

Family Law Forum

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Letter from the Editor

Linda Wold

It is good to have the opportunity to again present you with the Family Law Forum. The first edition of this period will be on the topic of *Children in the System(s)*. My thanks go to Mary C. Lauhead for inspiring the topic and for assisting me with suggestions for many of the great authors that have contributed to this edition. And after you read the articles and realize their importance to your family law practice, thank her for her stimulating topic suggestion.

This edition contains a broad spectrum of authors and individual articles that are sure to stimulate your thoughts, assist you with strategy, inform you, offer you opportunities for pro bono work, and most importantly serve your clients. And who knows, they might even inspire and motivate you to write a subsequent article for the Family Law Forum.

The current roster of the Publications Committee includes the following:

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Please contact any of us to discuss the current issue or to offer suggestions for topics and or authors you'd like to see in upcoming editions. Also, we'd like to invite you to join the Publications committee. Just make the contact.

The next issue is currently underway with the topic of **Benefits**. Several authors are working hard but we always welcome more contributions. Some examples of benefits to be covered are Medicare and MN Care for families with children, General Benefits on SSI, Unemployment and Food Stamps, QDRO's Retirement Benefits, Employee Benefits, Subsidized Housing, SSI and SSDI, Benefits Available to Domestic Abuse Survivors, and Military Benefits. If you are interested in contributing for the Benefits edition, please let the committee know. The deadline for final submissions is **FEBRUARY 1, 2009** so there is still plenty of time.

I look forward to talking with you and invite your comments and suggests on the publications.

Linda Wold
Publications Chair

Understanding the Child Protection System

Samantha J. Gemberling

To the potential client, the intersection between the juvenile and family courts would seem to be a natural one--family court, juvenile court, isn't all the same?? Aren't all cases that work with families "family law" cases? There is a distinct division of labor between the two court systems, as well as differences in the rules, statutes and procedure that govern them. The two "roads" to assist families may also, at times, intersect with one another. Knowing these differences and how to navigate them are an important component in an overall family based practice. This article is intended to provide a summary overview of the protection system, and to give family law attorneys some insight into what they should look out for when speaking with clients about these issues.

The Juvenile Court has jurisdiction over a number of specific areas, including voluntary out of home placements, adoption, juvenile status offenses, runaway cases, truancy juvenile delinquency (including Extended Juvenile Jurisdiction and Certification) Child Abuse and Neglect/Child in Need of Protection and Services (CHIPS), Permanent Placement Determinations, and Termination of Parental Rights (TPR).¹ Excluding juvenile delinquency and status offenses,² the bulk of the work of the juvenile court that impacts the family court (and thus potential family law clients) are issues related to the abuse and neglect of children. The juvenile court maintains continuing and exclusive jurisdiction over a child that is the subject of a child protection petition.³

Generally speaking, the largest group of potential clients in CHIPS⁴ cases is parents of

the children at issue, who are entitled to representation at public expense if they are eligible. For many years, the Public Defenders Office represented those parents. With the recent decision of the Public Defender's office in most counties to discontinue their representation of parents,⁵ counties are left to locate and train panels of attorneys to represent parents in these cases.⁶ As a result, there may be an increase in parents seeking private attorneys to represent them. Because the term "family law lawyer" seems to describe what one might find in the juvenile court, potential clients might seek you out to assist them in one of these types of cases, even if you don't advertise for juvenile work.

Juvenile cases are not for the faint of heart. They are also not cases to be entered into without the experience necessary to handle a case, or the willingness to learn the rules and the statutes. While the potential for the juvenile court system and the family court system to cross paths is always present, these intersections are not without their potholes and bumps that can be very difficult for the practitioner who is not familiar with the juvenile court. For family law attorneys who may be able to assist the ever increasing number of potential clients in the juvenile court, having a working knowledge of the child protection system is key.

Knowing the Players, Roles and Rules

A huge part of practice in the juvenile court requires knowing the players, understanding their roles, and how those roles affect your client. There are many

players in a typical protection case. One such group is child protection workers. There are different types of child protection workers in the system. One is the intake worker. This worker generally cooperates with law enforcement investigations, if any, and makes the presentation of evidence to the County Attorney to determine whether an immediate removal of the child is necessary or whether services can be provided in the home that adequately meet the needs of the child. Another worker is the ongoing worker. After a finding of maltreatment is made, if the case is opened to court, the case generally moves to an ongoing social worker. This worker generally has two duties: 1) to provide services to reunify the parent and the child; and 2) to concurrently prepare a plan for the child if the child cannot be returned to the parent. Due to the ever-present “duality” in such a role, in some counties, there will be two workers on the case, the ongoing worker and the permanency worker. In counties that have a such a “second” worker, they are the permanency worker. This person finds permanent placement for the child, by interviewing family members, and checking out relatives as required by statute, as well as doing any interstate work necessary to move a child if such an option was needed. They advise the County Attorney on permanent placement alternatives for the child and may even sign the TPR petition.

Another of the players is the County Attorney. Their duties are to represent the County or the social workers/child protection workers. They are responsible for communicating with the ongoing workers and for moving the case forward as is required by the governing statues and rules. They will also identify progress or lack thereof on the case plan designed to reunite the family.

Some counties allow attorneys access to the agency through the County Attorney only, while some will allow counsel to discuss the case directly with the social worker.⁷

The parents of the child at issue are also players in the case. The County is required to provide services to the parents. Thus, the parents of the child that are entitled to services must be conclusively identified. While the mothers of the child are generally readily identifiable, determining who the father of the child or children may require additional information. Many CHIPS case involved cases with more than one father in a group of children, or involve cases where paternity has not been conclusively established. For fathers in Juvenile Protection Cases, typically the county will want to involve all adjudicated and/or alleged fathers.⁸

Guardians ad Litem also have a part to play. They are generally mandatory in a child protection matter, unlike a family court proceeding.⁹ Guardians Ad Litem are responsible for advocating what they believe to be in the child’s best interest in the context of a protection proceeding. Rule 905.01 lays out the responsibilities of the Guardian, which include conducting an independent investigation of the case, reviewing relevant documents, meeting with and observing the child in the home setting, interviewing parents, caregivers, and others relevant to the case, monitoring the best interests of the child and presenting written reports on the best interests of the child that include conclusions and recommendations, and the facts upon which they are based.

The child, as the subject of the case, is also an important player. Some courts require the child to be present at the initial hearing, regardless of the child’s age. The child may be made a party to subsequent hearings and

may be appointed counsel, depending upon the child's age and county resources to provide the same. However, a Guardian Ad Litem should also be an advocate for the child or children involved in the case.

Other people with a significant relationship to the child may be allowed to participate in hearings if they are given participant status.¹⁰ Every party or participant has a right to counsel throughout the proceeding including through any appeal. Parties to the case have the right to counsel at public expense.¹¹

Another critical issue in the protection world requires an understanding of the goals of the protection system and the timelines that govern the cases in the juvenile court. Minn. Stat. § 260C.001 provides:

The purpose of the laws relating to juvenile courts is to secure for each child alleged or adjudicated in need of protection or services and under the jurisdiction of the court, the care and guidance, preferably in the child's own home, as will best serve the spiritual, emotional, mental, and physical welfare of the child; to provide judicial procedures which protect the welfare of the child; to preserve and strengthen the child's family ties whenever possible and in the child's best interests, removing the child from the custody of parents only when the child's welfare or safety cannot be adequately safeguarded without removal; and, when removal from the child's own family is necessary and in the child's best interests, to secure for the child custody, care and discipline as nearly as possible equivalent to that which should have been given by the parents.

Counties have a duty to provide reasonable efforts to reunify the parent and the child. Essentially, the County must provide services to the parent to correct the condition that led to out of home placement namely, to fix or

rehabilitate the parent so that the child can return safely to their family home.

The services provided must be:

- (1) relevant to the safety and protection of the child;
- (2) adequate to meet the needs of the child and family;
- (3) culturally appropriate;
- (4) available and accessible;
- (5) consistent and timely; and
- (6) realistic under the circumstances.¹²

If the efforts provided to the parent fail, or if efforts are found to be futile, the County must identify a permanent placement for the child. This determination is made within the timeline prescribed by the statute.¹³

The options for children include:

- (1) reunification with the parent or parents;
- (2) a transfer of legal and physical custody to relative or a third party;
- (3) a termination of parental rights and the placement of the child for adoption, or
- (4) long term foster care.¹⁴ (Long term foster care is a dispositional alternative only available in certain circumstances.)

An evidentiary hearing, known as a permanent placement determination hearing, is held to determine if efforts provided were reasonable and related to correcting the condition that led to out of home placement and what permanent plan for the child is in the child's best interest.

All abuse and neglect proceedings in the juvenile court are governed by the Minnesota Rules of Juvenile Protection Procedure. These rules lay out the framework and timelines which should be followed in all protection cases. The rules are very different from the rules of family court that practitioners may be used to operating under. The rules for motion

practice,¹⁵ discovery,¹⁶ continuances¹⁷ and settlement¹⁸ may present pitfalls for family court practitioners who rely on their knowledge of family court procedure in a juvenile proceeding.

There are also sets of rules that you must be familiar with including the Minnesota Rules of Guardian Ad Litem Procedure and Guardian Ad Litem Program Standards, the rules of Evidence and important exceptions to those rules, the limitations of the rules of civil procedure in protection cases, and Indian Child Welfare Act, as well as the chapters of Minnesota Statutes that govern these proceedings.

Family Law Cases in Juvenile Court

So with this basic framework in mind, how can your family law case end up in Juvenile Court, and what can you do to help clients? What follows are a few vignettes to “test your skills.” Can you spot the hidden pitfall in these cases?

CASE # 1:

Your potential clients are caring for a child, the young daughter of a teenage friend of their own daughter. Clients have cared for this child for 3 years and consider her their own child. Clients are fully prepared to continue caring for the child. Not entirely sure how to provide for this child, the clients head to get medical assistance or other benefits for the child. The County, now alerted to the situation due to the request for benefits on behalf of the child, investigates where this child’s parents are, and why they aren’t providing for her care. The County opens a CHIPS case, alleging the child has been abandoned by her parents.

How do you proceed?

Once the County opens a child protection case, they have a prescribed duty under the statute. That duty is to provide “reasonable efforts” to the parent and the child to reunify the family.¹⁹ In this case, the push to reunify the biological parents with the child is directly contrary to what your client is seeking. Your client wants to continue to be the child’s parent. Thus, you may find yourself advocating against the County and the child’s parents in an effort to advance the client’s interests.

At the outset you may need to consider some creative negotiations as well as some investigation. Do the child’s parents have the ability to care for her? Are they interested? It is critical to identify the father of the child and make sure services are offered to him as a parent to avoid the potential of a challenge to any action later. The biological parents of the child may consider some “pre CHIPS adjudication” possibilities to resolve the case. One of these options, either prior to an adjudication (or a finding) that the child is need of protection (“CHIPS”) or after such an adjudication as a disposition the case is a transfer of permanent and legal custody. Such a transfer to your clients would eliminate any protection issue for the child.

But beware.... A transfer of legal and physical custody in the juvenile court is a **permanent transfer**. Parents have been advised, mistakenly, by their counsel in the juvenile court that they should agree to the transfer, because they can “just go back to court in two years” to petition for a change pursuant to Minn. Stat. § 518.18. However, what parents contemplating a transfer of legal and physical custody need to understand is that this transfer is permanent and cannot be undone unless the

standards under 518.18 are met. The endangerment standard can be a difficult evidentiary standard to satisfy.²⁰

Such a resolution also does not make your clients the adoptive parents of this child. Although the chances of success in a subsequent motion to modify may be difficult, your clients may still be faced with the stress and expense of defending against the same. Clients need to be advised of the distinctions between potential dispositional options so that they can make an informed decision.

CASE # 2

Client's young son has been seriously injured. When the child is assessed at the hospital, Child Protection is called in. The physicians identify shaken baby syndrome as a cause of the child's injuries. The County brings a petition to terminate client's parental rights based upon egregious harm.

How do you proceed?

In this case, a number of potential issues arise. Who injured the child? Was the child in anyone else's care besides client? Is the other parent a potential perpetrator? What about the day care provider or another person? Was the injury indeed a result of abuse, or is there another explanation? While practices among lawyers may differ, this client may need representation separate from her spouse or the other parent. There also may be a need to associate an expert on traumatic childhood injuries.

In this type of case, the County is basically alleging that no services can be provided to rectify the situation; that the parent's conduct was so bad that they cannot parent

this child. There is also a presumption, if egregious harm or another basis for TPR is found, that the parent is presumptively unfit to parent any child.²¹ A termination of parental rights is, in this author's opinion, the most serious sanction that can be imposed on a parent. It has been described as a "civil death penalty", as it signifies the end of a parent /child relationship in a way that is the legal equivalent of the parents' death to the child. These cases are tremendously serious.

A potential pitfall in such a case is also the specter of criminal charges. Malicious punishments resulting in injury of a child or an assault are potential charges a client could face. Advising such a client requires an analysis and understanding of all potential consequences. These cases can be resolved in some circumstances. There can even be reunification with one or both parents. However, such outcomes are rare and require skillful representation and negotiation.

CASE # 3

Client has a teenage son. Client reports that son has become increasingly volatile. Client reports an incident where son was reported stealing from a neighbor's car for money to buy drugs. In the course of confronting the child about this issue, the child tries to leave the home. Client grabs the child by the arm . The child's arm is injured in the exchange. The next day, child reports the incident to a school counselor, who reports the parents to child protection. Child Protection wants client to come in for an interview. They remove the child and place him in shelter.

How do you proceed?

The issue of appropriate parental discipline is a prevalent one in protection cases. In the case of *In re Welfare of Children of N.F.*, 749 N.W.2d 802 (Minn., 2008), the Minnesota Supreme Court was unwilling to establish a bright line rule that inflicting pain on a child was the same as physical abuse, as to do the same would “effectively prohibit” any use of corporal punishment. The issue then becomes what is a reasonable exercise of parental discipline and authority?

Generally speaking, non accidental discipline that results in physical or mental injury to the child is defined as physical abuse. However, these are also intensive fact specific cases. Where your client may see an appropriate exercise of parental discipline, a county social worker may see abuse. The terms “physical abuse” and “neglect” are defined in Minn. Stat. § 626.556 which should be reviewed before advising clients.

What about the interview with the Child Protection Worker? Should clients talk to social workers? Aren’t they there to “help” the family? A good rule of thumb for any child protection client facing a potential “interview” with social services is the same as for any criminal defense client. It is the right to remain silent, or, in the child protection context, to exercise your rights not to talk to child protection social workers. While there is no inherent constitutional protection for such an interview, the client can decide not to speak. Another option is to have counsel present for the interview. All child protection interviews should, by statute, be audio taped. Sexual abuse interviews should be videotaped.²² It is appropriate to attend these interviews with clients, although an attorney’s attendance may surprise the investigating worker to some extent. It is not uncommon for the content of these interviews

to be forwarded to law enforcement in cases where criminal charges may be considered. Thus, clients should keep these considerations in mind when deciding who to talk to or when, and whether to make their children available for such interviews.²³

In this case, it is important to consider all of the potential dispositional alternatives for this child. Does he need help? What kind of help does he need? The Court may consider ordering services for the child based on his needs alone, pursuant to Minn. Stat. § 260C.007 Subd. 6(9).

CASE #4:

Potential client is an accountant who volunteers at the day care program of her church. Client is in a contested paternity case, fighting for custody of her daughter from the father. Mother gets temporary custody of the child via a temporary motion. While in the mother’s care, mother and child are in a one car accident. Father alleges that mother was withdrawing from the use of pain medication which caused her to drive off the road. The County investigates and makes a finding of maltreatment against the mother. No CHIPS case is opened.

How do you proceed?

So, if no CHIPS case is open, one might think, no problem, right? Wrong. Potentially your client has two very significant problems. One, the finding of maltreatment may very likely be used against them in their ongoing family court proceeding. The father will likely make a motion in family court to change custody of the child even on a temporary basis based on endangerment. Second, client may want to consider an appeal of the maltreatment determination.

The maltreatment finding, maintained on client's record by the Department of Human Services, will likely prohibit client from volunteering in any position that places her in direct supervision of children or vulnerable adults. An appeal of such a maltreatment finding may want to be considered.²⁴

Conclusion

Representation of a client in the juvenile court is a complex and rigorous undertaking. Not only does it require all your family law lawyering skills, but also requires a working knowledge and understanding of the relevant statutes and rules as they pertain to juvenile court, guardians ad litem, court and juvenile procedure, an understanding of the role of each of the many and varied parties that are not necessarily found in the family courts, and how those roles may impact negatively and positively on your client. Other elements necessary to represent a client in the juvenile court is that you must be able to make multiple court appearances in a very short time; be prepared for trial in 60 days; develop an appellate record throughout each appearance before the court; be open and willing to develop and offer creative solutions; and possess the tenacity sufficient to convince others (and there may be many) to go along with your suggested resolution of the case.

Family law attorneys should know that the protection aspects of their case can and should be referred to juvenile court specialists if they do not feel confident in handling all these aspects themselves. Alternatively, you can also associate with counsel to handle just the protection side of the case. This may be more cost effective for clients. A client's due process rights and their parenting relationship could be jeopardized if the case is not properly managed. Talking with colleagues who work most often in the

juvenile courts can provide you with a wealth of information. For those clients that either choose to go it alone without representation due to financial concerns or prefer to advocate for themselves, they may face an ultimate cost: loss of their relationship with their children.

Notes

¹ See, Minn. Stat. §260-260C.

² Delinquency offenses are governed by Minn. Stat. § 260B. Minn. Stat. §260B.101 defines the jurisdiction of the "delinquency arm" of the juvenile court, which is not addressed in this article.

³ Minn. Stat. § 260C.101 (2008).

⁴ The definition of a child in need of protection or services can be found at Minn. Stat. § 260C.007 Subd. 6 (2008).

⁵ See, "Public defenders to stop representing poor parents in child protection cases," [Elizabeth Stawicki](#), All things Considered, Minnesota Public Radio, July 3, 2008, "Court tie ups loom in loss of public defenders." Minneapolis Star Tribune, June 21, 2008.

⁶ "Parental-rights cases: Who should pay?" JOY POWELL Star Tribune September 1, 2008.

⁷ Caution should be taken to confirm with a County Attorney in writing that they are amenable to attorneys speaking with the social worker, who is the "client" of the County Attorney.

⁸ Minn. R. Juv. Prot. Pro. 2.01 (a), (b). See other articles in this volume for the impact of fathers in protection cases

⁹ Minn. R. Juv. Prot. Pro. 26.01 Subd. 1.

¹⁰ See, Minn. R. Juv. Prot. Pro. 22.01 and 22.02 for a definition of participants and their rights in a juvenile hearing.

¹¹ See, Minn. R. Juv. Prot. Pro Rule 25.02 . Who is responsible for the costs of "the right to counsel at public expense" has been long debated. The State Public Defender's office has found this expense to be an expense of the County, which supported the transfer of this service from the public defenders, who were facing severe budget cuts, to the Counties. Only Hennepin County's Public Defenders office continues to represent eligible parents in protection matters. That expense is paid out of the County budget. The provision of counsel for indigent parents and who pays the costs for the same continues to be an ongoing topic for the Children's Justice Initiative Parent Legal Representation Work Group, Chaired by Justice Helen M. Meyer.

¹² Minn. Stat. §260.012

¹³ The age of the child governs the timeline by which permanent placement decisions must be made. For a **child under age 8**: must address permanency within 6 months of out of home placement; for a **Child over 8**: must address permanency within 12 months of out of home placement. See, Minn. Stat. § 260C. 201.

¹⁴ Minn. Stat. § 260C.201 Subd. 11. (2008).

¹⁵ See, Minn.R.Juv. Prot. Pro 15, which provides that Motion must be made in writing, served on all parties and participants, and must be made 5 days prior to hearing. Oral motions during a hearing are permitted under the rule unless someone objects.

¹⁶ Minn. R. Juv. Prot. Pro. 17.

¹⁷ Minn. R. Juv. Prot.Pro. 5. Unlike in other courts, due to the strict timelines in protection cases, continuances may be tough to obtain and may have distinct consequences.

¹⁸ Minn. R. Juv. Prot. Pro.19. The rule lays out everyone who must be involved in settlement negotiations and who must consent to any settlement.

¹⁹ Minn. Stat. § 260.012 (2008).

²⁰ This writer has observed parents being told that the best interest standard would govern such a proceeding, and that if they had “changed sufficiently” they could get their child back. This does not appear to be correct under a close review of § 518.18, which indicates that the best interests standard can only be used if the parties agreed in writing for it to apply to any subsequent modification. This is rarely contained in any transfer of custody stipulation I have ever reviewed with a client in the juvenile court.

²¹ Minn. Stat. § 260C.301 Subd. 1 (b)(4).

²² See Minn. Stat. § 626.556 for a comprehensive review of the requirements of abuse or maltreatment investigations and definitions of prohibited conduct.

²³ It is also important to consider consequences for failing to talk to child protection or to make children available for interviews. Children may be removed from home in cases where a removal could have been avoided by cooperation. Each individual case needs to be assessed on its’ individual facts.

²⁴ Such administrative hearings are governed by Minn. Stat. § 256.045.

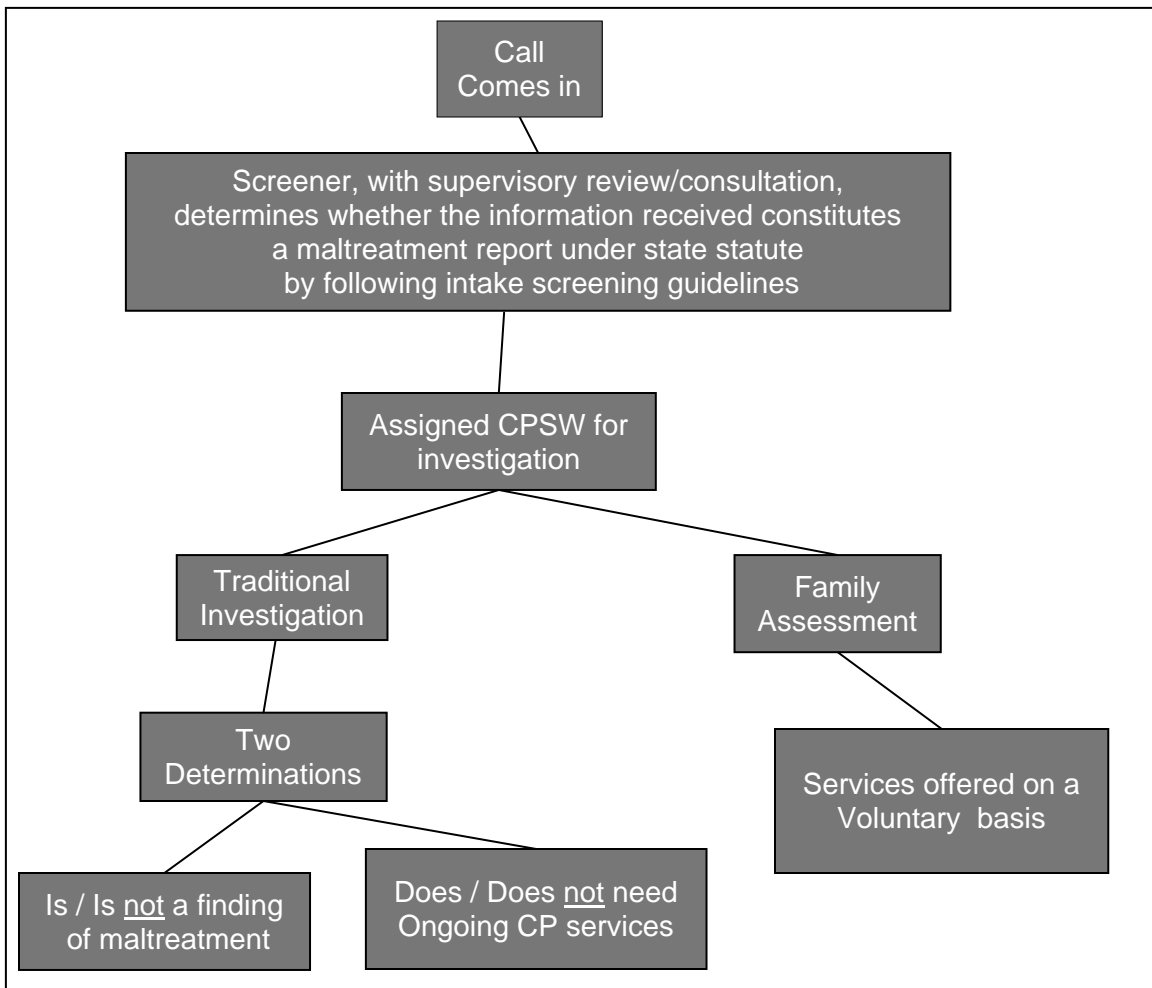
Samantha Gemberling helps clients navigate difficult and emotional legal challenges including dissolution, child custody disputes, paternity, child abuse and neglect, and juvenile delinquency. She also assists families with adoption, third party and grandparent custody issues. Her published juvenile cases include In re Children of T.R., 750 N.W.2d 656 (Minn., 2008), a reversal by the Minnesota Supreme Court. She is trained as a Parenting Consultant, focusing on cases working with teens, and serves as Guardian Ad Litem. She has been a presenter on the juvenile court in many venues including the Family law Institute. She promotes collaborative and cooperative settlements whenever possible, but is also a zealous advocate and fully able to take cases to trial when necessary. An active member of the MSBA, RCBA and Minnesota Women Lawyers, she is licensed in Minnesota and Arizona. She received her J.D. from Hamline University School of Law and completed her undergraduate studies at the University of South Dakota. Named the 2007 Favorite Family Law Attorney by the Minnesota Women's Press, she has been named a Super Lawyers “Rising Star” in 2007 and 2008.



Advising Family Lawyers When Their Clients are Investigated by Child Protection

Diana L. Hamilton

Diagram 1



General Overview of the Child Protection Process

Understanding what to do when your client is being investigated takes a basic understanding of how the Child Protection (“CP”) system works. The Diagram 1 describes the beginning of the CP process. The process begins when a community member, family member or “mandated

reporter”¹ makes allegations of maltreatment to the police or child protection. If the allegations rise to the statutory definition of “maltreatment,” then the CP screener will accept the allegations as a “report.” In Hennepin County 60% of allegations made to CP are rejected and NOT accepted as a “report” of maltreatment.² Once a report is accepted, then the report is sent to a CP social worker who determines the level of risk

involved to the child. The more serious reports are sent to “traditional investigation.” The less serious reports are sent to “family assessment.” It is important for your client to know which track CP is taking. The traditional investigation track focuses on determining whether maltreatment has occurred. The family assessment track focuses on offering voluntary services to the family. In family assessment the CP workers are not conducting an investigation, and they do not make a maltreatment determination. Most reports in Hennepin County are traditional investigations. Beware that a family assessment may turn into a traditional investigation if the CP worker finds more information that requires a traditional investigation.

Child Protection Process in Detail

If the route chosen is an investigation, social services have the right to question all parties which will include the children, parents, and service providers. They do not need prior permission to interview the children and this may be done at school or away from the alleged offender. You will want to make sure that each person interviewed received a Tennesen Warning which is required under, Minn. Stat. § 13.04, Subd. 2 (2002). Given this warning a person is then forewarned that anything they say can be used against them. Most Child Protection Petitions are made up of direct statements from the alleged offender or/and their children. If during the investigation there is an indication of drug or alcohol abuse they also have the right to ask for a chemical use assessment, which will include a urinalysis test and interview of use with recommendations given for possible treatment. Whether your client decides to talk to the CP investigator or go through testing is completely voluntary. I do want to remind you that it is a slippery slope between the parents rights not to potentially incriminate

themselves and for the investigators to take no information as a sign of endangerment occurring. No cooperation often means a case will open in court. The advice you give your client on this issue will depend on your client’s ability to remain calm and say only what is needed. If there is an open family court matter, it is very important to let the investigator know about the open family court matter and that these issues are being addressed in this setting.

Whether there is a family assessment or a full investigation, they must be completed within 45 days of the receipt of the report.³ At the conclusion of the investigation there must be a determination whether maltreatment has occurred and by whom.

Was there maltreatment?

Maltreatment is defined as acts or omissions of: physical abuse, neglect, sexual abuse, mental injury.⁴ Physical abuse is defined as any injury or threatened injury to a child. The injury is not an accident or cannot be reasonably explained.⁵ The vast majority of maltreatment determinations are based on neglect, which is defined as a caregiver failing to supply the child with necessary food, clothing, shelter, health, medical, or other care required for the child’s physical or mental health when reasonably able to do so.⁶ Any presence of Drugs or weapons in the reach of a child would be considered neglect. A DUI with at least one child in the care is also considered neglect. For more detailed examples of neglect, please review Minnesota’s Department of Human Services’s *Child Maltreatment Screening Guidelines*.⁷ If maltreatment is found as defined above then a maltreatment determination is made.

Who perpetrated the maltreatment? Your client may not have been the direct cause of

the harm but a finding of maltreatment may still be made against your client. For example, in a situation where your client is being abused by her boyfriend in the home in the presence of the children, a finding will be made on both the boyfriend who was the actual abuser and also on the mother. There are many problems with such determinations when getting into the dynamics of domestic abuse, but until laws are changed a determination of maltreatment will be made because she did not take protective actions to prevent the abuse in their presence. There may be one or more maltreatment determinations made in one case.

The decision of whether a maltreatment determination was made will be put into writing and sent to each alleged offender. Watch for this letter! It is very vital to understand if a determination was made or not. Some people make the mistake of thinking if they are not receiving further services from CP that nothing else needs to be done and they just throw this letter away. The decision of whether Child Protective Services still being needed is a separate decision from the determination. If such a determination of maltreatment is kept on a person's record it will affect current or future employment. They will not be able to work in any job around children, the disabled or the elderly. They will also be disqualified for foster care licensure. This disqualification is for a period of seven years.⁸

If there is a finding of maltreatment it must be appealed within 15 days of receipt.⁹ The appeal is to Hennepin County to reconsider their findings. If this appeal is then denied the next step is to appeal to the Department of Human Services. Upon the denial for reconsideration or if the county does not respond within 15 days of the receipt of the request for reconsideration, then an appeal must be made to the Department within 30

days.¹⁰ In this state agency hearing they will make a determination if there was or was not maltreatment. If they find there was maltreatment the next question is, does that person pose a safety risk. If they find the person does not pose a safety risk even though there was maltreatment the maltreatment can be set aside. This is a process that your client will want to do especially if they plan on being in any employment such as nursing, bus driving, teacher's aide, daycare provider, personal attendant, or youth counselor...etc. It is much easier to get the maltreatment off your record at this point in the process than to wait and try to get it set aside or to obtain a variance to work later on.

Are Child Protective Services Needed?

After determining if there will be a maltreatment determination the investigator will then decide if Child Protective Services are still needed. This would require a case plan for services. This case plan is for the child and for the parents. It usually entails some combination of parenting classes, mental, physical, or chemical health services, urinalysis testing, housing, employment, orders for protection, and possibly divorce services. The investigator would then turn the case over to a social worker if services are to be given. Services can be given without an open court case, but if CP determines there is a high risk of harm to a child they will most likely open a court case.

What Happens When the County Decides to Open a Case?

If the Child Protection Investigator decides there is an immediate risk of harm to the child they will place the child on a 72 hour hold. This means the child will be taken from the family and placed into a shelter home during this time period. If this hold is taking

place in Hennepin County the children are sent to St. Joseph's Shelter. If the child is a baby they will place that baby in a foster home. The parents have no rights to see the child during this hold, but an attorney can see the child at this time.

The family will have their first hearing within this 72 hour period of time. This hearing is called the Hold hearing or also referred to as the Emergency Protective Care hearing. Some advice to give your client in preparing for this hearing is to immediately search for family members who would qualify for foster care licensure,¹¹ and to come prepared with documentation showing all the steps the client has done to remedy the situation. The client has a right to present evidence at the 72-hour hold hearing, and the client needs to exercise that right. If the Court determines that the child cannot return home, then the client needs to be prepared to have family present to take the children so the children do not have to remain in non-relative foster care. However, relatives need to follow the same licensing requirements as non-relative foster parents. Have family members ready to complete the home safety checklist, which will facilitate faster placement.¹²

Concurrent Family Law Cases

If there is a Family Court matter open make sure your client lets the CP investigator know this. Juvenile Court has priority jurisdiction, and all current Juvenile Court orders supersede Family Court orders. Even if CP files a CHIPS Petition, Juvenile Courts are wary of dealing with a family that is addressing these same issues in Family Court. It will be important to file a Motion to Dismiss at the 72-hour hold hearing with the argument that Family Court is the best venue to address these issues. There are many different scenarios that may happen when this is the case.

First, if the reporter of the CP case is a parent the case may never open. CP investigators will be more skeptical of allegations made during Family Law proceedings.¹³ Especially when the report is coming from one of the parties to the family law proceeding. Whether the alleged abuse or neglect is actually happening may be overshadowed by having a Family Law case open. This may even be the case where the parent asserts he or she is leaving the marriage in response to the abuse that parent is now alleging to CP. CP workers tend to believe the allegations are fabricated or wildly exaggerated. The budgeting crises will also play a role in placing such cases on a low priority level. The lower priority is because there is a parent who is willing to protect the child and can do so in the family law process without involving the Child Protection System. If the reporter still believes CP should still be involved obtain a private evaluation of the child. Basically meaning, you need to prove the case for CP to pick it up. The downside to this is that it will take a family with the financial resources to take this step.

When deciding to make a CP allegation, keep in mind that it may not end up helping your Family Law case. Usually family court does not understand the reasoning for CP not taking such cases. The findings will be labeled as "unsubstantiated" or "unfounded". Even though the reasoning was not that the case allegations did not occur, but the family court may take it to mean this very thing. The assumption is that if the child is in danger, then the child welfare agency would have stepped in or CP determined that the allegations lacked merit. The reality is that even if CP does find that one parent is abusing the child the case may still be dropped with them assuming that the child will be adequately protected in the family law case. The non-abusive parent will then just obtain

custody. It is important to know that these assumptions are out there, whether or not they are true.

The coordination of legal proceedings is an arguable point for the attorneys involved. If a Family Court case and a Juvenile Court Child Protection proceeding are open concurrently then priority in dealing with custody and visitation issues will be given to the juvenile court proceedings. The point that may be argued and should be chosen carefully is venue. Now I am not saying that changing venue will be easy but under Minnesota law it can be done. The questions you will need to ask are:

- 1) Do you want to leave two cases open?
- 2) Can you get one transferred over to the other?
- 3) Is it possible to have a case originally brought under Chapter 518 consolidated with the CHIPS case and heard simultaneously in the Juvenile Court?¹⁴

The court is not precluded from consolidating family court matters with juvenile court matters where it would not be adverse to the best interests of the child and would not compromise the need of the juvenile court to lessen temporary risk to a child.¹⁵ The court is also authorized to just dismiss the child protection matter all together under Minn. Stat. 260C.193 (subd. 6). Both the client and the court itself may bring a motion to dismiss the CHIPS proceeding in juvenile court so that a petition for custody under Chapter 518 may proceed in family court. The Juvenile Court may also choose to stay the CHIPS action pending resolution of the matter in Family Court.¹⁶ Although, this option of a stay may not be granted because of the Juvenile Court time lines regarding permanency which cannot be delayed.

When choosing a forum there are some important things to consider. The Juvenile Courts have much more access to resources to protect a child than the Family Law court would have. They would also have more resources to rehabilitate the family. The Juvenile Court on the other hand is more intrusive into family life. This can also be a very stigmatizing process socially and legally.

4 MAIN TIPS WHEN ADVISING CLIENTS

- Client is NOT required to speak with the CP investigator. Client should be honest but be VERY CAREFUL, if s/he chooses to speak with the investigator.
- Immediately inform the CP investigator if there is an ongoing Family Court matter.
- Request client's and child's Child Protection file (Sample provided)
- Once investigation is complete, client should make sure that the investigator did NOT make a maltreatment determination. If a maltreatment determination was made, client has only 15 days to appeal that decision.

LIST OF IMPORTANT STATUTES & RULES TO KNOW

Minn. Stat. § 626.556 - Maltreatment Reporting Statute

Minn. Stat. § 260C - Child Protection Statute

Minn. Stat. § 245A - Foster Care Licensing Procedures

Minn. Stat. § 245C - Department of Human Services Background Studies Act (foster care licensing, disqualifications and procedures for their removal)

Rules of Juvenile Protection Procedure

LIST OF EXAMPLE FORMS

Use forms if the attorney is requesting the Child Protection file on behalf of the client, otherwise the client can request file on their own and request a child's file on behalf of the child. Children 12 and over are required to sign the release of information for their own files.

Ex. Form 1 (p. 17):

Letter requesting Child Protection File

Ex. Form 2 (p. 18):

Release of Information requesting Child protection File

Ex. Form 3 (p. 19):

Home Safety & Health Checklist

Notes

¹ Minn. Stat. § 626.556, Subd. 3 (2007) requires “mandated reporters” to report if they know or have reason to believe a child is being or has been neglected or physically or sexually abused. MR’s include: therapists, doctors, and teachers, etc.

² Final Report Hennepin County Child Protection Task Force, July 2007. Available online at www.co.hennepin.mn.us/.../Abuse%20Neglect%20Files/

³ Minn. Stat § 626. 556, Subd. 10e (2007).

⁴ Minn. Stat. § 626.556, Subd. 10e(f) (2007).

⁵ Minn. Stat. § 626.556, Subd. 2(g) (2007).

⁶ Minn. Stat. § 626.556, Subd. 2(f) (2007).

⁷ Available online at <http://edocs.dhs.state.mn.us/lfsrver/Legacy/DHS-5144-ENG>

⁸ Minn. Stat. § 245C.15, Subd. 4 (2007).

⁹ Minn. Stat. § 626.556, Subd. 10i(a) (2007).

¹⁰ Minn. Stat. § 626.556, Subd. 10i(b) (2007); Minn. Stat. § 256.045, Subd. 3(b) (2007).

¹¹ Minn. Stat. § 245A.035 (2007); Minn. Stat. § 245C (2007).

¹² Home Safety Checklist for the foster care licensing home study is attached.

¹³ Ann M.Haralambie, *Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases*, 252, 254-257, Marvin Ventrell & Donald N. Duquette (Bradford Publ. Co. 2005).

¹⁴ *Custody of E.A.Q.D. and T.L.D.*, 405 N.W.2d 262, 264 (Minn.App. 1987) citing *In Re Welfare of Hall*, 268 N.W.2d 418, 420 (Minn. 1978); *Hennepin County v. Hanneman*, 472 N.W.2d 149, 151 (Minn.App. 1991)

(found the Juvenile Court is authorized to hear a child support modification motion in the interest of judicial economy).

¹⁵ *Matter of Welfare of J.L.U.*, 450 N.W.2d 642, 644 (Minn.App. 1990); *Durkin v. Hinich*, 442 N.W.2d 148, 152 (Minn. 1989).

¹⁶ Minn. R. Juv. P. 5.01.



***Diana Hamilton,
Our Children Safe at
Home Attorney
Legal Aid Society's Youth
Law Project***

Ms. Hamilton provides legal representation to children under ten living in Hennepin County who are involved with child protection. Their project's mission is to stop race discrimination in the child protection system. They defend a child's right to be with family while ensuring the child is safe and healthy at home. Their goal is to work with community organizations and advocate for reform to maintain and strengthen African American and American Indian families.

Ms. Hamilton graduated from the University of St. Thomas School of Law in 2006. Prior to joining the Legal Aid Society of Minneapolis, she represented clients in Orders for Protection in the University of St Thomas School of Law's Family Law Clinic and was a women's legal advocate at Women of Nations.

- *Member of National Association of Counsel for Children*
- *Member of Minnesota State Bar Association*
- *Member of Minnesota Black Women Lawyers Network*
- *Member of African American DFL Caucus*
- *DFL Precinct 8 Chair*
- *Project Fresh Start President 06' - 08'*

Ex. Form 1: Letter requesting Child Protection File

LEGAL AID SOCIETY OF MINNEAPOLIS

DIANA HAMILTON
dhamilton@midmnlegal.org
(612) 746-3621

SOUTHSIDE OFFICE
2929 4TH AVE. SOUTH, SUITE 201
MINNEAPOLIS, MN 55408

CLIENT INTAKE: (612) 334-5970
TELEPHONE: (612) 332-1441
FACSIMILE: (612) 827-7890
TDD: (612) 827-1491

Date

Release of Information Department
Hennepin County Human Services
Human Services Building
525 Portland Avenue S.
Minneapolis, MN 55414

VIA FACSIMILE (612) 317-6189

RE: Mother's Name (DOB:) and child(ren):
Child's Name (DOB:)

To Whom It May Concern:

I am writing to request all information that Hennepin County Child Protection has in their records for the above-referenced adult and children. This request includes, but is not limited to, the following: reports of maltreatment, maltreatment assessments, notices of findings, letter to/from/about these individuals, CHIPS Petition and accompanying file, the Hennepin County Child Protection Expert System reports/sheets, and the Structured Decision-Making safety, family risk and family strengths and needs assessment scoring forms/sheets.

Attached are copies of a signed Release of Information from the parent, and signed releases from the children over 12 years old, if any. Please contact me to view the file if the file is too large to copy and mail. I appreciate your effort.

Sincerely,

Diana L. Hamilton
Attorney at Law
Encl.

Ex. Form 2: Release of Information requesting Child protection File

AUTHORIZATION FOR RELEASE OF INFORMATION

TO:	Hennepin County Human Services Department, any agent, agency or department of Hennepin County, including but not limited to child protection social workers.
REGARDING:	(Children's Names & Dates of Birth; Mother's Name & Date of Birth)

I authorize the above-named party to release to:

(Attorney's Name), or any agent of,
Legal Aid Society of Minneapolis, Inc.
2929 4th Avenue South
Minneapolis, MN 55408
612-746-3622 Fax: 612-827-7890

INFORMATION:	Discuss, and provide any and all records regarding: Any and all Hennepin County records, child protection social worker files, child protection records, SDM screening tools and/or assessments, evaluations, home and/or kinship studies, and all documentation in the County's possession regarding the aboved-named individuals
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All information gained through this release will only be used by the Legal Aid Society of Minneapolis, Inc., to assist in their present efforts on my behalf.

This authorization will remain in effect a maximum of six months from the date of signature and may be canceled by me in writing at any time. I understand that such cancellation may be harmful to proceedings requiring these records. I do not authorize re-release of this information to anyone. A photocopy of this authorization will be treated in the same manner as the original.

Dated

Mother's Name, on behalf of herself and **Children's**

Ex. Form 3: Home Safety & Health Checklist

Home Safety & Health

<input type="checkbox"/>	Yes	<input type="checkbox"/>	No	1. Knives, tools, matches, and other potentially hazardous materials are inaccessible to children, unless used with appropriate supervision. (FDC, FFH)
<input type="checkbox"/>	Yes	<input type="checkbox"/>	No	2. Combustible items are properly stored at least 36" from any heating sources.
<input type="checkbox"/>	Yes	<input type="checkbox"/>	No	3. Food is handled and properly stored to prevent contamination, spoilage, or a threat to health.
<input type="checkbox"/>	Yes	<input type="checkbox"/>	No	4. Residence is clean and free from accumulations of dirt, rubbish, peeling paint, rodents and insects.
<input type="checkbox"/>	Yes	<input type="checkbox"/>	No	5. Chemicals, detergents, medicines, and other toxic substances are stored separately from food products. When appropriate, these substances are inaccessible to clients.
<input type="checkbox"/>	Yes	<input type="checkbox"/>	No	6. Any Schedule II controlled substances are stored in a locked area. (AFC)
<input type="checkbox"/>	Yes	<input type="checkbox"/>	No	7. There is a safe water supply in the residence; water from privately-owned wells is tested annually by a certified laboratory.
<input type="checkbox"/>	Yes	<input type="checkbox"/>	No	8. Individual clean towels, wash cloths, and bedding are provided for each client.
<input type="checkbox"/>	Yes	<input type="checkbox"/>	No	9. Weapons and ammunition are stored separately in locked areas.

Remarks (Please explain all "NO" answers): _____

Obvious safety hazards or concerns?: _____

Provider Signature:	Date
Licensing Worker:	Date

Fathers as a Resource for Children in the Child Protection System

Melissa D. Froehle

Preamble: Working with Minnesota’s nonprofit and government agencies to increase healthy father involvement is the mission where I work. Minnesota has a long tradition of being a leader in the fatherhood field, both within and outside of government. One area, however, that remains in need of much work is increasing father involvement in child protection cases. This article intends to shed a critical light on the issue while recognizing that there currently are increased efforts and attention being paid to fathers by the child protection system, as described further herein. Unfortunately, when it comes to legal help, fathers in these cases often fall between the cracks. They don’t qualify for typical legal aid and pro bono services, and don’t usually qualify for court-appointed counsel until the termination of parental rights stage. This is an area where family law attorneys could step in and help out. With this in mind, Minnesota can continue to be a leader for fathers and children in the broad-range of family needs.

Introduction

Fathers are an overlooked and under-utilized resource for children in the child protection system. In this article, when I refer to fathers I am referring to **noncustodial** fathers (and use the term father to mean noncustodial) because the majority of child protection cases involves custodial mothers and noncustodial fathers.¹ Fathers have been overlooked for many reasons. Historically, social work practice in these cases has almost exclusively focused on mothers. Bias against fathers has been an issue, with caseworkers, judges and

others assuming that fathers don’t want to be involved or can’t take care of children as well as women. Moreover, working with fathers complicates the cases and makes more work for an already over-burdened system. And mothers have themselves played an important “gate-keeping” function, with caseworkers often relying on mothers in locating and finding fathers. More recently the focus has shifted to what to do with fathers when they’re found: what kind of case plan should they be offered and what services are available to them?²

Treatment of fathers once they do get involved with the child protection system is also an issue. Are fathers encouraged to participate and treated as important, or are they lambasted for “not being there” as has happened to fathers I’ve worked with when they show up to court. In this article I also argue that our laws in Minnesota act as a systemic barrier to father involvement in child protection cases, by treating fathers as “participants” rather than “parties” to the case, and by not providing court-appointed attorneys for fathers as a matter of course from the beginning of the court case. Because there has been such a history of overlooking and under-utilizing fathers as resources for children in these cases, I believe it is incumbent upon all the key players in the system, and those outside the system, to work together to better engage and include fathers in the child protection process.

Why? Besides the fact that engaging fathers is the law, as discussed later, I believe that one of the best things that can be done for

children in these cases is to promote early and active healthy involvement with fathers. Fathers and their families can be a resource for temporary or permanent placement of the children. Even in the vast majority of cases in which the child returns home to the mother, strengthening the father's positive relationship to the child can provide benefits for children.

Consider this: In a first of a kind 2008 follow-up study of child welfare agencies' efforts in 4 states to involve fathers whose children were in foster care (including efforts in Minnesota), researchers found:

- Nonresident fathers' involvement with their children is associated with a higher likelihood of a reunification outcome and a lower likelihood of an adoption outcome;
- Children with highly involved nonresident fathers (defined in this study as visiting the child at least once a week, and providing financial and nonfinancial support for the child) are discharged from foster care more quickly than those with less or no involvement; and
- Among children whose case outcome is reunification, usually with their mothers, higher levels of nonresident father involvement are associated with a substantially lower likelihood of subsequent maltreatment allegations.³

While the researchers caution that causality cannot be determined from this data (not an infrequent difficulty for studies of this kind), the association between father involvement and better discharge outcomes is clear. As the authors conclude, the results suggest that engaging fathers in child protection cases has the potential to improve outcomes for children.

Other Research Findings that Support Engaging Fathers as Resources for Children

There are good long-term reasons for engaging noncustodial fathers in child protection cases. Research in the last 15-20 years has demonstrated that children raised without their biological fathers are at risk for a variety of poor outcomes across childhood and into adulthood. Such children are more likely to receive lower grades, have a higher prevalence of behavioral and psychological problems, use illegal substances, have earlier contact with police, and engage in sex at an earlier age.⁴ Conversely, children raised with positive father involvement, even if noncustodial, can gain significant benefits. As just one example, studies by the National Center for Education Statistics show that children are less likely to have ever repeated a grade, been suspended or expelled if their noncustodial fathers are highly involved in their schools, and are more likely to get better grades in school, to enjoy school, and to participate in extracurricular activities.⁵ This is true even after controlling for the factors one might associate with school success, including income, mother's education, payment of child support by the father, etc.

One of the barriers to viewing fathers as a **resource** for children in child protection cases (instead of an impediment to resolving the case) is lack of accurate information or understanding about who these fathers are and what kind of relationships they have with their children. The prevailing view of these fathers has often been that they are uninvolved, dangerous, deadbeat, or not interested in or unable to take care of their children.⁶ While very little research exists about fathers in child protection cases, new research about unmarried fathers, in general, has helped to debunk some of these myths. (This is not to ignore the fact that there are some cases in which the father is the

perpetrator of abuse or neglect, and research that suggests a common overlap between cases of domestic violence and child abuse.)

The Fragile Families and Child Wellbeing Study provides new insights on the situation of unmarried parents, including never-married fathers (who make up a significant proportion of the child welfare caseload).⁷ According to this U.S. study, at the birth of their children, 82 percent of unmarried mothers and fathers are romantically involved and 51 percent live together. Four-fifths of unmarried fathers provide financial or other support during pregnancy.⁸ Contrary to myths, (1) most unmarried births are not the product of casual relationships, (2) most unmarried fathers do care about their children (99.8 percent of fathers interviewed in this study report that they want to be involved in raising their children in coming years), (3) most unmarried fathers are not dangerous and (4) mothers overwhelmingly report they want the fathers to be involved in raising the children.⁹

When looking specifically at *low-income* unmarried fathers, those most likely to be involved in the child protection system, national statistics show that, in fact, when children are young, the majority of these fathers are involved with their children. Sixty (60) percent of all poor children under the age of two who were born outside of marriage lived with both of their natural parents or lived with their mothers and saw their fathers at least weekly.¹⁰ As leading researchers in this field have emphasized:

In most discussions of single-mother families, fathers are presumed to be uninvolved. However, less than one-third (31.5 percent) of the youngest poor children live with a single mother and an uninvolved father. This proportion generally rises for older

*poor children, so that 36.4 percent of teenagers live with a single mother and an uninvolved father.*¹¹

Further, these researchers point out important racial distinctions that are often misunderstood. “While there are no statistically significant race or ethnic differences in the proportion of poor infants who live with a single mother and an uninvolved father, infants with highly involved fathers experience father-involvement through different living arrangements. Nonblack infants primarily experience father involvement through marriage, while black infants primarily do so through fragile-visiting arrangements.”¹² Fragile-visiting arrangements are those in which unmarried parents either cohabit, or the father visits the child frequently, almost always without formal or legal arrangements. These fragile-visiting relationships don’t often show up on paper (the father has never gone to court to establish his rights, for example), and mothers who fear losing custody of their children may not always be as forthcoming about the father or his relationship with the children.

Finally, recent research also shows that many fathers in child protection cases do express interest in their children living with them. In the original study quoted at the beginning of this article, 50 percent of fathers contacted by child protection expressed interest in having their children live with them.¹³ Reasons why children weren’t placed with fathers in the study included substance abuse, involvement in the criminal justice system, non-compliance with services, or multiple problems that prevented placement. However, as the study notes, many of these issues are the same kinds of problems that face mothers of children in foster care, most of whom go on to regain custody of their children. Further, some administrators in the

study seemed to admit a preference for paternal kin (we can't forget that bias against fathers as caretakers still exists). My own experience in Hennepin County Juvenile Court has been that judges appear to be more comfortable temporarily placing a child with a relative, particularly a female relative, or even with a stranger in foster care rather than the father, that is, until he has "proved" himself, no matter what the presenting circumstances. This was true even in cases where the father was substantially involved in the direct care of the child prior to the child protection case, or where the father posed little or no risk of harm.

While I believe we are seeing more and more fathers who are coming forward as placement options for their children in child protection cases, we don't have the data to know for sure. Unfortunately, it is difficult to say in Minnesota how often children are actually placed temporarily or permanently with fathers in child protection cases--and reasons why they aren't--because Minnesota doesn't track this data.

This information about unmarried fathers highlights the fact that treating fathers in child protection cases as if they are peripheral, uninvolved parents and unimportant to children doesn't match with what we know from the data and research. It further highlights a mismatch between the reality of children's lives and what we "in the system" may perceive to be in children's best interests when it comes to their fathers. Children should have the same opportunities to connect with their fathers, and their fathers' families, as is afforded to mother-child relationships.

*How the System Isn't Set Up to Involve Fathers*¹⁴

Imagine that you have just learned that your child has been put in child protective custody and there is a hearing about the child's

temporary residence. You go to the hearing but are told because you are a noncustodial parent, you can't get an attorney. You can't sit at the same table as the mother, the child protection worker, the county attorney and guardian ad litem, so you take a seat behind the dividing partition in the back part of the courtroom. When they are discussing where the child will live, you raise your hand to tell the judge that the child can live with you, but the judge declines to call on you (no one objects to this), and orders the child into foster care. After the hearing, you talk with the child protection worker and ask what you need to do so the child can live with you. You are told that you must prove that you're the child's father (go get a copy of the Recognition of Parentage, which, by the way, may take 4 to 6 weeks to obtain), and set up a case plan, which may include supervised visits. These are all situations that happen—and are allowable—under the current system in Minnesota. Even well-equipped fathers find these situations extremely challenging.

To explain, noncustodial unmarried fathers most often start out in the CHIPS case (Child in Need of Protection or Services) in this odd category of "participant" status (see chart). That means that they have the right to receive notice and a copy of the CHIPS petition, to attend hearings, and to offer information at the *discretion* of the court.¹⁵ Imagine being at an abuse or neglect hearing about your child's temporary residence, and having to ask the court's discretion to be able to speak to the issue! Such a rule would never be tolerated in family court. In contrast, the custodial parent is automatically a "party" to the case, has the right to conduct discovery, to present evidence, to cross-examine witnesses, to bring motions, etc.¹⁶ If the father is an adjudicated father (either made the legal father by court order or a Recognition of Parentage), he can become a party to the case simply by making a motion to intervene as a party.¹⁷ However, making this

formal motion is a daunting process for fathers in this system, most of whom are proceeding without attorneys; and it still requires a filing fee.¹⁸ Noncustodial fathers, and even presumed fathers who aren't adjudicated and men signed up on the Minnesota Fathers' Adoption Registry, are made a party to the case at the TPR (Termination of Parental Rights) or permanency stage (permanency could include

TPR or transfer of permanent legal and physical custody to a relative, for example).¹⁹ However, the permanency stage is too late in the process for the father to understand the full ramifications of his role in the case. It is also too late to make timely objections in many cases – such as the reasonableness of the case plan.

See Minnesota Rules of Juvenile Protection Procedure, Rule 2.01 for definitions and Rules 21 and 22 for party/participant status. For a legal resource on understanding paternity, see the Unmarried Fathers' Guide to Paternity, Custody, Parenting Time and Child Support in Minnesota (by author), available at www.mnfathers.org.

<u>Type of Father</u>	<u>Rights at CHIPS stage</u>	<u>Rights at TPR/Permanency stage</u>
Father on MFAR - Man who is not alleged, presumed, adjudicated or legal custodian, but has signed up on the Minnesota Fathers' Adoption Registry (Minn. Stat. § 259.52)	Participant (treated as an alleged father)	Party
Alleged Father – Individual claimed by party or participant to be the biological father	Participant	Participant (unless status as father has changed)
Presumed Father – Individual who is presumed to be the biological father of a child under Minn. Stat. § 257.55, subd. 1	Participant	Party
Adjudicated Father – Individual determined by a court, or pursuant to a Recognition of Parentage ²⁰ to be the biological father	Participant (but right to intervene as party) <i>NOTE: Most unmarried fathers fall into this category because of signing a Recognition of Parentage. However, if there is a custody or parenting time order, the father may be a legal custodian—a look at the court order is needed to see if he was granted any custody rights.</i>	Party
Legal Custodian – A person who by court order or statute has sole or joint legal or physical custody of the child (could be by divorce, paternity order, separate custody/parenting time action etc.)	Party	Party
Father in ICWA case – Same as above, except that there are additional ways that an unwed father can be considered a parent under the Indian Child Welfare Act. Besides establishing paternity under Minnesota law (through either a court order or Recognition of Parentage), individual tribal customs, rules and laws control whether paternity has been acknowledged in another way sufficient to give an unwed father status as a parent for ICWA purposes. <i>There is currently a proposal pending in Minnesota to change the rules to make fathers parties in ICWA cases. NOTE: Unlike non-ICWA cases, a noncustodial father in an ICWA case has the automatic right to court-appointed counsel from the beginning of the CHIPS case, if he cannot afford his own attorney. Minn. R. Juv. Prot. P. 25.02, subd. 2(c). Fathers also have the right to object to transfer of the case to tribal court.</i>		

This requirement to make a noncustodial father a party to the case at the permanency stage was reinforced earlier this year when the Minnesota Supreme Court exercised its supervisory power to enforce the rules of juvenile protection procedure and reversed the termination of parental rights of an unmarried noncustodial father because the county failed to name the father as a party in the petition to terminate rights.²¹ The court did this even though the father had been provided an attorney through the entire termination of parental rights trial. In my opinion, the Court is trying to clearly send the message that these “technicalities” that affect fathers can no longer be brushed aside.

Besides the two-tiered system of rights set up in the participant/party status that, in my opinion, negatively affects fathers (and children) in child protection cases, fathers are also enormously impacted by the lack of access to court-appointed counsel. Minnesota law states that in child protection cases “[e]xcept in proceedings where the sole basis for the petition is habitual truancy, if the child, parent, guardian, or custodian desires counsel but is unable to employ it, the court shall appoint counsel to represent the child who is ten years of age or older or the parents or guardian in any case in which it feels that such an appointment is appropriate.” Minn. Stat. § 260C.163, subd. 3(b) (2008). From what I understand, it is a county by county policy on whether to appoint counsel for noncustodial fathers before the permanency stage, with the permanency stage being the clearest point in the process when fathers get access to a court-appointed attorney if they are low-income. I am not aware of any case law that further clarifies when in the process of a CHIPS case, or for what set of facts, “appointment is appropriate” for these fathers. In my experience, judges can and do decline a father’s request for court-appointed

counsel in a CHIPS case without giving a reason why or further illuminating why counsel is “not appropriate” for the father in the case at that time. Resources are part of the issue, and much more so now that the Public Defender’s Office has ceased representation of parents in CHIPS and TPR cases outside of Hennepin County. However, I do not believe it is good public policy to give a noncustodial parent an attorney only at the point of termination of their rights. *All parents* who express an interest in their children, not just custodial parents, need legal advice and in-court representation and advocacy early in the process if we are to have the best outcomes for children.

*Let’s Not Forget:
Engaging Fathers is the Law*

Under Minnesota law, when a child is removed from the parent’s custody and placed in another living situation through the CHIPS process, called “placement,” the social services agency has the duty to work with the father, even if noncustodial and *even if not yet legally established as the father*. Specifically the law states the social services agency “shall make diligent efforts to identify, locate, and where appropriate, offer services to both parents of the child.”²² They must assess whether a noncustodial parent or a nonadjudicated parent is willing and capable of providing for the day-to-day care of the child temporarily or permanently. This may include a background study. The results of a background study of a noncustodial parent “shall not be used by the agency to determine that the parent is incapable of providing day-to-day care of the child unless the agency reasonably believes that placement of the child into the home of that parent would endanger the child’s health, safety, or welfare.”²³ If the child is not reunited with the mother (custodial parent) and not placed with the father, the social

services agency must prepare an out-of-home placement plan for *each parent* that states the conditions they must meet (i.e., a case plan) before the child can be in that parent's day-to-day care.²⁴

While this has been the law for some time, federal audits have consistently shown that Minnesota fails to serve fathers as well as it should. (I should point out that Minnesota is not alone in this regard—failure to provide equitable services to mothers and fathers is a nationwide problem.) Results from the most recent round of Minnesota's Child and Family Services Review in 2007 (the federal audit) found that for foster care cases, the child protection agency was more likely to assess and meet the needs of children and foster parents than it was to assess and meet the needs of either fathers or mothers. And for in-home cases, that is, children not removed from the home, the agency was more likely to meet the needs of children and mothers than it was fathers. The agency was not consistent in involving fathers in case planning, true even when the fathers' whereabouts were known. In several cases no visits were provided for the father and in some cases there were *no efforts* to locate the father.²⁵ This failure to adequately and equitably serve fathers was acknowledged in a recent decision by the Minnesota Supreme Court, where the court noted that it was "struck first by the disparity in services offered to" the custodial mother, whose actions led to the child's out-of-home placement in the first place, and those offered to the father, "a noncustodial parent who is not alleged to have contributed in any way to [the child's] out-of-home placement."²⁶ The court cited discrepancies offered to the parents in the areas of chemical dependency evaluation and treatment, and psychological and counseling help. The court also noted that

the county social service worker (and guardian ad litem) never visited the father's home he rented, even though obtaining suitable housing was a condition of his case plan. Although the disparity in services was not the basis for the court to reverse the termination of the father's parental rights, this case is important because it does highlight the need to provide relevant and comprehensive services to both the mother *and the father*, and underscores just how far we have yet to go in truly considering fathers as resources for children in child protection cases.

Opportunities to Better Serve and Engage Fathers

There are many opportunities to better serve and engage fathers in ways that serve the child's best interests. Training for child protection workers is of great importance and shows promise. For example, caseworkers trained on working with fathers were more likely to report locating fathers, sharing the case plan with fathers, considering placement with fathers, and discussing fathers' interest in the child living with them.²⁷ Currently, the Minnesota Department of Human Services is working on a training curriculum for child protection workers on father engagement. They are also working on a "Project Improvement Plan" (PIP) for involving and engaging fathers, an outcome of the federal audit. DHS submitted its first PIP draft in August 2008 to the federal Children's Bureau. One of the goals related to fathers is to increase the participation of fathers and support father involvement across the child welfare continuum, with collaboration between counties, community providers, and DHS key to success in this area.²⁸

Another solution that benefits kids is to involve fathers before the process becomes

too adversarial. One example is the Family Group Decision Making model, in which families are encouraged to use existing strengths and resources to find their best solution to the child protection issue.²⁹ A review of several studies found that this process contributes to a high level of father and paternal relative involvement.³⁰

For family law attorneys, county attorneys, guardians ad litem and judges, a first step is to understand how the child protection system works (or doesn't work) for fathers, barriers to father involvement and how to overcome those barriers, the true picture of how fathers are currently involved in their children's lives (even when it doesn't show up on paper), and how engaging fathers can produce good outcomes for children. The Minnesota Fathers & Families Network can provide training on these topics that complements the current work of the Minnesota Department of Human Services.

Beyond more training about fathers, key players in the child protection system should think from the child's point of view. Find out from the child about the relationship with father. Just like children love and are connected to their mothers in most child protection cases, despite what maltreatment may have occurred, they love and are connected to their fathers in most instances, despite what the father may "look like" on paper. If the father hasn't had the opportunity to be involved in the child's life or hasn't been involved lately, consider this an opportunity to reengage the father. Some of the best outcomes I saw in my limited time representing noncustodial fathers in CHIPS cases were in exactly those situations. (As just one example, child protection assumed custody of a child at birth from a drug-addicted mother. The father, whose only opportunity to be involved was through the child protection case, was able to provide a

home and obtain custody of the child when the mother was not able to provide a safe and stable home.) Given the right encouragement, support and services, many dads will "step to the plate" for their children.

Get the father's identity and legal status resolved early on in the case. Although the chart on the different types of fathers may look complicated, in reality, most cases with unmarried fathers boil down to three questions. (1) Did the parents sign the Recognition of Parentage? Information can be found through the child support system or by contacting the Office of State Registrar to obtain a certified copy of the document if it exists. Each parent is also supposed to be given a copy after signing it. (2) Is there a court order adjudicating paternity? (3) Is the father unadjudicated, but known? Research shows that in most child protection cases the identity of the father is known and paternity has usually been established. In Minnesota, our best guess is that paternity is established for about 70 percent of children born outside of marriage in the general population, with most of these paternities being established via the signing and filing of the Recognition of Parentage.³¹ A good piece of advice for family law lawyers to pass on is for fathers to automatically obtain a certified copy of their Recognition of Parentage and to keep copies of any court documents regarding their rights, including child support obligations.

Just a reminder: If there is a Recognition of Parentage or court order adjudicating paternity, absent an unusual case, there is a final determination of paternity. Unfortunately, there are still attorneys and judges who are confused about the Recognition of Parentage and treat it as more of a presumption than a final order. When there is an unmarried mother, the Recognition of Parentage "has the force and effect of a judgment or order determining the existence

of the parent and child relationship” equivalent to a paternity order, unless it has been revoked within 60 days of signing it, the parents were under 18 when it was signed (and one of them is still less than 18 ½ years old), or the mother signed a Recognition of Parentage with two different men.³² Note that these facts will exist in very few cases that come before the court in a child protection case. “Once a recognition has been properly executed and filed with the state registrar of vital statistics, if there are no competing presumptions of paternity, a judicial or administrative court may not allow further action to determine parentage regarding the signator of the recognition.”³³ Sending a father with a valid Recognition of Parentage from the child protection hearing to the child support office to get an “adjudication” or genetic testing is not only not required, but not allowed under the law. Fathers with the Recognition of Parentage are valid legal fathers, and the Recognition provides the basis for awarding the father custody and parenting time.

And the law in child protection cases goes even further than what family court would allow: Minnesota law allows the placement of a child with a noncustodial parent in a CHIPS or juvenile protection proceeding *even if paternity has not been established*, provided establishing paternity is part of the father’s case plan.³⁴ I have found that most people either aren’t aware of or overlook this piece of the law.

Another step forward for fathers and children is to find and advocate for services that truly meet the needs of the father. Although research shows that fathers’ non-compliance with services in child protection cases is sometimes an issue, other research has suggested that services being provided to fathers may not meet their needs and that many noncustodial fathers are not eligible for

the same services as mothers, such as housing and employment assistance. Fathers often need more than just services--they need support for their role as fathers as they go through a system that is focused on reunification with the custodial parent. There are many programs and services in Minnesota that are fulfilling this role, everything from responsible fatherhood projects to parenting and support groups. A directory of services for fathers in Minnesota can be found on the webpage of the Minnesota Fathers & Families Network (www.mnfathers.org).

Finally, because of the issues with noncustodial parents lacking legal representation in many cases, I believe there is a dire need for family law lawyers to fill the gap and provide legal advice in these situations. Providing even the simplest pro bono service can make a great impact in these cases. It could simply be meeting with a father to help him fill out a motion to intervene as a party (pro se forms and instructions available on the state courts website at www.mncourts.gov) and explaining to him his legal rights and what might happen if he doesn’t follow through with a case plan. In the Twin Cities, such volunteer opportunities exist with the Minneapolis Legal Aid Society (contact Kat Jimenez at 612-746-3615 or kjimenez@midmnlegal.org) and with family law clinics focused on fathers, organized by FathersFIRST! (contact Steve Onell at 612-384-7078 or fathersfirst@gmail.com). For volunteer opportunities outside the Twin Cities you can contact me at the Minnesota Fathers & Families Network and I can put you in touch with local opportunities.

Children truly deserve the love and support of both parents. There are tremendous opportunities to better engage fathers as a resource for children in child protection cases, if only they are seized upon.

Notes

¹ Although the exact proportion is unclear, a 1999 review of states with less than 10 percent missing data found that most states report at least half of the children in foster care come from single parent families headed by a female. See Adoption and Foster Care Analysis and Reporting System (AFCARS), Foster Care Data, Version 1, 1999 as cited in Freya Sonenstein et. al., The Urban Institute, *Study of Fathers' Involvement in Permanency Planning and Child Welfare Casework*, Report to the Asst. Sect. for Planning and Evaluation, U.S. Dept. of Health and Human Services, August 2002, online at: <http://aspe.hhs.gov/CW-dads02/>.

² For a review of practices pertaining to fathers in child welfare cases, see the National Family Preservation Network, *An Assessment of Child Welfare Practices Regarding Fathers*, March 2001, online at: <http://www.nfpn.org/tools/articles/fathers.php>, and *Study of Fathers' Involvement in Permanency Planning and Child Welfare Casework*, *supra* note 1.

³ Karin Malm et. al., The Urban Institute, *More About the Dads: Exploring Associations between Nonresident Father Involvement and Child Welfare Case Outcomes*, Report to the Asst. Sect. for Planning and Evaluation, U.S. Dept. of Health and Human Services, 2008, online at: <http://aspe.hhs.gov/hsp/08/MoreAboutDads/index.htm>.

⁴ Sara McLanahan and Wendy Sigle-Rushton, *Father Absence and Child Well-Being, A Critical Review*, in THE FUTURE OF THE FAMILY, 116-155, D. Moynihan et. al. eds., 2002.

⁵ Christine Nord, *Nonresident Fathers Can Make a Difference in Children's School Performance*, Issue Brief June 1998, U.S. Dept. of Education, National Center for Education Statistics, Office of Educational Research and Improvement.

⁶ See, for example, a review of focus groups that included child welfare workers in *An Assessment of Child Welfare Practices Regarding Fathers*, *supra* note 2, and discussion of caseworker bias in *Study of Fathers' Involvement in Permanency Planning and Child Welfare Casework*, *supra* note 1.

⁷ The Fragile Families and Child Wellbeing Study follows a birth cohort of (mostly) unwed parents and their children over a five-year period and is statistically representative of unwed births in large cities in the U.S. The study is designed to provide new information on the capabilities and relationships of unwed parents, as well as the effects of policies on family formation and child wellbeing. This study is important because it is

the first time that unmarried parents have been intimately studied at the national level. More about the Fragile Families study and links to their research is available online at: <http://www.fragilefamilies.princeton.edu/>.

⁸ Sara McLanahan et. al., *The National Baseline Report*, Bendheim-Thomas Center for Research on Child Wellbeing, Revised March 2003.

⁹ Fragile Families Research Brief, *Dispelling Myths about Unmarried Fathers*, Bendheim-Thomas Center for Research on Child Wellbeing, May 2000.

¹⁰ Elaine Sorensen et. al., *Redirecting Welfare Policy Towards Building Strong Families*, The Urban Institute, May 2000.

¹¹ Ronald B. Mincy and Helen Oliver, *Age, Race, and Children's Living Arrangements: Implications for TANF Reauthorization*, The Urban Institute, April 2003.

¹² *Id.*

¹³ The Urban Institute, *What About the Dads? Child Welfare Agencies' Efforts to Identify, Locate, and Involve Nonresident Fathers: Final Report*, Report to the Asst. Sect. for Planning and Evaluation, U.S. Dept. of Health and Human Services, April 2006, online at: <http://aspe.hhs.gov/hsp/06/CW-involve-dads/>.

¹⁴ An important caveat to the following paragraphs is that the rules and protections that apply to fathers of Indian children are substantially different in some respects, with greater protections, because of the applicability of the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 to § 1963. So, for example, low-income parents in ICWA cases, including fathers, have the right to have an attorney appointed at the beginning of the CHIPS case.

¹⁵ Minn. R. Juv. Prot. P. 22.02, subd. 1 (2008).

¹⁶ Minn. R. Juv. Prot. P. 21.02 (2008).

¹⁷ Minn. R. Juv. Prot. P. 23.01, subd. 3 (2008) (“Any parent who is not a legal custodian of the child shall have the right to intervene as a party”). The state courts website, www.mncourts.gov, has pro se forms to intervene as a party as a matter of right.

¹⁸ I am aware that some judges allow parents to make an oral motion to become a party, thereby removing one obstacle to the father's full participation.

¹⁹ Minn. R. Juv. Prot. P. 21.01, subd. 3 (2008).

²⁰ Prior to the Recognition of Parentage in Minnesota, there was a document called the Declaration of Parentage, which was similar in that it was a voluntary way to establish paternity, but was not conclusive like the Recognition of Parentage. The Declaration of Parentage could not be used after August 1, 1995.

²¹ *In re Welfare of the Child of: B.J.-M and H.W.*, 744 N.W.2d 669 (Minn. 2008).

²² Minn. Stat. § 260C.212, subd. 4(a) (2008).

²³ Minn. Stat. § 260C.212, subd. 4(a)(2)(ii) (2008).

²⁴ Minn. Stat. § 260C.212, subd. 4(a)(2)(i) (2008).

In addition, the statute mandates if the background study is to be used to recommend against putting the child with the parent(s), that the parent(s) be provided 15 days notice of this intent, as well as a copy of the results of the study and the court “shall afford the parent an opportunity to be heard concerning the study.”

²⁵ Minnesota Department of Human Services, *Executive Summary, Final Report: Minnesota Child and Family Services Review, July 2008*, p. 4, online at: http://www.dhs.state.mn.us/main/groups/children/documents/pub/dhs16_142184.pdf.

²⁶ *In re Children of T.R.*, 750 N.W.2d 656, 666 (Minn. 2008).

²⁷ The Urban Institute, *What About the Dads? Child Welfare Agencies’ Efforts to Identify, Locate, and Involve Nonresident Fathers: Final Report*, Report to the Asst. Sect. for Planning and Evaluation, U.S. Dept. of Health and Human Services, April 2006, online at: <http://aspe.hhs.gov/hsp/06/CW-involve-dads/>.

²⁸ Communication with DHS on file, September 24, 2008.

²⁹ This model is described on the Minnesota Department of Human Services website, online at: <http://www.dhs.state.mn.us/>: “The Family Group Decision Making (FGDM) model recognizes the importance of involving family groups in decision making about children who need protection or care. It can be initiated by child welfare agencies whenever a critical decision about a child is required. In FGDM processes, a trained coordinator who is independent of the case brings together the family group and the members. FGDM processes position the family group to lead decision making and the statutory authorities agree to support family group plans that adequately address agency concerns. FGDM processes actively seek the collaboration and leadership of family groups in crafting and implementing plans that support the safety, permanency and well-being of children.”

Lisa Merkel-Holguin et. al., *Learning with Families: A Synopsis of FGDM Research and Evaluation in Child Welfare*, PROTECTING CHILDREN, 18, No. 1&2, 2003.

³⁰ Lisa Merkel-Holguin et. al., *Learning with Families: A Synopsis of FGDM Research and Evaluation in Child Welfare*, PROTECTING CHILDREN, 18, No. 1&2, 2003.

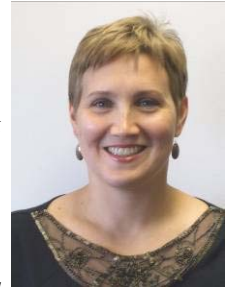
³¹ Contact author for data.

³² Minn. Stat. § 257.75, subd. 3(a) (2008).

³³ *Id.*

³⁴ Minn. Stat. § 260C.212, subd. 4(a)(1) (2008).

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Representing Guardians ad Litem on a Pro Bono Basis: An Opportunity to Work for the Best Interests of Children

Gillian J. Blomquist

Often, in either family court or juvenile court, the Guardian ad Litem is the person or party with the best opportunity to gain perspective on a case and on the situation facing a child. Because the Guardian ad Litem is charged with representing the “best interests” of the child and not any one particular party, they have the obligation and ability to speak freely with a wide variety of sources and give a neutral recommendation to the court. Guardians ad Litem research the backgrounds of parents and other caregivers, talk to teachers and daycare providers, interview witnesses, work in conjunction with the county and state programs, review medical and therapy records, and most importantly, meet with children. They are the eyes and ears of a case involving a child, and at least in juvenile court, they are a party to the case and have every right associated with that distinction. The Guardian ad Litem is appointed to provide the court with an unbiased opinion on the best course of action at any given time for a child.

Federal legislation in 1974 prompted the nationwide increase in the appointment of Guardians ad Litem. Depending on the state, Guardians ad Litem come from a variety of backgrounds and are a mixture of paid attorneys, volunteers, and paid professionals. Guardian ad Litem programs vary from comprehensive state governed programs with strict training requirements to locally devised volunteer programs. In Minnesota, the Guardian ad Litem program is still somewhat fragmented with both a state-wide Guardian ad Litem program as well as Guardian ad Litem programs in each judicial district. Training and qualification requirements vary

depending on the location. Guardians ad Litem in Minnesota are a vast mixture of attorneys, professionals with social work or mental health backgrounds, or simply caring individuals with a desire to help and work with children. Because there is no uniform statewide requirement for education level, experience, or licensure, Guardians ad Litem come to the job with a variety strengths and weaknesses. An attorney Guardian ad Litem may not be as conversant in children’s mental health issues as a Guardian ad Litem who has a therapy background. Contrarily, if a Guardian ad Litem is not an attorney, there may be a sharp learning curve when it comes to the mechanics of the courtroom, where a Guardian ad Litem necessarily spends significant amounts of time. Even Guardians who are practicing attorneys can find themselves at a loss in juvenile court, where the rules of practice are relaxed, strict timelines affect the pace of the proceedings, and a wide swath of interests must be considered at each hearing.

Guardians ad Litem require legal representation for several different reasons. First, if a Guardian ad Litem has no prior legal training, the complexity of motion practice and trial procedures can become too difficult to manage in a complex case. Second, because a Guardian ad Litem has a duty to represent and focus on the best interests of the child, it may not be advisable for the Guardian to act as their own attorney in a complicated proceeding because their focus will be taken off the child. Having an attorney to manage the deadlines, testimony, and filings can help the Guardian ad Litem concentrate on their purpose for the child. In a very practical

sense, a Guardian ad Litem is often a necessary witness and it is virtually impossible to provide comprehensive testimony without an attorney to keep the Guardian on point, particularly when other attorneys for the county or parents are vigorously cross-examining the Guardian.

When considering pro bono opportunities involving children, attorneys are likely to turn to the representation of children themselves. There are programs throughout the state that help further the recruitment of attorneys to fill the need for competent representation for children. Acting as the attorney for a child is often a crucial role and a fulfilling volunteer opportunity. However, the representation of children is necessarily limited. Although they can expect representation in many other states, generally children under twelve in Minnesota are often not assigned an attorney because of their inability to express a clear preference in most cases. Obviously it is difficult to glean and advocate for the preference of an infant. Even older children, and particularly teenagers, find themselves with conflicting wants and needs making it difficult for the attorney to give the court a clear statement of their client's position.

As an alternative to directly representing children on a volunteer basis, attorneys should consider the representation of Guardians ad Litem as a challenging volunteer opportunity. Depending on the judicial district, there may be both a lack of funds available to pay attorneys and also a lack of willing and able attorneys to do the job. While some districts have attorneys on contract and are able to provide attorneys to Guardians readily, others save representation to only emergency or high profile cases because of the lack of funds and attorneys availability. In addition, because Guardians ad Litem work primarily in juvenile court, attorneys may be willing to take on the representation, but do not have either the experience or training in juvenile

court to make them truly comfortable with the representation.

Family law attorneys are perhaps particularly suited to taking on the representation of Guardians ad Litem. Even without experience in juvenile court, the complex family dynamics that often play out in family court are similar, if not more intense, in juvenile court, giving family law attorneys a good background for understanding the factual basis for the cases facing Guardians. Attorneys who are interested in volunteering to represent Guardians ad Litem should contact the Guardian ad Litem District Manager in their judicial district or the State Guardian ad Litem program to express their interest. Attorneys should consider this invaluable opportunity to assist in making the vulnerable interests of children in our state heard.

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She has worked in the legal field for over 10 years, starting as a paralegal with the Hennepin County Attorney's Office. She spent much of her first years as an attorney in two general practice firms in Arizona and Minnesota, creating a broad base of legal knowledge and experience. Gillian also worked as a trial attorney for the Arizona Attorney General's Office in the Child Protective Services section.

Gillian is proud to have served as a Guardian ad Litem and as the chair of the Children and the Law section of the Minnesota State Bar Association. She has a commitment to quality client representation and maintains an abiding interest in matters affecting children. She can be contacted through her website at: www.blomquistlaw.com.

Children's Issues and Tribal Courts

Gary A. Debele

Introduction

Most family law attorneys have probably had very little direct contact with Indian tribes and tribal courts. Many, indeed, are unaware that most tribal courts in the state of Minnesota now have their own tribal courts, many of which also have domestic relations courts and children's courts that address family and child welfare issues. Because of the existence of these vibrant tribal courts, it is likely that in the years to come, most Minnesota family law attorneys will have some involvement with tribal courts in their practices.

The purpose of this article is to give the family law attorney a general overview of tribal court practice in general and provide some specific information as to how children's issues are addressed in tribal courts. This will not be an in-depth article, but rather will provide just a general sense of what a family law practitioner can expect if a tribal court becomes involved in a matter involving a child. Given that there are more than 500 federally recognized Indian tribes in the United States, and with each of those tribes being a sovereign entity in itself, there can be and will be as many discrete tribal court and legal processes as there are Indian Communities. Thus, as a practical matter, I must approach this in a very general fashion, and the reader of this article is advised that he or she must always research the actual tribal court provisions of the particular tribal entity with which they are dealing, as there are sometimes both subtle and significant differences between the tribal courts and state and federal courts.

In this article, I will first discuss the sources of authority for tribal courts. This will then be followed by a general discussion of the structure and operation of tribal courts, including a specific discussion of Minnesota's tribal courts and practical suggestions for tribal court practice. This will then be followed by a brief discussion of tribal court jurisdiction generally and jurisdictional complexities that are unique to child welfare and family law matters. I will then discuss some substantive issues relevant to children and family issues and then the enforcement challenges that one should be aware of when practicing in tribal courts.

A. Sources of Authority for Tribal Court

Indian tribes possess the powers of sovereign states. While they are subject to the legislative powers of the United States government, neither the conquest of Indian tribes nor the United States Congress has divested Indian tribes of their internal powers of sovereignty. These internal powers include the power to determine tribal membership, regulate domestic relations among tribal members, and to prescribe inheritance rules. While treaties or express congressional legislation may qualify or divest these internal powers, absent such action, full powers of internal sovereignty are vested in the Indian tribes and their duly constituted organs of government. These fundamental principles of Indian sovereignty go back to seminal United States Supreme Court cases authored by Chief Justice John Marshall. These cases are Cherokee Nation v. Georgia¹ and Worcester v. Georgia.²

In addition to this sovereignty doctrine, another important and fundamental doctrine to understand in dealing with tribal courts is something called the “non-infringement doctrine.” This doctrine was announced in a famous United States Supreme Court case called Williams v. Lee.³ This doctrine sets up a test to determine whether states have a legitimate adjudicatory and regulatory civil authority over Indian matters. Again, absent governing acts of Congress, the question has always been whether the state action infringed on the action of reservation Indians to make their own laws and be ruled by them. It is the general consensus that family related matters -- including such topics as child custody and support, divorce and related financial and property issues, child protection, domestic abuse, paternity, adoption and other broadly defined family law topics -- fall within the internal affairs of the tribes. In fact, the federal statute known as the Indian Child Welfare Act (ICWA)⁴ specifically grants exclusive jurisdiction to the Indian tribes and their courts over many of the issues that come within child welfare proceedings.

In addition to federally developed common law doctrines, other sources of tribal law include tribal constitutions, tribal ordinances, tribal resolutions, and then the broad body of tribal history and tradition. The Indian Reorganization Act of 1934, an important federal statute, provided many tribes with the right to reorganize themselves after years of failed assimilation as a federal policy. This led to many tribes adopting constitutions and bylaws, with the process of doing this usually controlled by the federal government. Most constitutions described territorial boundaries, specified requirements for tribal membership, and established governing bodies and powers. Anytime one ventures into tribal court practice, one should begin by reviewing the tribe’s constitution, bylaws, ordinances, and resolutions.

B. Structure and Operation of Tribal Courts

Because tribal judicial power derives from retained sovereign authority that predates the federal Constitution, tribal courts are not necessarily bound by specific constitutional requirements of due process that are typically imposed upon our state and federal courts. Thus, do not expect court processes and procedures to exactly mirror what you are used to in state and federal court. When disputes involve members of the tribe, tribal courts clearly have authority to adjudicate free from the constraints of the federal Constitution. The Indian Civil Rights Act,⁵ which applies many elements of the federal Bill of Rights to tribal actions, does not constitute a due process requirement because it includes no implied right of action for federal civil judicial relief.

When a tribal dispute involves non-members, the question arises whether the process offered in tribal courts must conform to federal standards. Federal courts asked to review tribal court actions often treat tribal courts like courts of a foreign sovereign for purposes of examining due process. Tribal courts are also not required to maintain a separation of powers between multiple branches of government. In fact, most tribal governments do not have tripartite systems of government with regard to separation of powers. Thus, some lawyers who first encounter tribal court are shocked to find that a tribal “executive” is also often head of the legislative body, i.e., the tribal council, and that often the only check on the tribal government is the tribal court. As a result, many practitioners are often skeptical of the ability of the tribal courts to function independently of tribal government. It has, however, been the experience of this author that that has not been the case and that most tribal courts are quite independent and mindful of due process.

Most tribal courts through ordinance have a process for the selection and qualification of tribal judges. This process impacts the independence of the tribal judiciary. It does vary significantly from tribe to tribe, ranging from popularly elected judges to judges who are appointed by the tribal council. Qualifications for the judges also vary, with some permitting non-tribal members to be appointed, and some not even requiring judges to be law trained. The terms for the judges vary from short fixed terms to long or indefinite appointment. Many tribes require a popular vote of the tribal membership rather than just the council in order to remove a tribal judge.

With regard to the rules of procedure and substantive law, these vary significantly from tribal court to tribal court. Each tribe generally establishes its own rules of procedure, although many are based on the federal rules of procedure. Many tribes also have highly developed substantive codes in various areas of the law, and even large bodies of developed case law. Again, the practitioner wading into tribal court practice must do his or her homework in terms of reviewing the nature of the laws that will be applied by the tribal court. If no statute or common law precedent exists within a tribal courts jurisdiction, many tribal courts often look to laws of other jurisdictions, but most frequently looking to other tribal courts or tribal customs before looking to state and federal law.

Many tribal courts also have an appellate process. In fact, some tribes have banded together to create “intertribal courts of appeal.” Other tribes have other trial judges who did not hear the case do the appellate review, either alone or in panels if there are enough judges.

In Minnesota, there are four Dakota (Sioux) tribal communities: Lower Sioux, Prairie Island, Shakopee Mdewakanton, and Upper Sioux. All four of those tribal communities have tribal courts. The state also has seven Ojibwa (Chippewa) tribes, all of which also have tribal courts. These bands include Bois Forte, Fond du Lac, Grand Portage, Leach Lake, Mille Lacs, White Earth, and Red Lake. Not all of these courts have established domestic relations jurisdiction, so in the event you have a matter involving a child welfare or family law issue in a tribal court, you will need to determine whether that tribe is in fact exercising jurisdiction over the issue in dispute. Each of these tribal courts has a tribal court administrator and you will want to establish contact with that person to determine what the requirements are for admission to practice before that court, as well as find out how to gain access to the tribe’s constitution, ordinances, and case law. For information on the tribal courts for these communities, see the website of the Minnesota American Indian Bar Association (“MAIBA”) at www.maiba.org.

With regard to practical suggestions for tribal court practice, it is important for the practitioner to treat the tribal court and the process with the same respect he or she would accord any other state or federal court. It is critical to abide by the rules of admission and the ethics codes and practices in play in those courts. You will need to review and understand all tribal codes, procedural rules, ordinances, constitutions, bylaws, as well as the customary practices and procedures, whether written or unwritten. It would be helpful to speak with someone who has already been admitted to the tribal court and to obtain their perspective and suggestions for how you should prepare. Be as careful in selecting and applying legal authority to the tribal court as you would in a state or federal court proceeding. For example, you would

not argue a Wisconsin case when you are appearing on a Minnesota court, or expect a Minnesota court to consider such cases as binding precedent. You can certainly cite foreign cases as persuasive authority, but be clear as to what is binding and what is not. You should also be aware of the level of involvement of the tribal council the tribal social services office of the tribe you will be appearing. The politics of their involvement can be quite critical to the outcome of your case. Learn and respect the unique cultural practices of the community and avoid any preconceived ideas and views as to how tribal courts function or do not function. Most importantly, you should enjoy this opportunity to expand your professional experience and outlook.

C. Tribal Court Jurisdiction Generally and Jurisdictional Complexities Unique to Child Welfare and Family Law Matters in Tribal Court

In general, the notions of subject matter and personal jurisdiction that you learned in law school will typically apply in tribal court cases, but you must be aware of certain laws and practices that could alter those rules. The extent of tribal court jurisdiction depends not only on whether a tribe has chosen to exercise its full range of authority, whether any of the parties is a non-member of the tribe, whether either of the parties reside on the reservation, and whether the Indian Child Welfare Act or Public Law 280 applies.

There has been much federal case law development over the last few years causing more uncertainty about earlier presumptions about tribal court jurisdiction over non-members in civil cases. You will want to review that case law carefully if that is an issue in your matter. Jurisdictional issues in family law and child welfare matters are especially difficult because, unlike contract

disputes or torts where you have a clear place where the transaction or injury occurred that leads to more predictable determinations as to jurisdiction, the existence of a marriage, the location of assets, the treatment of income for child support purposes, and the placement of children is much more complicated.

Like most state courts, most tribal courts that have delved into family law and child welfare matters have a residency or domicile requirement for at least one of the parties that must be met before jurisdiction by the tribal court can be asserted. The residency requirements can vary dramatically from tribe to tribe, so be sure and research this issue before starting your action. As a word of caution, while residency and domicile concepts can be quite complicated under state law, it is even more so in dealing with Indian law matters. Tribes may have reservation land, allotted or tribally purchased lands, or public domain land designated for tribal use. Tribes also have the right to define for themselves how tribal membership is determined and whether certain tribal benefits flow with residency on the reservation or other tribal lands. Again, my suggestion is that you speak with tribal counsel if you have domicile, residency, or jurisdiction questions before commencing your action.

As mentioned above, Public Law 280 is a federal statute enacted in 1953.⁶ It requires certain states, including Minnesota, and allows others, to assume civil jurisdiction over affairs arising in Indian country. It basically allows for concurrent jurisdiction over civil matters that occur on tribal lands. It applies only to jurisdictional claims arising in the Indian country, which the statute defines as Indian reservations under federal jurisdiction, Indian allotments, and dependent Indian communities. Disagreement exists as

to whether this law grants states exclusive jurisdiction or dictates that the tribes and states share jurisdiction if exclusive tribal jurisdiction existed before. Neither the Minnesota courts nor the United States Supreme Court have yet attempted to resolve this issue.

In terms of general jurisdiction determinations in tribal civil matters, it is important to remember that Indian tribes retain their inherent jurisdiction over all civil disputes between Indians over matters arising within the reservation boundaries. Unlike criminal jurisdiction, where the United States Supreme Court has differentiated between a tribe's jurisdiction over a non member persons and tribal members, there is no such a distinction in civil cases. Except with respect to matters arising exclusively under tribal law, such as tribal elections and membership, tribal jurisdiction is not exclusive over civil matters, but rather is concurrent. Once a party acquiesces to jurisdiction and the tribal court hears the matter, most subsequent challenges to jurisdiction are denied.

With regard to family law matters, there are several possible scenarios as to how jurisdiction will be exercised. If all parties are tribal members, and if subject matter and personal jurisdiction exists, it is generally a "race to the courthouse" and the tribal will usually exercise jurisdiction if the action is commenced first in tribal court.⁷ You may receive a challenge to jurisdiction if one party's ties to the tribe are attenuated or they do not live on tribal lands. If all parties are Indian, but not of the same tribe, the same analysis applies. When one party is a tribal member and the other is not an Indian, this situation can cause significant difficulty. This will also probably give rise to a "race to the court house" situation that should be analyzed in the same fashion as a family law

proceeding with participants residing in different states, unless a specific statutes addresses jurisdiction, such as the Indian Child Welfare Act or the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). The UCCJEA as enacted in Minnesota⁸ treats tribal entities just as states.

In situations when neither party is a member of the tribe, you will most likely not come within the jurisdiction of the tribal court, unless one of the non-Indian parties lives on tribal lands and the tribe wants to regulate the issues as part of its sovereignty, which is probably unlikely with such personal family matters.

In child welfare cases involving tribal children, the tribal courts jurisdiction may be exclusive, unless a parent objects to jurisdiction or a definitive showing of good cause is made to keep the case in state court.⁹ ICWA applies only to Indian children who are defined under the act as unmarried children under 18 who are either a member of a tribe or eligible for membership and a biological child of a member. Two cautions are in order: First, tribes themselves determine the criteria for eligibility for membership, and second, Minnesota has its own "mini ICWA" called the Minnesota Indian Family Preservation Act.¹⁰ This state act has even broader coverage than the federal ICWA. ICWA applies to all "child custody proceedings." This includes foster care placements, CHIPS cases, voluntary placements, adoptions, status offences where placement is an issue, guardianships, third party custody, orders for protection that address placement of children, interfamily custody disputes where involuntary placement is possible, petty misdemeanor level delinquencies, and terminations of parental rights proceedings, whether voluntary or involuntary. ICWA does not apply to custody actions between

parents, divorces, and placement based upon an act which, if committed by an adult, would be a crime.

Under ICWA, tribal court jurisdiction is exclusive to the tribal court if the child is domiciled on or resides on the reservation, or the child is a ward of the tribal court. Concurrent jurisdiction exists if the child is domiciled off the reservation. If the tribes asserts jurisdiction in those cases, however that case must be transferred to the tribal, unless objections to the tribal court jurisdiction are raised by either parent, or a state court finds a good cause exception.

Practitioners must be aware that ICWA has rigid notice requirements to tribes, Indian custodians and parents in Indian matters involving Indian children as defined by the statute. Tribes have a right to intervene in state court proceedings where ICWA applies. There are heightened burdens of proof for out-of-home placements away from tribes and in terminations of parental rights. Qualified Indian expert witness testimony is required before there can be an out-of-home placement or a termination of parental rights. The federal statute and federal regulations interpreting ICWA set out the order of preferred placement that must be complied with by state courts absent a finding of good cause to deviate from the preferred placements. It is often a surprise to the new tribal court practitioner to learn that tribal courts are not bound by ICWA in their own proceedings. Nevertheless, many tribal codes have custodial placement preferences that mirror ICWA.

As mentioned above, the UCCJEA¹¹ often is used to determine which state will decide custody disputes when more than one state is involved. When this model act was circulated to the states, it had an optional provision treating the tribes the same as a

sister state. Minnesota in its version of the modal act opted to enact that provision dealing with Indian tribes. It requires consenting states to enforce all tribal decrees arising from custody proceedings that substantially conform to the UCCJEA requirements. It is up to the individual tribe whether it enacts the UCCJEA and to honors it. The Act does not purport to legislate custody jurisdiction for tribal courts. While compliance with the UCCJEA guarantees that states will grant full faith and credit to tribal decrees, it also means that tribes cannot exercise jurisdiction beyond what the UCCJEA permits (i.e., the tribe would usually need to be “home” state to assert jurisdiction). Minnesota tribes have been slow to enact the UCCJEA as it has the potential to undercut the central policies at the heart of ICWA and many tribes refuse to take any action that would undermine in any way their ability to be involved in custody decisions affecting their children, wherever they may be located.¹²

D. Substantive Law

If your issue involving children and tribal law stems from a divorce or a custody dispute, you should begin by reviewing the jurisdictional issues discussed above. Be careful to early on discuss with your client the benefits and detriments that could arise by appearing in tribal court. In particular, you will want to review the factors that are considered in making custody determinations. You will also want to be sure you understand the role of the tribal court social services office, if there is one, and how the tribal court will move ahead on the matter procedurally. You should also review what forms of alternative dispute resolution are available and required. It is important to review the tribal custom and practices for custody determinations, and to keep in mind the unique nature of the

politics of tribal governments and tribal court structure. It is especially important to consider your client's reputation in the tribal community, as many of these communities are quite small and the reputation of many tribal members follows them into the court room. You should also review any case law that may be in existence in the particular tribal court; this is often the best source of information telling you what to expect in your proceeding.

You should always consider the impact of the Indian Child Welfare Act in any state court matter, the role of grandparents or other relatives and third party issues. Most tribal communities have a broad view of extended family and encourage the involvement of extended family as a placement resource and source of support. Review what kind of social services the tribes have, as well as the general policies of the tribe as to the placement and treatment of tribal children. Keep in mind that the "best interests of the child" concept will vary from tribe to tribe and do not assume that the way Minnesota courts address best interests in custody disputes would be applied or even welcomed in the tribal court proceeding.

With regard to child support matters, each tribe has its own mechanism for setting and enforcing child support. In some of the tribes, members may be receiving substantial payments from the tribe's gaming operations. These payments are often referred to as "per capita" payments. Most tribal courts consider these as a resource for paying child support. There may be caps on the amount of per capita payments that can be considered for child support. There also may be enforcement issues if your child support order is obtained in state court against a tribal member or if you obtain a tribal order against a non-tribal

member, although, in general, such orders are increasingly being recognized in both state and tribal courts. If a child in your proceeding is an enrolled tribal member, there may be substantial benefits available to that child, such as trust funds, medical benefits, daycare benefits, and educational benefits. Accessing such benefits may be easier by proceeding in tribal court.

With regard to child welfare matters, because of the long history of Native American children being abused in the state child welfare system, many tribal entities have developed unique and expansive child welfare laws and proceedings. To the extent you are involved in a matter raising child welfare issues, here in particular you should speak to an experienced practitioner and also speak to the tribal attorney to determine how these cases are handled.

Some tribal courts also have adoption provisions, but because of the widespread abuse of the adoption of Indian Children out of their tribes, many do not. Most tribes do not have termination of parental rights proceedings, so if that is needed to complete the adoption, you may need to do that part of the adoption in state court. Some tribes also do a uniquely Indian adoption that is more akin to a guardianship.

With regard to substantive issues in family and child welfare matters, the most important message is to be aware of the variance from tribe to tribe. These provisions are dramatically affected by the unique culture and history of the particular tribe. Read the tribal codes closely, ask questions of experienced practitioners, and do what you can to understand the culture and customs of the particular tribe.

E. Enforcement Issues

Several years ago, the Minnesota Supreme Court rejected a petition by a tribal/state court committee for a court rule requiring state courts to recognize tribal orders and judgments. As a result, in most instances, recognition of tribal court decrees is discretionary and notions of comity apply. Under the comity doctrine, where a federal or state statute does not require a state court to recognize and enforce a tribal court order or judgment, these issues are addressed on a case-by-case basis.

There are some instances where compulsory recognition of tribal order is required and the Full Faith and Credit doctrine applies. Indian child custody and placement matters under ICWA require all federal, state, and tribal courts to give Full Faith and Credit to tribal child custody determinations.¹³ With regard to child support orders, the federal Full Faith and Credit for Child Support Orders Act¹⁴ defines a state that issues such enforceable child support orders to include tribal communities. Federal law also requires states and tribes to enforce domestic abuse orders issued by other states and tribes.¹⁵ Some states, unlike Minnesota, have developed comprehensive legislation or rules that establish a consistent process for recognizing tribal order and judgments. As of now, however, the doctrine of comity simply requires a state court to analyze the nature of the proceeding, determine whether due process was accorded in the tribal court process, and then make the independent determination as to whether the state court will enforce the tribal order. It has been my experience that most state courts are very willing to enforce tribal court orders in matters involving children in the tribal courts.

With regard to the recognition of state orders

in tribal courts, just as different states have different approaches to the recognition of tribal orders and judgments, so the different tribes also have their own approaches. Indian tribes are usually bound by the same federal laws that require states to give Full Faith and Credit to tribal court orders. Many tribes have adopted ordinances and court rules that provide for consistent recognition of foreign orders and judgments, but many will often make it a quid pro quo dependent on state recognition of their orders and judgments. Many tribes also require the proponent of a state court order to go through a domestication process that may require a personal appearance in the tribal court and notice to the tribal member for whom the order is being enforced against.

Conclusion

Minnesota family law attorneys should welcome any opportunity to appear in tribal court. The experience can be very rewarding. While the thought of learning another body of substantive and procedural law may seem daunting, the satisfaction that comes from advocating for children and families in these important venues outweighs such concerns. You may, in fact, find these forums to be more efficient, less litigious, and more enjoyable places than state court systems in which to advocate for children and family members. Avoid buying into stereotypes you may have heard about the history and functioning of tribal courts. Instead, do your homework, educate yourself on the culture and values of the tribe whose court you will be working in, and enjoy this important and rewarding opportunity.

Notes

¹ 30 US (5 PET.) 1 (1831).

² 31 US (6 PET.) 515 (1832).

³ 358 US 217 (1959).

⁴ United States Code, Title 25m Sections 1901-1963.

⁵ 25 U.S.C. Section 1301, *et seq.*

⁶ Public Law No. 53-280, 18 U.S.C. § 1162.

⁷ Practitioners should be aware that unlike actions in Minnesota State courts, actions in some tribal courts are commenced by filing pleadings with the courts rather than by service upon a party.

⁸ Minn. Stat. § 518D.

⁹ United States Code, title 25, section 1901-1963.

¹⁰ Minn. Stat. § 260.751 *et seq.*

¹¹ Minn. Stat. § Chapter 518D.

¹² For a detailed discussion on the unique cultural aspects of the Indian culture and Indian views of the best interest of children, see *In the Matter of the Welfare of S.E.G.*, 521 N.W.2d 357 (Minn. 1994).

¹³ 25 U.S.C. § 1911(d).

¹⁴ 28 U.S.C. § 1738B(b).

¹⁵ 18 USC section 2265.



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Unaccompanied Alien Children - the Intersection of Immigration and Family Law

Vincent P. Martin & Kent B. Gravelle

Each year, thousands of unaccompanied alien children are arrested by the Department of Homeland Security (DHS).¹ "Unaccompanied alien children" are children, under the age of 18, who have no lawful immigration status in the United States and have no parent or legal guardian in the United States to care for them. DHS comes across unaccompanied alien children under many different circumstances: the children may be orphans; their family may have sent them to America in the hopes of finding a better quality of life; they may be trying to escape war; they may be running away from abuse; or they may be victims of trafficking.

This article will provide a brief overview of the disparate legal issues confronting these children and, if represented, their counsel.

Lack of Appointed Counsel

When DHS apprehends a child, it is its responsibility to attempt repatriation to the child's home country. The case will typically make its way to an immigration judge of the Executive Office for Immigration Review (EOIR). As intimated in the opening paragraph, unaccompanied alien children are rarely represented by attorneys or any other adult in immigration proceedings.² This lack of representation obviously leads to severe procedural and due process problems. Fortunately, however, 8 C.F.R. §1240.10(c) prevents an immigration judge from accepting "an admission of removability from an unrepresented respondent...[who is] under the age of 18 and is not accompanied by an attorney or

legal representative, a near relative, legal guardian, or friend.” Thus, immigration judges must at least conduct a hearing on the issues regarding removal for such unrepresented children. Furthermore, a memorandum has been released by the Chief Immigration Judge detailing the special procedures immigration judges should use when conducting hearings regarding unaccompanied children.³ Perhaps most importantly, the memo states that immigration judges should not assume that inconsistencies in testimony from an unaccompanied child are proof of dishonesty.⁴

Placement Pending Immigration Proceedings

In the recent past, as many as 30% of all unaccompanied alien children were placed in secure facilities, alongside juvenile offenders convicted of crimes.⁵ However, that percentage has decreased to 3% since the 2003 transfer of the care of unaccompanied children from legacy INS to the Organization of Refugee Resettlement (ORR).⁶ 8 C.F.R. §1263.3(b)(1) states that such children should be released to parents, legal guardians, or adult relatives, in that order. If such persons cannot be found or do not exist, the child will not be released except in “unusual and compelling circumstances”, even to adults willing to execute an agreement to care for the child’s well-being.⁷ The “unusual and compelling circumstances” language partially explains the large number of children held by ORR. This issue has reached the United States Supreme Court which held, “Where a juvenile has no available parent, close relative, or legal guardian, where the government does not intend to punish the child, and where the conditions of governmental custody are decent and humane, such custody surely does not violate the Constitution.”⁸

Special Immigrant Juvenile Status (SIJS)

8 United States Code §1101(a)(27)(J)/ INA §101(a)(27)(J) provides an opportunity for a special visa for children eligible for long-term foster care due to abuse, neglect, or abandonment. However, obtaining such a visa is difficult because of a variety of procedural hurdles. In addition, SIJS may lead to permanent residence (green card).

The first such hurdle is that the applicant must obtain “specific consent” from Immigration and Customs Enforcement (ICE) to ask the local juvenile court for a dependency determination if the child is in the “actual or constructive custody of the Attorney General”.⁹ ICE contends that a child is in constructive custody if the U.S. government is paying for the child’s care.¹⁰ Furthermore, great uncertainty exists as to what test ICE employs to determine whether it should grant “specific consent” but it appears that the traditional family law “best interests” test is part of the equation.¹¹

Evidence of abuse and/or abandonment will need to be obtained to convince ICE to grant “specific consent.”¹² Even if the evidence is strong, the request for “specific consent” may languish undecided while the child is in danger of “aging out” or ICE may deny consent without interviewing the child, conducting an evidentiary hearing, or setting forth any adverse evidence.¹³ Such a denial without a hearing may be partially due to ORR’s current, but legally suspect, practice of providing all of its voluminous records documenting each child’s needs, progress, and services rendered, to ICE, without consent from the child or even notification to the child or the child’s counsel.¹⁴ Thus, before requesting “specific consent”, it is important to obtain a copy of ORR’s records regarding the child.¹⁵

If ICE grants “specific consent”, the second hurdle is obtaining an order from a local juvenile court that the child is eligible for “long-term foster care due to abuse, neglect, or abandonment” pursuant to 8 U.S.C. §1101(a)(27)(J)(i)/ INA §101(a)(27)(J)(i) and that it would not be in the best interests of the child to be returned to child’s country of nationality or country of last habitual residence pursuant to 8 U.S.C. §1101(a)(27)(J)(ii)/ §INA 101(a)(27)(J)(ii). Even in meritorious cases, it may be difficult to convince a local judge to issue the necessary findings.¹⁶

If a local judge issues an order with the necessary language, the next hurdle is convincing U.S. Citizenship and Immigration Services (USCIS) to grant the SIJS petition and “expressly consent” to the juvenile court dependency order pursuant to 8 U.S.C. §1101(a)(27)(J)(iii)/ §INA 101(a)(27)(J)(iii). If the dependency order has a “reasonable factual basis”, USCIS policy requires USCIS officials not to “second-guess” the juvenile court’s rulings.¹⁷ Unfortunately, it appears that USCIS, at least in some instances, has violated its own policy by denying express consent to SIJS petitions, finding that a child was not neglected or abandoned despite an order from a state court judge which found otherwise as the result of a formal evidentiary hearing with all parties and counsel present. Such adverse decisions by USCIS should be appealed to the Administrative Appeals Office (AAO) in Washington, D.C., but such appeals must be filed within thirty-three days of the SIJS denial.¹⁸

Minnesota CHIPS-SIJS Case Law

Minnesota state case law exists with regard to the intersection between SIJS petitions and Minnesota CHIPS (child in need of protection or service) law. In *Matter of Welfare of C.M.K.*, a child born in China who

had witnessed the savage beating of his father by local villagers, escaped to the United States through smugglers.¹⁹ The smugglers beat the child for lack of payment of their demanded fees and the child was eventually arrested in New York City by the INS.²⁰ INS transferred physical custody of the child to Lutheran Social Services of Minnesota who placed the child in a foster home.²¹ Soon thereafter, the immigration court found the child deportable and denied him political asylum.²² The foster family sought to obtain SIJS status for the child by bringing a private CHIPS petition in Hennepin County Juvenile Court.²³ Both Hennepin County and INS opposed the private CHIPS petition²⁴ (a SIJS petitioner was not required to receive prior approval from INS to bring a private CHIPS petition until legislation was enacted a year later in 1997).

The Hennepin County Juvenile Court declined to exercise jurisdiction due to federal immigration law preemption over Minnesota CHIPS proceedings.²⁵ The Minnesota Court of Appeals affirmed, holding that the child did not qualify for CHIPS protection because he was under the custody of the INS, there was no evidence that the child had been harmed while under the custody of the INS, and any allegation that the child would be harmed upon his return to China was an issue that was preempted by federal law.²⁶

In *Matter of Welfare of Y.W.*, a foster parent of an unaccompanied alien child from China moved the Dakota County District Court for an order permitting him to file a private CHIPS petition on behalf of the child in the hopes of then pursuing SIJS status.²⁷ The Court granted the motion despite opposition from the county and INS (again, this was prior to the 1997 amendment that required prior approval from INS to apply to a state court for a dependency determination).

Before the Court issued its written decision, the immigration court denied asylum to the child and offered him voluntary departure as an alternative to deportation.²⁸ Prior to the child's eighteenth birthday, the district court adjudicated the child as a child in need of protection or services, ordered his long-term placement in the foster parent's home, and found that the child suffered from PTSD.²⁹

Both INS and the county appealed the CHIPS adjudication.³⁰ The Minnesota Court of Appeals reversed the district court, holding that the district court lacked jurisdiction to adjudicate the child as CHIPS because the child was already subject to deportation proceedings and in the custody of INS.³¹ The Court also found that INS was willing and able to provide care for the child's PTSD.³² Judge Randall concurred specially, noting that "I am not comfortable with the INS holding itself out as Y.W.'s guardian, while at the same time they vigorously line up a case to deport him."³³

T and U Visas

An unaccompanied alien child may be a possible beneficiary of a T visa if the child has been the subject of "severe trafficking" as defined by 22 U.S.C. §7102. However, "[i]f the child cannot demonstrate that someone used 'force, fraud, or coercion' to induce the child to perform sexual or labor services, the child is not a victim of 'trafficking.'"³⁴ Furthermore, 8 U.S.C. §1101(a)(15)(T)(i)(III) (aa) requires that the child "has complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime", although there is an exception for those children who are unable to cooperate due to psychological or physical trauma under (T)(iii).

An unaccompanied alien child is more likely to be eligible to be a beneficiary of a U visa, in that the scope of crimes covered are much broader than those under a T visa. The list of U visa crimes include such common crimes as domestic violence, rape, and felonious assault.³⁵ However, the U visa applicant must also show that he or she suffered "substantial physical or mental abuse" as a result of the crime and that the criminal activity "violated the laws of the United States or occurred in the United States (...including military installations)".³⁶ The test in determining "substantial physical or mental abuse" is found at 8 C.F.R. §214.14(b)(1). The U visa applicant must also submit a Form I-918 signed by the head of a "certifying agency" (a federal, state, or local law enforcement agency, prosecutor, or judge) stating that the applicant was a victim of one of the enumerated crimes, the applicant possesses information regarding the commission of the crime, the victim has been or is likely to be helpful in the investigation or prosecution of the crime, and that the crime violated U.S. law or was committed in the United States or its military installations abroad.³⁷

Military installations are defined expansively and even include vehicles, vessels, aircraft, encampments, and any other location under military control.³⁸ With the incredible expansion of U.S. military activity throughout the world, it appears likely that the percentage of U visa applications may increase from foreign nationals, particularly Iraqis and Afghans living on foreign soil, who have been the victim of any of the long list of enumerated crimes while in a location under U.S. military control. However, as explained above, there must be an investigation or prosecution of such crimes.

Asylum

While explaining the asylum process is beyond the scope of this article, it should be remembered that children can apply for asylum (and Withholding of Removal and protection under the Convention Against Torture) just as adult aliens. However, there are some important differences. For instance, many adult asylum seekers are denied asylum due to the fact that they failed to apply for asylum within one year of arriving in the United States. Fortunately, this one-year deadline does not apply to child asylum seekers.³⁹ Furthermore, children are not required to show the same level of harm upon return to their home country that an adult asylum-seeker would be required to show.⁴⁰ Generally, in order to apply for asylum an applicant must show that he or she is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of his or her home country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Conclusion

Counsel for unaccompanied alien children have a wide array of legal options at their disposal to prevent removal of their young clients. Of course, before exercising any options, counsel should confirm that the child in question was indeed born outside the United States, as any person born in the United States is a United States citizen. However, once it is confirmed that the child was born outside the U.S., the average alien child should still have a higher chance of avoiding removal when compared to the average adult alien, if the child is represented by counsel.

Notes

¹ Ann Chandler, Judy Flanagan, and Kathleen A. Moccio, *The ABCs of Working With Immigrant Children to Obtain Special Immigrant Juvenile Status for Those Abused, Neglected, or Abandoned*, Immigration & Nationality Law Handbook 300 (2006-07 ed.) and Jacqueline Bhabha, *Unaccompanied and Separated Children Seeking Asylum*, 26 AILA's Immigration Law Today 30 (March/April 2007).

² Jacqueline Bhabha, *Unaccompanied and Separated Children Seeking Asylum*, 26 AILA's Immigration Law Today 30, 31 (March/April 2007).

³ May 22, 2007 OPM re: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children.

⁴ *Id.* at 7.

⁵ Jacqueline Bhabha, *Vulnerable and Alone: Unaccompanied and Separated Children Seeking Asylum*, 26 AILA's Immigration Law Today 30, 31 (3/4 2007).

⁶ *Id.*

⁷ 8 C.F.R. §1236.3(b)(4).

⁸ *Reno v. Flores*, 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993).

⁹ 8 U.S.C. §1101(a)(27)(J)(iii)(I)/INA §101(a)(27)(J)(iii)(I).

¹⁰ Chandler, *supra* note 1, at 302.

¹¹ *Id.*

¹² *Id.* at 304.

¹³ *Id.* at 305.

¹⁴ Michelle Abarca, et al., *No Abused, Abandoned, or Neglected Child Left Behind: Overcoming Barriers Facing Special Immigrant Juveniles*, Immigration & Nationality Law Handbook, at 520, 522 (2007-08 ed.).

¹⁵ *Id.* at 525.

¹⁶ *Id.* at 532.

¹⁷ *Id.* at 528.

¹⁸ *Id.* at 529.

¹⁹ 552 N.W.2d 768, 768-69 (Minn.App.1996).

²⁰ *Id.* at 769.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 770.

²⁶ *Id.* at 770, 771.

²⁷ 1996 WL 665937 (Minn.App.).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at *2, *3.

³² *Id.* at *4.

³³ *Id.* at *5.

³⁴ Chandler, *supra* note 1, at 308.

³⁵ See 8 U.S.C. §1101(a)(15)(U)(iii) / INA §101(a)(15)

(U)(iii) for a full list of crimes.

³⁶ *Id.* at (i)(I), (III).

³⁷ 8 C.F.R. §214.14(c)(ii)(2)(i).

³⁸ 8 C.F.R. §214.14(a)(6).

³⁹ 8 C.F.R. §§8 C.F.R. 208.4(a)(5)(ii), 1208.4(a)(5)(ii).

⁴⁰ See *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045 (9th Cir. 2007) (“The Guidelines for Children’s Asylum Claims advises that ‘harm a child fears or has suffered...may be relatively less than that of an adult and still qualify as persecution.’ See Guidelines for Children’s Asylum Claims, INS Policy and Procedural Memorandum from Jack Weiss, Acting Director, Office of International Affairs to Asylum Officers, Immigration Officers, and Headquarters Coordinators (Asylum and Refugees) 14, (Dec. 10, 2998), available at 1998 WL 34032561. Indeed, other courts have used age as a determinative factor in deciding whether an applicant is eligible for asylum.”

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Rights and Remedies for Children with Behavioral Limits and Disabilities in the Classroom

Lori D. Semke & Anne Tyler Gueinzus

Introduction

We all know how important education is for children, but in many cases, ensuring that children receive an appropriate and fulfilling education becomes more difficult in the face of disciplinary challenges. Some children have limits in their behavior that affect the way they learn and at times the kind of education they receive. Schools are responsible for identifying appropriate settings and plans to teach children, and parents are responsible to be involved in their child’s school assessment and education plan. Yet many parents are not always aware of what rights they have regarding their child’s education. Furthermore, children who are state wards or in foster care do not have parents who can vigorously advocate on their educational behalf. Parents and attorneys helping parents and children need to be well equipped with knowledge of disciplinary

rules, rights and procedures when encountering these challenges in the educational setting.

Children often receive consequences for improper behavior. If these consequences in the school setting are extreme and negative, they can often lead to other detrimental outcomes, such as decreased interest or desire to remain in school. Children faced with such extreme consequences as being expelled, excluded or transferred from their school may also perceive themselves as different and separate from others.

Further, the more a child moves from school to school the harder it is to ensure that all the child’s school credits have moved with the child. Maintaining earned credits is important so that the child remains on track for graduation and does not have to make up credits that have already been partially or fully completed. Not only may credits go

uncompleted or be lost, but support from school counselors for a student's post-secondary education planning can be interrupted. As a result, a child's continued interest and enthusiasm in any post-secondary schooling can ultimately be lost.

This article will discuss legal rights and remedies arising from the extreme consequences of expulsions and transfers. Specifically, this article will focus on what parents and students can do to address and remedy such extreme school actions applied to students with behavioral limits and disabilities. Despite the significant and substantial concern regarding "the schoolhouse to jailhouse pipeline" for many disadvantaged children, this article will not address delinquency concerns within the school setting.¹

Expulsion

Schools are increasingly turning to expulsions and exclusions² to respond to disciplinary situations. The practice has been particularly prevalent in the Anoka-Hennepin school district, which in fiscal year 2006 expelled or excluded 82 students, which was 20.4% of the 402 total expulsions/exclusions statewide.³ Other districts with significant numbers of expelled or excluded students that year included Rochester (32), Rosemount (18), Forest Lake (13) and S. Washington County (13). The previous school year, Anoka-Hennepin also had the largest number of expulsions (47), followed by Rosemount (29) and Rochester (25).⁴ The demographic breakdown of expulsions by race for 2005 indicated that 62.47% of all expulsions in Minnesota involved white children; 13.7% of children expelled were black, 10.96% were Hispanic, 6.58% were Asian, and 6.3% were Native American.⁵ The percentage of expulsions of black, Hispanic, Asian and

Native American children is disproportionately higher than the statewide race population percentages of each of those groups (e.g., 10.96% of expulsions were of Hispanic children, but the total Hispanic population is only 4.96% of Minnesota's population). Expulsions are overwhelmingly more prevalent among young males, which account for 78.36% of expulsions in the fiscal year 2005.⁶ The practice of expulsions and exclusions reaches children of all demographics, and all families should be well versed in the law governing discipline in the education setting.

Minnesota's Pupil Fair Dismissal Act (PFDA), codified at Minnesota Statute sections 121A.40-121A.56 (2008), governs dismissal of students from public schools and protects the due process rights of all students.⁷ Recently, the Minnesota Court of Appeals, in the case of In the Matter of the Expulsion of N.Y.B., 750 N.W.2d 318 (Minn. Ct. App. 2008), clarified expectations for school districts making disciplinary decisions to expel students for certain infractions. The case focused on whether the school board adequately explained its decision to expel N.Y.B. for a full calendar year, consistent with the requirements of the PFDA.

N.Y.B. was a freshman in an Anoka-Hennepin Independent School District high school and was also a child in foster care with counsel from Children's Law Center of Minnesota (CLC).⁸ In December 2006, N.Y.B. confronted another student, C.S., who had made comments about N.Y.B.'s racial heritage. A fight ensued during which N.Y.B. broke a cafeteria tray over C.S.'s head. The principal recommended expulsion. At the school board meeting N.Y.B. read a prepared statement, and her CLC attorney urged the board to consider mitigating circumstances. The board voted 5 to 1 to

expel N.Y.B., and listed as its reasons only the portions of the school discipline policy it found her to have violated. N.Y.B. appealed her expulsion to the Commissioner of Education; the Commissioner found the expulsion was reasonable, but that the school board's written explanation was inadequate because it failed to state the controlling facts, and thus remanded with instructions to provide a sufficiently detailed written decision. The school board met again and amended its original resolution and expelled her for one year. N.Y.B., 750 N.W.2d at 320-21.

A school board has the "authority to expel a student for up to one calendar year if that student willfully (1) violates a reasonable school-board regulation, (2) engages in significantly disruptive conduct, or (3) engages in conduct that endangers the student or others." N.Y.B., 750 N.W.2d at 325 (citing MINN. STAT. §§ 121A.42, subd. 5; 121A.45, subd. 2). To ensure that the criteria were properly applied, the school board must provide its decision in writing and "state the controlling facts on which the decision is made in sufficient detail to apprise the parties and the commissioner of education of the basis and reason for the decision." Id. (quoting MINN. STAT. § 121A.47, subd. 13).

N.Y.B. argued on appeal that the school board's written decision failed to satisfactorily explain its reasons for expelling her for one calendar year, in violation of the PFDA's formal requirements. N.Y.B., 750 N.W.2d at 325. The school district's amended decision had stated that it had expelled 22 other students for fighting during that school year and that the totality of circumstances concerning N.Y.B. was at least as egregious as the facts involved in those previous cases. N.Y.B., 750 N.W.2d at 321-22. The school district contended that this explanation provided sufficient detail to

demonstrate its rationale for the decision, thus meeting the statute's requirements. N.Y.B., 750 N.W.2d at 325-26.

The Minnesota Court of Appeals disagreed. "An agency not only must identify the evidence on which it is relying, but also it must 'explain...how that evidence connects rationally with the agency's choice of action.'" N.Y.B., 750 N.W.2d at 324-25 (citing Peterson v. Minn. Dep't of Labor & Indus., 591 N.W.2d 76, 79 (Minn. Ct. App. 1999) (quotation omitted), *review denied* (Minn. May 18, 1999)). The explanation must be sufficient to facilitate meaningful appellate review. *See* MINN. STAT. § 121A.47, subd. 13 (2008); MINN. STAT. § 121A.50 (2008). Without the factual context of the prior expulsions, the decision failed to explain why the board concluded that N.Y.B.'s conduct was "at least as egregious as those incidents which led to one calendar year expulsions." The court also found that the decision does not address any of the mitigating circumstances raised by N.Y.B., or explain why it rejected N.Y.B.'s arguments. N.Y.B., 750 N.W.2d at 326.

The court remanded and directed the school board to explain its decision with enough detail to comply with Minn. Stat. § 121A.47, subd. 13, so that its decision includes its basis for comparing the relative egregiousness of conduct, the factual context of any incident with which N.Y.B.'s conduct was compared, an explanation of its comparison of N.Y.B.'s conduct with the other incidents, as well as its conclusion about the relative seriousness of N.Y.B.'s conduct after considering the mitigating factors she presented. N.Y.B., 750 N.W.2d at 326-27. The Court of Appeals' emphasis on the school board's obligations under the PFDA will go far to aid Minnesota students in ensuring that disciplinary decisions are fully considered and supported by school authorities.⁹

Not all children who are expelled from school have legal representation to advocate for them when they are being expelled; however, all children in Minnesota who are expelled from school are entitled to due process in their dismissal proceedings. MINN. STAT. § 121A.42 (2008).¹⁰

Transfers

Most school districts in the state of Minnesota have alternative learning centers (frequently referred to as ALCs, and often called “area learning centers” in some school districts) in which students can learn and earn credits toward graduation in a non-traditional setting.¹¹ ALCs often can be good fits for students with special needs or unique approaches to learning. For example, the Saint Paul school system offers several diploma-granting programs through its Area Learning Center alternative secondary learning programs, including Gordon Parks High School for high school age students who benefit from and prefer individual and small group instruction,¹² and the LEAP program, which helps students with limited English-language skills transition to traditional high school, post-secondary education or career opportunities.¹³ Minneapolis Public Schools has several Area Learning Centers, which are full day or extended day programs following various education models, including school-within-a-school, pullout and stand-alone sites. Minneapolis also has numerous “Contract Alternative Schools” run by community agencies; approximately 2200 students attended these schools in the 2007-08 school year.¹⁴

In many cases, however, school districts rely on ALCs as a holding area for youth who pose behavioral challenges in mainstream classrooms. Rather than addressing problems internally and searching for better ways to

deal with disciplinary challenges within the classroom—including evaluating whether behavioral issues are related to a disability—schools too quickly resort to expulsion and transfers to ALCs. Indeed, most ALCs primarily serve students characterized as “at-risk” and include youth who have been expelled or excluded from regular high schools in their school districts.¹⁵

“In general, students are referred to alternative schools and programs if they are at risk of education failure, as indicated by poor grades, truancy, disruptive behavior, suspension, pregnancy, or similar factors associated with early withdrawal from school.” *Public Alternative Schools and Programs for Students at Risk of Education Failure: 2000-01*, National Center for Education Statistics – Statistical Analysis Report, September 2002, at <http://nces.ed.gov/pubs2002/2002004.pdf> (hereinafter “NCES Rpt”). What is often not fully considered is whether those indicators are the result of a behavioral disorder or disability. The data in fact shows that behavior that may well be the result of emotional or behavioral disorders—such as assault, fighting, and threat or intimidation—comprised 21.76% of expulsions in Minnesota in 2006.¹⁶

Hasty transfer of students to ALCs raises several concerns. One risk of frequent transfers of students from and between regular high schools and ALCs is a loss of credits earned toward graduation, due to transfers and/or expulsions in the middle of a semester. Also, individual students who have been transferred numerous times have difficulty tracking the credits they have fully or partially earned. This difficulty adds to the student becoming frustrated with traditional methods of learning, and makes students less committed or interested in sticking with secondary education offerings long enough to earn a diploma. There also

may be a negative impact as a result of the stigma associated with being considered an “at-risk” youth.

Another reality is that minority students and students living in poverty appear to be disproportionately directed to alternative schools. A study by the National Center for Education Statistics (NCES) found that during the 2000-01 school year, urban districts, districts with high minority student enrollments, and districts with high poverty concentrations were among those more likely to utilize alternative school programs, and were more likely than other districts to consider certain behaviors (particularly drug or weapons possession, physical attacks or fights, and disruptive verbal behavior) to be reasons sufficient in themselves for transfer to an alternative school. NCES Rpt., at pp. iii, 33, 34.

Even though many ALC programs provide a better learning environment and experience for certain students, it should not become de facto practice to funnel youth to ALCs. In the NCES study, 54% of districts with alternative schools reported that demand for enrollment in alternative schools exceeded capacity during the three years prior to the study. NCES Rpt. at p. iv. Given the high demand by many students and families for access to alternative schools, it would make sense that school districts work harder to ensure there is room for those students by helping other students who prefer to stay in traditional schools to do so. One way to press school districts for more thoughtful use of ALCs is for a parent to request an assessment of the child so that the school may develop ways of better handling behavioral problems before resorting to transfers. Families should strongly advocate for all causes of behavioral problems at school to be fully evaluated for possible

disability services, so that students with unique needs are not lost in the ALC funnel.

Most school districts encourage that special education students be served in traditional school through the use of comprehensive special education services. If a child has a disability and is in need of special education and related services, an individual education plan or program (IEP), must be developed for the child. 34 C.F.R. § 300.306(c)(2) (2008).¹⁷ Where the school district does transfer a special education student to an ALC,¹⁸ all appropriate services must be provided. For example, the Saint Paul Public Schools expressly require that “[i]f a student with an IEP is referred to one of the ALC secondary locations an IEP meeting at the referring school must take place” and the Procedure for Referring Special Education Students to an ALC Program must be followed. According to this procedure, the school in which the student was originally enrolled must conduct an IEP meeting, the receiving school must conduct an intake meeting, and an ALC Special Education Referral Form must be completed. The IEP meeting must address what the best placement options are for the student based on his or her needs.¹⁹

Parents whose children are special education students should request copies of any such procedures applicable in their school district, and must insist upon full compliance with them in disciplinary situations to ensure that schools do not funnel a child perceived to be difficult to deal with into an ALC school if it is not in that pupil’s best interests. Parents who believe their child may need a special education evaluation should demand one so these services and procedures, if applicable, can be applied. Moreover, as the following section of this article discusses, transfers to ALCs may be rendered unnecessary if the

full spectrum of behavioral interventions to which special education children are entitled are followed.

Solutions

An emotional or behavioral disorder (EBD),²⁰ or other disability, may be the cause of a child's behavioral problems in the classroom. Schools must follow specific and distinct disciplinary procedures for students with disabilities,²¹ thus it is important for families to ensure not only that their child's unique needs are identified, but also that an appropriate individual education plan, or IEP, is in place so the school reacts appropriately in a disciplinary situation.

School districts must provide appropriate special education instruction and services to all students with disabilities.²² These services are determined and delivered through an IEP developed by schools, parents and students. MINN. STAT. § 125A.08(a)(1) (2008). An IEP is a written statement that addresses current performance, goals, services and aids to be provided, an implementation plan and measurement strategy. MINN. ADMIN. R. 3525.2810, subp. 1 (2008). The IEP is developed, reviewed, and revised in meetings of the IEP team; the IEP team must include parents, a regular and/or special education teacher, a school district representative, as well as other individuals with knowledge or expertise about the student or the student's evaluation results. When appropriate, the student is also a part of the IEP team. MINN. ADMIN. R. 3525.2810, subp. 1(B) (2008). The IEP must address the student's need to develop skills necessary to allow the student to live and work as independently as possible within their community; plans for transition to post-secondary education or employment must be included in the IEP by the time the

student reaches grade 9 or age 14. MINN. STAT. § 125A.08 (a)(1) (2008). The IEP team must review the IEP at least annually to determine whether annual goals are being achieved. MINN. ADMIN. R. 3525.2810, subp. 3 (2008).

In the case of a student whose behavior impedes his or her learning or that of others, the IEP team considers strategies to address that behavior, including positive behavioral interventions and supports. MINN. ADMIN. R. 3525.2810, subp. 2(B)(1) (2008). Because school districts are obligated to continue to provide special instruction services,²³ either within the district or in another district, to suspended or expelled students who are disabled, MINN. STAT. § 125A.03(a) (2008), and given the disruption that frequent changes in school placement creates, it behooves all involved to seek to avoid suspension or expulsion through a comprehensive IEP and behavioral intervention plan.

“Positive behavioral interventions and supports” are “those strategies used to improve the school environment and teach pupils skills likely to increase pupil ability to exhibit appropriate behaviors.” MINN. STAT. § 121A.66, subd. 6 (2008). The law requires that school rules regarding conditional procedures²⁴ must promote the use of positive behavioral interventions and supports, and must not encourage or require the use of aversive or deprivation procedures. MINN. STAT. § 121A.67, subd. 1(1) (2008). Any planned application of aversive or deprivation procedures can only be implemented after completing a functional behavior assessment, or FBA, and developing a behavior intervention plan that is included as part of the IEP. MINN. STAT. § 121A.67, subd. 1(2) (2008).²⁵ The school must also document that it has ruled out any other treatable cause for the behavior. MINN. ADMIN. R. 3525.2710, subp. 4(F) (2008).

An FBA is “a process for gathering information to maximize the efficiency of behavioral supports,” and “includes a description of problem behaviors and the identification of events, times, and situations that predict the occurrence and nonoccurrence of the behavior.” MINN. ADMIN. R. 3525.0210, subp. 22 (2008). Students work with teachers and the IEP team to complete an FBA worksheet, as well as a behavioral support or intervention plan that sets forth strategies for responding to triggers that lead to the problem behaviors to help avoid escalation and reduce the likelihood of negative consequences such as dismissal, suspension or expulsion. Members of the IEP team sign off on the plan and agree to review the plan as needed throughout the year. The law mandates that schools do everything possible to educate students with disabilities as much as possible in regular education settings:

To the maximum extent appropriate, pupils with disabilities shall be educated with children who do not have disabilities and shall attend regular classes. A pupil with a disability shall be removed from a regular educational program only when the nature or severity of the disability is such that education in a regular educational program with the use of supplementary aids and services cannot be accomplished satisfactorily.

MINN. ADMIN. R. 3525.0400 (2008). It also must be shown that the student will be better served outside of the regular program. *Id.*; see also MINN. STAT. § 125A.08(a)(5) (2008).

If a disabled child misbehaves and a school decides to change the child’s placement because of a violation of a code of student conduct, a “manifestation determination

meeting” is to be held within 10 school days of the decision, and must include all members of the child’s IEP team. 34 C.F.R. § 300.530(e)(1) (2008). A behavior is deemed to be a manifestation of the child’s disability when one of the following is true:

1. the conduct was caused by, or had a direct and substantial relationship to the child’s disability, or
2. the conduct was a direct result of the local educational agency’s failure to implement the IEP.

34 C.F.R. § 300.530(e)(1), (2) (2008). If the student’s violation of school disciplinary rules is determined to be a manifestation of the child’s disability, the school must either conduct a functional behavioral assessment, or review and modify if necessary any existing behavioral intervention plan. The school also must, unless otherwise agreed upon by the parents and the district, return the child to the placement from which he or she was removed. 34 C.F.R. § 300.530(f) (2008).

Additionally, “[i]f a pupil who has an individual education plan is restrained or removed from a classroom, school building, or school grounds by a peace officer at the request of a school administrator or a school staff person during the school day twice in a 30-day period, the pupil’s individual education program team must meet to determine if the pupil’s individual education plan is adequate or if additional evaluation is needed.” MINN. STAT. § 121A.67, subd. 2 (2008); *see also* MINN. ADMIN. R. 3525.2900, subp. 5(C) (2008) (requiring IEP team meeting in certain circumstances after emergency intervention or conditional procedures have been used).

If a student with an IEP is excluded or expelled for misbehavior that is not a manifestation of his or her disability, the district must continue to provide special

education and related services after any imposed period of suspension. The school district must initiate a review of the student's IEP and "conduct a review of the relationship between the pupil's disability and the behavior subject to disciplinary action and determine the appropriateness of the pupil's education plan before commencing an expulsion or exclusion." MINN. STAT. § 121A.43 (2008). Clearly, there are many statutory protections in place to reassess and ensure that the needs and education plan of a child with a disability are appropriate before extreme disciplinary consequences are implemented.

In addition to ensuring that a child has been properly assessed, evaluated and provided appropriate services, another solution for some children could be the use of an "education passport."²⁶ This would be a particularly useful approach for those students who are subject to multiple transfers. The concept of an education passport is that it allows a child's educational information to be kept together which then would follow the child. For example, all of the child's credits, schools attended, and educational plans would be part of the passport and thus would be easily available when the child attends a new school. This concept currently focuses primarily on court-involved children such as foster care youth who often change schools when they are moved to new homes; however, it could be used for all students in our increasingly mobile society, and should be considered by school administrators and legislators as a way to ensure a student's educational record is not lost.

Resources for Children and Parents

Minnesota has many organizations that provide information, help and advocacy for parents and children with disabilities. The following is a list of such organizations:

1. P.A.C.E.R. (Parent Advisory Coalition for Education Rights), a parent training and information center for families of children with disabilities. You may contact P.A.C.E.R. at www.pacer.org, 952.838.9000, 1.800.537.2237, or 952.838.0190 (TTY).
2. Minnesota Disability Law Center, which provides advocacy for children with disabilities. The Center is located at 430 First Avenue N., Mpls, MN 55401 and can be reached at 612.332.1441, 612.332.4668 (TTY), 1.800.292.4250;
3. Legal Aid Society of Minneapolis Youth Law Project offers counseling, advocacy and representation to youth aged 12-18 who live in Hennepin County and are facing issues of abuse, neglect, abandonment and/or estrangement. The project advocates for youth at school as well as truancy matters. It is located at 2929 Fourth Avenue South, Minneapolis, MN 55408 and can be reached at 612.827.3774.
4. Southern Minnesota Regional Legal Services (SMRLS) Education Law Project at 652.222.5863 provides legal advocacy on special education issues for students who reside in Ramsey County.
5. Minnesota Department of Children, Families & Learning at 651.582.8689, 651.582.8201 (TTY) also provides information about parental rights and procedural safeguards.
6. Family Service Inc., Learning Disabilities Program at 651.222.0311, 1.800.982.2302, 651.222.0175 (TTY) provides information and support to parents with children with learning disabilities residing primarily in Dakota, Ramsey, Anoka and Chisago counties.

Another useful resource and guide is [In School, The Right School, Finish School - A Guide to Improving Educational Opportunities for Court-Involved Youth](#), by National Children's Law Network, April 2007. This guide provides a valuable state resource list and practice tips. Although the guide is primarily for those working with court-involved youth, much of the information contained in the guide is also useful for anyone working with a child with disability or other education concerns.

Conclusion

Parents need to be mindful of the obligations that their child's school has to their child, and need to be an active part of their child's education team. This means requesting evaluations for possible eligibility for special education services, demanding IEPs for children who have special education needs, and attending IEP meetings. Parents must question their child's educators as to what and why specific plans and strategies are being implemented for their child and must work collaboratively with the other team members.

It is important that students and their parents stand up for their school rights. In order to do this they must educate themselves as to the school's written policies and obligations.²⁷ It is necessary to identify the problematic behaviors in order to determine the proper diagnosis and education plan and thereby avoid unnecessary and extreme negative consequences for students. It is hoped that with a strong IEP, and if necessary EBD support plan, extreme disciplinary decisions such as expulsions and exclusions for students are decreased. The key to avoiding extreme and negative school consequences is to correctly identify a child's behavior limits and plan accordingly.

When behavioral issues come to a head in the school setting, resulting disciplinary decisions can be extreme and have serious repercussions for a student's educational career and future. Parents and family law attorneys should be mindful of the student's appeal rights as well as the school district's obligations in making disciplinary decisions.²⁸

Notes

¹ A good summary of this concern can be found at Education on Lockdown: the Schoolhouse to Jailhouse Track, Advancement Project in Partnership with Padres and Jovenes Unidos, Southwest Youth Collaborative, and Children & Youth Justice Center of Northwestern University School of Law, March 2005. Moreover, students are well advised to remember that police liaisons at schools are in fact police officers and any comments made to them are comparable to any other statements made to police officers. In the Matter of the Welfare of B.M.K., No. A07-0852, 2008 WL 1972488 (Minn. App. May, 6, 2008).

² An "expulsion" prohibits a student's further attendance for up to 12 months; an "exclusion" prevents enrollment or reenrollment of a student for a period not to extend beyond the school year. MINN. STAT. § 121A.41, subs. 4, 5 (2008).

³ "Breakdown of Expulsions/Exclusions Reported by District for FY06" at <http://education.state.mn.us/mdeprod/groups/Compliance/documents/Report/030948.pdf>.

⁴ "Breakdown of Expulsions Reported by District July 01, 2004 to June 30, 2005" at <http://education.state.mn.us/mdeprod/groups/Compliance/documents/Report/008561.pdf>.

⁵ "Number and Percentage of Expulsions by Race for Fiscal Year 2005" at <http://education.state.mn.us/mdeprod/groups/Compliance/documents/Report/008557>.

⁶ "Number and Percentage of Expulsions by Gender for Fiscal Year 2005" at <http://education.state.mn.us/mdeprod/groups/Compliance/documents/Report/008569>.

⁷ "No public school shall deny due process or equal protection of the law to any public school pupil involved in a dismissal proceeding which may result in suspension, exclusion, or expulsion." MINN. STAT. § 121A.42 (2008).

⁸ Children's Law Center of Minnesota (CLC) is a 501(c)(3) nonprofit organization whose mission is to promote the rights and interests of Minnesota's children in the judicial, child welfare, health care and education systems. CLC carries out its mission in three main ways: (1) by providing direct representation for children; (2) by

advocating and participating in state-wide efforts to improve and reform the child protection and juvenile justice systems; and (3) by training volunteer lawyers and other child advocates to represent children.

⁹ N.Y.B. also challenged the board's decision on due process grounds, relying on technical violations of the PFDA. The court denied this claim, finding that N.Y.B. did not demonstrate that she was prejudiced by the technical violations of the PFDA, and thus had not established a basis for relief. N.Y.B., 750 N.W.2d at 327-28.

¹⁰ Procedural protections required for school disciplinary situations are set forth in Minn. Stat. § 121A.47.

¹¹ A list of over 180 Minnesota alternative schools can be found at the Minnesota Association of Alternative Programs website, at <http://www.maapmn.org/schools/>.

¹² See <http://gordonparks.spps.org>.

¹³ See <http://leap.spps.org>.

¹⁴ See <http://alternative.mpls.k12.mn.us/home.html>.

¹⁵ For example, Minnesota's Intermediate District 287—a collaboration of 13 community school districts in the west, northwest, and southwest Twin Cities Metro area—has Area Learning Center “educational programs that are tailored to meet the needs of at-risk learners and to help each student earn a high school diploma.” http://www.district287.org/index.php?src=gendocs&link=teachLearn_ALC_Overview&category=TeachingLearning_ALC. Students are considered “at-risk” for a variety of reasons, such as being chemically dependent, being chronically truant, having been expelled or excluded, or having been homeless, among other factors. http://www.district287.org/index.php?src=gendocs&link=teachLearn_ALC_Eligibility.

¹⁶ “Number of Percentage of Expulsions and Exclusions by Reason for Fiscal Year 2006” at <http://education.state.mn.us/mdeprod/groups/Compliance/documents/Report/030949.pdf>.

¹⁷ IEPs will be discussed in greater detail in the Solutions section of this article, *infra*.

¹⁸ Twelve percent of all students in alternative schools in 2000-01 were special education students with IEPs in place. NCES Rpt. at pp. iv, 34.

¹⁹ See <http://alc.spps.org/Eligibility.html>.

²⁰ A child that has an emotional or behavioral disorder and needs special instruction and services is a child with a disability under Minnesota law. MINN. STAT. § 125A.02, subd. 1 (2008). Emotional or behavioral disorders (EBD) are defined in the Minnesota Administrative Rules as “an established pattern of one or more of the following emotional or behavioral responses:

- A. withdrawal or anxiety, depression, problems with mood, or feelings of self-worth;
- B. disordered thought processes with unusual behavior patterns and atypical communication

styles; or

C. aggression, hyperactivity, or impulsivity.” MINN. ADMIN. R. 3525.1329, subp. 1 (2008). To qualify as EBD, the “established pattern of emotional or behavioral responses must adversely affect educational or developmental performance, including intrapersonal, academic, vocational, or social skills; must be significantly different from appropriate age, cultural or ethnic norms; and be more than temporary, expected responses to stressful events in the environment.” Id. The child is in need of special education and related services for EBD when the pattern of emotional or behavioral responses (e.g., inappropriate language, overly affectionate behavior, or threatening/antagonistic behaviors) adversely affects educational performance, and significant impairments in intrapersonal, academic, vocational, or social skills are demonstrated. MINN. ADMIN. R. 3525.1329, subp.2a (A) – (C) (2008).

²¹ These procedures typically involve use of a behavioral intervention plan (discussed *infra*), incorporated through the IEP and following the completion of a functional behavioral assessment (FBA) by the IEP team.

²² Children with disabilities are generally entitled to special instruction and services through the age of 21. See MINN. STAT. § 125A.03(b) (2008).

²³ Minn. Stat. § 125A.03(a) defines “special instruction and services” as a “free and appropriate public education” including special education and related services as set forth in the Individuals with Disabilities Education Act, subpart A, section 300.24.

²⁴ Conditional procedures are “interventions that meet the definitions of aversive and deprivation procedures which are not prohibited” and include 1) manual restraint, 2) mechanical or locked restraints, 3) time-out procedures for seclusion, and 4) temporary delay or withdrawal of regularly scheduled meals or water. MINN. ADMIN. R. 3525.0210, subp.9 (2008).

²⁵ Conditional procedures may also be used in an emergency situation according to Minn. Admin. Rule 3525.0200.

²⁶ See Mary Lee Allen & Mary Bissell, *Safety and Stability for FosterChildren:14 The Policy Context, THE FUTURE OF CHILDREN: CHILDREN, FAMILIES AND FOSTER CARE*, 60 (2004).

²⁷ The Minnesota Department of Education's website has considerable information helpful for navigating the school system and disciplinary issues. Go to <http://www.spps.org/Rights and Responsibilities.html> for more information.

²⁸ For more information on appeal rights following school disciplinary decisions, see Minn. Stat. §§ 121A.49, 121A.50.

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Emancipation of Minors in the State of Minnesota

Irene M. Opsahl

Minor emancipation exists in Minnesota, but lack of a statutory process to establish emancipation leaves room for confusion about the responsibility of parents and the status of children. Courts recognize minor emancipation, mostly in the context of who will pay for incurred costs. A number of statutes refer, without elaboration, to the existence of minor emancipation or carve out little pieces of autonomy for minors primarily in the area of access to medical and mental health services. This article will discuss minor emancipation in the context of Minnesota case law, statutes and real world application.¹

Guidance from the Statutes

A number of statutory provisions assume the existence of emancipation. For instance, a child under the age of 18 may be considered "legally emancipated" for the purpose of eligibility for General Assistance if the child has been married, on active duty in the military, emancipated by a court of competent jurisdiction or "is otherwise considered emancipated under Minnesota law . . ."² An employed, "emancipated minor" who holds a Minnesota driver's license may own a passenger automobile or truck.³ For purposes of the Minnesota

Family Investment Program, eligibility as a minor caregiver depends on a finding that the minor has never been married “or otherwise legally emancipated . . .”⁴ Guardianship of a minor terminates upon the minor’s “death, adoption, emancipation, attainment of majority, or as ordered by the court.”⁵ These statutes recognize that some particular right or privilege accrues to emancipated minors, but they do not refer to or establish criteria for establishing that status.

Consent for Medical and Mental Health Services

In a number of key areas, the legislature recognizes that minors may exercise certain rights, whether or not they are considered emancipated. For instance, a minor living away from parents with or without their consent and “managing personal financial affairs, regardless of the source or extent of the minor’s income,” may consent to medical and mental health services.⁶ Minor parents may consent to medical and mental health services for themselves and their child, whether or not the minor is living with a parent.⁷ “Any minor may give effective consent for medical, mental and other health services to determine the presence of or to treat pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse . . .”⁸ “A minor may give effective consent for a hepatitis B vaccination”⁹ and for emergency care.¹⁰ Medical, dental and mental health professionals are protected when they rely “in good faith upon the representations of the minor” who asserts the right to consent.¹¹ Providers may inform the parent if failure to do so “would seriously jeopardize the health of the minor patient.”¹² The Data Practices Act and implementing rules provide that

minors must let them know that they have the right to ask that the data be kept confidential from parents. If a minor makes such a request, the agency must apply criteria outlined in the rule to determine whether honoring that request would be in the best interests of the minor.¹³

None of these provisions addresses emancipation directly, but they identify critical situations where children can access confidential medical and mental health care without parental consent. These provisions make sense from a public policy point of view because they help ensure that children will receive necessary services and at the same time protect the autonomy of the parent-child relationship by giving providers discretion to involve the parents in appropriate circumstances.

Guidance from the Courts

Minnesota court decisions establish that parents may emancipate their children and that determination of the existence of emancipation in a particular case involves an examination of whether a parent surrendered the right to control the child and the extent to which the parent-child relationship has been severed. Emancipation may be partial or complete and may be proven “by an instrument in writing, by verbal agreement, or by implication from the conduct of the parties.”¹⁴ The foundation cases may be located in those crumbly old volumes at the beginning of the shelf and they deal with who will bear the responsibility for paying for services incurred by or on behalf of a minor. Many of the later cases involve child support disputes. A few examples illustrate the various circumstances that bring the emancipation question before the courts.

For instance in one of the early cases, *Lufkin v. Harvey*, 131 Minn. 238, 154 N.W. 1097 (Minn. 1908), parents sought to avoid liability for medical care provided to their son, claiming they had emancipated him by giving up their right to his wages. He had been working for two years, lived at home and paid room and board. When he was injured on the job, a doctor provided emergency surgery “and continued to treat the son for a period of nine months, all with the knowledge and acquiescence of defendants.” The court found that emancipation may be complete or partial. In this case, the evidence did not establish complete emancipation because although the parents gave up the right to collect their son’s wages, those wages were not sufficient to cover all of his expenses. The court found the existence of an implied contract and ordered a new trial. In *Taubert v. Taubert*, 103 Minn. 247, 114 N.W. 763 (Minn. 1908), the court also explored the concept of partial emancipation. A child sued his mother for negligence in connection with injuries he suffered in an accident while in her employ. The insurance company, on behalf of the defendant mother, argued that since a parent is immune to suit by their child in tort, the court should have directed a verdict in the mother’s favor. The court found since the minor proved that his mother had waived her right to his services (she paid him his own wages) and surrendered parental control over him (although the decision does not recount the details that support that conclusion) she effected a complete emancipation and he had the right to sue.

Some emancipation cases involve disputes between counties as to who is responsible for “poor relief.” In *In re Fiihr*, 289 Minn. 322, 184 N.W.2d 22 (Minn. 1971) a young woman left her parent’s home in South Dakota and moved in with her brother in

Scott County, Minnesota. She subsequently found a job, moved out of her brother’s home, and got pregnant. The baby’s father sent her to Duluth to have the baby. Her parental rights were terminated. St. Louis County put the baby in foster care and sought a determination that Scott County was the young woman’s settlement for poor relief. Scott County argued that the girl had not established residence in Scott County because she was unemancipated, and her parents retained responsibility for costs of caring for her and her baby. The court determined that when the parents allowed their daughter to leave home and establish independent living arrangements in Minnesota, they affirmatively severed their right to custody and control. Thus the girl was emancipated and Scott County was responsible for covering “poor costs.”

Courts that address emancipation in the context of child support disputes use the principles established in the early cases to determine whether or not to terminate a support obligation. In an unpublished case, *Siedel v. Seidel*, 1991 WL 536101 (Minn. App.) a mother allowed her daughter to move in with the daughter’s boyfriend and his family. The mother continued to provide financial support and eventually the daughter moved back home. The court determined that the mother had not surrendered control of her daughter, the child was not emancipated and the father had to continue to pay child support. In *Erickson v. Erickson*, 1996 WL 330540 (Minn. App.) (unpublished) the court considered the circumstances of a child who moved away from home, dropped out of school, lived with friends and supported himself. The court determined that the parent had effectively surrendered the right to control the child’s actions and severed the parent-child relationship, even though the child eventually moved back home. The

different result may turn on the fact that the parent in *Siedel* affirmatively approved her daughter's living arrangements and provided her daughter with the child support while she lived elsewhere.

The emancipation question arises in a number of contexts and always requires a careful analysis of the facts to determine the extent to which the parent has given up the right to control a child's actions and has severed the parent-child relationship.

Distinguishing Juvenile Court Proceedings

People sometimes confuse a Juvenile Court order allowing independent living with an order for emancipation. When the Juvenile Court adjudicates a child in need of protection or services (CHIPS) the court must order a disposition taking into account the child's needs. Options include ordering a child age 16 or older "to be allowed to live independently, either alone or with others as approved by the court under supervision the court considers appropriate, if the county board, after consultation with the court, has specifically authorized this dispositional alternative for a child."¹⁵ Sometimes the result looks like emancipation, depending on the level of supervision approved by the court and the level of detail included in the court order about the child's right to make independent decisions. However, the court may retain jurisdiction to monitor the child's well-being and the order only comes after a finding that a child needs protection or services.

An Experience Based Collection of Real World Considerations

Many of the children who call the Youth Law Project asking about emancipation

report parental abuse. They believe emancipation will give them the authority to move away from home, over their parents' objections, and live with another family who will not mistreat them. In reality these children don't want to be on their own, they just don't want to continue to live with abusive parents. They would not be considered emancipated under Minnesota common law because the parents do not agree to relinquish control and the children continue to need the care and support of adults. Legal options available for these children include obtaining an order for protection, having a supportive adult seek custody, or filing a CHIPS petition asking the court to order out-of-home care.¹⁶

Occasionally, a youth will call asking whether she would be emancipated if she had a baby. Under Minnesota law, the answer is no. The genesis of this misunderstanding may be that the statutes recognize the right of a minor parent to consent to medical care.¹⁷ Or it may have its roots in former public assistance guidelines that allowed eligibility for minor parents, regardless of their age or circumstances. Eligibility rules changed and under current law, with very limited exceptions, a minor parent can only receive public benefits for a child if the minor and child live with a parent, guardian or approved adult relative.¹⁸ Pursuant to Minnesota common law, since emancipation is the act of the minor's parent, the fact of giving birth to a child, without more, would not establish emancipation.¹⁹

The question of whether a parent has effectively emancipated a child turns on the very particular facts of each situation. Since the law provides little direction, advocates face the difficult prospect of attempting to determine, in the absence of explicit parental consent, whether a parent's failure

to exercise their right to care and control has evolved into implicit agreement that the child may be considered emancipated. Over the years, some have sought to resolve this difficulty by pressing for the adoption of legislation establishing a process to obtain court-ordered emancipation and laying out the legal consequences of such an order. Others have opposed such legislation, over concern that it would establish an all too convenient way for parents to wash their hands of the responsibility to provide for their difficult teenage children. Without well documented examples of the need for a statute or agreement on the benefit of more clarity attempts at legislation have failed.

Conclusion

Minnesota statutes and case law recognize that parents may emancipate their minor children. Emancipation may be partial or complete. Courts considering whether or not a minor is emancipated will consider whether the parent has acted explicitly or implicitly to relinquish their right to control a child and to rescind the parent-child relationship.

Notes

¹ Thanks to Jay Wilkinson for all of his work on emancipation issues while he was supervisor of the Youth Law Project.

² MINN. STAT. §256D.05, Subd. 1(a)(10) (2007).

³ MINN. STAT. §168.101, Subd. 1 (2007).

⁴ STAT. § 256J.08, Subd. 59 (2007).

⁵ MINN. STAT. § 524.5-210 (2007).

⁶ MINN. STAT. § 144.341 (2007).

⁷ MINN. STAT. § 144.342 (2007).

⁸ MINN. STAT. § 144.343 (2007).

⁹ MINN. STAT. § 144.3441 (2007).

¹⁰ MINN. STAT. § 144.344 (2007).

¹¹ MINN. STAT. § 144.345 (2007).

¹² MINN. STAT. § 144.346 (2007).

¹³ Minnesota Rules 1205.0500.

¹⁴ *In re Fiihr*, 289 Minn. 322, 184 N.W.2d 22 (Minn. 1971); See *In re Sonnenberg*, 256 Minn. 571, 99 N.W.2d 444 (Minn. 1959).

¹⁵ MINN. STAT. § 260C.201, Subd. 1(a)(5).

¹⁶ A Judge may enter an order determining that a child is emancipated, in connection with a request for an OFP filed by a child seeking protection from a parent, if the Judge determines that the parent agrees to relinquish the right to control the child.

¹⁷ MINN. STAT. § 144.342 (2007).

¹⁸ MINN. STAT. §256J.14 (2007).

¹⁹ See *King v. Braden*, 418 N.W.2d 739 (Minn. App. 1988).

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Lessons Learned in Juvenile Court - Delinquency Defense

Thomas C. Gallagher

Well, in traditional juvenile court it's not really called "criminal defense." It's called "juvenile delinquency defense," I suppose. For me, it's a part of what I do as a criminal defense lawyer – as in "*practice limited to.*"

These days, and for many years, lawyers in juvenile court are mostly government lawyers – from the County Attorney's and Public Defender's offices. Most cases in juvenile court in Minnesota are either CHIPS ("Child in need of protective services" – *allegedly*) petition cases, or juvenile delinquency petition cases. Though I have represented people in both kinds, I have only done CHIPS cases for existing criminal defense clients. I have represented many children over the years in juvenile delinquency petition cases.

The best way to analyze problem-solving in a juvenile delinquency case, in my view, is to first consider the case as if it were a normal, adult, criminal case. Then, modify the analysis slightly to fit the differences presented by traditional juvenile court. The most important of those differences are: (1) types of dispositions or outcomes; (2) the availability of government records of criminal or delinquent allegations and any adjudications; and (3) the lack of a right to jury trial.

When it comes to claims of violations of criminal statutes by juveniles, there are three broad categories of types of cases: (1) by far the most common, "traditional" juvenile court jurisdiction; (2) adult court certification; and (3) a hybrid of the previous two, Extended Juvenile Jurisdiction ("EJJ") which stays an adult sentence with probation

conditions. The latter two are less common, for the most serious cases.

Where does it start? For me, it usually starts with a phone call from someone other than the child, asking about legal help. One of the first things I tell these callers is that most kids should be appointed a public defender, so they may not need to hire a private lawyer like me. Sometimes they follow that lead, and apply for a public defender. I offer a few tips if I can before ending the call. One tip is my reassuring (to them) conviction that the public defenders I have known have been great lawyers, and highly qualified. Public Defenders have an advantage over a private lawyer like me in that they are captive in that court day after day and know that court well. Lawyers like me travel about the state, or only visit juvenile court now and then. The main competitive advantage a private lawyer can offer is time spent working up the defense case. But of course, someone is paying for that lawyer time.

The next step is an initial meeting in my office. This has always been a meeting of the potential client and his or her parent (or person *in loco parentis*). I don't have to say which one will be paying me! Two professional responsibility issues routinely arise here: (a) lawyer – client privilege issues; and (b) third party payer issues. Those two issues seem interrelated in most juvenile cases. The solution is simple enough. The written retainer agreement has the client sign as the client, and the parent sign as the guarantor. Language above the guarantor's signature warns that even though they are paying, they have no right to control

the case or information about it. My experience has been that this is perfectly acceptable to parents. Still, it is essential to cover that base.

As we begin to work up the defense case, we start with the client's information about what is stake, what is involved, what the facts seem to be, and the nature of the claims made against the client. Much like any criminal defense case, we start with identifying potential consequences (including so-called "collateral" consequences), and the desired or needed outcome. In general, as the outcome goal increases in desirability, it may become more difficult to obtain. Sometimes that does not seem to matter much – such as in Criminal Sexual Conduct Claim cases (due to the severity and permanence of consequences).

In all of my criminal defense work over the past twenty or so years, I have found that human beings accused of crimes are tremendously traumatized, especially in the beginning. I've handled traffic cases to homicide cases. They seem to have only two reactions to events – calm indifference or outright panic – like an on-off only, light switch (not like a rheostat "dimmer" light switch). I first administer psychological, spiritual *First Aid*. Strong emotion is poison to strategic problem-solving. We can't eliminate it entirely but we can reduce it and redirect it.

With kid clients, it's the same except kids often look to their parents for cues from their reaction and judgments. The age of the kid affects this. And in certain cases, the parent is not much involved in developing the defense case. That tends to be more true, where the claim is more serious. When it comes to parental involvement, it varies because it is up to the kid how much of that she wants. As the kid's lawyer I have to

discuss this question with the kid periodically, but always in private – away from the parent or anyone else. This discussion of course depends upon the young client trusting me to maintain confidence and secrecy from the parent, and others. Many times the juvenile client will instruct me to tell the parent certain things but not others. Sometimes the parent has a more idealized, or more rarely, a more demonized, view of the kid, and the case. Most of the time parents are key supporters. I encourage them to avoid viewing juvenile court as a moral authority, and instead to view it as a threat (though a well intentioned one).

In adult criminal cases, there are two major *bright lines* in terms of outcomes – whether a "criminal record" will result, and, whether there could be a commitment to prison. The former correlates to cases where the person has no prior convictions, generally. The latter bright line correlates to cases where the person either has prior convictions or is facing a serious felony claim. With juveniles, there is still the concern over the "criminal record" for people that don't have one yet. In juvenile cases, instead of the bane of a prison commitment, there is that of an "out of home placement," the worst of which is "county home school." County home school seems like "the workhouse for kids." This is normally not a concern unless the juvenile has prior adjudications, or is facing a serious felony claim.

Here is a list of my top ten insights about representing kids in juvenile delinquency cases:

1. Parents, you do not want your kid to be adjudicated delinquent if you can avoid it. You especially don't want your kid to be placed out of home by the county. The government is facing serious resource limitation issues.

Despite its good intentions, your kid would be better off with a private solution if you can afford one.

2. Public defenders are generally great lawyers. The main reason to retain a private lawyer instead is that the private lawyer may be able to do more work on the case, which typically will produce a better result. Of course, that costs money.
3. The lawyer must have the trust and faith of the client. Having the parents' trust is a lower priority, but is helpful and normal.
4. Avoid preaching or judging the client (or anyone). Avoid blaming. Direct attention to the future, and problem-solving.
5. These cases are quite important and often are *life-changing* for the client – for good or for ill. The lawyer must take these seriously, work hard, fight hard.
6. Far too many of these cases are resolved via settlement. Set a goal. Then litigate until either the client's goal can be met by settlement, or litigate to victory or defeat. Even if lost on the question of delinquency adjudication, the question of disposition can still be argued. Often judges are more compassionate than competitive prosecutors.
7. Make sure your client fully understands what is at stake, what her outcome goal is and why. Make sure you listen to her and her concerns. Make sure you do what she wants, after fully advising her.
8. Dive right in to the backroom discussions. In juvenile court, often the lawyers are outnumbered by social workers, probation officers, and others, when discussing cases with judges, *ex parte* essentially, in chambers. This is a weakness of

juvenile court. Don't be shy. Advocate. Also, lobby and persuade all of the players when you can, where you can. Listening to them is essential, here.

9. Make sure your client hears what everyone is saying behind their back. *Help the client "gain insight" into how others perceive them.* Help the client understand tactics and strategies to win over all involved, to support client's outcome goal. Solicit the client's personal involvement to help do this. Coach the client. Help the client understand how to communicate effectively with others involved.
10. Never give up. You are the champion of a noble cause, your client and her future. Compassion, patience and hard work usually pay off.

Representing juveniles in delinquency cases is similar to adult criminal cases, but with a twist or two. Though heart wrenching at times, helping someone through this difficult legal process is rewarding. The defense lawyer is uniquely situated to make a real difference in a person's life.

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Interstate and International Civil and Criminal Remedies to Parents of Children Who Have Been Kidnapped

Valerie A.D. Arnold & Scott M. Rodman

Despite legislative efforts at the state, federal and international levels, parental child abductions cases remain a serious problem. According to the U.S. Department of Justice estimates, as contained in the NISMART -2 study (October 2002), approximately 200,000 children annually are the victims of family abductions as compared to an estimated 100 to 150 stranger abductions. Family law practitioners can play a significant role in combating parental child abductions by educating clients about parental child abduction prevention and by managing cases with potential for parental child abduction in a proactive and comprehensive manner. However, when parental child abductions do occur, the family law practitioner will be called upon to employ measures to locate the child, assess the risk of a subsequent abduction once the child is located, develop and implement the recovery strategy, and once the child is successfully recovered, to establish protective measures for parenting time to prevent future abductions while simultaneously supporting the child's best interests. Effective advocacy requires thoughtful analysis of legal remedies, a prompt plan of action, and above all, persistence.

Locating the Child

Whether the parental abduction is in-state, interstate or international in nature, as preliminary steps, both law enforcement and the NCMEC for Missing and Exploited Children (NCMEC)(1-800-THE-LOST) should be notified immediately of the abduction. The National Child Search

Assistance Act of 1990 requires that law enforcement enter the missing child's name into state law enforcement system and the National Crime Information Center (NCIC) database, and prohibits states from having waiting periods before accepting a missing child report. 42 U.S.C. 5780. The NCIC entry is critical to coordinating law enforcement efforts because information regarding the child abduction will then be made available to law enforcement nationally.

After contacting law enforcement, NCMEC should be immediately notified even if the left-behind parent knows where the child may be located. NCMEC will enter the child's name into its own database and assign a case manager who can offer vital technical and practical assistance including interfacing with law enforcement at state, national, and international levels. As an example, NCMEC may work with law enforcement to obtain an NCIC entry in cases where the left-behind parent has encountered reluctance with law enforcement because the situation was deemed a "family matter" by law enforcement perhaps unfamiliar with its obligations under the National Child Search Assistance Act of 1990. NCMEC may also assist law enforcement in locating the child. In fact, the National Child Search Assistance Act of 1990 mandates that law enforcement maintain a close liaison with NCMEC as it institutes search and investigative procedures.

In cases where the child may have been taken across international lines, the U.S. State Department Office of Children's Issues

should also be notified (Regular hours: 1-202-736-9090; After hours: 1-888-407-4747). Both NCMEC and the U.S. State Department have staff available 24 hours a day to respond in emergency parental abduction cases. In addition to recommending that local law enforcement and the NCMEC be contacted, the U.S. State Department may also recommend contacting the FBI. Through coordinated efforts, the U.S. State Department may be able to intervene on an emergency basis to prevent the child from leaving the United States.

The U.S. State Department and NCMEC may also recommend that the International Police Organization (INTERPOL) be notified. INTERPOL, which is the world's largest international police organization, can distribute information regarding the parental child abduction to its 186 member countries through its Notice System. In missing person cases, INTERPOL may issue a Yellow Notice, which is the equivalent of an NCIC entry at the international level. The Yellow Notice can serve as a basis to locate and detain the abducting parent and child if they attempt to cross an international border. A Red Notice may issue for felony warrants against the abductor. The effectiveness of INTERPOL can be enhanced by the family law practitioner's efforts to obtain a clear, concise, and jurisdictionally sound custody and parenting time determination that includes explicit jurisdictional and notice findings with respect to state, federal, and international law.

Once the appropriate authorities have been notified, the U.S. State Department's Website (http://www.travel.state.gov/family/abduction/Solutions/Solutions_3850.html) for parental child abductions recommends the following as additional steps for locating the child:

- Contacting friends and relatives;
- Contacting the child's school to determine whether there was a request for a school record transfer;
- Contacting the United States Postal Inspections Services to obtain a mail cover, which scans the outside of mail that is sent to an address for up to 120 days
- Seeking to have local police subpoena credit card and telephone records of the abducting parent or the abducting parent's friends and family to obtain information about the child's whereabouts

The family law practitioner can assist the left-behind parent in following these steps. In particular, the usefulness of contacting family and friends to locate the child should not be underestimated. While family and friends may initially be sympathetic to the abducting parent, assisting the abducting parent in fleeing with the child or concealing the child can result in criminal charges at both the state and federal levels. Over time, family and friends may gain perspective on what has occurred and offer critical tips in locating the child.

The family law practitioner and the left-behind parent should also consider employing a private investigator to attempt to locate the child. While this avenue may seem to be cost-prohibitive to some, investment in this type of service may be most beneficial at the early stages of the abduction rather than as a tool of last resort. However, the use of private investigators should be coordinated with law enforcement so as to not undermine law enforcement investigations and to optimize resources.

If parents have located or believe they have located the child, the left-behind parent may seek to have a welfare check completed as a

means to confirm the location and welfare of the child. In interstate cases, local law enforcement or the local child protection agency may attempt to contact the abducting parent and complete the welfare check. On the international level, if the abducted-to country is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction (“Hague Convention”), the Central Authority may conduct a welfare check at the request of the left-behind parent. The U.S. State Department may also arrange for the local U.S. Embassy or Consulate to conduct a welfare check in both Hague and Non-Hague countries. International Social Services (ISS) is an international non-profit organization, which also offers welfare check assistance, among other services, in over 100 countries.

Steps to Recovering the Child

The difficult task of developing a plan for the return of a child should be commenced immediately, even if the child has not yet been located. If the left-behind parent does not have a custody determination, that parent should attempt to obtain one as soon as possible. When seeking a custody determination, initiating a custody action in the proper jurisdiction and complying with notice requirements are critical to obtaining a determination that will be recognized and enforced nationally and even internationally. It is also important to obtain at least a temporary award of sole custody to assist in enforcement efforts.

The Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), which has now been adopted or introduced as legislation in all 50 states and the District of Columbia, governs subject matter jurisdiction over custody and parenting time determinations. For initial custody determinations, the UCCJEA gives precedence to “home state” jurisdiction consistent with the Parental

Kidnapping and Prevention Act (PKPA). If there is no home state, the UCCJEA allows a court to assume jurisdiction based upon significant connection, more appropriate forum or vacuum jurisdiction, respectively. Minn. Stat. §518D.202(a)(2). In emergency cases, temporary emergency jurisdiction may be asserted in the state where the child is located if the child has been abandoned there or is subject to or threatened with mistreatment or abuse, even if the child has a home state. Minn. Stat. §518D.204.

In modification cases, generally, the state that issued the existing custody or parenting time determination retains exclusive and continuing jurisdiction to modify the custody or parenting time determination as long as a parent or person acting as a parent continues to reside in the state. Minn. Stat. §518D.202. Continuing jurisdiction in modification cases minimizes the possibility of competing proceedings in the abducted-to state. If no state has exclusive, continuing jurisdiction, then the home state of the child would have modification jurisdiction. Minn. Stat. §518D.202(b); Minn. Stat. §518D.201. Home state jurisdiction includes situations where the child has been absent from the state, but the state was the home state of the child within the previous six months (or since birth for a child under six months), and a parent or person acting as a parent continues to live in this state. Minn. Stat. §518D.201(a) (1). This allows the home state of the child to assert jurisdiction even if the abducting parent has relocated to another state with the child.

In international cases, the jurisdictional principals of the UCCJEA must be respected to the extent they do not conflict with the jurisdictional mandates of the Hague Convention. The purpose of the Hague Convention is to “secure the prompt return of children wrongfully removed to or retained in

any Contracting State’ and to “ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting State.” Hague Convention, Art. 1(a-b). To this end, the Hague Convention precludes the exercise of subject matter jurisdiction to modify custody by any state other than the place of habitual residence of the child unless one of the exceptions to the Hague Convention applies. Hague Convention, Art. 16. The child’s place of habitual residence is the state where the child resided habitually at the time “immediately before the removal or retention” and may or may not be the child’s home state within the meaning of the UCCJEA. Hague Convention, Art. 3.

While some civil and criminal remedies may be available to a left-behind parent without a custody determination, the custody determination can be extremely helpful in clarifying each parent’s rights with respect to the child and providing a solid framework for obtaining the return of the child. Once the proper jurisdiction for seeking a custody determination has been determined, the family law practitioner should explore what additional relief could be helpful in obtaining the return of the child. Custody determinations should be drafted to include precise language to support any future use of a civil contempt remedies or criminal prosecutions, and should contain comprehensive jurisdictional and notice findings to minimize the risk of competing custody determinations in the abducted-to or wrongfully retained-in state.

Once the left-behind parent has a custody determination, certified copies should be obtained and the determination should be registered in any state where the child may be located. In international cases, the custody determination should be certified with an “apostille,” which is essentially a certificate

of authenticity issued by a designated authority to ensure compliance with the Hague Convention Abolishing the Requirement of Legalization of Foreign Public Documents (“Hague Legalization Convention”). The Minnesota Secretary of State is a designated authority under the Hague Legalization Convention and will affix the apostille to a certified copy of the custody determination. This is a very simple process that involves delivering the certified copy to the Minnesota Secretary of State and paying a nominal fee for the apostille. The U.S. State Department can also certify state court orders with an apostille once they have been certified by the a designated authority of the issuing state through the U.S. Secretary of State’s Office. Although proceedings brought under the Hague Convention have a relaxed authentication standard and may not require the apostille, it is still recommended given the ease of obtaining the apostille to avoid any delay in the Hague Convention process. 42 U.S.C. §11605.

In international cases, the left-behind parent may need to produce a copy of the custody determination with the apostille (and certified translation) to initiate any type of proceeding for recognition and enforcement of the decree in a foreign jurisdiction if that country is a signatory to the Hague Legalization Convention. A copy of the custody determination with the apostille and translation will also be needed to accomplish service and therefore several copies should be obtained as soon as possible. The U.S. State Department’s Website provides information about the Hague Legalization Convention and how to obtain the apostille at: http://travel.state.gov/law/info/judicial/judicial_2545.html. If the abducted-to country is not a signatory to the Hague Legalization Convention or the Hague Convention, obtaining copies of the certified custody determination with an apostille is

still recommended for the foreign jurisdiction as this can act as a shield against challenges to the authenticity of the U.S. custody determination.

Moving Forward with a Recovery Plan

Civil and criminal remedies may be used to obtain the return of the child. Any recovery plan should weigh the benefits and risks to the child. The U.S. State Department and the NCMEC can provide information about remedies in parental abduction cases including country specific information in international cases. In interstate cases or international cases where the child is located within the United States, the UCCJEA offers two main civil enforcement mechanisms: the Expedited Enforcement Petition and the Warrant to Take Physical Custody of a Child. The Expedited Enforcement Petition is essentially a hybrid Order to Show Cause process where the parent violating the custody determination is ordered to appear in Court with or without the child at a hearing on the next judicial day after service of the order unless that date is impossible. The custody determination will be enforced unless the violating parent can establish:

- (1) the child custody determination has not been registered and confirmed under section 518D.305 and that:
 - (i) the issuing court did not have jurisdiction under sections 518D.201 to 518D.210;
 - (ii) the child custody determination for which enforcement is sought has been vacated, stayed, or modified by a court having jurisdiction to do so under sections 518D.201 to 518D.210;
 - (iii) the respondent was entitled to notice, but notice was not given in accordance with the standards of section 518D.108, in the

- proceedings before the court that issued the order for which enforcement is sought; or
- (2) the child custody determination for which enforcement is sought was registered and confirmed under section 518D.304, but has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under sections 518D.201 to 518D.210.

Minn. Stat. §518D.308.

Under this expedited enforcement process, the Court has broad discretion to order any additional relief “necessary to ensure the safety of the parties and the child.” Id. Depending upon the circumstances of the case, this additional relief may be production of passports and/or other travel documentation or production of information related to finances, vehicle, or work information, which may help track the abducting parent should the parent attempt to re-abduct. If the parent fails to appear at the hearing or fails to comply with the order for additional relief, a basis for contempt of court would then be established, thereby opening the door to additional enforcement mechanisms including a warrant for the arrest of the non-complying parent.

In an emergency situation, the court may also issue a Warrant to Take Physical Custody of a Child. Minn. Stat. §518D.311. This process is relatively simple and requires the filing of a Verified Petition along with testimony of the Petitioner and/or other witnesses. Id. Upon a finding that the child is imminently likely to suffer serious physical harm or be removed from the state, the Court may issue a warrant to take physical custody of the child. Id. Like a criminal warrant, a Warrant to Take Physical Custody of a Child issued pursuant to the UCCJEA is immediately

enforceable. Id. Through this warrant, the Court may authorize law enforcement to enter private property and/or make a forcible entry at any hour. Id.

In cases where a parent is seeking enforcement remedies in a state other than the state that issued the custody determination, the Court in the foreign state, as well as local law enforcement, may require that the custody determination be registered in that state prior to enforcement. Registration of a child custody determination has the effect of confirming the determination in the foreign state as a matter of law. While the registration process is simple, it requires service notice to the opposing party of the registration, and affords the opposing party twenty (20) days to challenge the registration on either jurisdictional or procedural grounds. This can be an extremely frustrating dilemma since the registration process, by its nature, requires notice to the abducting parent, thereby offering another opportunity to flee before the child is recovered. If a subsequent abduction is a concern or there is a basis for believing the child is endangered, the local child welfare office may intervene as a child protection matter to retrieve the child prior to the completion of the registration, or temporary emergency jurisdiction may be invoked. It is noteworthy that the enforcement mechanisms of the UCCJEA specifically authorize the prosecutor to initiate relief in Hague Convention and UCCJEA enforcement cases acting on behalf of the court and not representing any party. Minn. Stat. §518D.315. As a practical matter, parties may not be able to rely upon prosecutors to pursue these types of cases in a timely manner, if at all.

In international cases, the filing of a Application for the Return of the Child may the primary civil remedy if the child is under age 16 and has been wrongfully removed or

retained in a country that is a signatory to the Hague Convention. As of 2008, there were 81 Contracting States to the Hague Convention. A list of signatory countries to the Hague Convention along with the effective date of entry for each country can be accessed at: http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=24. Pursuant to the Hague Convention, every Contracting State must establish a Central Authority to Administer incoming and outgoing Hague Cases. Hague Applications can be filed with the Central Authority in the place of habitual residence of the child or in the country where the child is located. However, filing the Hague Application through the U.S. Central Authority may offer the left-behind parent a better ability to oversee the progress of the case. As of April 2008, the U.S. State Department, Office of Children's Issues is the acting Central Authority for the United States.

Once the Hague Application has been submitted to the Central Authority, either directly or by transmittal from the Central Authority of the child's place of habitual residence, a judicial proceeding on the Hague Application must be commenced in the state where the child is located. Where it has been determined that the retention or removal was wrongful, the prompt return of the child to the place of habitual residence is mandated, without making any best interest determination, if the Application for return of the child is brought within one-year of the wrongful abduction, unless one of the narrow exceptions applies. Hague Convention, Arts. 12, 19. If the case is brought after one year, the child may still be returned if it cannot be established that the child is well settled in his or her current environment or if the left-behind parents can establish a claim for equitable tolling of the one-year period. Id.; Public Notice 957: Hague International Child Abduction Convention: Text and Legal

Analysis, 51 Fed. Reg. 10494, 10509 (1986); Mendez v. Lynch, 220 F. Supp. 2d 1347, 1364 (M.D. Fla. 2002).

If the child is located outside of the United States, the left-behind parent should seek a Declaration of Wrongfulness in the U.S. to support the Hague Application in the Contracting State. Hague Convention, Art. 15. A Declaration of Wrongfulness can be sought in state or federal court. 42 U.S.C. § 11603(a). Under the Hague Convention, the removal or retention of a child is considered wrongful where:

- a. it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- b. at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Hague Convention, Art. 3. While such a Declaration is non-binding on the Contracting State, some jurisdictions consistently request a Declaration of Wrongfulness; therefore, efforts should be made to obtain such a declaration as soon as possible. If the motion for the Declaration of Wrongfulness is sought in state court, additional relief related to custody and parenting time can also be sought simultaneously, such as a modification or suspension of the abducting parent's parenting time. While Hague proceedings require the stay of child custody and parenting time proceedings in the wrongful removal or retention state pending the completion of the Hague proceeding, the stay does not apply to the place of habitual residence of the child. Hague Convention, Art. 16.

In developing a recovery strategy in Hague cases, it is important to consider the Contracting State's history of compliance in Hague cases. The 2008 Department of State Report to Congress on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction names Honduras as "Non-compliant." It identifies Brazil, Bulgaria, Chile, Ecuador, Germany, Greece, Mexico, Poland and Venezuela as "Demonstrating Patterns of Non-Compliance." The U.S. State Department's Office of Children's Issues Website also offers country specific information, which can be accessed at: http://www.travel.state.gov/family/abduction/hague_issues/hague_issues_3781.html. If the child is located in a non-compliant Contracting State, the U.S. State Department or NCMEC may offer country specific information regarding options for maximizing the effectiveness of the Hague proceeding and other remedies. If the child is not located in a non-compliant Contracting State, it is still recommended that country specific information be obtained from the U.S. State Department or NCMEC to gain insight on that country's specific history of compliance and any idiosyncrasies relevant to Hague Convention proceedings.

When civil remedies are ineffective, criminal remedies should also be explored. However, the U.S. State Department and NCMEC recommend moving cautiously with criminal remedies in certain cases. It is noteworthy that while every U.S. state has a statute criminalizing interference with custodial rights, which are summarized at NCMEC's Website at: www.missingkids.com/en_US/documents/CriminalCustodialInterference.pdf, many foreign nations do not recognize parental child abduction as a criminal act and may refuse to return a child under circumstances where the abducting parent may face criminal prosecution. Under

Minnesota law, a person may be charged with a felony who conceals a minor child or takes, obtains, retains, or fails to return a minor child from or to the child's parent (or person with custodial or parenting time rights). Minn. Stat. §609.26. The International Parental Kidnapping Crime Act of 1993 (IPKCA) makes international child abduction a federal felony and imposes criminal fines and/or imprisonment on anyone who removes a child from the United States unlawfully, or who unlawfully retains a child in a foreign country. 18 U.S.C. 1204 (Public Law 103-173, 107 Stat. 1998). If criminal remedies are pursued, the U.S. State Department and the NCMEC can offer country specific information related to extradition options and historical compliance where criminal remedies have been used.

Other Civil Remedies

There may be other civil remedies available to a custodial parent whose child is abducted by the non-custodial parent. In other jurisdictions, the trend in recent years has been to recognize a tort of “intentional interference with custodial rights” and to allow aggrieved custodial parents to sue for civil damages. However, the Supreme Court of Minnesota addressed this issue, and declined to recognize such a tort in Larson v. Dunn, 460, N.W.2d 39 (Minn. 1990), a case that examined the alternative civil remedies available in parental abduction or wrongful retention cases brought in Minnesota. In Larson, the non-custodial mother fled with the parties’ two-year-old child, sparking a seven-year search across the country, which included efforts by law enforcement agencies including the FBI. Eventually, the child was located and returned to her father. The father sued the mother and her parents in district court, alleging their actions constituted intentional interference with custodial rights, civil conspiracy, intentional infliction of

emotional distress, and fraud. The father claimed damages for over \$50,000 in search-related costs, emotional distress, and the loss of his daughter’s companionship.

Citing public policy concerns, the Supreme Court declined to recognize a tort for intentional interference with custodial rights. The Court found that such a tort would increase family law litigation, and would not serve the best interests of the children in such cases as the children may be forced to testify against a parent. In addition to creating an additional burden on children, the Court was concerned a tort like this would escalate family warfare and be used as a weapon in such disputes, which was similar to the reasoning of the Court in Bock v. Lindquist, 278 N.W.2d 326 (Minn. 1979), a case which abolished any action for alienation of a child’s affection. Therefore, there is no right to sue for civil damages in Minnesota on the basis of intentional interference with custodial rights.

However, there are several other civil remedies that may be available to a parent in abduction or wrongful retention cases. Minn. Stat. § 609.26 is the statute governing the crime of depriving a parent of their custodial rights. Parental kidnapping is a felony. Subdivision 4 of this statute provides that the Court may assess any expense incurred in returning the child against any person convicted of violating this law. However, a criminal statute does not automatically give rise to a civil cause of action unless the statute expressly affords that it does, and Minn. Stat. § 609.26 does not explicitly or implicitly provide for any civil cause of action for deprivation of custodial rights.

Minn. Stat. § 611A.04 provides a more concrete right for the victim of this crime. This statute establishes the right of a victim of a crime to receive restitution from a

convicted offender. Therefore, if the custodial parent has suffered out-of-pocket losses associated with the abduction or wrongful retention, i.e. search-related costs or legal fees, the custodial parent is entitled to receive restitution for this amount from the offender. In most circumstances, the prosecutor will request information regarding the monetary losses in affidavit form from the custodial parent, but it is a good idea to provide this information voluntarily to the prosecutor even before they request it. Advise your client to keep detailed records and retain all receipts for any costs they incur as a result of the abduction or wrongful retention, including statements of attorney's fees. These records and receipts should be attached as exhibits to their affidavit. In any event, the affidavit and supporting documents must be received by the Court at least three business days before the sentencing or dispositional hearing.

In addition to recovering out-of-pocket damages under the aforementioned statutes, a parent may be able to recover monetary damages for emotional distress in egregious cases under the tort of "intentional infliction of emotional distress." The Minnesota Supreme Court recognized this tort in Hubbard v. United Press International, 330 N.W.2d 428 (Minn. 1983). However, this tort is reserved for intentional or reckless conduct that is not only extreme and outrageous, but which also causes severe emotional distress. While it can certainly be argued that every abduction or wrongful retention of a child is extreme, outrageous and likely to cause severe emotional distress to the custodial parent, it may be difficult to successfully prevail on such a claim in this context, as there are plenty of cases limiting recovery of damages for emotional distress to the most egregious of situations. In fact, there are no appellate cases in Minnesota that deal specifically with the tort of intentional

infliction of emotional distress in parental abduction cases. This may be because inflicting emotional distress upon the custodial parent is often tangential to the intent of the non-custodial parent when they abduct or wrongfully retain a child, i.e., in most cases the non-custodial parent is not abducting or retaining the child with the primary intent of causing emotional distress to the custodial parent. However, there may certainly be cases where it can be established that this is in fact their primary motivation, and a claim under this tort may be more successful under such a scenario. The Minnesota Supreme Court did suggest such an action could be maintained in egregious cases in the Larson case. Keep in mind that there is a two-year Statute of Limitations on claims for intentional infliction of emotional distress. Therefore, any claim under this tort must be brought within two years of the abduction or wrongful retention of a child.

Of course, nothing prohibits an aggrieved parent from seeking sanctions pursuant to a motion for contempt in family court. However, as contempt sanctions are not meant to be punitive but rather are intended to facilitate compliance with an applicable court order, it is unlikely that sanctions would extend past normal restitution for out-of-pocket losses. However, a motion for contempt and the threat of jail time may pressure a non-custodial parent to return the child.

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