

NO. A-20-7

IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA, o/b/o Emory Violet Walker,
A Minor Child,
Appellee,

vs.

MICHAEL BRETT WALKER,
Appellant,

vs.

MALLORY MORGAN BUCKINGHAM,
Appellee.

APPEAL FROM THE DISTRICT COUNTY COURT OF DODGE COUNTY, NEBRASKA

THE HONORABLE GEOFFREY C. HALL
DISTRICT COURT JUDGE

BRIEF OF APPELLANT

Prepared and Submitted By:

Linsey Moran Bryant, #23380

SIDNERLAW

340 E. Military Ave., Ste. 1

Fremont, NE 68025

Ph. (402) 721-7111

Fx: (402)721-9120

bryantl@sidnerlaw.com

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STATEMENT OF JURISIDICITION

This is an appeal from an order of the Dodge County District Court pursuant to Neb. Reb. Stat. §§ 25-1911 and 25-1912 (Reissue 2016). After a trial on the matter, the district court entered an order and parenting plan on December 17, 2019, with regard to custody, parenting time, child support, health insurance and medical expenses, and tax dependency exemptions. (T41-51). On January 6, 2020, Appellant timely filed his notice of appeal and deposited the requisite docket fee.

STATEMENT OF THE CASE

A. Nature of the Case

On February 28, 2019, the Defendant/Father, Michael Brett Walker, filed a complaint to modify the previous order of support entered on February 7, 2018 by the district court. (T10-13) On April 10, the Third Party Defendant/Mother, Mallory Morgan Buckingham filed an answer and counterclaim. (T24-28) Trial was held before the district court on October 30, and on December 17, the district court entered an order to modify and parenting plan. (T41-51)

B. Issues Actually Tried to the Court Below

Trial was held on the issues of custody, parenting time, child support, health insurance and medical expenses, and the tax dependency exemptions for Michael and Mallory with regards to their two minor children.

C. Decision of the Lower Court

On December 17, 2019, the district court entered an order and parenting plan. (T41-51) The district court awarded Mallory and Michael joint legal custody of the parties two minor children; sole physical custody to Mallory; ordered Michael to pay \$646 per month in child support for two minor children and \$467 per month for one minor child; ordered medical expenses be

divided between the parties pursuant to the child support percentages; and ordered that each party shall be entitled to claim one of the minor children for income tax purposes. (T41-51)

D. Scope of Review

In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. *Cesar C. v. Alicia L.*, 281 Neb. 979, 800 N.W.2d 249 (2011). 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. *Leners v. Leners*, 302 Neb. 904, 925 N.W.2d 704 (2019).

In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Cesar C. v. Alicia L.*, *supra*.

ASSIGNMENTS OF ERROR

1. The district court erred in characterizing the physical custody of the children as sole physical custody when custody was effectively joint physical custody.
2. The district court abused its discretion by calculating child support based upon the sole physical custody calculation worksheet.
3. The district court erred by failing to terminate cash medical support.

PROPOSITIONS OF LAW

I.

In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion.

Cesar C. v. Alicia L., 281 Neb. 979, 800 N.W.2d 249 (2011).

II.

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.

Leners v. Leners, 302 Neb. 904, 925 N.W.2d 704 (2019).

III.

In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.

Cesar C. v. Alicia L., 281 Neb. 979, 800 N.W.2d 249 (2011).

IV.

“Physical custody” is defined by the Parenting Act as “authority and responsibility regarding the child’s place of residence and the exertion of continuous parenting time for significant periods of time.”

Neb. Rev. Stat. § 43-2922(20) (Reissue 2016).

V.

Although the Parenting Act does not speak in terms of “sole” or “primary” physical custody, it contemplates that an award of physical custody will determine the child’s primary residence and identify the parent who will exert “significant” and “continuous” parenting time over the child.

Neb. Rev. Stat. § 43-2922(20) (Reissue 2016);

State v. Jeffery T., 303 Neb. 933, 932 N.W.2d 692 (2019).

VI.

“Joint physical custody” as defined by the Parenting Act means “mutual authority and responsibility of the parents regarding the child’s place of residence and the exertion of continuous blocks of parenting time by both parents over the child for significant periods of time.

Neb. Rev. Stat. § 43-2922(12) (Reissue 2016).

VII.

“Parenting time” is defined under the Parenting Act as “communication or time spent between the child and parent.”

Neb. Rev. Stat. § 43-2922(19) (Reissue 2016).

VIII.

The Parenting Act makes clear that regardless of the physical custody arrangement, when parents are exercising parenting time, they are performing “[p]arenting functions.”

Neb. Rev. Stat. §43-2922(17) (Reissue 2016).

IX.

The Parenting Act does not require any particular parenting time schedule to accompany an award of either sole or joint physical custody, and there is a broad range of potential parenting times and schedules that can be found to be in the child’s best interests.

State v. Jeffery T., 303 Neb. 933, 932 N.W.2d 692 (2019).

X.

Where a parenting plan effectively establishes a joint physical custody arrangement, courts will so construe it, regardless of how prior decrees or court orders have characterized the arrangement.

Becher v. Becher, 299 Neb. 206, 908 N.W.2d 12 (2018);

Elsome v. Elsome, 257 Neb. 889, 601 N.W.2d 537 (1999).

XI.

It is the trial court's allocation of parenting time that drives the physical custody label, not the other way around.

State v. Jeffery T., 303 Neb. 933, 932 N.W.2d 692 (2019).

XII.

Child support payments should generally be set according to the child support guidelines.

Hotz v. Hotz, 301 Neb. 102, 917 N.W.2d 467 (2018).

SUMMARY OF THE ARGUMENT

Michael argues that the district court erred by awarding Mallory sole physical custody of the children when the parenting time equates to joint physical custody and by calculating child support based on sole physical custody to Mallory.

STATEMENT OF FACTS

On February 7, 2018, the district court entered an order for support which was submitted upon the stipulation of the parties. (T1-7) The order found that Michael and Mallory were the parents of the minor child, Emery Violet Walker and ordered Michael to provide support for the child. (T1) Beginning March 1, 2018, Michael was ordered to pay child support in the amount of \$373.00 per month and \$32.00 per month for cash medical support. (T2) A child support calculation worksheet was attached to the order. (T6)

On February 28, 2019, Michael filed a complaint to modify which alleged a substantial and material change of circumstances since the entry of the order of support such that the parties had conceived a subsequent child born in 2018, Elise Rose Walker. (T10-12) In his complaint, Michael requested joint physical and legal custody of both Emery and Elise, the establishment of parenting time, the recalculation of child support and cash medical support, and a determination of tangential issues. (T10-12) On March 29, the State of Nebraska authorized attorney from the child support enforcement office filed a voluntary appearance and answer. (T21-23) On April 10, Mallory filed an answer and cross-complaint. (T24-28) Mallory's cross-complaint sought a modification of the order of support, sole legal and physical custody or, in the alternative physical custody to Mallory and joint legal to both parties, and a determination regarding other expenses for the children. (T25-26). On April 10, Michael filed a reply and answer. (T29)

On April 11, 2019, the district court entered a temporary order finding that Michael was the father of Elise and which awarded Mallory temporary physical custody of the children, and both parties' temporary joint legal custody of the children. (T32) Michael was ordered to pay \$373.00 per month in child support and \$38.00 per month in cash medical support. (T33) Daycare expenses were divided in accordance with the child support calculation, the parties were ordered to complete a parenting class and to contact mediation. (T33)

On July 9, 2019, the district court entered a journal entry which ordered Michael and Mallory to attend mediation within forty-five (45) days and set the matter for trial on October 30. (T39)

The matter came on for trial on October 30, 2019. Michael called Mallory to the stand and Mallory also testified for her case. (6:1-2; 144:19-24) At the time of trial, Mallory was 24 years old and was employed as a CNA and medication aid at Dunklau Gardens. (6:14-18; 9:17-23) Mallory earned \$14.50 per hour. (13:1; E12) Mallory and the parties' two children, Emery and Elise, lived in Fremont with Mallory's mother, brother and sister. (7:8-18; 145:24-25) Mallory had plans to move into her own apartment with the children in the future. (8:21-9:5; 146:5-7) At the time of the trial, Emery and Elise were two years old and eleven months old. (23:7-8)

Mallory explained that she and Michael began dating in high school, around 2013. (13:17-18) The parties' first child, Emery was born in 2017. (17:18) Thereafter, the parties' second child, Elise was born in 2018. (14:6-10) Mallory and Michael lived together for approximately nine months in 2017 and 2018. (14:11-14) Thereafter, the parties did not get along and Mallory testified she ceased keeping Michael involved because the two would argue. (18:10-17) Mallory explained that she and Michael had never resided together in the same home with both children. (145:21-23) Mallory testified that Michael should have visitation with the children every other weekend and

explained that the visitation was the same as her father had with her and it was enough for her to still have a good connection with her father. (23:14-17; 24:3-7) Mallory indicated there was no reason for Michael to have the girls' social security numbers because she did not trust Michael. (27:10-22)

Mallory testified that daycare for the children costed \$145 per week and that her childcare provider did not accept Title 20. (147:13) Mallory testified that she had provided the health insurance coverage through her employer for the children since July 2019. (148:19-23; 149:13-15; 172:14-23; E26, E27) The children were also covered under Medicaid coverage. (152:23-153:4) Mallory also explained that she contributed to a 401K retirement plan. (151:3-4) Mallory offered a proposed child support calculation based on her information as an aid to the court. (151:17-22; E28) Mallory testified that she paid her mother rent to live in her home, paid for car insurance and helped pay for groceries and supplies for the children. (161:14-16) Mallory testified that the Women Infant Children's program provided food for the children. (161:17-23)

Mallory testified that the children were involved in a low-income, family-based program called Sixpence, which helped her with supplies and helped the children reach milestones. (153:2-14) Mallory learned the month before trial that, through the Sixpence program, she could enroll the girls in early preschool and that she notified Michael because they had discussed pick-up and potty training. (153:17-22) Mallory testified that Emery would be eligible to begin preschool in August, if she were potty-trained by that time. (154:7-10) Mallory testified Emery would be eligible for higher learning classes, grants and scholarships. (154:12-16)

Mallory explained that the parties had a partially mediated parenting plan, and she agreed to joint legal custody and asked the district court to adopt the partial parenting plan. (37:25-38:16; 167:1-5; E9) Mallory testified that Michael had exercised all of his parenting time with the children

except on one occasion, and that he had returned them early on occasion when he had to work. (40:10-19) Mallory agreed that the children appear to enjoy their time with Michael and that he was a good father. (41:1-5) However, Mallory testified that she believed sole physical custody with her was in the best interests of the children. (167:6-11)

Michael testified that he was 25 years old and lived in Omaha, approximately 20 to 30 minutes from Mallory. (42:17; 44:5-11) Michael lived with his parents and brother at that residence. (44:20) Michael testified the residence was in the Pepperwood neighborhood on the west side of Omaha. (45:3-5) Michael explained he was not financially able to afford his own place and had lived with his parents for approximately three years. (45:10-22) Michael was employed by Casey's General Stores and earned \$12.50 per hour. (76:14-17) Michael's work schedule generally included 40 hours per week, working from 2:00 p.m. to 11:00 p.m. (76:16-20) Michael testified he usually had Monday or Tuesdays and Thursdays off. (76:25-77:3) Michael was current on his child support and cash medical support obligations and provided the children with food, formula, clothes and anything else they needed during his parenting time. (46:1-16) Michael agreed that Mallory was a good mother to the children. (47:2-4)

Michael indicated that he agreed to the joint legal custody as mediated by the parties, but requested joint physical custody as well. (47:8-11) Michael explained he was in agreement that the children would attend Fremont Public Schools so long as one of the parties continued to live in Fremont. (47:12-21) Michael believed he could communicate with Mallory and wanted to be involved in decisions regarding the children. (48:1-18) Michael explained he is on the same page with Mallory and has attempted to maintain the same bedtime. (49:23-50:3)

Michael recalled the parties' history in living together and separately with Emery, with both parents being involved and parenting Emery together. (52:2-56:2) Michael explained the

parties were able to co-parent and shared responsibilities for Emery together, although it was tough for him during the time Michael and Mallory were not living together to see Emery as much as he wanted. (52:2-56:2)

In July 2018, the parties separated and Michael explained he and Mallory had started fighting and he did not want the children to be around the arguments. (57:13-22) Their second child Elise was born in late 2018, and Michael testified he attended Mallory's pre-natal appointments, Elise's well-baby visits and immunization appointments. (59:4-14) Michael signed the acknowledgement of paternity for Elise and believed he was her father. (59:24-50:5) Initially after Elise's birth, he did not have much access to Elise because she was breastfeeding, but that changed when Mallory was done breastfeeding. (60:6-13) Michael indicated he was not given very much time, including overnight visitation, with either of his daughter's until he filed for the modification. (60:14-61:1) Michael explained that he attempted to work through visitation with Mallory over the months following the July 2018 separation, but filed the complaint to modify because he wanted more time and Mallory was not allowing much time. (61:9-22) Michael testified Mallory told him he could not have more time because of the girl he was dating at that time. (61:23-62:5)

Michael testified about his time with Emery and Elise, and described their routine with him during his parenting time. (66:12-67:12) Michael testified that since the temporary order, he had parenting time with the children on alternate weekends, Thursday through Sunday, and one overnight during the off week. (68:11-17) Michael testified that he had not missed any of his visitation with the children, but admitted to ending the visit early on two occasions due to work schedules and his grandmother staying in Emery's room for a visit. (68:18-69:9) Michael testified he wanted joint physical custody of the children and requested week on, week off visitation.

(70:11-18) Michael testified he would continue to be responsible for getting Emery to school in Fremont from Omaha during his parenting time and would move to Fremont to be able to do that. (71:2-9; 71:18-21) Michael also testified that he would be able to exercise week on, week off visitation with the children in childcare as most often his parents provided care to the children, or a babysitter came into the home to allow the children to remain in the house. (72:1-10) Michael further explained that if he were to have the children on a week on, week off schedule, he would try to switch his schedule at Casey's to the day shift and he would hire a babysitter to come into the home and watch the children during the day. (77:19-22)

Michael agreed that his residence and commute from West Omaha was not an issue or impediment to exercising custody because he had a different car and could afford it, whereas with his previous car he could not. (78:6-14) Michael explained he was willing to make sacrifices to spend more time with his children. (78:15-17) Michael submitted a partially mediated parenting plan, his tax information and a current pay stub. (E9-11) Michael further submitted a proposed child support calculation as an aid to the court, which utilized the parties' employment information, and gave Mallory deductions for retirement contribution and health insurance. (E14)

On cross-examination, Michael admitted that he had made minimal efforts to find a residence in Fremont or to change his employment hours, but indicated that he believed he could make joint custody happen in Omaha, and further, he had no knowledge or notice that Mallory planned on Emery attending preschool in Fremont. (84-86; 87:18-88:5; 104:2-16; 104:21-23) Michael agreed that he had not previously made more significant efforts because he did not know Emery would be attending preschool so soon and his first knowledge of the preschool decision had been learned during trial. (105:13-18) Michael testified he had no knowledge that Emery was involved in the Sixpence program prior to trial, but he wanted to be involved moving forward.

(105:19-106:3) Michael again agreed that he believed he could work a joint custody arrangement from Omaha and that he would do whatever was necessary to get Emery to wherever she needed to go. (106:14-23)

Nina Walker, Michael's mother, testified on his behalf. Nina testified that her sons, Michael and Bryce, lived with her and her husband at their residence in Omaha. (115:7-20) Nina testified that Michael did not have the funds to live on his own at that time, but he had frequently talked about moving to Fremont. (115:21-23) Nina explained that her and her husband provided care to Emery and Elise while Michael worked. (116:6-11) They also assisted Michael with transportation of the girls. (116:12-13) Nina testified she had no issue with continued assistance with her grandchildren and that she enjoyed her time with the girls. (116:25-117:4) Nina indicated that she had also provided Mallory with childcare if she needed it and hoped that would continue. (118:1-8) Nina testified that, when Michael is home with the children, he took care of them. (118:15-19) Nina testified Michael was a devoted parent who spent time with the girls, engaged in activities with them, such as watched movies and read books. (120:14-25) Nina testified that Michael was a great dad. (121:3)

Cordie R. Buckingham, Mallory's mother, testified on her behalf. Cordie testified that Mallory and the girls lived with her, but she had talked about getting her own place. (194:12-24; 195:5-6; 195:4-6) Cordie's two other children, Noah and Audrey also lived in the home. (195:3-4) Cordie explained that Mallory paid \$200 rent each month and helped with groceries. (195:16-22) Cordie testified that she helped with the children, specifically because Mallory had to be at work at 5:30 a.m., Cordie would get the children up, get them dressed and take them to daycare each day Mallory worked or that they did not go to Michael's. (196:11-23) Cordie described that

Mallory was a very good parent. (197:12-15) Cordie explained that she was aware Mallory wanted to move out of Cordie's home, but had no formal plans at that time to move. (207:16-21)

At the conclusion of the trial, the district court made an oral statement of its order and also later entered an order on December 17, 2019, which memorialized the determination. (211-215: T41-52) The district court found a substantial change of circumstances which warranted the modification of the previous decree. (211; T46-52) The district court awarded the parties joint legal custody, with the tie-breaker to Mallory. (211:12-15) The district court awarded the mother physical custody subject to reasonable visitation by Michael, specifically: "every other week Tuesday through Sunday, Tuesday at 6:00 p.m. until Sunday at 6:00 p.m. During the alternating week, it shall be Tuesday at 6 p.m. until Thursday at 6 p.m." (211:17-21; T41-45) The district court ordered the parties to share transportation. (211:21-24) The court ordered child support pursuant to Exhibit 28 in the amount of \$646.00 per month for two children and \$467.00 per month for one child. (212:13-15; T47) The district court ordered holiday visitation pursuant to *Wilson v. Wilson*, 224 Neb. 589, 399 N.W.2d 802 (1987).

ARGUMENT

Physical Custody Label.

Michael first assigns and argues that the district court erred by ordering Mallory to have sole physical custody of the minor children. It is Michael's contention that, similar to the situation presented in *State v. Jeffery T.*, 303 Neb. 933, 932 N.W.2d 692 (2019), the district court effectively imposed a joint physical custody arrangement but labeled it as sole physical custody. To be clear to the Court, Michael does not argue that the district court abused its discretion in the actual time ordered, he is in favor of the physical joint custody arrangement and does not believe that the award of parenting time was an abuse of discretion as he believes equal time with both parents is

in the best interests of the children. Michael's issue is with the label of the custody as sole physical. In this case, the district court ordered Michael to have "every other week Tuesday through Sunday, Tuesday at 6:00 p.m. until Sunday at 6:00 p.m. During the alternating week, it shall be Tuesday at 6 p.m. until Thursday at 6 p.m." (211:15-21) At the conclusion of the district court's oral pronouncement of custody, Michael's trial counsel asked the district court if the order was for seven out of fourteen overnights, to which the district court affirmed. (215:6-14)

"Physical custody" is defined by the Parenting Act as "authority and responsibility regarding the child's place of residence and the exertion of continuous parenting time for significant periods of time." Neb. Rev. Stat. § 43-2922(20) (Reissue 2016). Although the Parenting Act does not speak in terms of "sole" or "primary" physical custody, it contemplates that an award of physical custody will determine the child's primary residence and identify the parent who will exert "significant" and "continuous" parenting time over the child. See *id*; *State v. Jeffery T.*, 303 Neb. 933, 932 N.W.2d 692 (2019). "Joint physical custody" as defined by the Parenting Act means "mutual authority and responsibility of the parents regarding the child's place of residence and the exertion of continuous blocks of parenting time by both parents over the child for significant periods of time. § 43-2922(12). The Parenting Act does not further define either "significant periods of time" or "continuous blocks," but it does define "parenting time." See *id*; *State v. Jeffery T.*, *supra*.

"Parenting time" is defined under the Parenting Act as "communication or time spent between the child and parent." § 43-2922(19). The Parenting Act makes clear that regardless of the physical custody arrangement, when parents are exercising parenting time, they are performing "[p]arenting functions." §43-2922(17). The Parenting Act does not require any particular parenting time schedule to accompany an award of either sole or joint physical custody, and there is a broad

range of potential parenting times and schedules that can be found to be in the child's best interests. See *State v. Jeffery T.*, *supra*.

Nebraska case law consistently establishes that, if the evidence presented to the trial court established a joint custody arrangement, the courts will so construe it no matter how court orders or decrees have characterized the agreement. *State v. Jeffery T.*, 303 Neb. 933, 932 N.W.2d 692 (2019); *Dooling v. Dooling*, 303 Neb. 494, 930 N.W.2d 481 (2019); *Becher v. Becher*, 299 Neb. 206, 908 N.W.2d 12 (2018); *Hill v. Hill*, 20 Neb. App. 528, 827 N.W.2d 304 (2013); *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999).

In the case of *State v. Jeffery T.*, *supra*, a paternity action, the district court awarded primary physical and legal custody to the father and awarded the mother almost equal parenting time. The district court calculated child support using the joint custody child support worksheet and ordered the father to pay child support. *Id.* The father appealed the matter and alleged several errors made by the district court. *Id.* The Nebraska Court of Appeals found that the district court erred in its determinations regarding parenting time, child support, nonreimbursed health care expenses and contempt; specifically, as to parenting time and child support, the Court of Appeals reversed and remanded the district court's order with directions to modify the mother's parenting time consistent with the award of sole physical custody to the father. *Id.*

On petition for further review to the Nebraska Supreme Court, the court held that the blanket rule disfavoring joint physical custody was disfavored and inconsistent with the Parenting Act. *State v. Jeffery T.*, *supra*. With regard to physical custody and parenting time, the Supreme Court opined that where the parenting plan "effectively establishes a joint physical custody arrangement, the courts will so construe it, regardless of how prior decrees or court orders have characterized the agreement." *State v. Jeffery T.*, 303 Neb. at 948, 932 N.W.2d at 704. The

Supreme Court modified the language of the decree consistent with the finding that joint physical custody was effectively imposed. *Id.* With regard to child support, the Nebraska Supreme Court similarly found that the use of joint custody child support worksheet 3 was appropriate for the district court to utilize given the award of parenting time was nearly equal. *Id.*

As indicated, the district court's award of custody is nearly equal parenting time with the minor children, which equates to seven out of fourteen days overnights to each parent. (211:15-21) This schedule provides that the children spend roughly the same amount of time with each parent at their respective residence and, while not as extensive in continuous blocks of time as a week-on, week-off schedule, does provide each parent with continuous blocks of parenting time for significant periods of time. Michael asserts that this meets the statutory definition of joint physical custody. See *Becher v. Becher*, 299 Neb. 206, 908 N.W.2d 12 (2018) (parenting plan establishing every-other-week parenting time schedule with equal time over summer break meets statutory definition of joint physical custody regardless of label used by the trial court.); *State v. Jeffery T.*, *supra*.

Where a parenting plan effectively establishes a joint physical custody arrangement, courts will so construe it, regardless of how prior decrees or court orders have characterized the arrangement. *Becher v. Becher*, 299 Neb. 206, 908 N.W.2d 12 (2018); *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999). It is the trial court's allocation of parenting time that drives the physical custody label, not the other way around. *State v. Jeffery T.*, *supra*.

Michael respectfully asks that the Court modify the language of the district court's order and parenting plan to reflect that the district court's order effectively imposed a joint physical custody arrangement with the schedule ordered for each parent's parenting time with the minor children.

Child Support Calculation.

Michael also assigns and argues that the district court abused its discretion in its determination of child support and requests that the matter be remanded for recalculation in accordance with the Nebraska Child Support Guidelines and utilizing the appropriate joint calculation worksheet.

The child support calculation ordered by the district court is attached to the final order and was also submitted by Mallory as an aid to the district court at trial. (E28; T50) The calculation includes only worksheet 1 and is based on an award of sole physical custody. At trial, Michael offered a child support calculation, received as an aid to the district court, which included a worksheet 3, joint physical custody calculation for two minor children and one minor child. (E14)

Child support payments should generally be set according to the child support guidelines. See *Hotz v. Hotz*, 301 Neb. 102, 917 N.W.2d 467 (2018). Neb. Ct. R. § 4-212 (rev. 2011) of the child support guidelines sets forth the application of worksheet 3:

[w]hen a specific provision for joint physical custody is ordered and each party's parenting time exceeds 142 days per year, it is a rebuttable presumption that support shall be calculated using worksheet 3. When a specific provision for joint physical custody is ordered and one party's parenting time is 109 to 142 days per year, the use of worksheet 3 to calculate support is at the discretion of the court. . . . For purposes of these guidelines, a "day" shall be generally defined as including an overnight period.

Again, in the circumstances as set forth above in the case of *State v. Jeffery T.*, *supra.*, with regard to child support, the Nebraska Supreme Court determined that the use of joint custody child support worksheet 3 was appropriate for the district court to utilize given the award of parenting time was nearly equal. In this case, Michael asserts that the award of parenting time is nearly equal and effectively created a joint physical custody arrangement. Under the parenting

plan, Michael's parenting time exceeds the rebuttable presumption of 142 nights per year pursuant to § 4-212. A calculation of Michael's parenting time for calendar year 2020, shows that he will have overnight visitation on 183 days, and Mallory with 182 days. No evidence was presented or provided to the district court at trial that would rebut the presumptive use of child support calculation worksheet 3. The district court abused its discretion by failing to utilize a child support calculation which included worksheet 3 and Michael respectfully requests that the matter be reversed and remanded to the district court for a recalculation of child support accordingly.

Cash Medical Support.

Lastly, Michael assigns and argues that the district court erred by failing to terminate cash medical support.

In the district court's April 11, 2019 temporary order, the court in paragraph 5, ordered Michael to pay cash medical support as a result of neither parent having insurance available to them at a reasonable cost. (T32-34) Mallory testified that she had provided the health insurance coverage through her employer for the children since July 2019, but the children were also covered under Medicaid coverage. (148:19-23; 149:13-15; 172:14-23; 152:23-153:4; E26, E27) In the final order, the district court ordered Mallory to maintain health insurance for the minor children. (T48) However, the district court did not specifically terminate the cash medical support ordered in the temporary order and that obligation still remains for Michael even though the children have coverage through private health insurance through Mallory's employer. If the Court were able to review the active case status as it is in the district court within its powers, it could verify that the cash medical support obligation remains in place even though the children have health insurance coverage.

Michael asserts that the failure to specifically terminate the cash medical support was error and respectfully requests that the Court order the matter remanded to terminate Michael's cash medical support retroactive to the date of the district court's final order.

CONCLUSION

In conclusion, Michael assigns and argues that the district court erred in regards to the order of sole physical custody, the child support calculation and the failure to terminate cash medical support. Michael respectfully asks the Court to modify the language of the district court's order and parenting plan to reflect the district court's order which effectively imposed a joint physical custody arrangement and that the Court find the district court abused its discretion by failing to utilize the joint child support calculation worksheet 3. Michael requests that the child support calculation be reversed and remanded back to the district court for recalculation, along with an order on remand to address the termination of the cash medical support order.

DATED this 25th day of March, 2020.

Respectfully submitted,
MICHAEL BRETT WALKER, Appellant

/s/ Linsey Moran Bryant
Linsey Moran Bryant, #23380
Attorney for Appellant
SIDNERLAW
340 E. Military Ave., Suite 1
Fremont, Nebraska 68025-5097
Phone: 402-721-7111
bryantl@sidnerlaw.com

PROOF OF SERVICE

STATE OF NEBRASKA)
)ss.
COUNTY OF DODGE)

The undersigned hereby certifies that two (2) copies of the foregoing Brief were placed in the United States mail with sufficient first-class postage attached, on this 25th day of March, 2020, addressed to the following:

Avis R. Andrews
Attorney at Law
P.O. Box 1236
Fremont, NE 68026

Justin Bignell
Authorized Attorney
Child Support Enforcement Office
435 N. Park Ave., RM 303
Fremont, NE 68025

/s/ Linsey Moran Bryant
Linsey Moran Bryant, #23380
Attorney for Appellant
SIDNERLAW
340 E. Military Ave., Suite 1
Fremont, Nebraska 68025-5097
Phone: 402-721-7111
bryantl@sidnerlaw.com

Subscribed and sworn before me on this 25th day of March, 2020.

/s/ Sheryl Jean Castillo Exp. 07/04/2021
Notary Public
State of Nebraska
County of Dodge

Certificate of Service

I hereby certify that on Wednesday, March 25, 2020 I provided a true and correct copy of this *Brief of Appellant Walker* to the following:

Michael B Walker represented by Shane J Placek (22780) service method: Electronic Service to **placeks@sidnerlaw.com**

Mallory M Buckingham represented by Avis R Andrews (15620) service method: Electronic Service to **avisa@qwestoffice.net**

State of Nebraska represented by Justin David Bignell (25725) service method: Electronic Service to **justin.bignell@nebraska.gov**

Signature: /s/ Linsey Moran Bryant (23380)