant to the requirements of Neb. Rev. Stat. § 43-2932, which restricted Robert's parenting time and set forth protections for Jessica and Violet. (T35-36).
- h. Equalization:** The court found the total marital estate to be valued at \$319,487.22, with each party entitled to one-half of that amount, totaling \$159,743.61. (T48-49). Robert received assets in the amount of \$222,396.00; and Jessica received assets in the amount of \$97,091.22. As such, Robert owed an equalization payment to Jessica in the amount of \$62,652.39. (T40).

3. Scope of Appellate Review

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. *Eis v Eis*, 310 Neb. 243, 965 N.W.2d 19 (2021). This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees. *Id.* In a review de novo on the record, an appellate court 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. *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. *Id.*

PROPOSITIONS OF LAW

1. 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. *Eis v Eis*, 310 Neb. 243, 965 N.W.2d 19 (2021).
2. 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. *Eis v Eis*, 310 Neb. 243, 965 N.W.2d 19 (2021).
3. 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. *Eis v Eis*, 310 Neb. 243, 965 N.W.2d 19 (2021).
4. Neb. Rev. Stat. § 42-365 authorizes a trial court to equitably distribute the marital estate according to what is fair and reasonable under the circumstances. *Parde v Parde*, 313 Neb. 779, 986 N.W.2d 504 (2023).
5. Equitable property division 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 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 this section. *Osantowski v. Osantowski*, 298 Neb. 339, 904 N.W.2d 251 (2017).
6. Generally, all property accumulated and acquired by either spouse during a marriage is part of the marital estate. *Brozek v Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016).
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. *Brozek v Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016).

8. If the separate property remains segregated or is traceable into its product, commingling does not occur. *Brozek v Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016).
9. The burden of proof rests with the party claiming that property is nonmarital. *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016).
10. Trier's of fact have the right to test the credibility of witnesses by their self-interest and to weigh it against the evidence, or the lack thereof. *Burgardt v. Burgardt*, 304 Neb. 356, 934 N.W.2d 488 (2019).
11. Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Betz v. Betz*, 254 Neb. 341, 575 N.W.2d 406 (1998).
12. In contested custody cases, where material issues of fact are in great dispute, the standard of review and the amount of deference granted to the trial judge, who heard and observed the witnesses testify, are often dispositive of whether the trial court's determination is affirmed or reversed on appeal. *Barth v. Barth*, 22 Neb. App. 241, 851 N.W.2d 104 (2014).
13. When a court is required to develop a parenting plan, [Neb. Rev. Stat. § 43-2932\(1\)](#) (Reissue 2016) permits limitations to parenting time or other access for a parent if the preponderance of the evidence demonstrates the parent has, among other things, "committed child abuse or neglect," committed "domestic intimate partner abuse," or "interfered persistently with the other parent's access to the child." *Wright v. Wright*, 29 Neb. App. 787, 961 N.W.2d 834 (2021).
14. If a parent is found to have engaged in such activity, "limits shall be imposed that are reasonably calculated to protect the child or child's parent from harm." *Wright v. Wright*, 29 Neb. App. 787, 961 N.W.2d 834 (2021).

15. Further, the limitations permitted by § 43-2932 include, but are not limited to, "allocation of sole legal or physical custody to one parent"; "[s]upervision of the parenting time, visitation, or other access between a parent and the child"; "[e]xchange of the child between parents through an intermediary or in a protected setting"; "[r]estraints on the parent from communication with or proximity to the other parent or the child"; "[d]enial of overnight physical custodial parenting time"; and "[a]ny other constraints or conditions deemed necessary to provide for the safety of the child, a child's parent, or any person whose safety immediately affects the child's welfare." *Wright v. Wright*, 29 Neb. App. 787, 961 N.W.2d 834 (2021).

ASSIGNMENT OF ERRORS

- 1. THE COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT ROBERT FAILED TO MEET HIS BURDEN TO TRACE HIS ALLEGED PREMARITAL ASSETS AND THE COURT DID NOT ABUSE ITS DISCRETION IN PROPERLY VALUING AND DIVIDING THE MARITAL ASSETS AND DEBTS OF THE PARTIES.**
- 2. THE COURT DID NOT ABUSE ITS DISCRETION DEVELOPING A PARENTING PLAN THAT PROTECTED BOTH JESSICA AND VIOLET PURSUANT TO NEB. REV. STAT. 43-2932.**

STATEMENT OF FACTS

Jessica generally agrees with Robert's Statement of Facts in his brief and adopts it as her own, subject to the following additions/clarifications to Robert's Statement of Facts ([Robert's br. at 11-14](#)):

4(e) Dissipation of Coinbase Investment: The court made specific findings that the Coinbase account was dissipated for Robert’s drug use. (T35).

4(f) Domestic Violence: Robert violently assaulted Jessica on July 15, 2022. The court described this assault as “shocking”, referencing beating with fists and kicking her, as well as jumped and stomped on Jessica. (T35-36). The court made a finding that Dr. Cottam’s testimony should be given no weight as Dr. Cottam had not met Violet or Jessica and that the documents relied upon were provided solely by Robert. (T35-36). The court made a finding that Neb. Rev. Stat. § 43-2932(1)(a) applied and the court ordered a Parenting Plan pursuant to Neb. Rev. Stat. § 43-2932(1)(b).

4(g) (i) Equalization: The marital equity in the real estate found to be \$97,091.22 which was determined by the assessed value of \$245,000.00, less the encumbrance of \$147,908.78, which represents the net value that was awarded to Jessica. (T48-49).

To equalize the marital estate, Robert was ordered to pay an equalization payment to Jessica in the amount of \$62,552.39. (T40).

ARGUMENT

- 1. THE COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT ROBERT FAILED TO MEET HIS BURDEN TO TRACE HIS ALLEGED PREMARITAL ASSETS AND THE COURT DID NOT ABUSE ITS DISCRETION IN PROPERLY VALUING AND DIVIDING THE MARITAL ASSETS AND DEBTS OF THE PARTIES.**

Neb. Rev. Stat. § 42-365 authorizes a trial court to equitably distribute the marital estate according to what is fair and reasonable

under the circumstances. *Parde v. Parde*, 313 Neb. 779, 986 N.W.2d 504 (2023).

Equitable property division 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 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 this section. *Osantowski v. Osantowski*, 298 Neb. 339, 904 N.W.2d 251 (2017).

Generally, all property accumulated and acquired by either spouse during a marriage is part of the marital estate. *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016). Exceptions include property that a spouse acquired before the marriage, or by gift or inheritance. *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. *Id.* 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.* The burden of proof rests with the party claiming that property is nonmarital. *Id.*

A nonmarital interest in property may be established by credible testimony. *Burgardt v. Burgardt*, 304 Neb. 356, 934 N.W.2d 488 (2019). Trier's of fact have the right to test the credibility of witnesses by their self-interest and to weigh it against the evidence, or the lack thereof. *Id.* Evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence. *Id.*

**A. ROBERT FAILED TO MEET HIS BURDEN OF PROOF
REGARDING HIS ALLEGED PREMARITAL/
NONMARITAL ASSETS AS FOLLOWS:**

1. **Real Estate:** Robert provided the closing statements from the original purchase of the property located at 1205 Potter Road, Bellevue, Nebraska. (Ex. 68). The parties' refinanced the home after they were married and Jessica was added to the deed. (54:5-25; 55:1-7). There was no evidence as to the value of the home at time of refinance, nor was there evidence presented at trial of the amount of any encumbrance on the home at that time.

In *Onstot v Onstot*, 298 Neb. 897, 906 N.W.2d 300 (2018), Mark Onstot had purchased the home in question in 1990. *Id.* He then married Maria Onstot in 1999. *Id.* Mark had requested that he be credited for his pre-marital home, purchased almost 10 years before the marriage. *Id.* Mark testified as to his belief of the value at the time of marriage; however, he did not testify or produce documentation as to any encumbrance, if any, on the home at the date of marriage. *Id.* As such, the court found that Mark failed to meet his burden of establishing that the property is a nonmarital asset. *Id.*

In the instant case, Robert produced evidence of the purchase of the home prior to the marriage. (Ex. 68). There was no testimony or evidence as to the value of the home at the time of the marriage. Further, there was no testimony or evidence as to any encumbrance on the home at the time of the parties' marriage. Jessica testified that the home was refinanced and her name was added to the deed after they married; however, neither party testified nor produced any evidence as to the value of the home when they married, nor when they refinanced and there was no evidence as to encumbrance. As such, the court found Robert failed to meet his burden of any premarital interest in the home.

Additionally, Robert mischaracterizes Exhibit 68 stating that it evidences a \$13,290.00 downpayment on the home when the document actually evidences a \$7,500.00 downpayment on the home and the remaining costs were closing costs that did not increase the equity of the home. (Ex. 68).

Robert further alleges he should be credited for payments made toward the mortgage prior to the marriage based on Exhibit 68, which is the mortgage statement for July 2022, the month that the parties separated. (Ex. 68). Jessica testified that the parties had refinanced the home after their marriage adding her name to the deed. (55:3-7) There was never any evidence presented at trial as to the mortgage prior to the parties refinancing nor any other evidence that shows amounts Robert paid on the mortgage prior to the marriage. Robert failed to offer *any* evidence of premarital payments he is claiming and further failed to make this request at trial. The first time this issue was addressed was on appeal. In fact, the sole request Robert made at trial was for credit for mortgage payments he was ordered to pay in lieu of child support payments, asking the court that he be reimbursed for the support he had paid for Violet. (143: 18-25; 144:1-9; 161:6-13; 171:2-6; 176:7-1-25; 177:1-19) (Ex. 9).

Robert is now requesting this Court to grant him relief which was not requested at trial. The court did not abuse its discretion in not awarding relief that was not requested at trial. Further, Robert failed to meet his burden in tracing his claimed premarital contribution to the home. As such, the court did not abuse its discretion in finding that the entire value of the home was marital.

2. **Empower 401(k)** – Robert had a 401(k) account prior to the marriage of the parties. (155:14-18) (Ex. 39). The court found

that there were no remaining premarital funds in this account. The court did not abuse its discretion in finding that Robert failed to meet his burden to establish any remaining premarital funds in his Empower 401(k) account.

Both parties testified to a withdrawal or loan on this account in 2021 (60: 7-25; 61:1-25; 62: 1-4; 200:17-21). Jessica testified that there was a withdrawal of approximately \$50,000.00 that was used to pay off windows for the home and the Toyota, which the party's already paid taxes on. (60:24-15; 61:1-25). Robert testified that there was a "loan" of \$53,000.00 on the account that he was repaying through his paychecks. (200: 17-25).

Robert argues that he paid back this "loan" when he withdrew the remaining funds in the 401(k) account; however, there is no evidence that the withdrawal amount on this account was reduced by any outstanding loan balance. (200:17-25; 201:1-6). Robert argues that the court improperly added this "loan" back into the marital estate and charged Robert with using this amount. The Empower 401(k) value was already reduced by the \$53,000.00 withdrawal and accounted for. The Empower 401(k) value was based on what was in the account prior to Robert's withdrawal.

Robert failed to trace his premarital interest in the Empower 401(k) following the withdrawal or loan on the account. Robert failed to provide documentation to establish the value of the account after the withdrawal or loan that would establish that any of his premarital funds were still in the account. Robert, as the owner of this account, was in the best position to obtain and provide the court evidence of the tracing of his premarital interests, but failed to do so. The

court did not abuse its discretion in determining this account to be marital or in valuing the Empower 401(k) account.

- 3. Empower IRA:** The court valued this IRA as \$44,633.33. (T34). Robert argues that the value of his IRA account contains funds from his 401(k) withdrawal; however, Robert failed to provide adequate tracing demonstrating his contention. At trial Jessica submitted a statement for the Empower IRA account which demonstrates that between March 2022 and September 2022 there was a \$44,633.33 deposit into this account. (Ex. 18). The parties separated on July 15, 2022. Robert alleges he transferred funds from his Empower 401(k) to the Empower IRA and alleges that is evidenced in Exhibit 60; however, this document fails to establish the source of the deposits on this account. (Ex. 60). Robert acknowledges that the origins of the funds from this account is “murky” at best. Robert’s br. at 21. The court has a right to weigh the credibility of witnesses based on their self-interest and to weigh the testimony against the evidence or lack thereof. *Burgardt v. Burgardt*, 304 Neb. 356, 934 N.W.2d 488 (2019). Robert is therefore asking this Court to make a determination as to the credibility of a witness, contrary to the trial court, who actually observed the testimony at time of trial.

Additionally, Robert testified that he had withdrawn \$25,000.00 from his IRA to pay off marital debts on December 15, 2022, stating that this was a full eight (8) months prior to the separation or filing; however, Robert misstates the date of separation of the parties. Robert’s br. at 21. The parties separated on July 15, 2022, when Robert violently attacked Jessica. The parties did not reside together, had no relationship or meaningful contact thereafter. Therefore, this withdraw in December 2022 was a

post-separation withdrawal. Further, Jessica testified that the charges on Robert's credit cards were not for marital purposes as those charges included: glass pipes, hotel charges, sex store charges, microwave radiation gear, and night vision goggles among other things. (125:13-25; 126:1-25). As such, Robert should not be credited for this \$25,000.00 withdrawal as it was post-separation and not established that these funds were used for marital purposes.

Robert did not provide any additional evidence at trial regarding the transactions on this IRA account. As this account is solely Robert's, he was in the best position to evidence this alleged transfer. However, the limited and admittedly "murky" evidence presented did not demonstrate that this account included funds withdrawn from Robert's Empower IRA and therefore, fails to demonstrate that this account was accounted for twice in the court's valuation.

4. Vehicles:

- a. **1991 Toyota 4Runner:** The court did not abuse its discretion in finding that marital funds were used to modify, repair and upgrade this vehicle throughout the marriage and therefore, finding the value of this vehicle to be marital. Robert testified that there were no modifications done to this vehicle during the marriage (205: 20-21); however, Jessica testified to the contrary (113:17-25; 114:). Trier's of fact have the right to test the credibility of witnesses by their self-interest and to weigh it against the evidence, or the lack thereof. *Burgardt v. Burgardt*, 304 Neb. 356, 934 N.W.2d 488 (2019). The court did not abuse its discretion in finding Jessica to be more credible in valuing this asset.

B. THE COURT DID NOT ABUSE ITS DISCRETION IN VALUING AND DIVIDING THE MARITAL ASSETS AND DEBTS AS FOLLOWS:

1. **2008 Toyota 4Runner:** The court did not abuse its discretion in finding Jessica's testimony as to the value of this vehicle more credible than the testimony and evidence provided by Robert's father, Michael Cerra. Jessica testified as to the value of this vehicle. (115:8-17) (Ex. 24). Robert offered a Kelley Blue Book value for the vehicle showing a value of \$8,865.00 for dealer value, his father testified he believed trade-in value should be used for this vehicle (152:16-25; 153:1-21) (Ex. 62). His father did not testify as to the mileage on this vehicle, the features on this vehicle or any modifications of this vehicle. Jessica, as an owner of this vehicle, would have more knowledge of the mileage, features, etc. of the vehicle, making her better suited to provide a more accurate value for this vehicle than Robert's father. Robert, choosing to have his father testify as to the values of the vehicles versus testifying himself, he took the risk that Jessica's testimony would be found to be more credible as an owner of the vehicle. The court heard testimony and viewed evidence and determined Jessica's valuation to be more credible and accepted her value. Trier's of fact have the right to test the credibility of witnesses by their self-interest and to weigh it against the evidence, or the lack thereof. *Burgardt v. Burgardt*, 304 Neb. 356, 934 N.W.2d 488 (2019). The court did not abuse its discretion in making this finding.
2. **Coinbase:** The court did not abuse its discretion in valuing the dissipation of marital assets as to the amount of the marital funds used for Robert's Coinbase

activity that was admittedly used for drug purchases. Robert is asking the court to value his Coinbase account as to the value of it as of the date of trial. [Robert's br. at 21-22](#). Robert's Father testified that the Coinbase was "just high risk investment banking"; however, in Robert's answers to discovery, it is admitted that this account was used solely for trading for drugs. [\(164, 4-13\) \(Ex. 26\)](#). Robert now wants to characterize the Coinbase account as an "investment" account instead of a source that allowed him to trade for drugs. Robert argues he should not be "punished" for the market fall of this Coinbase account. [Robert's br. at 22](#). Robert did not provide any documentary evidence of a loss in value of this account or any shares. Further, Michael Cerra's testimony as to the investment in Coinbase is inconsistent with Robert's Answers to discovery. [\(Ex 26\)](#).

The court had two (2) options for valuing the Coinbase dissipation in this case. Jessica valued the Coinbase account based on the actual value of the loss to the marital estate. Robert would like the court to value the Coinbase account as of the current value, arguing that the account was a bad investment that simply lost value, which is inconsistent with Robert's answers to discovery. [\(Ex. 26\)](#). Robert made statements contrary to his interest in his Answers to discovery, where he admitted he used this account regularly to trade for his drug use. However, at trial, Robert's father testified that Robert should be assessed amounts remaining in the account after Robert's deductions for his drug use, and would like to only be assessed the value of the account that is left, i.e. \$150.00. [\(163:13-25; 164:1-14\)](#). The only equitable way to value this Coinbase dissipation in this case is to value it based on the amount of the loss to the marital estate. [\(Ex. 19\) \(Ex.](#)

23). To assess the account as of the current value as Robert has requested, does not properly assess the loss of value to the marital estate by his use of this account for his drug purchases.

The court did not abuse its discretion in valuing the Coinbase dissipation at the actual value of the loss to the marital estate through his Coinbase purchases.

3. Debts:

- b. **Northpoint:** Following the violent assault on Jessica, Robert went to drug treatment at Northpoint Recovery. (160:16-25). Robert argues that Northpoint charges were incurred prior to the parties' separation stating that Exhibit 66 evidences that. (Ex. 66). It was not contested that the date of separation of the parties was on July 15, 2022, as this is the date when Robert violently assaulted Jessica and was arrested. The Northpoint charges were not incurred until after this time.

Jessica testified that she had not agreed to the treatment at Northpoint prior to the July 15, 2022 assault. (141:4-7). In fact, Jessica's testimony was that Robert went to Northpoint for treatment after being ordered to in his criminal case for his assault against her. (140: 23-25; 141:1-7). The court correctly determined the true facts at time of trial and correctly determined Robert's court-ordered drug treatment for his violent attack against Jessica did not create a marital debt as Robert alleges.

The court did not abuse its discretion in finding this debt to be nonmarital and ordering that Robert be solely responsible for this debt.

b. Tax liability for withdrawal(s) of 401(k): The court did not abuse its discretion in finding that the tax liability for the 401(k) withdrawals should be Robert's solely.

i. \$53,000.00 Withdrawal: The testimony regarding the \$53,000.00 withdrawal on this account is conflicting. Robert alleges that this was a loan that was being paid back through his paychecks and ultimately paid back when he made the \$134,000.00 withdrawal on this account. (20:17-25; 201:1-7). By contrast, Jessica testified that this was a withdrawal in 2021 and that taxes were already paid on this withdrawal. (60:11-25; 61:1-18). Robert offered no evidence that this was in fact a loan versus a withdrawal. Robert also offered no evidence as to any taxes he alleged is still owed on this account. Robert did not even offer evidence as to the value of this loan he alleges was paid off with the \$134,000.00 401(k) withdrawal. Trier's of fact have the right to test the credibility of witnesses by their self-interest and to weigh it against the evidence, or the lack thereof. *Burgardt v. Burgardt*, 304 Neb. 356, 934 N.W.2d 488 (2019). Based on the evidence presented at trial, together with the court's conclusions as to the veracity of the witnesses, the conclusion that any tax liability should be the sole responsibility of Robert is not an abuse of discretion.

b. \$134,000.00 Withdrawal: With regards to the \$134,000.00 Robert withdrew from his 401(k), Jessica was not made aware of this transaction prior to Robert withdrawing these funds. (58:7-25; 59:1-14). Jessica had no choice in the withdrawal of funds, received no benefit from the withdrawal of these funds and the monies were not used for marital purposes. Robert's father testified that Robert used the money from this withdrawal for attorney fees for the divorce action, his criminal case, and drug treatment. (158:20-25; 159:1;

162:4-16). Jessica received no benefit from the funds withdrawn from this account. (59:12-24). Had Jessica had the opportunity to say what she wanted to do with the funds that would have been awarded to her, she could have invested that money into her own 401(k), avoiding a tax penalty. Jessica was not given that choice. Robert now wants Jessica to be liable for a tax penalty for his decision to withdrawal marital funds to spend on a criminal defense attorney, which was necessitated by his violent beating of Jessica. It is beyond all comprehension and reason that Jessica be forced to pay for Robert's attorney fees and cost of drug recovery. Neither Jessica nor Violet received any benefit from the funds from this withdrawal and had no prior knowledge of the withdrawal; therefore, the tax penalty on this withdrawal was solely Robert's.

The court did not abuse its discretion in finding that the tax liability for Robert's 401(k) withdrawal should not be included in the marital estate.

**B. THE COURT DID NOT ABUSE ITS DISCRETION
DEVELOPING A PARENTING PLAN THAT
PROTECTED BOTH JESSICA AND VIOLET
PURSUANT TO NEB. REV. STAT. §43-2932.**

Robert argues that the court abused its discretion in giving no weight to his expert witness, Dr. Cottam and in creating a Parenting Plan that restricts Robert's visitation. Robert's brief fails to adequately acknowledge that after the court determined that domestic violence had occurred, the court was required, after determining that domestic violence had occurred, to develop a Parenting Plan pursuant to Neb. Rev. Stat. § 43-2932, which includes putting protections in place to protect both Jessica and Violet. The court did not err in developing this Parenting Plan.

Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Betz v. Betz*, 254 Neb. 341, 575 N.W.2d 406 (1998).

In contested custody cases, where material issues of fact are in great dispute, the standard of review and the amount of deference granted to the trial judge, who heard and observed the witnesses testify, are often dispositive of whether the trial court's determination is affirmed or reversed on appeal. *Barth v. Barth*, 22 Neb. App. 241, 851 N.W.2d 104 (2014).

Where a preponderance, or the greater weight, of the evidence demonstrates that a parent has committed one of the listed actions, the obligations of this section are mandatory. *Flores v. Flores-Guerrero*, 290 Neb. 248, 859 N.W.2d 578 (2015).

“When a court is required to develop a parenting plan, Neb. Rev. Stat. § 43-2932(1) (Reissue 2016) permits limitations to parenting time or other access for a parent if the preponderance of the evidence demonstrates the parent has, among other things, "committed child abuse or neglect," committed "domestic intimate partner abuse," or "interfered persistently with the other parent's access to the child." *Wright v. Wright*, 29 Neb. App. 787, 961 N.W.2d 834 (2021). If a parent is found to have engaged in such activity, "limits shall be imposed that are reasonably calculated to protect the child or child's parent from harm." *Id.* Further, the limitations permitted by Neb. Rev. Stat. § 43-2932 include, but are not limited to, "allocation of sole legal or physical custody to one parent"; "[s]upervision of the parenting time, visitation, or other access between a parent and the child"; "[e]xchange of the child between parents through an intermediary or in a protected setting"; "[r]estraints on the parent from communication with or

proximity to the other parent or the child"; "[d]enial of overnight physical custodial parenting time"; and "[a]ny other constraints or conditions deemed necessary to provide for the safety of the child, a child's parent, or any person whose safety immediately affects the child's welfare." *Id.*

Jessica testified as to the terrifying and traumatic experience that occurred on July 15, 2022, in which Robert violently attacked her, which included Robert hitting Jessica in the back of the head with a baseball bat and chasing her to a neighbor's house where the assault continued. (17:21-25; 18:1-7, 25; 19:1-5). The court viewed photographs of Jessica's injuries. (Ex. 33). The court also viewed video evidence of a small portion of the attack from a neighbor's doorbell video camera. (Ex. 34). It was uncontested that Robert is serving a prison sentence for his attack on Jessica. (Ex. 7). It was uncontested that domestic violence had occurred and, as such, the court made the finding that Neb. Rev. Stat. § 43-2932 would apply to the court's determination in any visitation for Robert with Violet. (T35-36).

Robert argues that the court erred in failing to give weight to Dr. Cottam's testimony. (T35-36). The court explained in detail its findings and was based on the fact that Dr. Cottam had never met the child, about which she was asked to provide her opinion for, nor had she met with Jessica. (T.36), (88: 10-25; 89: 1-17). Dr. Cottam testified that the temperament of a child is extremely important and would likely make a difference in her recommendations. (89: 4-17; 90: 11-22). Dr. Cottam further testified to not having several documents she requested including Robert's counseling records, records from the supervised parenting time and records from Robert's criminal defense attorney. (82: 14-25; 83: 1-9). Dr. Cottam's report also specifically details her concerns that she did not have the opportunity to meet with Jessica and Violet prior to her evaluation. (Ex. 58). The court did not abuse its discretion in failing to give any weight to Dr. Cottam's testimony as Dr. Cottam testified that had she met Jessica and Violet,

her determinations and recommendations may have been different. (89:4-14; 79) (Ex. 58).

Dr. Cottam's testimony, even if given weight by the court, would not have affected the final result. Robert's brief makes a serious misstatement of Dr. Cottam's testimony, which states that Dr. Cottam recommended that it would be in the minor child's best interests to continue face-to-face visits and she would recommend grandma handling transportation. Robert's br. at 25. This is not an accurate account of Dr. Cottam's testimony. In fact, Dr. Cottam testified that in "general" she recommends face-to-face visits or "some other modality". (81:11-25; 81:20-25). Further, Dr. Cottam specifically testified about her concerns with Robert's parents being involved in any visitation, as well as reiterating those concerns in her report. (95:1-17) (Ex. 58). Robert further states that he was allowed visitation prior to his incarceration that was supervised by his mother. Robert's br. at 24. This is also an inaccurate statement as the testimony and evidence clearly reflect that the visitation prior to Robert's incarceration were supervised by a "visitation specialist". (29: 9- 25; 30: 1- 7) (Ex. 9).

Robert further argues that the court abused its discretion in determining visitation he believes to be "conditional" and does not provide him means to maintain a relationship with his Violet.

The court did not err in developing a Parenting Plan pursuant to the best interests of Violet, as well as pursuant to Neb. Rev. Stat. § 43-2932, providing protections for both Violet and Jessica. Robert argues that the court created a "conditional Decree" that delegated future parenting time in the hands of an unknown party. Robert's br. at 24. While Robert interprets the Parenting Plan to give him specific visitation with certain conditions, this interpretation is certainly not the court's intent nor how Jessica interprets the Order. The Parenting Plan eliminates Robert's parenting time while still allowing Robert to request visitation with certain protections in place.

In *Vanskiver*, the court addressed whether a Parenting Plan that allowed the minor children to decline to go on visitation with their father was an improper delegation of parenting time. *Vanskiver v. Vanskiver*, 303 Neb. 664, 930 N.W.2d 569 (2019). In *Vanskiver*, the father had engaged in behavior that the court found was mental abuse towards the children. *Id.* As such, a Parenting Plan was developed that allowed the children to decline to go on visitation. *Id.* The trial court stated intention was to enter an order to allow the children to see their father at their discretion. *Id.* The Appeals Court found that there is no suggestion that the trial court intended there to be any enforceable parenting time. *Id.* Instead, the court's Parenting Plan was intended to eliminate the father's enforceable parenting time, which was designed to protect the children from their father's harmful behavior while still considering that the children may want to spend time with their father. *Id.* This Court found that this was not a delegation of parenting time but instead a suspension of parenting time for the father. *Id.*

In the instant case, the court entered a Parenting Plan that provides in part that "Defendant Father *may* have parenting time with the minor child under therapeutic visitation as supervised by a licensed therapist and as coordinated with such therapist." (T45) (emphasis added). The use of the word "may" in the parenting plan suggests that the court intended for this visitation to be permissive, not mandatory. The court, by the Parenting Plan, effectively suspended all of Robert's parenting time, while still providing an avenue for which Robert may request parenting time that would ensure that no harm would come to Jessica or Violet. These so called "conditions" are Robert calls them, are not conditions at all, but actually protections the court has put in place to protect Jessica and Violet, which the court had a duty and responsibility to do.

With regards to visitation at the prison facility where Robert was incarcerated, the court was placed in a position to weigh the

potential harm to Violet in a prison environment, the nature of the violence of Robert's assault on Jessica, and the threat Robert may impose on Jessica and Violet, together with the court's duty to protect both Jessica and Violet from Robert. The only way to ensure that both Violet and Jessica are fully protected is to eliminate Robert's parenting time. In doing so, the court still allowed for a method for Robert to request parenting time with certain protections. However, the Parenting Plan did not provide any enforceable parenting time for Robert. The visitation set forth in the Parenting Plan is permissive and pursuant to Neb. Rev. Stat. § 43-2932 included conditions necessary to protect Jessica and Violet. Accordingly, Robert's interpretation of the Parenting Plan as a "conditional" decree is inconsistent with the permissive language in the parenting plan for Robert's parenting time or the court's requirement to put protections in place for Violet and Jessica based on Robert's violent past behavior.

The court did not abuse its discretion in developing a parenting plan that is in Violet's best interests and put necessary protections in place pursuant to Neb. Rev. Stat. § 43-2932 to protect Violet and Jessica.

SUMMARY OF ARGUMENT

The court did not abuse its discretion in determining the marital assets of the parties. The court found that Robert had failed to meet his burden to establish assets he claimed to be premarital assets. The court did not err in the valuation and distribution of Robert's IRA and 401(k) accounts as Robert failed to produce sufficient evidence that these accounts contained the same funds. The court further found that Jessica's testimony and valuation of marital assets was more credible than the testimony of Robert and his father. The court properly awarded Robert the debt for Northpoint Recovery and the tax debt on his 401(k) withdrawal as nonmarital property. The court further distributed assets equitably between the parties.

The court did not abuse its discretion in developing a Parenting Plan that restricts Robert's visitation pursuant to Neb. Rev. Stat. § 43-2932, which includes necessary protections for Violet and Jessica.

CONCLUSION

The court did not abuse its discretion its classification of the marital assets and debts of the parties and its division thereof. The property division established by the court should be affirmed.

The court did not abuse its discretion in developing a Parenting Plan pursuant to Neb. Rev. Stat. § 43-2932, which restricted Robert's visitation with Violet, as the court was required to develop a Parenting Plan that protects both Jessica and Violet. The Parenting Plan established by the court should be affirmed.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Neb. Ct. R. App. P. § [2-103\(C\)\(3\)\(a\)](#), which requires an appellee's total original submission on appeal not to exceed 18,000 words when a cross-appeal is presented by the parties. This brief contains 7,583 words, including all text, cover pages, tables, captions, headings, quotations, signature blocks, and other kinds writing in this brief except for this certificate. This brief complies with the typeface, formatting, and style requirements of Neb. Ct. R. App. P. § [2-103\(C\)](#). Counsel determined the word count for this brief using the word count function of counsel's word-processing software, Microsoft Word (2021, version 2502).

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Certificate of Service

I hereby certify that on Wednesday, April 02, 2025 I provided a true and correct copy of this *Brief of Appellee Jessica* to the following:

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