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Minnesota's System of Justice by Geography in Child Protection Proceedings: Base Issues in Minnesota's Parental Representation Scheme and in the Discretionary Appointment of Counsel Under Section 260C.163.

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MINNESOTA'S SYSTEM OF JUSTICE BY GEOGRAPHY IN CHILD PROTECTION PROCEEDINGS: BASE ISSUES IN MINNESOTA'S PARENTAL REPRESENTATION SCHEME AND IN THE DISCRETIONARY APPOINTMENT OF COUNSEL UNDER SECTION 260C.163.

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"'*If you cannot afford an attorney, one will be appointed for you.' Unless you're losing your children, or your home, or your healthcare . . . .*"
– National Coalition for a Civil Right to Counsel[1]

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[1] NAT'L COAL. FOR A CIV. RIGHT TO COUNS., http://civilrighttocounsel.org/ [https://perma.cc/RR2B-FADJ].

I. INTRODUCTION

In dealing with issues of parental representation, states must contend with the United States Supreme Court's decision in *Lassiter v. Department of Social Services of Durham County, North Carolina*.[2] The Court, using the factors established in *Mathews v. Eldridge*,[3] held that there is no constitutional right to counsel for parents in child protection cases.[4] This decision has led states to develop varying statutory schemes for parental representation in child protection cases. Differences in statutes by state lead to differences in outcomes for parents and children across the nation. While there are many factors that contribute to differing outcomes in legal disputes, research indicates that states providing representation to all parents in child protection proceedings leads to better outcomes for both parents and children within their state.

Arguably, Minnesota has one of the more challenging child protection systems for parents to navigate. Emergency Protective Care (EPC) hearings are not appealable by right in Minnesota, and the state currently does not mandate counsel for parents who, while not indigent, may not be able to employ counsel of their own.[5] A first step to improving Minnesota's child protection system is to re-evaluate section 260C.163 of the Minnesota Statutes,[6] which does not afford parents representation as a matter of right. Over the course of a child protection proceeding, parents are at risk of the state severing their court-recognized fundamental liberty interest in the care and custody of their children.[7] Children likewise enjoy a corresponding liberty interest in being raised by their parents.[8] Both fundamental liberty interests are placed at unnecessary risk when parents are unrepresented in a child protection matter. Attorneys representing parents have a crucial impact on protecting these fundamental liberty interests. To fully protect the recognized rights of parents and children in Minnesota, attorneys should be appointed as a matter of right before children are removed from the home. If the state of Minnesota is unable to assign representation to parents at or before an EPC hearing to protect its citizens' fundamental liberty interests, EPC hearings should be made appealable by right to help alleviate the risk of erroneous removals.

This Article outlines the groundwork laid by *Lassiter v. Department of Social Services*, in which the Supreme Court held that counsel is not constitutionally required in matters of civil litigation.[9] It next examines the

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[2] 452 U.S. 18 (1981).
[3] 424 U.S. 319, 335 (1976).
[4] *Lassiter*, 452 U.S. at 33.
[5] MINN. STAT. § 260C.163 subdiv. (3)(c) (2020).
[6] *Id.*
[7] *See, e.g.*, Quilloin v. Walcott, 434 U.S. 246 (1978).
[8] Santosky v. Kramer, 455 U.S. 745 (1982).
[9] 452 U.S. at 3.

state of parental representation in Minnesota and the fundamental shift in parental representation that occurred in 2008 amidst budget shortfalls, the effects of which are felt in the state's representation scheme today. This Article then explains what an EPC hearing is and why it is integral that Minnesota parents' be able to appeal decisions made during this hearing if they are not assigned counsel before such hearing. Next, this Article argues that section 260C.163 of the Minnesota Statutes is unhelpful and provides no guidance for judicial discretion when determining whether parents receive legal representation, in light of the involved fundamental liberty interests of the state's parents and children.

This Article posits that to best serve Minnesota's families, representation must be appointed before children are at risk of being erroneously removed from their parents. Even when removed from the home, children are more likely to be reunified with their parents if parents are assigned counsel.[10] This Article also offers that parent representation could ultimately save the state capital, following the findings of other states that mandate representation.[11] In conclusion, this Article argues that Minnesota families deserve better than the state's current system of justice by geography,[12] and that families in Minnesota do not deserve to wait for the changes in Minnesota's child protection system to access equal opportunities for justice.

At the time of publication, the change to section 260C.163 of the Minnesota Statutes advocated for within this Article is currently under legislative consideration.[13] These changes are imperative to increase access to justice for Minnesota's families.

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[10] *See infra* Section V.B.

[11] *See infra* Section V.B.

[12] Minnesota is second-in the nation (following Ohio) of states most heavily funded by a county system. Andrea Brubaker, *Follow the Money: Child Welfare Funding in MN*, CTR. FOR ADVANCED STUD. IN CHILD WELFARE (Mar. 6, 2015), https://cascw.umn.edu/policy/follow-the-money-child-welfare-funding-in-mn/ [https://perma.cc/U9UW-CMUR]. "The State itself provides the least amount of funding for child welfare while the counties contribute nearly half." *Id.* It is this author's assertion that county-by-county funding of parents' attorneys may lead to disparate outcomes in child protection proceedings within the state, if parents are granted an attorney at all.

[13] *See* HF 312 Minn. Stat. 260C.163 subdiv. 3. The proposed legislation mandates the appointment of counsel before the first hearing, "[i]n all child protection proceedings where a child risks removal from the care of the child's parent, guardian, or custodian," including a child in need of protection or services petition (CHIPS), termination of parental rights proceedings, and petitions for permanent out-of-home placement. Payment for counsel would continue to be at county expense. *Id.*

II. *LASSITER V. DEPARTMENT OF SOCIAL SERVICES*: THE DEATH OF CIVIL GIDEON

The Supreme Court's decision in *Lassiter*, addressing the right to counsel in civil cases, squashed the hope many had for a "civil *Gideon*."[14] *Lassiter* created a presumption against appointing counsel to litigants unless their physical liberty is at issue.[15] To discover the extent of process constitutionally required to meet the standard of "fundamental fairness," *Lassiter* determined that courts must evaluate and balance the factors established in *Mathews v. Eldridge*.[16] These factors are: "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions."[17] As the appeal before the Court arose from a termination of parental rights, the Court recognized the parent's interest as an "extremely important one."[18] The Court also found that the state shared the parent's interest in reaching accurate decisions in termination of parental rights cases.[19] When considering the third factor, the Court found that the risk of the erroneous deprivation of a parent's rights could, but would not always, be "insupportably high."[20]

After analyzing the *Mathews* factors as applied to the case before it, the Court concluded that such distribution of interests and risk would not be present in every child protection case.[21] The Court concluded that the

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[14] Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (establishing a criminal defendant's right to counsel) ("[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."). *See also* Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 36 LOY. U. CHI. L.J. 363, 373 (2005).

[15] *Lassiter*, 452 U.S. at 27.

[16] *Id.* at 26–27.

[17] *Id.* at 27 (citing 424 U.S. at 335). The *Mathews* test has become ingrained in the Court's assessment of due process and liberty rights. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004); Bowen v. New York, 476 U.S. 467, 482–83 (1986).

[18] *Lassiter*, 452 U.S. at 19 (Blackmun, J., dissenting) (characterizing the litigants' interest at stake as "the interest of a parent in the companionship, care, custody, and management of his or her children") (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)). However, while the *Lassiter* court characterized the interest involved as an extremely important one, subsequent courts reaffirmed that parents have a fundamental liberty interest in "the care, custody, and control of their children . . ." and that this fundamental liberty interest was among the oldest recognized by the Court. Troxel v. Granville, 530 U.S. 57, 65 (2000) (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

[19] *Lassiter*, 452 U.S. at 31.

[20] *Id.*

[21] *Id.*; hereinafter referred to as the *Mathews* factors to comport with prior Minnesota Supreme Court naming conventions. *See* State v. Rey, 905 N.W.2d 490, 494 (Minn. 2018) ("The three-factor balancing test in *Mathews* requires us to consider . . ."); T.C.B. v. Bergstrom, 845 N.W. 2d 764, 786 (Minn. 2014) ("Thus, if a protected life, liberty, or

flexibility required under the Due Process Clause would not presume that counsel need always be appointed in parental termination proceedings as the interests of the state and the parent, as well as the risk of erroneous deprivation, vary on a case-by-case basis.[22] The Court relied heavily on *Gagnon v. Scarpelli*,[23] determining that if the risk of deprivation of personal liberty is diminished, the right to counsel likewise diminishes.[24] In creating a barrier to the right to counsel in civil litigation—including matters relating to child protection—it left such matters in the hands of individual state legislatures. The Court did note, however, that "a wise public policy . . . may require that higher standards be adopted than those minimally tolerable under the Constitution" and that "[i]nformed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but in dependency and neglect proceedings as well."[25] The Court has not re-examined the issue after its 1981 decision in *Lassiter*.[26]

In general, the state of civil representation has not improved since the Court's decision in *Lassiter* when considering issues such as funding or public access to the civil justice system. Federal funding of legal services in the United States has declined by fifty percent over the last quarter century.[27] In the 2019 World Justice Project Rule of Law Index, the United States tied for 30 out of 126 countries listed when measuring "accessibility and affordability of civil justice."[28] The National Coalition for a Civil Right to Counsel indicates that between 2015 and 2019, the United States fell by

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property interest is at stake, we must weigh the *Mathews* factors to determine what type of process is constitutionally due to a person deprived of such an interest.").

[22] *Lassiter*, 452 U.S. at 31.

[23] 411 U.S. 778 (1973). The *Lassiter* dissent later attempted to distinguish *Gagnon* by noting that *Gagnon* involved merely the revocation of probation procedures, whereas a termination of parental rights is "distinctly formal and adversarial." *Lassiter*, 452 U.S. at 42 (Blackmun, J., dissenting).

[24] *Lassiter*, 452 U.S. at 26.

[25] *Id.* at 33–34.

[26] Dennis A. Kaufman, *The Tipping Point on the Scales of Civil Justice*, 25 TOURO L. REV. 347, 347 (2009).

[27] NAT'L COAL. FOR A CIV. RIGHT TO COUNS., *Backdrop: The Access to Justice Crisis*, http://civilrighttocounsel.org/about/history [https://perma.cc/X5QL-9Z4P].

[28] THE WORLD JUSTICE PROJECT, THE WORLD JUSTICE PROJECT RULE OF LAW INDEX 2019 28 (2019). With respect to civil justice, the report measured "the accessibility and affordability of civil courts, including whether people are aware of available remedies; can access and afford legal advice and representation; and can access the court system without incurring unreasonable fees, encountering unreasonable procedural hurdles, or experiencing physical or linguistic barriers." *Id.* at 13. It is perhaps important to note that more countries declined than improved in overall performance, indicating globally weaker rule of law. *Id.* at 6–7.

over forty places when measuring access to and affordability of civil litigation.[29]

III. MINNESOTA'S REPRESENTATION SCHEME

It is not in the scope of this Article to argue whether *Lassiter* was properly decided.[30] A quarter century after the Court's decision in *Lassiter*, the American Bar Association's (ABA) house of delegates unanimously decided that it was indeed wise public policy to rise above the constitutional floor established by *Lassiter*.[31] In 2006, the ABA voted to provide public counsel as a matter of right, at public expense, to low-income persons in certain adversarial proceedings.[32] Such proceedings identified by the ABA included those "where basic human needs are at stake, such as those involving . . . child custody."[33]

The Constitution is the backbone of criminal justice reform in the United States.[34] Such reform included the constitutionally mandated

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[29] *U.S. Rank on Access to Civil Justice in Rule of Law Index Drops to 108th out of 128 Countries*, NAT'L COAL. FOR A CIV. RIGHT TO COUNS. (Mar. 10, 2020), http://civilrighttocounsel.org/major_developments/217 [https://perma.cc/B2BQ-WA4X].

[30] While this article does not argue that *Lassiter* should be overturned, many other articles eloquently make the argument that parents should have the right to representation under the Due Process Clause of the constitution. *See, e.g.*, Tom Pryor, Turner v. Rogers, *the Right to Counsel, and the Deficiencies of* Mathews v. Eldridge, 97 MINN. L. REV. 1854, 1857–60 (2013) (exploring the history and application of the Due Process Clause with respect to procedural matters, particularly the right to counsel). "When the state is in reality the opposing party and when the interests of the indigent litigant, although not involving his personal liberty, are fundamental and compelling, due process and fundamental fairness require a presumption in favor of appointed counsel." William L. Dick, Jr., *The Right to Appointed Counsel for Indigent Civil Litigants: The Demands of Due Process*, 30 WM. & MARY L. REV. 627, 628 (1989) (arguing that in termination of parental rights proceedings there should be a presumption of a parents' right to counsel). *But see* Kaufman, *supra* note 26, at 355 (stating that overruling *Lassiter* would not create a comprehensive right to counsel but could be a first step toward creating such right).

[31] Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World?*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 769 (2006).

[32] After the vote recommending the appointment of counsel by right to low-income parties in child custody cases, ABA President Michael Greco stated, "[E]very poor American, like every wealthy American, should have access to a lawyer to protect the fundamental needs of human existence." *Id.*

[33] *Id.*

[34] In New York, Chief Judge Janet DiFiore observed that New York's parental representation system "has suffered from many of the same deficiencies that once afflicted our criminal defense system, including excessive attorney caseloads, inadequate training, and insufficient funding for support staff and services." KAREN K. PETERS, COMM'N ON PARENTAL LEGAL REPRESENTATION, INTERIM REPORT TO CHIEF JUDGE DIFIORE 9 (2019). Other reports originating from New York state that the impact of parental representation in child protection matters is as profound as representation is for persons navigating the criminal justice system.

provision of counsel as seen in *Gideon*.[35] *Lassiter* denies such opportunity for drastic and widespread reform in the field of child protection. Post-*Lassiter*, individual state legislatures must determine if litigants in civil matters receive court-appointed representation. Such individual determinations of the right to counsel in civil matters have led to the creation of a patchwork of rights across the United States.[36]

A. Pre-2008: Public Defenders as Court-Appointed Parent Attorneys in Minnesota

Parents in Minnesota were appointed public defenders in child protection matters until 2008.[37] The State of Minnesota Board of Public Defense (Board) made three requests to the legislature between 2003 and 2007 for increased funding for parent representation in child protection cases.[38] Until 2008, Minnesota's system of parental representation was funded by the state. However, massive budget cuts across Minnesota caused the state to transition from a state-funded system to a system funded by individual counties.[39] Given that public defenders are not statutorily required to represent parents in child protection matters, the Board of Public Defense stopped representing parents in child protection cases in July 2008, in light of stark cuts to its budget.[40] Three years after Minnesota's

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See N.Y. STATE BAR ASS'N COMM. ON FAMILIES AND THE LAW, MEMORANDUM IN SUPPORT OF STATE FUNDING FOR MANDATED PARENTAL REPRESENTATION 3 (2018).

[35] The American Bar Association (ABA) states that public defense is "essential to the administration of criminal justice." The ABA also sets an aspirational standard, directing public defenders to work towards reform and improvements in our system of criminal justice. CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, 4-1.2(a), (e) (A.B.A., 4th ed. 2017).

[36] States mandating the appointment of parental counsel have generally done so on due process grounds under individual state constitutions, or by using an equal protection framework. *See* Clare Pastore, *Life After* Lassiter*: An Overview of State-Court Right-to-Counsel Decisions*, CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 186, 191 (2006) (analyzing how state courts have considered *Lassiter* in claims arguing for the appointment of counsel in parental representation).

[37] HELEN MEYER, REPORT OF CHILDREN'S JUSTICE INITIATIVE PARENT LEGAL REPRESENTATION WORKGROUP TO MINN. JUDICIAL COUNCIL 2 (2008).

[38] *Id.* at 5.

[39] CTR. FOR ADVANCED STUD. IN CHILD WELFARE, CHILD WELL-BEING IN MINNESOTA: A PRIMER FOR THE 2013–2014 LEGISLATIVE SESSION 3 (2013) (stating that counties are responsible for the funding of child welfare services). Minnesota was one of forty-six states, in addition to the District of Columbia, to face such massive budget shortfalls in 2008. This led to the majority of states cutting services to families and vulnerable populations. NICHOLAS JOHNSON, PHIL OLIFF & ERICA WILLIAMS, CTR. ON BUDGET & POL'Y PRIORITIES, AN UPDATE ON STATE BUDGET CUTS 1 (2011).

[40] MEYER, *supra* note 37, at 5. The $3.8-million-dollar deficit for fiscal year 2009 caused the Board of Public Defense to stop offering services it was not required by law to provide. *See also* Elizabeth Stawicki, *Public Defenders to Stop Representing Poor Parents in Child*

transition to the county-by-county scheme of representation, the state consistently ranked among the lowest in the nation for state funding contribution and among the highest in county contribution.[41] This funding scheme contributed to a system where Minnesota's families can expect a system of justice by geography, as funding for representation is determined entirely by the county in which a family resides.

After the Board reported that it would no longer represent parents, it was unclear, as a matter of law, who would thereafter be responsible for parent representation and its payment.[42] Crow Wing County voted in July 2008 not to pay for court-appointed counsel in such cases.[43] In 2010, the Minnesota Supreme Court granted accelerated review to determine who would represent parents in child protection cases when the court deemed such appointment appropriate, and what entity would be responsible for payment.[44]

The court did not consider the financial state of either the Board or the county when entering its decision, but instead analyzed the statutes concerning appointment of counsel in child protection proceedings.[45] The court noted that nothing in the statutes dictating the appointment of counsel for parents in child protection cases required the appointment of a public defender.[46] Although the court held that parents are not statutorily entitled to representation by a public defender, it is nevertheless permissible for a court to appoint private counsel in juvenile protection matters.[47] The court also held that the legislature intended that, if the district court appoints parent's counsel, it was for the county to pay each such expense.[48] As a result of *In re Welfare of J.B.*, individual counties are financially responsible for parents' legal representation unless, and until, the legislature creates a statewide system for parent representation.

In a separate proceeding, *In re Welfare of S.L.J.*, the court came to the same conclusion when considering the appointment of public defenders for indigent Native American parents in child protection and termination of

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Protection Cases, MPR NEWS (July 4, 2008), https://www.mprnews.org/story/2008/07/03/public-defenders-to-stop-representing-poor-parents-in-child-protection-cases [https://perma.cc/7NCT-XFVY]. The Board continues to represent children in child protection cases, as children are appointed counsel by statute. MINN. STAT. § 260C.163 subdiv. 3(b) ("[I]f the child desires counsel but is unable to employ it, the court *shall* appoint counsel to represent the child who is ten years of age or older . . . at public expense.") (emphasis added).

[41] CTR. FOR ADVANCED STUD. IN CHILD WELFARE, *supra* note 39, at 2.

[42] Stawicki, *supra* note 40.

[43] *In re* Welfare of J.B., 782 N.W.2d 535, 537 (Minn. 2010).

[44] *Id.* at 538.

[45] *Id.* at 540–41.

[46] *Id.* at 542 (citing MINN. STAT. § 611.18).

[47] *Id.* at 544.

[48] *Id.*

parental rights cases.[49] While Native American parents unable to afford representation are statutorily given court-appointed counsel in juvenile protection proceedings under the Indian Child Welfare Act,[50] there is no statutory evidence that Congress intended such appointment to be filled by a public defender.[51]

As a result of both *In re Welfare of J.B.*, and *In re Welfare of S.L.J.*, the court confirmed that each of Minnesota's eighty-seven counties had to find attorneys to represent parents, in addition to finding a way to fund such parent representation. Consequently, there are now eighty-seven different ways of recruiting, paying, supervising, and monitoring parent attorneys. One attorney writing anonymously to the ABA lamented that parent attorneys are generally left to struggle within the county-mandated and funded system.[52] This individual reported that "[n]one of the 87 counties provides pre-service or in-service training for their parent attorneys. The attorneys struggle to understand the overall purpose and process of the child protection court system, their role and responsibilities within that system, and the role of others."[53] This sentiment is supported by additional reports, which state that outcomes for children and families vary widely by county, and that the state is limited in its ability to influence county performance and outcomes.[54]

Minnesota's public defenders remain overwhelmed.[55] The Board continues to identify child protection as the fastest growing area of proceedings in Minnesota, with the number of cases increasing by nearly fifty percent between 2015 and 2018.[56] Based on both caseloads and current staffing, the Board states that it is only at 68.5% of attorney staffing as

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[49] 782 N.W.2d 549, 554–55 (Minn. 2010).

[50] Indian Child Welfare Act, 25 U.S.C. § 1912(b) (2006).

[51] *In re S.L.J.*, 782 N.W.2d at 554.

[52] AM. BAR ASS'N, CTR. ON CHILDREN & THE LAW, COURT IMPROVEMENT PROGRAM PARENT ATTORNEY SURVEY RESULTS 2 (2011).

[53] *Id.* This issue is not specific to Minnesota. Even in states where the appointment of counsel is mandatory, there is no guarantee that the appointed attorney will be familiar with the child protection system so as to provide adequate representation. Wendy Haight, Jane Marshall & Joanna Woolman, *The Child Protection Clinic: A Mixed Method Evaluation of Parent Legal Representation*, 56 CHILD. & YOUTH SERVS. REV. 7, 8 (2015).

[54] CTR. FOR ADVANCED STUD. IN CHILD WELFARE, *supra* note 39, at 3.

[55] As of 2016, public defenders have consistently been the most frequent users of the Minnesota state court system, with around 150,000 cases per year. Bob Collins, *Governor Starves Public Defender Program, Gets Appointed to a Case*, MPR NEWS (Aug. 4, 2016), https://blogs.mprnews.org/newscut/2016/08/governor-starves-public-defender-program-gets-appointed-to-a-case/ [https://perma.cc/8B77-ZVU3].

[56] MINN. BD. OF PUB. DEF., 2020–21 BIENNIAL BUDGET 7 (2018). The Board attributes the increase in cases to both statutory changes and changes in enforcement. *Id.*

recommended by both state and national standards.[57] The Board further predicts that if the current increase in child protection cases continues and no additional attorneys are provided, staffing will drop to sixty-three percent of state and national standards by fiscal year 2021.[58] The Board additionally anticipates a doubling of child protection cases between 2015 and 2021 if there continues to be increased emphasis on child protection cases at both a state and national level.[59] In summation, the number of child protection cases is likely to continue increasing in Minnesota and across the nation. With our already overwhelmed force of public defenders, simply mandating public defenders to resume representing parents—without altering the budget and resources available to the Board—is not a viable option for Minnesota.

B. Minnesota's 2018 Analysis of Section 260C.163: In re the Welfare of the Child of A.M.C.

While the Supreme Court previously determined that parents' appointment of counsel would not be fulfilled by the Board and that representation would be at county expense, the court did not, in that same line of cases, consider the discretionary appointment of counsel at the district court level. The Minnesota Court of Appeals most recently analyzed section 260C.163 subdivision 3(c) in 2018, in *In re the Welfare of the Child of A.M.C.*[60] As stated in Parts II and IV, the determination of whether to appoint counsel to parents in child protection cases is a discretionary decision resting with the district court. The court of *In re the Welfare of the Child of A.M.C.* considered the extent of the district court's discretion in the appointment of counsel to a noncustodial father.[61]

In the context of *In re the Child of A.M.C.*, it is important to note that custodial and noncustodial parents generally have different rights under the Minnesota Rules of Juvenile Protection and Procedure.[62] Custodial

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[57] *Id.* Additionally, the Board is also operating with only fifty-seven percent of the support staff recommended by state and national standards with respect to child protection cases. *Id.*

[58] *Id.*

[59] *Id.* The Board concluded that the assumption of public defender costs by the state from the counties has become unsustainable. *Id.*

[60] *In re* Welfare of Child of A.M.C., 920 N.W.2d 648 (Minn. Ct. App. 2018).

[61] *Id.* at 652.

[62] *See generally* MINN. R. JUV. PROT. P. 32.01 (2019) (stating who receives party status); MINN. R. JUV. PROT. P. 32.02 (2019) (detailing the rights of parties); *see also* MINN. R. JUV. PROT. P. 33.01 (2019) (stating who is a participant in a proceeding); MINN. R. JUV. PROT. P. 33.02 (2019) (detailing the rights of participants). Notably, appointment of counsel for both parties and participants is governed by Rule 36 of the Minnesota Rules of Juvenile Protection and Procedure, which states that "[e]very party and participant has the right to be represented by counsel in every juvenile protection matter . . . ." MINN. R. JUV. PROT. P. 36.01 (2019).

parents have greater rights in child protection proceedings.[63] Custodial parents are considered parties to a child protection proceeding, while noncustodial parents are only participants to the proceeding.[64] The party/participant designation provides varying attendant rights. In *In re Welfare of the Child of A.M.C.*, the district court determined in the child in need of protection or services (CHIPS) proceeding that, because the father was a noncustodial parent and therefore not a party to the proceedings, he was not entitled to court-appointed counsel.[65]

The court of appeals first quickly dismissed the father's contentions that his constitutional rights under the Equal Protection Clause were violated when the district court declined to appoint him counsel.[66] The court likewise quickly dismissed his contention that his due process rights were violated, as the Minnesota Supreme Court has never found there to be a due process right to counsel under the Minnesota Constitution.[67] In reviewing section 260C.163 to determine if the district court erroneously denied the father appointment of counsel, the court of appeals noted the district court recognized the father as a legal parent in the previous proceeding.[68] It noted that the Minnesota Rules of Juvenile Protection and Procedure distinguishes participants and parties, but section 260C.163 of the Minnesota Statutes "does not distinguish between parents who are parties and parents who are participants."[69]

However, such appointment is pursuant to section 260C.163, which is a discretionary standard. MINN. STAT. § 260C.163 subdiv. (3)(c) (2020).

[63] Participants only have four statutorily enumerated rights, including legal representation at the discretion of the court. MINN. R. JUV. PROT. P. 33.02 (2019). Parties to the proceedings have all attendant party-rights. *Id.*

[64] Minn. R. Juv. Prot. P. 22.02, subdiv. 1.

[65] *In re A.M.C.*, 920 N.W.2d at 660. The district court did, however, appoint father counsel during the termination of parental rights (TPR) proceeding, and he had counsel on appeal. *Id.* at 658.

[66] *Id.* at 654 (stating that the equal protection argument was inadequately briefed for the court to review).

[67] *Id.* at 659. The court noted the constraints placed on the due-process rights to counsel imposed by *Lassiter* in the context of a termination of parental rights proceeding. *Id.* The court additionally stated that the Minnesota Supreme Court has never held that the Minnesota Constitution provides parents with a due process right to court appointed counsel. *Id.*

[68] *Id.* While the child's father was never married to the child's mother, they lived together as a family unit for ten years, and the father was adjudicated as such by Recognition of Parentage. *Id.* at 653. Note also that Rule 36 of the Minnesota Rules of Juvenile Protection Procedure states that "[t]he appointment of counsel for a parent . . . shall occur as soon as practicable after the request is made." MINN. R. JUV. PROT. P. 36.02 subdiv. 2 (2019). This seems to create tension between those adjudicated as parents and non-custodial parents.

[69] *In re A.M.C.*, 920 N.W.2d at 660.

In interpreting section 260C.163, the court of appeals noted that the legislature did not define the word "appropriate."[70] The court additionally noted the legislature did not provide any factors for a district court to consider in the application of its discretion to appoint counsel in child protection proceedings.[71]

Because section 260C.163 of the Minnesota Statutes provides a discretionary standard for the appointment of counsel, any appellate court is constrained in its review to determine if the district court abused its discretion by improperly applying the law.[72] Appellate courts will therefore only find an abuse of discretion when the district court reached a decision against both the logic and facts on record.[73] The court of appeals concluded that because the father of the child is an adjudicated father, and because section 260C.163 of the Minnesota Statutes does not require that a parent be a party before they are appointed counsel, the district court erred by declining to appoint the father counsel under section 260C.163.[74]

However, although the court of appeals determined the district court had erred by not appointing counsel based on the father's participant status, it determined the error was harmless.[75] The court of appeals additionally concluded that because the father was not a meaningful option for placement of the child,[76] it was unwilling to state the appointment of

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[70] *Id.* at 659–60 (citing the language of section 260C.163 subdivision 3(c) of the Minnesota Statutes, which reads: "the court shall appoint counsel to represent the parent, guardian, or custodian in any case in which it feels that such an appointment is *appropriate* . . . ."). I argue in Part IV of this note that Minnesota courts should be equally concerned with the presence of the word "feel," in the statute, as it is with the word "appropriate." *See infra* Part IV. To that end, the court of appeals in *In re A.M.C.* acknowledged that it found the Legislature's use of "feel" in statutory language peculiar. *See, e.g.*, *In re A.M.C.*, 920 N.W.2d at 660 n.6 ("The legislature's use of the verb 'to feel' is unusual, but we take the statute as we find it.").

[71] *In re A.M.C.*, 920 N.W.2d at 660.

[72] *Id.* at 654 (citing *In re* Welfare of Child of J.K.T., 814 N.W.2d 76, 93 (Minn. Ct. App. 2012)).

[73] *Id.* at 660 (citing *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984), which stated that "[t]here must be a clearly erroneous conclusion that is against logic and the facts on record before this court will find that the trial court abused its discretion.").

[74] *Id.*

[75] *Id.* The court thoroughly reviewed the record and determined clear and convincing evidence supported the district court's decision to terminate father's parental rights. *Id.* at 661–664. In so finding, the court gave three additional reasons for declining to reverse. *Id.* First, the court stated that the father did not appeal the order of the district court terminating his rights. *Id.* Second, the court inferred that the district court "implicitly 'felt'" that appointment of counsel for the father was not appropriate in this case, as the father was repeatedly incarcerated and unavailable to care for the child. *Id.* at 660–61. Third, the court stated that it was not in the best interest of the child to delay a permanent placement with foster parents, with whom the child had been thriving. *Id.* at 661.

[76] *Id.* ("Father was incarcerated for significant periods of time and was repeatedly noncompliant with conditions of his probation.").

counsel would have otherwise been "appropriate."[77] Although the court noted the ambiguity presented by section 260C.163—in that the statute fails to define the word "appropriate" or offer any factors for a district court to consider in exercising its discretion[78]—the court was unable to state that it would have felt any differently about the decision to decline to give the father counsel based upon the facts of this case.[79]

C. The Emergency Protective Care (EPC) Hearing

The EPC hearing represents the first opportunity for a parent to be heard by a court, and for the parent to be represented by an attorney in a child protection proceeding. The EPC hearing—the first hearing in a child protection matter—determines significant rights of parents to their children during the pendency of the case and beyond. If a child has been taken into emergency protective care, an EPC hearing must be held within seventy-two hours of the child's removal from the home.[80] The purpose of an EPC hearing is "to determine whether the child shall be returned home or [be] placed in protective care."[81] This initial hearing, in determining placement and visitation rights, is the most critical in the child protection court process.[82] The Supreme Court recognized in *Stanley v. Illinois* that "the interest of a parent in the companionship, care, custody, and management of his or her children" was at stake in such proceedings.[83] The Supreme Court has also determined that "until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."[84] If the child's removal is ordered at an EPC hearing, reunification becomes more difficult for families, and courts may not recommend reunification until every aspect of a service plan is met.[85] Additionally, studies indicate once a child has been removed from

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[77] *Id.* The court of appeals inferred from a "number of the district court's statements" that this was implicit in the district court's decision to not appoint counsel to the father, and that, on this record, a finding that appointment of counsel was not appropriate would not have been an abuse of discretion. *Id.*

[78] *Id.* at 659–60

[79] *Id.* at 661.

[80] MINN. R. JUV. PROT. P. 42.01 subdiv. 1 (2019) (stating an exception to this rule is if the child was released from emergency protective care pursuant to Rule 41 of the Minnesota Rules of Juvenile Protection Procedure).

[81] *Id.*

[82] WILLIAM G. JONES, WORKING WITH THE COURTS IN CHILD PROTECTION 26 (2006). The Honorable William G. Jones states that the EPC hearing is also important for setting the tone for future interactions between all involved parties in the proceeding. *Id.*

[83] Stanley v. Illinois, 405 U.S. 645, 651 (1972).

[84] Santosky v. Kramer, 455 U.S. 745, 760 (1982).

[85] Frank E. Vandervort & Vivek S. Sankaran, *Protocol for Attorneys Representing Parents in Child Protective Proceedings*, U. OF MICH. L. SCH. SCHOLARSHIP REPOSITORY 12 (2008). In Minnesota, the county bringing the petition must use appropriate services to "meet the

the home, decision-makers prefer to let past placement decisions stand, in what has been termed the "sequentially effect."[86] The stakes of an EPC hearing can therefore appear heightened in Termination of Parental Rights proceedings, which threatens to permanently sever the fundamental liberty interest parents have in the control and care of their children.[87]

D. The Appealability of Decisions Made During an EPC Hearing in Minnesota

Further, while *Lassiter* establishes the due process framework for representation in civil matters, it is for individual states to determine whether due process requires representation in child protection proceedings.[88] However, EPC hearings are likely not appealable by right in Minnesota.[89] While the decision to appoint counsel may be appealable,[90] any decision made at an EPC hearing is not appealable by right until a final order has

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needs of the child's family . . . to eliminate the need for removal and reunite the family." MINN. STAT. § 260.012(f) (2020). Additionally, service plans—of which a parent must meet every aspect—may place significant burdens on families, with "plans that look more like grocery lists than thoughtful targeted approaches to reunification." Cristina Freitas, Debbie Freitas, Michael Heard & Alexandra Roark, Bringing Data to Life, ABA, (Feb. 27, 2020) https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2020/bringing-data-to-life--data-as-a-tool-for-parent-representation/ [https://perma.cc/3TYV-7N8V]. The average parent must complete 7.5 services, and task completion "requires an average of 22 to 26 hours per week." *Id.*

[86] *See* Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139, 139–55 (1995).

[87] U.S. DEP'T OF HEALTH & HUM. SERVS., ADMINISTRATION FOR CHILDREN AND FAMILIES, HIGH QUALITY LEGAL REPRESENTATION FOR ALL PARTIES IN CHILD WELFARE PROCEEDINGS REPORT 3 (2017). The Department of Human Services noted that the termination of parental rights is "often referred to as the civil law equivalent of the death penalty." *Id.*

[88] Lassiter v. Dep't of Soc. Serv.'s of Durham Cty., N.C., 452 U.S. 18, 34–35 (1981) ("I am content to join the narrow holding of the Court, leaving the appointment of counsel in termination proceedings to be determined by the state courts on a case-by-case basis.") (Burger, J., concurring).

[89] *See In re* Welfare of E.G., 876 N.W.2d 872, 875 (Minn. Ct. App. 2016) (holding that there is no appeal as of right from a CHIPS intermediate disposition order). Under an extension of the logic of E.G., any attempt to directly appeal an EPC determination would likely be dismissed. The Court declined to consider the issue in 2017. *In re* S.M.H., No. A17-0841, 2017 WL 5077441, at *4 (Minn. Ct. App. Nov. 6, 2017) ("[A]ppellant made no effort to appeal from the initial transfer of custody after the EPC hearing. Whether that initial custody transfer would be reviewable by discretionary review, extraordinary writ, or otherwise is not before us."). However, the Minnesota Rules of Civil Appellate Procedure allow for the "discretionary review" of cases not otherwise appealable, "in the interests of justice." MINN. R. CIV. APP. P. 105.01 (2020).

[90] *Lassiter*, 452 U.S. at 32 (citing Wood v. Georgia, 450 U.S. 261 (1981)).

been issued in the case.[91] Any initial errors in a district court's individualized, explicit findings determining whether a child is in need of protection or services, or in its determination of assigning placement of the child—including continuing out-of-home placement of the child or stranger foster care—are allowed to compound until the resolution of the case.[92]

Erroneous removals can imbue children with lasting trauma.[93] The effect of removal on children and families is one that "cannot be undone."[94] The Supreme Court has never held that harms may be committed if they are allowed to be undone, and the Court has recognized that, during the delay between an error and the court and its undoing, parents suffer from the deprivation of their children.[95] The Court also recognized the harm to those children resulting from "uncertainty and dislocation."[96] Yet, mistakes in Minnesota are allowed to compound when parents are not represented,

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[91] A final order is typically understood as an order that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *See, e.g.*, Catlin v. United States, 324 U.S. 229, 233 (1945). Courts in child protection cases must constantly analyze and decide the legal rights afforded to families, all of which impact the children of the state. However, these decisions are made as part of an ongoing case, rendering these decisions interlocutory and generally unappealable. *See* MINN. STAT. § 558.215 (2020).

[92] While an interlocutory order may be heard by the court of appeals or the supreme court by bringing it by extraordinary writ, this still does not obviate the issue that the determinations made at an EPC hearing—which can be made regarding an unrepresented parent—are not appealable by right. *See* MINN. R. CIV. APP. P. 120 (outlining the procedure by which to bring a case by extraordinary writ).

[93] Children who experience placement in foster care further have been found to suffer from greater instances of mental health disorders, lower rates of employment, and higher rates of homelessness, as compared to those who never experienced the foster care system. Theo Liebmann, *What's Missing from Foster Care Reform? The Need for Comprehensive, Realistic, and Compassionate Removal Standards*, 28 HAMLINE L. REV. 141, 143 (2006); *see also* Katherine Kortenkamp & Jennifer Ehrle Macomber, *The Well-Being of Children Involved with the Child Welfare System: A National Overview*, THE URBAN INST. 2 (2002) ("Children in the child welfare system are more likely to have behavioral and emotional problems compared with all children in parent care and even compared with children living in high-risk parent care."). Even removals for short periods of time can cause lasting harm, and research indicates that even short separations can create future barriers to success. *See* Joseph J. Doyle, Jr., *Child Protection and Adult Crime: Using Investigator Assessment to Estimate Causal Effects of Foster Care*, 116 J. POL. ECON. 746, 756–58 (2008). While it is sometimes necessary to place children in out-of-home care, family settings can help obviate some trauma resulting from removal. MINN. DEP'T OF HUM. SERVS., MINNESOTA'S OUT-OF-HOME CARE AND PERMANENCY REPORT, 2017 9 (2018).

[94] Dep't of Health and Hum. Servs., *Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews*, 65 FED. REG. 4020, 4052 (Jan. 25, 2000) (codified as 45 C.F.R. § 1355 (2021), 45 C.F.R. § 1356 (2021), 45 C.F.R. § 1357 (2021)).

[95] *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 647 (1972).

[96] *Id.*

and hearings determining placement are not appealable until the conclusion of all proceedings.[97]

In this Minnesota is not alone; twenty-one states do not have clear laws on the appellate process for dependency review hearings, and at least ten more states have decided that such hearings are not subject to appellate review.[98] However, Minnesota is one of only twelve states that do not statutorily mandate appointment of counsel for parents after initiating a child protection proceeding.[99] Minnesota is, therefore, in the minority of states that do not mandate appointment of counsel to parents in child protection proceedings. Additionally, only five other states allow for discretionary appointment of counsel in child protection cases.[100] As Minnesota does not mandate counsel for parents and likely does not permit appeals of decisions made at an EPC hearing, errors that could have been prevented by mandating counsel before an EPC hearing are allowed to persist until the conclusion of trial and beyond.[101]

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[97] Other advocates have called for states to reform appellate review procedures in interim dependency decisions, in the interest of justice. Alicia LeVezu, *The Illusion of Appellate Review in Dependency Proceedings*, 68 JUV. & FAM. CT. J. 83, 84 (2017).

[98] Josh Gupta-Kagan, *Filling the Due Process Donut Hole: Abuse and Neglect Cases Between Disposition and Permanency*, 10 CONN. PUB. INT. L.J. 13, 29–32 (2010).

[99] *See* VIVEK SANKARAN & JOHN POLLOCK, U. MICH. L. SCH. CHILD ADVOC. L. CLINIC, A NATIONAL SURVEY ON A PARENT'S RIGHT TO COUNSEL IN STATE-INITIATED DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS CASES 1 (2016).

[100] *See id.* at 2–25. States allowing for judicial discretion in the appointment of counsel in child welfare proceedings are Delaware, Missouri, Hawaii, Indiana, and Wisconsin. *Id.* California also allows discretion in the appointment of counsel, but only if the child is not in out-of-home placement. *Id.*

[101] Statutes controlling the timelines in child protection cases are in place to ensure that courts "provide a just, thorough, speedy, and efficient determination of each juvenile protection matter . . . ." MINN. R. JUV. PROT. P. 1.02(b) (2019). However, if the child has been removed and the parent is properly working on a case plan, the matter may be continued for an additional six months, thus marking one year from removal. *See* MINN. STAT. § 260C.212 subdiv. 1a(b) (2020). The Adoption and Safe Families Act (P.L. 105-89) requires a permanency planning hearing at twelve months from the date the child entered care, and every twelve months thereafter to review and approve the permanency plan for the child. Child Welfare Information Gateway, *Court Hearings for the Permanent Placement of Children*, CHILDREN'S BUREAU 2 (2016) (citing Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115). Further, if the parent intends to appeal the court's final order, the timeline for appeal is strict, which could make compliance by an unrepresented parent especially difficult. MINN. R. JUV. PROT. P. 23.02 subdiv. 2 (2019) ("An appeal shall be taken within 20 days of the service of notice"). Finally, others have argued that when permanency decisions cannot be reviewed until the conclusion of the case, appellate judges are incentivized to avoid looking too closely at the trial courts determination of reasonable efforts made by the agency. Gupta-Kagan, *supra* note 98, at 27.

IV. 260C.163: THE WORD "FEEL" PROVIDES UNBRIDLED DISCRETION TO DETERMINE IF LITIGANTS ARE ASSIGNED COUNSEL

It is well known that there are great and long-standing inequalities in the American justice system between the wealthy and the poor.[102] As discussed in Part II, the United States ranks in the bottom third of countries in providing access to justice as of 2019.[103] Reginald Heber Smith—whose work is generally cited as revolutionary in the legal aid movement[104]—observed that "substantive law, however fair and equitable itself, is impotent to provide the necessary safeguards unless the administration of justice, which alone gives effect and force to substantive law, is in the highest sense impartial."[105] The legal system of the United States is founded on the idea that the judiciary is impartial in interpreting and applying the law.[106] Further, the International Declaration of Human Rights states that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal . . . ."[107]

The language of section 260C.163 of the Minnesota Statutes does not provide appropriate guidelines for judges to determine whether parents

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[102] REGINALD HEBER SMITH, JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND OF THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW 8 (1919) ("[T]he rich and the poor do not stand equally before the law; the traditional method of providing justice has operated to close the doors of the courts to the poor, and has caused a gross denial of justice in all parts of the country to millions of persons.").

[103] NAT'L COAL. FOR A CIV. RIGHT TO COUNS., *supra* note 27 (ranking the United States 65th of 99 countries when measuring "providing access to justice."). After *Lassiter*, the United States affirmed its stance apart from the European Court of Human Rights decision in *Airey v. Ireland*, which stated that free counsel is a human right. Following this decision, the Council of Europe required its now forty-seven members member countries to provide free civil counsel. NAT'L COAL. FOR A CIV. RIGHT TO COUNS., *International Perspective on Right to Counsel in Civil Cases*, http://civilrighttocounsel.org/about/international_perspective [https://perma.cc/69M6-E47C]. *see also* Airey v. Ireland, 32 Eur. Cr. H.R. (1979).

[104] Ruth Bader Ginsburg, *In Pursuit of the Public Good: Access to Justice in the United States*, 7 WASH. U. J.L. & POL'Y 1, 5–6 (2001) (describing Reginald Heber Smith's "groundbreaking" work "galvanized a national movement to provide lawyers for those who could not afford to pay counsel fees.").

[105] SMITH, *supra* note 102, at 5.

[106] MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS'N 2007) ("The United States legal system is based upon the principle that an independent, impartial, and competent judiciary . . . will interpret and apply the law that governs our society."); *Justice in Jeopardy*, 2003 A.B.A. REP. OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY 9 (stating that impartial judges are necessary for the rule of law and that the law would be reduced to judicial whim without impartial judges).

[107] G.A. Res. 217 (III) A, 1948 Universal Declaration of Human Rights (Dec. 10 1948) (UDHR), (while the International Covenant on Civil and Political Rights binds the United States to the UDHR, any obligations flowing from the UDHR are not enforceable in the United States, as the rights are not self-executing); Sosa v. Alvarez-Machain, 542 U.S. 692, 734–35 (2004).

should receive counsel in child protection cases. Section 260C.163 states that, "if the parent, guardian, or custodian desires counsel but is unable to employ it, the court shall appoint counsel to represent the parent, guardian, or custodian *in any case in which it feels that such an appointment is appropriate.*"[108] While the language of the statute seems to indicate a strict standard of appointment in its use of the phrase "shall appoint," the statute concludes that appointment of counsel is permissive.[109] Not only is the statute permissive, it provides no guidelines to assist the district court in determining if counsel should be appointed. The statute merely directs the district court to appoint counsel when it "feels" it to be appropriate.[110] Such a statute is unhelpful in that it provides no guidance for the district court and therefore seemingly calls for unguided judicial discretion.

Merriam Webster defines "feel" as "to have a marked sentiment or opinion."[111] Black's Law Dictionary provides no definition of "feel," but does provide a definition of the word "arbitrary," which reads: "[d]epending on individual discretion; of, relating to, or involving a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures."[112] Section 260C.263 provides no fixed rules or procedures for a district court to consider when determining whether to appoint counsel to parents. Although a district court judge is able to act with discretion, they are "not wholly free. He is not to innovate at pleasure."[113]

While there is no cause to believe that any district court would intentionally use the language of the statute to act in an arbitrary or capricious manner, section 260C.163 subdivision (3)(c) provides no guidance for its application. We assume "public officials are properly performing their duties,"[114] and "government official[s] properly perform[] [their] official duties and compl[y] with statutory procedures."[115] Indeed, any party in litigation asserting public officers did not act within the limits of their

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[108] MINN. STAT. § 260C.163 subdiv. 3(c) (excepting cases where the petition is solely based on habitual truancy) (emphasis added).
[109] *Id.*
[110] *Id.*
[111] *Feel*, MERRIAM-WEBSTER, (Sept. 10, 2019), https://www.merriam-webster.com/dictionary/feel [https://perma.cc/ELV6-K5RX]. Of note, the court of appeals stated that it "underst[oo]d [feel] to have the meaning: 'To be persuaded of' or 'To believe; think.'" *In re* Welfare of the Child of A.M.C., 920 N.W.2d 648, 660 n.6 (Minn. 2018) (citing *The American Heritage Dictionary of the English Language* 647 (5th ed. 2011)).
[112] *Arbitrary*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see* SANKARAN & POLLOCK, *supra* note 99 (further stating that Minnesota is the only state in the country to use the word "feel" in connection with the appointment of counsel in child protection proceedings).
[113] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921).
[114] Otter Tail Power Co. v. Vill. of Elbow Lake, 49 N.W.2d 197, 205 (Minn. 1951).
[115] R.E. Short Co. v. Minneapolis, 269 N.W.2d 331, 337 (Minn. 1978).

statutory powers has the burden of overcoming the presumption of proper performance.[116]

There is, correctly, the presumption that public officials properly perform their duties. However, the direction of section 260C.163 to appoint counsel in situations where the district court "feels" it to be appropriate does not provide language adequate to ensure the judiciary is acting as a neutral intermediary between the reach of the state and the lives of its constituents, concerning the control and custody of their children. While not immediately applicable, the Supreme Court has invalidated statutes for lack of narrow tailoring when there are "no standards prescribed for the exercise of [ ] discretion."[117]

It has long been held that judges are to give effect to the law, and not to personal feelings.[118] As the Supreme Court elaborated in *Osborn v. President, Directors & Co. of Bank*, "[j]udicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."[119] Discretion, when utilized by a court, must mean discretion with sound footing in the law; it must not be arbitrary and capricious, giving effect to the personal feelings of any one judge.[120] The will of the judiciary does not exist; courts, as "mere instruments of the law,"[121] exercise discretion in "discerning the course prescribed by law; and . . . it is the duty of the court

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[116] Brookfield Trade Ctr., Inc. v. Ramsey, 609 N.W.2d 868, 876 (Minn. 2000) (stating that evidence is "viewed in the context of a presumption that the county assessor, as a government official, properly performed his official duties and complied with statutory procedures" in certifying minimum market value of property).

[117] Saia v. New York, 334 U.S. 558, 560 (1948) (holding that a city ordinance limiting speech in public places except with permission of the police and offering no standards for the exercise of such police discretion is unconstitutional on its face). *Saia* was discussing freedom of speech under the First Amendment and the requirement that if statutes are to limit that right they must be narrowly tailored. *See also* Chicago v. Morales, 527 U.S. 41, 71 (1999) (Breyer, J., concurring in part and concurring in judgment). "The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid . . . ." *Id.*

[118] ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 32 (2008) ("Good judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities, including most especially their emotions."); *contra* William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3 (1988) (stating that sensitivity to one's intuition and passionate responses is both inevitable and desirable in the judicial process).

[119] Osborn v. Bank of the United States, 22 U.S. 738, 866 (1824).

[120] Rex v. Wilkes (1770, K. B.) 4 Burr. 2527, 2539 ("Discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule not by humour; it must not be arbitrary, vague and fanciful, but legal and regular.").

[121] *Osborn*, 22 U.S. at 866.

to follow it."[122] Courts have long noted that discretion cannot be exercised by considering what would be fair, and that there must be settled rules guiding how discretion is to be exercised.[123]

Finally, judicial oaths require judges to put any feelings toward litigants aside.[124] If parents cannot afford counsel, section 260C.163 of the Minnesota Statutes directs judges to appoint counsel when the judge feels that appointment is appropriate.[125] The judge is directed by statute to consider the interests of the parties involved in the litigation, which is proscribed both by judicial oaths and precedent.[126]

This is not to argue that judges must be *emotionless*.[127] It is noted that the work of judging is naturally emotionally charged.[128] In matters dealing with children, it is possible that an emotional charge may be even more deeply felt. However, judges still may not let their feelings towards individual litigants affect the outcome of cases.[129] Minnesota's statute, at minimum, may allow for the appearance of individual judges' feelings affecting their determination of whether parties in a child protection proceeding are appointed counsel, as the court is instructed by statute to be guided by "feel[ings]."[130] Deference to the courts is uniquely dependent on the appearance of and actual integrity and impartiality of judges.[131] To direct judges to appoint counsel according to their feelings regarding individual

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[122] *Id.*

[123] Haywood v. Cope, 25 Beav. 140, 140 (1858).

[124] *See, e.g.*, 28 U.S.C. § 453 (2012) (stating "I, ____, do solemnly swear (or affirm) that I will administer justice without respect to persons . . . .").

[125] *See* MINN. STAT. § 260C.163 subdiv. 3(c) (2020).

[126] *See* Sadberry v. Wilson 441 P.2d 381, 384 (Okla. 1968) ("Every litigant is entitled to nothing less than the cold neutrality of an impartial judge who must possess the disinterestedness of a total stranger to the interests of the parties involved in the litigation . . . ."); Ranger v. Great W. Ry. Co., 10 Eng. Rep. 824, 831 (1854) (appeal taken from Eng.) ("[A] judge ought to be, and is supposed to be, indifferent between the parties.").

[127] This would deny the long-standing and "unremarkable" conclusion that judges are human beings. *See* Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493, 509 (2013). Further, one cannot simply extract their emotions upon appointment to the judiciary, and emotion is "fundamental" to "human existence." *See* Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEXAS L. REV. 855, 855 (2015).

[128] *See, e.g.*, Jennifer Scarduzio, *Managing Order Through Deviance: The Emotional Deviance, Power, and Professional Work of Municipal Court Judges*, 25 MGMT. COMM. Q. 283, 287 (2011) ("There are several feeling rules for the judges' expression of emotion when communicating and interacting with defendants and lawyers during the legal process . . . .").

[129] *See* Denny Chin, Essay, *Sentencing: A Role for Empathy*, 160 U. PA. L. REV. 1561, 1563–64 (2012) (discussing how judges have stated that "[e]mpathy, of course, should play no role in a judge's determination of what the law is . . . . We do not determine the law or decide cases based on 'feelings' or emotions or whether we empathize with one side or the other.").

[130] *See* MINN. STAT. § 260C.163 subdiv. 3(c) (2020).

[131] United States Courts, Guide to Judiciary Policy, Code of Conduct for U.S. Judges 3 (2019).

cases and litigants leaves room for questioning the impartiality and legitimacy of judicial authority.[132]

Nonetheless, it is in the best interest of public policy to remove the language in section 260C.163, which seemingly provides free reign for the judiciary to determine whether parents receive counsel in matters concerning the custody of their children. "[C]ourts, be they high or low, should and must be like Caesar's wife, above suspicion. Any other standard is one which undermines the trust and confidence of the average citizen in his government."[133] Courts have also recognized the value of appearances: not only do litigants have the right to trial by a judge who is impartial and disinterested, the appearance of such trial must be fair.[134] Bearing in mind long and enduring inequities between the wealthy and the poor with respect to access to the legal system, it is perhaps easier for the public to retain faith in our judiciary if the public trusts they would have access to legal counsel on more occasions than just when the judiciary "feels" like appointing representation.[135] This public perception may be particularly important considering that, although judges in Minnesota face re-election, they are initially appointed by the state's executive branch. When children are removed from the home, they are removed by the state. The common denominator of "the state" may decrease trust in and erode the legitimacy of the state judiciary. Thus, it is sound public policy for judges to be given greater direction from the legislature than only to consider how they "feel" when appointing counsel in subsequent adversarial proceedings against the state.[136]

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[132] Judges appearing partial towards parties undermines judicial commitment to the rule of law, and the legitimacy of the judiciary suffers. Geyh, *supra* note 127, at 511.

[133] *In re* Turney, 533 A.2d 916, 920 (Md. 1987) (internal quotations omitted).

[134] *See* Jefferson-El v. State, 622 A.2d 737, 741 (Md. 1993) (recognizing "the importance of the judicial process not only being fair, but *appearing* to be fair.") (emphasis added); *see* Stuart Chinn, *The Meaning of Judicial Impartiality: An Examination of Supreme Court Confirmation Debates and Supreme Court Rulings on Racial Equality*, 2019 UTAH L. REV. 914, 918–919 (2020) (arguing that judicial impartiality aspires to the ideal of fairness. "[A]n impartial judge is a person who acts in a fair manner toward all parties in a case appearing before them.").

[135] Charles Gardner Geyh argues that there are three subsets of people benefiting from judicial impartiality:

> (1) parties to ligation, who seek a fair hearing from an impartial judge, in a "procedural dimension" of impartiality; (2) the public, for whom the institutional legitimacy of the judiciary depends on the impartiality of its judges, in a "political dimension" of impartiality; and (3) judges themselves, who take an oath to be impartial and for whom impartiality is a standard of conduct that is core to their self-definition, in an "ethical dimension" of impartiality.

Geyh, *supra* note 127, at 497.

[136] Additionally, section 260C.163 of the Minnesota Statutes is problematic because it creates no consistency for how judicial discretion of appointment is bound. For the standard "abuse

Attorneys who represent parents in child protection proceedings play a crucial role in safeguarding the liberty interests of both parents and children.[137] Parents' attorneys work to prevent unnecessary state intrusion in the arena of family life.[138] However, attorneys are unable to protect the fundamental liberty interests of parents or children if they are not appointed in the first instance, as a result of Minnesota's statute directing the judiciary to appoint counsel on the basis of an individual judge's feelings. Section 260C.163 of the Minnesota Statutes calling for the discretionary appointment of counsel for parents at the initial EPC hearing must be rewritten to better serve Minnesota's families; parents should be provided access to information regarding their right to counsel, and parents should be appointed counsel in advance of their first court appearance at an EPC hearing.

V. MOVING BEYOND *LASSITER* AND SECTION 260C.163: IT IS IN THE BEST INTEREST OF MINNESOTA'S FAMILIES TO HAVE MANDATED RIGHT TO COUNSEL

In 2008, the Children's Justice Initiative recommended the Minnesota state legislature amend section 260C.163 subdivision 3 of the Minnesota Statutes to mandate the appointment of counsel to parents involved in child protection matters.[139] However, no such changes mandating counsel occurred. Additionally, that same year, public defenders

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of discretion" to be meaningful, there must be consistency in how that discretion is bound so abuse of such discretion can be readily recognized. *See* Sarah M. R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. MIAMI L. REV. 947, 994 (2010).

[137] At the EPC hearing, parents' attorneys can advocate for the child's placement with either the parent or parents, or in family out-of-home placement in situations where it is safe to advocate for such placement. Parents' attorneys can also advocate for case plans that are appropriate for the family's needs and which recommend services with the goal of reunification in mind.

[138] *See* Frank E. Vandervort & Vivek S. Sankaran, *Child Welfare Services Div., Protocol For Attorneys Representing Parents In Child Protective Proceedings* 2 (2008), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1059&context=other [https://perma.cc/6P27-BC9B] (stating that, in preventing state overreach, parents' attorneys function in a similar manner to defense lawyers in criminal cases).

[139] MEYER, *supra* note 37, at 17. The workgroup also recommended that section 260C.163 be amended to read that indigent parents or indigent legal guardians who are parties to CHIPS, TPR, and other permanency cases have a mandatory right to court-appointed attorneys, and that indigent parents in TPR cases should also have such right. *Id.* Additionally, it should be remembered that the same year the workgroup's report was published, Minnesota slashed the budget of the Board of Public Defense as the result of nation-wide state deficits, and the Board of Public Defense officially stated they would no longer represent parents in child welfare proceedings. *Id.*

stopped representing parents in child protection matters due to statewide budget cuts.[140]

In 2013, approximately 25,000 children across the country were removed from their homes and returned within thirty days.[141] Minnesota—after removing the mandatory right to counsel in 2008 and switching to the county-by-county system of representation—has one of the highest "short stayer" populations in the United States.[142] As such, the state returned nearly twenty-eight percent of children within thirty days of removal from the home.[143] Often, these children are returned to the same caretaker from whom they were removed.[144] The median stay was six days outside the home for all short stayers, and only eighteen percent of all short stayers were placed in relative foster care placement.[145] Authors Church and Sankaran noted that, while removal from the home causes trauma in children, such trauma can be "compounded when they are placed in unfamiliar settings."[146] Out-of-home placement has been linked to difficulties in school, as well as emotional and behavioral problems.[147] Removal often occurs at a very young age, when disrupting a child's attachment to their primary caregiver can have negative consequences for future attachments.[148] While the trauma and subsequent consequences experienced by removing children are well-documented, it should be noted that sometimes placement in an out-of-

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[140] *Id.* at 5.

[141] Christopher Church & Vivek Sankaran, *Easy Come Easy Go: The Plight of Children Who Spend Less Than 30 Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 217 (2016).

[142] *See id.* at 219–20 (defining a "short stayer" as a child removed from the home for less than thirty days).

[143] *Id.*

[144] *See id.* at 222 (finding that, nationally, 76.2% of children removed from their homes return to their original caretakers). Overall, most children in Minnesota are eventually returned to their original caretakers. In looking at all placements in Minnesota ending in 2017—not only placement episodes ending in less than thirty days—64.1% of children were returned to the same parent or caregiver from whom they were removed. MINN. DEP'T OF HUM. SERVS., *supra* note 93, at 29. In Minnesota, the rate of reunification with the child's primary caretakers has remained relatively consistent. *See* CHILD WELFARE LEAGUE OF AMERICA, MINNESOTA'S CHILDREN 2017 1 (2017) (reporting that sixty-four percent of children in Minnesota were returned to their original caretakers in 2014).

[145] Church & Sankaran, *supra* note 141, at 218.

[146] *Id.* at 226; *see also* UPENN COLLABORATIVE ON CMTY. INTEGRATION, REMOVAL FROM THE HOME: RESULTING TRAUMA 2, ("Removal from the home and replacement in the home can lead to feelings of instability, loss of status and a loss of control as children may always expect and fear that they can be removed and replaced at any time without explanation."). As stated in Part II, removal from the home for even a short period of time can have long-lasting emotional impact on a child. Liebmann, *supra* note 93, at 161–62.

[147] MINN. DEP'T OF HUM. SERVS., *supra* note 93, at 9.

[148] *Id.* Additionally, children under the age of two, and children between the ages of fifteen and seventeen, are the most likely to experience out-of-home placement. *Id.* at 6. Studies have suggested that removing children before they are "pre-verbal" can exacerbate the trauma of removal. UPENN COLLABORATIVE ON CMTY. INTEGRATION, *supra* note 146, at 3.

home setting is necessary.[149] Anecdotally, we are more aware of the sometimes devastating consequences of not removing children from homes from which they should be removed.[150] However, removing a child from his or her home causes certain harm.[151] Any unnecessary removals of children who subsequently become short stayers could potentially be obviated by appointment of counsel at or before the parents' first appearance at the EPC hearing. As the purpose of the EPC hearing is to determine placement, parents' attorneys are able to advocate for the child's placement with parents or suitable relatives in instances where such placement is safe, thus mitigating potential trauma to the child.

In addition to having one of the highest short stayer populations in the country, Minnesota has one of the highest removal rates in the country, removing children at a rate behind only five other states in the nation.[152] In

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[149] However, family foster care settings have been found to help provide children placed out of their home with the support necessary for healthy development. MINN. DEP'T OF HUM. SERVS., *supra* note 93, at 9 (citing THE ANNIE E. CASEY FOUND., RECONNECTING CHILD DEVELOPMENT AND CHILD WELFARE: EVOLVING PERSPECTIVES ON RESIDENTIAL PLACEMENT 7–8 (2012)); Minnesota reports that, in recent years, only thirty percent of children placed outside the home were placed with relatives. THE ANNIE E. CASEY FOUNDATION, *Children in Foster Care by Placement Type in the United States* (Oct. 22, 2019), http://datacenter.kidscount.org/data/tables/6247-children-in-foster-care-by-placementtype#detailed/2/2-52/true/36/2621/12994 [https://perma.cc/76NU-36JX]. In Minnesota, the numbers of children placed in non-relative out-of-home care has steadily increased since 2011. CHILDREN'S BUREAU, FY 2005–FY 2014 FOSTER CARE: ENTRIES, EXITS, AND IN CARE ON THE LAST DAY OF EACH FEDERAL FISCAL YEAR (2015); CHILD WELFARE LEAGUE OF AMERICA, *supra* note 144 (reporting that an additional 2,525 children were living in non-relative out-of-home placements in 2015 than in 2011). Most children experiencing placement in out-of-home stranger placements were five years of age or younger. *Id.* Perhaps such low numbers of relative placement are largely accounted for by family members who are unable to care for relative children in contact with the child protection system. *See id.* It is also possible that significantly fewer children find their way to placement with their relatives as the result of the lack of parent attorneys at EPC hearings, who would have been able to advocate for such suitable relative placement. *See id.*

[150] For example, the horrific death of Eric Dean following fifteen reports of abuse is known in Minnesota as it led to massive child protection reforms across the state. MINN. DEP'T OF ADMIN. COUNCIL ON DEVELOPMENTAL DISABILITIES, 2014: Death of Boy with Disabilities Sparks New Legislation, https://mn.gov/mnddc/future/2014/2014-06.html [https://perma.cc/DS23-39KX]; *see also* Jay Olstad & Steve Eckert, *Pope County Abuse Case Exposes Problems with System*, USA TODAY (Sept. 29, 2014) https://www.usatoday.com/story/news/investigations/2014/09/29/eric-dean-pope-county-15-reports/16425467/e [https://perma.cc/5BJH-X2WK] ("'The picture of 4-year-old Eric Dean,' said governor Mark Dayton, 'will haunt me for a long[]time.'").

[151] Joanna Woolman & Jeff Hayden, *The Trauma of Child Separation Also Exists Right Here in Minnesota*, STAR TRIBUNE (July 13, 2018), http://www.startribune.com/the-trauma-of-child-separation-also-exists-right-here-in-minnesota/488151491/ [https://perma.cc/836C-UBNK] (stating that leaving children in homes where they are in danger can lead to "catastrophic consequences" but also that removal inevitably causes trauma from separation).

[152] *Id.*

2017, 16,593 children in Minnesota experienced some form of out-of-home placement for at least one day.[153] Some counties in Minnesota have reported increases of more than 100% in removals over the last few years.[154] 2017 marked an overall increase in removals by 10.6% from 2016.[155] Over one-third of children removed were returned to their original caretaker in six months or less.[156] It is worth noting that a little over one-fifth of the children removed in Minnesota are removed under the broad category of neglect.[157]

The blurring of the line between neglect and the mere effects of poverty is apparent in section 260C.007 of the Minnesota Statutes.[158] This statute permits a child to be adjudicated as a child in need of protection or services due to a lack of adequate care when the child "is without necessary food, clothing, shelter, education or other required care . . . because the child's parent, guardian, or custodian is unable . . . to provide that care[.]"[159] Maren K. Dale, writing for the ABA, notes that poverty can lead to increased rates of actual maltreatment.[160] However, issues arise when poverty is mistaken for neglect, which leads to the increased reporting of low-income families to child protection services.[161]

In addition to families who experience poverty, families of color are also overrepresented in Minnesota's child protection system.[162] In

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[153] MINN. DEP'T OF HUM. SERVS., *supra* note 93, at 6.
[154] Woolman & Hayden, *supra* note 151.
[155] MINN. DEP'T OF HUM SERVS., *supra* note 93, at 6.
[156] *Id.* at 7.
[157] *Id.* at 21. Notably, parental drug abuse accounts for almost one-third of removals. *Id.* This could account for the topic of another paper entirely.
[158] *See, e.g.*, MINN. STAT. § 260C.007, subdiv. 6(3) (2020).
[159] *Id.*
[160] Maren K. Dale, *Addressing the Underlying Issue of Poverty in Child-Neglect Cases*, AM. BAR ASS'N (Apr. 10, 2014), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2014/addressing-underlying-issue-poverty-child-neglect-cases/ [https://perma.cc/WLT8-V2HH] ("The inability to feed, clothe, or house a child should not be mistaken for neglect.").
[161] One 2017 study in Wisconsin found a strong correlation between housing instability, welfare benefits, and risk of Child Protection Services involvement. Kristen S. Slack, Sarah Font, Kathryn Maguire-Jack & Lawrence M. Berger, *Predicting Child Protective Services (CPS) Involvement among Low-Income U.S. Families with Young Children Receiving Nutritional Assistance*, 14 INT. J. ENV'T. RES. & PUB. HEALTH 1197 (2017). Additionally, New York's Center for Family Representation (CFR) notes that all the families it serves live below the poverty line, and thirty-one percent struggle with issues of homelessness or unstable housing. *Our Families,* CTR. FOR FAM. REPRESENTATION, https://www.cfrny.org/our-families/ [https://perma.cc/UW3N-XBWR].
[162] This issue is not isolated to Minnesota. Families identifying as a member of minority populations are overrepresented in child welfare systems across the nation. U.S. DEP'T OF HEALTH AND HUMAN SERV. CHILD. BUREAU, RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE 2 (2016). The CFR states that eighty-eight percent of its

Minnesota, African American and Native American families are significantly more likely to encounter the state's child protection system than their Caucasian-family counterparts.[163] Based on relative population percentages, Native American families will encounter the child protection system at a rate 18.5 times greater than their Caucasian counterparts.[164] Similarly, African American families are three times more likely to experience the child protection system than their Caucasian counterparts with respect to relative population size.[165] Finally, children identifying as "two or more races" experienced care at a rate 4.8 times greater than their Caucasian counterparts.[166]

In summary, these statistics indicate that Minnesota's poor are most likely to encounter the child protection system. Minnesota's communities of color are also more likely to encounter the child protection system when compared to Caucasian families in the state. Additionally, the state's communities of color face a far greater risk of their children being placed in out-of-home placement than their Caucasian counterparts. Families both below the poverty line and identifying with minority heritage have a significantly greater chance of encountering Minnesota's child protection system than any other population subset within the state. It follows that, because Minnesota does not automatically assign counsel in child protection proceedings, Minnesota disproportionately does not provide representation to the state's poor and populations of color in child protection proceedings. It is this author's conclusion that, because Minnesota does not automatically assign counsel before the initial EPC hearing, Minnesota is more likely to remove children from the home of families of its poor and minority residents.

Attorney representation consistently leads to more positive outcomes for families.[167] In Minnesota, attorney representation in child protection proceedings could consistently lead to more positive outcomes for the state's poor families and families of color. In the first hearing, the advocate is able to contest removals, identify relatives to act as placement options if the child cannot return to the care of their parents, and identify

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clients are people of color. CTR. FOR FAM. REPRESENTATION, *supra* note 161. The CFR also reports that twenty-six percent of its clients are immigrants. *Id.*

[163] While Caucasian children comprise the largest number of children in the care of the state, the disproportionality by race which factors into the likelihood that families will experience care, or encounter the child protection system, is of "significant concern." MINN. DEP'T OF HUMAN SERVS., *supra* note 93, at 6.

[164] *Id.* at 16.

[165] *Id.*

[166] *Id.*

[167] Elizabeth Thornton & Betsy Gwin, *High-Quality Legal Representation for Parents in Child Welfare Cases Results in Improved Outcomes for Families and Potential Cost Savings*, 46 FAM. L.Q. 139, 139 (2012).

appropriate safety planning options and resources.[168] Overall, represented parents attend court more often, stipulate to fewer allegations, and have their children placed in a non-foster care arrangement more often than their non-represented counterparts.[169] Parent representation at the EPC hearing also ensures the presence in the courtroom of those who can advocate for placement options, which may help obviate trauma to children.[170] Additionally, parent representation ensures that there are advocates available to those in Minnesota who are at significantly greater risk of encountering Minnesota's child protection system because of race and poverty.

A. Other States' Statutory Systems of Parent Representation

New York, much like the Court in *Stanley v. Illinois*, acknowledged that while a parent has a right and important interest in raising their child, the child also maintains interests that are at risk when this bond is scrutinized by the court.[171] New York statutorily requires the appointment of counsel to parents who cannot afford such counsel by the time of the initial hearing.[172] New York is one of seven states that mandate the appointment of counsel by statute for both termination and dependency proceedings.[173] New York specifically found that if parents are unrepresented in child protection matters, their due process rights are violated.[174] Given the state's express statutory provision calling for representation of assigned counsel for parents lacking financial means to afford such counsel, New York's highest court determined that the lack of parental representation also denies unrepresented parents equal protection of the laws.[175]

Because New York has long-recognized parents' rights to counsel, New York led the charge on significant social reform in child protection. Both the Bronx Defenders and the Center for Family Representation (CFR) provide free legal representation to parents involved in child protection proceedings.[176] The goal of the Bronx Defenders is to provide advocacy for indigent clients to address the underlying issues which cause people to come

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[168] U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 87, at 6.
[169] *Id.*
[170] MINN. DEP'T OF HEALTH & HUM. SERVS., *supra* note 93, at 9.
[171] Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 69–70 (1995). In *Stanley v. Illinois*, the Supreme Court recognized that the state "needlessly risks running roughshod over the important interests of both parent and child" when examining those bonds through procedures with a presumption of unfitness. 405 U.S. 645, 657 (1972).
[172] N.Y. FAMILY COURT ACT § 262 (McKinney 2012).
[173] SANKARAN & POLLOCK, *supra* note 99, at 2–25.
[174] *In re* Ella B., 30 N.Y.2d 352, 357 (1972).
[175] *Id.*
[176] AM. BAR ASS'N, SUMMARY OF PARENT REPRESENTATION MODELS 11 (2009).

into contact with the legal system.[177] In fiscal year 2018, only four percent of children whose parents were represented by the Bronx Defenders were ultimately placed in stranger foster care.[178] Additionally, New York discovered that the mandatory appointment of counsel, as well as other programs offered by the CFR, saved taxpayers nearly $37 million since 2002.[179]

B. Fiscal Considerations Behind the Mandatory Appointment of Counsel

Mandating the appointment of counsel to parents in child protection proceedings provides opportunities for the state to save costs from a myriad of sources. This includes savings in foster care costs, savings in litigation costs, and costs saved by not requiring the court system to spend additional time and effort working with unrepresented parents.[180] As discussed above, Minnesota has one of the largest populations of short stayers in the nation.[181] Mandating counsel to parents in child protection proceedings could save the State considerable capital, as evidenced by two case studies in New York and Washington.[182] In general, states have discovered that parental representation in child protection proceedings leads to improved case planning, expedited permanency, and cost-savings to the government.[183]

i. The New York State Example

New York has similarly saved its taxpayers significant money by providing representation to parents in child protection proceedings. The CFR began providing free legal services to parents in 2002.[184] CFR has been instrumental in keeping children from entering foster care unnecessarily, to the benefit of the state's taxpayers. The Minnesota Children's Justice

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[177] *Id.* at 1.

[178] *Family Separation in New York City: Hearing Before the New York City Council Justice System Committee* 12 (2018) (statement of Emma Ketteringham, The Bronx Defenders).

[179] CTR. FOR FAM. REPRESENTATION, *Mission & History*, https://www.cfrny.org/about-us/history-mission/ [https://perma.cc/4C7N-9Y9F].

[180] *See, e.g.*, Bobbie J. Bridge & Joanne I. Moore, *Implementing Equal Justice for Parents in Washington: A Dual Approach*, 53 JUV. & FAM. CT. J. 31 (2002) (finding that strengthening parents' access to counsel increased family reunifications by fifty percent. Additionally, "the enhancement of parents' representation has the potential to save . . . millions in state funding on an annualized basis.").

[181] Church & Sankaran, *supra* note 141, 219–20.

[182] *See infra* Part V.B.

[183] *See, e.g.*, Thornton & Gwin, *supra* note 167, at 139.

[184] CTR. FOR FAM. REPRESENTATION, *Mission & History*, https://www.cfrny.org/about-us/history-mission/ [https://perma.cc/H9HF-5AAT].

Initiative found that CFR saved New York $3,107,662 in foster care and litigation costs during an eight-month period between 2007 and 2008.[185] Since 2007, CFR additionally saved New York taxpayers money by either reducing the amount of time children spent in foster care or by avoiding foster care entirely.[186] In 2011 alone, CFR prevented seventy-three percent of its clients' children from entering foster care.[187] Considering the children who did enter care, the median length of stay in foster care by children whose parents were represented by CFR equaled 2.2 months, a stay 17.7 months shorter than the median in the state of New York.[188] CFR also determined that the cost of keeping one child in foster care in New York is $30,000 each year.[189] CFR's services only cost $7,100 per family, and the provision of such services has reduced the cost of foster care in the state by $48.5 million.[190]

ii. The Washington State Example

Washington state mandates court-appointed counsel to indigent parents.[191] In 2000, Washington launched the pilot Parent Representation Program to provide state-funded attorney representation to indigent parents.[192] Program results indicate that shortening the time it takes for children to achieve permanency can potentially save the state millions in dollars.[193] One study of the program determined that if all 8,231 children in the Washington study cohort who eventually reunified had reunified one month sooner, the state would have saved $3 million in foster care maintenance payments alone.[194]

More importantly, when represented by public defenders in Washington, parents and children achieved reunification eleven percent faster than unrepresented parents in the state.[195] The eleven percent decrease in reunification times translates to twenty-seven days each child did not spend in foster care.[196] The Parent Representation Program ultimately

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[185] MEYER, *supra* note 37, at 11.
[186] CTR. FOR FAM. REPRESENTATION, *supra* note 161.
[187] CTR. FOR FAM. REPRESENTATION, THE CENTER FOR FAMILY REPRESENTATION 1 (2015).
[188] ELIZABETH THORNTON, COURT-BASED CHILD WELFARE REFORMS: IMPROVED CHILD/FAMILY OUTCOMES AND POTENTIAL COST SAVINGS, AM. BAR ASS'N, CTR. ON CHILD. & THE LAW 10 (2012).
[189] *Our Results*, CTR. FOR FAM. REPRESENTATION, https://www.cfrny.org/about-us/our-results/ [https://perma.cc/MK54-RWQE].
[190] *Id.*
[191] WASH. REV. CODE § 13.34.092 (2000).
[192] Thornton & Gwin, *supra* note 167, at 6.
[193] *Id.* at 7.
[194] *Id.* at 7–8.
[195] *Id.* at 7.
[196] *Id.*

led to a thirty-nine percent increase in reunification rates in the thirty-four counties that implemented the program.[197] Ultimately, when reunification was not possible, parental representation also led to adoptive placement or guardianship nearly one year sooner when compared to cases where parents were unrepresented.[198]

As indicated by the results in other states, Minnesota could save capital by reducing the state's short-stayer population and the unnecessary money spent on the out-of-home placement of children who are returned to their parents less than thirty days after removal. By having attorneys represent parents at the initial EPC hearing, the attorney can advocate for the child to remain in the care of his or her parent or guardian in situations in which it is safe to so advocate. Any money saved from the reduction in the state's short-stayer population could then be used to support appropriate structural changes to Minnesota's representation practices. The United States Department of Health and Human Services stated that changes to structural best practices in parent representation are needed to ensure high-quality representation to parents and families.[199] The Department recommended that States:

> [1] Support adequate payment and benefits to "professionalize" this type of law practice, and move from a contract system with competing priorities to an employment system like other indigent and state agency representation[; and]
>
> [2] Support a payment system for parent and child representation that is designed to promote high quality, ethical legal representation and discourages overly large caseloads.[200]

These are likely recommendations from which Minnesota could directly benefit. As discussed in Part III, and according to the 2008 Children's Justice Initiative Report, there is no statewide standard of practice for attorneys representing parents.[201] Statements made by in-state

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[197] *Id.*

[198] Mark E. Courtney, Jennifer L. Hook & Matt Orme, *Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care*, 1 PARTNERS FOR OUR CHILD. 1, 6 (2011).

[199] U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILDREN AND FAMILIES, ACYF-CB-IM-17-02, HIGH QUALITY LEGAL REPRESENTATION FOR ALL PARTIES IN CHILD WELFARE PROCEEDINGS 13 (2017).

[200] *Id.*

[201] MEYER, *supra* note 37, at 3. As indicated above, the Public Defender's Office continues to represent children older than ten in child protection proceedings, as public defenders are statutorily required to represent children. MINN. STAT. § 260C.163 subdiv. 3(a)–(b). However, the Board reports that they are overwhelmed and working with resources below those designated by national standards. *Infra* Part III. The Board additionally reported that

lawyers indicate that no such standardized practices have materialized in the ten years since public defenders ceased representing parents.[202] After the dissolution of state funding for parent representation in 2008, individual counties determine what minimal practice standards, if any, apply to parental representation in their own jurisdictions.[203] Such patchwork practices—the vestiges of *Lassiter*—created a lack of consistency in parental representation across Minnesota's eighty-seven counties. Adopting the standards suggested by the Department of Health and Human Services would help create more consistency in child protection proceedings across Minnesota.

The 2008 Children's Justice Initiative Report also provided an in-depth analysis of attorney payment by county.[204] Such payment schemes varied widely by county. Some counties reported attorney payment as low as $24 per hour, with a reported maximum hourly payment of $100 per hour.[205] Other counties reported paying attorneys on a flat-fee basis depending on the type of proceeding, and others still reported contracting with attorneys for monthly sums.[206] Several counties reported having only two attorneys appointed to handle the county's entire child protection caseload.[207] While this information is, at this point, a decade old, no other published reports have collected this breadth of information regarding attorney payment schemes by county in Minnesota. Regardless, it is unlikely the system of contract payments adopted by Minnesota in 2008 is the system of compensation the Department of Health and Human Services envisioned when it recommended a system of adequate payment and benefits to "professionalize" the practice of parent representation.

More important than fiscal considerations, timely access to counsel for parents in child protection proceedings may: contribute to a more expeditious provision of appropriate and individualized services to families; assist in placing children with relatives rather than in stranger foster care;

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the starting salary at the Public Defender's Office and the maximum salary both fall between eleven and twelve percent below those of employees in comparable public agencies. MINN. BD. OF PUB. DEF., *supra* note 56, at 7. In 1999, Washington state discovered that there were severe disparities between counties in compensation provided to attorneys representing indigent parents. Courtney et al., *supra* note 198, at 1–2. The Washington legislature believed that such disparity in payment called into "serious question whether parents in Washington were being provided adequate legal representation in processes that have significant consequences for parents and children[.]" *Id.* at 2. In New York, it was noted that attorneys would leave child protection practice because they were receiving inadequate pay. Thornton & Gwin, *supra* note 167, at 10.

[202] AM. BAR ASS'N, *supra* note 52.

[203] MEYER, *supra* note 37, at 2.

[204] *Id.* at 25 (noting that, after the dissolution of the statewide system of payment, almost every county that had agreed to pay for attorney's fees had only done so under protest).

[205] *Id.* at 7.

[206] *Id.*

[207] *Id.* at 26–27.

prevent unnecessary removals of children; and avoid unnecessary court proceedings.

VI. CONCLUSION

Representation by competent counsel in a child protection proceeding is integral to preserve both parents' and children's fundamental liberty interests. Section 260C.163 of the Minnesota Statutes affords broad and legislatively unguided judicial discretion with respect to the decision to appoint counsel to parties in child protection proceedings. The appointment of counsel is an important right of both the parent and the child when considering the magnitude of the intrusion by the state into the sphere of family life. According to sound public policy arguments and national trends in representation, Minnesota should reform section 260C.163 of the Minnesota Statutes to mandate counsel for parents at the beginning of a child protection case, before the first appearance at an Emergency Protective Care Hearing. As noted in the beginning of this Article, at the time of publication, the legislature is considering amending the language of the statute to mandate counsel before the first hearing in a child protection matter. This proposed change does not affect Minnesota's families that were separated without representation. However, this change is necessary, and provides the path forward.

Minnesota's child protection system is struggling. Our state public defenders—who are statutorily required to represent children in child protection matters—are overwhelmed by daunting caseloads and lack of financial support. Children continue to be removed from their homes at higher rates, and our state's public defenders believe Minnesota will only continue to remove children in greater numbers. This increase in the number of children removed continues to disproportionately affect Minnesota's families of color as well as families experiencing poverty, who are least able to protect themselves against state intrusion.

Minnesota must not turn a blind eye to its struggling parents when the integrity of its families and the well-being of its children are at stake. It is not a partisan issue to protect Minnesota families from state intrusion after a call to child protection has been made. Further, it is not a partisan issue to mandate parents counsel before the first Emergency Protective Care hearing, where mistakes can have long-lasting effects on the outcome of the case, the placement of the child, and the child's well-being. It is unjust that in Minnesota, these mistakes—which have grave consequences for families—are allowed to occur without attorney representation. The presence of qualified and culturally competent counsel before the first appearance at the Emergency Protective Care hearing and at all stages of a child protection proceeding is the start of the journey toward better outcomes in child protection matters for Minnesota families.

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