The Mutilation of a Child's Spirit: A Call for a New Approach to Termination of Parental Rights in Cases of Child Abuse

Victor I. Vieth

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THE MUTILATION OF A CHILD'S SPIRIT: A CALL FOR A NEW APPROACH TO TERMINATION OF PARENTAL RIGHTS IN CASES OF CHILD ABUSE

VICTOR I. VIETH†

“Someday, maybe, there will exist a well informed, well considered, and yet fervent public conviction that the most deadly of all possible sins is the mutilation of a child’s spirit.”

Erik Erikson

1. INTRODUCTION .......................................... 728
2. SCOPE OF THE PROBLEM ................................ 729
3. MINNESOTA'S RESPONSE TO CHILD ABUSE ............ 733
   A. Criminal Code ...................................... 733
   B. Child Protection Statutes ........................... 736
   C. Family Law ....................................... 740
4. CHILD ABUSE AND MINNESOTA’S TERMINATION OF PARENTAL RIGHTS STATUTE ............................ 744
   A. Repeated Failure to Comply with Parental Duties .... 747
   B. Palpable Unfitness to Parent ....................... 750
   C. Neglected and in Foster Care ...................... 754
   D. Reasonable Efforts at Reunification Have Failed .... 757
   E. Conviction for Killing a Parent’s Child ............. 758
5. PROBLEMS WITH THE CURRENT TPR STATUTE IN CASES OF CHILD ABUSE ........................................ 761
   A. The Current Statute Fails to Recognize the Harm Resulting from Child Abuse ............................ 762
   B. The Current Statute Places Children at Risk ........ 766
   C. The Current Statute Creates a Delay in Permanency Planning .................................................. 767
6. A NEW APPROACH ....................................... 768
   A. Proposal for Amended Statute ........................ 769
   B. Benefits of the Amended Statute ...................... 773

† Assistant Cottonwood County Attorney; B.S. magna cum laude 1984, Winona State University; J.D. 1987, Hamline University School of Law.
I. INTRODUCTION

The Minnesota Legislature recognizes the abuse of children as a crime that warrants our attention and our action. The legislature utilizes the criminal code to accord special protection to abused children and authorizes court ordered services for any family where even one abused child can be found. In the arena of family law, the legislature places the burden on an abusive parent to prove that visitation, much less custody, will serve the child's best interests.

Despite efforts to address child abuse in Minnesota's criminal and family codes, acts of physical and sexual abuse, by themselves, do not warrant termination of a parent's rights unless the parent is convicted of causing the death of a natural or adopted child. As a result, a petitioner for termination of parental rights (TPR) must not only prove that termination would serve the abused child's best interests, but also that the abuse falls into at least one of eight statutory categories warranting involuntary termination.

This outdated legislative framework not only places children at risk, but it compels children's legal advocates to creatively place abusive conduct within the parameters of the TPR statute. This creative legal drafting is necessitated by the legislature's failure to include child abuse as an independent ground for termination in the TPR statute.

This Article analyzes the scope of child abuse in Minnesota and the nation. It also discusses the Minnesota Legislature's response to child abuse, and accords specific attention to the five statutory grounds that are currently considered in parental rights actions where a parent has abused a child. Finally, this Article highlights the shortcomings of the present statute and offers a proposed amendment to the TPR statute.

1. See infra notes 44-49 and accompanying text.
2. See infra notes 75-85 and accompanying text.
3. See infra notes 86-89 and accompanying text.
5. See infra note 110.
II. THE SCOPE OF THE PROBLEM

In recent years, there has been a disturbing increase in reported incidents of abused and neglected children. In 1986, over 1.5 million children were reported as victims of abuse or neglect. This figure rose to 2.5 million in 1990. Reports of child sexual abuse increased even more dramatically, from 1975 in 1976 to 155,000 in 1986.

These statistics, however, do not reflect the sea of abused children whose plight is unreported. A 1985 household survey of parents reveals that 1.5 million children suffer from "very severe" physical abuse and that 6.9 million children are victimized by some form of caretaker violence. With respect to sexual abuse, studies indicate that as many as thirty-eight percent of all women and sixteen percent of all men have been subjected to childhood sexual abuse.

Increasingly, child abuse victims pay with their lives. One study reports that, in 1991, 1383 children died as a result of abuse or neglect, a ten percent increase from the previous year. According to Dr. Ann Cohn, Executive Director of the National Committee for Prevention of Child Abuse, four children die each day as a result of maltreatment, and 7300 children are reported as victims of abuse or neglect.

Minnesota is not immune to the dramatic increase in child abuse cases. From 1984 to 1991, reports of child abuse and neglect increased approximately twenty-five percent from 13,841 to

7. Id. (citing AMERICAN HUMANE ASS'N, NATIONAL ANALYSIS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING (1990); NATIONAL COMM. FOR THE PREVENTION OF CHILD ABUSE, CURRENT TRENDS IN CHILD ABUSE REPORTING AND FATALITIES (1990)).
8. Id. (citing NATIONAL CTR. ON CHILD ABUSE & NEGLECT, STUDY FINDINGS: STUDY OF NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT (1988)).
9. Id. (citing M. Straus & R. Gelles, How Violent are American Families? Estimates from the National Family Violence Resurvey and Other Studies, in FAMILY ABUSE AND ITS CONSEQUENCES: NEW DIRECTIONS IN RESEARCH (G. Hotaling et al. eds., 1988)).
12. Id.
13. Id.
The reports received in 1991 involved 26,345 alleged child victims. Between 1984 and 1991, reports alleging child physical abuse increased by forty-four percent, from 5635 to 8124. Approximately forty percent of these cases resulted in a determination that abuse had occurred.

In contrast, reports of sexual abuse from 1984 to 1991 declined by thirty-six percent, from 3662 to 2342. Throughout this time period, approximately forty-five percent of the sexual maltreatment reports resulted in a determination that sexual abuse had occurred. It is likely that some portion of those children whose cases of alleged physical or sexual abuse could not be substantiated because of insufficient evidence were also victimized.

When allegations of abuse are substantiated, the local welfare agency is directed by statute to offer those services necessary to prevent further abuse and to preserve the family “whenever possible.” When the abuse is so egregious to necessitate removing the child from the home, the agency is required to exercise this authority.

15. Id.
16. Id.
17. Id.
18. Id.
19. DHS REPORT, supra note 14, at 1.
20. It can be argued that, when there is insufficient evidence to allow intervention, the mere fact that an investigation took place may subject the child to retaliatory abuse by the perpetrator. There are two shortcomings to this argument, however. First, it is not always necessary to alert the alleged perpetrator that a child has been interviewed or that the child may have indicated abuse. Where reasonable grounds exist, the court may grant a local welfare agency’s motion to withhold notice of the occurrence of the interview from a parent, legal custodian, or guardian. MINN. STAT. § 626.556, subd. 10(c) (1992 & Supp. 1993).
In Minnesota, the cost of out-of-home placement for neglected and abused children constitutes the single largest expenditure of community social service money.\textsuperscript{23} Between 1986 and 1991, the total number of Minnesota children placed out of the home increased thirty-one percent.\textsuperscript{24} As many as one-third of these children are placed as a result of being abused.\textsuperscript{25} In Minnesota, four out of five of these children are eventually reunited with their parents or close relatives.\textsuperscript{26}

It is often difficult, however, to reunite victims of physical or sexual abuse with their offending parents. Parents charged with abuse or neglect of a child “are not candidates for quick change” and often require “long-term treatment and long-term support in order to achieve any measure of success.”\textsuperscript{27} One study concludes that the success rate of treating abusive parents may be as low as forty percent.\textsuperscript{28}

For social workers, the greatest challenge may be to help a nonoffending parent accept the fact that abuse has taken place.\textsuperscript{29} Typically, “[n]on-offending parents tend to lie to cover for the guilty parent because of their emotional ties to that person.”\textsuperscript{30} The following example illustrates this problem.\textsuperscript{31}

A three-year-old boy was hospitalized with severe burns. According to his doctors, the burns were consistent with immersion and not consistent with the splattering type of burns that result from an accidental spill. The child related that his mother had placed him in hot water as punishment for playing with the telephone. Irrespective of the evidence, the child’s mother denied the abuse. Moreover, the “whole family denied the obvious circumstances of his injuries.”\textsuperscript{32} The social worker was “constantly

\textsuperscript{23} DHS REPORT, supra note 14, at 1.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
\textsuperscript{27} MAYHALL & NORGARD, supra note 20, at 348-49 (emphasis added).
\textsuperscript{28} Id. at 348.
\textsuperscript{29} Joy MAUGANS GARLAND, AMERICA’S THROWAWAY CHILDREN 23 (1990).
\textsuperscript{30} Id. If the nonoffending parent has also been abused by the same perpetrator, fear of retaliation may prevent the nonoffending parent from supporting the child. Minnesota’s criminal code reflects this possibility and provides that a parent who knowingly permits the continuing physical or sexual abuse of a child cannot be convicted of child neglect or endangerment if “there was a reasonable apprehension . . . that acting to stop or prevent the neglect or endangerment would result in substantial bodily harm to the [parent] or the child in retaliation.” MINN. STAT. § 609.378, subd. 2 (1992).
\textsuperscript{31} This example is adapted from GARLAND, supra note 29, at 23-24.
\textsuperscript{32} Id. at 23-24.
involved” with the family during the months of hearings. The family eventually despised the social worker and accused her of racism. Helping the family “was like trying to pull tiger’s teeth.” In the end, the child’s father realized that his wife had abused their son, the family split up, and the child’s siblings were placed with an aunt.

The failure to provide for the prompt, permanent placement of a child can be devastating. According to one commentator, “the instability of foster-home placements and the series of moves that many foster children experience [results in] . . . problems in developing trust in others and a sense of appropriate autonomy. Complicating these factors is the directive given to many foster parents that they should not become close to these children.”

The Minnesota Supreme Court has agreed that continual alteration of a parent-child relationship does not serve the child’s best interest. The United States Supreme Court has echoed these sentiments, stating:

It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child’s sound development as uncertainty over whether he [or she] is to remain in his [or her] current “home,” under the care of his [or her] parents or foster parents, especially when such uncertainty is prolonged.

Consequently, the challenge of the child protection system is not only to spare children from further abuse, but also to

33. Id. at 24.
34. Id.
35. Id.
36. GARLAND, supra note 29, at 24.
37. DR. KEN MAGID & CAROLE A. MCKELVEY, HIGH RISK 150-51 (1987); see also In re N.C.K., 411 N.W.2d 577, 582 (Minn. Ct. App. 1987) (noting that long-term foster care is contrary to the best interests of children).
38. In re K.T., 327 N.W.2d 13, 18 (Minn. 1982). The court noted that “[o]nly the most serious circumstances justify tampering with this most fundamental relationship.” Id.
promptly reunite those children with their parents. If prompt and safe reunification is not possible, other permanency plans must be made when doing so would serve the child's best interests.

III. MINNESOTA’S RESPONSE TO CHILD ABUSE

Minnesota’s statutory laws recognize child abuse as a social ill and specifically address this social ill in a variety of provisions. Minnesota law protects child abuse victims through the criminal code which punishes child abusers, through the child protection statutes which provide a range of services, and through the family code which places the abused child’s interests as superior to those of the abusive parent. An examination of these statutes demonstrates the depth of Minnesota’s commitment to the victims of child abuse.

A. Criminal Code

Minnesota’s criminal code protects physically and sexually abused children. Persons who deprive a child of necessary food, clothing, shelter, or supervision are guilty of criminal neglect.

40. Minnesota law currently requires that the case plan prepared for abused children must include provisions for services to end the abuse that are aimed at “preserving family life whenever possible.” MINN. STAT. § 626.556, subd. 10(a) (1992 & Supp. 1993). Moreover, the court must ensure that services provided for abused children “prevent placement or eliminate the need for removal and reunite the child with the child’s family at the earliest possible time.” Id. § 260.012(a) (1992).

41. See infra notes 44-51 and accompanying text.

42. See infra notes 52-85 and accompanying text.

43. See infra notes 86-109 and accompanying text.

44. MINN. STAT. § 609.378 (1992 & Supp. 1993). This statute provides as follows:

Subd. 1. Persons guilty of neglect or endangerment. (a) Neglect.

(1) A parent, legal guardian, or caretaker who willfully deprives a child of necessary food, clothing, shelter, health care, or supervision appropriate to the child’s age, when the parent, guardian, or caretaker is reasonably able to make the necessary provisions and the deprivation harms or is likely to substantially harm the child’s physical, mental, or emotional health is guilty of neglect of a child and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000, or both. If the deprivation results in substantial harm to the child’s physical, mental, or emotional health, the person may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both. If a parent, guardian, or caretaker responsible for the child’s care in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the child, this treatment or care is “health care,” for purposes of this clause.

(2) A parent, legal guardian, or caretaker who knowingly permits the continuing physical or sexual abuse of a child is guilty of neglect of a child and
Several statutes address crimes of physical abuse. Cruel or excessive punishment is specifically proscribed as "malicious punishment" of a child. 45

Under this statute, the offense can be classified as a gross misdemeanor or a felony, depending on the
severity of the harm caused to the child. Unreasonable restraint of a child is also specifically proscribed.

Minnesota also maintains enhancement statutes that classify an assault against a child as a felony when there has been a past pattern of abuse. If the child dies under circumstances manifesting extreme indifference to human life and there has been a past pattern of child abuse, the perpetrator is guilty of first degree murder.

Minnesota also has several statutes that prohibit sexual abuse of children. Many of these statutes are divided into subdivisions according to the age of the child, the age of the perpetrator, and the identity of the perpetrator. Parents and stepparents are de-

46. Id.
47. MINN. STAT. § 609.255 (1992). This statute provides as follows:

   Subdivision 1. Definition. As used in this section, the following term has the meaning given it unless specific content indicates otherwise.

   "Caretaker" means an individual who has responsibility for the care of a child as a result of a family relationship, or who has assumed responsibility for all or a portion of the care of a child.

   Subd. 2. Intentional restraint. Whoever, knowingly lacking lawful authority to do so, intentionally confines or restrains someone else’s child under the age of 18 years without consent of the child’s parent or legal custodian, or any other person without the person’s consent, is guilty of false imprisonment and may be sentenced to imprisonment for not more than three years or to payment of a fine of not more than $5,000.00, or both.

   Subd. 3. Unreasonable restraint of children. A parent, legal guardian, or caretaker who intentionally subjects a child under the age of 18 years to unreasonable physical confinement or restraint by means including but not limited to, tying, locking, caging, or chaining for a prolonged period of time and in a cruel manner which is excessive under the circumstances, is guilty of unreasonable restraint of a child and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000.00, or both. If the confinement or restraint results in substantial bodily harm, that person may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000.00, or both.

Id.
48. Id. § 609.223, subd. 2 (1992). This statute provides that “[w]hoever assaults a minor may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000.00, or both, if the perpetrator has engaged in a past pattern of child abuse against the minor.” Id.
50. Sexual intercourse or contact with a child under the age of 13 is strictly prohibited and neither mistake about the child’s age nor consent are recognized defenses. MINN. STAT. § 609.342, subd. 1(a) (1992); see also MINN. STAT. §§ 609.342, subd. 1(b); 609.343, subd. 1(a) (1992); 609.344, subd. 1(a) (1992 & Supp. 1993); 609.345, subd. 1(a) (1992 & Supp. 1993).

Classification of crimes against children ages 13-16 depends on the age and identity of the perpetrator. See, e.g., Id. §§ 609.342, subd. 1(b),(g) (1992); 609.345, subd. 1(b),(e)-(g) (1992 & Supp. 1993).
fined as having a significant relationship with the child and are specifically prohibited from sexually abusing their children.\textsuperscript{51}

\section*{B. Child Protection Statutes}

Minnesota requires that teachers, doctors, police officers, day-care providers, psychiatrists, and other professionals "immediately" report to the authorities when they suspect that a child has been physically or sexually abused by a parent.\textsuperscript{52} The mandated reporting law represents the legislature's recognition that a child's "health or welfare may be jeopardized through physical abuse, neglect, or sexual abuse."\textsuperscript{53} A mandated reporter who fails to comply with the statute faces civil\textsuperscript{54} and criminal penalties.\textsuperscript{55}

A local welfare agency receiving a report alleging neglect or physical or sexual abuse of a child by a parent is required to conduct an investigation.\textsuperscript{56} Further, the welfare agency must conduct an assessment and offer protective social services for purposes of preventing further abuses, safeguarding and enhancing the welfare of the abused or neglected minor, and preserving family life whenever possible.\textsuperscript{57}

\textsuperscript{51}. See \textit{Id.} § 609.341, subd. 15(1) (1992). The following statutes prohibit certain behavior when the actor has a significant relationship with the child: \textit{Minn. Stat.} §§ 609.342, subd. 1(g), (h) (1992); 609.343, subd. 1(g), (h) (1992); 609.344, subd. 1(f), (g) (1992 & Supp. 1993); 609.345, subd. 1(f), (g) (1992 & Supp. 1993). Other relatives by blood, marriage, or adoption, including brothers, sisters, grandparents, aunts, and uncles, are also defined as having a significant relationship with the child. Thus, these relatives are specifically proscribed from having sexual intercourse or contact with the child. \textit{Id.} § 609.341, subd. 15(2) (1992).

\textsuperscript{52}. \textit{Id.} § 626.556, subd. 2(b)(2) (1992 & Supp. 1993), subd. 3(a) (1992). The information must be reported to the local welfare agency, police department, or the county sheriff. \textit{Id.}, subd. 3(a) (1992). This reporting law is not limited to neglect or abuse which in fact has occurred in the past, but also mandates a report whenever there is knowledge of or reasonable cause to believe a child is currently being neglected or abused. \textit{Id.}

\textsuperscript{53}. \textit{Id.}, subd. 1.

\textsuperscript{54}. See \textit{Minn. Stat.} § 626.556, subd. 4(c) (1992). This statute also accords immunity from civil liability to a voluntary or mandated reporter who makes a report. \textit{Id.}, subd. 4(a) (1992). Obviously, civil liability remains a possibility when a report is not made. Reporters of child abuse are also protected from retaliation by their employers. \textit{Id.} Indeed, there is a "rebuttable presumption that any adverse action within 90 days of a report is retaliatory." \textit{Id.}, subd. 4a(c) (1992).

\textsuperscript{55}. Failure to report constitutes a misdemeanor. \textit{Id.}, subd. 6 (1992).

\textsuperscript{56}. \textit{Id.}, subd. 10(a) (1992 & Supp. 1993).

\textsuperscript{57}. \textit{Id.}
In carrying out the assessment, the local welfare agency has
the power to interview the victim without parental consent.\textsuperscript{58}
This interview may take place at the child’s school, and school
officials are prohibited by law from disclosing to the child’s par-
ten the fact that the interview took place.\textsuperscript{59} The welfare agency
also may interview other children who either formerly resided or
presently reside with the alleged perpetrator.\textsuperscript{60} Again, the
school may not disclose the fact that the interviews took place.\textsuperscript{61}

If the local welfare agency deems it necessary to immediately
take the child into custody, it may petition the court for emer-
gency relief.\textsuperscript{62} In the alternative, a police officer may take a
child into immediate custody when the officer reasonably be-
lieves the child’s environment endangers his or her health or
welfare.\textsuperscript{63} When a child is taken into custody, the parent must
be notified as soon as possible\textsuperscript{64} and a hearing must be held
within seventy-two hours.\textsuperscript{65}

As an alternative to removing the child, the agency may peti-
tion the court to remove the abusive parent from the home.\textsuperscript{66} If
the petition asserts reasonable grounds to believe the child faces
an immediate and present danger of abuse, the court may grant
an \textit{ex parte} temporary order excluding the abusive parent from
the dwelling.\textsuperscript{67}

When the local welfare agency completes its assessment, two
determinations must be made. First, the agency must determine
if maltreatment has occurred. The welfare agency determines
whether maltreatment has occurred, after receiving a report

\textsuperscript{58} Id., subd. 10(c) (1992 & Supp. 1993). Interviews may be conducted without
parental consent in situations where someone other than the parent is the alleged per-

\textsuperscript{59} Id. at 690. “The interview—rightly implemented and conducted—is the fastest, most effective and least
intrusive means of assessing the validity of a report of abuse.” Id.

\textsuperscript{60} Id.

\textsuperscript{61} Id.

\textsuperscript{62} Id. §§ 260.133, subd. 1 (1992); 260.135, subd. 5 (1992); see, e.g., \textit{In re Shady}, 264

\textsuperscript{63} Minn. Stat. § 260.165, subd. 1(c) (2) (1992); see, e.g., \textit{In re Scott County Master
Docket}, 672 F. Supp. 1152, 1199 (D. Minn. 1987), aff’d by Myers v. Scott County, 868
F.2d 1017 (8th Cir. 1989); \textit{In re Scalzo}, 300 Minn. 548, 550, 220 N.W.2d 495, 496 (1974).

\textsuperscript{64} Minn. Stat. § 260.171, subd. 1 (1992).

\textsuperscript{65} Id. § 260.172, subd. 1(a) (1992).

\textsuperscript{66} Id. § 260.133, subd. 2(2) (1992).

\textsuperscript{67} Id.
which alleges abuse or neglect, by gathering facts, consulting and interviewing, and assessing the level of risk. 68 The definition of maltreatment includes the physical and sexual abuse of the child. 69

Second, the agency must determine whether protective services are needed. 70 For the agency to make the determination, it must have documented conditions "sufficient to cause a child protection worker . . . to conclude that the child is at significant risk of maltreatment if protective intervention is not provided and that the individuals responsible for the child's care have not

68. MINN. STAT. § 626.556 (1992 & Supp. 1993). The agency evaluates eleven factors to assess the level of risk. Those factors are:
   (1) the child's age, physical and mental abilities: "generally the younger the child the more vulnerable the child is to abuse,"
   (2) the location, severity, recency and/or frequency of abuse,
   (3) the severity and/or frequency of neglect, condition of the home: "behaviors that have appeared frequently in the past have a high chance of being repeated in the future."
   (4) caretaker's age, physical, intellectual or emotional abilities/control: the caretaker's disabilities which impede the ability to care for the child should be considered,
   (5) caretaker's level of cooperation: cooperation is defined as a willingness to take action to protect the child,
   (6) caretaker's parenting skills and/or knowledge,
   (7) alleged perpetrator's access to the child: access is defined as alleged perpetrator's ability to be close enough to the child to cause harm through passive or active means,
   (8) presence of a parent substitute or other person in the home: a substitute is defined as a person who is not legally responsible for parenting, for example a boyfriend,
   (9) previous history of abuse or neglect: regardless of whether the past victim is the same as the current victim,
   (10) strength of family support systems: support systems are defined as individuals, professionals, etc. who can aide the caretaker, and
   (11) stresses.

MINNESOTA DEP'T HUMAN SERVS., PROTECTIVE INTERVENTION ASSESSMENT: COMMENTARY ON THE RISK ASSESSMENT FACTORS (1990) (interpreting MINN. R. 9560.0220, subp. 6(B) (1991)).

69. MINN. STAT. § 626.556, subd. 10e(a) (1992 & Supp. 1993).
   "Physical abuse" means any physical or mental injury, or threatened injury, inflicted by a person responsible for the child's care on a child other than by accidental means, or any physical or mental injury that cannot reasonably be explained by the child's history of injuries, or any aversive and deprivation procedures that have not been authorized under section 245.825.

Id., subd. 2(d) (Supp. 1993).
   "Sexual abuse" means the subjection of a child by a person responsible for the child's care, or by a person in a position of authority, as defined in section 609.341, subdivision 10, to any act which constitutes a violation of sections 609.342, 609.343, 609.344, or 609.345. Sexual abuse also includes any act which involves a minor which constitutes a violation of sections 609.321 to 609.324 or section 617.246. Sexual abuse includes threatened sexual abuse.


70. Id. § 626.556, subd. 10e (1992 & Supp. 1993).
taken or are not likely to take actions to protect the child from maltreatment or risk of maltreatment."\textsuperscript{71}

If the agency determines that a child faces imminent danger, the agency must respond to the report as soon as it is received.\textsuperscript{72} Absent imminent danger, the agency must respond within one working day or within seventy-two hours under certain conditions.\textsuperscript{73} A parent must be notified of the results of the maltreatment determination within ten working days.\textsuperscript{74}

A family refusing services offered by the agency can be forced to comply pursuant to Minnesota's Child in Need of Protection or Services statute (CHIPS).\textsuperscript{75} This statute provides that any child who has been physically or sexually abused is in need of protection or supervision.\textsuperscript{76} Any child who resides with a victim of physical or sexual abuse or with a perpetrator of such abuse is declared in need of protection or services.\textsuperscript{77} A CHIPS petition alleging physical or sexual abuse must be placed at the top of the court docket.\textsuperscript{78} At the conclusion of the trial, the court must make a decision within fifteen days.\textsuperscript{79} If the petition is proved by clear and convincing evidence, this declaration entitles the child and the family to court ordered services.\textsuperscript{80}

\textsuperscript{71.} MINN. STAT. § 626.556, subd. 10e(b) (1992 & Supp. 1993).
\textsuperscript{72.} Id. If the agency has no reason to believe the child will be in imminent danger within the next 72 hours or if the agency has more critical reports to respond to first, it may delay responding up to 72 hours. Id.
\textsuperscript{73.} Id. § 626.556, subd. 10(f) (1992 & Supp. 1993). The notice must include, in addition to the determination whether services are needed, the length of time that the records will be kept before being destroyed or the right to have records destroyed. Id.
\textsuperscript{74.} Id. § 260.191 (1992 & Supp. 1993).
\textsuperscript{75.} Id. § 260.111, subd. 3 (1992). This urgency reflects the seriousness of the problem as well as the Minnesota Legislature's policy of protecting children, strengthening the community, and promoting responsible child care. Id. § 626.556, subd. 1 (1992).
\textsuperscript{77.} Id., subd. 1b (1992 & Supp. 1993).
\textsuperscript{78.} Id. §§ 546.27, subd. 1(b) (1992); 260.155, subd. 1 (1992 & Supp. 1993).

This author has worked as a trial attorney in two CHIPS cases involving child abuse in which the court waited 90 days after the adjudicatory hearing to render its decision. As a result, services were delayed and, in each case, the child suffered further abuse. The author contacted Minnesota State Senator Tracy Beckman and Representative Katy Olson, who sponsored legislation limiting the trial court's time to file a decision in these cases. The legislation eventually became part of the 1992 Omnibus Crime Bill and is now codified as MINN. STAT. § 546.27, subd. 1(b) (1992 & Supp. 1993) and MINN. STAT. § 260.155, subd. 1 (1992 & Supp. 1993). See 1992 MINN. LAWS ch. 571, art. 7, §§ 3, 11.

After finding that a child has been the victim of physical or sexual abuse, the court may transfer custody to the local welfare agency or place the child in his or her own home under the protective supervision of the welfare agency and "under conditions prescribed by the court directed to the correction of the child's need for protection or services." 81 If the child's physical or mental health requires special care, the court may order the parent to provide it. 82 If the child is sixteen years of age or older, the court may allow the child to live independently of his or her parents. 83

The court's order may also include the following provisions: (1) restrain the abusive parent from committing further acts of abuse; (2) exclude the abusing parent from the family dwelling; (3) establish a temporary visitation schedule for the abusive parent with his or her children; (4) order the abusive parent to pay child support and maintenance; (5) order counseling or other social services for the family or household members; (6) require the abusive parent to participate in treatment or counseling services. 84

If the court excludes an abusive parent from the family home, the court must find that this exclusion serves the best interests of the child(ren) remaining in the home, that a remaining adult family member is able to care for the child(ren), and that the local welfare agency has developed an appropriate plan for providing services to the remaining family or household members. 85

C. Family Law

Minnesota's domestic relations code provides that if a parent has been convicted of certain acts and if that parent seeks custody or even visitation with his or her child, then the parent must prove that the contact would serve the best interests of the child. 86 If the victim was a family or household member, the

84. Id., subd. 1(b) (1992).
85. MINN. STAT. § 260.191, subd. 1(b) (1992). An order to exclude an abusive parent from the home, as is the case with all orders to remove children or restrain parents, can only be valid for a specified length of time which cannot exceed one year, but the order can be renewed by the court for another term. Id., subd. 2 (1992 & Supp. 1993).
86. MINN. STAT. § 518.179 (1992). This statute provides as follows:
   Subdivision 1. Seeking custody or visitation. Notwithstanding any contrary provision in section 518.17 or 518.175, if a person seeking child custody
parent must prove by clear and convincing evidence that custody or visitation would serve the child's best interests. 87

To determine a child's best interests, Minnesota law requires that the court consider all relevant factors, including:

1. the wishes of the child's parent or parents as to custody;
2. the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;
3. the child's primary caretaker;
4. the intimacy of the relationship between each parent and the child;
5. the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests;

or visitation has been convicted of a crime described in subdivision 2, the person seeking custody or visitation has the burden to prove that custody or visitation by that person is in the best interests of the child if:

1. the conviction occurred within the preceding five years;
2. the person is currently incarcerated, on probation, or under supervised release for the offense; or
3. the victim of the crime was a family or household member as defined in section 518B.01, subdivision 2.

If this section applies, the court may not grant custody or visitation to the person unless it finds that the custody or visitation is in the best interests of the child. If the victim of the crime was a family or household member, the standard of proof is clear and convincing evidence.

Subd. 2. Applicable crimes. This section applies to the following crimes or similar crimes under the laws of the United States, or any other state:

1. murder in the first, second, or third degree under section 609.185, 609.19, or 609.195;
2. manslaughter in the first degree under section 609.20;
3. assault in the first, second, or third degree under section 609.221, 609.222, or 609.223;
4. kidnapping under section 609.25;
5. depriving another of custodial or parental rights under section 609.26;
6. soliciting, inducing, or promoting prostitution involving a minor under section 609.322;
7. receiving profit from prostitution involving a minor under section 609.323;
8. criminal sexual conduct in the first degree under section 609.342;
9. criminal sexual conduct in the second degree under section 609.343;
10. criminal sexual conduct in the third degree under section 609.344, subdivision 1, paragraph (c),(f), or (g);
11. solicitation of a child to engage in sexual conduct under section 609.352;
12. incest under section 609.365;
13. malicious punishment of a child under section 609.377; or
14. neglect of a child under section 609.378.

Id.
(6) the child's adjustment to home, school, and community;

(7) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;

(8) the permanence, as a family unit, of the existing or proposed custodial home;

(9) the mental and physical health of all individuals involved;

(10) the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any;

(11) the child's cultural background; and

(12) the effect on the child of the actions of an abuser, if related to domestic abuse... that has occurred between the parents.88

Although the court may not use one factor to the exclusion of the others,89 it is clear that courts disfavor granting custody to abusive parents.90 The Minnesota Supreme Court has held that an order awarding custody to a father who has sexually molested his eight- and ten-year-old daughters constituted an abuse of dis-

88. MINN. STAT. § 518.17, subd. 1(1)-(12) (1992).

89. Id., subd. 1a (1992); see Rosenfeld v. Rosenfeld, 311 Minn. 76, 82-83, 249 N.W.2d 168, 171-72 (Minn. 1976) (requiring that trial court's findings reflect its consideration of all statutory factors in determining a child's best interests); Nazar v. Nazar, 505 N.W.2d 628, 633 (Minn. Ct. App. 1993), review denied, (Minn. Oct. 28, 1993) (stating that the trial court must consider all statutory factors pertaining to the best interests of children but need not make a specific finding on each factor) (citing Schultz v. Schultz, 358 N.W.2d 136, 138 (Minn. Ct. App. 1984)); see also Abbott v. Abbott, 481 N.W.2d 864, 867 (Minn. Ct. App. 1992) (holding that specific findings of fact must be made on statutory factors relevant in any particular custody modification case).

90. See Simonson v. Simonson, 292 N.W.2d 12, 13 (Minn. 1980) (finding an abuse of discretion where custody of minor was awarded to mother who was cohabiting with a man who had a record of sexually molesting children); In re T.B., 299 Minn. 218, 219, 218 N.W.2d 757, 758 (Minn. 1974) (holding that an order which allowed the father to retain custody was an abuse of discretion where the juvenile court found that the father had sexually molested his daughters); Nazar, 505 N.W.2d at 633 (finding that the trial court "must seriously examine any allegations of child abuse before determining custody"); Uhl v. Uhl, 395 N.W.2d 106, 111 (Minn. Ct. App. 1986) (holding that the trial court erred in neglecting to carefully examine allegations of physical abuse prior to making a custody determination); cf. Surratt v. Surratt, 396 N.W.2d 870, 873-74 (Minn. Ct. App. 1986), review denied, (Minn. Jan. 16, 1987) (affirming custody award where mother was living out of wedlock with man convicted of forgery, uttering, and indecent exposure since examining psychologists did not find that he posed any kind of threat to the physical or emotional health of the child).
According to the court, "[t]he gravity of the offenses disqualifies him as a custodial parent, and the retention of the custodial relationship . . . would not remove the emotional scars upon the children."92 The supreme court remanded the case for the trial court to consider whether the father had been rehabilitated, but noted that the father had apparently not acknowledged his offenses and that such acknowledgment "must precede reformation."93

In *Simonson v. Simonson*,94 the Minnesota Supreme Court ruled that it was an abuse of discretion to award custody of a three-year-old boy to an otherwise fit mother when the mother was living with a man who had been convicted of two sexual offenses involving girls and who had also been accused of other sexual improprieties.95 The court stated that it was "clearly" not in the child's best interests to live in the same home with a convicted child abuser.96 The court awarded custody to the father "until and unless the trial court finds the [mother] has terminated her relationship" with the child abuser.97 The court further prohibited the mother from visitation with her child when she was in the company of the abusive boyfriend.98

In *Uhl v. Uhl*,99 the Minnesota Court of Appeals remanded a trial court's award of custody to a mother when allegations of physical abuse had not been fully examined.100 Upon rehearing, the appellate court affirmed the award of custody to the mother when the acts of abuse were not egregious, not repetitive, reflected the mother's culture, and occurred when the mother was under a great deal of stress.101 Moreover, the mother was undergoing therapy, and her therapist maintained that she had discontinued the use of physical punishment.102 If the physical punishment had been serious, repetitive, or if the mother had

91. *In re T.B.*, 299 Minn. at 219, 218 N.W.2d at 757-58.
92. *Id.*
93. *Id.*
94. 292 N.W.2d 12 (Minn. 1980).
95. *Id.* at 13.
96. *Id.*
97. *Id.*
98. *Id.*
100. *Id.* at 215.
101. *Id.* The mother spanked one of her children with a wooden spoon and slapped the child's mouth. *Id.* at 214.
102. *Id.* at 216.
failed to address the conduct, an award of custody would presumably have been an abuse of discretion. 103

Rather than wait for dissolution or custody proceedings, any family household member can seek an order for protection on behalf of a minor victim of physical or sexual abuse. 104 If necessary to protect the children, the court may deny a parent’s right to visitation entirely. 105 The court is required to give “primary consideration” to the safety of the children. 106 A violation of the order for protection constitutes a misdemeanor. 107 A second violation within two years of the previous violation constitutes a gross misdemeanor requiring an executed sentence of at least ten days in jail. 108 An order for protection may be valid for one year unless the court finds that a longer period would be appropriate. 109

IV. CHILD ABUSE AND MINNESOTA’S TERMINATION OF PARENTAL RIGHTS STATUTE

In Minnesota, there are eight grounds upon which parental rights may be involuntarily terminated. 110 A court need find the

103. The court was persuaded by the report of the child protection investigator who investigated the two 1985 reported incidents of abuse and concluded they were not serious. Id. Presumably, then, a report of serious abuse may have altered the court’s decision.

104. MINN. STAT. § 518B.01, subd. 2(b), subd. 4(a) (1992); see, e.g., Kimmel v. Kimmel, 392 N.W.2d 904, 907 (Minn. Ct. App. 1986).

105. MINN. STAT. § 518B.01, subd. 6(3) (1992 & Supp. 1993).

106. Id.; see Hall v. Hall, 408 N.W.2d 626, 629 (Minn. Ct. App. 1987), review denied, (Minn. Aug. 19, 1987) (affirming protective order which restricted husband to supervised visitation even though wife only alleged acts of domestic abuse directed at herself and not at the children); Kimmel, 392 N.W.2d at 908 (finding that trial court did not abuse its discretion in acting quickly to protect the child when faced with an emergency situation which jeopardized the child’s health, safety, and welfare even though the court did not strictly adhere to the statutory requirements of domestic abuse act).

107. MINN. STAT. § 518B.01, subd. 14(a) (1992 & Supp. 1993); Swenson v. Swenson, 490 N.W.2d 668, 670-71 (Minn. Ct. App. 1992); see also State v. Andrasko, 454 N.W.2d 648, 650 (Minn. Ct. App. 1990) (holding that violation of a protective order was punishable under the statute even though the order was voided after it had been violated).


110. MINN. STAT. § 260.221, subd. 1(b) (1992 & Supp. 1993). The eight grounds for involuntary termination are as follows:

(1) That the parent has abandoned the child. Abandonment is presumed when:

(i) the parent has had no contact with the child on a regular basis and no demonstrated, consistent interest in the child’s well-being for six months; and
(ii) the social service agency has made reasonable efforts to facilitate contact, unless the parent establishes that an extreme financial or physical hard-
ship or treatment for mental disability or chemical dependency or other good cause prevented the parent from making contact with the child. This presumption does not apply to children whose custody has been determined under chapter 257 or 518. The court is not prohibited from finding abandonment in the absence of this presumption; or

(2) That the parent has substantially, continuously, or repeatedly refused or neglected to comply with the duties imposed upon that parent by the parent and child relationship, including but not limited to providing the child with necessary food, clothing, shelter, education, and other care and control necessary for the child’s physical, mental, or emotional health and development, if the parent is physically and financially able, and reasonable efforts by the social service agency have failed to correct the conditions that formed the basis of the petition; or

(3) That a parent has been ordered to contribute to the support of the child or financially aid in the child’s birth and has continuously failed to do so without good cause. This clause shall not be construed to state a grounds for termination of parental rights of a non custodial parent if that parent has not been ordered to or cannot financially contribute to the support of the child or aid in the child’s birth; or

(4) That a parent is palpably unfit to be a party to the parent and child relationship because of a consistent pattern of specific conduct before the child or of specific conditions directly relating to the parent and child relationship either of which are determined by the court to be of a duration or nature that renders the parent unable, for the reasonably foreseeable future, to care appropriately for the ongoing physical, mental, or emotional needs of the child. It is presumed that a parent is palpably unfit to be a party to the parent and child relationship upon a showing that:

(i) the child was adjudicated in need of protection or services due to circumstances described in section 260.015, subdivision 2a, clause (1), (2), (3), (5), or (8); and

(ii) within the three-year period immediately prior to that adjudication, the parent’s parental rights to one or more other children were involuntarily terminated under clause (1), (2), (4), or (7) of this paragraph, or under clause (5) of this paragraph if the child was initially determined to be in need of protection or services due to circumstances described in section 260.015, subdivision 2a, clause (1), (2), (3), (5), or (8); or

(5) That following upon a determination of neglect or dependency, or of a child’s need for protection or services, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination. It is presumed that reasonable efforts under this clause have failed upon a showing that:

(i) a child under the age of 12 has resided out of the parental home under court order for more than one year following an adjudication of dependency, neglect, need for protection or services under section 260.015, subdivision 2a, clause (1), (2), (6), (8), or (9), or neglected and in foster care, and an order for disposition under section 260.191, including adoption of the case plan required by section 257.071;

(ii) conditions leading to the determination will not be corrected within the reasonably foreseeable future; and

(iii) reasonable efforts have been made by the social service agency to rehabilitate the parent and reunite the family.

This clause does not prohibit the termination of parental rights prior to one year after a child has been placed out of the home. It is also presumed that reasonable efforts have failed under this clause upon a showing that:

(i) the parent has been diagnosed as chemically dependent by a professional certified to make the diagnosis;

(ii) the parent has been required by a case plan to participate in a chemical dependency treatment program.
existence of only one of the statutory grounds in order to terminate parental rights.\textsuperscript{111} However, termination statutes are in derogation of the common law and must be strictly construed in favor of the parental relationship.\textsuperscript{112} Parental rights will be taken away only for "grave and weighty" reasons.\textsuperscript{113} The law presumes that a natural parent is fit and suitable to be entrusted with the care of a child.\textsuperscript{114} In any termination proceeding, the best interests of the child are the paramount consideration.\textsuperscript{115} However, the best interests of the child are a factor only if one of the statutory grounds for termination has been proved.\textsuperscript{116} More-

\begin{itemize}
  \item[(iii)] the treatment programs offered to the parent were culturally, linguistically, and clinically appropriate
  \item[(iv)] the parent has either failed two or more times to successfully complete a treatment program or has refused at two or more separate meetings with a caseworker to participate in a treatment program; and
  \item[(v)] the parent continues to abuse chemicals.
\end{itemize}

Provided, that this presumption applies only to parents required by a case plan to participate in a chemical dependency treatment program on or after July 1, 1990; or

\begin{itemize}
  \item[(6)] That the parent has been convicted of causing the death of another of the parent's children; or
  \item[(7)] That in the case of a child born to a mother who was not married to the child's father when the child was conceived nor when the child was born the person is not entitled to notice of an adoption hearing under section 259.26 and either the person has not filed a notice of intent to retain parental rights under section 259.261 or that the notice has been successfully challenged; or
  \item[(8)] That the child is neglected and in foster care.
\end{itemize}

\textit{Id.}

\begin{itemize}

  \item 112. \textit{In re A.K.K.}, 356 N.W.2d at 340. (citing \textit{In re Parks}, 267 Minn. 468, 474, 127 N.W.2d 548, 553 (1964)).


  \item 116. \textsc{Minn. Stat.} § 260.221, subd. 4 (1992 & Supp. 1993). The best interests of a child was not a compelling factor in parental rights termination proceedings until fairly recently. \textit{See In re Linechan}, 280 N.W.2d 29, 31 (Minn. 1979) (rejecting a child's best interests as a compelling factor in parental rights termination proceeding).
over, the petitioner must prove that the conditions necessitating termination will continue for a prolonged, indeterminate period of time.\textsuperscript{117}

Of the eight statutory grounds for termination of parental rights, five may be used in cases of child abuse. Parental abuse of a child may warrant termination if the conduct constitutes a repeated failure to comply with parental duties, makes the abuser palpably unfit to parent, or leaves the child neglected and in foster care.\textsuperscript{118} Parental rights may also be terminated when the abuse is followed by failed but reasonable efforts at reunification or when the abuse results in death of one of the parent's children.\textsuperscript{119}

Four of these statutory grounds require proof of more than mere abuse. As a result, Minnesota parents may physically and sexually molest their children without risk of losing their parental rights as long as the abuse is not repeated, the parent acknowledges the need for help, and a child has not died. Additionally, parents may physically and sexually molest their children until efforts at reunification have failed, a process which often continues for years.

A. Repeated Failure to Comply With Parental Duties

The repeated neglect of a parental duty is one statutory ground for termination of parental rights.\textsuperscript{120} Specifically, the statute provides for termination when:

\begin{itemize}
  \item Subsequent legislative changes made it clear that courts should balance the interests of both parents and children in determining whether to continue or terminate parental rights. \textit{See In re J.J.B.}, 390 N.W.2d at 279; \textit{see also, In re C.K.}, 426 N.W.2d at 847; \textit{In re P.J.K.}, 369 N.W.2d 286, 292 (Minn. 1985); \textit{In re H.G.B.}, 306 N.W.2d at 826-27; \textit{In re R.T.B.}, 492 N.W.2d 1, 3 (Minn. Ct. App. 1992); \textit{In re J.S.}, 470 N.W.2d at 701 (citing \textit{In re J.J.B.}, 390 N.W.2d at 279).
  \item \textit{See infra} part IV.A-C.
  \item \textit{See infra} art IV.D, E.
  \item Termination of parental rights has been upheld on the basis of neglect of parental duties in a variety of situations. \textit{See In re Kidd}, 261 N.W.2d 833, 836 (Minn. 1978) (finding that behavior stemming from a mental condition was "other conduct" likely to be detrimental to the health and welfare of the child); \textit{In re A.H.}, 402 N.W.2d 598, 603 (Minn. Ct. App. 1987) (terminating parental rights on grounds of neglect of parental duties where a parent suffered from mental illness); \textit{see also In re R.M.M.}, 316 N.W.2d at 541 (supporting termination of parental rights where the parent suffered from alcohol abuse and where the child's emotional and physical health would be jeopardized); \textit{In re

\end{itemize}
The parent has substantially, continuously, or repeatedly refused or neglected to comply with the duties imposed upon that parent by the parent and child relationship, including but not limited to providing the child with necessary food, clothing, shelter, education, and other care and control necessary for the child's physical, mental, or emotional health and development, if the parent is physically and financially able, and reasonable efforts by the social service agency have failed to correct the conditions that formed the basis of the petition.121

Although child abuse breaches the parental duty to provide for the safety of children, this statutory provision requires much more than proof of child abuse. Consequently, an act of physical or sexual abuse, no matter how egregious, does not warrant termination because the statute requires the parent to repeatedly or continuously neglect to comply with a parental duty.122 Individual acts of child abuse do not generally fit the definition of "repeated" or "continuous."

Although not repeated or continuous, a single, extreme act of child abuse may constitute a "substantial" neglect of a parental duty. For example, beating a child to the point of death obviously constitutes a substantial neglect of the parental duty to provide for the child's health and welfare. However, the statute requires the local welfare agency to make reasonable efforts at reunification prior to seeking termination.123 In other words, the local welfare agency must work toward the goal of placing the child with his or her abuser prior to any consideration of severing the relationship. This means that the presumption that a parent is a fit and suitable caretaker124 operates to give the abusive parent another chance to harm the child victim.

Even if the abusive parent reoffends during reunification efforts, the local welfare agency must prove that the abusive conduct will continue "for a prolonged, indeterminate period in order to terminate the abusive parent's rights."125 The existence

Staat, 287 Minn. 501, 506, 178 N.W.2d 709, 713 (1970) (terminating parental rights based on neglect of parental duties where abandonment was found).

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122. Id.
123. Id.
124. In re Chosa, 290 N.W.2d 766, 769 (Minn. 1980).
of a neglect or CHIPS determination is not enough to warrant termination.\textsuperscript{126}

In the case of \textit{In re J.H.D.},\textsuperscript{127} the court found that abusive and neglectful conduct constituted a breach of parental duties and warranted termination of the parent's rights.\textsuperscript{128} The abuse included cigarette burns and repeatedly tying one of three children to the bed by his ankle.\textsuperscript{129} There were additional unexplained injuries and, on one occasion, the children witnessed their father shoot their mother and the mother's boyfriend.\textsuperscript{130}

If the court in \textit{J.H.D.} had not found that this pattern of abuse and neglect would continue for a prolonged, indeterminate period of time, termination would not have been warranted. If the local welfare agency had not made reasonable efforts at reunification, termination would also have been inappropriate.

In \textit{J.H.D.}, the determination that the abuse would continue for a prolonged, indeterminate period of time, and that reasonable efforts at reunification would fail, involved experimenting with the lives of three children. The court allowed the children to live with one or both parents for nearly two years \textit{after} the children were determined to be neglected, with the exception of a one-month period when the children were placed in foster care.\textsuperscript{131} As a result, the children lived in a house "which reeked of urine" and had dog feces on the floor.\textsuperscript{132} When the children lived briefly with their mother, they had no beds and slept on the floor.\textsuperscript{133} There was an inadequate supply of diapers and the children were not dressed properly for the weather.\textsuperscript{134}

When the children lived with their father, the dishes were cleaner and there was more food, but "the house was still filthy and reeked of urine."\textsuperscript{135} At one point, a "pile of laundry in the basement appeared to be growing 'mold.' "\textsuperscript{136} When the children were placed in foster care in September of 1985, reunification efforts presumably continued until May of 1986 when a

\begin{footnotes}
127. \textit{Id.}
128. \textit{Id.} at 200.
129. \textit{Id.} at 196.
130. \textit{Id.} at 196-197.
132. \textit{Id.} at 196.
133. \textit{Id.}
134. \textit{Id.}
135. \textit{Id.}
\end{footnotes}
petition to terminate parental rights was filed.\textsuperscript{137} By that time, the father had already been in prison for four months for shooting his wife.\textsuperscript{138} The TPR trial did not occur until October 1986.\textsuperscript{139} The court of appeals order upholding the decision to terminate parental rights is dated December 8, 1987.\textsuperscript{140} A final order denying further review is dated February 12, 1988, five years after the trial court first determined that the children were neglected.\textsuperscript{141}

In an effort to keep the children with their parents, the local welfare agency provided nutrition lectures, home management and hygiene information, parenting classes, visits two times per week by a public health nurse, and counseling.\textsuperscript{142} The parents signed service contracts but failed to abide by them.\textsuperscript{143} Although the financial cost of these efforts is substantial, it pales in comparison to the emotional cost that necessarily accompanied the continuing neglect endured by these children.

\subsection*{B. Palpable Unfitness to Parent}

Palpable unfitness to parent is a ground for termination of parental rights.\textsuperscript{144} Specifically, the statute allows for termination when:

\begin{quote}
[A] parent is palpably unfit to be a party to the parent and child relationship because of a consistent pattern of specific conduct before the child or of specific conditions directly relating to the parent and child relationship either of which are determined by the court to be of a duration or nature that renders the parent unable, for the reasonably foreseeable fu-
\end{quote}

\begin{flushleft}
\textsuperscript{137.} Id.
\textsuperscript{138.} Id. at 196-197.
\textsuperscript{139.} Id. at 197.
\textsuperscript{140.} Id. at 194.
\textsuperscript{141.} In \textit{re J.H.D.}, 416 N.W.2d at 194.
\textsuperscript{142.} Id. at 198.
\textsuperscript{143.} Id. at 198-99.
\textsuperscript{144.} See \textit{In re Martinson}, 287 Minn. 213, 215-16, 177 N.W.2d 808, 809-10 (1970) (terminating parental rights based on palpable unfitness to parent where the mother expressed little interest in the child and had made no serious attempt to provide home for child); \textit{In re E.L.H.}, 356 N.W.2d 795, 797 (Minn. Ct. App. 1984) (finding termination appropriate on grounds of palpable unfitness to parent where the parent had an ongoing chemical dependency problem, had never established a home suitable for the child, and had never helped support the child); \textit{see also In re J.H.D.}, 416 N.W.2d at 194; \textit{cf. In re Solomon}, 291 N.W.2d 364, 368 (Minn. 1980) (holding that sporadic or infrequent visitation alone is not sufficient to warrant termination of parental rights on grounds of palpable unfitness to parent).
\end{flushleft}
ture, to care appropriately for the ongoing physical, mental, or emotional needs of the child.\textsuperscript{145}

Child abuse has been a basis for determining a parent to be palpably unfit.\textsuperscript{146} Irrespective of its severity, however, child abuse alone does not warrant termination of parental rights. This is because the abuse must be "of a duration or nature that renders the parent unable, \textit{for the reasonably foreseeable future} to care for the victim."\textsuperscript{147}

In the case \textit{In re B.C.},\textsuperscript{148} a mother who killed her six week old infant daughter was determined to be palpably unfit to parent one of her three remaining children.\textsuperscript{149} The infant's death was the result of "massive" skull fractures "of a size the examining doctor had never before seen in such a small baby—fractures which had to be accomplished with substantial force, fractures consistent with the impact of the skull on the floor or wall."\textsuperscript{150} The presence of scar tissue on the brain indicated that the child had been abused on multiple occasions.\textsuperscript{151} In explaining the murder to a police officer, the mother said, "[t]he baby is lucky, she doesn't have to grow up in this world. People hurt people they love, she is better off in the hands of the Lord."\textsuperscript{152} The mother was deemed to be "psychologically disturbed" and to suf-

\begin{itemize}
\item \textsuperscript{145} MINN. STAT. § 260.221, subd. 1(b)(4) (1992 & Supp. 1993). The statute further provides:
\begin{itemize}
\item (i) the child was adjudicated in need of protection or services due to circumstances described in section 260.015, subdivision 2a, clause (1), (2), (3), (5), or (8); and
\item (ii) within the three-year period immediately prior to that adjudication, the parent's parental rights to one or more other children were involuntarily terminated under clause (1), (2), (4), or (7) of this paragraph, or under clause (5) of this paragraph if the child was initially determined to be in need of protection or services due to circumstances described in section 260.015, subdivision 2a, clause (1), (2), (3), (5), or (8).
\end{itemize}
\textit{Id.}

\item \textsuperscript{146} \textit{See In re Suchy}, 281 N.W.2d 723 (Minn. 1979); \textit{In re N.C.K.}, 411 N.W.2d 577 (Minn. Ct. App. 1987); \textit{In re M.A.}, 408 N.W.2d 227 (Minn. Ct. App. 1987); \textit{In re L.M.M.}, 372 N.W.2d 431 (Minn. Ct. App. 1985); \textit{In re Maas}, 355 N.W.2d 480 (Minn. Ct. App. 1984); \textit{In re Udstuen}, 349 N.W.2d 300 (Minn. Ct. App. 1984). \textit{See also infra notes 148-72 and accompanying text.}

\item \textsuperscript{147} MINN. STAT. § 260.221, subd. 1(b)(4) (1992 & Supp. 1993) (emphasis added).

\item \textsuperscript{148} 256 N.W.2d 328 (Minn. Ct. App. 1984).

\item \textsuperscript{149} \textit{Id.} at 330. The appellate court also upheld termination on the ground the child was neglected and in foster care. \textit{Id.}

\item \textsuperscript{150} \textit{Id.} at 331.

\item \textsuperscript{151} \textit{Id.}

\item \textsuperscript{152} \textit{Id.}
fer from "delusional thinking."\textsuperscript{153} The mother was sentenced to prison as a result of the killing and had four years left to serve at the time the court of appeals upheld the trial court's decision to terminate the mother's parental rights.\textsuperscript{154}

Although the court of appeals found the mother palpably unfit to parent her four year old boy, B.C., the court noted the mother's imprisonment for savagely beating her infant, by itself, did not warrant a finding of palatable unfitness to parent.\textsuperscript{155} The court correctly found that the TPR statute, as written, requires "other evidence" such as the parent's lack of interest in her surviving children.\textsuperscript{156} According to the court, "[t]he statute clearly requires proof of specific conditions over a period of time which are permanently detrimental to the child."\textsuperscript{157}

In this case, the mother's beating of the infant makes her unfit to parent only when combined with her imprisonment and her refusal to recognize her parental shortcomings.\textsuperscript{158} Indeed, the appellate court found "most important to the characterization of appellant as palpably unfit is her conviction that she is indeed a good parent."\textsuperscript{159}

As a result of requiring more than egregious physical abuse to prove a parent palpably unfit, the child B.C. remained in foster care for at least two years and endured emotionally harmful visits

\textsuperscript{153.} \textit{In re B.C.,} 356 N.W.2d at 331.
\textsuperscript{154.} \textit{Id.} at 330.
\textsuperscript{155.} \textit{Id.} at 331.
\textsuperscript{156.} \textit{Id.}
\textsuperscript{157.} \textit{Id.} at 332.
\textsuperscript{158.} \textit{In re B.C.,} 356 N.W.2d at 331. Another case that represents the need for more than abuse or threatened abuse in order to terminate parental rights under the statute is \textit{In re N.C.K.,} 411 N.W.2d 577 (Minn. Ct. App. 1987). In \textit{N.C.K.,} the mother had been committed to the State Security Hospital in Saint Peter for five months when she had twin boys. \textit{Id.} at 579. The mother was mentally retarded (her I.Q. was 69), and she was diagnosed with several other psychological disorders including unpredictable mood swings and violent outbursts of temper. \textit{Id.} She threatened to kill her unborn children during one outburst and had assaulted several children because she said "they irritated" her. \textit{Id.} Two psychologists testified that the mother would never be able to care for the twins. \textit{Id.} The court rejected the mother's request that termination of her parental rights be delayed because the record clearly showed that the mother would never be able to parent her children and it was in their best interests to have her parental rights terminated so they could be adopted. \textit{Id.} at 580-81.

In a separate case, a father's savage beating of his son justified termination on the basis that the child was neglected and in foster care. \textit{In re Udstuen,} 349 N.W.2d 300 (Minn. Ct. App. 1984). Apparently, no effort was made to declare the father palpably unfit. See infra notes 179-90 and accompanying text.

\textsuperscript{159.} \textit{In re B.C.,} 356 N.W.2d at 332.

http://open.mitchellhamline.edu/wmlr/vol20/iss3/4
with his imprisoned mother. After visiting with his mother, the child resorted to “hitting, kicking and biting others.” The effects of these visits were deemed “permanently detrimental” to the child’s “mental health and emotional development.”

In another case, *In re M.A.*, a finding that the father was palpably unfit to parent was based on evidence that he had physically and sexually abused his children. The appellate court expressed the “greatest concern” over the lower court’s finding of parental unfitness “where there has been no contact between parent and child for over three years . . . .” However, there was evidence that the father’s violent propensity was ongoing. For example, the father threatened to kill a social worker and brought bullets and razor blades to his termination hearing.

Although the termination decision was upheld, the final decision came approximately five years after the father’s two children were placed in foster care as dependent children. In addition to waiting at least five years for permanency planning, the child M.A. endured further abuse. Approximately three months after her placement in foster care, the child was sexually abused by her father in the building of the local welfare agency. While accompanying the child to the bathroom, the father inserted his finger into the child’s vagina.

160. *Id.* at 330, 332.
161. *Id.* at 330.
162. *Id.* at 332.
163. 408 N.W.2d 227 (Minn. Ct. App. 1987).
164. *Id.* at 232.
165. *Id.* The court also terminated the mother’s parental rights on grounds of palpable unfitness. *Id.* at 232-33. However, the court again expressed reluctance in doing so when the mother’s contact with the children was limited. *Id.* Nonetheless, the mother initially abused the children and there was “guarded reason” to expect improvement in her overall ability to parent. *Id.* at 235. The court also expressed concern about the mother’s marriage to a convicted and untreated sex offender. However, the court found the sexual abuse was “inadequately evaluated” and “marriage to one who has been guilty of misconduct does not per se establish unfitness . . .” *Id.*

In another case a court found palpable unfitness, partly because of a parent’s association with a child abuser. *In re Maas*, 355 N.W.2d 480 (Minn. Ct. App. 1984). In *Maas*, a mother’s continued defense of her boyfriend’s physical abuse of her child was one factor to be considered in deeming the mother palpably unfit. *Id.* at 483.

166. *In re M.A.*, 408 N.W.2d at 229.
167. *Id.* at 232.
168. *Id.*
Another case where the court considered terminating parental rights based on palpable unfitness is *In re M.D.O.*\(^{169}\) In that case the court held that a parent’s conviction for murdering her own adopted daughter was an insufficient basis to find her palpably unfit to parent a subsequent child who was born while she was awaiting trial.\(^{170}\) The court noted that it is onerous to prove that parental rights should be terminated\(^{171}\) and concluded that in this case there was no “consistent pattern of conduct” or “specific conditions” which were permanently detrimental to the welfare of M.D.O.\(^{172}\)

In Minnesota, abused children do not receive the benefit of a presumption favoring the termination of their abusers’ parental rights. For these children, the burden of proving palpable unfitness or detrimental parental conduct continues to be onerous. As a result, these children face the prospect of years of foster care during which ongoing contact with their abusive parents may emotionally and physically harm them.

### C. Neglected and in Foster Care

A child’s status as “neglected and in foster care” is also a statutory ground for termination of parental rights.\(^{173}\) In determining whether a child is neglected and in foster care, the court must consider at least seven factors. These factors include:

1. the length of time the child has been in foster care;
2. the effort the parent has made to adjust circumstances, conduct, or condition that necessitates the removal of the child to make it in the child’s best interest to be returned to the parent’s home in the foreseeable future, including the use of rehabilitative services offered to the parent;
3. whether the parent has visited the child within the three months preceding the filing of the petition, unless extreme financial or physical hardship or treatment for mental disability or chemical dependency or other good cause prevented the parent from visiting the child or it was not in the best interests of the child to be visited by the parent;

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\(^{169}\) 462 N.W.2d 370 (Minn. 1990). See also infra notes 203-26 and accompanying text.

\(^{170}\) *In re M.D.O.*, 462 N.W.2d at 378.

\(^{171}\) *Id.* at 376.

\(^{172}\) *Id.* at 377.

(4) the maintenance of regular contact or communication with the agency or person temporarily responsible for the child;

(5) the appropriateness and adequacy of services provided or offered to the parent to facilitate a reunion;

(6) whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent within an ascertainable period of time, whether the services have been offered to the parent, or, if services were not offered, the reasons they were not offered; and

(7) the nature of the efforts made by the responsible social service agency to rehabilitate and reunite the family, and whether the efforts were reasonable. 174

The statutory framework again urges the county to look toward reunification before the parent-child relationship is permanently severed. 175 In cases of abuse, this means that the child must have ongoing contact with the abuser or remain idle in foster care until sufficient time has passed that the child can be deemed "neglected and in foster care." 176

For example, a father's imprisonment for first degree assault 177 has previously formed the basis for a finding that the child was neglected and in foster care. 178 In the case In re Ud-

175. Id.; see, e.g., In re J.J.L.B., 394 N.W.2d at 862-63 (upholding termination after the parent refused to use most of the rehabilitation services offered to her, failed to keep in contact with social services, and after social service professionals concluded that additional services would probably not result in parental adjustment which would facilitate return of the children to the parent); In re J.A., 377 N.W.2d at 73 (finding that termination of parental rights on grounds of the child's status as neglected and in foster care was correct where, despite reasonable social service efforts, the parent failed to correct conditions of neglect and the prognosis for correction of such conditions was poor); see also In re S.N., 423 N.W.2d 83, 89-90 (Minn. Ct. App. 1988) (concluding that it was inappropriate to terminate parental rights where no formal reunification program had been developed and where it could not be said that reunification efforts would be unsuccessful).

176. See, e.g., In re B.C., 356 N.W.2d 328, 332 (Minn. Ct. App. 1984) (noting that the son of a convicted child murderer was placed in foster care for two years and the boy's progress was "sprinkled with setbacks—noticeable, alarming setbacks following visits" with his imprisoned mother). See also supra notes 148-62 and accompanying text (analyzing In re B.C.).

177. First degree assault is an assault resulting in "great bodily harm". Minn. Stat. § 609.221 (1992). Great bodily harm means "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm." Id. § 609.02, subd. 8 (1992).

a father held his three-month-old son under water and ran a comb over the child's hand with such force that the child received linear cuts. In addition, the child suffered rib and skull fractures, subdural and retinal hemorrhaging. Although the hemorrhaging was the result of recent trauma, the fractures were in the process of healing, suggesting a pattern of abuse. Even years after the abuse, the child was still "unable to walk, crawl, hold things in his hands, or feed himself." 

Incredibly, the father's conduct in *Udstuen*, standing alone, did not justify termination of his parental rights. Instead, the trial court and appellate court found it necessary to apply the seven factors listed in section 260.155, subdivision 7 of the Minnesota Statutes. Moreover, the court again recognized the petitioner's obligation to show that the conditions existing at the time of the hearing would continue for a prolonged, indeterminate period of time. Because the father expressed a lack of interest in his son, and because the child suffered extraordinary physical and emotional harm as a result of the beating, termination was warranted.

Up to the time of the TPR trial, the child had lived in a hospital or foster care for all but six weeks of the first twenty-two months of his life. By the time of the court of appeals decision, the child was nearly three years old. The appeals court noted that the child's aging would lessen his adoptability and that he needed a "permanent family relationship as soon as possible." If the statutory scheme did not require proof that the child's neglect would continue indefinitely, the TPR petition probably could have been filed earlier and a "permanent family relationship" developed more quickly.

179. Id.
180. Id. at 302.
181. Id.
182. Id. at 301.
183. In re *Udstuen*, 349 N.W.2d at 302.
184. Id.
185. See supra note 174 and accompanying text.
186. In re *Udstuen*, 349 N.W.2d at 304.
187. Id. at 304-05.
188. Id. at 303.
189. Id. at 300-01.
190. Id. at 304; see also In re *N.C.K.*, 411 N.W.2d 577, 582 (Minn. Ct. App. 1987) (following social service professionals' recommendations that "it is essential to the children's development that they have a permanent plan as soon as possible, especially since the children are presently adoptable").
D. Reasonable Efforts at Reunification Have Failed

Child abuse may warrant termination of the parent's rights when "following upon a determination of neglect or dependency, or of a child's need for protection or services, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination."\footnote{191} Children below the age of twelve living out of the home for more than a year may benefit from a presumption that reasonable efforts have been made.\footnote{192} There is also a presumption favoring termination if the parent is chemically dependent, is required to undergo chemical dependency treatment as part of a case plan, the treatment program is culturally appropriate, the parent fails two or more times to successfully complete treatment, and the parent continues to abuse chemicals.\footnote{193}

For example, \textit{In re H.K.}\footnote{194} concerned a dependency petition of a three-year-old child. Although specifics were not given, the problems leading to the dependency determination were listed as "chemical dependency and physical abuse."\footnote{195} The child was placed in foster care and reunification efforts included chemical dependency treatment for the mother, a battered women's program, and parenting classes.\footnote{196} The local welfare agency also provided transportation and a supervisor for visitation between the mother and child.\footnote{197} In addition, the mother received financial assistance and frequent visits from caseworkers.\footnote{198} The trial court deemed these to be reasonable efforts and terminated the mother's parental rights.\footnote{199}

Although the court of appeals upheld the termination order, the court noted that determining the existence of reasonable efforts "requires consideration of the length of the time the county
has been involved and the quality of the efforts given." Even in cases of egregious child abuse, this language explicitly instructs the local welfare agency to take its time and to expend significant resources on reunification. While this may be proper in some cases, no allowance is made for the likelihood of success or the child's immediate need for a permanent family relationship.

As a result of the requirement for a lengthy and high quality effort at reunification, H.K. waited over three years from the filing of the dependency petition until the court of appeals upheld the trial court's decision to terminate the mother's parental rights. A child psychologist diagnosed the child as suffering oppositional disorder, post traumatic stress disorder, and depression.

E. Conviction for Killing a Parent's Child

Until recently, a parent's conviction for murdering his or her own child was insufficient to warrant termination of parental rights as to the remaining children. In the case In re M.D.O., Janet and David Ostlund adopted a fifteen-month-old, developmentally delayed girl named Maria. Mrs. Ostlund was subsequently convicted of murdering Maria.

At the criminal trial, there was evidence that the mother had fed Maria food that was too hot, repeatedly tossed a foam ball at Maria's face, spanked Maria, slapped Maria, and shaken Maria. Other witnesses observed that Maria drooled blood and once had a black eye. There was also evidence that Mrs.

200. Id. at 532.
201. Id. at 529-30.
202. Id. at 531.
203. 450 N.W.2d 655 (Minn. Ct. App. 1990) [hereinafter M.D.O. 1], rev'd, 462 N.W.2d 370 (Minn. 1990) [hereinafter M.D.O. II].
204. M.D.O. I, 450 N.W.2d at 656. Mrs. Ostlund was convicted of murder in the second degree. Minnesota law provides:

Whoever does any of the following is guilty of murder in the second degree and may be sentenced to imprisonment for not more than 40 years:

1. Causes the death of a human being with intent to effect the death of that person or another, but without premeditation, or

2. Causes the death of a human being, without intent to effect the death of any person, while committing or attempting to commit a felony offense other than criminal sexual conduct in the first or second degree with force or violence . . .

205. M.D.O. II, 462 N.W.2d at 372.
206. Id.
Ostlund abused daycare children in her home; specifically, that she dropped other children into their cribs and declined to feed those who could not talk.207

On July 15, 1986, Maria died as a result of severe brain injury intentionally inflicted by her adoptive mother.208 In September 1986, while awaiting trial, Mrs. Ostlund gave birth to M.D.O.209 and the juvenile court assumed custody of the child. In January 1987, Mrs. Ostlund was sentenced to 105 months in prison.210

On July 16, 1987, the county petitioned for termination of Ostlund’s parental rights to M.D.O. on grounds that: “(1) Ostlund had repeatedly refused or neglected to comply with the duties imposed by the parent-child relationship, and (2) Ostlund was palpably unfit to be a party to that relationship because of a consistent pattern of specific conduct and specific conditions permanently detrimental to the child’s health.”211

The trial court dismissed the petition, finding that “Ostlund’s conduct toward Maria showed incidents of abuse but did not establish a consistent pattern of abuse.”212 Moreover, the court concluded that Ostlund did not pose a “current or even foreseeable danger to M.D.O.”213 In addition, the child’s best interests “were served by maintaining and strengthening the relationship with Ostlund.”214 As a result of this decision, the child was returned to her natural father.215

The Minnesota Court of Appeals reversed the trial court, holding that Ostlund was a palpably unfit mother as a matter of law.216 Given the “consistent pattern of abuse” prior to Maria’s murder and Ostlund’s refusal to admit to the intentional assault on Maria, resulting in a questionable prognosis for therapy, the appellate court ruled that the palpable unfitness to parent would continue for the foreseeable future.217

207. Id.
208. M.D.O. I, 450 N.W.2d at 656; M.D.O. II, 462 N.W.2d at 372.
209. M.D.O. I, 450 N.W.2d at 656.
211. Id. at 373.
212. Id. at 374.
213. Id.
214. Id.
217. Id. at 657-658.
In a dissenting opinion, Judge Klaphake agreed that Ostlund had engaged in a consistent pattern of abuse toward Maria. However, the Judge did not agree "with the conclusion that this pattern renders Ostlund unable to care for M.D.O. for the reasonably foreseeable future or renders her palpably unfit to parent." In reversing the court of appeals, the Minnesota Supreme Court held that since a past pattern of abuse was not an essential element of Ostlund's crime, the court of appeals could not make this finding as a matter of law. The court noted that the burden of proving a parent palpably unfit is onerous. Again, the court noted that, at the time of the TPR trial, the petitioner must prove a pattern of conduct or specific conditions that are permanently detrimental to the child and that will continue for a prolonged, indefinite period of time.

The supreme court found no "consistent pattern of conduct" or "specific conditions" which were permanently detrimental to the welfare of M.D.O. Moreover, Ostlund's refusal to acknowledge culpability was not considered permanently detrimental to the child. The court noted that Ostlund was fulfilling numerous case plan requirements and several professionals testified that Ostlund could be rehabilitated without admitting that she had murdered Maria. The court concluded that "Janet Ostlund may not be the picture of a model parent. Yet few children would be reared by natural parents if model parents were the standard."

Reacting to the supreme court's decision in M.D.O., the legislature amended the TPR statute to provide for termination when

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218. Id. at 658.
219. Id. at 658-659.
220. M.D.O. II, 462 N.W.2d 370, 376 (Minn. 1990) rev'd 450 N.W.2d 655 (Minn. Ct. App.). Two statutes now make "past pattern of abuse" an essential element of the crime. An assault of a minor is an assault in the third degree "if the perpetrator has engaged in a past pattern of child abuse against the minor." MINN. STAT. § 609.223, subd. 2 (1992). Murder in the first degree now includes causing the death of a minor "while committing child abuse, when the perpetrator has engaged in a past pattern of child abuse upon the child and the death occurs under circumstances manifesting an extreme indifference to human life." Id. § 609.185, subd. 5 (1992).
221. M.D.O. II, 462 N.W.2d at 376.
222. Id. at 377.
223. Id. at 378.
224. Id. at 377.
225. Id. at 378.
226. M.D.O. II, 462 N.W.2d at 379 (citation omitted).
“the parent has been convicted of causing the death of another of the parent’s children.”²²⁷ Had this statute been in place at the time of the *M.D.O.* decision, the result of the case would likely have been the same because it is not enough to prove a statutory ground for termination. The court must still find that termination would serve the child’s best interests.²²⁸ In *M.D.O.*, the supreme court upheld the lower court’s finding that termination would not serve the child’s best interests.²²⁹

The amendment to the TPR statute does nothing to protect those children whose parents kill unrelated children such as daycare children,²³⁰ foster children,²³¹ or neighbor children. Likewise, the killing of adults, or one of the child’s parents, would be nothing more than a factor to consider under the present termination statute.²³²

Most important, the amendment fails to address those cases where physical and sexual abuse have been inflicted on a child, but the child has not died. For these children, reunification with, rather than severance from the abuser remains the primary goal.

V. Problems with the Current TPR Statute in Cases of Child Abuse

Minnesota recognizes that physical and sexual abuse places a child in need of protection.²³³ Convicted child abusers have the burden of proving to the court why they should be permitted visitation with, much less custody of their children.²³⁴

Unfortunately, Minnesota fails to recognize an egregious act of child abuse, by itself, as a ground for termination of parental

²²⁸. *Id.*, subd. 4.
²²⁹. *M.D.O. II*, 462 N.W.2d at 379.
²³⁰. Mrs. Ostlund, a day care provider, allegedly dropped children into their cribs and did not feed children who could not talk. *Id.* at 372.
rights unless the child dies, is the offspring of a convicted abuser, and has at least one brother or sister. There are three serious shortcomings to this approach. First, the current statute fails to recognize the harm resulting from child abuse. Second, the current statute places children at risk. Third, the current statute creates a delay in permanency planning.

A. The Current Statute Fails to Recognize the Harm Resulting From Child Abuse

The current TPR statute does not specifically refer to the physical or sexual abuse of a child. This omission fails to recognize that the abuse of a child, standing alone, should warrant termination of parental rights when doing so would serve the child’s best interests. The impact of abuse on a child cannot be overstated.

Abused children share characteristics indicative of a tortured spirit and body. Older children exhibit both physical and psychological effects of abuse. Younger abused children also exhibit physical and psychological effects of abuse. For all children, the effects of abuse can be severe and long-lasting.

235. KAROSOV & LANSING, MANUAL FOR PROSECUTION OF CHILD ABUSE 99 (Minn. County Attorney’s Assn. 1991). Specific behaviors include:

- (1) depression;
- (2) withdrawal;
- (3) poor self image;
- (4) chemical abuse;
- (5) running away or aversion to going home;
- (6) recurrent physical complaints, such as infections, cramping or abdominal pains, muscle aches, dizziness, gagging and severe headaches;
- (7) self mutilation, such as cutting;
- (8) suicide attempts;
- (9) truancy;
- (10) change in school performance;
- (11) overtly seductive behavior, promiscuity or prostitution;
- (12) eating disorders, such as anorexia, obesity, sudden weight gain or loss;
- (13) limited social life;
- (14) attention getting or delinquent behavior.

Id.

236. Id. Specific behaviors include the following:

- (1) nightmares and other sleeping disturbances;
- (2) bedwetting;
- (3) elimination problems;
- (4) enuresis/encapresis;
- (5) explicit sexual knowledge, behavior or language unusual for their age;
- (6) withdrawal;
- (7) frequent genital infections;
- (8) unexplained gagging;
- (9) agitation, hyperactivity, irritability or aggressiveness;
- (10) loss of appetite.
Several Minnesota courts have admitted testimony regarding the characteristics of abused children. In *State v. Myers*, an expert testified that, unlike most crimes, child sexual abuse rarely occurs only once. Young victims of sexual abuse fear that they will be blamed or punished if they report the abuse. Young children are confused because the abuse feels wrong but the perpetrator contends that the abuse is proper. In many instances where one parent perpetrates the abuse, the nonabusive parent does not believe the child’s allegations.

In *State v. Davis*, the court admitted expert testimony regarding characteristics of sexually abused adolescents. The shame and guilt experienced by adolescents may cause a particular abused adolescent to engage in “lying, stealing, running away, [and] sexually acting out.”

As one physician has noted, child abuse “is an experience that interferes or has the potential to interfere with a child’s normal, healthy development. It is an experience with which the child may not be able to cope physically, intellectually or emotionally.” An abusive parent shatters the child’s self image and distorts the child’s perceptions of power and trust.

Minnesota’s TPR statute finds certain acts toward children to be so abhorrent that termination is justified. For example, abandonment of a child is a ground for termination. Indeed, abandonment is presumed in some cases where a parent has no contact with the child for six months and has no demonstrated or consistent interest in the child’s well being. In certain cir-

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*Id.*
237. 359 N.W.2d 604 (Minn. 1984).
238. *Id.* at 608.
239. *Id.*
240. *Id.*
241. *Id.* at 610.
243. *Id.* at 299. *But see State v. Danieslski, 350 N.W.2d 395, 397-98 (Minn. Ct. App. 1984) (holding that it was error to allow testimony about the characteristics of sexually abused adolescents).*
244. *Davis*, 422 N.W.2d at 299.
246. *Id.*
circumstances, the failure to pay child support is also a ground for termination of parental rights.249

Obviously, the physical and sexual abuse of a child is abhorrent to any person with normal human feelings. Certainly, child abuse harms the victims at least as much as abandonment or the failure to pay child support. Certainly, egregious child abuse should constitute a sufficient ground for termination of parental rights.

Unlike Minnesota’s present statute, some state statutes do specifically provide that child abuse constitutes an independent ground for termination of parental rights. In Wisconsin, for example, child abuse is a separate and distinct ground for termination of parental rights. Specifically, the Wisconsin statute provides:

Child abuse may be established by showing that the parent has exhibited a pattern of abusive behavior which is a substantial threat to the health of the child who is the subject of the petition and a showing of either of the following:

(a) That the parent has caused death or injury to a child or children resulting in a felony conviction.

(b) That, on more than one occasion, a child has been removed from the parent’s home by the court... after an adjudication that the child is in need of protection or services and a finding by the court that sexual or physical abuse was inflicted by the parent.250

North Carolina also permits termination of parental rights on the grounds that a child has been abused. A child is considered abused when the parent, or another adult responsible for the child’s care, has engaged in any of the following conduct:

a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means; or

b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means; or

b1. Uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior; or

c. Commits, permits, or encourages the commission of a violation of the following laws by, with, or upon the juvenile: first

249. Id., subd. 1(b)(3) (1992); see In re S.F., 482 N.W.2d 500, 503 (Minn. Ct. App. 1992); In re M.G., 375 N.W.2d 588, 590 (Minn. Ct. App. 1985).

degree rape . . . second degree rape . . . first degree sexual offense . . . second degree sexual offense . . . sexual act by a custodian . . . crime against nature . . . incest . . . preparation of obscene photographs, slides or motion pictures of the juvenile . . . employing or permitting the juvenile to assist in a violation of the obscenity laws . . . dissemination of obscene material to the juvenile . . . displaying or disseminating material harmful to the juvenile . . . first and second degree sexual exploitation of the juvenile . . . promoting the prostitution of the juvenile . . . and taking indecent liberties with the juvenile . . . regardless of the age of the parties; or

d. Creates or allows to be created serious emotional damage to the juvenile. Serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal or aggressive behavior toward himself or others; or

e. Encourages, directs, or approves of delinquent acts involving moral turpitude committed by the juvenile.\footnote{251}

If the trial court determines that abuse has occurred, parental rights must be terminated under the North Carolina statute unless the child's best interests dictate otherwise.\footnote{252} Minnesota, like Wisconsin and North Carolina, should recognize egregious child abuse as an independent ground for termination of parental rights. Not only does the current TPR statute's failure to include child abuse result in physical and psychological harm to

\footnote{251}{N.C. GEN. STAT. § 7A-517(1) (Supp. 1993). In one case, the trial court found that a 23-month-old girl was an abused juvenile. \textit{In re Hughes}, 330 S.E.2d 213, 218-19 (N.C. Ct. App. 1985). The girl had "stocking" type third degree burns on both feet and extending six inches up both her legs and first and second degree burns on her buttocks. \textit{Id.} at 214. The burns were caused by approximately 134 degree bath water. \textit{Id.} at 215. Although a child would instinctively scramble out of hot water, this child's burns appeared to result from her "standing flat footed in a tub filled with approximately six inches of hot water, without enough movement by the child to create splash marks." \textit{Id.} The examining doctor concluded that the burns were "non-accidental." \textit{Id.} at 214.

In another case a mother "became upset with her [child], struck her with a belt, and had washed her genital area with sufficient force to cause the child to bleed on at least three occasions." \textit{In re Thompson}, 306 S.E.2d 792, 793 (N.C. Ct. App. 1983). The court found that the injuries to the child did not constitute an injury which creates a "substantial risk of impairing the health of the child" and, therefore, the injuries did not rise to the level of abuse under G.S. 7A-517(1). \textit{Id.} at 795.

252. N.C. GEN. STAT. § 7A-289.51 (1993); \textit{see}, \textit{e.g.}, \textit{In re Smith}, 287 S.E.2d 440, 445 (N.C. Ct. App. 1982) (stating that it is "within the court's discretion to consider such factors as family integrity in making its decision of whether termination is in the best interests of the children. The children's best interests are paramount, not the rights of the parent"); \textit{In re Caldwell}, 330 S.E.2d 513, 517 (N.C. Ct. App. 1982) (finding that "the court retains discretionary authority to dismiss the petition in the best interests of the child").}
child victims of parental abuse, but this failure also contradicts Minnesota's deep commitment to protect children.

**B. The Current Statute Places Children at Risk**

The current statute makes termination too difficult in cases of egregious child abuse. This difficulty means that child victims may endure further consequences of an abusive relationship. Although child abuse may fit within the boundaries of several statutory provisions warranting termination, child abuse alone is an insufficient basis to terminate parental rights under the present law even if termination would serve the child's best interests.

In most cases, in order to terminate parental rights, the abuse must occur over an extended period of time. Moreover, the county must prove that the abusive conditions will continue for an indefinite, prolonged period of time. In most cases, the local welfare agency is urged to make reasonable efforts at reunification. Indeed, the court is instructed to make specific findings regarding reunification efforts prior to termination under any of the statutory grounds. If the petitioner proves all of the above, termination is warranted if it would serve the child's best interests.

In the case *In re J.H.D.*, requiring the welfare agency to prove more than abuse before parental rights could be terminated resulted in placing the children with their abusive parents for an extended period of time. The children endured further neglect and witnessed their father shoot their mother. Termination was not finalized until five years after the trial court had originally found that the children were neglected.
In another case, *In re B.C.*,\(^{265}\) requiring the welfare agency to prove more than abuse before parental rights could be terminated resulted in two years of visitation between the minor child and the parent, imprisoned for the murder of another one of her children.\(^{266}\) These visits were eventually deemed emotionally harmful and termination was accomplished.\(^{267}\) The children in *In re J.H.D.* and *In re B.C.* endured further harm as a result of the current TPR statute’s failure to include child abuse as an independent ground for termination of parental rights and as a result of reunification efforts which can take years to complete. J.H.D. and B.C. are not alone; many other children have also endured further harm.\(^{268}\) The TPR statute must be amended so that abused children will not risk further harm.

**C. The Current Statute Creates a Delay in Permanency Planning**

Prior to terminating the parental relationship under any of the statutory grounds, the court must make findings regarding efforts at reunification of the family.\(^{269}\) This statutory scheme fails to recognize that, in some instances, the prospect of reunification is so remote that the delay in planning for the permanent placement of the abused child cannot be justified. More often than not, cases of egregious child abuse fall into this category.\(^{270}\)

In the case *In re L.M.M.*,\(^{271}\) a mother who sexually and physically abused her children was subjected to psychiatric evaluations of herself and her children in “various combinations and in various settings.”\(^{272}\) Based on these evaluations, the psychologist concluded that the children “were at risk of physical punishment in unpredictable patterns” and recommended termination of parental rights.\(^{273}\) Unfortunately, the court ordered a plan for reunification which included supervised visitation.\(^{274}\) A petition for termination of parental rights was filed, more than one year

\(^{265}\) 356 N.W.2d 328 (Minn. Ct. App. 1984).
\(^{266}\) Id. at 330.
\(^{267}\) Id. at 331-33.
\(^{269}\) MINN. STAT. § 260.221, subd. 5 (1992).
\(^{270}\) MAYHALL & NORCUM, supra note 20, at 348.
\(^{271}\) 372 N.W.2d 431 (Minn. Ct. App. 1985).
\(^{272}\) Id. at 431-32.
\(^{273}\) Id. at 432.
\(^{274}\) Id.
after the court's initial order placing the children in foster care and ordering psychological evaluations, because the social workers concluded the plan was not producing substantial changes. Given the original psychological evaluations, this is an example of a case where the agency and the court could have determined the prospect of successful reunification to be so remote that reunification efforts should not have been a prerequisite to filing a TPR petition.

The nature of egregious child abuse makes reunification difficult. Researchers have found that physical abuse of a child "impedes or even prevents the formation of a strong and confident attachment between infant and parent." Such attachment problems may cause an abused child to become violent or experience "a schizophrenic type of withdrawal, retreating into a total psychotic state." In describing the difficulty of working with and reuniting abused children and their parents, one pediatrician observes that "we've got a problem in the area of abuse and neglect that is far greater than anyone suspected when the system was set up. We're asking social services to bail out the ocean with a couple of buckets."

According to some researchers, child abuse victims are less likely to become abusers themselves or to engage in other antisocial behaviors if they can form attachments to adults and peers other than their abusers. Unfortunately, the TPR statute's requirement of reunification efforts means continuing the child's attachment to the abuser rather than placing the child in a permanent, nonabusive home.

VI. A NEW APPROACH

Minnesota's TPR statute should recognize egregious child abuse as an independent ground for termination of parental rights. An amendment to the statute must reduce the risk of reunification efforts in child abuse cases when the abusive parent is likely to continue to abuse the child, expedite permanency planning, and yet remain within the bounds of the Constitution. Accordingly, the following proposal is made.

275. Id.
276. MAGID & McKELVEY, supra note 37, at 179.
277. Id. at 175.
278. Id.
279. Id. at 178.
A. Proposal for Amended Statute

The framework for amending Minnesota's TPR statute can be found in Minnesota's custody and visitation statute. This statute restricts a convicted child abuser's access to his or her children. This concept should be employed in termination of parental rights cases to create a separate and distinct basis for termination. If a parent is convicted of an egregious act of child abuse, termination of parental rights is appropriate if it would serve the child's best interests. Specifically, the statute could be amended to read as follows:

The Juvenile Court may involuntarily terminate all rights of a parent to a child upon the parent's conviction of child physical or sexual abuse. A conviction for child physical abuse or sexual abuse means conviction under any of the following statutes for acts against a minor child:

1. Murder in the first, second or third degree under sections 609.185, 609.19 or 609.195.


281. Id., subd. 1. This section places upon the person seeking custody or visitation the burden of proving that such access would serve the best interests of the child. Id.

282. MINN. STAT. § 260.221, subd. 4. (1992).

283. Id. § 609.185 (1992). The statute provides in relevant part that whoever does any of the following is guilty of murder in the first degree: (1) causes the death of another as a result of premeditation with intent to kill; (2) causes the death of another while committing or attempting to commit criminal sexual conduct; (3) causes the death of a minor while committing child abuse when the perpetrator has engaged in a past pattern of abuse and death occurs under circumstances manifesting an extreme indifference to life; or (4) causes the death of another while committing domestic abuse when the perpetrator has engaged in a past pattern of abuse and death occurs under circumstances manifesting an extreme indifference to life. Id.

284. Id. § 609.19 (1992). The statute provides in relevant part that whoever does any of the following is guilty of murder in the second degree: (1) causes the death of another with intent to cause the death but without premeditation; (2) causes the death of another without intent to kill while committing or attempting to commit a felony offense other than criminal sexual conduct; (3) causes the death of another without intent to kill while intentionally inflicting or attempting to inflict bodily harm, when an order for protection is in effect, and the victim is the person designed to receive protection under the order. Id.

285. Id. § 609.195 (1992). The statute provides in relevant part that whoever does any of the following is guilty of murder in the third degree: (1) causes the death of another without intent by perpetrating an act eminently dangerous to others and evincing a depraved mind without regard for human life; (2) proximately causes the death of another without intent by unlawfully selling, giving away, bartering, delivering, exchanging, distributing, or administering a controlled substance. Id.
2) Manslaughter in the first degree under section 609.20;\textsuperscript{286}

3) Assault in the first, second or third degree under sections 609.221,\textsuperscript{287} 609.222\textsuperscript{288} or 609.223;\textsuperscript{289}

4) Kidnapping under section 609.25;\textsuperscript{290}

5) Depriving another of custodial or parental rights under section 609.26;\textsuperscript{291}

6) Soliciting, inducing or promoting prostitution involving a minor under section 609.322;\textsuperscript{292}

\textsuperscript{286} Id. § 609.20 (1992). The statute provides in relevant part that whoever does any of the following is guilty of manslaughter in the first degree: (1) intentionally causes the death of another in the heat of passion provoked by words or acts, which would provoke a person of ordinary self-control under similar circumstances, provided that the crying of a child does not constitute provocation; (2) causes the death of another while committing or attempting to commit a misdemeanor or gross misdemeanor with such force and violence that death or great bodily harm was reasonably foreseeable, and the circumstances do not constitute murder in the first or second degree. \textit{Id.}

\textsuperscript{287} MINN. STAT. § 609.221 (1992). The statute provides in relevant part that whoever assaults another and inflicts great bodily harm is guilty of assault in the first degree. \textit{Id.}

\textsuperscript{288} Id. § 609.222 (1992). The statute provides in relevant part that a person is guilty of assault in the second degree when that person assaults another with a dangerous weapon or assaults another with a dangerous weapon and inflicts substantial bodily harm. \textit{Id.}

\textsuperscript{289} Id. § 609.223 (1992). The statute provides in relevant part that a person is guilty of assault in the third degree when that person assaults another and inflicts substantial bodily harm, or assaults a minor if the perpetrator has a past pattern of abuse against the minor. \textit{Id.}

\textsuperscript{290} Id. § 609.25 (1992). The statute provides in relevant part that a person is guilty of kidnapping when that person confines or removes from one place to another any person without the person’s consent or in the case of a child under age 16, without the parent’s consent, and holds the person for ransom, or as a hostage, or to facilitate the commission of a felony or flight, or physically harms or terrorizes the victim, or holds the victim in involuntary servitude. \textit{Id.}

\textsuperscript{291} Id. § 609.26 (1992). The statute provides in relevant part that whoever intentionally does any of the following may be charged with depriving another of custodial or parental rights: (1) conceals a minor child from the child’s parent with the intent to deprive that parent of parental rights or conceals the child from a person having a right to visitation or custody; (2) takes or fails to return a minor child in violation of a court order which has transferred legal custody; (3) takes or fails to return a minor child in violation of a court order to intentionally deprive a parent of visitation or custody rights; (4) takes or fails to return a minor child after the start of an action relating to child visitation or custody; (5) retains a child in Minnesota with the knowledge that the child was taken out of another state in violation of any of the above provisions. \textit{Id.}, subd. 1.

\textsuperscript{292} MINN. STAT. § 609.322 (1992). The statute provides in relevant part that a person is guilty of soliciting, inducing or promoting prostitution involving a minor when that person intentionally: (1) solicits, promotes, or induces a minor under the age of 16 to practice prostitution, or (2) solicits, promotes, or induces a minor between the ages of 16 and 18 to practice prostitution by means of force or uses a position of authority to induce the minor to practice prostitution. \textit{Id.}, subd. 1.
7) Receiving profit from prostitution involving a minor under section 609.323;\textsuperscript{293} 
8) Criminal sexual conduct in the first degree under section 609.342;\textsuperscript{294} 
9) Criminal sexual conduct in the second degree under section 609.343;\textsuperscript{295} 
10) Criminal sexual conduct in the third degree under section 609.344, Subd. 1 (c), (f) or (g);\textsuperscript{296} 

\textsuperscript{293} MINN. STAT. § 609.323 (1992). The statute provides in relevant part that a person is guilty of receiving profit from prostitution involving a minor when that person: (1) intentionally receives profit from the prostitution of a minor under the age of 16 and that person is not a prostitute or patron; or (2) intentionally receives profit from the prostitution of a minor between the ages of 16 and 18 and that person is not a prostitute or patron. \textit{Id.}, subd. 1a. 

\textsuperscript{294} MINN. STAT. § 609.342 (1992). The statute provides in relevant part that a person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the first degree when: (1) the complainant is under 13 years of age and the actor is more than 36 months older than the complainant; (2) the complainant is at least 13 years of age but less than 16 and the actor is more than 48 months older than the complainant, in a position of authority over the complainant, and uses this authority to cause the complainant to submit; (3) circumstances existing at the time of the penetration cause the complainant to believe great bodily harm is imminent; (4) the actor is armed with what complainant reasonably believes is a dangerous weapon and the weapon is used or threatened to be used to cause the complainant to submit; (5) the actor causes personal injury to the complainant and either uses force or coercion, or knows the complainant is mentally impaired, incapacitated, or physically helpless; (6) the actor is aided or abetted by one or more accomplices who cause the complainant to submit; or (7) the actor has a significant relationship with the complainant and the complainant was under the age of 16 at the time of the penetration. \textit{Id.}, subd. 1 (a)-(g). 

\textsuperscript{295} MINN. STAT. § 609.343 (1992). The statute provides in relevant part that a person who engages in sexual contact with another person is guilty of criminal sexual conduct in the second degree when: (1) the complainant is under 13 years of age and the actor is more than 36 months older than the complainant; (2) the complainant is at least 13 years of age but less than 16 and the actor is more than 48 months older than the complainant, in a position of authority over the complainant, and uses this authority to cause the complainant to submit; (3) circumstances existing at the time cause the complainant to believe great bodily harm is imminent; (4) the actor is armed with what complainant reasonably believes is a dangerous weapon and the weapon is used or threatened to be used to cause the complainant to submit; (5) the actor causes personal injury to the complainant and either uses force or coercion, or knows the complainant is mentally impaired, incapacitated, or physically helpless; (6) the actor is aided or abetted by one or more accomplices who cause the complainant to submit; or (7) the actor has a significant relationship with the complainant and the complainant was under the age of 16 at the time of the contact. \textit{Id. See, e.g.}, State v. Wermerskirchen, 483 N.W.2d 725, 731-32 (Minn. Ct. App. 1992) (reversing conviction and ordering new trial where defendant was charged with second degree sexual conduct with daughter because the state openly encouraged the misuse of Spreigl evidence under Rule 404(b) of the Minnesota Rules of Evidence). 

\textsuperscript{296} MINN. STAT. § 609.344, subd. 1(c),(f),(g) (1992 & Supp. 1993). The statute provides in relevant part that a person who engages in sexual penetration with another
11) Solicitation of a child to engage in sexual conduct under section 609.352;\textsuperscript{297}

12) Incest under section 609.365;\textsuperscript{298}

13) Malicious punishment of a child under section 609.377;\textsuperscript{299}

14) Neglect of a child under section 609.378.\textsuperscript{300}

This proposal is similar to a Wisconsin statute providing for termination of parental rights upon a felony conviction for causing death or injury to any child\textsuperscript{301} and a North Carolina statute allowing termination of parental rights upon conviction under

person is guilty of criminal sexual conduct in the third degree when: (1) the actor uses force or coercion to accomplish the penetration; (2) the actor has a significant relationship with the complainant and the complainant was at least 16 years of age but under 18 at the time of the penetration; or (3) the actor has a significant relationship with the complainant and the complainant was at least 16 years of age but under 18 at the time, and the actor or actor's accomplice used force or coercion, the complainant suffered personal injury, or the sexual abuse involved multiple acts committed over an extended period of time. \textit{Id.}

\textsuperscript{297} Id. § 609.352, subd. 1-2 (1992). The statute provides in relevant part that a person who is 18 years of age or older is guilty of soliciting a child to engage in sexual conduct when that person commands, entreats, or attempts to persuade a child under 15 years of age to engage in sexual conduct with the intent to engage in sexual contact of the individual's primary genital area, sexual penetration, or sexual performance. \textit{Id.}

\textsuperscript{298} Id. § 609.365 (1992). The statute provides in relevant part that a person is guilty of incest when that person has sexual intercourse with another nearer of kin than first cousin with knowledge of the relationship. \textit{Id.} See, e.g., \textit{In re C.B.}, No. C5-89-1107, 1989 WL 138953, at *3-4 (Minn. Ct. App. Nov. 21, 1989) (affirming trial court judgment terminating parental rights of parents due partly to the fact that incestuous relationships and sexual abuse had existed for many years in the family even though the children were not directly abused).

\textsuperscript{299} MINN. STAT. § 609.377 (1992). The statute provides in relevant part that a parent, legal guardian, or caretaker is guilty of malicious punishment of a child when that person by an intentional act or a series of intentional acts evidences unreasonable force or cruel discipline, which is excessive under the circumstances. \textit{Id.}

\textsuperscript{300} Id. § 609.378 (1992 & Supp. 1993). The statute provides in relevant part that a parent, legal guardian, or caretaker is guilty of neglect of a child when: (1) that person willfully deprives a child of necessary food, clothing, shelter, health care or supervision appropriate to the child's age, and (2) that person is reasonably able to make the necessary provisions and the deprivation harms or is likely to harm the child's physical, mental, or emotional health. \textit{Id.}, subd. 1(a). A parent, legal guardian, or caretaker is guilty of endangering a child's person or health when: (1) that person intentionally or recklessly causes or allows a child to be placed in a situation likely to substantially harm the child's physical, mental, or emotional health or cause the child's death; or (2) that person knowingly causes or permits the child to be present where any persons are selling or possessing a controlled substance. \textit{Id.}, subd. 1(b). In addition, a parent, legal guardian, or caretaker is guilty of endangering a child by firearm access when that person intentionally or recklessly causes a child under 14 years of age to be placed in a situation likely to substantially harm the child's physical health, or cause the child's death, as a result of the child's access to a loaded firearm. \textit{Id.}, subd. 1(c).

\textsuperscript{301} \textit{See supra} note 250 and accompanying text.
enumerated criminal statutes.\textsuperscript{302} Wisconsin and North Carolina also require that a court must find that termination of parental rights would serve the child’s best interests.\textsuperscript{303}

Although this proposal would not protect children whose abusers are neither charged nor convicted, it is increasingly rare not to prosecute serious acts of child abuse. According to the Bureau of Justice Statistics, ninety percent of those arrested for crimes against children are prosecuted.\textsuperscript{304}

Child abuse victims whose parental abusers are not convicted may still receive the benefit of the TPR statute. However, the local welfare agency will need to place the abuse within one of the other statutory grounds for termination.

\textbf{B. Benefits of the Amended Statute}

There are at least four benefits to the amended statute. First, the amendment recognizes child abuse as a social ill that warrants termination of parental rights. Although the amendment itself may not deter egregious acts of child abuse, the amendment reflects society’s intolerance of such conduct and the desire to separate children from an abusive environment.

Second, the amended statute reduces a child’s risk of further abuse. Under the present statute, reunification efforts are necessary even when the prospect of successful reunification is remote. As a result, children have endured further abuse\textsuperscript{305} or have experienced emotional trauma from ongoing contact with an abuser.\textsuperscript{306}

Under the amended statute, reunification efforts are not required. If the parent has been convicted of one or more acts of child abuse and the local welfare agency can establish that terminating the parent’s rights would serve the child’s best interests, the child would not have to endure ongoing contact with the perpetrator.

Third, the amended statute expedites permanency planning after the perpetrator of the abuse has been convicted. Under the present statute, reunification efforts are necessary prior to

\textsuperscript{302} See \textit{supra} note 251 and accompanying text.
\textsuperscript{303} N.C. GEN. STAT. § 7A-289.31 (1989); Wis. STAT. § 48.415 (5)(a),(b) (1991-92).
\textsuperscript{304} WHITCOMB ET AL. \textit{supra} note 245, at 6.
\textsuperscript{305} See, e.g., \textit{In re M.A.}, 408 N.W.2d 227, 232 (Minn. Ct. App. 1987) (noting that child was abused by the parent during supervised visitation in a welfare agency).
When a child abuser is charged, the trial court may prohibit contact between the abuser and the child pending trial. Accordingly, the local welfare agency may have to delay visitation, family counseling, and other services until the criminal proceeding is finalized. When the criminal case ends, the local welfare agency must then wait for documented failure of reunification efforts before it institutes a TPR petition.

Under the amended statute, the local welfare agency will still have to wait until the criminal case ends. However, if the case ends in a conviction, the agency will no longer have to attempt reunification. If terminating the parent’s rights would serve the child’s best interests, the agency may immediately file a TPR petition. In addition, the wait for the outcome of the criminal proceedings need not be long. An accused child abuser or the prosecutor can demand that a trial be held within sixty days after a not guilty plea.

Fourth, the amended statute may reduce the number of times the child victim will have to testify about the abuse. Under the present statute, the child may have to testify about the abuse in both the criminal and TPR trials. Under the amended statute, terminating parental rights on the basis of a repeated failure to comply with parental duties requires “reasonable efforts” by the agency to reunite the family. The Minnesota Court of Appeals has the “greatest concern” in upholding a termination on the basis of palpable unfitness if an abusive parent has not been allowed ongoing contact with the victim. See generally In re J.H.D., 416 N.W.2d at 194.

Terminating parental rights on the basis that a child is neglected and in foster care requires an evaluation of the agency’s efforts to reunite the abuser and the victim. Obviously, terminating parental rights on the basis that reasonable efforts at reunification have failed also requires reunification efforts.

The court will still need to make findings as to any reunification efforts. However, an agency should be able to prove that termination of parental rights would serve the best interests of the child if the agency shows that reunification efforts will be unsuccessful.

An out of court statement from a child below the age of 10 may be admissible in a criminal trial if certain conditions are met. One of these conditions is that the child testify or be unavailable and there is other corroborating evidence. In order to reduce the trauma of testifying, the court may order that the testimony of an abused child below the age of 12 be conducted by closed circuit television or be recorded for later showing. For a detailed discussion of the admissibility of child hearsay in abuse cases, see Michelle M. Zehnder, A Step Forward: Rule 803(25), A New Approach to Child Hearsay Statements, 20 WM Mitchell L. Rev. 875 (1994).
proof of the conviction is all that is required. If any testimony is needed, it may be on the broader issue of whether terminating the parent’s rights would serve the child’s best interests. Further, under the amended statute, it may be possible to prove that terminating the parent’s rights would serve the child’s best interests based on the testimony of counselors, teachers, doctors, the guardian ad litem, and other professionals who have worked with the child victim. In such cases, the child victim may never have to testify.

C. The Constitutionality of the Amended Statute

1. Due Process

The United States Supreme Court has “little doubt that the Due Process Clause would be offended ‘[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness . . . .’”313 However, it was not until 1981 that the United States Supreme Court actually considered what the due process clause requires in a TPR proceeding.314

In Lassiter v. Department of Social Services,315 the Court held that the due process clause does not mandate the appointment of counsel for indigent parents in every TPR case.316 Nonetheless, Justice Blackmun stated that it was “not disputed that state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause.”317

In Santosky v. Kramer,318 the Supreme Court overruled a New York statute which allowed termination by a “fair preponderance of the evidence” if the child was “permanently neglected.”319 This statute permitted removal of a child from the parental home upon a showing of neglect.320 The state was then obli-

316. Id. at 33.
317. Id. at 37 (Blackmun, J., dissenting).
319. Id. at 747.
320. Id. at 748.
gated to work toward reunification. If the state made diligent efforts at reunification but the parent substantially or continuously failed to maintain contact with the child or plan for the child’s future, the child was deemed “permanently neglected.” A “dispositional” hearing would then take place, at which time a parent’s rights would be terminated if doing so would serve the child’s best interests.

In finding the New York statute unconstitutional under the due process clause, the court in *Santosky* evaluated “the process due” in a TPR proceeding by applying “three distinct factors:”

1) the private interests affected by the proceeding;  
2) the risk of error created by the State’s chosen procedure; and  
3) the countervailing governmental interest supporting use of the challenged procedure.

In considering the private interests affected, the court noted that, in a TPR proceeding, the government seeks not merely to infringe upon a parent’s right to the care and custody of a child, but to end it. Accordingly, the private interest affected “weighs heavily against use of the preponderance standard at a state-initiated permanent neglect proceeding.”

In considering the risk involved in an erroneous deprivation of a parent’s rights, the court in *Santosky* noted that the local welfare agency may have significant sums of money to expend on a TPR proceeding and that even if the agency fails initially, “it always can try once again to cut off the parents’ rights after gathering more or better evidence.” The court further noted that TPR proceedings often “employ imprecise substantive standards that leave determination unusually open to the subjective values of the judge.” When combined with a fair preponderance of the evidence standard, “these factors create a significant prospect of erroneous termination.”

321. *Id.*  
322. *Id.*  
323. *Santosky*, 455 U.S. at 748.  
324. *Id.* at 754 (citing *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976)).  
325. *Id.* at 759.  
326. *Id.*  
327. *Id.* at 764.  
329. *Id.* at 764.
In considering the government's interest in "preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings," the *Santosky* court found that requiring a clear and convincing standard of proof would be "consistent with both interests." This is because the state's interest in termination arises only when it is clear that a parent is unfit, and because judges are familiar with the clear and convincing evidence standard and can apply it.

Based on these three factors, the proposed statute would not infringe on the due process clause. A parent's fundamental interest in the care and custody of the child will be served by a procedure requiring a conviction of felony child abuse, and clear and convincing evidence that TPR would serve the child's best interests. Since a criminal conviction is necessary, the parent will be afforded the constitutional or statutory rights associated with a criminal trial, including the right to counsel, the right to a jury trial, the protection against self-incrimination, the protection against unreasonable search and seizure, and proof beyond a reasonable doubt. These rights would not be afforded in a civil TPR proceeding if the local welfare agency was called on to prove child abuse.

Moreover, the mere conviction of a parent will be insufficient to terminate parental rights. The trial court must determine whether the abuse is such that the child's best interests would be served by termination. This may involve consideration of such factors as the level of attachment to the parent and the likelihood of adoption.

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330. *Id.* at 766.

331. *Id.; see also In re Rosenblom,* 266 N.W.2d 888, 889 (Minn. 1978) (stating that due process does not require proof beyond a reasonable doubt to terminate parental rights because "it is not clear that justice would be served by applying this standard . . . its use might instead exalt the parents' rights and ignore the child's welfare").


333. *U.S. Const.* amend. VI.

334. *Id.*

335. *U.S. Const.* amend. V.

336. *U.S. Const.* amend. IV.

2. Equal Protection.

The United States Supreme Court has held that the freedom of personal choice in family matters is a fundamental liberty interest protected by the Constitution.\textsuperscript{338} Thus, a statutory provision allowing termination of parental rights upon conviction for certain acts of abuse must serve a compelling state interest.\textsuperscript{339} The United States Supreme Court has stated that "the state has an urgent interest in the welfare of the child."\textsuperscript{340} Indeed, the entire community has an interest "that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed . . . citizens."\textsuperscript{341}

The state’s urgent interest in protecting children from physical and sexual abuse would likely sustain a constitutional attack on equal protection grounds. This is because the amended statute will safeguard the child from abuse by severing ties to the abuser. By expediting the TPR process, the statute will enhance the child’s opportunity for growth into a free and well-developed citizen.\textsuperscript{342} This will be done upon proof beyond a reasonable doubt that the parent is an egregious child abuser, and by clear and convincing evidence that terminating the parent’s rights as a result of the abuse would serve the child’s best interests.

VII. Conclusion

The Minnesota Legislature has responded appropriately to child abuse by enacting legislation in the criminal, child protection, and family codes. Unfortunately, Minnesota’s termination of parental rights statute fails to recognize child abuse as anything more than a factor to consider in a TPR proceeding, unless a child dies and has a brother or sister. Therefore, under current law the local welfare agency must initiate reunification efforts even when the abuse is egregious and likelihood of reunification is poor. This statutory scheme risks physical and

\begin{itemize}
\item 339. See Davis v. Davis, 297 Minn. 187, 189-90, 210 N.W.2d 221, 223-24 (1973).
\item 342. Id.
\end{itemize}
emotional harm to the child and causes an unconscionable delay in permanency planning. A more efficient and humane approach would allow termination when a parent is convicted of egregious acts of child abuse and when terminating the parent’s rights would serve the child’s best interests. Accordingly, the Minnesota Legislature should amend the TPR statute.