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Review De Novo in Alimony and Property Settlement: Is it Desirable?

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Comment

REVIEW DE NOVO IN ALIMONY AND PROPERTY SETTLEMENT: IS IT DESIRABLE?

A. INTRODUCTION

From January, 1953, through December, 1966, there were one hundred fifty-three opinions of the Nebraska Supreme Court dealing with some aspect of divorce law.[1] Fifty-four of these opinions, or thirty-five per cent, were particularly concerned with alimony or property settlement. In forty-two of these fifty-four cases, however, the decision of the district court was either reversed or modified.[2] This category includes those cases in which the supreme court granted a divorce refused earlier in the district court, requiring the supreme court to make its own determination of alimony and property settlement.

The principal factor in the high modification and reversal rate appears to have been the Nebraska statute requiring the supreme court to try these cases de novo on the record, without reference to the findings of the district court.[3] Since the rule for determining alimony and property settlement "does not permit a mathematical certainty in arriving at the answer,"[4] the trial de novo inevitably resulted in seemingly inconsistent opinions. In the opinions published from January, 1967, through July, 1969, however, the supreme court has reversed or modified only three of twelve lower court decisions dealing with alimony and property settlement, leading one to conclude that perhaps the court is giving more credence to the findings of the district judges.

It is imperative to evaluate several of the issues presented by the review de novo requirement, in order to determine the desirability of this procedure. These issues concern the effect of review de novo

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[1] A period following World War II was selected, due to the tremendous economic changes in our society. *See*, Annot., 1 A.L.R.3d 1 (1965). Additionally, since a rather strict adherence to review de novo was not effected until 1950, a period after that date was also desirable, and with an apparent change in approach in the last two years the survey period was concluded with 1966. Also surveyed were the opinions of the last two and one half years but the results have been separately tabulated.

[2] Twenty-seven per cent of the total dealt with either custody of children or child support payments. Fifteen per cent concerned only the question of whether a decree should or should not be granted and the remaining twelve per cent dealt with various other aspects of divorce such as costs, attorney's fees, foreign divorce, etc.

[3] NEB. REV. STAT. § 25-1925 (Reissue 1964).

[4] Schlueter v. Schlueter, 158 Neb. 233, 243, 62 N.W.2d 871, 877 (1954).

on the decision-making process in both the district courts and supreme court, and on the ultimate objective of arriving at a just result, the certainty of the law and its understanding by attorneys, and workload of the supreme court. This comment attempts to analyze the practical effects of review de novo in one category of cases: those involving alimony and property settlement. To accomplish this task, it is necessary to examine Nebraska's substantive rules for determining alimony and rendering property settlements, followed by an exploration of the historical basis for review de novo, with particular attention to its development in Nebraska. There will then be an analysis of review de novo in alimony and property settlement cases, and some of the issues presented above will be discussed. Finally, some procedural recommendations will be posited with the goal of improving appellate review of trial court decisions in these cases.

B. GENERAL RULES IN ALIMONY AND DIVISION OF PROPERTY

As in most jurisdictions, divorce in Nebraska is predicated on fault.[5] Such a system necessarily entails a voluminous record in any contested case, especially where there is an issue relating to alimony and property settlement. Every aspect of the personal conduct and affairs of the parties and their financial interests must be considered by any court in making an award of alimony or property settlement.[6] The general rule is succinctly stated in *Gartside v. Gartside*:[7]

> The factors to be considered in an award of alimony or a division of property in a divorce case are the age and health of the parties; their earning ability; their relative conduct leading up to the divorce; the duration of the marriage; the social standing of the parties; the property of the parties and its value at the time of the divorce, its income-producing capacity, the manner in which it was acquired, and the respective contributions that each party has made thereto; the property of the parties and its value at the time of the marriage; and all other relevant facts and circumstances.[8]

The inherent generality of these factors has been recognized by the supreme court as early as 1932. In *Swolec v. Swolec*,[9] the court stated that it had "never [made] an attempt . . . to fix any rule which would relieve the trial judge of a patient, detailed study of

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[5] *See generally* Comment, *Terminating a Marriage in Nebraska*, 43 NEB. L. REV. 156 (1963).

[6] NEB. REV. STAT. § 42-318 (Reissue 1968).

[7] 181 Neb. 46, 146 N.W.2d 777 (1966).

[8] *Id.* at 52, 146 N.W.2d at 781.

[9] 122 Neb. 837, 241 N.W. 771 (1932).

every fact and circumstance relating to each case as it comes on for trial."[10] These rules do not allow creation of an exact formula for arriving at an answer, but the court must, nevertheless, employ them to arrive mathematically at a result in a specific case. These factors have been given comparative weights as applied to the record in an individual case, discussed *infra.*

C. HISTORY OF REVIEW DE NOVO GENERALLY

In the spring of 1903, two significant, yet apparently independent actions occurred. The Nebraska legislature passed Senate Bill 108[11] which was signed into law on April 13. The present statute which embodies this bill[12] is virtually identical to the 1903 text.[13] It provides:

> In all appeals from the district court to the Supreme Court in suits in equity, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the Supreme Court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial de novo of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be evidence in support thereof.[14]

In addition to passage of Senate Bill 108, the opinion in *Faulkner v. Simms*[15] was released on March 18, which was written in the absence of any statute dealing specifically with the method of review in equity cases. The opinion stated that:

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[10] *Id.* at 842, 241 N.W. at 774.

[11] Neb. Laws c. 125, p. 631 (1903).

[12] NEB. REV. STAT. § 25-1925 (Reissue 1964).

[13] The original statute stated: "That in all appeals from the district court to the Supreme Court in suits in equity, whether now pending or hereafter to be brought to said court, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the Supreme Court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial de novo of such question or questions of fact reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof." Neb. Laws c. 125, § 1 (1903).

[14] NEB. REV. STAT. § 25-1925 (Reissue 1964).

[15] 68 Neb. 299, 94 N.W. 113 (1903), *modifying*, 68 Neb. 295, 89 N.W. 171 (1902).

> The reported decisions of this court leave the question as to the power and duty of the court on appeal from findings of fact in seeming confusion. Often, in the same volume of reports, statements on this subject are to be found in very different terms, if not in absolute contradiction.[16]

One approach had been to review all facts and evidence on an essentially de novo basis,[17] derived, in all likelihood, from the equity review doctrine in force in England during the first half of the nineteenth century.[18] Prior to 1852, the English chancery courts, having jurisdiction of equitable proceedings, followed the practice of complete review of all facts and evidence on appeal.[19] The rationale for adopting this form of review was based on taking testimony by deposition prior to trial in equity cases.[20] These depositions were then admitted as the sole testimony by the litigants, thus eliminating the need for their personal appearance before the judge.[21] The decision of the trial judge was based upon these depositions and arguments of counsel. Since such a procedure does not offer the trial court an advantage over the appellate court, at least in terms of hearing actual testimony and observing the demeanor of the litigants, the appellate court was unquestionably justified in making a complete review de novo of all the evidence. It was upon this ground that the Nebraska Supreme Court apparently based its early review de novo.[22] In actual application, however, the court more often followed the rule that a decision of the district court would not be reversed unless it was "clearly wrong"[23] in light of the evidence. The court also stated that it would not disturb a decree if there was evidence "sufficient to sustain such finding as to the point,"[24] which is confusing in light of the earlier statement.

In *Faulkner v Simms*,[25] the court adopted the opinion of Roscoe Pound, Commissioner, which established a clear precedent regarding review of findings made in the district court.

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[16] *Id.* at 300, 94 N.W. at 114.

[17] Gibson v. Hammang, 63 Neb. 349, 351, 88 N.W. 500, 501 (1901); Delorac v. Conna, 29 Neb. 791, 811, 46 N.W. 255, 261 (1890).

[18] There was, however, a Nebraska statute, which is still law, which abolishes all distinctions between actions at law and suits in equity. NEB. REV. STAT. § 25-101 (Reissue 1964).

[19] 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 369 (1926).

[20] *Id.* at 340, 353.

[21] *Id.* at 365-68.

[22] Gibson v. Hammang, 63 Neb. 349, 351, 88 N.W. 500, 501 (1901); Delorac v. Conna, 29 Neb. 791, 811, 46 N.W. 255, 261 (1890).

[23] Seymour v. Street, 5 Neb. 85, 89 (1876); *see also* Storms v. Eaton, 5 Neb. 453, 459 (1877).

[24] Burt v. Baldwin, 8 Neb. 487, 491, 1 N.W. 457, 458 (1879).

[25] 68 Neb. 299, 94 N.W. 113 (1903), *modifying*, 68 Neb. 295, 89 N.W. 171 (1902).

> Considering the matter upon principle, we think it clear that in passing on findings of fact upon appeal, the reviewing court should go over all the evidence and reach its own conclusion thereon, giving such weight to the determination of the trial court as to credibility of witnesses and its finding on conflicting evidence as, under all the circumstances of the case, the nature of the evidence before the trial court, and that court's special opportunities, if any, for reaching a correct solution, such findings may be entitled to. It goes without saying that, in general, the trial judge has a great advantage in that he sees and hears the witnesses. Moreover, he commonly knows more or less of their general character and standing, and may have a general local knowledge as to matters referred to in evidence and surrounding circumstances which enables him to weigh conflicting evidence with much greater assurance of reaching a correct solution than is possible in the reviewing court. Hence, in ordinary cases, where the evidence is entirely oral and the trial court may be presumed to have had a general local knowledge of the parties, the witnesses and the subjects of controversy, the finding of the trial court is often entitled to almost decisive weight. It is a matter of common knowledge that a written record can not reflect the oral testimony at the trial with absolute accuracy. For these reasons, it is eminently proper that findings on conflicting evidence in such cases be adhered to unless clearly wrong.[26]

This procedure recognized that there are cases in which the trial judge's decision should be affirmed unless "clearly wrong."

The statute clearly provided a different method of review from the rules enunciated in *Faulkner v. Simms,* but as disclosed by the cases in the period following enactment of the statute, the required review was not generally recognized, at least in the opinions of the court, for a number of years.

D. REVIEW IN ALIMONY AND PROPERTY SETTLEMENT CASES

1. PRIOR TO 1903

The court's mode of review in cases of alimony and property settlement prior to passage of a statute requiring review de novo[27] was similar to that for other equity cases as discussed earlier.[28] Unless the district court's decision was unsupported by the evidence, the court would not modify or reverse that decision.[29] In *Berdolt v. Berdolt,*[30] the court stated that "[t]he allowance of alimony, especially the amount thereof, is within the discretion of the

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[26] *Id.* at 301-02, 94 N.W. at 114.

[27] NEB. REV. STAT. § 25-1925 (Reissue 1964).

[28] Seymour v. Street, 5 Neb. 85 (1876); Storms v. Eaton, 5 Neb. 453 (1877).

[29] Wilde v. Wilde, 37 Neb. 891, 56 N.W. 724 (1893).

[30] 56 Neb. 792, 77 N.W. 399 (1898).

trial court, and unless there has been a clearly wrongful exercise of the discretion, this court will not interfere on the ground that there was an excessive sum given."[31] The court had apparently adopted certain factors to be used in determining the amount of alimony: "The amount should be just and equitable, due regard being had for the rights of each party, the ability of the husband, the estate of the wife, and the character and situation of the parties."[32] This rule, although not as explicit as the rule presently in existence,[33] is nevertheless broad enough to cover all the factors now listed by the court. This rule was apparently taken from the statute which allowed alimony.[34] It can be seen, then, that prior to 1903, the court adhered to the rule that the district court's opinion would be accepted unless "clearly wrongful."[35]

2. 1903 THROUGH 1953

Although a complete review of divorce actions in this period was not undertaken, it appears that the court initially paid little attention to the statute and made their determination on the basis of whether the evidence justified the decision reached in the trial court.[36] This conclusion is reflected by *King v. King*:[37]

> [T]he trial judge knew far better than the members of this court do, or possibly can know, the amount of time, labor, money and skill required of the defendant and her attorneys and expended by them in preparation and trial of the case, and he knows better than they the cost of maintenance and education of the children in the neighborhood in which they live, and the ability of the husband to pay.[38]

This passage clearly recognizes that the trial court had advantages over the appellate court in divorce actions. Yet the statute required review de novo, and this was to be acknowledged.

Apparently the first direct recognition of the statutory mandate came twenty-four years after its enactment. In *Westphalen v. Westphalen*,[39] the court said that "such appeal when perfected vests this court with jurisdiction to try the case de novo."[40] Although it may be argued that the court purported to follow the *Faulkner* precedent, the *Westphalen* decision was later cited as the authority

[31] *Id.* at 802-03, 77 N.W. at 403.
[32] Heist v. Heist, 48 Neb. 794, 798, 67 N.W. 790, 791 (1896).
[33] *See* Gartside v. Gartside, 181 Neb. 46, 146 N.W.2d 777 (1966).
[34] NEB. REV. STAT. § 42-318 (Reissue 1968).
[35] Berdolt v. Berdolt, 56 Neb. 792, 77 N.W. 399 (1898).
[36] *See, e.g.*, Russell v. Russell, 77 Neb. 136, 108 N.W. 149 (1906).
[37] 79 Neb. 852, 113 N.W. 538 (1907).
[38] *Id.* at 853-54, 113 N.W. at 538.
[39] 115 Neb. 217, 212 N.W. 429 (1927).
[40] *Id.* at 219, 212 N.W. at 430.

for review de novo.[41] Some decisions rendered subsequently to *Westphalen*, however, did not mention the review de novo requirement, but held that the evidence supported the decision of the trial judge.[42] Following the decision in *Peterson v. Peterson*,[43] however, the court apparently settled on a literal application of the statutory requirement that a divorce case be tried de novo, without reference to the findings of the district court.

3. 1953 THROUGH 1966

This period could be characterized as the period of literal interpretation, evidenced by the strict application of the statutory requirement of review de novo without reference to the findings of the district court. Although the opinions did at one time reflect a certain reliance on the district judges, it appears that this was done only when the supreme court did not have enough information upon which to base a new finding.[44] The seemingly inconsistent opinions written during this period reflect the effects of both the broad general rule and review de novo.

In *Schlueter v. Schlueter*,[45] the parties had accumulated a total net estate of approximately thirty-three thousand dollars. The husband was a farmer and the couple owned their own home. After twenty-five years of marriage, the wife, who was fifty-five, was granted a divorce for extreme cruelty from her husband who was fifty-four. The supreme court, in modifying the decision of the district court,[46] awarded the wife nine thousand dollars permanent alimony, her personal effects and a small separate bank account. The remainder of the property was awarded to the husband, which resulted in the wife's receiving just over *one-fourth* of the total net estate. In making their determination the court noted that "the rule . . . does not permit a mathematical certainty in arriving at the answer as to alimony or a division of property."[47] This statement is certainly obvious in *Malone v. Malone*.[48] In that case the husband, a rancher, was granted a divorce from his wife on the grounds of

41 McNamee v. McNamee, 154 Neb. 212, 47 N.W.2d 383 (1951); Hoffmeyer v. Hoffmeyer, 157 Neb. 842, 62 N.W.2d 138 (1954).

42 Tway v. Tway, 135 Neb. 266, 280 N.W. 910 (1938).

43 152 Neb. 571, 41 N.W.2d 847 (1950).

44 *See, e.g.*, Foltyn v. Foltyn, 180 Neb. 42, 141 N.W.2d 433 (1966); Kinch v. Kinch, 168 Neb. 110, 95 N.W.2d 319 (1959); Waldbaum v. Waldbaum, 171 Neb. 625, 107 N.W.2d 407 (1961).

45 158 Neb. 233, 62 N.W.2d 871 (1954).

46 The district court had awarded the wife 80 acres of land, $2600 cash, landlord's share of crop planted on the land, and all personal effects. *Id.* at 242, 62 N.W.2d at 877.

47 *Id.* at 243, 62 N.W.2d at 877.

48 163 Neb. 517, 80 N.W.2d 294 (1957).

extreme cruelty. During the marriage the parties had accumulated a net estate of over forty-five thousand dollars. In modifying the award made by the district court,[49] the supreme court awarded the wife ten thousand dollars for a home and twenty-eight thousand dollars in alimony—a total of thirty-eight thousand dollars, amounting to *eighty-four* per cent of the total net estate. In *Malone*, the parties had been married twenty years, as compared to twenty-five in *Schlueter*. The court's statement concerning mathematical certainty is borne out by these two cases: when the decree was granted to the wife, she received twenty-six per cent of the net estate, but when the decree was granted to the husband, the wife received eighty-four per cent.

Additional opinions also reflect inconsistencies in the relative weight to be assigned to various factors, two of which are the duration of the marriage and the relative conduct of the parties.[50] Yet in *Matson v. Matson*,[51] the court failed to indicate in the opinion the length of the marriage, and in *Upah v. Upah*,[52] the court stated that "[i]t is not so important to rectify past wrongs or deviations as it is to try to accomplish a solution that will measure up to the future best interests of these two young people and their children."[53] The court seemingly minimizes any fault of the parties and places emphasis on the very personal aspect of a divorce proceeding. The foregoing cases merely serve to illustrate the inconsistencies reached by application of the same basic rule adopted by the court.

It may be well, at this point, to distinguish between the decision of the court and the written opinion. The decision certainly represents the considered judgment by all of the judges. But the written opinion, even one developed and reviewed with considerable participation by several justices, must be taken principally as a reflection of the decisional analysis of its author. It is he who almost exclusively examines the entire transcript and bill of exceptions, and the synthesis of those facts reported in the opinion are primarily selected, organized and described through the mind and pen of a single justice. His personal style is reflected by the semantics and style used in the opinion. The seeming inconsistencies in the decisions discussed in this comment applying the general rules concerning alimony and property settlement undoubtedly represent more the differences in the individual judgments and opinion writing style of the justices than inconsistent decisions on the merits.

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[49] *Id.* at 520, 80 N.W.2d at 297.

[50] *See* Gartside v. Gartside, 181 Neb. 46, 52, 146 N.W.2d 777, 781 (1966).

[51] 175 Neb. 60, 120 N.W.2d 364 (1963).

[52] 175 Neb. 606, 122 N.W.2d 507 (1963).

[53] *Id.* at 615, 122 N.W.2d at 512. *But see* Cowan v. Cowan, 160 Neb. 74, 69 N.W.2d 300 (1955) (apparently giving weight to conduct and contribution).

4. 1967 THROUGH JULY, 1969

In the past two years the supreme court appears to have departed somewhat from its strict adherence to review de novo in cases concerning alimony and property settlement. This is due in part to a reliance on the fact that the trial judge has had an opportunity to hear the parties and has decided in favor of one of them, when there is an irreconcilable conflict in testimony.[54] This position appears to be more in line with that announced in *Faulkner v. Simms*.[55] Of the twelve alimony cases since January, 1967, only three have been either reversed or modified, in marked contrast to the previous thirteen years.[56]

This apparent change of attitude on the part of the supreme court is perhaps best exemplified in *Baudendistel v. Baudendistel*,[57] in which the court stated, in affirming the decision of the district court, that "when evidence on material questions of fact is in irreconcilable conflict, this court will . . . consider the fact that the trial court . . . accepted one version rather than the opposite."[58] No facts were set forth by the court showing the supposed conflict. This type of review gives the necessary weight to the district court's decision, a procedure suggested earlier by the *Faulkner* decision.

However, the opinion in *Johnson v. Johnson*[59] makes it clear that not all members of the court are willing to utilize a type of review which recognizes the determination of the trial court. In *Johnson*, while noting the reluctance of an appellate court to interfere with the trial court's discretion, the court modified an alimony award by reducing it from forty-five hundred to twenty-five hundred dollars,[60] and reiterated that "a divorce action is triable de novo upon the issues presented by the appeal."[61] It must be noted, however, that the court must review the proceeding de novo by mandate of the statute.

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[54] Baudendistel v. Baudendistel, 183 Neb. 334, 159 N.W.2d 827 (1968).

[55] 68 Neb. 299, 94 N.W. 113 (1903), *modifying*, 68 Neb. 295, 89 N.W. 171 (1902).

[56] These figures include modifications to decrees of the district court and cases where the district court had refused to grant a divorce but the supreme court reversed and also made a determination of alimony and property settlement.

[57] 183 Neb. 334, 159 N.W.2d 827 (1968).

[58] *Id.* at 336, 159 N.W.2d at 828.

[59] 183 Neb. 670, 163 N.W.2d 596 (1968).

[60] The reduction in the alimony of $2000 represented only about 7% of the total net estate.

[61] Johnson v. Johnson, 183 Neb. 670, 163 N.W.2d 596 (1968).

E. IS REVIEW DE NOVO CURRENTLY DESIRABLE?

Review de novo raises several issues to which reference has already been made. What it means is that the entire record and bill of exceptions must be thoroughly analyzed and a decision reached without the aid of the district court findings. Due to the capacious nature of the record, it is unrealistic to expect that each member of the supreme court will read, let alone digest, the entire record. The result is that even though it is the court's decision, the opinion is the work of one justice. In all likelihood the result reached will be just, but not necessarily "more just" than that reached by the trial court. Considering that personal judgment is involved in weighing the factors and the evidence, it is difficult to see how the opinion of the supreme court will be any more "just." Assuming that justice can, in fact, be achieved in the district court, an assumption which previous members of the court have apparently recognized,[62] then the requirement for review without reference to the district court accomplishes little beyond imposing additional work on the supreme court. The judge writing the opinion not only must review all the evidence but when he writes his opinion he must include all facts necessary to justify his result. However, since each case is unique it is really only the particular litigants who are interested in a comprehensive restatement of facts. Yet the judge writing the opinion is nevertheless required to spend a great deal of time on the presentation of the facts, even though they neither add to nor improve the understanding of this body of law.

The district judge is also affected by the requirement of review de novo. Since the supreme court is to reach a determination without reference to his findings, the trial judge may feel, especially in bitterly contested cases which he should study most carefully, that his careful study, his work and his abilities are being slighted. The district courts of Nebraska are competent courts and should not be relegated to the status of an evidence-gathering body. As pointed out in *King v. King*,[63] the district court, not the supreme court, may be better able to make a correct decision in divorce actions.

As previously noted, review de novo gives rise to seemingly inconsistent results. This may induce more attorneys to appeal this type of case simply because they may fare better on appeal. With more appeals the court would be further burdened with de novo cases, thus requiring even more work and more opinion writing.

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[62] *See* Faulkner v. Simms, 68 Neb. 299, 94 N.W. 113 (1903), *modifying*, 68 Neb. 295, 89 N.W. 171 (1902); King v. King, 79 Neb. 852, 113 N.W. 538 (1907).

[63] 79 Neb. 852, 113 N.W. 538 (1907).

It is submitted that the requirement for review de novo in cases dealing with alimony and property settlement affects the district court's attitude to these cases, gives rise to a feeling by attorneys that they must appeal, and eventually leads to an unproductive expenditure of the limited time and resources of the supreme court.

F. RECOMMENDATIONS

1. The statute requiring review de novo in all equity cases should be amended to exclude those cases dealing with alimony and property settlement. Additionally, a statute requiring a review based on the "clearly erroneous" rule should be enacted covering all cases of alimony and property settlement. This would require the supreme court, in reviewing cases, to determine only whether the district court was clearly erroneous, giving proper weight to the findings of the trial judge.

2. The Nebraska Supreme Court must accept and follow these statutory changes. This would give the members of the bar an indication of what would be acceptable to the court in the way of alimony and property settlements, and would also aid in reducing the workload of the court by reducing the number of appeals. Further, the court should strive to write opinions which will be meaningful to the bar as well as the parties.

3. Finally, it is recommended that other areas subject to review de novo be critically studied in light of this survey to determine if review de novo is the best alternative form of review in those areas.

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