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FUNDAMENTALLY FAIR? A CRITICAL LOOK AT THE DUE PROCESS AFFORDED PARENTS IN CHILD PROTECTION PROCEEDINGS UNDER MINNESOTA LAW.

Brooke Beskau Warg

I. INTRODUCTION.......................................................... 685

II. CONSTITUTIONAL RIGHTS.................................................. 687
    A. Substantive Due Process: Parenting as a Fundamental Right .................................................. 687
    B. Procedural Due Process and Fundamentally Fair Procedures.................................................. 688
    C. Santosky v. Kramer: Fundamental Fairness .......................................................... 689
    D. Lassiter v. Dep’t of Soc. Services: No Right to Counsel........... 690
    E. The Non-Party Parent’s Right to Representation in Minnesota.................................................. 691

III. REMOVAL UNDER MINNESOTA LAW ........................................ 693
    A. Case Study: Whisman v. Rinehart .......................................................... 694
    B. K.D. v. County of Crow Wing and Minnesota’s Removal Statute................................................. 695
    C. A Comparison with Other States’ Removal Statutes ........... 696

IV. ISSUES THROUGHOUT THE PROCEEDINGS ..................................... 698
    A. Out-of-Home Placement Plans.......................................................... 698
    B. Reasonable Efforts to Hold the Agency Accountable? ........ 701
    C. Social Services Agency Court Reports .................................................. 703
       1. Content of Reports.......................................................... 703
       2. A Parent’s Right to Rebuttal .......................................................... 704
       3. A Parent’s Right to Be Heard .......................................................... 704

V. MINIMAL OPPORTUNITY FOR APPELLATE REVIEW .................. 706
    A. No Appeal as of Right for an Intermediate Disposition Order.................................................. 706
    B. Reasonable Efforts Go Unchecked.......................................................... 708
    C. Emergency Protective Care Orders Goes Unchecked ....... 709
    D. Other Issues with the Emergency Protective Care Process.. 711

VI. TERMINATION OF PARENTAL RIGHTS ........................................ 713
    A. Involuntary Termination and Presumption of Pulpable Unfitness.................................................. 713
Parents have a “fundamental right to make decisions concerning the care, custody, and control of [their children].” However, more than three million parents are subject to child protection investigations every year in the United States. Approximately 700 to 800 children are removed from their homes daily, according to the U.S. Department of Health and Human Services. Removal of the child from the home is, in many cases, where the child protection process begins for parents and families and when the permanency-timeline clock starts ticking. Once the court has jurisdiction over the child, parents must correct the conditions that led to the out-of-home placement within a specified period. Sometimes parents

† Thank you to Natalie Netzel for her help in finding this topic, her support through the writing process, and her guidance as I learn to navigate the child protection system as a parent advocate.

have as little as three to six months—or up to twelve months in Minnesota—to correct the conditions before regaining full custody and control of their children. Parents not only work against the clock in child protection matters, but they also confront procedural issues throughout the proceedings that create barriers to the fundamentally fair procedures to which they are entitled. This is because child protection proceedings function differently than proceedings in a more traditional legal case.

For instance, once a court determines a child needs protection or services, the court must then oversee the process and efforts of the social services agency as that agency works toward permanency for the child and the family. A number of decisions made between the initial adjudication and the final permanency order have the potential to affect the outcome of the case and substantially affect a parent’s rights.

Other legal scholars have examined various issues within the child protection system and looked broadly at those problem areas. This note will explore Minnesota’s procedures throughout child protection proceedings that cut away at the due process rights of parents. First, this note will lay the backdrop by exploring the constitutional rights of parents in the upbringing of their children. Second, this note will cover the concepts of due process and fundamental fairness as they apply to parents involved in the child protection system. Third, this note will discuss various procedural barriers in Minnesota that diminish fundamental fairness for parents and erode parents’ due process rights. These procedural barriers include the lack of representation for parents in child

5. GUGGENHEIM & SANKARAN, supra note 4, at 2.
6. MINN. STAT. § 260C.505(a) (2016) (“A permanency or termination of parental rights petition must be filed at or prior to the time the child has been in foster care or in the care of a noncustodial or nonresident parent for 11 months . . . .”); MINN. STAT. § 260C.507(a) (2016) (“An admit-deny hearing on the permanency or termination of parental rights petition shall be held not later than 12 months from the child’s placement in foster care or an order for the child to be in the care of a noncustodial or nonresident parent.”); MINN. R. JUV. PROT. P. 4.03, subdiv. 2(b) (“[T]he court shall commence permanent placement determination proceedings to determine the permanent status of the child not later than twelve (12) months after the child is placed in foster care or in the home of a noncustodial or nonresident parent.”).
8. MINN. STAT. § 260C.007, subdiv. 27a (2017) (“‘Responsible social services agency’ means the county social services agency that has responsibility for public child welfare and child protection services and includes the provision of adoption services as an agent of the commissioner of human services.”).
10. See infra Parts IV, V.
welfare proceedings, issues with the removal of children from their parents, the inability to appeal certain orders throughout the proceedings, the lack of repercussions for child welfare agencies when they fail to perform their statutory obligations, and issues with involuntary termination and the presumption of palpable unfitness. Fourth, and finally, this note will explore the tension between the best interests of the child and the rights of the parents.

II. CONSTITUTIONAL RIGHTS

A. Substantive Due Process: Parenting as a Fundamental Right

The right of parents to control the care and upbringing of their children is a fundamental right protected by the U.S. Constitution. In its 1923 decision *Meyer v. Nebraska*, the U.S. Supreme Court held that a statute forbidding the teaching of any language except English to schoolchildren was unconstitutional because it interfered with an individual’s right to “establish a home and bring up children.” Then, in 1925, in *Pierce v. Society of Sisters*, the Court found the Oregon Compulsory Education Act, which required attendance at public schools, unconstitutional. The Court found that “the Act of 1922 unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control.” Furthermore, the Court held that “rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state.”

Later, in *Troxel v. Granville*, pursuant to a state statute permitting any person to petition the court for visitation rights, a state court granted visitation to the paternal grandparents of two children, despite the mother’s opposition to the amount of visitation the grandparents requested. The U.S. Supreme Court held that the parents’ determination

12. 262 U.S. 390 (1923).
13. *Id.* at 399.
15. *Id.* at 534.
16. *Id.* at 534–35.
17. *Id.* at 535.
19. *Id.* at 57.
of their child’s best interests must be given weight.\textsuperscript{20} The Court asserted that:

[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the state to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.\textsuperscript{21}

Thus, \textit{Troxel} reaffirmed that parents have a fundamental right to make decisions concerning the care, custody, and control of their children under the Due Process Clause of the Fourteenth Amendment\textsuperscript{22} by holding that the statute “unconstitutionally infringe[d] on that fundamental parental right.”\textsuperscript{23} In addition to substantive rights, parents also have procedural protections when the parent-child relationship is at stake.

\textbf{B. Procedural Due Process and Fundamentally Fair Procedures}

The Fourteenth Amendment of the U.S. Constitution states that no state shall “deprive any person of life, liberty, or property, without due process of law.”\textsuperscript{24} Due process has not been, nor will it likely ever be, precisely defined. Rather, “[a]pplying the Due Process Clause is . . . an uncertain enterprise which must discover what ‘fundamental fairness’ consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.”\textsuperscript{25}

When considering what process is due, there are three elements that must be analyzed: (1) the private interest at stake, (2) the government’s interests, and (3) the risk that the procedures used will lead to an erroneous decision.\textsuperscript{26} In the context of the parent-child relationship, due process analysis begins with the premise that a parent’s right to “the companionship, care, custody, and management of his or her children” is a significant interest that “warrants deference and, absent a powerful countervailing interest, protection.”\textsuperscript{27} This interest must be balanced against the state’s interest in the welfare of the child.\textsuperscript{28} Finally, the risk of erroneous deprivation of the right to parent must be considered in

\begin{itemize}
\item \textsuperscript{20} \textit{Id.} at 67.
\item \textsuperscript{21} \textit{Id.} at 68–69.
\item \textsuperscript{22} \textit{Id.} at 66.
\item \textsuperscript{23} \textit{Id.} at 67.
\item \textsuperscript{24} \textit{U.S. CONST. amend. XIV, § 1.}
\item \textsuperscript{25} \textit{Lassiter v. Dep’t of Soc. Servs.}, 452 U.S. 18, 24–25 (1981).
\item \textsuperscript{26} \textit{Id.} at 27 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).
\item \textsuperscript{27} \textit{Id.} (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)).
\item \textsuperscript{28} \textit{Id.}
\end{itemize}
assessing the procedural protections afforded to the parent.\textsuperscript{29} It is “not disputed that state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause.”\textsuperscript{30}

In \textit{Stanley v. Illinois},\textsuperscript{31} pursuant to an Illinois law, an unwed father’s children were declared wards of the state without a finding of unfitness when the children’s mother died. The Court found that as “a matter of due process of law,” the father was entitled to a hearing on his fitness as a parent before his children were taken away from him.\textsuperscript{32} Accordingly, \textit{Stanley} stands for the proposition that parents must be afforded due process in matters where the state seeks to dissolve their fundamental right to parent. As a component of due process, parents are entitled to “fundamentally fair procedures.”\textsuperscript{33}

\textbf{C. Santosky v. Kramer: Fundamental Fairness}

In \textit{Santosky v. Kramer},\textsuperscript{34} the U.S. Supreme Court had to decide whether a New York law, which required only “a fair preponderance of the evidence” to support a termination of parental rights, was a rigorous enough standard in the face of the Due Process Clause of the Fourteenth Amendment.\textsuperscript{35} The Court held that “the Due Process Clause of the Fourteenth Amendment demands more . . . . Before a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the state support its allegations by at least clear and convincing evidence.”\textsuperscript{36} The Court explained that:

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.

\textsuperscript{29} \textit{Id.} at 28.
\textsuperscript{31} 405 U.S. 645 (1972).
\textsuperscript{32} \textit{Id.} at 649.
\textsuperscript{33} \textit{Santosky}, 455 U.S. at 755.
\textsuperscript{34} \textit{Id.} at 745.
\textsuperscript{35} \textit{Id.} at 747–48.
\textsuperscript{36} \textit{Id.} at 747–48.
When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.\(^{37}\)

Accordingly, under *Santosky*, parents are entitled to fundamentally fair proceedings.\(^{38}\) However, notwithstanding the Court’s *Santosky* holding, parents are not necessarily entitled to representation.

**D. Lassiter v. Dep’t of Soc. Services: No Right to Counsel**

The U.S. Supreme Court’s decision in *Lassiter v. Department of Social Services*\(^{39}\) established that indigent parents do not have a right to appointed counsel in parental termination proceedings under the Constitution.\(^{40}\) The Court noted that “a parent’s desire for and right to ‘the companionship, care, custody, and management of his or her children’ is an important interest that ‘undeniably warrants deference and, absent a powerful countervailing interest, protection.’”\(^{41}\) Nonetheless, the Court held that the appointment of counsel in every parental termination proceeding is not constitutionally required.\(^{42}\) Therefore, individual legislatures and courts determine whether a parent will receive counsel and at what point in the proceedings counsel will be appointed.\(^{43}\) This leads to variation in how and when counsel is appointed to parents across the states. Some states require the appointment of counsel before the removal of a child from her parents.\(^{44}\) Other states do not appoint counsel until the parents’ rights are being terminated.\(^{45}\) But perhaps most troubling of all, some states allow a termination to be finalized without ever appointing counsel.\(^{46}\)

In Minnesota, a parent receives representation only if the court determines that “such an appointment is appropriate.”\(^{47}\) The discretionary nature of Minnesota’s statute, backed by the U.S. Supreme Court’s decision in *Lassiter*, means Minnesota parents may not be appointed counsel when their constitutional right to the control and custody of their

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37. *Id.* at 753–54.
38. *Id.*
40. *Id.*
41. *Id.* at 27 (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)).
42. *Id.*
43. Sankaran, supra note 11, at 2.
44. *Id.*
45. *Id.*
46. *Id.*
47. MINN. STAT. § 260C.163(3) (2016).
children is at stake. Recently, there have been efforts to reform and clarify this law through appellate advocacy.

E. The Non-Party Parent’s Right to Representation in Minnesota

The Minnesota Court of Appeals, in its 2018 decision In re Welfare of the Child of A.M.C. and G.J.F., 48 re-established that parents in Minnesota do not have a federal or state constitutional due process right to appointed counsel in a child in need of protection or services (CHIPS) case. The court, however, clarified whether a non-party parent in a CHIPS case is afforded the right to court-appointed counsel. 49

Specifically, G.J.F.—the adjudicated father of N.F., who was adjudicated a child in need of protection or services—attended the admit/deny hearing in the CHIPS case and requested court-appointed counsel. 50 At that time, the district court denied the father’s request because he was not a custodial parent and was not a party to the proceedings. 51 The district court also denied the father’s request to become a party to the proceedings. 52 The father did not receive court-appointed counsel until the county filed a petition seeking termination of parental rights of both parents in August 2017. 53 The father received court-appointed counsel for the termination proceedings and his parental rights were subsequently terminated. 54 On appeal, the court considered whether the father was entitled to reversal of the termination of his parental rights because of the district court’s failure to appoint counsel for him in the CHIPS case. 55

The court of appeals held that the district court erred when it “based its denial of appointed counsel for the father on the fact that the father was not a party to the CHIPS case.” 56 The court reasoned that section 260C.163, subdivisions 3(a)–(g) of the Minnesota Statutes provide that “[t]he child, parent, guardian or custodian has the right to effective assistance of counsel in connection with a proceeding in juvenile court as provided in this subdivision.” 57 Under Chapter 260C, a parent is defined

49. Id. at 648.
50. Id. at 653.
51. Id.
52. Id.
53. Id.
54. Id.
55. Id. at 654.
56. Id. at 659.
57. Id. (emphasis added).
as “a person who has a legal parent and child relationship with a child which confers or imposes on the person legal rights, privileges, duties, and obligations.” In this case, because he was the adjudicated father of N.F., the father was legally recognized as the child’s parent under Minnesota law.

Because the district court denied the father’s request for appointed counsel given his nonparty status, the court of appeals explained that the Minnesota Rules of Juvenile Protection Procedure distinguished between parties and participants. Specifically, the court noted that under the rules, a noncustodial parent, such as a father, is a participant unless the parent successfully intervenes under Minnesota Rules of Juvenile Protection Procedure 23. However, the court explained that section 260C.163 of the Minnesota Statutes and Minnesota Rules of Juvenile Protection Procedure 23 make no distinction between parents who are parties and parents who are participants regarding the appointment of counsel. Instead, the statute allows the district court to appoint counsel to an indigent parent when the court “feels that such an appointment is appropriate.” Under this reasoning, the court concluded that the father, as an adjudicated parent of N.F., should not have been denied court-appointed counsel simply because he was a participant rather than a party to the proceedings. Accordingly, the court of appeals found that the district court abused its discretion because it misapplied the law.

The court, however, did not ultimately reverse the termination of the father’s parental rights, noting that:

[T]he district court could have declined to appoint counsel for father in the CHIPS case had it felt, as it seems it may have felt, that appointment of counsel would be inappropriate for a parent who is repeatedly incarcerated, unavailable to care for the child, and marginally interested in working a case plan.

Despite the fact that the court did not reverse the father’s termination of parental rights, the court did clarify that all parents, regardless of their party status, are entitled to representation where the court finds that

58. Id. (citing MINN. STAT. § 260C.007, subdiv. 25 (2016)).
59. Id.
60. Id. at 660.
61. Id.
62. Id.
63. Id. at 659 (citing MINN. STAT. § 260C.163, subdiv. 3(c) (2016)).
64. Id. at 660.
65. Id.
66. Id. at 660–61.
While the court afforded parents slightly greater protection regarding appointment to counsel, it nonetheless did not alter the discretionary nature of Minnesota’s appointment-of-counsel statute. Consequently, under Minnesota law, parents may still not be afforded counsel when their parental rights are at stake.

Parents must contend with several other procedural barriers beyond the possible lack of representation that threaten the fundamentally fair procedures to which they are entitled.

III. REMOVAL UNDER MINNESOTA LAW

“Perhaps the most important court decision made at the outset of a child protection case is whether to remove a child from his or her home or whether to approve a removal if one has been made extrajudicially.”

Under Minnesota law, child protective services (CPS) can remove a child from their home before going to court under certain circumstances. The circumstances under which a child can be removed from her parents without judicial approval depend on the statutory language governing CPS’ operation. The issue is whether the statutory language that permits CPS to remove a child without judicial approval is specific or open-ended.

In contrast to state statutes that require “immediate danger” to the child to justify removal without a court order, Minnesota’s removal statute broadly states that a child can be taken into custody without a court order “when [the] child is found in surroundings or conditions which endanger the child’s health or welfare or which such peace officer reasonably believes will endanger the child’s health or welfare.” This broad language may be partially why Minnesota removes children from their homes at the sixth highest rate in the country. Beyond the fact that studies have shown

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67. *Id.*
68. GUGGENHEIM & SANKARAN, supra note 4, at 33.
69. *Id.* at 34.
70. *See id.*
71. *See id.* (discussing state statutes that require the risk of “imminent” or “immediate” harm to child to justify removal without a court order).
72. MINN. STAT. § 260C.175, subdiv. 1(2)(a) (2016) (emphasis added). *See also* GUGGENHEIM & SANKARAN, supra note 4, at 34 (“In many states, however, statutes that authorize police officers and child protective caseworkers to take children into protective custody without prior judicial approval contain considerably more open-ended language. For example, Oregon merely requires a caseworker’s conclusion that ‘the child’s condition or surroundings reasonably appear to be such as to jeopardize the child’s welfare.’”).
that children who are left in their homes fare better than those children placed in foster care—\textsuperscript{74}—which is reason enough to reconsider the statutory language—there may be constitutional due process issues for parents when their children are removed from their care without a court order.\textsuperscript{75}

\textbf{A. Case Study: Whisman v. Rinehart}

The decision of the U.S. Court of Appeals for the Eighth Circuit in \textit{Whisman v. Rinehart}\textsuperscript{76} illustrates the constitutional issues at stake.\textsuperscript{77} Joel Whisman, the sixteen-month-old son of Michelle Whisman, was removed from his mother’s care and placed in a shelter because she had not picked him up from the babysitter at the agreed-upon time, alongside reports from Michelle’s boyfriend that she was “passed out drunk” at home.\textsuperscript{78} Joel was placed in a shelter despite that the babysitter had arranged for his grandmother to pick him up.\textsuperscript{79} There was no court-ordered hold until thirteen days after Joel was taken into custody, and Michelle was not afforded a due-process hearing until Joel had been in custody for seventeen days.\textsuperscript{80} Moreover, the social services agency failed to investigate whether it was necessary to take Joel in the absence of physical neglect indicators, no immediate threat to his well-being, and no indication that Michelle was involved in any criminal activity.\textsuperscript{81}

Michelle Whisman brought suit against the juvenile officers and social workers, claiming that they violated her constitutional right to familial association and denied her the right to the due process of law.\textsuperscript{82} The court held that Michelle had an established right to the custody of Joel, that Joel had a corresponding right to familial association with his mother, and that the defendants violated these rights.\textsuperscript{83} The court further held that even if the defendants had the right to take custody of Joel, they were required to afford Michelle and Joel a post-deprivation hearing.\textsuperscript{84}

\textsuperscript{74}. Id.
\textsuperscript{75}. Id.
\textsuperscript{76}. See GUGGENHEIM & SANKARAN, supra note 4, at 34–36.
\textsuperscript{77}. See \textit{id.} at 36 (“[A] parent’s remedy for a constitutionally illegal seizure of one’s child is limited to a damages action in federal court pursuant to 42 U.S.C. § 1983 (2014).”).
\textsuperscript{78}. 119 F.3d 1303 (8th Cir. 1997).
\textsuperscript{79}. Id. at 1307.
\textsuperscript{80}. Id. at 1310.
\textsuperscript{81}. Id.
\textsuperscript{82}. Id. at 1307.
\textsuperscript{83}. Id. at 1310.
\textsuperscript{84}. Id.
This case not only illustrates the dangers associated with a lack of oversight of the decisions made by juvenile officers and social workers but also demonstrates the ease with which parents’ rights may be violated.

B. K.D. v. County of Crow Wing and Minnesota’s Removal Statute

In contrast to the Whisman example, the court in K.D. v. County of Crow Wing found that a mother’s constitutional rights were not infringed when her seven-year-old son was placed under a seventy-two-hour protective hold. The police had previously investigated the mother after reports that she was involved in narcotics trafficking. When the mother went to the law enforcement center with her son to retrieve her vehicle after the police had seized it, her son was placed in a protective hold. The officers later testified that they believed the mother had been under the influence of drugs when she reported to the law enforcement center; however, neither of the incident reports prepared by the officers indicated their belief that she was under the influence at the time of the child’s removal. The mother alleged violations of the Due Process Clause and violations of the Fourth Amendment.

In its analysis, the court examined section 260C.175 of the Minnesota Statutes and concluded that the defendants did not violate the mother’s constitutional rights when they temporarily removed the child pursuant to the statute because, based on the circumstances, the removal was proper. The court explained that:

The circumstances under which a child can be removed from his or her parents’ custody without a court order are extremely limited. ... Minnesota Statutes § 260C.175 . . . provides that a child may be taken into immediate custody by a peace officer “when a child is found in surroundings or conditions which endanger the child’s health or welfare or which such peace officer reasonably believes will endanger the child’s health or welfare.”

The court’s assertion that the statute provides extremely limited circumstances under which a child can be removed without a court order is flawed. Under the statute, a police officer may remove a child as long as

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85. 434 F.3d 1051, 1058 (8th Cir. 2006).
86. Id. at 1053.
87. Id. at 1054.
88. Id.
89. Id.
90. Id. at 1056.
91. Id. (emphasis added).
he merely “reasonably believes” that the child’s health or welfare is threatened.92

Furthermore, Minnesota law does not contemplate removal only where there is the risk of immediate or imminent harm as other states’ statutes do.93 The Minnesota statute’s subjective nature leaves the door open to situations in which a child may be removed without judicial approval. The court’s view that this statutory language limits the circumstances under which a child may be removed implies that courts are likely to approve a majority of non-court-ordered removals in Minnesota. This is because—under the court’s interpretation—removals not ordered by a court are understood to be the exception rather than the rule.

C. A Comparison with Other States’ Removal Statutes

This flawed interpretation is especially apparent when contrasted with other state statutes that limit the circumstances under which a child may be removed without judicial approval.94 For instance, in Arizona, “exigent circumstances” must exist to place a child into protective custody without a court order.95 Under Arizona’s statute, “exigent circumstances” means:

[T]here is probable cause to believe that the child is likely to suffer serious harm in the time it would take to obtain a court order for removal and either of the following is true: 1. There is no less intrusive alternative to taking temporary custody of the child that would reasonably and sufficiently protect the child’s health or safety. 2. Probable cause exists to believe that the child is a victim of sexual abuse or abuse involving serious physical injury that can be diagnosed only by a physician . . . or health care provider . . . and who has specific training in evaluations of child abuse.”

The statutes of West Virginia,96 Iowa,97 New Jersey,98 Washington,99 and Missouri all have similar requirements.100 In addition to the

92.  MINN. STAT. § 260C.127 (2016).
93.  See id.; see also GUGGENHEIM & SANKARAN, supra note 4, at 34.
94.  See GUGGENHEIM & SANKARAN, supra note 4, at 34.
96.  Id.
97.  W. VA. CODE ANN. § 49-4-303 (West 2019) (“a child protective service worker may take the child or children into his or her custody (also known as removing the child) without a court order when: (1) In the presence of a child protective service worker a child or children are in an emergency situation which constitutes an imminent danger . . . (2) The worker has probable cause to believe that the child or children will suffer additional child abuse or neglect or will be removed from the county before a petition can be filed and temporary custody can be ordered.”).
requirements of “no time to obtain a temporary order” and “immediate danger” to the child, Texas’ removal statute requires that any information furnished by another be “corroborated by personal knowledge of facts.”"102

Even in states where there is no time limitation requirement for action in the absence of a court order, other statutes still restrict instances where a child may be removed from the home. For example, Colorado’s statute provides that a child may be taken into temporary custody without a court order where “[a]n emergency exists and a child is seriously endangered . . . whenever the safety or well-being of a child is immediately at issue and there is no other reasonable way to protect the child without removing the child from the child’s home.”103

Thus, while the Eighth Circuit asserted Minnesota’s statute only allows children to be removed without a court order in “extremely limited” circumstances, closer scrutiny shows this is not the case. Accordingly, the subjective and open-ended nature of Minnesota’s statute, along with the

98. IOWA CODE ANN. § 232.79 (West 2019) (“A peace officer or juvenile court officer may take a child into custody, a physician treating a child may keep the child in custody, or a juvenile court officer may authorize a peace officer, physician, or medical security personnel to take a child into custody, without a court order as required under section 232.78 and without the consent of a parent, guardian, or custodian provided that both of the following apply: a. The child is in a circumstance or condition that presents an imminent danger to the child’s life or health. b) There is not enough time to apply for an order under section 232.78.”).

99. N.J. STAT. ANN. 9:6-8.29 (West 2019) (“A police officer or designated employee . . . may remove a child from the place where the child is residing, or any person or any physician treating a child may keep a child in the person’s or physician’s custody without an order . . . and without the consent of the parent or guardian . . . if the child is in such condition that the child’s continuance in the place or residence or in the care and custody of the parent or guardian presents an imminent danger to the child’s life, safety, or health, and there is insufficient time to apply for a court order . . .”).

100. WASH. REV. CODE ANN. § 26.44.050 (West 2018) (“A law enforcement officer may take, or cause to be taken, a child into custody without a court order if there is probable cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order . . .”).

101. MO. ANN. STAT. § 210.125 (West 2018) (“A police officer, law enforcement official, or a physician who has reasonable cause to believe that a child is in imminent danger of suffering serious physical harm or a threat to life as a result of abuse or neglect and such person has reasonable cause to believe the harm or threat to life may occur before a juvenile court could issue a temporary protective custody order . . . the police officer, law enforcement official or physician may take or retain temporary protective custody of the child without the consent of the child’s parents, guardian or others legally responsible for his care.”); GUGGENHEIM & SANKARAN, supra note 4, at 34.

102. TEX. FAMILY CODE ANN. § 262.104 (West 2017).

103. COLO. REV. STAT. ANN. § 19-3-401 (West 2018).
court’s interpretation that the statute only allows for limited removals, places Minnesota parents at a greater risk of having their children wrongfully removed from their care, in violation of their substantive and procedural due process rights.

IV. ISSUES THROUGHOUT THE PROCEEDINGS

Child protection cases begin and end with the typical due process procedures that attorneys understand and expect. These cases begin when the government formally charges a parent with abuse or neglect of a child. The government then has the burden of proving that the individual charged is an unfit parent, which results in the custody of the child being transferred to the governmental agency. Similarly, at the end of the proceedings, there is typically a permanency trial, where the state must prove by clear and convincing evidence that the parent has not corrected the conditions that initially led to the transfer of custody to the governmental agency. However, some of Minnesota’s statutes and rules that guide practices between these two bookends may not be fundamentally fair and may undermine a parent’s due process rights.

A. Out-of-Home Placement Plans

State laws require that the responsible social services agency make reasonable efforts to provide services to the family to remedy the issues


105. *Id.*; see MINN. STAT. § 260C.141, subdiv. 1 (2016) (stating that any “reputable person” having knowledge that a child is in need of protection or services may petition the juvenile court, and outlining the information a petition must contain, including, but not limited to, a statement of facts that would establish there is a need for protection or services).

106. Gupta-Kagan, *supra* note 104, at 15-16; see MINN. STAT. § 260C.163, subdiv. 1(a) (2016) (“To be proved at trial, allegations of a petition alleging a child to be in need of protection or services must be proved by clear and convincing evidence.”).

107. *Id.* at 16; see generally MINN. STAT. § 260C.163, subdiv. 1(a) (2016) (“To be proved at trial, allegations of a petition alleging a child to be in need of protection or services must be proved by clear and convincing evidence.”); MINN. STAT. § 260C.301, subdiv. 1(b) (2016) (stating that the juvenile court may terminate all rights of a parent to a child if it finds that “following the child’s placement out of the home, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the child’s placement.”).

that led to the out-of-home placement. To receive federal funds for foster care, the state must provide a written case plan for each child. Moreover, under federal law, the case plan must specify:

A plan for ensuring that the child receives safe and proper care and that appropriate services are provided to the parents, child, and foster parents: [t]o improve the conditions in the parents’ home[,] [t]o facilitate the child’s return to his or her own safe home or the alternative permanent placement of the child.

States typically require that the case plan include goals and objectives that the parent must meet to create a safe home for the child, along with timelines in which to complete the goals and objectives. The agency must file the out-of-home placement plan with the court once the child has been removed from her home.

Under the Minnesota Statutes, “[a]n out-of-home placement plan . . . shall be filed with the court within 30 days of the filing of a juvenile protection petition . . . when the court orders emergency removal of the child under this section.” Additionally, the out-of-home-placement plan is to be “developed jointly with the parent and in consultation with others.” While these statutes contemplate a timeline and procedures (developing the plan jointly with the parent) for the agency to complete the


111. Id.


114. Id.

115. See generally id. at 2 (“States . . . require a case plan when a child welfare agency places a child in out-of-home care, including foster care, placement with a relative, group homes, and residential placement.”).

116. MINN. STAT. § 260C.178, subdiv. 7(a) (2016); MINN. STAT. § 260C.212, subdiv. 1(a) (2016); MINN. R. JUV. PROT. P. 37.02, subdiv. 2.

117. MINN. STAT. § 260C.178, subdiv. 7(b) (2016); MINN. STAT. § 260C.212, subdiv. 1(b) (2016).
out-of-home placement plan, they do not contemplate repercussions for the agency in the event of noncompliance.\footnote{118}

Moreover, the Minnesota Court of Appeals, while examining whether a court’s failure to issue a termination-of-parental-rights order within the required fifteen days under Minnesota Rules of Juvenile Protection Procedure 39.05 and 10.01, found that the court’s failure to comply with the rules did not warrant a reversal or remand as the mother had argued.\footnote{119} The court of appeals asserted that Minnesota case law distinguishes between mandatory and directory provisions, and that where a statute contains a requirement, but provides no consequence for noncompliance, the statute is directory rather than mandatory.\footnote{120} Finally, the court of appeals found that noncompliance with a directory provision does not trigger an automatic penalty.\footnote{121} In this way, the court of appeals found that the district court’s noncompliance with the rules did not warrant a reversal because rules 10.01 and 39.05 do not provide a consequence for noncompliance. Since section 260C.212, subdivision 1, of the Minnesota Statutes does not contemplate a consequence for noncompliance, courts are likely to consider the thirty-day timeline a directory provision, which means noncompliance would not trigger an automatic penalty. Accordingly, even though the agency’s failure undoubtedly affects the parents who are required to comply with the case plan in a timely manner if they wish to regain custody of their children, the agency will suffer no repercussions for failing to comply with the thirty-day timeline in the statute.\footnote{122}

Not only must parents comply with the case plan if they wish to regain custody of their children, but they must make adequate progress on the case plan throughout the proceedings. For instance, in Minnesota, the

\footnote{118}{See Minn. Stat. § 260C.212 (2016) (outlining the requirements for the case plan).}
\footnote{120}{Id. (citing Johnson v. Cook County, 786 N.W.2d 291, 295 (Minn. 2010) and Hans Hagen Homes, Inc. v. City of Minnetrista, 728 N.W.2d 536, 541 (Minn. 2007)).}
\footnote{121}{Id. (citing Johnson, 786 N.W.2d at 295-96).}
\footnote{122}{See Minn. Stat. § 260C.301, subdiv. 1d)(iii) (2016) (“Conditions leading to the out-of-home placement have not been corrected. It is presumed that conditions leading to a child's out-of-home placement have not been corrected upon a showing that the parent or parents have not substantially complied with the court's orders and a reasonable case plan[].”); Minn. Stat. § 260C.517 (outlining the required findings for a disposition order, including “the parent’s or parents’ efforts and ability to use services to correct the conditions which led to the out-of-home placement; and that the conditions which led to the out-of-home placement have not been corrected so that the child can safely return home.”).}
court must conduct a permanency-progress-review hearing six months after the case begins. At this hearing, the court must review the progress of the case and, specifically, “the parent’s progress on the case plan or out-of-home placement plan, whichever is applicable.” If the court finds that the parent has maintained contact with the child and is complying with the court-ordered case plan, then the court may return the child home or continue the matter for up to another six months. However, if the court determines that the parent is not complying with the case plan, presumably measured by the parent’s progress, then the court may order the agency to develop a plan for a legally permanent placement away from the parent and file a permanency petition within thirty days. Accordingly, if the agency fails to file the case plan within the statutorily mandated thirty days, the parent is the only party who suffers the consequences at the six-month mark after failing to make progress. Moreover, the failure of the agency to file a case plan promptly also can affect the outcome of the case, as the parent is nevertheless held to the permanency timelines and must still correct the conditions that led to the out-of-home placement prior to the twelve month permanency deadline. Consequently, a late start on the case plan at the beginning of a case could mean termination of parental rights at the end.

B. Reasonable Efforts to Hold the Agency Accountable?

As noted, under federal law, state agencies are required to make “reasonable efforts” to rehabilitate parents who have had their children removed and ultimately reunify the family. What reasonable efforts entail, however, is not clearly defined in federal law. In Minnesota, what

124. Id.
125. Id.
126. See id. (“(a) When a child continues in placement out of the home of the parent or guardian from whom the child was removed, no later than six months after the child’s placement the court shall conduct a permanency progress hearing to review: (1) the progress of the case, the parent’s progress on the case plan or out-of-home placement plan, whichever is applicable[,]”).
127. Id.
129. O’Brien, supra note 110, at 1030.
130. See id. at 1054 (stating that “[t]here is lack of a concise definition in federal statute or judicial opinions . . . “); Amelia S. Watson, A New Focus on Reasonable Efforts to Reunify, A.B.A. (Jan. 9, 2018), https://www.americanbar.org/groups/child_law/resources/child_law_practiceonline/child_la
constitutes reasonable efforts is a factual inquiry that requires the court to consider several factors. Specifically, the “court shall consider whether services to the child . . . were: (1) relevant to the safety and protection of the child; (2) adequate to meet the needs of the child and family; (3) culturally appropriate; (4) available and accessible; (5) consistent and timely; and (6) realistic under the circumstances.” Regardless of how “reasonable efforts” are defined, the requirement seems intended to hold the agency accountable for its efforts to reunify the family, in light of the parents’ fundamental right to the care and custody of their child under the Fourteenth Amendment. Accordingly, the reasonable efforts requirement functions as a check on the agency. However, in practice, this requirement may not fulfill its apparent purpose.

Presumably, the parent may argue that the agency has failed to make “reasonable efforts” to create the case plan promptly when the agency does not meet the deadline outlined in the statute. However, even where the agency fails to make reasonable efforts to submit a timely case plan, judges are reluctant to find that no reasonable efforts were made because the state may lose federal aid. Consequently, even when agencies fail to make the required reasonable efforts, they do not suffer repercussions. Instead, parents who receive case plans more than thirty days into the case are the ones left with less time to remedy the conditions that led to the removal of their children.

132. Id.
133. O’Brien, supra note 110, at 1030.
134. See Gupta-Kagan, supra note 104, at 27 (“It is not surprising, therefore, that state courts’ implementation of federal ‘reasonable efforts’ requirements has faced criticism as substance-free rubber stamp decisions by state judges . . . . In the absence of a federal definition of the term or adequate federal funding for prevention or reunification services, ‘judicial findings of reasonable efforts are often made by judges by rote.’”).
135. See generally Priscilla Martens, Reasonable Efforts Revived, INTENSIVE FAM. PRES. SERVS., (Feb. 4, 2015), http://www.intensivefamilypreservation.org/reasonable-efforts-revived/ [https://perma.cc/6V3B-V5LB] (“In a revealing survey conducted in Michigan in 2005, 20% of judges reported they always found reasonable efforts had been made, 70% said they rarely concluded there were no reasonable efforts, and 40% admitted that they lied about reasonable efforts being made because the state would otherwise lose federal aid! A nationwide survey of over 1,200 juvenile court judges found that only 44 judges had ever made at least one no reasonable efforts finding.”); Gupta-Kagan, supra note 106, at 27 (“One study of 463 New York City cases involving children who had been in foster care for at least two years, and thus lacked legal permanency for a significant period of time, revealed that judges found that the government had made reasonable efforts to reach permanency in 457 cases.”).
C. Social Services Agency Court Reports

Similarly, under the Minnesota Rules of Juvenile Protection Procedure, the responsible social services agency “shall submit periodic certified reports to the court regarding the child and family.” These reports must be filed with the court and served upon all parties at least five days before the hearing at which the report will be considered. Additionally, the report may be supplemented at or before the hearing, orally or in writing. This rule implicates two issues that affect fundamental fairness for parents. First, the content of these reports is critical to the court’s decisions, even if the reliability of the report may be questionable. Second, this rule specifies that all reports be filed with the court and served upon the parties at least five business days before the hearing. Similar to the issue regarding the timeline for the filing of the out-of-home placement plan discussed previously, there are seemingly no repercussions contemplated in the rule for when the agency fails to file the report by the given deadline.

1. Content of Reports

Agency reports must contain not only demographic information pertinent to the case but also must “identify progress made on the out-of-home placement plan or case plan; . . . address the safety, permanency, and well-being of the child . . .; and . . . request orders related to . . . the child’s need for protection or services.” Thus, these reports offer critical information on which the court relies. As such, it is important to take a closer look at the sources of this information and their reliability.

The rule states that “[e]ach report shall include a statement certifying the content as true based upon personal observation, first-hand knowledge, or information and belief.” While each report must include a statement of veracity, the reports must be based merely on “personal observation, first-hand knowledge, or information and belief.” Consequently, these reports are nothing more than the subjective observations and beliefs of agency workers who need to do nothing more

136. MINN. R. JUV. PROT. P. 38.
137. MINN. R. JUV. PROT. P. 38.01, subdiv. 1.
138. Id. at subdiv. 2.
139. Id. at subdiv. 3.
140. See supra Section IV.A.
141. Id. at subdiv. 5.
142. Id.
143. Id.
than believe the truth of their statements. This information is then communicated to the court. The court, in turn, relies on this information in making significant decisions about the lives of children and families, as well as the trajectory of the case. Additionally, parents may not be afforded the opportunity to rebut this information when the reports are filed late.

2. **A Parent’s Right to Rebuttal**

While Minnesota Rules of Juvenile Protection Procedure 38 explicitly states that the agency shall file and serve the report at least five business days before the hearing, the rule itself does not include any language regarding the consequences for a failure to submit the reports within the designated time. Thus, similar to the timing requirement pertaining to case plans, the timing requirement for reports is likely a directory provision rather than mandatory. Accordingly, noncompliance would not trigger a consequence for the agency. However, lack of compliance with the timing requirement by the agency affects a parent’s right to be heard.

3. **A Parent’s Right to Be Heard**

One firmly established element of procedural due process is the opportunity to be heard. Minnesota law confers on parents the right to participate and be heard in the proceedings: “A parent with a legally recognized parent and child relationship must be provided the right to be heard in any review or hearing held with respect to the child, which includes the right to be heard on the disposition order . . ., parental visitation . . ., and the out-of-home placement plan.” While section 144.

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144. See generally Gupta-Kagan, supra note 104, at 22–25, 28 (including Minnesota in a list of states that do not provide statutory guidance regarding whether courts should receive contested evidence at hearings).
145. Id.
146. See infra Section IV.A.
147. United States Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 272 (2010) (“Due process requires notice ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’”).
148. **Minn. Stat.** § 260C.163, subdiv. 2(b) (2016).
149. Id.; **Minn. Stat.** § 260C.201, subdiv. 1 (2016).
150. **Minn. Stat.** § 260C.163, subdiv. 2(b) (2016); **Minn. Stat.** § 260C.178 (2016).
151. **Minn. Stat.** § 260C.163, subdiv. 2(b) (2016) (referring to **Minn. Stat.** § 260C.212, subdiv. 1).
260C.163 of the Minnesota Statutes ostensibly allows parents to participate in all proceedings, including “any review or hearing held with respect to the child,” when the agency fails to submit its reports on time, the parents’ opportunity to be heard is eroded.

The timing requirement in this rule was presumably included to allow parents or their counsel to effectively prepare for the hearing by reviewing the report, identifying any inaccuracies, and taking the necessary steps to correct or counter those inaccuracies. Under Minnesota Rules of Juvenile Protection Procedure 38.10, “[a] party may object to the content or recommendations of the responsible social services agency’s report by submitting a written objection either before or at the hearing at which the report is to be considered . . . . Objections . . . may also be stated on the record.” But when the agency fails to file the report within five business days of the hearing at which it will be considered, parents and counsel are left with little to prepare for the hearing and ensure that parents have a meaningful opportunity to be heard.

Preparation is important because, at these hearings, the court reviews “whether foster care is necessary and continues to be appropriate or whether the child should be returned to the home of the parent or legal custodian from whom the child was removed.” Additionally, the court must determine, among other things, whether the agency is making reasonable efforts, the parents’ progress toward case plan goals, and whether the parent is visiting the child. These are all significant decisions that can affect the case and later permanency decisions. Furthermore, as explained in more detail below, orders from review hearings or intermediate-disposition hearings are not appealable since they are not “final” orders of the court. Accordingly, when parents or their attorneys are not provided with reports promptly before the hearing, the agency suffers no repercussions, but the parents likely will. This is especially true when parents are unrepresented.

152. Id.
153. MINN. R. JUV. PROT. P. 38.10.
154. MINN. R. JUV. PROT. P. 41.06, subdiv. 2(a).
155. Id.
156. See infra Part V.
157. Felders v. Barrett, 885 F.3d 646, 650 (10th Cir. 2018) (“A ‘final decision’ is ordinarily one that ‘ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’”).
158. See generally Gupta-Kagan supra note 104, at 23 (discussing the fact that in New York, delayed and incomplete agency reports are the biggest cause of delayed permanency hearings).
Thus, there are several issues with social services agencies’ court reports that impact the rights of parents and undoubtedly affect how each case unfolds. Moreover, the court’s decisions at each review hearing where a report is considered are not appealable; consequently, these decisions go unchecked by a higher court.

V. MINIMAL OPPORTUNITY FOR APPELLATE REVIEW

In child welfare cases, the appellate system functions as a safeguard that ensures that the parent-child relationship is not unfairly terminated. It forces the parties and the courts to follow statutes, rules, and policies, and provides an independent check to correct any mistakes.159 Minnesota is one of many states that require juvenile protection hearings to apply traditional appellate rules.160 This means that appellate review is limited to final orders, which does not fit well into the system of juvenile protection proceedings where most of the court’s orders are not considered “final.”161 Consequently, “many—if not most—of the decisions about the scope and definition of a child’s legal rights are completely shielded from appellate review.”162 Not only are a child’s legal rights affected but a parent’s rights are implicated as well.163

A. No Appeal as of Right for an Intermediate Disposition Order

The Minnesota Rules of Juvenile Protection Procedure state that “[a]n appeal may be taken by the aggrieved person from a final order of the juvenile court affecting a substantial right of the aggrieved person, including but not limited to an order adjudicating a child to be in need of protection or services, neglected and in foster care.”164 The rule seemingly contemplates that there are orders beyond an order adjudicating a child in need of protection or services that may be appealed as of right.

160. Minn. R. Juv. Prot. P. 47.01 (“Appeals of juvenile protection matters shall be in accordance with the Rule of Civil Appellate Procedure.”); LeVezu, supra note 7, at 2.
162. LeVezu, supra note 7, at 7.
163. Id. at 2.
164. Minn. R. Juv. Prot. P. 47.02, subdiv. 1.
Nonetheless, the Minnesota Court of Appeals has determined that intermediate-disposition-hearing orders are categorically not appealable.\(^165\)

In \textit{In re Welfare of the Child of E.G. and K.G., Sr., Parents},\(^166\) appellants E.G. and K.G., Sr. appealed an intermediate dispositional order in the CHIPS matter concerning their two children.\(^167\) Child One had previously been removed from the home and placed in foster care, while Child Two was allowed to remain in the home.\(^168\) However, the county later filed an emergency motion to remove Child Two from the home, and after a hearing on December 1, 2015, the court ordered Child Two to be placed in foster care.\(^169\) At a dispositional review hearing on December 17, 2015, after the removal of the second child, the court ordered that both children remain in foster care, that the county determine whether the children’s grandparents could be foster-care licensed, and that the parents receive supervised visitation.\(^170\) The parents appealed both orders.\(^171\)

The Minnesota Court of Appeals held that an intermediate dispositional order in a CHIPS matter is not appealable as a matter of right.\(^172\) The court noted that in juvenile-protection proceedings, the interim dispositional orders, which grant legal custody to the responsible social services agency, are subject to district court review every ninety days.\(^173\) In its holding, the court asserted, “The district court’s intermediate dispositional orders prior to the permanency hearing do not determine a substantial right of [parents] and, therefore, are not appealable as a matter of right under Minn. R. Juv. Prot. P. 47.02, subd. 1.”\(^174\) Because the orders did not determine the final placement of the children, the court reasoned that they were not “final” orders under the Minnesota Rules of Juvenile Protection Procedure\(^175\) and therefore, were not appealable as of right.\(^176\)


\(^{166}\) \textit{Id.}

\(^{167}\) \textit{Id. at 873.}

\(^{168}\) \textit{Id.}

\(^{169}\) \textit{Id.}

\(^{170}\) \textit{Id. at 873–74.}

\(^{171}\) \textit{Id. at 874.}

\(^{172}\) \textit{Id. at 874–75.}

\(^{173}\) \textit{Id. at 874 (citing Minn. R. Juv. Prot. P. 41.06, subdiv. 1).}

\(^{174}\) \textit{Id. at 875.}

\(^{175}\) Minn. R. Juv. Prot. P. 47.02, subdiv. 1.

\(^{176}\) \textit{In re Child of E.G. and K.G., Sr.,} 876 N.W.2d at 874; Gupta-Kagan, \textit{supra} note 104, at 29.
B. Reasonable Efforts Go Unchecked

As noted previously, one of the functions of the appellate system is to ensure that the court and the parties follow statutes, rules, and agency policies.\(^\text{177}\) In the case of reasonable efforts, which a court must determine at each intermediate disposition hearing,\(^\text{178}\) the court’s finding is nearly always in favor of the agency\(^\text{179}\) and goes unchecked by higher courts throughout the proceedings.\(^\text{180}\)

Of course, the reasonable efforts of the agency may be checked after the final termination order, as was the case in *In re Welfare of the Children of A.R.B.*\(^\text{181}\) In that case, the district court terminated the father’s parental rights after finding that he failed to complete a case plan to correct conditions that led to his son’s out-of-home placement.\(^\text{182}\) However, the county never actually developed a case plan for the father to complete, and the evidence showed that the county never attempted to explore any reunification services for the father during his period of incarceration.\(^\text{183}\) On appeal, the father argued that the county failed to provide reasonable rehabilitative efforts to reunify him with his son.\(^\text{184}\) Specifically, he argued that the court must reverse the district court’s order terminating his parental rights because the county had not prepared a written case plan that outlined the necessary steps he needed to take to reunite with his son.\(^\text{185}\)

The court found that section 260C.212 of the Minnesota Statutes was unambiguous.\(^\text{186}\) The statute mandates that a case plan be prepared and that it include all necessary components outlined in the statute, including reasons for placement of the child in foster care, a description of the problems or conditions that led to the out-of-home placement, and the changes the parent must make for the child to safely return home.\(^\text{187}\) Because the county never provided the father with a written case plan, the

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177. See infra Part V.
178. *Minn. Stat.* § 260C.201, subd. 2 (2016) (stating that any order for disposition must set forth in writing whether reasonable efforts to finalize the permanent plan for the child were made, including reasonable efforts to reunify the child with the parent or guardian).
179. See supra note 136.
182. Id. at 896.
183. Id.
184. Id. at 897.
185. Id.
186. Id.
187. Id.
court reversed the termination of the father’s parental rights and remanded the case to the district court to allow the county to prepare a case plan with the father and provide him with an opportunity to complete it.\textsuperscript{186}

This case illustrates the importance of appellate review in child-protection proceedings, as well as its pivotal role in enforcing the rights of parents who find themselves in the system. However, this case also illustrates that reasonable efforts go unchecked until the final order. This means that children remain in foster care—as D.T.R.’s child did—while their parents navigate a system that is, at times, indifferent to their rights and not held accountable for inaction.\textsuperscript{187} Had the county’s efforts been checked earlier in the process, the outcome may have been different. Additionally, as noted previously, one of the goals of the system is to achieve timely reunification for families.\textsuperscript{189} When reasonable efforts go unchecked until the end of the proceedings, parents do not have their rights enforced, families spend more time in the system, and children spend more time in foster care. Not only do reasonable efforts by the agency go unchecked, but emergency removals also go unchecked.

C. Emergency Protective Care Orders Goes Unchecked

In Minnesota, the court must hold an emergency removal hearing within seventy-two hours of the time the child was removed from her parents to determine whether the child should continue in custody.\textsuperscript{191} At that hearing, the child may be released to the parents if the court determines that the child’s health or welfare is not immediately endangered.\textsuperscript{192} Alternatively, if the court concludes that the child’s health or welfare will be immediately endangered in the care of the parent, then “the court shall order the child into foster care under the legal responsibility of the responsible social services agency.”\textsuperscript{193} The court must

\textsuperscript{188} Id. at 900.
\textsuperscript{189} See Gupta-Kagan, supra note 104, at 27 (“When such decisions cannot be appealed until the end of a case—when an adoption decree or termination of parental rights decision is entered—appellate judges face strong incentives to avoid close examination of reasonable efforts decisions. Overturning a permanency decision based on the lack of reasonable efforts earlier in the case could ‘upset stability for a child who has been previously neglected or abused. In such circumstances, courts may find it earlier to rule that reasonable efforts need only mean meager or pro-forma efforts.’”).
\textsuperscript{190} See supra Section IV.A.
\textsuperscript{191} Minn. Stat. § 260C.178, subdiv. 1(a) (2016).
\textsuperscript{192} Id. at subdiv. 1(b).
\textsuperscript{193} Id. at subdiv. 1(c).
issue a written order within three days of the conclusion of the emergency protective care (EPC) hearing.\footnote{194}

There is no language in the emergency protective care rule or statute that indicates that an EPC order may be appealed.\footnote{195} Furthermore, similar to an intermediate disposition order, the emergency protective order is reviewable by the court and is, therefore, likely not considered a “final” appealable order under current Minnesota law.\footnote{196} For instance, the court may schedule a formal review hearing concerning continued protective care at the request of a party or the county attorney.\footnote{197} At the conclusion of the review hearing, the court can either return the child home, continue the child in protective care, or release the child with conditions to assure the child’s safety.\footnote{198} Accordingly, because the court has a mechanism for review by way of motion of any party, and the EPC rule and statute do not contain language indicating that the order is appealable, an effort to appeal an EPC order would likely be rejected.\footnote{199}

Notably, while the EPC order may not be considered a “final” order, it undoubtedly affects “a substantial right” of the parent. An EPC order effectively, even if only temporarily, ends a parent’s fundamental right to the “care, custody, and control” of his or her children.\footnote{200} However, the rule reads, “An appeal may be taken by the aggrieved person from a final order of the juvenile court affecting a substantial right of the aggrieved person . . . .”\footnote{201} The rule’s implied conjunctive nature does not allow a court to consider separately whether the order is final or whether it affects a

\begin{footnotes}
\footnotetext{194}{MINN. R. JUV. PROT. P. 30.10.}
\footnotetext{196}{See MINN. R. JUV. PROT. P. 47.02, subdiv. 1; accord In re Child of E.G. and K.G., Sr., 876 N.W.2d 872, 874 (Minn. Ct. App. 2016); In re Welfare of Child of B.G. and B.C., A16-1512, 2017 WL 958476, at *4 (Minn. Ct. App. Mar.13, 2017) (“In this case, the EPC order was not an appealable final order affecting substantial rights.”) (citing In re Welfare of E.G., 876 N.W.2d at 873-74); In re Welfare of E.G., 876 N.W.2d at 874.}
\footnotetext{197}{MINN. R. JUV. PROT. P. 30.11, subdiv. 3(a)-(b).}
\footnotetext{198}{Id. at subdiv. 3(d)(1)-(2).}
\footnotetext{199}{Netzel et al., supra note 195; In re Welfare of Child of B.G. and B.C., 2017 WL 958476, at *4.}
\footnotetext{200}{See Troxel v. Granville, 530 U.S. 57, 58 (2000).}
\footnotetext{201}{MINN. R. JUV. PROT. P. 47.02, subdiv. 1.}
\end{footnotes}
substantial right of the parent. Instead, an order is only appealable where it is final and affects a substantial right of a parent.\textsuperscript{202}

As noted previously,\textsuperscript{203} this is significant within the context of this rule’s application and because of the unique nature of child-protection proceedings.\textsuperscript{204} The ongoing nature of the proceedings means that substantial rights of parents are repeatedly reviewed, and decisions regarding these substantial rights are made each step of the way.\textsuperscript{205} The lack of appellate review of these decisions means that many, if not all of them, will go unchecked by a higher court.\textsuperscript{206}

\textbf{D. Other Issues with the Emergency Protective Care Process}

Besides the fact that emergency protective care determinations likely are not appealable, there are other issues with the EPC process that must be addressed. For example, the court must advise all parties and participants of their rights at the EPC hearing.\textsuperscript{207} Specifically, the court must advise the parties of their right “to present evidence and to cross-examine witnesses regarding whether the child should return home with or without conditions or whether the child should be placed in protective care.”\textsuperscript{208} This provision seems to afford procedural due process\textsuperscript{209} to all

\begin{itemize}
\item \textsuperscript{202} \textit{Id.}
\item \textsuperscript{203} See \textit{supra} Part V.
\item \textsuperscript{204} See LeVezu, \textit{supra} note 7, at 2 (“In the realm of state trial courts, child abuse and neglect (dependency) proceedings are unique. A traditional court case starts with a list of grievances by one party and ends with a settlement or trial resolving those grievances on the merits. However, the dependency proceedings that accompany a child’s entry into foster care are different. Dependency proceedings place courts in the position of not only determining an ultimate result, but of overseeing the ongoing actions of a state agency . . . . The grievances in a dependency proceeding are ever-changing as the child grows and her needs and circumstances change.”).
\item \textsuperscript{205} \textit{Id. at 8.}
\item \textsuperscript{206} \textit{Id.}
\item \textsuperscript{207} \textsc{Minn. R. Juv. Prot. P.} 30.05.
\item \textsuperscript{208} \textit{Id.}
\item \textsuperscript{209} Henry J. Friendly, \textit{Some Kind of Hearing}, 123 U. Pa. L. Rev. 1267 (1975) (including in the elements of a fair hearing: an unbiased tribunal, notice of the proposed action and the grounds asserted for it, an opportunity to present reasons why the proposed action should not be taken, the right to present evidence (including the right to call witnesses, the right to know opposing evidence, the right to cross-examine adverse witnesses), a decision based exclusively on the evidence presented, opportunity to be represented by counsel, requirement that the tribunal prepare a record of the evidence presented, and requirement that the tribunal prepare written findings of fact and reasons for its decision).  
\end{itemize}
parties, but in practice, only the county attorney is able to present evidence and cross-examine witnesses.

Parents are first advised of their rights “at the beginning of the emergency protective care hearing.” This means that parents may not be aware that they have the right to present a defense until they walk into the courtroom. Nor are they given adequate time or means to prepare their defense before the hearing. In contrast, the county enters the hearing presumably armed with a report that will act as evidence as to why the child should remain in protective care. This lack of time for the parent to meaningfully prepare is coupled with that fact that the parent may not be represented by counsel. While their right to introduce evidence or cross-examine witnesses does not disappear simply because they are unrepresented, a parent’s likelihood of successfully combating the county’s allegations through the presentation of their own evidence or through effective cross-examination is slim without the assistance of counsel. Even where counsel is appointed, the lawyer probably will be a public defender who, given large caseloads, lacks the time to prepare a meaningful defense to the county’s allegations, as they have likely just been introduced to the client and the case.

Finally, the court has broad discretion to admit “any evidence . . . that is relevant to the decision of whether to continue protective care of the child or return the child home.” This includes “reliable hearsay” and “opinion evidence.” While this may allow a parent who is not represented and not well-versed in the rules of evidence to present a defense, it also means that a parent’s fundamental right to the care and control of her child is halted based, at times, only on hearsay and the opinions of others, rather than facts backed by reliable evidence.

210. MINN. R. JUV. PROT. P. 30.05.
211. MINN. STAT. § 260C.163, subdiv. 3(a) (2016).
212. See generally Powell v. Alabama, 287 U.S. 45, 68–69 (1932) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one . . . . He requires the guiding hand of counsel at every step in the proceedings against him.”).
213. MINN. R. JUV. PROT. P. 30.06.
214. Id.
215. See FED. R. EVID. 102 (“These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”).
VI. TERMINATION OF PARENTAL RIGHTS

A. Involuntary Termination and Presumption of Palpable Unfitness

Under Minnesota law, a parent “is presumed . . . palpably unfit to be a party to the parent and child relationship upon a showing that the parent’s parental rights to one or more other children were involuntarily terminated or that the parent’s custodial rights to another child have been involuntarily transferred to a relative.”216 As an initial matter, parents who invoke their right to a trial in the face of termination or transfer of custody run the risk of being labeled “palpably unfit.” However, parents who voluntarily relinquish their right to the control and custody of their child, without holding the state to its burden of proving unfitness by clear and convincing evidence, will not be deemed palpably unfit.217 Beyond the fact that a parent who holds the state to its burden runs the risk of being classified as palpably unfit, there are other issues with the statutory presumption.

When a parent’s rights have previously been terminated, the county’s duty to provide reasonable efforts to rehabilitate the parent and reunify the family is relieved.218 The presumption is seemingly meant to protect the best interests of children by expediting the termination of parental rights and quickly establishing permanency for children.219 As noted in In re Welfare of Child of R.D.L. and J.W., Parents,220 “[t]he statutory presumption directly serves the compelling government interest of protecting children because it facilitates the more expeditious resolution of cases involving children in need of protection. The principle that child protection cases are to receive priority and be resolved quickly is a thoroughly engrained policy . . . .”221 Although well intentioned, this presumption undermines parental rights and due process protections.

217. See id.
218. MINN. STAT. § 260.012 (a)(2), (4) (2016); In re P.T. and A.T., 657 N.W.2d 577, 592 (Minn. Ct. App. 2003) (finding that the elimination of the requirements of reasonable efforts in cases where there has previously been an involuntary termination does not violate the Minnesota Constitution).
220. 853 N.W.2d 127 (Minn. 2014) (establishing that the statutory presumption in Minnesota Statute §260C.301, subdivision 1(b)(4) does not violate the Equal Protection Clauses of the Minnesota or United States Constitutions).
221. Id. at 134.
Vivek Sankaran explains, “[l]awyers challenging the constitutionality of prior TPR statutes have relied upon Stanley to frame their arguments.” In Stanley v. Illinois, under Illinois law, unwed fathers were presumed incapable of caring for their children. When the mother of Stanley’s children died, his children became state wards without the state proving that Stanley was unfit to parent. The Illinois Supreme Court ultimately held that as a matter of due process, Stanley was entitled to a hearing on his fitness before his children we taken from him. The court reasoned:

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child.

The court further asserted the state “insists on presuming rather than proving Stanley’s unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.”

The presumption under Minnesota law can be distinguished from the presumption in Stanley v. Illinois. The Minnesota presumption applies to parents who have previously been proven unfit to parent and had their parental rights involuntarily terminated, rather than simply applying to all unwed parents, regardless of their fitness as parents. However, that does not eliminate the dangers associated with operating under a presumption. Specifically, as the Supreme Court noted in Stanley, the presumption “forecloses the determinative issues of competence and care” and “needlessly risks running roughshod over the important interests of both parent and child.”

Despite the apparent contradiction between the holding in Stanley v. Illinois and the statutory presumption under Minnesota law, the presumption remains.

222. Sankaran, supra note 219, at 696.
223. 405 U.S. 645 (1972).
224. Id. at 647.
225. Id. at 646.
226. Id. at 649.
227. Id. at 656–57.
228. Id. at 658.
230. Stanley, 405 U.S. at 646–47.
231. Id. at 657.
1. **Challenging the Presumption in Minnesota**

Despite challenges to it, the presumption remains in Minnesota. In *In re Child of P.T. and A.T.*, appellant-parents challenged the involuntary termination of their parental rights to their fifth child after their rights to their other four children had previously been involuntarily terminated. On appeal, appellants argued, among other things, that the statutory presumption of unfitness found in section 260C.301, subdivision 1(b)(4), of the Minnesota Statutes violated appellants’ procedural and substantive due process rights under both the United States Constitution and the Minnesota Constitution.

In its procedural due process analysis, the court noted that due process in parental termination proceedings “embodies the notion of fundamental fairness.” The court went on to assert that “[f]undamental fairness guarantees a parent facing termination proceedings a right to a meaningful adversarial hearing.” Accordingly, the court concluded that because appellants were afforded an adversarial proceeding, the presumption in section 260C.301, subdivision 1(b)(4) did not deny procedural due process to parents.

Similarly, in its substantive due process analysis, the court concluded that the statutory presumption does not violate parents’ substantive due process right to raise their children. The court reasoned that the state has a compelling interest in protecting children from abuse by their parents and that the statute is narrowly tailored to meet the state’s compelling interest. The court asserted that a “parent who has had his or her parental rights involuntarily terminated has been adjudicated as posing a threat to the child now and into the future.” This view is precisely what worried the Supreme Court in *Stanley*: the notion that a parent who has...
had her rights terminated poses a threat to children now and in the future.\textsuperscript{241}

In applying a presumption that a parent is palpably unfit, the court is determining that because a parent was unfit at one time, she will always be unfit.\textsuperscript{242} When courts and child-welfare agencies presume that a parent is unfit simply because she or he may have been at one time, they ignore the fact that people grow and change over time.\textsuperscript{243} This, in turn, suggests a belief that efforts to rehabilitate are futile.\textsuperscript{244} This view undermines the entire child protection system, which is intended to focus on the rehabilitation of parents and reunification of families.

Thus, a parent who has had his or her rights involuntarily terminated is classified as unfit, and any future parent-child relationship may be terminated.\textsuperscript{245} So, while the parent may be afforded a trial regarding fitness to parent, it typically occurs after the children have already been removed from the parent’s care, regardless of whether or not the parent is currently fit.\textsuperscript{246} Parents are then tasked with overcoming the statutory presumption that they are unfit to parent.

2. Case Study: The Presumption in Kansas\textsuperscript{247}

While Kansas did not invalidate the statutory presumption entirely, the Kansas Supreme Court did invalidate the presumption as it pertained to \textit{In re Interest of J.L. and D.L.}\textsuperscript{248} The court’s reasoning offers further insight into the deficiency of a statutory presumption such as the one the court confronted in the case and the one found in Minnesota.

\begin{itemize}
  \item 241. Stanley v. Illinois, 405 U.S. 645, 657–58 (1972); see Sankaran, supra note 219, at 698 (“The reasoning in these cases flatly contradicts Stanley, which barred courts from relying on irrebuttable presumptions to find a parent to be currently unfit based solely on past conduct.”).
  \item 242. Sankaran, supra note 219, at 699.
  \item 243. \textit{Id} (citing \textit{In re Gach}, 889 N.W.2d 707 (Mich. Ct. App. 2016)).
  \item 244. \textit{Id}.
  \item 245. See MINN. STAT. § 260C.301, subdiv. 1(4).
  \item 247. In his article, \textit{Child Welfare’s Scarlet Letter: How a Prior Termination of Parental Rights can Permanently Brand a Parent as Unfit}, author Vivek Sankaran briefly summarizes the court’s findings in \textit{In re J.L.} as an example of courts that have invalidated prior TPR statutes. Mr. Sankaran’s article provides a more thorough analysis and highlights the issues with the statutory presumption found in Minnesota law. See Sankaran, \textit{supra} note 219, at 697–98.
\end{itemize}
In *In re Interest of J.L. and D.L.*, a mother had had her parental rights to two children terminated by court order. When the mother had another child eight years later, the state sought termination of her parental rights to that child. Operating under a Kansas statute that contained a presumption of unfitness where a parent had a previous termination, the state simply offered proof of the prior termination as evidence of the mother’s unfitness. The mother was then burdened with rebutting that presumption. Despite the mother’s efforts, the trial court found that she had failed to rebut the presumption and terminated her parental rights once again.

On appeal, the court questioned whether the mother’s procedural due process rights were violated. To answer that question, the court looked to *Mathews v. Eldridge* and applied the *Mathews* test. In analyzing the case, the court first looked at the private interests affected by the government’s action. Here, the private interest was the parent’s right to the custody and control of her child. The court reasoned that “other than the right to personal freedom, there may be no private right valued more highly or protected more zealously by the courts than the right of a parent to the custody and control of his or her children.” Accordingly, the court concluded that the private rights affected were “very significant” and “entitled to the highest protection.”

The second factor the court analyzed under the *Mathews* test was the risk of error from the procedures employed and the value of different procedural safeguards. The court weighed the risk of error in using the “uncontrolled presumption of unfitness versus the standard procedure of

249. Id.
250. Id. at 666.
251. Id. at 666–67.
252. Id. (citing K.S.A. 1994 Supp. 38-1585) (“If the state establishes by clear and convincing evidence that: (1) A parent has previously been found to be an unfit parent in proceedings . . . (b) The burden of proof is on the parent to rebut the presumption. In the absence of proof that the parent is presently fit . . . the court shall now terminate the parent’s parental rights . . . .”).
253. Id. at 667.
254. Id. at 668.
255. Id. at 669.
256. Id.; see supra Section II.B.
258. Id.
259. Id.
260. Id.
261. Id.
requiring the State to prove that unfitness.” The court ultimately determined that the risk of error in using the presumption (as applied in this case) was too high. The court noted that allowing the state to terminate a parent’s rights, based on documentation of an eight-year-old termination, was simply too easy a task for the government and that there was “no good reason to excuse the government from the task of proving unfitness by clear and convincing evidence.”

Perhaps most significant is the court’s comparison between the resources available to the state and the resources available to the parent. The court found that the parent is always operating at a disadvantage in terms of resources and that applying the statutory presumption of unfitness only magnifies this disadvantage. The court concluded, “The net result is an unacceptable risk that a parent judged unfit many years ago will erroneously be adjudged unfit today for no other reason than a presumption based on the result in a case which has become irrelevant.”

More importantly, the court’s reasoning on this issue cannot be limited to cases where the prior termination was eight years old. Parents, regardless of the age of the prior termination, nearly always operate at a disadvantage in this system. This is especially true when parents must prove their current fitness while the state merely needs to present evidence of a prior termination to dissolve the parent-child relationship. On this issue, the court analogized, stating that:

> The State may not deprive a citizen of liberty by doing nothing more than filing proof of a prior conviction. The State may, however, terminate parental rights by doing nothing more than filing proof of a prior termination. Once this is done, parental rights will be terminated unless the unfortunate parent can convince the trial court that he or she is no longer unfit... that burden is shifted from the State with all its resources to a parent who has little, if any, resources in comparison.

Ultimately, the court determined that to remedy this disadvantage, at least in this case, the state must be required to prove its case without the benefit of the presumption. This adjustment would not only reduce the risk of error, but also would readjust resources available to the parties and ensure that parental rights cannot be terminated without clear and

262. Id.
263. Id. at 672.
264. Id.
265. Id.
266. Id. at 672–73 (emphasis added).
267. Id. at 674.
268. Id.
convincing evidence of the parent’s current unfitness.\textsuperscript{269} Again, while the court intended to apply this procedure to the case at hand, this remedy would undoubtedly improve procedural protections for parents in all subsequent termination cases.

Finally, as to the last \textit{Mathews} factor, the court found that the state’s power to protect children would not be hindered by eliminating the presumption, as it does not place an unreasonable burden on the government. The court determined that the loss suffered by a parent “greatly outweighs the government’s interest in a summary adjudication.”\textsuperscript{269}

As noted previously, the court did not find the statute itself unconstitutional;\textsuperscript{270} rather, it found the statutory presumption unconstitutional as applied to the case at hand.\textsuperscript{271} Despite the court’s determination that the statute itself was constitutional, the court’s application of the \textit{Mathews} test identified procedural issues that must be considered in any case that uses presumptions.

3. Minnesota’s Approach to the Statutory Presumption

Minnesota’s approach to statutory presumption challenges is considerably different from Kansas’ approach and has been, in general, less protective of parents’ rights until recently. Minnesota courts generally have held where the presumption of unfitness applies, district courts need not establish independent reasons for a subsequent termination of parental rights.\textsuperscript{272} The court must base its decision to terminate parental rights on the conditions at the time of the termination and “it must appear that the conditions giving rise to the termination will continue for a prolonged, indeterminate period.”\textsuperscript{273} Therefore, it is the parent’s burden to establish that she or he is a fit parent.\textsuperscript{274}

Furthermore, the Minnesota Court of Appeals has asserted, “[w]hen the presumption of unfitness applies, a parent must affirmatively and
actively demonstrate her or his ability to successfully parent a child."^276 This means that the parent has to do more than simply engage in services; rather, the parent must “demonstrate that his or her parenting abilities have improved.”^277 The Minnesota Court of Appeals has acknowledged that this is an “onerous task” and that it requires parents and their counsel to “marshal any available community resources to develop a plan and accomplish results that demonstrate the parent’s fitness.”^278 The court of appeals also has recognized that parents must accomplish this task in light of the fact that the county is relieved of its burden to provide reasonable efforts where the presumption applies.^^279 However, despite this recognition, the court has not acknowledged, as the Kansas court did, that allowing the presumption to operate in the child-welfare system puts parents at a further disadvantage.^^280 That disadvantage results in the “unacceptable risk” that a parent will erroneously be judged unfit.^^281

4. Rebutting the Statutory Presumption in Minnesota

In 2014, the Minnesota Supreme Court clarified the parent’s burden in rebutting the presumption and, in doing so, offered parents more procedural protection by lowering the standard of proof required to rebut the presumption. The court concluded, “the presumption is easily rebuttable.”^282 This is contrary to the Minnesota Court of Appeals’ prior determinations that the parent must “affirmatively and actively demonstrate her or his ability to successfully parent a child.”^283 Yet, under strict scrutiny analysis, the Minnesota Supreme Court reasoned, “the burden imposed by the presumption cannot be a heavy one.”^284

In early 2018, in In re Child of J.A.K. and J.M.S., Parents,^^285 appellant-mother challenged the district court’s finding that she failed to rebut the statutory presumption of palpable unfitness.^^286 The mother

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276. Id. at 251 (emphasis added).
278. Id.
279. In re D.L.R.D., 656 N.W.2d at 251.
281. Id.
283. In re D.L.R.D., 656 N.W.2d at 251.
286. Id. at 244–45.
previously had her parental rights terminated after a three-day trial. After the case was tried, but before the court issued its decision, the mother gave birth to another child, K.J.K. The child was immediately placed in foster care and the county petitioned to terminate the mother’s parental rights. After a two-day trial, the district court terminated the mother’s parental rights to K.J.K., finding that she had failed to rebut the statutory presumption of palpable unfitness. On appeal, the mother argued that the district court erred when it terminated her parental rights on the basis that she failed to rebut the statutory presumption of palpable unfitness.

The Minnesota Court of Appeals noted that contrary to the district court’s finding that the mother failed to rebut the presumption, the record demonstrated that the mother introduced “considerable evidence that is inconsistent with the statutory presumption.” Among other things, the court noted that the mother had seen a psychiatrist and was now taking medication for her depression and personality disorder. She had been sober for more than a year and had maintained consistent employment for two years. She also was going to move into a two-bedroom apartment in the near future. Further, the mother had completed a parenting assessment, had regularly attended supervised visits with her child, and the family therapist assigned to the case had noted that the mother was attentive to the child’s needs and demonstrated that she was a “really skilled mom.”

Using the lower standard of proof established by the Minnesota Supreme Court in R.D.L., the court of appeals concluded that the mother had presented evidence that was sufficient to rebut the statutory presumption. Accordingly, the court concluded that the presumption “shall have no further role” in the case and that the burden shifted to the

287. Id. at 244.
288. Id.
289. Id.
290. Id.
291. Id. at 244–45.
292. Id. at 246.
293. Id.
294. Id.
295. Id.
296. Id. at 246–47.
297. Id. at 247.
298. Id. (quoting In re Child of J.W. and G.P., 807 N.W.2d 441, 447 (Minn. Ct. App. 2011)).
county to prove by clear and convincing evidence that the mother was, in fact, unfit.  

Since 2015, Minnesota courts have begun to clarify and refine the law regarding the statutory presumption. These cases illustrate not only the importance of parental representation, but also the significance of appellate review in this arena. As the Minnesota Court of Appeals and the Minnesota Supreme Court hear more cases, parents may begin to enjoy enhanced due process protections for their fundamental rights.

VII. BUT WHAT ABOUT THE BEST INTERESTS OF THE CHILD?

The paramount concern in all child protection proceedings is the “best interests of the child.” While the child’s interests and safety should be the focus in these proceedings, courts cannot lose sight of the parents’ substantive and procedural rights. There are several issues that arise in child protection proceedings that force a collision between a parent’s rights and the child’s best interests. For instance, this issue arises in cases of extrajudicial removal of the child from the parent’s care.

Another more recently explored example is where a parent wishes to call the child to testify in permanency proceedings. Under Minnesota law, parents are “entitled to be heard” and entitled “to present evidence material to the case.” Often, the child at the center of the proceedings has essential information that is highly relevant to the court’s decision regarding permanency. Yet, requiring the child to testify may not be in the child’s best interests, as testifying in open court might not only be anxiety-provoking for a young child, but may also re-traumatize the child. However, under subdivision 6 of section 260C.163 of the Minnesota Statutes, the “court may, on its own motion or the motion of any party, take the testimony of a child witness informally when it is in the child’s best interests to do so.” Section 260C.163, however, does not include language allowing a court to exclude the child’s testimony altogether. Despite there being a method outlined in Minnesota law to take the testimony of a child informally and no language allowing a court to exclude a child’s testimony, there are two recent unpublished opinions where the Minnesota Court of Appeals had to determine whether a district

300. MINN. STAT. § 260C.001, subdiv. 2.
301. *See supra* Part III.
302. MINN. STAT. § 260C.163, subdiv. 8.
303. *Id.* at subdiv. 6.
304. *See id.*
court could exclude a child’s testimony entirely. These two cases shed light on this important issue and also examined the conflict between the child’s interests and the parent’s rights.

A. In re Welfare of the Child of G.G., Parent

In In re G.G., the appellant attempted to call her minor child to testify on her behalf; however, the child’s attorney moved the court to exclude the child’s testimony. The guardian ad litem, respondent father, and the county agency joined that motion. Appellant argued that the district court erred when it excluded the testimony of her minor child because the court did not have discretion to do so under subdivisions 6–7 of section 260C.163. Subdivision 6 provides the district court with the discretion to take testimony of a child informally when it is in the child’s best interest to do so. Subdivision 7 allows the court to waive the presence of the child at any stage of the proceeding when it is in the child’s best interest to do so. Specifically, appellant argued that when reading subdivisions 6 and 7 together, it is clear that “the legislature allows courts to waive the presence of a minor in court, but that it cannot exclude the testimony altogether. Thus, when it is not in the child’s best interest to testify in open court, the legislature has provided another option: informal testimony.”

The Minnesota Court of Appeals concluded that it need not decide whether subdivisions 6–7 of section 260C.163 allow a court to exclude a child’s testimony because the court’s decision not to allow the child to testify was not prejudicial error. Notably, the court asserted, “there is no doubt that prohibiting a minor child from testifying may affect the substantive rights of a parent and the child.” The court also expressed “grave concern” with such exclusions in the future. So, while the court of appeals expressed concern over future exclusions of a minor’s testimony,

307. Id. at *2.
308. Id.
309. MINN. STAT. § 260C.163, subdiv. 6.
310. Id. at subdiv. 7.
312. Id. at *6.
313. Id. at *6 n.1.
314. Id.
this decision nonetheless seemed to allow a district court to exclude such testimony in contravention of the clearly proscribed alternative method outlined in subdivision 6 of section 260C.163. Such an exclusion undoubtedly implicates a parent’s constitutional right to “fundamentally fair procedures” since it denies the parent the right to present all relevant evidence to the court. In an opinion issued one week later, a different three-judge panel addressed the same issue.


_In re Child of Q.S.M. and T.R.S_ explored the issue in greater detail. Similar to _In re G.G._, the parent, in this case, attempted to call her child to testify, but the district court, on the county’s motion, excluded the child’s testimony without making any written or oral findings. Each judge on the three-judge panel concluded that the district court erred in precluding the minor’s testimony. Each judge, however, offered different reasoning for this conclusion. Most relevant here are the concurrences by Judge Ross and Judge Johnson.

In his concurrence, Judge Ross asserted that even if the statute in question gave the district court the authority to exclude a child’s testimony, “the district court may never apply that authority in a manner that fails to give full account of a person’s fundamental, constitutionally protected right to present relevant evidence in a case that threatens to terminate that person’s parental rights to her children.” Accordingly, Judge Ross opined that a parent has the right to present relevant evidence unless the court finds that the risks to the child in testifying are greater than the interest in maintaining the parent-child relationship.

Similarly, Judge Johnson determined that the district court did not have authority under chapter 260C to exclude the testimony of a child who is the subject of the petition. Judge Johnson’s concurrence expressed concern about interpreting the statutory best-interest policy broadly, explaining that such an interpretation would “unjustifiably limit or negate procedural rights” of parents. Moreover, he concluded that the

317. _Id._ at *11.
318. _See id._
319. _Id._ at CS-1 (Ross, J., concurring).
320. _Id._ at CS-2.
321. _Id._ at CS-1 (Johnson, J., concurring).
322. _Id._ at CS-3.
court must interpret the statute in a manner that preserves its constitutionality. As such, he advised the court to interpret the provisions of section 260C.163 “in a manner that would avoid any infringement on a parent’s constitutional rights.”

Whether a parent has the right to call a minor child who is the subject of the petition to testify is an unresolved question that implicates both the constitutional rights of parents and the statutory rights of children. This important issue demonstrates the tension between a parent’s rights to “fundamentally fair procedures” and a child’s best interests, while also illustrating a somewhat new acknowledgment by Minnesota courts that a child’s best interests may, at times, have to yield to the parent’s constitutionally protected rights.

C. The Minnesota Supreme Court’s View of the Conflict Between Parents’ Rights and the Child’s Best Interests

The issue of whether parents have the right to call a minor child to testify on their behalf has not come before the Minnesota Supreme Court. However, other issues that involve the conflict between a parent’s rights and the best interests of the child have been addressed. A recent case provides insight into the court’s current view of this tension and how it should be resolved. Thus, this case may give attorneys who want to bring such issues before the supreme court an indication of how the court may rule on such issues.

In re Welfare of Child of R.K. involved a father’s appeal of an order terminating his parental rights. The court of appeals dismissed the father’s appeal of the order as untimely and the supreme court granted the father’s petition for review to determine whether the appeal was, in fact, untimely under the Minnesota Rules of Juvenile Protection Procedure. While the issue primarily revolved around interpreting provisions of the Minnesota Rules of Juvenile Protection Procedure regarding appellate procedures, intimately intertwined with that issue was a conflict between a parent’s due process rights and the child’s best interests.

The majority found that a “plain-language interpretation [of the rule] [was] sufficient to resolve the case” and that permanency would not be significantly delayed by allowing the father’s appeal to proceed since the

323.  Id.
324.  Id.
325.  901 N.W.2d 156 (Minn. 2017).
326.  Id. at 159.
327.  Id.
328.  Id. at 160.
difference in the appeal period would be only three days. The majority further asserted that expeditious resolutions to permanency are required, so as to not allow children to “linger in uncertainty,” but “[t]he ‘just, thorough, speedy, and efficient’ resolution of permanency also requires that [the court] ‘ensure due process for all persons involved in the proceedings.’” Specifically, the majority noted that permitting the father to rely on mail service, rather than electronic service, to calculate his appeal deadline “is consistent with the due process he is owed.” Accordingly, the court remanded to the court of appeals with instructions to reinstate the father’s appeal.

This decision came with a sharp dissent by Chief Justice Gildea, joined by Justice McKeig.

Chief Justice Gildea addressed the interpretation of the rules governing appeals and clarified that the interpretation must occur within the context and through the lens of the larger issue: the best interests of the child. She opened her dissent with a look at the goal of the Children’s Justice Initiative, which directs the court “to look to the best interests of the child at every step of [the] process.” She further asserted that the majority undermined that goal of the Children’s Justice Initiative. By relying on the “general principle that procedural rules are construed to preserve the right to an appeal,” the majority disregarded the “overarching objective” of juvenile protection matters, which is to make “an expedient determination of permanency.” Accordingly, Chief Justice Gildea would find, based “most importantly” on the best interests of the child, that the father’s appeal was untimely.

It comes as no surprise that this tension between the child’s best interests and a parent’s rights produced a divided court. There are no easy answers in situations where a child’s health, safety, and well-being are pitted against a parent’s constitutionally protected rights. Despite the paramount importance of serving “the best interests of the child,” courts must be careful not to blindly pursue this objective and ignore the parent’s due process rights in the process.

329. Id. at 162.
330. Id. (quoting MINN. R. JUV. PROT. P. 1.02(0)).
331. Id. (citing Santosky v. Kramer, 455 U.S. 745, 753–54 (1982)).
332. Id. at 163.
333. See id. (Gildea, J., dissenting).
334. Id.
335. Id. at 165.
336. Id.
337. MINN. STAT. § 260C.001, subdiv. 2.
VIII. CONCLUSION

Parents have both a substantive due process right to raise their children and a procedural due process right to be afforded fundamentally fair procedures when the state attempts to terminate the substantive right. While elements of Minnesota law afford parents the procedural due process to which they are entitled, other aspects are seriously lacking. Several procedures under Minnesota law create barriers to fundamental fairness for parents. They start when children are first removed from the home and continue throughout the duration of the proceedings. Due to the statutory presumption of unfitness, parents are confronted with these procedural barriers even after a termination order has been entered. Despite Minnesota’s strides in recent years, parents remain disadvantaged in child protection proceedings.
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