

4. PROPRIETY OF DETENTION ORDER

The foregoing question brings us to the fourth and last summarized assignment of error, the mother's claim that the juvenile court erred in continuing the infant's temporary care after seizure in the department.

The circumstances required to be established for continuing to withhold a juvenile's custody from her or his parent pending adjudication are found in § 43-254:

If a juvenile has been removed from his or her parent, guardian, or custodian pursuant to subdivision (3) of section 43-248, the court may enter an order continuing detention or placement only upon a written determination that continuation of the juvenile in his or her home would be contrary to the welfare of such juvenile and that reasonable efforts were made, prior to placement, to prevent or eliminate the need for removal and to make it possible for the juvenile to return to his or her home.

Although Neb.Rev.Stat. § 43-279.01(3) (Cum.Supp.1990) provides that when adjudicating whether a juvenile is dependent or neglected within the purview of § 43-247(3)(a) the State must establish its allegations by a preponderance of the evidence and that when seeking to terminate parental rights the proof must be clear and convincing, it is silent as to the quantum of proof required to satisfy the State's burden of proving that the custody of an alleged dependent or neglected juvenile should be in the department pending adjudication.

[28] However, as the temporary placement is no more onerous than an adjudication that a juvenile is dependent or neglected such as to subject the juvenile to the jurisdiction of the juvenile court, we hold that proof by a preponderance of the evidence that such placement needs to be continued is sufficient. See *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986) (preponderance of evidence sufficient to support adjudication that juvenile was within purview of § 43-247(3)(a)).

[29] The evidence of the mother's demonstrated unabashed § 428 proclivity to leave

her other children in their own care under the supervision of a not-quite-9-year-old, coupled with the evidence of her recent drug use, preponderates in favor of a conclusion that the infant is neglected such as to come within the purview of § 43-247(3)(a). The State need not wait to intervene until the infant suffers injury because she was left in the immature care of her oldest sibling.

VI. JUDGMENT

The record failing to sustain any of the summarized assignments of error, we affirm the detention order of August 27, 1990.

AFFIRMED.



238 Neb. 439

§ 439 STATE of Nebraska, Appellant,

v.

DODGE CITY et al., Appellees.

No. 89-339.

Supreme Court of Nebraska.

June 21, 1991.

State petitioned for forfeiture of five electronic and video gambling machines seized from clubs. The District Court, Buffalo County, DeWayne Wolf, J., found that seizure was proper, but that devices were no longer unlawful under statute, and ordered devices returned to their owners. State appealed. The Supreme Court, White, J., held that: (1) statute in effect at time of seizure, not statute in effect at time of trial, controlled, and (2) machines which were activated by players using coins and provided free replay credits were, in any event, illegal gambling devices under either statute where machines were equipped with reset switches and with meters to

make permanent record of replays awarded.

Reversed and remanded with directions.

### 1. Statutes ⇐277

Under general savings clause, pending action is not affected by repeal or amendment of statute, and laws in effect at time of commencement of action are controlling. Neb.Rev.St. § 49-301.

### 2. Gaming ⇐6

Electronic and video machines which were activated by players using coins and which provided free replay credits were illegal gambling devices subject to forfeiture where machines were equipped with reset switches and with meters to make permanent record of replays awarded. Neb.Rev.St. §§ 28-1101(4), 28-1107, 28-1111, 29-820(1)(d).

#### *Syllabus by the Court*

1. Penalties and Forfeitures: Equity: Appeal and Error. An action for forfeiture is considered to sound in equity, and we review an equity action de novo on the record and reach our own conclusion independent of the findings of the trial court.

2. Actions: Statutes. Under the general saving clause, a pending action is not affected by the repeal or amendment of a statute, and the laws in effect at the time of the commencement of the action are controlling.

3. Statutes. The saving clause applies to both civil and criminal statutes.

4. Gaming: Penalties and Forfeitures. Neb.Rev.Stat. § 28-1111 (Reissue 1989) requires that any gambling device possessed in violation of article 11 of chapter 28 shall be forfeited to the state. In addition, Neb.Rev.Stat. § 29-820(1)(d) (Reissue 1989) requires that seized contraband shall be destroyed.

Robert M. Spire, Atty. Gen., and William L. Howland, Lincoln, for appellant.

Daniel L. Lindstrom and Jeffrey H. Jacobsen, of Jacobsen, Orr, Nelson, Wright,

Harder & Lindstrom, P.C., and Andrew J. McMullen, Kearney, for appellees.

HASTINGS, C.J., and BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, Justice.

The State appeals from an order of the district court which <sup>1440</sup>held that five electronic and video machines were prohibited gambling devices on the date of their seizure, but which held that the machines could not be forfeited to the state. The trial court ruled that the machines could be returned to their owners because the applicable statute had been amended prior to the hearing on the petition for forfeiture. We reverse.

Sgt. Larry Williams, an investigator for the Nebraska State Patrol, testified that in January 1987, he took part in the seizure of five electronic and video gambling machines from clubs in Kearney, Nebraska. On May 19, 1987, the State filed a petition seeking an order directing forfeiture of the machines as illegal gambling devices. A hearing on the petition was held on January 17, 1989, and the court issued its order on March 14, 1989. The trial court found that the seizure was proper, but that the devices were no longer unlawful under current statutes, and that the devices and money found in them should be returned to their owners. The State's motion for new trial was overruled, and this appeal followed.

The State assigns as error the trial court's determination that the 1987 amendment to Neb.Rev.Stat. § 28-1107 (Reissue 1989) made only possession of certain mechanical gambling devices illegal, and its determination that in order for forfeiture to be legal, possession of the gambling devices had to be in violation of article 11 of chapter 28 of the Nebraska Revised Statutes.

As we noted recently in *State v. Two IGT Video Poker Games*, 237 Neb. 145, 465 N.W.2d 453 (1991), an action for forfeiture is considered to sound in equity, and we review an equity action de novo on the

record and reach our own conclusion independent of the findings of the trial court.

[1] The State's petition seeking the forfeiture was filed prior to the amendment of § 28-1107, and under the general saving clause a pending action is not affected by the repeal or amendment of a statute, and the laws in effect at the time of the commencement of the action are controlling. See, *United Mineral Products Co. v. Nebraska Railroads*, 177 Neb. 802, 131 N.W.2d 388 (1964); Neb.Rev.Stat. § 49-301 (Reissue 1988). We have held that the saving clause applies to both civil and criminal statutes. See *State v. Randolph*, 186 Neb. 297, 183 <sup>1441</sup>N.W.2d 225 (1971), cert. denied 403 U.S. 909, 91 S.Ct. 2217, 29 L.Ed.2d 686.

[2] Although we must apply the statute which was in effect at the time of the petition for forfeiture, and in so doing we find that the machines in question were gambling devices and were properly seized, we also find that the devices were illegal under either version of the statute.

In *Two IGT Video Poker Games, supra*, we analyzed whether two video poker devices similar to the ones at issue here met the statutory definition of gambling device as found in Neb.Rev.Stat. § 28-1101(5) (Reissue 1989), which has not been amended since 1986. We held:

A gambling device is therefore a device which is used or usable by a person to bet something of value on the outcome of a future event, which outcome is determined by an element of chance and which does not fall within one of the exceptions contained in § 28-1101(4). There is no question but that the outcome of the poker hands played on the machines in question is a future event determined by an element of chance. . . .

*State v. Two IGT Video Poker Games, supra* 237 Neb. at 151, 465 N.W.2d at 459.

The version of § 28-1107 which was in effect in early 1987 provided that possession of a gambling device is illegal, and provided exceptions for certain types of devices, including for

any coin-operated mechanical game designed and manufactured to be played for amusement only and which may allow the player the right to replay such mechanical game at no additional cost, which right to replay shall not be considered money or property, except that such mechanical game (a) can accumulate no more than fifteen free replays at one time, (b) can be discharged of accumulated free replays only by reactivating the game for one additional play for each accumulated free replay, and (c) makes no permanent record directly or indirectly of free replays so awarded.

§ 28-1107 (Reissue 1985).

In the later 1987 version, exceptions were added for "computer gaming device[s], electronic gaming device[s], or <sup>1442</sup>video gaming device[s]." Also eliminated was the 15-replay limit. See § 28-1107 (Reissue 1989). The revision in the law makes no difference to the facts of this case, since the machines are illegal gambling devices under either version of the statute.

Dodge City and the other games in the present case, like those in *Two IGT Video Poker Games*, are activated by players using coins and provide free replay credits, which involve extension of a service or entertainment. Thus, the devices are used to bet something of value on the outcome of a future event, and "unless the activity falls within one of the exceptions listed in § 28-1101(4), playing the machines is engaging in gambling, and the machines are gambling devices within the meaning of the statute." *State v. Two IGT Video Poker Games, supra* at 152, 465 N.W.2d at 459. None of the exceptions in § 28-1101(4)—entering into a lawful business transaction, playing an amusement device with an unrecorded right of replay, conducting or participating in a prize contest, and conducting or participating in any bingo, lottery, or raffle—apply to this case.

As with the devices in *Two IGT Video Poker Games*, we find that these machines are equipped both with reset switches and with meters to make a permanent record of the replays awarded, which violates the

statute and makes the machines illegal gambling devices. Under Neb.Rev.Stat. § 28-1111 (Reissue 1989), which has remained in effect throughout the history of this case, any gambling device possessed in violation of article 11 of chapter 28 "shall be forfeited to the State." In addition, Neb.Rev.Stat. § 29-820(1)(d) (Reissue 1989) requires that seized contraband, such as these illegal gambling devices, shall be destroyed.

The district court was correct in finding that the machines were illegal at the time of the seizure; however, the trial court erred in holding that the machines were no longer illegal 2 years later and that they should be returned to the owners.

We reverse the decision of the district court and remand the cause with directions to grant the plaintiff's petition for forfeiture.

REVERSED AND REMANDED WITH DIRECTIONS.



238 Neb. 428

1428 **Kurt A. KNIPPELMIER, Appellant,**

v.

**Kimberly Ann  
KNIPPELMIER, Appellee.**

**No. 89-135.**

Supreme Court of Nebraska.

June 21, 1991.

In action for dissolution of marriage, the District court, Nemaha County, Robert T. Finn, J., entered order requiring husband to pay child support. Husband appealed. The Supreme Court, Grant, J., held that: (1) evidence was sufficient to rebut presumption that child support guidelines should be applied; (2) trial court did not abuse its discretion in setting child support payable by husband at \$113.75 per month per child, rather than at \$78.65 as suggest-

ed by husband; (3) trial court did not abuse its discretion in ordering husband to contribute \$150 per month toward child-care expenses; but (4) trial court should not have ordered automatic decrease in total payments by husband to commence at future date when younger child was to begin attending school.

Affirmed as modified.

#### 1. Divorce $\S$ 184(1, 5, 6)

In appeals involving actions for dissolution of marriage, Supreme Court's review is de novo on record to determine whether there has been abuse of discretion by trial judge, whose judgment will be upheld in absence of abuse of discretion; when evidence is in conflict, Supreme Court considers, and may give weight to, fact that trial judge heard and observed witnesses and accepted one version of facts rather than another.

#### 2. Parent and Child $\S$ 3.1(10)

Generally, child support payments should be set according to guidelines established by state Supreme Court. Neb. Rev.St. §§ 42-364(4), 42-364.16.

#### 3. Parent and Child $\S$ 3.1(10)

Court may deviate from state Child Support Guidelines whenever application of guidelines in individual case would be unjust or inappropriate. Neb.Rev.St. §§ 42-364(4), 42-364.16.

#### 4. Parent and Child $\S$ 3.1(10)

Child support guidelines of state Supreme Court apply to any child support award made from and after October 1, 1987. Neb.Rev.St. §§ 42-364(4), 42-364.16.

#### 5. Divorce $\S$ 307

Evidence, including husband's admission that he was able-bodied and capable of gainful employment, with some skills in automobile repair business, was sufficient to rebut presumption that child support guidelines should be applied in dissolution of marriage proceeding; under circumstances, strict application of guidelines would have discounted husband's earning capacity and placed unfair burden on wife. Neb.Rev.St. §§ 42-364(4), 42-364.16.