Under the circumstances of this case, we find no abuse of discretion by the district court in ordering the parties to file joint income tax returns for 2008 and 2009.

CONCLUSION

We conclude that the district court did not abuse its discretion in treating the parties' premarital homes as nonmarital assets, in valuing the house bought during the marriage, in dividing the marital estate, or in ordering the parties to file joint income tax returns. Accordingly, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RANDY L. MORTENSEN, APPELLANT.

809 N.W.2d 793

Filed September 27, 2011. No. A-10-1208.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Judgments: Appeal and Error.** To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.
3. **Speedy Trial: Indictments and Informations: Time.** Neb. Rev. Stat. § 29-1207(1) (Reissue 2008) requires that every person indicted or informed against for any offense shall be brought to trial within 6 months, unless the 6 months are extended by any period to be excluded in computing the time for trial.
4. **Speedy Trial.** Under Neb. Rev. Stat. § 29-1208 (Reissue 2008), if a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he or she shall be entitled to his or her absolute discharge.
5. **Speedy Trial: Motions for Continuance.** The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel shall be excluded from the calculation of the time for trial.
6. **Speedy Trial.** The last date to try a defendant, before consideration of excludable timeframes, is calculated by excluding the date of the filing of the information, moving forward 6 months, and then backing up 1 day.
7. **Speedy Trial: Pretrial Procedure: Appeal and Error.** The motion to discharge is a tolling motion, and the speedy trial clock remains tolled until the motion to discharge is finally resolved, including during the appeal until action is taken on the appellate court's mandate.

8. **Speedy Trial: Waiver.** A waiver of speedy trial rights, if explicitly stated, can be for a limited time or purpose.
9. ____: ____. A defendant may terminate his waiver of a speedy trial by filing a written request for trial with the clerk of the court in which the defendant is to be tried. The defendant shall serve a copy of the written request for trial upon the prosecutor. The clerk of the court, immediately upon receipt of the request for trial, shall also forward a copy of it, together with the date of filing, to the trial judge and to the prosecutor's office.
10. **Speedy Trial: Pretrial Procedure: Time.** From the date a defendant files his written request for trial, the 6-month period for the State to bring a defendant to trial provided in Neb. Rev. Stat. § 29-1207 (Reissue 2008) shall begin anew.
11. **Speedy Trial: Waiver: Pretrial Procedure.** After a defendant's unlimited waiver of speedy trial rights, it is not the setting of a trial date by the court, but, rather, the defendant's request for a trial, that starts the speedy trial clock running again—but running anew.
12. **Motions for Continuance: Notice.** When a defendant requests an indefinite continuance, it is his or her affirmative duty to end the continuance by giving notice of his or her request for trial.

Appeal from the District Court for Butler County: MARY C. GILBRIDE, Judge. Affirmed.

Robert J. Bierbower for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

On October 27, 2009, an information was filed in the district court for Butler County, Nebraska, charging Randy L. Mortensen with the offense of assault while being incarcerated, in violation of Neb. Rev. Stat. § 28-932 (Reissue 2008), and asserting that he was a habitual criminal. On October 25, 2010, Mortensen filed his motion for absolute discharge on the ground that his speedy trial rights had been violated under Neb. Rev. Stat. § 29-1208 (Reissue 2008). The district court denied Mortensen's motion via a signed and file-stamped journal entry of November 15. Mortensen perfected a timely appeal to this court.

The State has filed a motion for summary affirmance, which we hereby overrule. Briefing in the matter is complete. Pursuant

to our authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), we have ordered this case submitted for decision without oral argument.

PROCEDURAL BACKGROUND

The chronology of the procedural occurrences in this case is as follows, and necessary additions will be provided in our discussion:

- 10/27/2009 Information is filed.
- 01/04/2010 Mortensen moves to continue trial and files waiver of speedy trial right.
- 01/05/2010 Trial is continued to March 16.
- 02/23/2010 Mortensen's counsel moves to continue trial.
- 03/02/2010 Mortensen files written waiver of speedy trial rights.
- 03/09/2010 Trial is set for June 22.
- 05/18/2010 Mortensen moves to continue trial, and trial is set for August 17.
- 05/20/2010 Mortensen files written waiver of speedy trial rights.
- 07/26/2010 Mortensen moves to continue trial and files written waiver of speedy trial rights.
- 08/02/2010 Trial is set for October 26.
- 10/25/2010 Mortensen moves for absolute discharge.

In its November 15, 2010, ruling on the motion to discharge, the court found that the time period from October 28, 2009, to January 4, 2010, 68 days, counts against the State, but that no additional days have run on the speedy trial clock since January 4 because of the motions to continue and waivers of speedy trial filed by Mortensen. Accordingly, the court found that there were 112 days left to bring Mortensen to trial. The trial court overruled the motion; set the matter for trial on January 27, 2011; and set a status hearing for December 22, 2011 (we assume that this is a typographical error and that the status hearing was to be December 22, 2010). Mortensen filed his timely notice of appeal on December 15, 2010.

ASSIGNMENT OF ERROR

Mortensen asserts that the trial court erred in denying his motion for discharge.

STANDARD OF REVIEW

[1,2] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Sommer*, 273 Neb. 587, 731 N.W.2d 566 (2007); *State v. Vasquez*, 16 Neb. App. 406, 744 N.W.2d 500 (2008). However, to the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below. See *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002).

ANALYSIS

We begin by noting that the speedy trial claim being advanced is statutory and that the constitutional right to a speedy trial is not implicated in this case.

[3-5] Neb. Rev. Stat. § 29-1207(1) (Reissue 2008) requires that every person indicted or informed against for any offense shall be brought to trial within 6 months, unless the 6 months are extended by any period to be excluded in computing the time for trial. *State v. Cox*, 10 Neb. App. 501, 632 N.W.2d 807 (2001). Under § 29-1208, if a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he or she shall be entitled to his or her absolute discharge. Section 29-1207(4)(b) provides that the period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel shall be excluded from the calculation of the time for trial.

Mortensen does not quibble with the procedural background and timeline we have set forth above, although his briefing ignores the fact that he signed and filed four different waivers of speedy trial rights, a crucial procedural fact. Mortensen asserts with respect to the first motion to continue, filed on January 4, 2010, that the time excludable for that motion ceased on March 9, the date on which the trial court set the matter for a status hearing on May 4 and trial on June 22. He applies this same rationale and calculation to his motion to continue filed May 18. Thus, he asserts that the time period to be "added" is 49 days, as the time for the latter motion ended July 6 when

the court held a status conference. Brief for appellant at 9. The same method is asserted for the motion to continue filed July 26; he claims the time attributable to this motion ended September 7, when the court held a status conference, resulting in 49 days attributable to this motion and thus excludable in calculating the time in which to bring him to trial. We quote Mortensen's final conclusion:

> The total amount of time which must be added as the result of the three Motions To Continue is 161 days. Adding 161 days to the April 27, 2010, date, results in October 5, 2010, being the last day within which [Mortensen] must have been brought to trial; this was not done and [Mortensen] is entitled to an absolute discharge.

Id.

[6] The information was filed October 27, 2009. We have long calculated the last date to try the defendant, before consideration of excludable timeframes, by excluding the date of the filing of the information, moving forward 6 months, and then backing up 1 day. See, *State v. Vrtiska*, 227 Neb. 600, 418 N.W.2d 758 (1988); *State v. Kriegler*, 225 Neb. 486, 406 N.W.2d 137 (1987), *overruled on other grounds, State v. Petty*, 269 Neb. 205, 691 N.W.2d 101 (2005). Therefore, we exclude October 27, move forward 6 months to April 28, 2010, and back up to April 27 for the last day to begin Mortensen's trial, before adding excludable timeframes. See *State v. Sommer*, 273 Neb. 587, 731 N.W.2d 566 (2007). The trial court correctly found that the timeframe from October 28, 2009, to January 4, 2010, the date when Mortensen filed a motion to continue and a "Waiver of Speedy Trial," was chargeable to the State—meaning that 68 days, as the trial court found, had run off of the 6-month speedy trial clock.

[7] Mortensen filed four separate written "Waiver[s] of Speedy Trial" signed by him, dated, and file stamped by the clerk of the district court. In each, he states that he "informs the Court that he has been advised of the effect of" the corresponding motion to continue "upon his right to a speedy trial and [t]hereby knowingly, voluntarily, and intelligently waives his right to a speedy trial for the purposes of such [m]otion." The first of these effectively identical waivers was

filed January 4, 2010, and on that day, a motion to continue was filed. A nearly identical waiver was filed March 2, after a motion to continue on behalf of Mortensen had been orally made by his counsel on February 23. Mortensen moved to continue the June 22 trial by a written motion filed May 18, and Mortensen's signed "Waiver of Speedy Trial" was filed May 20, with the same language as quoted above. And on July 26, a motion to continue the trial then set for August 17 was filed and another "Waiver of Speedy Trial" signed by Mortensen was filed on the same date. After the last two filings, the court entered an order on August 2 setting a status hearing for September 7 and a trial for October 26. The status hearing of September 7 resulted only in the scheduling of another status hearing for October 5. The court's journal entry of October 5 reflects, "Matter remains as set." On October 25, the motion for discharge was filed. We note that the motion to discharge is a tolling motion and that the speedy trial clock remains tolled until the motion to discharge is finally resolved, including during the appeal until action is taken on our mandate. See *State v. Miller*, 9 Neb. App. 617, 616 N.W.2d 75 (2000).

When one examines the procedural history as outlined at the outset of our opinion, it is clear that after January 4, 2010, up to the time of the filing of the motion to discharge on October 25, there was never any time during which the cause was not continued by Mortensen's request for a continuance and during which there was not also an operative waiver of his speedy trial rights "for the purposes of such [m]otion" to continue. Mortensen's waivers apparently were intended to have a limited scope and purpose—for the motions to continue. We note that the only mention we can find in Nebraska case law of a "limited waiver" of speedy trial rights is in *State v. Knudtson*, 262 Neb. 917, 636 N.W.2d 379 (2001), where the court said that the defendant did not waive his right to a speedy trial for an indefinite period and that his waiver was for a 120-day continuance only. The *Knudtson* court then said:

> The State argues that [the defendant's] waiver was absolute and cannot be limited in time. Section 29-1207

> does not mention a waiver or suggest that a waiver cannot be limited in time. In addition, the statute provides that the 6-month period shall exclude "[t]he period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel." § 29-1207(4)(b). The statute does not provide that requesting a continuance results in a complete waiver of the right to a speedy trial; rather, it provides that the delay caused by a continuance granted for the defendant is excluded from the 6-month period and counted against the defendant.

262 Neb. at 923, 636 N.W.2d at 384.

[8] From the *Knudtson* court's discussion, we conclude that under Nebraska precedent, a waiver of speedy trial rights, if explicitly stated, can be for a limited time or purpose. Here, the waivers were expressly "for the purposes of" the motion for continuance that was filed simultaneously with, or within days of, each of the four waivers—but no time limit for such waivers was specified. Therefore, the waivers, like the continuances simultaneously requested, were for an indefinite period of time.

[9,10] The Nebraska Supreme Court's opinion in *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989), essentially resolves the issues presented here as a matter of law. The *Andersen* court pronounced two significant holdings of law relating to speedy trial and waivers. The court announced a specific procedure for a criminal defendant to terminate an unconditional waiver of his or her speedy trial rights as well as the effect of a termination of an indefinite waiver:

> We hold that a defendant may terminate his waiver of a speedy trial by filing a written request for trial with the clerk of the court in which the defendant is to be tried. The defendant shall serve a copy of the written request for trial upon the prosecutor. The clerk of the court, immediately upon receipt of the request for trial, shall also forward a copy of it, together with the date of filing, to the trial judge and to the prosecutor's office. From the date the defendant files his written request for trial, the

> 6-month period for the State to bring a defendant to trial provided in § 29-1207 shall begin anew.

232 Neb. at 195, 440 N.W.2d at 211.

Thus, when this holding is applied to the present case, there are four different unlimited waivers of speedy trial rights, the last of which was filed July 26, 2010, and which was still effective at the time of the filing of the motion for discharge on October 25. And, after January 4, 2010, there was never a time that there was not a knowing, intelligent, and voluntary waiver of speedy trial rights in effect. And, even if one of such waivers could be considered as terminated, although none were via the specific procedure provided for in *Andersen*, the speedy trial clock starts anew after termination, meaning the State had another 6 months in which to bring Mortensen to trial. See, also, *State v. Dailey*, 10 Neb. App. 793, 802, 639 N.W.2d 141, 148 (2002) (defendant secured indefinite continuance and never provided "notice of any sort that she was ready for trial," which notice would have terminated her waiver of speedy trial rights). Finally, the motion for discharge, as said earlier, operates as a complete tolling of the speedy trial clock until finally resolved. Thus, the only time that has run off of the speedy trial clock is the 68 days from October 28, 2009, to January 4, 2010, as correctly calculated by the district court.

[11,12] We understand Mortensen's argument to be that the trial court's action in holding status conferences and making trial settings (all of which Mortensen moved to continue as well as filing a corresponding waiver of speedy trial rights) started the speedy trial clock running again against the State. However, it is clear that after a defendant's unlimited waiver of speedy trial rights, it is not the setting of a trial date by the court, but, rather, the defendant's request for a trial as outlined in *Andersen*, that starts the speedy trial clock running again—but running anew. Moreover, putting aside Mortensen's four waivers of speedy trial rights, the law is that even when the defendant requests, as Mortensen did, an indefinite continuance, it is his or her affirmative duty to end the continuance by giving notice of his or her request for trial, *State v. Dailey, supra*—something Mortensen never did. Accordingly,

the speedy trial clock was continuously tolled starting January 4, 2010, and has never begun to run again.

CONCLUSION

For the reasons outlined above, we find that the trial court correctly determined that as of the time of the filing of the motion for discharge on speedy trial grounds on October 25, 2010, only 68 days were chargeable to the State. All of the time since January 4, 2010, is chargeable to Mortensen and excluded from the speedy trial clock because of the waivers he filed. And, all of the time after the filing of the motion to discharge until such is finally resolved is chargeable to Mortensen. As a result, 112 days remain on the speedy trial clock, as determined by the district court.

AFFIRMED.

RYAN J. BRODRICK, APPELLEE, V. SARAH A. BAUMGARTEN, FORMERLY KNOWN AS SARAH A. BRODRICK, APPELLANT.

809 N.W.2d 799

Filed September 27, 2011. No. A-11-082.

1. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered.
2. **Modification of Decree: Child Support.** Among the factors to be considered in determining whether a material change of circumstances has occurred are (1) changes in the financial position of the parent obligated to pay support, (2) the needs of the children for whom support is paid, (3) good or bad faith motive of an obligated parent in sustaining a reduction in income, and (4) whether the change is temporary or permanent.
3. ____: ____. Changes in the financial position of the parent obligated to pay support are a factor to be considered in determining whether a material change of circumstances has occurred.
4. **Modification of Decree: Child Support: Rules of the Supreme Court: Presumptions.** Application of the child support guidelines which would result in a variation by 10 percent or more of the current support obligation establishes a rebuttable presumption of a material change of circumstances.

Appeal from the District Court for Dawes County: BRIAN C. SILVERMAN, Judge. Reversed and remanded.