for the entry of a new decree that divides the marital property in accordance with our opinion and determines an appropriate alimony award. On remand, the court shall address and remedy the errors in the original decree that we have discussed in detail in our opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA ON BEHALF OF KEEGAN M., A MINOR CHILD, APPELLEE, V. JOSHUA M., DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE, AND AMY B., THIRD-PARTY DEFENDANT, APPELLANT.

___ N.W.2d ___

Filed December 11, 2012. No. A-12-074.

1. **Parties: Words and Phrases.** A necessary party to a suit is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.
2. **Courts: Parties: Jurisdiction.** The presence of necessary parties to a suit is a jurisdictional matter and cannot be waived.
3. **Motions for Continuance: Appeal and Error.** An appellate court reviews a judge's ruling on a motion to continue for an abuse of discretion.
4. **Trial: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
5. **Motions for Continuance.** The failure to comply with Neb. Rev. Stat. § 25-1148 (Reissue 2008) is a procedural defect that affects the technical rights of an opposing party. It does not affect the opposing parties' substantial rights.
6. **Motions for New Trial: Appeal and Error.** An appellate court reviews a judge's ruling on a motion for new trial for an abuse of discretion.
7. **Motions for New Trial.** Motions for new trial are entertained with reluctance and granted with caution, because of the manifest injustice in allowing a party to allege that which may be the consequence of the party's own neglect in order to defeat an adverse verdict, and, further, to prevent fraud and imposition.
8. ____. To grant a motion for a new trial, a court must also find that the injury materially affected a party's substantial rights.
9. **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.

10. **Child Custody.** The decision to award custody of a minor child must be based upon the best interests of the child.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Justin A. Quinn and Casey J. Quinn for appellant.

Karen S. Nelson, of Schirber & Wagner, L.L.P., for appellee Joshusa M.

IRWIN, PIRTLE, and RIEDMANN, Judges.

RIEDMANN, Judge.

INTRODUCTION

Amy B. appeals an order of the district court for Douglas County granting Joshua M. custody of the parties' minor child, Keegan M. Because we find no error in the trial court's decision, we affirm.

BACKGROUND

Keegan, born in March 2003, is the biological child of Joshua and Amy. The State commenced an action to establish Joshua's paternity and compel child support. The court entered an order establishing paternity and compelling child support in December 2007. Amy retained custody of Keegan until the Nebraska Department of Health and Human Services (DHHS) removed him from her home. In November 2008, the separate juvenile court acquired jurisdiction over Keegan on the basis that Keegan lacked proper parental care under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). According to a DHHS court report, the juvenile court petition alleged that Amy "subjected Keegan . . . to inappropriate and excessive physical discipline" and that she "engaged in domestic violence with . . . her live-in boyfriend, in the presence of [Keegan]."

DHHS placed Keegan with Joshua for foster care. Joshua and Keegan initially lived in Carter Lake, Iowa, before moving to Council Bluffs, Iowa, less than 30 minutes from Amy. Keegan attends school in Council Bluffs, and Joshua's wife cares for Keegan when he is at their home. Joshua's child

support obligations terminated in March 2009 while Keegan was in his custody.

In October 2009, Joshua filed a motion to add Amy as a necessary party to the pending action in order to address unresolved custody and visitation issues between Amy and Joshua. In the motion, Joshua represented that neither the attorney for the State nor Amy's attorney had any objection to the motion.

After the court granted the motion, Joshua filed an application to modify support and to establish custody and visitation. Amy filed a responsive pleading, and by agreement of the parties, the matter was transferred to the juvenile court. The record presented does not indicate how, or if, the juvenile court ruled on Joshua's application, although a subsequent pleading filed by Amy alleges that the juvenile court terminated its jurisdiction over Keegan without resolving the pending issues.

In the meantime, Keegan flourished in Joshua's care, and in 2010, DHHS recommended terminating the juvenile case and awarding custody to Joshua. DHHS noted that Keegan "found stability in his relationships and in his school setting," but expressed concern about Amy's interactions with Keegan. In a report, DHHS noted that Amy resided with her boyfriend when their relationship was good. When she and her boyfriend were fighting, Amy lived with her mother. According to the above report, on one occasion, DHHS received a call that police had responded to a fight between Amy and her boyfriend, which fight occurred in front of Keegan, and that the police required Amy and Keegan to leave her boyfriend's home.

DHHS also reported that it had to suspend Amy's unsupervised visits with Keegan after Keegan reported that Amy made derogatory comments about Joshua's wife and threatened bodily harm to her. These conversations with Amy caused Keegan to be "stressed out." Although DHHS believed Amy had "made progress" participating in rehabilitative services, DHHS stated in its report that "it is also believed that [Amy] has not internalized what she has learned."

In August 2010, Joshua again filed a motion to add Amy as a necessary third party in order to seek custody of Keegan.

The motion was served upon "Douglas County Child Support Enforcement" and Amy. After the court granted the motion, Joshua filed a complaint to modify the order of support in the district court.

The juvenile court judge entered an order that was filed in the present action stating that the juvenile court case was terminated and that the juvenile court no longer had jurisdiction over either Keegan or this matter. That same day, Amy filed in district court a motion for temporary custody of Keegan. In that motion, she alleged she feared that Joshua would remove Keegan from Nebraska. Amy requested temporary care, custody, and control of Keegan as well as child support. The next day, the district court for Douglas County entered an order giving Joshua temporary custody of Keegan. In October 2010, the district court entered a further order clarifying Amy's and Joshua's respective temporary custody and visitation rights to Keegan.

In April 2011, Joshua filed a notice of trial, notifying Amy that the trial date for Keegan's custody determination was set for August 18. On June 15, Joshua filed an amended notice of trial setting a trial date of August 16. On July 11, Amy's attorney filed a motion to withdraw due to a breakdown in the attorney-client relationship. The motion was granted on July 20. The trial court continued the trial to September 22 because of a scheduling conflict. On August 17, Joshua filed another amended notice of trial reflecting the September trial date.

On September 22, 2011, the parties appeared for trial. Joshua was represented by counsel, and Amy appeared pro se. Amy requested a continuance so that she could obtain legal representation. She stated that she had not yet obtained new counsel because she believed the custody issue would be settled. She also requested a continuance because Joshua had not responded to outstanding interrogatories. Amy conceded that she had not compelled Joshua to answer the interrogatories, because she believed the case would be settled.

The court denied Amy's motion for a continuance, noting that Amy had known the case was scheduled for trial since June and had already received a month-long continuance because of the court's scheduling conflict.

At trial, Joshua testified to the history of the case, including DHHS' removal of Keegan from Amy's care and its recommendation that Joshua receive sole physical and legal custody. He testified that in December 2010, while Keegan was at Amy's house, a brick was thrown through Amy's window. This incident raised continuing concerns about Keegan's safety in Amy's custody. He also testified that Keegan had been "[p]sychiatrically hospitalized" and was experiencing hallucinations centering around Amy. Joshua asked that the court grant him sole physical and legal custody subject to visitation by Amy.

Amy argued that she should receive primary custody of Keegan because Joshua is frequently away from home on business and it is Joshua's wife, rather than Joshua, who takes care of Keegan during those times. Amy asked that she be given custody of Keegan at all times other than the "five to seven" days per month that she claimed Joshua was home.

Amy testified that she was concerned Keegan might have a detachment disorder or psychiatric issue because he is in the care of Joshua's wife and away from both of his biological parents for long periods of time. Amy admitted that Keegan has not been diagnosed with detachment disorder, but she said he has been diagnosed with a loss of reality, confusion, and suicidal tendencies. According to Amy, Keegan was admitted to a hospital for a psychiatric evaluation and she was upset that she was excluded from treatment decisions. Those decisions had been made by Joshua's wife.

Amy admitted that she had been a victim of domestic violence and that Keegan had witnessed domestic violence while in her care. She testified that DHHS removed Keegan from her care because of incidents that occurred between her and her ex-boyfriend and because DHHS had received numerous telephone calls from individuals reporting that Keegan was being abused and neglected. Amy testified that she called the 911 emergency dispatch service in December 2010 because someone had thrown a brick through her window. She testified that at the time, she believed it was her ex-boyfriend who had thrown the brick. Amy also testified that she was not paying child support, not providing Keegan with health insurance,

and not paying for Keegan's daycare because those needs were being met by Joshua and his wife. Amy testified that she does provide Keegan with food and clothes and also meets his other needs.

The court found that awarding custody to Joshua was in Keegan's best interests. Amy timely filed a motion for new trial, in which she argued that (1) Joshua's complaint to modify did not request removal of Keegan from Nebraska, and therefore the custody proceeding was inappropriately treated as a regular custody proceeding rather than a removal proceeding; (2) Joshua never served the State, a necessary party to the proceeding, and the lack of service created a void order; and (3) Joshua's failure to respond to Amy's interrogatories meant the trial needed to be continued so that proper discovery could take place.

The court denied Amy's motion for new trial, noting that Amy never objected to Joshua's failure to serve the State, and the court found that the State was not a necessary party, even though the State was notified of the proceedings at various times and appeared at some hearings. The court also found that the parties knew that Joshua resided in Council Bluffs, that it had been discussed at trial, and that the action was properly treated as a removal action. Lastly, the court held that Amy should have moved to compel Joshua to answer the interrogatories prior to trial.

ASSIGNMENTS OF ERROR

Amy assigns that the district court erred in (1) failing to dismiss on jurisdictional grounds because the State was a necessary party that had not been served, (2) denying Amy's motion to continue, (3) denying Amy's motion for new trial, and (4) granting Joshua custody of Keegan.

ANALYSIS

Failure to Serve State.

Amy argues that the trial court did not have jurisdiction to hear arguments about modifying Keegan's custody because the State was a necessary party and was not served process within 6 months as required by Neb. Rev. Stat. § 25-217 (Reissue

2008). Because we find that the State was not a necessary party, we find no merit in Amy's argument.

[1,2] A necessary party is synonymous with an indispensable party.

> [A] necessary party to a suit is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.

American Nat. Bank v. Medved, 281 Neb. 799, 806, 801 N.W.2d 230, 237 (2011). The presence of necessary parties to a suit is a jurisdictional matter and cannot be waived. *Robertson v. School Dist. No. 17*, 252 Neb. 103, 560 N.W.2d 469 (1997).

To determine whether the State was a necessary party, we turn to the pleadings to determine the interests asserted. The State initiated an action to determine paternity and support for Keegan. The court issued an order for support requiring Joshua to make child support payments to Amy and provide health and medical insurance for Keegan. The State did not seek any action regarding Keegan's custody. After DHHS placed Keegan in Joshua's custody, the court terminated the support order. The only interests the State asserted were paternity, which had been established, and support, which had been terminated.

Joshua correctly points out in his modification complaint that the prior orders in this action did not award custody of Keegan to either Joshua or Amy. Joshua seeks an order granting him sole custody of Keegan, subject to Amy's reasonable visitation, and any further order that is in Keegan's best interests or that the court deems just and equitable.

Joshua's modification complaint deals solely with the issue of which parent should have custody of the minor child. This issue can be addressed without affecting any interest that the State previously had in the support of Keegan. The court was able to resolve the custody controversy without affecting the

State's interest, and therefore, the State was not a necessary party to the modification complaint.

We note that had the State not commenced the paternity and support action, Amy could have done so before the child's fourth birthday without the State's being named a party. See Neb. Rev. Stat. § 43-1411 (Reissue 2008). In such an action, the court could have awarded custody to either party, again, without the State's intervention. See, e.g., *Cox v. Hendricks*, 208 Neb. 23, 302 N.W.2d 35 (1981) (stating that in actions to establish paternity, issues of custody and visitation rights are incidental to primary cause of action and district courts have jurisdiction to address them).

We find that the issue of custody could be finally adjudicated without affecting the State's interest and that therefore, the State was not a necessary party to the modification action. Since the State was not a necessary party, Joshua was not required to serve it with process in order to confer jurisdiction upon the district court.

Failure to Grant Continuance.

Amy argues that the trial court abused its discretion in failing to grant her oral motion to continue the trial. She argues that her lack of counsel and Joshua's failure to respond to interrogatories entitled her to a continuance. We disagree.

[3,4] An appellate court reviews a judge's ruling on a motion to continue for an abuse of discretion. See *Adrian v. Adrian*, 249 Neb. 53, 541 N.W.2d 388 (1995). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Id*.

[5] Neb. Rev. Stat § 25-1148 (Reissue 2008) governs the requirements for requesting a continuance. Section 25-1148 requires that the motion be in writing and supported by an affidavit. Although it is not determinative, an appellate court considers whether the moving party complied with § 25-1148 in determining whether the trial court abused its discretion in granting or denying a motion to continue a trial. See, *State v. Perez*, 235 Neb. 796, 457 N.W.2d 448 (1990); *In re Interest of*

Azia B., 10 Neb. App. 124, 626 N.W.2d 602 (2001). The failure to comply with § 25-1148 is a procedural defect that affects the technical rights of an opposing party. See *State v. Vela-Montes*, 19 Neb. App. 378, 807 N.W.2d 544 (2011). It does not affect the opposing parties' substantial rights. See *id*.

Because the failure to comply with § 25-1148 does not affect the substantial rights of an opposing party, we assess a motion to continue that does not fully comply with § 25-1148 "in the broader context of Nebraska jurisprudence focusing on the parties' substantial rights." *State v. Vela-Montes*, 19 Neb. App. at 386, 807 N.W.2d at 551. This focus leads us to "concentrate on whether the continuance was justified in light of [the moving parties'] representations of cause." *Id*. In *Adrian v. Adrian, supra*, the Nebraska Supreme Court overruled a trial court's decision to deny a motion to continue after finding (1) substantial gravity in the matter to be decided at the hearing sought to be continued, (2) the party had been granted only two previous continuances, and (3) the moving party did not intend to unnecessarily delay the proceedings.

In this instance, Amy argued that she needed a continuance in order to obtain counsel. The motion to continue was Amy's first motion to continue, although the trial had already been continued for 5 weeks due to the court's schedule. The matter to be determined at the hearing, child custody, was also a matter of substantial gravity. However, Amy waited until the morning of trial to request the continuance in order to obtain counsel after the trial had already been continued almost 5 weeks. Amy had been without counsel and had notice of an upcoming trial date for months prior to her request for a continuance. She did not need a continuance in order to have enough time to procure representation. The trial court determined that Amy already had sufficient time to obtain counsel and denied her motion to continue. In this case, we cannot say that the trial court abused its discretion in denying Amy's motion to continue, because her motion to continue did not comply with the requirements of § 25-1148 and the court's granting her motion to continue would have needlessly delayed trial.

Failure to Grant New Trial.

Amy argues that the trial court abused its discretion in failing to grant her motion for new trial, because Joshua's failure to answer her interrogatories deprived her of her right to full discovery and to a fair trial. We disagree.

[6] An appellate court reviews a judge's ruling on a motion for new trial for an abuse of discretion. See *Murray v. UNMC Physicians*, 282 Neb. 260, 806 N.W.2d 118 (2011). Neb. Rev. Stat. § 25-1142 (Reissue 2008) allows the trial court to grant a new trial on the following bases: "(1) Irregularity in the proceedings of the court, jury, referee, or prevailing party or any order of the court or referee or abuse of discretion by which the party was prevented from having a fair trial; (2) misconduct of the jury or prevailing party . . . ."

[7,8] Motions for new trial are "'entertained with reluctance and granted with caution, because of the manifest injustice in allowing a party to allege that which may be the consequence of his own neglect in order to defeat an adverse verdict, and, further, to prevent fraud and imposition . . . .'" *Smith v. Erftmier*, 210 Neb. 486, 494, 315 N.W.2d 445, 451 (1982). To grant a motion for a new trial, a court must also find that the injury materially affected a party's substantial rights. See *Phillips v. Industrial Machine*, 257 Neb. 256, 597 N.W.2d 377 (1999).

Amy's substantial rights were not affected by irregularities in the proceedings or misconduct by the jury or the opposing party. A party's failure to return an interrogatory alone does not make a proceeding irregular. Rather, the justice system has in place processes and procedures for discovery as well as processes and procedures for requesting sanctions for discovery violations. See *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987) (noting that discovery sanctions exist to punish parties for their attempts to neglect or frustrate discovery process). The Nebraska Rules of Discovery provide a process for compelling an opposing party to answer interrogatories. See Neb. Ct. R. Disc. § 6-337(a). These rules provided Amy with a sufficient avenue to compel answers to interrogatories. See *id.*

The proceedings in this case were not sufficiently irregular to warrant granting Amy a new trial, and Amy does not allege misconduct. Instead, Amy alleges a discovery violation that is so routine there is a standard process for addressing it. The fact that Amy did not take advantage of this process does not make the alleged discovery violation irregular. Furthermore, Amy did not prove how Joshua's failure to answer her interrogatories affected her ability to prepare for trial. Many of the interrogatory questions Amy served on Joshua seek information unrelated to the issues at trial, and it is unclear what type of information Amy hoped to develop. There is no evidence that Amy was prejudiced by Joshua's failure to answer her interrogatories.

The decision to grant a new trial is an extreme decision that places a significant burden on the parties. In this case, where Amy had the opportunity to compel discovery and made no specific allegations about how Joshua's failure to return the interrogatories affected her substantial rights, the trial court did not abuse its discretion in denying Amy's motion for new trial.

Custody Determination.

Amy assigns as error the trial court's award of primary custody in favor of Joshua. This assignment is without merit.

[9] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Farnsworth v. Farnsworth*, 276 Neb. 653, 756 N.W.2d 522 (2008).

[10] The decision to award custody of a minor child must be based upon the best interests of the child. Neb. Rev. Stat. § 42-364(1)(b) (Cum. Supp. 2012). In determining the best interests of a minor child, a judge should consider the following factors:

> (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. . . .
>
> (e) Credible evidence of child abuse or neglect or domestic intimate partner abuse.

Neb. Rev. Stat. § 43-2923(6) (Cum. Supp. 2012).

The trial court heard evidence related to the factors listed in § 43-2923(6). The court was ultimately persuaded that granting custody to Joshua was in Keegan's best interests because Amy had been engaged in relationships where domestic violence was present. Section 43-2923(6)(e) requires a court to consider intimate partner abuse in determining the best interests of a child. Although there is no evidence that Amy is currently engaged in abusive behaviors or an abusive relationship, the trial judge properly considered her history of domestic violence, particularly in light of DHHS' concern that she had not internalized what she had learned from rehabilitative services.

The record contains additional evidence supporting the trial court's decision. The trial court heard evidence about Keegan's relationship with both parents, including the evidence as set forth in the DHHS report. The DHHS report reveals that DHHS removed Keegan from Amy's home due to allegations of abuse, neglect, and domestic violence. It further shows that after being placed with Joshua, Keegan began to achieve stability in his relationships at home and at school, and that Keegan felt comfortable in his present living arrangement. The evidence supports a finding that Keegan flourished more in the care of Joshua than in the care of Amy.

Although there was no testimony about Keegan's living preferences, the DHHS report indicated that Amy's interactions with Keegan caused concern. The report states that Keegan appeared to be "stressed out" by Amy's statements, and her unsupervised visitation had to be terminated because Keegan

reported that she made threats of bodily harm to Joshua's wife—Keegan's stepmother.

The DHHS report also suggests that Keegan's health and general welfare improved after being taken from Amy's custody and placed with Joshua. Given the evidence presented, the trial court did not abuse its discretion in finding that it was in Keegan's best interests to grant Joshua custody of Keegan.

CONCLUSION

The district court had jurisdiction of the case, despite the fact that Joshua did not serve the State. This is so because the State was not a necessary party to the case. The trial court did not err in denying either the motion to continue or the motion for new trial, nor did it err in determining that it was in Keegan's best interests to award custody to Joshua. We therefore affirm the judgment of the trial court.

AFFIRMED.

NICK LESSER, ALSO KNOWN AS KLAUS LESSER, APPELLANT, V. EAGLE HILLS HOMEOWNERS' ASSOCIATION, INC., APPELLEE.

___ N.W.2d ___

Filed December 11, 2012. No. A-12-268.

1. **Courts: Appeal and Error.** Neb. Rev. Stat. § 25-2733 (Reissue 2008) provides that when the district court is sitting as an appellate court, the district court shall review the case for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. ____: ____. In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
4. **Judgments.** In the absence of a request by a party for specific findings, a trial court is not required to make detailed findings of fact and need only make its findings generally for the prevailing party.
5. **Trial: Judgments: Evidence: Appeal and Error.** If there is a conflict in the evidence, the appellate court in reviewing the judgment rendered will presume that the controverted facts were decided in favor of the successful party, and the findings will not be disturbed unless clearly wrong.