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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-643  
A11-1525**

In re the Marriage of:  
Sheree Rosett Curry, petitioner,  
Appellant,

vs.

Michael David Levy,  
Respondent,

**Filed June 4, 2012  
Affirmed  
Collins, Judge\***

Hennepin County District Court  
File No. 27-FA-06-9089

Sheree R. Curry, Minnetonka, Minnesota (pro se appellant)

Theresa A. Capistrant, Capistrant & Wong, P.A., Minneapolis, Minnesota; and

Lisa L. Peralta, Peralta & Peralta, Ltd., Minneapolis, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Peterson, Judge; and Collins,  
Judge.

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\* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

**COLLINS**, Judge

Appellant challenges two orders of the district court, arguing that the district court erred in (a) not ordering arbitration, (b) accepting late filings, (c) restricting her parenting time without holding an evidentiary hearing, (d) imputing income for child-support purposes, (e) denying her motion to extend spousal maintenance, (f) denying her motion for attorney fees, (g) failing to correct certain clerical errors, and (h) not re-opening the judgment and decree on property issues. Because we conclude that the district court did not abuse its discretion or improperly apply the law, we affirm on all issues.

### FACTS

Appellant-mother Sheree Curry and respondent-father Michael Levy's seven-year marriage was dissolved by judgment and decree in 2008. They were awarded joint legal and joint physical custody of their two minor children, J.D.L. and J.K.L., and Curry was awarded child support and temporary spousal maintenance. As a part of the dissolution proceedings, the parties engaged in arbitration on various parenting-related issues and the arbitrator issued an award which the district court incorporated into an amended judgment and decree.

In July 2010, Levy filed a motion seeking modification of legal custody and relief on several other parenting issues, and Curry responded with a motion raising new issues. A hearing was held on August 4, and the district court issued an order on October 18, 2010. Curry brought a motion to correct clerical errors, and the district court issued an amended order on February 4, 2011 (February order).

In April 2011, Curry brought a motion to modify child support in the expedited process. Because Levy responded with a motion that also raised custody and parenting-time issues, the matter was transferred to district court. A hearing was held on May 9, and the district court issued an order on July 26, 2011 (July order).

Curry's appeal challenging numerous rulings contained in the February order and the July order followed.

## D E C I S I O N

### I.

Curry first argues that the district court should have ordered the parties to participate in binding arbitration or another alternative dispute resolution (ADR) method with respect to their parenting-related disputes rather than hearing the matters. She relies on two sources for this arbitration requirement: (1) a provision in the 2008 arbitration award incorporated into the judgment and decree; and (2) rule 303.03(c) of the Minnesota Rules of Family Court Procedure, which addresses settlement efforts.

In general, an appellate court does not consider issues not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *Putz v. Putz*, 645 N.W.2d 343, 350 (Minn. 2002). Curry never asked the district court to compel or order arbitration under the arbitration award or rule 303.03(c) either at the August 4, 2010 hearing or in her motion papers requesting that hearing, and arbitration was not discussed on the record or addressed in the February order. Therefore, the issue of whether arbitration or another method of ADR should have been ordered with respect to the February order cannot be raised for the first time on appeal.

Likewise, other than a passing mention at the May 9, 2011 hearing, Curry never asked the district court to order arbitration under the provisions of the arbitration award, and the district court did not address the award or its provisions in the July order. Thus, the issue of whether to compel arbitration pursuant to the terms of the arbitration award was not considered by the district court in the July order and cannot be raised for the first time on appeal. Settlement efforts under the family court rules, however, were discussed at the May 9 hearing and were addressed in the July order, and the issue is properly before us.

“Procedural and evidentiary rulings are within the district court’s discretion and are . . . reviewed under an abuse-of-discretion standard.” *Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001). “[W]here, in a particular case, the interests of justice would be best served by relieving a party from formal compliance with a rule, the trial court, in its discretion, may suspend or relax its operation.” *Swenson v. Swenson*, 257 Minn. 431, 434, 101 N.W.2d 914, 917 (1960).

Rule 303.03(c) requires the moving party to initiate a conference with the other party before a hearing “in an attempt to resolve their differences,” and consider the use of ADR if a resolution is not reached. Minn. R. Gen. Pract. 303.03(c). If the moving party does not attempt to confer with the other party, that party must certify to the court the reasons for non-compliance. *Id.* In the July order, the district court acknowledged that Levy failed to comply with the requirements of rule 303.03(c). But the court explained clearly on the record, and in the July order, its belief that enforcing rule 303.03’s requirements would be futile in light of Curry’s repeated refusal to submit to ADR, other

than binding arbitration, and concerns about Curry having recorded interactions between the parties.<sup>1</sup> The record indicates that the court relieved Levy from the formal requirements of rule 303.03(c) in the interests of justice and expediency, and this decision was within the court's discretion. *Swenson*, 257 Minn. at 434, 101 N.W.2d at 917. Given the district court's exhaustive knowledge of this case and the dynamics of the parties' relationship, we are satisfied that it did not abuse its discretion in relieving Levy from the requirements of rule 303.03(c).

## II.

Curry next argues that several of Levy's motions were not timely served and filed, and therefore the district court erred in not rejecting the motions or giving Curry additional time to respond. Again, procedural and evidentiary rulings are reviewed for abuse of discretion. *Braith*, 632 N.W.2d at 721. The district court may relax procedural rules or relieve a party from formal compliance if "the interests of justice would be best served." *Swenson*, 257 Minn. at 434, 101 N.W.2d at 917. "[I]t is within the district court's discretion to rule on [a] motion despite [a party's] late filings and, based on the discretion afforded the district court, we will not reverse . . . because of noncompliance with the rules even though another result is defensible." *Benassi v. Back & Neck Pain Clinic, Inc.*, 629 N.W.2d 475, 483 (Minn. App. 2001) (citing *Swenson*, 257 Minn. at 434, 101 N.W.2d at 917), *review denied* (Minn. Sept. 11, 2001). To prevail on appeal, a party

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<sup>1</sup> Curry also claims that the district court erred in ordering her to refrain from recording her interactions with Levy, arguing that it violates her First Amendment rights. This contention was not argued to or considered by the district court, and thus will not be reviewed on appeal. *Thiele*, 425 N.W.2d at 582; *see County of Blue Earth v. Wingen*, 684 N.W.2d 919, 923 n.2 (Minn. App. 2004) (applying *Thiele* to a constitutional issue).

must show both that the district court erred and that the error was prejudicial. *Braith*, 632 N.W.2d at 724.

The district court addressed timeliness issues extensively both on the record at the August 4, 2010 and May 9, 2011 hearings and in the February and July written orders. Specifically, in the February order the court found that both parties served their pleadings late but, in the interest of expediency and efficiency, denied the requests to strike late pleadings and considered all documents submitted. In the same way, the district court thoroughly addressed Curry's arguments regarding untimely motions preceding the July order, concluded that Levy's motions were not late under the rules, and considered all filings. Even if the district court erred in determining the timeliness of certain motions, Curry has not made a sufficient showing of prejudice resulting from any such error. It was well within the district court's discretion to consider late filings, and we conclude that the district court did not abuse that discretion here.

### **III.**

Curry next challenges the district court's modification of the regular and holiday parenting-time schedules and certain decision-making provisions in the parenting agreement. "The district court has broad discretion in determining parenting-time issues and will not be reversed absent an abuse of that discretion." *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009) (citing *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995)). An abuse of discretion occurs if the district court makes findings not supported by the evidence or misapplies the law. *Dahl*, 765 N.W.2d at 123. "A district court's findings of

fact underlying a parenting-time decision will be upheld unless they are clearly erroneous.” *Id.*

**A. Regular Schedule**

Curry argues that the district court’s modification of her parenting time from seven to five overnights during each 14-day period constitutes a “restriction” of her parenting time such that the court was required to conduct an evidentiary hearing before making the modification. “Determining the legal standard applicable to a change in parenting time is a question of law and is subject to de novo review.” *Dahl*, 765 N.W.2d at 123. Minn. Stat. § 518.175, which governs modification of a parenting time order, does not allow a court to restrict a party’s parenting time unless it holds an evidentiary hearing and finds that: “(1) parenting time is likely to endanger the child’s physical or emotional health or impair the child’s emotional development; or (2) the parent has chronically and unreasonably failed to comply with court-ordered parenting time.” Minn. Stat. § 518.175, subd. 5 (2010). We have previously held:

Whether the district court must hold an evidentiary hearing depends on the degree of modification. Insubstantial parenting-time modifications or adjustments do not require an evidentiary hearing. Whether a modification is substantial depends on whether parenting time was restricted, which requires looking at both the reasons for the change and the amount of reduction of the parenting-time rights.

*Matson v. Matson*, 638 N.W.2d 462, 468 (Minn. App. 2002) (citation omitted). A restriction includes a substantial change in parenting time. *Dahl*, 765 N.W.2d at 123-24. A modification does not necessarily constitute a restriction simply because it reduces the amount of time a parent spends with a child. *See Dahl*, 765 N.W.2d at 123; *Danielson v.*

*Danielson*, 393 N.W.2d 405, 407 (Minn. App. 1986). In determining whether a parenting-time modification based on a change in the amount of parenting time constitutes a restriction of parenting time, the court must first look to “the order that establishes the baseline parenting-time schedule and then determine whether the district court’s parenting-time change from the baseline parenting-time schedule is significant enough to constitute a restriction.” *Dahl*, 765 N.W.2d at 123.

1. *Amount of Reduction*

The amount or percentage of parenting time a parent has with a child can be determined in two ways: “by calculating the number of overnights that a child spends with a parent or by using a method other than overnights if the parent has significant time periods on separate days when the child is in the parent’s physical custody but does not stay overnight.” Minn. Stat. § 518.175, subd. 1(e) (2010). In this case, it does not appear that the children spend significant time with Curry on days that they do not stay overnight. Therefore, it is not proper to calculate her percentage of parenting time based on the time she spends with the children on days the children do not stay overnight with her. The baseline parenting-time schedule in effect before the July order provided Curry and Levy each with seven overnights per 14-day period. In the July order, the district court granted Levy two additional overnights during the week, so now Levy has nine overnights and Curry has five overnights per 14-day period. The parties still have the same amount of weekend parenting time.

After determining the change from the baseline schedule, the court must then decide whether that change is “substantial” so as to constitute a restriction of parenting

time that would trigger the need for findings as to endangerment or noncompliance. *Dahl*, 765 N.W.2d at 123-24; Minn. Stat. § 518.175, subd. 5. There is no bright-line rule for making this determination; it depends on the particular facts of each case. *See Dahl*, 765 N.W.2d at 124 (modification from one week at Christmas and an extended summer break of undefined duration to three 11-hour days per month and one 11-hour day for Christmas was substantial and constituted a restriction of parenting time); *Matson*, 638 N.W.2d at 468 (an approximate 50% reduction in a party's parenting time was substantial and required an evidentiary hearing). Here, we agree with the district court that the reduction in Curry's parenting time is not a substantial change in parenting time that would, of itself, constitute a restriction under the statute.

2. *Reason for the change*

In addition to the amount of the reduction, the court can look to “the reasons for the change” in determining whether there has been a restriction. *Matson*, 638 N.W.2d at 468. We have previously held a modification to be insubstantial where it was caused by one parent's move to a different state. *Anderson v. Archer*, 510 N.W.2d 1, 4-5 (Minn. App. 1993); *Hagen v. Schirmers*, 783 N.W.2d 212, 219 (Minn. App. 2010). In contrast, we have found a “slow erosion” of parenting time from 14 weeks per year to 5 1/2 weeks per year, without good reason, to be a substantial modification that amounts to a restriction of parenting time. *Clark v. Clark*, 346 N.W.2d 383, 385-86 (Minn. App. 1984), *review denied* (Minn. June 12, 1984).

Here, the district court's stated reason for the change was that Curry “continues to interfere with the children's attendance at their extracurricular activities,” blocks their

enrollment in activities in Maple Grove (where they attend school), and refuses to transport the children to activities during her parenting time. The court noted Curry's persistent and continued non-cooperation with Levy on those matters and changed the schedule so that Levy now has more school days, in order to ensure that the children get to their activities, especially as they become more involved in extracurriculars.

We conclude that the reason for the change in this case amply justifies the modification of the regular parenting-time schedule without constituting a restriction of parenting time. The district court described how the change in the parenting-time schedule was in response to its "significant frustration with [Curry] and her unwillingness to ensure the children attend the activities of their choosing," especially after giving Curry "one more chance to demonstrate her ability and willingness to co-parent with [Levy]" in the February order. Further, the previous parenting-time schedule was instituted when both parties lived in Maple Grove; the modification appears to acknowledge that Curry's relocation of her residence from Maple Grove to Minnetonka makes it more difficult for her to transport the children to activities in Maple Grove during her parenting time. Rather than a "slow erosion" of Curry's parenting time without good reason, the district court's modification represents a measured change based on the best interests of the children and well-explained changed circumstances. Considering that "[t]he intent of [section 518.175, subd. 5] is to allow a child to maintain a two parent relationship," *Clark*, 346 N.W.2d at 385, the district court's modification is not so substantial as to frustrate that goal, especially considering Curry still has the same amount of weekend parenting time with the children.

Because we are satisfied that the modification of the regular parenting-time schedule does not constitute a restriction of Curry's parenting time, an evidentiary hearing was not necessary and the district court did not abuse its discretion in making the modification.

**B. Holiday Schedule**

The district court also found that it was in the children's best interests to make minor modifications to the holiday parenting-time schedule in an effort to reduce transportation time for the children and eliminate some exchanges between the parties. These findings are not clearly erroneous and are supported by the evidence. Since the parties essentially alternate holidays with the children each year, this modification did not result in any overall reduction in parenting time for either party and does not constitute a restriction of parenting time that would necessitate an evidentiary hearing. We conclude that the district court did not abuse its discretion in modifying the holiday parenting-time schedule.

**C. Health-Care Responsibilities**

The district court also modified the parties' parenting agreement such that Levy is now solely responsible for scheduling the children's non-emergency medical appointments and for ordering, picking up, paying for, and distributing the children's medication. While Curry argues that this is tantamount to a modification of legal custody requiring an evidentiary hearing, we agree with the district court that this was merely a minor adjustment of responsibilities in response to an ongoing point of disagreement between the parties. The district court did not eliminate Curry's ability or right to share

in joint decision-making regarding health care or any other major parenting issue. *See* Minn. Stat. § 518.003 subd. 3(b) (2010) (“‘Joint legal custody’ means that both parents have equal rights and responsibilities, including the right to participate in major decisions determining the child’s upbringing, including . . . health care. . . .”). We conclude that the district court acted within its discretion in making this adjustment without holding an evidentiary hearing.

#### IV.

Next, Curry argues that the district court erred in determining her income for the purposes of child support. We review the district court’s decisions in a child-support matter for an abuse of discretion. *Davis v. Davis*, 631 N.W.2d 822, 826 (Minn. App. 2001). A ruling that is against logic and the facts on record exhibits an abuse of discretion, *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984), as does a misapplication of the law, *Ver Kuilen v. Ver Kuilen*, 578 N.W.2d 790, 792 (Minn. App. 1998). We will not reverse the district court’s findings as to a parent’s income unless they are clearly erroneous. *Schallinger v. Schallinger*, 699 N.W.2d 15, 23 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005).

When making a child-support determination, if the court finds that a party is “voluntarily unemployed, underemployed, or employed on a less than full-time basis . . . child support must be calculated based on a determination of potential income. . . . [I]t is rebuttably presumed that a parent can be gainfully employed on a full-time basis.” Minn. Stat. § 518A.32, subd. 1 (2010). “Whether a parent is voluntarily unemployed is a

finding of fact, which we review for clear error.” *Welsh v. Welsh*, 775 N.W.2d 364, 370 (Minn. App. 2009).

Curry argues that the district court erred in the July order by finding that she was voluntarily unemployed and continuing to impute income to her at the level determined in the judgment and decree, \$3,500 per month. We disagree. Curry contended at the May 9, 2011 hearing that she had no income, as she was recently relieved of her contract with AOL.com, which was the primary source of her income as a freelance journalist. She also asserted that she was seeking but had not been able to find either freelance or salaried work as a journalist. Despite her arguments, the district court found that Curry was voluntarily unemployed because she was employed in the same field and she had the capacity and education to find work at the previously imputed income level. The district court expressed doubt about Curry’s “desire to seek full-time, appropriate employment rather than continue this litigation,” and found that Curry had not provided any evidence of attempts to secure employment since the cancelation of her previous contracts. The district court made extensive findings regarding Curry’s employment, found her arguments not credible, and concluded that she had not met her burden to show she was not voluntarily unemployed or underemployed. This finding is not clearly erroneous. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (deference must be given to the trial court’s credibility determinations).

Upon a finding of voluntary unemployment or underemployment, the court “must” calculate potential income by one of the three methods provided for by statute. Minn. Stat. § 518A.32, subd. 1 (2010); *see* Minn. Stat. § 518A.32, subd. 2 (2010) (listing

methods for calculating potential income); Minn. Stat. §645.44, subd. 15(a) (2010) (stating that “[m]ust’ is mandatory”). Curry argues that the district court should have imputed income at 150% of minimum wage, rather than the previously-set amount of \$3,500 per month, which is based on her “probable earnings level.” *Id.*, subd. 2(1). As discussed above, the district court made detailed findings on why income was being imputed to Curry at \$3,500 per month rather than at 150% of minimum wage. These findings are supported by the record and are not clearly erroneous. On this record, we conclude that the district court did not abuse its discretion in imputing Curry’s income at \$3,500 per month for child support purposes.

## V.

Curry next argues that the district court erred in its February order by not granting her request to extend spousal maintenance. This court reviews a district court’s spousal maintenance award under an abuse-of-discretion standard. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997). Findings of fact, including determinations of income for maintenance purposes, must be upheld unless they are clearly erroneous. *Peterka v. Peterka*, 675 N.W.2d 353, 357 (Minn. App. 2004); *Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992). In the amended judgment and decree, Curry was awarded temporary spousal maintenance of \$1,800 per month through August 2010. Curry contends that her current employment status, as described above, makes it impossible for her to meet her expenses, and the district court erred in not extending spousal maintenance for an additional two years.

“In the event of an award of temporary maintenance with a reservation of jurisdiction, a subsequent request to extend spousal maintenance would be based on the factors applicable to awarding maintenance in the first instance, not the standards for modification of spousal maintenance. *Maiers v. Maiers*, 775 N.W.2d 666, 668 (Minn. App. 2009). Here, the district court alluded to its extensive findings as to spousal maintenance in the judgment and decree and found that it was still appropriate to assume that Curry could earn at the same level. She was expected to become self-supporting based on her educational and employment history, and the court found those expectations still applied and she should be able to meet her reasonable expenses. *See* Minn. Stat. § 518.552, subd. 2(b) (2010) (in setting maintenance, court looks to party’s education, skill, and training to determine whether party can become self-supporting). These findings are not clearly erroneous, particularly given the district court’s extensive knowledge of Curry’s employment history and prospects. We conclude that the district court did not abuse its discretion in denying Curry’s request to extend maintenance.

## VI.

Curry also argues that the district court erred in denying her motion for need-based attorney fees in the February order. “The standard of review for an appellate court examining an award of attorney fees is whether the district court abused its discretion.” *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999). Curry contends that the district court should have awarded her attorney fees incurred in engaging counsel to correspond with Levy’s counsel regarding distribution of proceeds from the sale of the marital home. The district court “shall” award attorney fees provided it finds, among other things, “that the

fees are necessary for the good faith assertion of the party's rights in the proceeding and will not contribute unnecessarily to the length and expense of the proceeding.” Minn. Stat. § 518.14, subd. 1 (2010). The district court denied Curry's motion, finding that her request for fees was an “attempt, through counsel, to re-litigate issues already determined [and was] not ‘good faith’ and does unnecessarily contribute to the cost of these proceedings.” This finding is not clearly erroneous on this record. Having found that prerequisites for awarding need-based attorney fees were not met, the district court correctly applied the law and did not abuse its discretion in denying the motion.

## VII.

Curry argues that the district court erred in failing to correct certain errors in the October 18, 2010 order which she characterizes as “clerical.” We review de novo the district court's ruling on the motion to correct clerical errors. *See Brazinsky v. Brazinsky*, 610 N.W.2d 707, 710 (Minn. App. 2000) (“Questions of civil procedure are issues of law upon which this court owes no deference to the district court's decision.”) (citing *Carter v. Anderson*, 554 N.W.2d 110, 112 (Minn. App. 1996)), *review denied* (Minn. Dec. 23, 1996)). To prevail on appeal, an appellant must show both error and prejudice resulting from the error. *Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975); *Braith*, 632 N.W.2d at 724; Minn. R. Civ. P. 61. The Minnesota Supreme Court has described a “clerical error” as follows:

Such a mistake ordinarily is apparent upon the face of the record and capable of being corrected by reference to the record only. It is usually a mistake in the clerical work of transcribing the particular record. It is usually one of form. It may be made by a clerk, by counsel, or by the court. A

clerical error in reference to an order for judgment or judgment, as regards correction, includes one made by the court which cannot reasonably be attributed to the exercise of judicial consideration or discretion.

*Wilson v. City of Fergus Falls*, 181 Minn. 329, 332, 232 N.W. 322, 323 (1930); *see also* Minn. R. Civ. P. 60.01.

Addressing Curry's motion to correct clerical errors, the district court made detailed findings, accepting some of the proposed changes and rejecting others as "irrelevant or unwarranted," or as relating to substantive issues that cannot be reviewed in a motion to correct clerical errors. Although Curry's argument is somewhat unclear, one error she alleges is that the district court misstated which party originally requested relief regarding one of the children's religious schooling. Specifically, Curry argues that the court should have written "[Levy's] motion for [the child] to be withdrawn from Talmud Torah is GRANTED" instead of "[Curry's] motion that [the child] repeat his studies at Talmud Torah is DENIED." Our review of the record indicates that the original motion regarding Talmud Torah was brought by Levy in his July 21, 2010 motion, and Curry never made any such motion but rather argued in response to Levy's motion. This does appear to be a clerical error that is "capable of being corrected by reference to the record." *Wilson*, 181 Minn. at 332, 232 N.W. at 323. However, the error is harmless and therefore it is not necessary to reverse the district court's decision. *Braith*, 632 N.W.2d at 724. Curry makes no specific assertion of prejudice, and her argument that this inconsequential error may affect future legal custody issues is speculative at best.

Similarly, the other alleged clerical errors appear to relate to very minor points and, even if erroneous, are likewise harmless.

### VIII.

Curry further argues that the district court erred by not re-opening the judgment and decree to redetermine issues relating to the proceeds from the sale of the marital home and certain related reimbursements. However, Curry neither made such a motion to the district court, nor argued her position with respect to Minn. Stat. § 518.145, which governs re-opening of a judgment and decree. Thus, the issue was not presented to or considered by the district court, and will not be considered on appeal. *Thiele*, 425 at 582; *Putz*, 645 N.W.2d at 350.

Finally, Curry makes arguments regarding “plain error” allegedly committed by the district court in not attaching the arbitration award to the judgment and decree and not updating the judgment and decree to reflect the elimination of the parenting time expeditor. Again, there is no indication that these issues were argued to or considered by the district court, and they are not properly before us on this appeal. *Thiele*, 425 N.W.2d at 582.

**Affirmed.**