2003 A-02-973; Belitz v. Belitz;
Kathleen Belitz, now known as Kathleen Monaco, appellant, v. John F. Belitz, Jr., appellee.
(Not Designated for Permanent Publication)

Filed July 15, 2003.

No. A-02-973.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Affirmed.

Elizabeth Stuht Borchers and Steven J. Riekes, of Marks, Clare & Richards, L.L.C., for appellant.

Joan Watke Stacy for appellee.

Sievers and Carlson, Judges.

Sievers, Judge.

Kathleen Belitz, now known as Kathleen Monaco, appeals from an order of the district court for Douglas County, Nebraska, which modified the custody arrangement in the decree of dissolution and awarded custody of the parties' three minor children to John F. Belitz, Jr., subject to Kathleen's specific visitation. Kathleen asserts that the district court erred in denying her motion to recuse, admitting into evidence taped conversations and the accompanying transcripts, and modifying the decree and awarding John custody of the children.

I. FACTUAL BACKGROUND

John and Kathleen were married in June 1993. The couple, who are both chiropractors, subsequently opened and operated a chiropractic clinic in Omaha. During the marriage, John and Kathleen had three children: Kaitlin, born in October 1994; Kristin, born in March 1996; and Katherine, born in July 1997.

In August 1997, Kathleen filed for divorce and also for permission to remove the children to Chicago, Illinois. Kathleen asserted that she had a job opportunity in Chicago that would allow her to work part time and still be able to support the children and that she had family and friends in the Chicago area. On January 27, 1998, the district court for Douglas County entered a decree of dissolution, awarding Kathleen custody of the children and granting her request to remove the children to Illinois. The district court granted John "reasonable and liberal" visitation rights, including but not limited to one weekend per month, 45 continuous days in the summer (except the youngest child for the summer of 1998), and alternating holidays. The court also ordered John to pay child support.

John subsequently appealed to this court, and on January 12, 1999, we affirmed the trial court's ruling. See Belitz v. Belitz, 8 Neb. App. 41, 587 N.W.2d 709 (1999). Kathleen and the girls moved to Chicago, and on August 12, Kathleen remarried.

II. PROCEDURAL BACKGROUND

On September 10, 1999, John filed an application to modify the custody arrangement, asserting that there had been a material change in circumstances because (1) Kathleen had denied John visitation with the girls; (2) Kathleen had denied John telephone access with the girls; (3) Kathleen had failed to inform John of the girls' school, religious, and sporting activities and events; and (4) Kathleen had failed to reimburse John for travel expenses pursuant to the decree. On January 6, 2000, Kathleen filed an answer and cross-application, asserting that there had been a material change in circumstances and requesting an upward variation in the child support and an order limiting the girls' travel during visitation with John to only the State of Illinois except for certain extended holidays.

On February 8, 2000, John filed an amended application to modify the custody arrangement, alleging that it would be in the girls' best interests that he be awarded custody and asserting that there had been a material change in circumstances since entry of the dissolution decree because (1) Kathleen continues to alienate John from the girls; (2) Kathleen refuses to give John her home telephone number so that he can contact the girls; (3) Kathleen refuses to communicate directly with John and allows communication only between John and her new husband, Ernie Monaco; (4) Kaitlin was registered in school under the surname "Monaco" without consulting John; (5) Kathleen refuses to inform John of the girls' educational and extracurricular activities; (6) Kathleen encourages the girls to call John "Omaha Dad"; and (7) Kathleen continues to violate the court-ordered custody arrangement.

On March 7, 2000, the district court for Douglas County ordered that Kathleen refrain from using the surname "Monaco" when referring to the girls and that Kaitlin be reregistered in school under the surname "Belitz." On March 9, Kathleen answered the amended application to modify, denying each and every allegation, and on April 11, Kathleen filed a motion to transfer the modification proceedings to Illinois, asserting forum non conveniens and lack of subject matter jurisdiction. The district court overruled Kathleen's motion to transfer, and trial was had on January 28 and May 14 and 15, 2002.

1. John's Evidence

Kathleen testified that on August 12, 1999, she married Ernie. Kathleen stated that she has a 1-year-old son with Ernie and is currently pregnant. Kathleen stated that John was permitted to visit the girls every other weekend, on alternating holidays, and 45 days throughout the summer. Kathleen stated that the original decree awarded John visitation with the girls for one weekend per month and 45 continuous days throughout the summer; however, she and John agreed that John would get visitation every other weekend and that she would get visitation every other weekend during John's 45 summer days. Kathleen admitted that immediately following the entry of the dissolution decree, she allowed John to visit Katherine for only a few hours during each visitation period,

because Katherine was nursing. Kathleen testified that she did not allow John to have an overnight visit with Katherine until Katherine was 1½ years old. Kathleen stated that she also refused to use a breast pump so that John could have a full visit with Katherine. Kathleen further testified that she did not allow John his visitation on Father's Day in 1998, because she did not believe it was a "holiday" under the dissolution decree.

Kathleen testified that she refers to John as "Omaha Dad" to the girls and that the girls call Ernie "Dad." Kathleen stated that she may have cut short a few of John's holiday visitations with the girls, may have said that 2 weeks is enough summer visitation for John, and may have hung up on John a few times during their telephone conversations. Kathleen testified that she schedules John's 45 summer visitation days when it is convenient for her. Kathleen testified that she registered Kaitlin for preschool under the preferred surname of "Monaco" and only changed it back to "Belitz" after a court order. Kathleen testified that she has asked John for more money in addition to the child support. Kathleen stated that she, John, and the girls were raised Catholic; however, she converted to "Reformed Christian" in 1999 or 2000 and intends on raising the girls Reformed Christians. Kathleen testified that John talks to the girls by telephone between three and six times a week; however, she told John he could call the girls anytime he wanted to. Kathleen testified that she often used a kitchen timer to set the amount of time each girl was permitted to speak with John on the telephone. Kathleen also testified that each girl gets about 5 minutes to talk with John and that she "may have" hung up the telephone after the timer went off.

Kathleen testified that at the original dissolution proceeding, she said that John could visit the girls whenever he wanted to and that John's summer visitation would increase over time; however, she admitted that neither occurred. Kathleen also testified that at the original dissolution proceeding, she said that she was going to earn approximately $25,000 a year working in Chicago; however, in 2001, she earned $9,500, and in 2002, she earned $8,000. Kathleen further testified that at the original dissolution proceeding, she said that she would raise the girls as Catholics and that the children would attend a Catholic church; however, she admitted that neither occurred. Lastly, Kathleen testified that at the original dissolution proceeding, she said that she would transport the girls back to Omaha once a month and pay for half the transportation costs once a month; however, she admitted that neither has occurred. Kathleen also testified that John offered her money, approximately $1,200 per month, if she and the girls would move back to Omaha.

John testified that he is a self-employed chiropractor and works 4 days a week (Monday through Thursday). He stated that if he were awarded custody of the girls, they would attend a Catholic school, and that after school, they would be cared for by him 2 days a week and by his family (parents and sister) the other 2 days while he was at work. John stated that if he were awarded custody, he would continue paying for the girls' medical insurance and would make sure the girls visited Kathleen and contacted her by telephone on a regular basis. John further testified that if he were awarded custody of the girls, he would follow the visitation plan ordered by the court and would not do anything to hinder or harm the girls' relationship with Kathleen.

John testified that the girls have never contacted him by telephone without making it a collect call. John stated that between 1999 and 2001, he taped many of the telephone and in-person conversations he had with Kathleen, Ernie, and the girls. The conversations, which were also transcribed, revealed the following: Kathleen used a timer during many of the telephone conversations John had with the girls, Kathleen hung up on John numerous times during their telephone conversations, Kathleen failed to advise John of certain school events that the girls participated in, Ernie would not allow John or made it difficult for John to talk with Kathleen during certain telephone conversations, Kathleen asked John for money for the appeals process and for extra visitation with the girls, Kathleen asked John not to contact the girls' school, Kathleen and Ernie did not effectuate the custody and visitation plan, the girls called John "Omaha Dad" and Ernie "Dad," Kathleen did not permit John visitation on Father's Day in 1998, and Kathleen and Ernie would threaten to stop visitation or make it difficult for John.

John testified that he flew to Chicago every other weekend to visit the girls (over 100 times) and for numerous special occasions (between 10 and 15 times), including preschool graduation, Christmas performances, and gymnastic events. John testified that Kathleen would not pack the girls' clothes when he flew to Chicago for visitation. John stated that there have been problems with the visitation plan on almost every holiday since the entry of the dissolution decree. John testified that when he originally appealed the dissolution decree, Kathleen made his visitation with the girls very difficult. John stated that he would sometimes arrive a little early to pick up the girls because of the travel situation and that Kathleen would make him wait outside the home until the exact time for the scheduled pickup. John testified that the girls were raised Catholic and that Kathleen did not discuss or involve him in the girls' religious conversion to Reformed Christianity. John also testified that Kathleen failed to discuss the girls' education with him because Kathleen said that she had custody and he did not. John stated that Kathleen would not let him participate in the girls' extracurricular activities, such as gymnastics, soccer, or T-ball.

John stated that Kathleen failed to follow through on her promises she made at the original dissolution proceeding, such as the following: She has hardly worked since the dissolution decree, she has earned only $8,000 to $9,000 a year and is not financially independent, she has not allowed John to come to Chicago to visit the girls whenever he wants, she has not transported the girls once a month from Chicago to Omaha as she promised, she has not been paying for any of the travel expenses as required by the decree, and she has not allowed John the full 45 summer visitation days as required by the decree.

2. Kathleen's Evidence

Kathleen testified that she has no problem with allowing John to see the girls during special activities and events and whenever he wants to. Kathleen stated that the cross-application she filed was inaccurate and that she is not asking for additional child support, is not asking to limit John's visitation, and has no problem with John taking the girls to Omaha every other weekend. Kathleen testified that she was sorry that she registered Kaitlin at school under the preferred surname of "Monaco" and did not know

that it would offend John. Kathleen testified that she has informed John about the girls' schooling, swimming, Girl Scouts, gymnastics, and other events and activities.

Kathleen testified that the girls are doing well in school, that they have many friends, and that they are well-adjusted in Illinois. Kathleen testified that she is afraid of John and that that is why Ernie has been involved in the custody and visitation arrangement. Lastly, Kathleen testified that it is in the girls' best interests that they continue to live with her.

On July 18, 2002, the trial court held that there had been a material change in circumstances since the entry of the decree of dissolution and that it was not in the best interests of the girls that their care, custody and control remain with Kathleen. Specifically, the court found the following: When John arrived in Chicago to effectuate his visitation with the girls, Kathleen would not allow him to pick up the girls until the exact minute visitation began; Kathleen denied John visitation with the girls on Father's Day in 1998; Kathleen would not permit John to pick up the girls the night before Thanksgiving weekend in 1998, even though he arrived in Chicago that night and it was his holiday; Kathleen advised Kaitlin's school that her preferred surname was "Monaco"; Kathleen unilaterally removed the girls from Catholic school and decided to raise them as Reformed Christians, even though John, Kathleen, and the girls were raised as Catholics; Kathleen denied John reasonable telephone access to the girls and used a timer during certain telephone conversations; Kathleen criticized John for contacting the girls' school; Kathleen demanded additional money from John for extra visitation with the girls or to schedule an earlier pickup time; Kathleen refused to communicate with John on certain occasions and authorized Ernie to speak on her behalf; Kathleen and Ernie interfered with the court-ordered custody arrangement and visitation plan; Kathleen argued with and insulted John on the telephone in front of the girls; Kathleen encouraged the girls to call John "Omaha Dad" and Ernie "Dad"; Kathleen failed to pay for the girls' transportation costs to effectuate the court-ordered visitation plan; Kathleen denied John's very simple visitation requests; and Kathleen did everything in her power to alienate John from the girls. The court awarded John custody of Kaitlin, Kristin, and Katherine, subject to Kathleen's reasonable and liberal visitation rights, allocated the costs of transportation between the parties, and ordered Kathleen to pay child support.

On July 19, 2002, Kathleen filed a motion for new trial, which was overruled. Kathleen now appeals to this court.

III. ASSIGNMENTS OF ERROR

Kathleen asserts, summarized and restated, that the district court abused its discretion in (1) denying her motion to recuse, (2) receiving taped telephone conversations into evidence, and (3) modifying the dissolution decree and awarding John custody of the parties' three minor children.

IV. STANDARDS OF REVIEW

A motion to recuse for bias or partiality is initially entrusted to the discretion of the trial court, and the trial court's ruling will normally be affirmed absent an abuse of that discretion. Mihm v. American Tool, 11 Neb. App. 543, ___ N.W.2d ___ (2003).

In all proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the rules, and a trial court's application of the Nebraska Evidence Rules will be upheld unless clearly erroneous. Hill v. Hill, 10 Neb. App. 570, 634 N.W.2d 811 (2001). However, in those instances under the rules where judicial discretion is a determining factor, the admissibility of evidence is a matter initially entrusted to the discretion of the trial court, and the trial court's determination will normally be affirmed absent an abuse of discretion. Id.

Modification of a child custody determination is a matter 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. See Kumke v. Kumke, 11 Neb. App. 304, 648 N.W.2d 797 (2002). A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result. Vogel v. Vogel, 262 Neb. 1030, 637 N.W.2d 611 (2002).

V. ANALYSIS

1. Motion to Recuse

Kathleen contends that the district court erred in denying her motion to recuse because the trial judge, Judge J. Michael Coffey, represented the estate of John's uncle, Ronald L. Staskiewicz, and said at a previous hearing that "he could not understand why Kathleen was allowed to move to Illinois." Brief for appellant at 36. The Staskiewicz will allegedly provided for a $2,000-per-month payment to Kathleen if she decided to stay in Nebraska with the children. (While the purported Staskiewicz will is part of the transcript, it is not attached to any pleading, nor was it offered as an exhibit at trial.)

A trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown. Gibilisco v. Gibilisco, 263 Neb. 27, 637 N.W.2d 898 (2002).

On February 7, 2000, a hearing was had on the motion to recuse. While Kathleen's counsel had a lengthy discussion on the record, no evidence was offered in support of the motion. Nonetheless, Judge Coffey said that he was never involved in the Staskiewicz will or estate, but that he and Staskiewicz had been friends and that Staskiewicz referred litigation matters to him before Staskiewicz became a county attorney. While not a basis for the motion, Judge Coffey did disclose that he had worked as a private lawyer on the estate of "another Belitz years before who used to work in the clerk's office." As for the statement the judge allegedly made about not understanding why Kathleen had been allowed to go to Illinois, he denied prior exposure to the case through Staskiewicz, but

said that if he had discussed Kathleen's moving to Illinois, it was only in the context of not knowing the facts.

Based on the record before us, the only basis for Kathleen's motion to recuse is her allegation, which is unproved and unfounded, that the trial judge was involved in the Staskiewicz estate, which allegedly provided for $2,000 per month for Kathleen if she would not leave Nebraska. The trial judge was not involved in the original Belitz dissolution proceeding or the aforementioned provision in the Staskiewicz will. And, Kathleen's counsel at the time of the hearing specifically said, "If you've never been exposed to this case prior to this litigation being in front of you, then I don't have any reason to try to recuse you." The record shows no prior involvement with the parties or the Staskiewicz estate. A motion to recuse is reviewed for an abuse of discretion, and we find no abuse in the judge's decision to overrule the motion.

2. Taped Telephone Conversations

Kathleen's brief contends that the district court erred in receiving exhibits 4, 5, and 6 (transcripts of taped conversations between John and Kathleen, John and Ernie, and John and the girls) and exhibit 7 (four CD's containing the taped conversations) into evidence, because the exhibits (1) lacked sufficient foundation, (2) were inadmissible hearsay, (3) were irrelevant and unfair, and (4) were made in violation of 720 Ill. Comp. Stat. Ann. 5/14-2 (Michie 1993). At trial, Kathleen's counsel objected to exhibits 4, 5, 6, and 7, based on foundation, hearsay, and relevance. The trial judge overruled the objections, stating:

As the trier of fact, all I can tell you is I'll do my best just to disregard things I don't think are important or that don't accurately reflect [Kathleen's] position or things she's said. And the things I think are relevant, I'll listen to. . . . I'll go through [the exhibits] and figure out what I think is relevant and what I think might, in fact, if anything, be binding on [Kathleen] or [John].

In State v. Hinton, 226 Neb. 787, 794, 415 N.W.2d 138, 143 (1987), the Nebraska Supreme Court stated that the Nebraska intercepted communications statutes, Neb. Rev. Stat. § 86-701 et seq. (Reissue 1999),

make it unlawful to . . . deliberately intercept . . . through the use of any "electronic, mechanical, or other device," any . . . oral communications, unless the interceptor has previously obtained a court order permitting the interception or is a party to the communication, or one of the parties to the communication has previously consented to the interception.

(Emphasis supplied.) Exhibit 7 contains four CD's, and exhibits 4, 5, and 6 are accompanying transcripts of telephone and in-person conversations between John and Kathleen, John and Ernie, and John and the girls. Since John is a party to the taped communications, any contention by Kathleen that the taped conversations are illegal or a violation of Nebraska law is unfounded.

Kathleen's trial objections were that exhibits 4, 5, 6, and 7 lacked foundation, were inadmissible hearsay, and were irrelevant. Kathleen's brief asserts those same grounds for excluding the exhibits; however, Kathleen also adds that the taped conversations were

made in violation of 720 Ill. Comp. Stat. 5/14-2. One may not, on appeal, assert a different ground for excluding evidence than what was urged in the objection(s) made to the trial court. Ford v. Estate of Clinton, 265 Neb. 285, 656 N.W.2d 606 (2003). Additionally, where the grounds specified for the objection(s) at trial are different from the grounds advanced on appeal, nothing has been preserved for an appellate court to review. See Cockrell v. Garton, 244 Neb. 359, 507 N.W.2d 38 (1993). Thus, we do not consider Kathleen's argument based on the Illinois statute.

Lastly, we note that Kathleen failed to address as error the admission of exhibit 30, which is a transcript of a taped conversation between John and Kathleen, and exhibit 31, the accompanying CD. Exhibits 30 and 31 were offered for impeachment purposes. Errors that are not specifically assigned will not be addressed by an appellate court. Kumke v. Kumke, 11 Neb. App. 304, 648 N.W.2d 797 (2002). Thus, we address the admissibility of only exhibits 4, 5, 6, and 7.

Tape recordings and/or transcripts of conversations are admissible as evidence of such conversations and in corroboration of oral testimony of the conversations, provided that the conversations are relevant; that the recordings and/or transcripts accurately reflect the conversations; that the tapes have not been altered, changed, or erased; that the voices heard on the tapes are those of the parties and/or witnesses; and that proper foundation is laid. See, State v. Pearson, 215 Neb. 339, 338 N.W.2d 445 (1983); State v. Lynch, 196 Neb. 372, 243 N.W.2d 62 (1976); State v. Myers, 190 Neb. 146, 206 N.W.2d 851 (1973).

(a) Foundation

Kathleen argues that the tapes and the accompanying transcripts lacked foundation, because the conversations took place many years ago; John was unsure of the exact dates of each conversation; the conversations were incomplete; some of the conversations were between John and Ernie and between John and the girls, not between John and Kathleen; and John was able to edit and possibly "doctor" the taped conversations.

According to the record, John testified that the taped conversations, some in-person communications when he had a recorder in his pocket and most while on the telephone, took place on various dates between 1999 and 2001. John testified that exhibit 7, which contains four CD's labeled "1," "2," "3-A," and "3-B," directly corresponds with the transcripts presented in exhibits 4 (CD 1), 5 (CD 2), and 6 (CD 3-A and 3-B). John testified that he originally taped the telephone conversations onto cassette tapes and then "burned" them onto CD's. John testified that the court reporter transcribed the conversations from the original cassette tapes and that exhibits 4, 5, 6, and 7 contain the full and entire conversations between John and Kathleen, John and Ernie, and John and the girls. John further testified that he did not edit or alter the taped conversations.

Various sections of exhibit 7 were played at trial and various excerpts of exhibits 4, 5, and 6 were read into evidence, both used to corroborate John's oral testimony of the conversations. John testified that both the CD's and the accompanying transcripts accurately reflected the conversations he had with Kathleen, Ernie, and the girls. John

testified that the voices on the CD's were of him, Kathleen, Ernie, and the three girls. Before the CD's were played and the transcripts were read into evidence, Kathleen's counsel was permitted to voir dire and cross-examine John as to foundation. Thus, after a review of the evidence and the cases herein cited, we hold that proper and sufficient foundation was laid by John for the admission of exhibits 4, 5, 6, and 7.

(b) Hearsay

Kathleen next argues that exhibits 4, 5, 6, and 7 are inadmissible hearsay because they "contain conversations with persons such as Ernie and the children who were not parties to this litigation." Brief for appellant at 40.

Under Neb. Rev. Stat. § 27-801(3) (Reissue 1995), "[h]earsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (Emphasis supplied.) Thus, not all out-of-court statements admitted at trial are excludable under the hearsay rule. See Neb. Rev. Stat. § 27-802 (Cum. Supp. 2002). Additionally, § 27-801(4)(b) provides that a statement is not hearsay if "[t]he statement is offered against a party and is . . . his own statement, in either his individual or a representative capacity, or . . . a statement by a person authorized by him to make a statement concerning the subject . . . ." Clearly, the conversations between John and Kathleen, specifically the statements made by Kathleen, were statements made by a party opponent and are therefore not hearsay. Thus, we turn to the conversations between John and Ernie and between John and the girls.

(i) Conversations Between John and Ernie

The conversations between John and Ernie were offered to show that on various occasions, Ernie would not allow John to talk with Kathleen regarding the custody arrangement, the visitation plan, and the girls' welfare. Ernie also stated that John would have to talk with him exclusively, not Kathleen, regarding the girls' welfare and visitation arrangements. The trial court found that Kathleen authorized Ernie to speak and act on her behalf.

In Gray v. Maxwell, 206 Neb. 385, 293 N.W.2d 90 (1980), at issue was a tape recording of two telephone conversations between a mother who gave her baby up for adoption and the conciliation court counselor who received the baby from the mother along with the relinquishment papers. The Nebraska Supreme Court, while not addressing whether an agency relationship existed between the court counselor and the adoptive parents, concluded that the tape recordings were not hearsay, because the tape was offered not to prove the truth of any assertions, but, rather, to corroborate the allegations made by the mother that such statements were made to her, in order to establish whether the statements had an effect upon the voluntariness of her acknowledgment of the relinquishment of her baby.

In the present case, the conversations between John and Ernie were not offered to prove the truth of Ernie's assertions, e.g., that Ernie actually does not feed the girls fast food, the conversations were offered to show that Ernie may have been hampering the visitation process, thus interfering with the father-child relationship, and that Kathleen

was forcing John to deal with her new husband instead of with her regarding the girls' best interests. Therefore, the conversations between John and Ernie are not hearsay and are admissible as evidence.

(ii) Conversations Between John and Girls

The conversations between John and the girls were offered to show that Kathleen was denying John an opportunity to communicate with the girls by telephone, that John and Kathleen were having difficulty effectuating the visitation plan, that Kathleen was using a timer during John and the girls' telephone conversations, that the girls likely had been told not to call John "Daddy," and that the girls' welfare and social behavior was deteriorating due to their parents' failure to communicate. Thus, the conversations between John and the girls were not offered to prove the truth of any assertions made, e.g., that Katherine was actually doing handstands or that Kaitlin was actually eating dinner at 8:45 p.m., the conversations were offered to show a material change in circumstances and the best interests of the girls. See Gray v. Maxwell, supra. See, also, Murdoch v. Murdoch, 200 Neb. 429, 264 N.W.2d 183 (1978) (in child custody action, father testified to conversation between him and his daughter, and Nebraska Supreme Court held that testimony was not hearsay, because daughter's statements were relevant, material, and not offered to prove that conversation was true, but to show that conversation took place, that mother was heard "coaching" daughter, and that mother had ability to influence what daughter said). Therefore, the conversations between John and the girls are not hearsay and are admissible.

(iii) Relevance

Lastly, Kathleen argues that the taped conversations and the accompanying transcripts were irrelevant because they were made years ago and contained communications between John and Ernie and between John and the girls, not just between John and Kathleen.

Evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Neb. Rev. Stat. § 27-401 (Reissue 1995). In the present case, the main issue on appeal is whether the trial court erred in modifying the dissolution decree and in awarding John custody of the three girls. Specifically, was there a material change in circumstances, and was it in the girls' best interests to modify custody? We conclude that the trial court did not err in admitting exhibits 4, 5, 6, and 7 into evidence, because they were material and probative on the issue whether there had been a material change in circumstances, as well as the best interests of Kaitlin, Kristin, and Katherine. Furthermore, the timing of the conversations goes to their weight. Therefore, the trial court did not err in receiving exhibits 4, 5, 6, and 7 into evidence.

3. Modification of Child Custody

Lastly, Kathleen contends that the district court erred in modifying the dissolution decree and awarding John custody of the girls because "[t]here is nothing in the evidentiary record" which shows that there has been a material change in circumstances or that the best interests of the girls require such action. Brief for appellant at 25.

Generally, custody of minor children will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the children require such action. Vogel v. Vogel, 262 Neb. 1030, 637 N.W.2d 611 (2002). The party seeking modification of child custody bears the burden of showing such a material change in circumstances affecting the best interests of the children. Id.

(a) Material Change in Circumstances

A "material change in circumstances" means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. Tremain v. Tremain, 264 Neb. 328, 646 N.W.2d 661 (2002).

In Belitz v. Belitz, 8 Neb. App. 41, 587 N.W.2d 709 (1999), this court found that Kathleen had a legitimate basis for removing the girls from Nebraska because Kathleen was raised in the Chicago area, had substantial family ties to the Chicago area, and was able to obtain employment in her brother's chiropractic clinic in Chicago, for which there was nothing comparable in Omaha; in Chicago, she had family and friends from which to build a client base, establish a successful career, and earn enough money to support the girls and not rely on others. Regarding the best interests test, we held:

When considering that the parties' chiropractic clinic in Omaha has never consistently made money and that Kathleen has an opportunity to join an established practice and earn a secure income, the move to Chicago provides an opportunity for Kathleen to improve the quality of life for her and the children.

Id. at 46, 587 N.W.2d at 713. We based our decision on finding that Kathleen was willing to bear the cost of transporting the girls back to Omaha once a month to see John, that Kathleen would certainly permit John to come to Chicago to visit the girls whenever he desired, and that John's reasonable visitation rights were able to coexist with the girls' leaving the state with Kathleen. Id.

Although not weighing heavily in our decision, the record clearly reflects that in contrast to Kathleen's assertions at the time of the divorce, which assertions formed the rationale for allowing removal in Belitz v. Belitz, supra, Kathleen has not built a large client base in the Chicago area, has not established an extremely successful chiropractic career in Chicago, has not earned enough money to exclusively support the girls, and has not improved the quality of life for the girls. Moreover, she has not provided the costs of transporting the girls back to Omaha once a month to see John and has not permitted John to come to Chicago to visit the girls whenever he has desired.

What does weigh heavily in our decision, however, and what is reflective of the extensive testimony, is that the court-ordered custody and visitation plan has been frustrated, lessened, and made as difficult as possible--short of a complete denial of visitation--due to the actions or inactions of Kathleen. "[V]isitation is a key ingredient in raising children after a divorce," and "it is in a child's best interests to be with his or her respective parents to the utmost." Sullivan v. Sullivan, 249 Neb. 573, 580, 544 N.W.2d

354, 359 (1996). Moreover, custody and visitation must coexist, and frustration or denial of visitation can be a material change in circumstances. See, Parker v. Parker, 234 Neb. 167, 449 N.W.2d 553 (1989); Heyne v. Kucirek, 203 Neb. 59, 277 N.W.2d 439 (1979). Had it been known to the district court that due to Kathleen's actions, John's reasonable visitation rights would not peacefully coexist with the girls' leaving the state, the trial court and the appellate court would have decreed differently. See Parker v. Parker, 234 Neb. at 169, 449 N.W.2d at 554 (violation of parties' settlement agreement relating to visitation "constituted a material change in circumstances affecting the best interests of the minor child involved"). Thus, we find that there has been a material change in circumstances since the entry of the original dissolution decree.

(b) Best Interests

Both parents have been found to be fit parents, so we turn to the girls' best interests. In determining Kaitlin, Kristin, and Katherine's best interests for purposes of modification of custody, Neb. Rev. Stat. § 42-364(2) (Reissue 1998) provides that the relevant factors to be considered shall include the following: "(a) The relationship of the minor child[ren] to each parent prior to the commencement of the action or any subsequent hearing; . . . (c) The general health, welfare, and social behavior of the minor child[ren]." A court may also consider, in addition to the statutory factors, matters such as the moral fitness of the children's parents, respective environments offered by each parent, the effect on the children as the result of continuing or disrupting an existing relationship, the attitude and stability of each parent's character, and parental capacity to provide physical care and satisfy educational needs of the children. Templeton v. Templeton, 9 Neb. App. 937, 622 N.W.2d 424 (2001); Hoins v. Hoins, 7 Neb. App. 564, 584 N.W.2d 480 (1998). Thus, we analyze the relevant factors in the present case.

The record reflects the following: Kathleen has negatively interfered with the court-ordered custody arrangement and visitation plan; Kathleen refused to allow John to pick up the girls a few minutes early, even though John lived in Nebraska and the girls resided in Illinois; Kathleen denied John visitation with the girls on various court-ordered holidays; Kathleen advised Kaitlin's school that her preferred surname was "Monaco" without consulting John; and Kathleen unilaterally decided that the girls would not attend Catholic school and would become Reformed Christians, even though John, Kathleen, and the girls were raised as Catholics. (While we understand the general rule that the custodial parent normally determines religious training for the children, see Hornung v. Hornung, 1 Neb App. 6, 485 N.W.2d 335 (1992), here there was Kathleen's representation to the original divorce court that the girls would remain Catholic and attend Catholic schools if Kathleen moved to Chicago; thus, there is a violation of that representation, as well as a failure to communicate about a matter of significance, which if nothing else, shows Kathleen's negativity toward John and his role in the girls' lives.) Kathleen denied John reasonable telephone access to the girls and used a timer during telephone conversations between John and the girls, Kathleen attempted to persuade John not to contact the girls' school, Kathleen demanded additional money from John for extra visitation with the girls or to schedule an earlier pickup time, Kathleen refused to communicate with John on certain occasions and authorized Ernie to speak on her behalf, Kathleen argued with and insulted John on the telephone in front of the girls, Kathleen

encouraged the girls to call John "Omaha Dad" and Ernie "Dad," Kathleen failed to pay for the girls' transportation costs to effectuate the court-ordered visitation plan, and Kathleen attempted to alienate John from the girls.

Visitation relates to continuing and fostering the normal parental relationship of the noncustodial parent with the minor children of the marriage. Fine v. Fine, 261 Neb. 836, 626 N.W.2d 526 (2001); Parker v. Parker, 234 Neb. 167, 449 N.W.2d 553 (1989). The listed actions of Kathleen are clearly the exact opposite of what a custodial parent should be doing concerning visitations. And, it is not in the best interests of Kaitlin, Kristin, and Katherine to reside with a parent who gives so little importance and respect to the rights of her children's father, to say nothing of the girls' right to have as loving and normal a relationship as possible with their father.

In determining the best interests of the children, it is appropriate to consider which parent would better promote visitation and a positive relationship between the children and the other parent. See, Huffman v. Huffman, 236 Neb. 101, 459 N.W.2d 215 (1990); Hibbard v. Hibbard, 230 Neb. 364, 431 N.W.2d 637 (1988). Thus, based on the record before us, we hold that there has been a material change in circumstances since the entry of the original dissolution decree, making it in the girls' best interests that John be awarded custody of them. We affirm the trial court's modification order.

Affirmed.

Moore, Judge, participating on briefs.