22-7163 ORIGINAL

IN THE

Supreme Court of the United States

In re:

MARCUS MARKO BACHMAYER (M.M.B.),

Petitioner.

On Petition for Writ of Habeas Corpus to the State of Minnesota Court of Appeals

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PETITION FOR WRIT OF HABEAS CORPUS

QUESTIONS FOR REVIEW

1. Whether a child's familial relationships are protected.

2. Whether the Bill of Rights is applicable to the States.

3. Whether the district court engaged in a witch hunt in violation of M.M.B.'s and his father's rights and liberties under the First, Fourth, and Fifth Amendments.

4. Whether the Clearly Erroneous Standard of Review is unconstitutional.

5. Whether State legislation asserting authority to alter the Constitution's guarantee of the privilege of the writ of habeas corpus is unconstitutional.

6. Whether Congress' unconstitutional alterations to the writ of habeas corpus are void.

7. Whether the Court should create new Federal Common Law establishing the standard of review ensuring that the judgments made are in the best interests of the child and that courts of review may not be immobilized by fraud upon the court.

8. Whether the Court should vacate the Judgments and Orders and Opinions of this case in the lower courts.

9. Whether the issues of sanctions and attorney fees and costs should be remanded.

10. Whether M.M.B. is entitled to equitable relief.

11. Whether M.M.B. is entitled to the writ of habeas corpus and should be entrusted to the custody of his father.

PARTIES TO LOWER PROCEEDINGS

I. Michaela Dojcinovic Bachmayer, NKA Michaela Dojcinovic, Respondent

II. Kyle Dalke Bachmayer, Appellant

RELATED PROCEEDINGS

1. In the Minnesota Court of Appeals; No. A21-1346; In re the Marriage of: Michaela Dojcinovic BACHMAYER, nka Michaela Dojcinovic, petitioner, Respondent, v. Kyle Dalke BACHMAYER, Appellant; Judgment entered: **November 10, 2022**.
2. In the Minnesota Supreme Court; No. A21-1346; Michaela Dojcinovic Bachmayer, NKA Michaela Dojcinovic, Respondent, vs. Kyle Dalke Bachmayer, Petitioner; Judgment entered: **November 10, 2022**.
3. In the Fourth Judicial District Court of Minnesota; No. 27-FA-18-4040; In the Marriage of Michaela Dojcinovic Bachmayer and KYLE DALKE BACHMAYER; Judgment entered: **August 13, 2021**.
4. In the Fourth Judicial District Court of Minnesota; No. 27-FA-18-4040; In the Marriage of Michaela Dojcinovic Bachmayer and KYLE DALKE BACHMAYER; Judgment entered: **March 23, 2021**.
5. In the Minnesota Court of Appeals; No. A19-1929; In re the Marriage of: Michaela Dojcinovic BACHMAYER, petitioner, Respondent, v. Kyle Dalke BACHMAYER, Appellant; Judgment entered: **October 6, 2020**.

6. In the Fourth Judicial District Court of Minnesota; No. 27-FA-18-4040; In the Marriage of Michaela Dojcinovic Bachmayer and KYLE DALKE BACHMAYER; Judgment entered: **October 8, 2019**.

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JURISDICTION

Sought to be reviewed is the judgment entered November 10, 2022, and the underlying:

a. October 8, 2019, Judgment & Decree;

b. August 3, 2020, Opinion;

c. October 6, 2020, Judgment;

d. January 5, 2021, Order;

e. March 23, 2021, Order;

f. August 13, 2021, Order;

g. May 16, 2022, Opinion.

M.M.B. is "in custody pursuant to the judgment of a State court ... in violation of the Constitution [and] laws ... of the United States." 28 U.S.C. § 2254(a). The statute of limitation has not expired. § 2244(d)(1). Therefore, the Court has jurisdiction to entertain this petition for writ of habeas corpus. § 2254(a); *see also* § 2242 (written, signed, and verified by one acting on behalf of the prisoner). Jurisdiction is also conferred under § 1651(a) in courts of the United States, the writ of habeas corpus being a necessary jurisdictional power. *Ex parte Bollman*, 8 U.S. 75, 83, 2 L. Ed. 554 (1807) (Writs of *scire facias* and *habeas corpus*, are "clearly and obviously necessary" for jurisdiction but also "for the general purposes of justice and protection," and "[t]he authority, therefore, to issue these writs, is positive and absolute" and not dependent on any unnecessary consideration.). The Court may grant the writ and decide the issues on the merits. 28 U.S.C. §§ 2254(b)(1), (b)(2). Further, "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." § 1654. "The common law historically has given recognition to the right of parents, not merely to be notified of their children's actions, but to speak and act on their behalf." *Hodgson v. Minnesota*, 497 U.S. 417, 482–85, 110 S. Ct. 2926, 2962–63, 111 L. Ed. 2d 344 (1990) (KENNEDY, J., dissenting). "It is beyond dispute that the relationship between a parent and child is sufficient to support a legally cognizable interest in the [interests] of one's child" that may be litigated by parents without counsel. *Winkelman ex rel.*

Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 535, 127 S. Ct. 1994, 2006-07, 167 L. Ed. 2d 904 (2007). Where "it is the action of the state court which might result in a denial of constitutional rights and [] it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court ... the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied." *Barrows v. Jackson*, 346 U.S. 249, 257, 73 S. Ct. 1031, 1035, 97 L. Ed. 1586 (1953).

This petition is in aid of the Court's appellate jurisdiction. The Constitution vests the Supreme Court with the power to review and revise "both as to Law and Fact" a lower court's decision in cases such as this. *Justices v. Murray*, 76 U.S. 274, 279-82, 19 L. Ed. 658 (1869). U.S. Const. art. I, § 9, cl. 2 guarantees the writ of habeas corpus.

28 U.S.C. § 2403(a) applies. The notifications required by U.S. Sup. Ct. R. 29.4(b) have been made.

CONSTITUTIONAL PROVISIONS & STATUTES

Pertinent statutory provisions are reproduced in the appendix to this petition. App., *ante*, D.185 thru D.262.

STATEMENT OF THE CASE

I. 28 U.S.C. § 2242

On May 25, 2018, Michaela Dojcinovic Bachmayer served Kyle Dalke Bachmayer (herein "Father") with summons and petition for dissolution. Married in 2016, on September 21, 2017, they had a child, *Bachmayer v. Bachmayer,* No. A19-1929, 2020 WL 4434557, at *1 (Minn. Ct. App. Aug. 3, 2020) (herein "*Bachmayer I*"), Marcus Marko Bachmayer (M.M.B.), the above-named petitioner, who is currently imprisoned and restrained of liberty – in violation of the Constitution of the United States – by his mother, Michaela Dojcinovic PKA/AKA Michaela Dojcinovic Bachmayer PKA/AKA Michaela Dojcinovicova (herein "Mother"), illegally, at 849 Providence Drive, Shakopee, MN 55379.[1]

II. 28 U.S.C. § 2254(b)

On December 16, 2022, Father's attempt at relief to the only State authority with jurisdiction to grant it, *see Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 250, 64 S. Ct. 997, 1003, 88 L. Ed. 1250 (1944) (court issuing judgment has "both the duty and the power to vacate its own judgment")[2],

[1] Location is as last known.

[2] Cf. here, appellate court refused jurisdiction

was "rejected. The [Minnesota] Supreme Court does not entertain petitions for writ of habeas corpus in the first instance. The Court of Appeals may review a District Court ruling on a petition for habeas corpus if a proper appeal is filed. It does not appear that you are seeking review of any district court ruling on a petition for habeas corpus. Accordingly, your filing is being rejected." *Ante* at E.275.

On November 28, 2022, Father's attempt to file a petition for emergency writ of mandamus in the Minnesota Supreme Court was rejected "for the following reason(s): Closed case." *Ante* at E.277. [3] On November 14, 2022, Father's attempt at filing a petition for discretionary review in the Minnesota Supreme Court was "rejected. Your case is closed and judgment has been entered. No further filings will be accepted. A refund of your filing fee will be issued." *Ante* at E.279.

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[3] On November 22, 2022, the court-ordered supervised exchange center terminated services to M.M.B. and Father, stating that Father "has been consistent in his attendance and overall provides a safe, healthy and fun space for [M.M.B.] during visits" but "has expressed frustration and concerns with our service delivery," noting that Father and M.M.B. had "lost time" due to M.M.B.'s "custodial parent" and that "[t]here has been continued pressure on an ongoing basis from [Father] alleging FamilyWise is violating his civil liberties or breaking the law. ... This communication far exceeds what we typically manage with participants that we serve." FamilyWise concluded, "We recommend [Father] seek an independent provider or work to overcome any barriers related to unsupervised time with his son as a center-setting is not sustainable in this case." *Ante* at E.281-E.282 (letter).

On November 10, 2022, the Court of Appeals failed to consider Father's submissions before rejecting them. "On November 7, 2022, [Father] filed more than 200 pages of additional motions and supporting documents. [Father] seeks relief from multiple decisions made by the district court in the underlying action, alleging 'fraud upon the court.' This court has already rejected [Father's] challenges to the judgment and decree and the district court's post-dissolution orders. No petition for rehearing is permitted in this court." *Ante* at A.3. "By opinion filed May 16, 2022, this court rejected all arguments made by [Father]. The supreme court later denied [Father's] petition for further review. [Mother] prevailed on appeal and is entitled to $300 for judgment costs. ... [Mother] filed a timely request for this amount." *Ante* at A.1. "[Mother] also filed a timely motion for attorney fees, relying on Minn. Stat. § 518.14, subd. 1 (2020). [Father] opposes the motion. The district court imposed conduct-based fees under Minn. Stat. § 518.14, subd. 1, based on its determination that [Father's] pleadings unnecessarily contributed to the length and expense of the proceedings. [Father's] submissions to this court, including multiple motions he filed after the appeal was decided, also unnecessarily increased the length and expense of appellate proceedings." *Ante* at A.2. "[Father] made a motion for sanctions against [Mother's] attorney, [but] [Mother's] motion for attorney fees was still pending [and] [Father] had already filed a response to that motion." *Ante* at A.2.

Erroneously, the Court of Appeals determined that "[Father] did not establish any valid objection" to Mother's requests for costs on appeal, *Ante* at A.1; "failed to establish that any award of sanctions against [Mother's] attorney is warranted," *Ante* at A.2; and "[his] motions are improper and unauthorized by the appellate rules." *Ante* at A.3. "[Mother's] motion for attorney fees is granted, in part. [Mother] shall recover $4,000 under Minn. Stat. § 518.14, subd. 1, because [Father] unreasonably contributed to the length and expense of appellate proceedings, plus an additional $500 for responding to [Father's] motions filed on November 7, 2022, [and] judgment costs in the amount of $300 when entering judgment for [Mother]. All other motions are denied. The clerk of the appellate courts shall not accept any additional filings, directed to this court, in this file." *Ante* at A.3. Judgment was entered.

The November 10 order, made in violation of the Constitution of the United States, impeded Father and M.M.B. from filing for further review, for mandamus relief, and for habeas relief, see 28 U.S.C. § 2244(d)(1)(B) – impediment undiminished. Thus, State remedies are exhausted or ineffective, and there is in part an absence of corrective process, discussed later. § 2254(b).

III. U.S. Sup. Ct. R. 20.4(a)

> "When instances which actually involve the question are rare or have not in fact occurred, the weight of the mere presence of acts on the statute book for a considerable time as showing general acquiescence in the legislative assertion of a questioned power is minimized. ... The fact seems

> to be that all departments of the government have constantly had in mind, since [] passage ..., that the question ... has not been settled adversely to the legislative action ..., but, in spite of congressional action, has remained open until the conflict should be subjected to judicial investigation and decision. ... While this court has studiously avoided deciding the issue until it was presented in such a way that it could not be avoided, in the references it has made to the history of the question, and in the presumptions it has indulged in favor of a statutory construction not inconsistent with the legislative decision of 1789, it has indicated a trend of view that we should not and cannot ignore. When on the merits we find our conclusion strongly favoring the view which prevailed in the First Congress, we have no hesitation in holding that conclusion to be correct."

Myers v. United States, 272 U.S. 52, 171-76, 47 S. Ct. 21, 43-45, 71 L. Ed. 160 (1926).

This Court is that "which is destined to unite and assimilate the principles of National justice and the rules of National decisions,'" *Justices*, 76 U.S. at 279–80, (citing & quoting The Federalist No. 82 (Hamilton)); that which, "in times of faction or oppression, the liberty of the citizen can be safe," *Bollman*, 8 U.S. at 82; not of the Federal Government but engrafted upon the Constitution itself "by the people of the States, who formed and adopted that Government, and conferred upon it all the powers, legislative, executive, and judicial, which it now possesses." *Ableman v. Booth*, 62 U.S. 506, 521, 16 L. Ed. 169 (1858).

"The gravity of the separation-of-powers issues raised ... and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render [this case] exceptional." *Boumediene v. Bush*, 553 U.S. 723, 772, 128 S. Ct. 2229, 2263, 171 L. Ed. 2d 41 (2008). "The parties before us have addressed the [fraud upon the court] issue. While we would have found it

informative to consider the reasoning of the Court of Appeals on this point, we must weigh that against the harms petitioners may endure from additional delay. And, given there are few precedents addressing what features an adequate substitute for habeas corpus must contain, in all likelihood a remand simply would delay ultimate resolution of the issue by this Court. Under the circumstances we believe the costs of further delay substantially outweigh any benefits of remanding to the Court of Appeals to consider the issue it did not address in these cases." *Id.*, 553 U.S. at 772–73, 128 S. Ct. at 2262–63.

The procedure on habeas corpus dictated by Congress is too precarious to be entrusted with bringing this petition's fundamental questions of civil liberty – the central principle on which the country was founded – as it would all but inevitably defeat them. A decision by this Court on the issues presented will advance the interests of justice, in many cases. The gravamen of the petition, that a child now five has spent their life deprived of liberty but forced to live in abusive custody, that this petition may well be their final hope for release, are interests and rights which require immediate vindication in conformity with the Constitution – the Constitution, the greatest failed experiment, if the proceedings below are permitted to stand.

"The facts of this case are~~, we must hope, extra~~ordinary." *Michael H. v. Gerald D.*, 491 U.S. 110, 113, 109 S. Ct. 2333, 2337, 105 L. Ed. 2d 91 (1989). Adequate relief cannot be obtained in any other form or from any other court. U.S. Sup. Ct. R. 20.1, 20.4.(a).

"Pending review of a decision failing or refusing to release a prisoner, the prisoner may be detained ... in other appropriate custody ..., as may appear appropriate to ... this Court." U.S. Sup. Ct. R. 36.3.(a); *see also* 28 U.S.C. § 2251(a)(1). "An initial order respecting the custody ... of the prisoner ... shall continue in effect pending review ... in this Court unless for reasons shown to ... this Court ..., the order is modified or an independent order respecting custody ... is entered." U.S. Sup. Ct. R. 36.4. "After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void." 28 U.S.C. § 2251(b).

M.M.B. requests that the Court transfer his custody to his father pending final determination by the Court of his petition.

IV. Appeal, 2022

> "We had a great time on Saturday, October 3, and [M.M.B.] returned to [Mother] glowing, happy, loved. So, when he came into my care on Sunday, October 4, not his usual fun-loving self but quiet and distant and breaking into tears several times on the drive to our house, I knew something was wrong. [Mother] had *not* left me a journal entry, so I had no clue what had taken place in the 16 hours since I had dropped [M.M.B.] off happy. When I took [M.M.B.] out of his car seat, he reached for me with immediacy. I picked him up and he wept on my shoulder uncontrollably, his body shuddering. I held him close, but I could not make sense of it. It was not the first time that [M.M.B.] had arrived at my parenting time out of sorts and later wept vigorously for a little while and then seemed OK for the rest of my parenting time. It wasn't until much later in the day that I found *gouges* in [M.M.B.'s] back where it looked like someone had dug fingernails into him. I sent [Mother] an OFW asking what they were. No response. No journal. No information. When I asked [M.M.B.] what they were from, all he would say is 'I'm not telling you! I'm not going

to tell you!' Seated at the kitchen table, [M.M.B.] standing a bit away from me, I demonstrated pushing my nails into my leg just above my knee, hard, and [M.M.B.] stepped toward me and said, "that's what Momma did." I called CPS and opened a case despite my fear that [Mother] would try to paint my actions as antagonism, as she had done before – deflecting and covering her abuse of [M.M.B.] – and that the Court might believe her false accusations and remove me from [M.M.B.'s] life, thus further endangering him. I put [M.M.B.'s] safety ahead of my own and made myself vulnerable. After [M.M.B.] had told me what had happened it was evident to me that he felt better."

Doc.192 at 30.

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"In October of 2019, the district court issued its findings of fact, order for judgment, and judgment and decree (J&D) dissolving the parties' marriage. Mother was awarded sole legal and sole physical custody of the child, and father was awarded restricted parenting time of nine hours per week.
The district court restricted father's parenting time because it found that additional parenting time would 'endanger the child's emotional health and impair his emotional development' and that 'maximizing time between the child and father could be detrimental, while minimizing time could be beneficial.' We affirmed the district court's restriction of father's parenting time. *Bachmayer v. Bachmayer*, No. A19-1929, 2020 WL 4434557, at *1 (Minn. App. Aug. 3, 2020).
Both parties filed postjudgment motions related to parenting time and custody."

Bachmayer v. Bachmayer, No. A21-1346, 2022 WL 1531733, at *1 (Minn. Ct. App. May 16, 2022), review denied (Aug. 9, 2022) (herein "*Bachmayer II*").

"In June 2020, the district court granted father compensatory parenting time," in "December 2020, [Mother] moved the district court to allow her to relocate with the child to her native country of Slovakia and to require that father's parenting time be supervised," and "Father filed a responsive motion seeking to modify custody by granting him sole legal and sole physical custody with equal parenting time, and an order holding mother

> in contempt for, in part, her failure to facilitate his compensatory parenting time. After a January 2021 hearing to consider the parties' motions, the district court limited father's in-person parenting time to supervised contact only and reduced his parenting time to one-half hour per week. In a March 2021 written order, the district court denied mother's relocation motion, ordered that father's weekly parenting time must be supervised and denied all of father's motions. In April 2021, father brought a motion for amended findings, which the district court denied."

Id.

The Court of Appeals later explained that "[b]y opinion filed May 16, 2022, this court rejected all arguments made by [Father]," and "[Mother] prevailed." *Ante* at A.1. This is supported in the opinion:

> "Father submitted approximately 600 pages comprised of affidavits and additional documents. Mother also submitted more than 200 pages comprised of affidavits and additional documents, all of which the district court considered. Additionally, the district court was intimately familiar with the claims made by the parties as it presided over this case through all proceedings from the J&D to the most recent order which we now review. Father, therefore, was not prejudiced by the lack of an evidentiary hearing, and any error in failing to conduct an evidentiary hearing was harmless."

Bachmayer II at *4. The district court, victorious, rewrote the facts by false claims it denoted "credibility determinations," untouchable under the Clearly Erroneous Standard of Review.

A.

"To make an initial showing of child endangerment, father, as the moving party, must allege a *prima facie* case to obtain an evidentiary hearing."

Bachmayer II at *2 (citing *Christensen v. Healey*, 913 N.W.2d 437, 440 (Minn. 2018)). The appellate court cited *Amarreh v. Amarreh*, 918 N.W.2d 228 (Minn. App. 2018), *rev. denied* (Minn. Oct. 24, 2018) six times. In *Amarreh*, "the court found that father's affidavit alleged that mother had interfered with his relationship with the minor children. At the prima-facie-case stage of the proceeding, father need not *establish* anything. Father need only make allegations which, if true, would allow the district court to grant the relief he seeks." *Amarreh*, 918 N.W.2d at 231. Well, the district court found that "[Father's] Our Family Wizard (OFW) messages and entries, as well as the pleadings he filed with the Court, show a fixation on proving Mother is abusive and a bad parent." Doc.226 at 4. At the prima facie stage, Father need only make allegations which, if true, would allow the district court to grant the relief he seeks. *Amarreh*, 918 N.W.2d at 231.

> "'The existence of endangerment must be determined on the particular facts of each case.' *Sharp v. Bilbro*, 614 N.W.2d 260, 263 (Minn. App. 2000) (quotation omitted) (rejecting custodial parent's position because it 'would encourage custodial parents to interfere or to continue to interfere with visitation in an attempt to prevail in a later custody dispute'), *review denied* (Minn. Sept. 26, 2000). 'A majority of courts, including Minnesota courts, agree [ ] that a sustained course of conduct by one parent designed to diminish a child's relationship with the other parent is unacceptable and may be grounds for denying or modifying custody.' *Lemcke v. Lemcke*, 623 N.W.2d 916, 919 (Minn. App. 2001), *review denied* (Minn. June 19, 2001); *see also*; *Nies v. Nies*, 407 N.W.2d 484, 487 (Minn. App. 1987) (noting district court's finding that 'consistent interference with visitation endangered the children's emotional health and development'); *Chafin v. Rude*, 391 N.W.2d 882, 886 (Minn. App. 1986) (affirming modification of custody based on expert's opinion that mother's inability or unwillingness to support healthy relationship between

son and his father posed real and serious danger to son's healthy development).

Interference with a parent-child relationship, or parental alienation, is sometimes referred to as 'psychological kidnapping,' and means 'any constellation of behaviors by a parent, whether conscious or unconscious, that could evoke a disturbance in the relationship between a child and the targeted parent.' Sandi S. Varnado, *Inappropriate Parental Influence: A New App for Tort Law and Upgraded Relief for Alienated Parents*, 61 DePaul L. Rev. 113, 120–21 (Fall 2011) (quotation omitted) (listing parental alienation techniques, including 'cutting off the other parent's access to information about the children, ... denying him information about the children's activities, or access to the child's medical or school records,' and limiting 'the other parent's contact with the child by refusing to allow telephone conversations or visits' (quotation omitted)).

When a district court finds a 'denial of, or interference with, a duly established parenting time schedule,' the court may modify custody. Minn. Stat. § 518.18(d) (2016). Minnesota law recognizes the importance of the parent-child relationship and the need to protect it against interference from other parties. *See SooHoo v. Johnson*, 731 N.W.2d 815, 820 (Minn. 2007) ('A parent's right to make decisions concerning the care, custody, and control of his or her children is a protected fundamental right.'); *In re C.D.G.D.*, 800 N.W.2d 652, 656 (Minn. App. 2011) (stating that grandparent seeking visitation rights 'must prove by clear and convincing evidence that visitation would not interfere with the parent-child relationship'), *review denied* (Minn. Aug. 24, 2011).

Here, the district court found that father's affidavit alleged that mother had interfered with his relationship with the children. The district court abused its discretion by concluding that father failed to allege facts which, if true, would make a prima facie case for modification because father sufficiently alleged emotional endangerment by providing examples of mother's substantial interference with his relationship with his children. We conclude that father's affidavit contains allegations that, if true, amount to child endangerment and that the district court erred by determining that no need existed for an evidentiary hearing on father's endangerment-based custody-modification motion. *See Harkema v. Harkema*, 474 N.W.2d 10, 14 (Minn. App. 1991) ('Where some dispute exists as to whether the present environment endangers the [children's] emotional development, an evidentiary hearing would be helpful and is justified.')."

Amarreh, 918 N.W.2d at 231–32. As *Amarreh* is a guide, endangerment is not only a physical concern; emotional trauma from interference in a child's relationships is a basis. Father's allegations of contempt established both bases.

The facts stated by the court in *Bachmayer II* were scant; notwithstanding this, from the date of the Divorce Decree, October 8, 2019, to December 2020, when Mother brought her last fake action, very many events took place.

B.

> "To no branch of legal science, perhaps, have the principles of a sound philosophy been applied so fully as to evidence; and with justice, because if truth be the great end of moral conduct, our first efforts should be to investigate the surest means of attaining it; and justly too, because every thing of character depends on what the designated tribunals shall declare to be the truth. Hence no branch of law rests more on principle than evidence. By it, Courts have been governed in their decisions, and it is not too much to say, that if they should find an arbitrary rule existing, which tended to obstruct the development of truth, no antiquity, no precedent, would induce them to adhere to it. If, however, there be one rule of evidence more absolute and controlling than all others—to which all others must yield—it is that the best evidence must always be produced; not one sort or another indiscriminately—not parol or documentary—but whatever, in the particular case, is the best. Suppose a man to be charged with stating falsely what he said to another; the testimony of those who heard what he did say would be the best. Suppose him to be charged with stating falsely what he had written to another; will it be doubted whether the writing itself, or the testimony of one who had read it, is the best? An arbitrary rule, which should sustain the latter in preference to the former, could not stand the test of judicial wisdom for a moment."

United States v. Wood, 39 U.S. 430, 432–34, 10 L. Ed. 527 (1840).

[4]On October 30, 2019, Mother left with M.M.B. for Slovakia. Ex.185 (Ex.GG) at 1. The parties had finally agreed on a schedule for remote contact for Father and M.M.B. *Id.* at 2-11. Mother **failed to attend** the November 2 call, completely unresponsive. *Id.* at 12-16. Mother was **late** attending the call on November 5, *Id.* at 20, at which Father saw that M.M.B. had sustained a substantial injury to his forehead. *Id.* at 21. Father requested a picture of the injury, stating that he could not see it well but that it "looked bad." *Id.* Mother told Father to "Please stop," and blamed M.M.B., stating that "[M.M.B.] scratched himself last night. I trimmed his fingernails today." *Id.* at 22. Mother often blamed "small knicks and cuts" on "[M.M.B.'s] nails," but "the current injury was much larger and looked more severe than" that. Doc.154 at 40. Mother did not provide a picture. Mother **did not attend** the November 9 call. Ex.185 (Ex.GG) at 24-25. On November 11, Mother "surprised" Father at 7:25 AM when he would normally have been commuting to work, stating that he could have "'a video call with [M.M.B.] right now. ... Otherwise, we'll resume the parenting time'" after their return to Minnesota. *Id.* at 28. On the video call, M.M.B. "pointed to the injury on his forehead, seeing himself in the video image." Doc.154 at 40; Ex.185 (Ex.GG) at 31. But Mother, unsolicited, followed up in a message that "'[M.M.B.] has a scab on his forehead because he scratched himself with his fingers during sleep. It is not an injury as I said last time.'" Ex.185 (Ex.GG) at 30. "The 'last time' was now

[4] *See* Doc.154 at 37-42

nine (9) days ago. The wound was still large and bruised. [Mother] continued to push that [M.M.B.] had inflicted the substantial wound on himself in his sleep with his baby fingernails." *Id.*; Doc.154 at 41. Father responded, "'The injury on his forehead looked pretty bad. [M.M.B.] seemed concerned about it during the call this morning. To be honest, it looked like something sharp hit him in the head hard.'" Ex.185 (Ex.GG) at 31. Recognizing that M.M.B. would be traveling during their arranged call on November 12, Father offered to reschedule for the next day. *Id.* at 27. Mother declined. *Id* at 28. It was six days before Father saw M.M.B. again. On November 14, Father asked Mother how M.M.B. was doing, but she did not respond. *Id.* at 32. These facts are uncontroverted. In paragraph **two** of its order, the district court found, pursuant to paragraph 6 of Mother's motion, that "Mother was permitted to travel internationally with the minor child for up to fourteen consecutive days so long as Father was informed of the dates, flight information, and contact information for the travel." Doc.226 at 1.

[5]On March 21, 2020, M.M.B. arrived at Father's parenting time with untreated, severe eczema. Ex.157 (Ex.D). Only after Father asked her about this, Ex.158 (Ex.C) at 3, did Mother seek medical assistance for M.M.B. Ex.156 (Ex.E) at 4. Following the appointment, Mother deceived Father about M.M.B.'s medical condition, Ex.158 (Ex.C) at 4, Ex.156 (Ex.E) at 1, and manipulated FamilyWise, Ex.155 (Ex.F) at 1 ("I see what you are saying. I don't think she told us the same

[5] *See* Doc.154 at 2-6.

thing."), to place Father's parenting time "on hold," Ex.158 (Ex.C) at 4. Months later, on June 18, Mother's counsel stated by letter, "[Father] will not be compensated for impetigo," Ex.162 (Ex.H), and listed the dates of "March 24th and March 28th." *Id.* But "in December 2019 and February 2020, I had received compensatory time when my parenting time was canceled due to [M.M.B.], [Mother], or me being ill." Doc.154 at 6.

[6]On March 27, 2020, FamilyWise closed due to the COVID-19 pandemic. During FamilyWise's closure, Father and M.M.B. had video calls. On April 3, Father asked Mother, "Would you be open to working with me to try to find a way for me to see [M.M.B.]?" Ex.166 (Ex.L) at 1. Mother replied, "[F]or right now we continue with the virtual time for [M.M.B] and you... We will resume visits with FamilyWise when possible." *Id.* at 2. M.M.B. expressed during their calls that he missed Father. Father asked Mother if she would "please speak English to [M.M.B.]," Ex.165 (Ex.K) at 2, during his calls with M.M.B., but Mother refused. **Mother frequently had altercations with M.M.B. and hung up on Father. Some minutes later, the call would resume with M.M.B. in a different mood.** Ex.165 (Ex.K). On May 5, Father messaged Mother, "It has been several months since [M.M.B.] and I were together... Would you consider the involvement of a third party to assist with exchanges?" Ex.166 (Ex.L) at 7. Mother replied, "We will

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[6] *See* Doc.154 at 7-20; Ex.164 (Ex.J) (Phone Call Table of lengths of calls); Ex.167 (Ex.M) (Letter, counsel-to-Father); Ex.168 (Ex.N) (Letter, opposing counsel's response).

resume parenting time when it is possible with Family Wise. You have scheduled FaceTime parenting time during covid 19 crisis. No third party. **The order of parenting time is in place for a reason.**" *Id.* at 8 (emphasis added).

[7]On May 13, 2020, FamilyWise reopened. Ex.171 (Ex.Q) at 1. From FamilyWise's closure until its reopening, Father was **denied court-ordered parenting time on March 28, 31, April 4, 7, 11, 14, 18, 21, 25, 28, May 2, 5, 9, 12.** Doc.154 at 7-20. Despite her prior assurances, Mother would not schedule Father's parenting time. Ex.171 (Ex.Q) at 3, 5 ("Your lawyer will share more insight about this with you once my lawyer addresses things during the conference."). Mother refused to provide an explanation for why she was not scheduling Father's parenting time, and Father requested that the district court intervene. Ex.169 (Ex.O).

[8]On May 15, 2020, Mother had messaged M.M.B.'s pediatrician's office for a description of "gnat bites." The pediatrician's office provided Mother with a cited medical definition: "**Insect bites cause itchy, red bumps.**" Ex.204 (Ex.K) at 1 (emphasis added).

[9]On May 20, 2020, a telephone motion hearing was held off the record. Doc.131. Mother used the hearing to ask the district court to terminate Father's parenting time **pending the conclusion of the COVID-19 pandemic**. Ex.161

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[7] *See* Doc.154 at 20-23.

[8] *See* Doc.193 at 33.

[9] *See* Doc.154 at 20-23.

(Ex.G). The district court ordered Father's parenting time to resume, immediately. Accordingly, Father was **denied parenting time on May 16 and 19**.

On May 23, 2020, Father had his first parenting time since March 21. Beforehand, Mother wrote in OFW, "[M.M.B.] has bug bites around head and neck from black flies (gnats) - dr knows about these." Ex.207 (Ex.N). When M.M.B. arrived at his care, Father found swaths of open and oozing, painful wounds all along M.M.B.'s neck just above the hairline, more irritated scabs on his forehead and a massive scab on the top of his scalp. Ex.206 (Ex.M) at 1-5. The description from M.M.B.'s pediatrician's office does not describe the disturbing wounds seen on M.M.B. which Mother consistently referred to as "bug bites" when communicating with Father regarding these injuries. Mother inflicted wounds on M.M.B. by picking at his skin and gaslighting Father by referring to these injuries as bug bites. *See* Doc.193 at 33. "This has been an ongoing behavior constituting **physical and likely emotional endangerment** to [M.M.B.]." Doc.232 at 13-14 (emphasis added).

On June 2, 2020, the district court, issued its order, **making no negative finding against Mother**, attributing Father's two months of lost parenting time to COVID-19, and finally reinstating Father's parenting time and granting him compensatory parenting time. Doc.135. Mother disregarded COVID-19 precautions following the hearing. Ex.174 at 2 (Ex.T). *See also* Doc.154 at 22, 28, 31. Father's reinstated parenting time had new requirements. To exercise his weekday parenting time, he had to seek out a "private exchange provider."

Doc.135. His weekday parenting time and compensatory parenting time required that the parties "cooperate" to set a schedule. *Id.* Father had been ordered to pay all associated costs. *Id.* In spite of Father's best efforts, Mother made the scheduling of Father's court-ordered parenting time as difficult and stressful as possible. Doc.154 at 23-33. Mother set the schedule, then changed the schedule as she pleased. *Id.* Mother granted Father parenting time, then denied him parenting time as she pleased. *Id.* Mother made maximally expensive schedules. *Id.* at 24, 32. Father suggested realistic schedules that were workable for both parties, but these were denied or ignored by Mother. Doc.154 at 24-26. Mother's counsel sent Father a letter stating that if he didn't accept Mother's schedule, he would forfeit the parenting time she had offered. Doc.154 at 24; Ex.162 (Ex.H). Minn. Stat. § 518.175, subd. 6(c)(3) states, "When compensatory parenting time is awarded, additional parenting time must be... at a time acceptable to the parent deprived of parenting time."

On June 13, 2020, Father's video call with M.M.B. lasted over 3 hours. M.M.B. did not want to end the call with Father. Doc.154 at 28; Ex.164 (Ex.J) (Phone calls table); Ex.177 (Ex.W) ("Wow. That was a really long phone call. Almost 3 hours. I think that says a lot about how [M.M.B.] is feeling."). In an effort to end the call, Father calmly assured M.M.B. that he and Mother were going to talk and find time for them to be together. Doc.154 at 28. Seated on Mother's lap, M.M.B. broke into tears, weeping, saying over and over, "Momma doesn't want to talk to Dada!" *Id.*; Ex.177 (Ex.W) at 13. The FamilyWise program director

had written a letter in support of Father's efforts to schedule his significant backlog of compensatory parenting time. Doc.154 at 33; Ex.180 (Ex.AA). Following the call, Father suggested to Mother that they try one of the options presented to them by FamilyWise's program director. Mother refused: "**The only available exchange time is Tuesday 4:00pm-7:00pm if you're interested.**" Doc.154 at 28; Ex.177 (Ex.W) at 12 (emphasis added).

On August 1, 2020, M.M.B. arrived at Father's care in discomfort. Father discovered that "his butthole was deep red and **between his butthole and [testicles] was an oval about 1" in length and 1/2" in width that was bright red, raised, and looked either painful or itchy**." Doc.193 at 35; Ex.202 (Ex.I) at 1. Father was concerned that Mother was unaware of the situation and informed her. He suggested that application of "A&D butt cream" may help M.M.B. *Id.* Mother did not reply. In her affidavit, Mother claimed that Father's concern for M.M.B. was actually a personal attack on her. She stated that Father was "implying that I was somehow failing in this area." Doc.146 at 8. Mother didn't express concern for M.M.B.'s condition, but, rather, criticized Father, alleging impropriety for having described M.M.B.'s "bottom in disturbing detail." *Id.* "I don't understand why [Mother] raised my comments as an issue in her *affidavit*. I feel that I handled things well, but that [Mother] did not. **I am autistic though**. I may have misunderstood or miscommunicated something." Doc.193 at 37 (emphasis added). One week later, at pickup, M.M.B. had feces "smeared between his buttcheeks" and in his underwear. Ex.202 (Ex.I) at 4. Father rushed

him home to change him. *Id.* Father reached out to Mother about this, stating that the same issue had occurred the week before, and asked her, "Can you catch me up on what's going on with [M.M.B.]?" *Id.* at 5. Mother's entire reply was: "He must have had a shart." *Id.* at 6; *See* Doc.193 at 36-37.

On August 12, 2020, M.M.B. sustained a serious injury to his testicles while on vacation in northern Minnesota with Mother and a male companion.[10] The doctor's notes were submitted as evidence by Father in support of his request to change custody. Ex.188 (Ex.II).

On Friday, August 14, 2020, at 9:20 AM, Mother checked in to Rapid Clinic Urgent Care in Grand Rapids, MN. *Id.* at 1. Mother told the doctor that M.M.B. had a 24-hour erection which dissipated that morning, but his testicles were still swollen. *Id. See* Ex.189 (Ex.JJ) at 1-2 (An erection lasting four hours is an emergency situation; "non-ischaemic priapism, rare in children, **usually due to trauma**") (emphasis added). Mother claimed to not know the cause of M.M.B.'s injury and suggested that maybe M.M.B. grabbed his testicles in the bathtub and caused this injury to himself, Ex.188 (Ex.II) at 1, but she reported that this "started ... after they took a drive from the Twin Cities up north. Yesterday It seemed to be a little bit worse." *Id.* The cause remains unknown. "No known

[10] Father learned this from the doctor's notes. Ex.188 (Ex.II) at 1 ("It started on **Wednesday** evening") (emphasis added).

other trauma." *Id.* The doctor "did consider the possibility of nonaccidental trauma." *Id.* at 3, 5.

On August 15, 2020, Mother **failed to attend** a pre-arranged telephone call between Father and M.M.B., but during this time, viewed Father's messages and did not respond. *Id.* at 42-44; Ex.187 (Ex.HH) at 10-12. Mother downplayed and misrepresented this incident in her affidavit, Doc.146 at 9-10, and did not provide the Rapid Clinic doctor's notes as evidence.[11]

On August 16, 2020, Mother informed Father that M.M.B. had been injured, had seen a doctor, that the doctor was unconcerned, and that M.M.B. was fine. Ex.187 (Ex.HH) at 18. Mother delayed two and a half days after M.M.B. was injured before seeking medical care and treatment and delayed four days after M.M.B. was injured before informing Father of the injury. Doc.154 at 42. "**[Mother] was neglectful** in her handling of [M.M.B.'s] injury. The medical doctor who eventually examined [M.M.B.] suggested the injury was caused by 'nonaccidental trauma.' A thorough investigation of this highly concerning event is conducted in my Affidavit for Contempt of Court. ... **[Mother] endangered [M.M.B.]**." Doc.232 at 13 (emphasis added). "[Mother] did not *ever* schedule a follow up appointment. [Mother] did not follow the care plan of the doctor in Grand Rapids. [Mother] lied and lied and lied and now she lied here,

[11] Father obtained the doctor's notes by contacting the clinic at which M.M.B. had been seen. Ex.188.

too. There are so many lies [Mother] can't keep them straight even in her own *affidavit*." Doc.193 at 45.

On August 25, 2020, Mother scheduled work during Father's Tuesday parenting time and denied him compensatory parenting time. Doc.154 at 23-24; Ex.175 (Ex.UU) at 13.

On October 4, M.M.B. arrived to Father's care emotionally devastated after having been very happy just the day before, with gouges in his back from Mother's fingernails. **Father informed CPS**. Doc.154 at 30; Doc.232 at 14 ("[Mother] endangered [M.M.B.]"); Ex.178 (pictures & messages of Mother's abuse of M.M.B.).

On October 5, according to Mother, M.M.B.'s daycare called her because a CPS investigator was there wanting to "interview" M.M.B. Doc.146 at 13. Mother "immediately sought advice from counsel."[12] *Id.* Mother then permitted the "day care provider to allow the interview to move forward." *Id.*

On October 6, Mother states that she "had a meeting with CPS. The investigator told me they were investigating claims that I physically abused [M.M.B.]. ... The investigator was aware of the **two** prior reports **accusing me** of abuse." *Id.* "I am now anxiously awaiting the **third** child protection **investigation**

[12] However, the statement of fees provided by Mother's counsel does not have any charge associated with October 5, 2020 – **the entry for "10/05/2020" is a deposit of $5000**. Doc.250 at 5 (emphasis added). In fact, there is no mention of CPS in Mother's counsel's statement of fees until the entry dated December 28, 2020.

alleging abuse *by me*." *Id.* at 15 (emphasis added). Mother accused Father of being "behind all three reports." *Id.* Father responded, "Interestingly, I am only aware of two (2) investigations. I am not sure if I have confused myself in this, but to the best of my knowledge, I am not responsible for one of the three investigations [Mother] claims to have been the subject of." Doc.193 at 57 (emphasis added). On the January 5, 2021, telephone hearing, Mother's counsel stated that M.M.B. "is only three years old now" and "we are [on] the third child protection file" – including that which resulted from "the domestic assault that happened between the parties and [Father] was charged"[13] – "and I want to address that because [Father] did believe that there were only two." Trn.224 at 5. "We had child protection -- Mary Carey of child protection was the person that was the investigator. That is mentioned in Bob Hyland's report. She had given information January of 2018. Then there was the finger-burn[, chipped tooth, and "a black eye, with an open wound the size of a dime, bruise below his left eye, open wound, approximately an inch," *see ante* at 120-126] incident[s] [Father] talks about. That happened in 2019, and that was going on about the same time as the trial, and resolved itself after the trial. Now, in 2020, we've got a CPS investigator ... Kao Mao [phonetic], I think is the pronunciation. So we've had different child protection investigators looking at this couple and looking at this situation in this child's very brief three-year life." *Id.* at 5-6.

[13] With disorderly conduct. *See* Doc.95 at 6.

"On November 24, 2020 [Father] did not have parenting time as [M.M.B.] was quarantined due to a COVID-19 exposure," Mother stated. Doc.146 at 15. She also stated that Father wrote "that I [Mother] was violating the Court order by not answering the phone, and [Father] stated '**I am worried that you may have harmed him [M.M.B.] again**'. I reassured [Father] that he would have a call with [M.M.B.], but was and still am concerned about [Father's] mental health. [] His accusations and negative messaging are alarming, and he is clearly relaying his thoughts and concerns about me to [M.M.B.]." *Id.* (emphasis added). The district court found this, albeit on altered grounds: "[Father] is clearly exposing [M.M.B.] to his excessive hostility to [Mother] by asking about [Mother's] care and physically examining him at every turn." Doc.226 at 6.

On November 25, 2020, Father asked if he could have a brief call with M.M.B. on Thanksgiving. Ex.172 (Ex.R) at 2. **Mother replied that he could not**. *Id.* at 3; Doc.154 at 49. This fact is uncontroverted.

"On December 4, [Mother] informed me that I suddenly had 5 more hours of compensatory time after telling me on November 1 that I had no more compensatory time." Doc.154 at 31; Ex.179 (Ex.Z) at 1-2. Mother stated, "I touched base **with my lawyer** about the order in regards the compensatory time and it appears to be that **you have 5 hrs remaining** to meet the 66hrs for covid 19 lockdown. If you would like to schedule these 5 hrs, we can do 12/29 11:30-7:30pm." Ex.179 (Ex.Z) at 2 (emphasis added). "I asked [Mother] to explain what had led to her discovery of these new hours. [Mother] did not respond."

Doc.154 at 31; *See* Ex.179 (Ex.Z) at 4. Mother's counsel's fees statement does state for December 2, "emails w/ [Mother] re:[Father] and compensatory time disagreement." Doc.250 at 5. Mother later stated that "[Father] enjoyed his last 5 hours of compensatory parenting time to meet his 66 hours on 12/29. He was also compensated for parenting time he missed in August for my trip to northern Minnesota which he exercised on August 30th." Doc.215 at 1.

From March 24 until May 20, Father had not received 75 hours of parenting time, but Mother insisted, "The judge awarded you with 66hrs of compensatory time." Doc.154 at 25. Ex.175 (Ex.U) at 4.

Mother refused to cooperate with Father as she was required to by the June 2020 order. Mother interfered with M.M.B. and Father using the custodial authority bestowed on her by the district court. Mother constantly abused, neglected, and endangered M.M.B., and CPS opened another investigation into her.

Father brought these facts before the district court. After Father had exercised nine or more hours of parenting time per week for over two years and three months, the court all but eliminated his parenting time – slashing it by 86% from 10.5 hours to 1.5 hours. The district court ordered Father's less than 1% parenting time be supervised "at the high level of supervision." Doc.223 at 2; 226 at 7. The district court punished M.M.B. for his father's having respectfully and appropriately attempted to defend his statutory parental rights and seek relief for M.M.B. from Mother's abusive custody of him.

> "How could a Court, in these circumstances, take the imperfect testimony of the 'living witness' under a technical rule, in preference to the incontrovertible written document; how could it reject what is primary and excellent, for what is secondary and inferior?"

Wood, 39 U.S. at 434.

C.

The appellate court found Mother's allegations in her affidavit, that the parenting time Father **"was unable to exercise due to COVID-19" was "66 hours,"** and that she had "ensured that father could exercise **all** of his compensatory parenting time ... **in a timely manner.**" *Bachmayer II* at *2 (emphasis added). Father, however, was alleging that he was due another **9 hours** for the same period. When the issue came before the district court, it construed its order in favor of Mother's interpretation.

"Whether a provision in a dissolution judgment and decree is clear or ambiguous is a legal question," *Suleski v. Rupe*, 855 N.W.2d 330, 339 (Minn. Ct. App. 2014), that Father raised.

> "The district court's June 2020 order required the parties to 'cooperate in arranging for compensatory parenting time for Father' to recoup parenting time lost due to the COVID-19 pandemic.[14] However, the order specified neither an amount of compensatory parenting time for father nor when the compensatory parenting time was to occur. In an affidavit,

[14] "The district had ordered parenting time exchanges be supervised by a third-party organization, which closed temporarily during the COVID-19 pandemic."

> mother stated that she 'ensured that [father] could exercise all of his compensatory parenting time (66 hours) that he was unable to exercise due to COVID-19 in a timely manner.' Because father failed to allege that mother was in noncompliance with the district court's order, we discern no abuse of discretion in the district court's denial of father's contempt motion."

Bachmayer II at *2 (citing *Hopp v. Hopp*, 156 N.W.2d 212, 216 (Minn. 1968) ("In exercising civil contempt powers in divorce cases, the only objective is to secure compliance with an order presumed to be reasonable.").

On December 7, Mother claimed that, "[i]n May 2020 [Father] requested a teleconference to address the issue of parenting time during the COVID-19 pandemic. [Father] requested and was awarded 66 hours of compensatory parenting time due to missing in person parenting time during the Family Wise closure." Doc.146 at 6. She alleged, "I have diligently followed the Court's order regarding parenting time and have made information regarding [M.M.B.'s] child care and health care readily available to [Father]. **I ensured that [Father] could exercise all of his compensatory parenting time (66 hours) that he was unable to exercise due to COVID-19 in a timely manner.** I have tried to co-parent with [Father] and be flexible and open to parenting time options given the parameters of the Court Order." *Id.* at 4 (emphasis added).

Seven days prior to the January 5, 2021, hearing, "[o]n December 29, 2020 [Father] brought another responsive motion asking the court to deny the relief requested in [Mother's] motion." *Ante* at E.265. "On December 30, 2020 [Mother] brought a responsive motion asking that the Court deny [Father's]

requests in his December 22, 2020 motion," *Id.*, – *and* December 29 motion. While Father's motions were timely, Minn. R. Gen. Prac. 303.03(a)(2) (new issues due at least 14 days before the hearing), Mother's response was late. 303.03(a)(3) (responses "to issues raised in the initial motion [or] to a motion that raises new issues [due] at least 7 days before the hearing").

In her late responsive affidavit, Mother disputed (1) her denials of compensatory parenting time by stating that "[Father] enjoyed his last 5 hours of compensatory parenting time **to meet his 66 hours on 12/29**," Doc.215 at 1 (emphasis added), and (2) that she had denied him parenting time by stating, "[Father] **continues** to observe his regular parenting time. Thus he has not missed 7 weeks of parenting time." *Id.* at 2 (emphasis added). This absurdity was converted to truth by the district court.

"If responsive documents are not properly served and filed in a nondispositive motion, the court may deem the motion unopposed and may grant the relief requested without a hearing." Minn. R. Gen. Prac. 115.06; 303.03(b) (same). "If irreparable harm will result absent immediate action by the court, or if the interests of justice otherwise require, the court may waive or modify the time limits established by this rule." *Id.* at 115.07. Father filed an objection. Doc.218.

"A defendant in two answers to a bill in equity, swears unequivocally to a fact, and as positively against it," commits perjury. *Wood*, 39 U.S. at 441.

The district court, in denying the contempt motion, found that "Mother has provided sufficient compensatory time," Doc.226 at 6, that "Father shall not *(sic.)* entitled to any compensatory parenting time for the period preceding January 5, 2021," *Id.* at 7, and that Father "has been" and – despite its having confined his parenting time to 1.5 hours weekly "at the high level of supervision," Doc.223 at 2; 226 at 7 – "**continues** to be granted compensatory parenting time on a weekly, *(sic.)* specifically on Tuesdays." Doc.226 at 6 (emphasis added). Notwithstanding its affirmance, the appellate court found Mother's "failure to facilitate [Father's] compensatory parenting time." *Bachmayer II, supra* at 29.

Post-trial, Mother's counsel stated that, **regarding the "June 2, 2020 order reinstating Fathers *(sic.)* parenting time**," "the Court found ... 'there is no evidence that Mother has interfered with or denied parenting time.'" Doc.238 at 2-3 (emphasis added). And so, on appeal, Mother's counsel made claims such as, "[Father's] regular parenting time schedule was not modified" by the June 2020 Order, Resp.Br at 28, which "defines the acts to be performed by [Mother] as 'cooperating in arranging compensatory parenting time for [Father]',[15] with no further express command or prohibition." *Id.* at 15 (quoting Doc.135). The June 2 order contains a modified parenting time schedule. Doc.135 at 2. *See* Reply.Br at 21-22 (discussing). On this false claim, Mother's counsel, by misapplying the precedent she plagiarized, argued that Mother could not be

[15] Father alleged this as one ground for contempt. Doc.153 at 2; Doc.154 at 26-33.

found in contempt. *See Id.* (discussing). Mother's counsel extended these false claims to support her statement that "[Mother] complied with the [June 2020] order as written." Resp.Br at 15; *see* Reply.Br at 22 (discussing). Not satisfied to rest on these claims, Mother's counsel also claimed that Mother had been found indemnified of her violations of the parties' court orders, Resp.Br at 8 ("finding that [Mother] had complied with the court's order(s) regarding parenting time. (DOC ID#226)"); *Id.* at 12 ("found that [Mother] complied with all court orders"); *Id.* at 13 ("found that [Mother] did not willfully violate any court orders"); *Id.* at 15 (found that "the reason [Father] was owed compensatory parenting time was ... by no fault of [Mother]. (See DOC ID#135)"); *Id.* at 20 ("found that [Mother] had not denied [Father] parenting time"); *Id.* at 24 (the same), although no such finding exists. *See* Reply.Br at 19 (discussing). But Mother's counsel approaches the truth when she states that Father argued "that [Mother] was in constructive civil contempt by denying him parenting time, in violation of the June 2, 2020 order awarding him compensatory parenting time," Resp.Br at 12; that "[Father] claims he was denied reasonable telephone contact on November 2, 2019, November 9, 2019, and November 12, 2019. (DOC ID#154)," *Id.* at 13; that "[t]he June 2, 2020 Order awards [Father] compensatory time in an unspecified amount and orders the parties to cooperate in arranging the time. (DOC ID#135)," *Id.* at 14; that "[Mother] technically was in violation of the parenting time order(s)," *Id.* at 14, and that "**The District Court did not find that [Mother] willfully denied [Father's] parenting**

time to support a change of custody or parenting time."[16] *Id.* at 23. Post-appeal, Mother's counsel insisted that the district court denied Father's motion for contempt for "finding that [Mother] complied with the court's order(s) regarding parenting time." *Ante* at E.266. No such finding exists.

The district court's order is false, and Mother committed perjury. Mother was refusing to honor any time that she had denied Father and M.M.B. for *other* reasons than under the guise of FamilyWise's closure during "the COVID-19 pandemic," such as the **9 hours** prior to FamilyWise's closure she denied Father under the pretense of impetigo, *see supra* at 14, and the **9 hours** following FamilyWise's reopening she denied Father during the pendency of the May 20, 2020, telephone conference with the district court. *See supra* at 16. Father failed to understand that. Mother's counsel oscillated between these two explanations in excusing her and Mother's denials of the disputed 9 hours. In June 2020, Mother's counsel alleged "66 hour[s]," and that "[Father] will not be compensated for impetigo." *See supra* at 15; *see also* Doc.154 at 5-6. Following Father's December 22, 2020, affidavit, Mother's counsel *included* Father's parenting time on March 24 and March 28, 2020, – the dates previously alleged unrecoverable for impetigo – in the alleged "66 hours" Mother had provided for, now blaming Father:

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[16] The multitude of false and misleading statements and frivolous arguments regarding the issue of contempt, not made without the support of the district court's orders and upheld on appeal, are discussed in Father's appellate reply brief. *See* Reply.Br at 17-24.

> "[H]e says **on May 13th** that he was due compensatory time of 66 hours. That is his OFW entry to [Mother] on that date. That's where we got the 66 hours. The 66 hours were also mentioned, I believe, to the Court in a phone conference, in correspondence we had with his prior counsel. So we were operating on the 66 hours and trying to compensate him for that while still following the prior schedule."

Trn.224 at 13 (emphasis added). But the claim that Mother and her counsel had been operating under, following the June 2, 2020, order, was, as communicated by Mother, "The judge awarded you with 66hrs of compensatory time **during the lock down**," Ex.175 (Ex.U) at 4 (emphasis added); *see also* Ex.179 (Ex.Z) ("I touched base with my lawyer ... and it appears to be that you have 5 hrs remaining to meet the 66hrs **for covid 19 lockdown**." (emphasis added)).

According to Mother's counsel, "[W]e got the 66 hours" from Father's "May 13th claim." Trn.224 at 13; *See* Ex.171 (Ex.Q – Father's OFW message) at 1 ("I am currently due compensatory time of 66 hours."). However, on May 14, *See supra* at 16, Mother *refused* Father's request to schedule his May 16 parenting time with FamilyWise – *now open* – for the reason that "**The stay-at-home order expires May 18th and it is important that we follow through.**" Ex.171 (Ex.Q) at 5 (emphasis added). Subsequently, Mother denied Father his 6 hours of court-ordered parenting time on May 16, 2020, a Saturday, allegedly due to the "stay-at-home order." The district court's order states, "On May 11, 2020, Father submitted correspondence to the Court requesting a telephone conference relating to parenting time exchange issues **due to COVID- 19**." Doc.135 at 1 (emphasis added).

Thus, per Mother's counsel, the parties agree that Father is due the 9 hours he did not receive on March 24 and March 28, and all sources agree that Father is due any parenting time not received and attributed to COVID-19. Thus far, that tally is **72 hours**. Father's parenting time table, Ex.176 (Ex.V), states, in the "TOTAL ACCRUED" column for "COMPENSATORY TIME," that, on "2020-05-16", he had "**72h** 0m" outstanding. On "2020-05-19", this tally is **"75h 0m"**. *Id.* (emphasis added).

As Mother stated, "[Father] resumed in person parenting time on or about May 23, 2020." Doc.146 at 6. Thus, Father did not receive parenting time on May 19. *See supra* at 16. The only explanation provided by Mother for this is, "The teleconference is scheduled next week. Your lawyer may address what needs to be. We will resume the exchanges after the conference. Until then, [M.M.B.] will have FaceTime with you." Ex.171 (Ex.Q) at 3. Mother's counsel argued that Father's non-receipt of his May 19 parenting time was **not** due to COVID-19, in which case this was a denial of three hours of Father's parenting time, without cause. But if it is attributed to COVID-19, then Father is due the 75 hours he claimed throughout.

Mother's counsel argued:

> "So I do not -- and I've looked at it a number of times. I do not fully understand [Father's] exhibit -- and I'm trying to figure out which number that is. That is his **Exhibit V** to his first affidavit is the spreadsheet he made of parenting time where he tallies up that he believes he's due **77 hours**, somehow. I -- you know, it really -- for us, it's confusing. But if the Court believes he is still due some compensatory time, we can -- we can certainly talk about that. But to have contempt, there needs to be an

> intent to not follow a court order, and our client was certainly trying to follow the court order."

Trn.224 at 13 (emphasis added). The result is that Father's "spreadsheet he made of parenting time" stated ***75*** *hours* due, Ex.176 (Ex.V), and everyone agreed. It is undisputed that Mother denied Father *at least* 9 hours of parenting time. Mother denied Father parenting time on March 24 and March 28, used COVID-19 and the district court's decree to deny him parenting time from March 31 - May 16, and denied him parenting time on May 19, 2020.

> "So we understood that he was caught up on **all of the 66 hours and his regular parenting time**. If Your Honor's intention was that he should have the ten-and-a-half hours plus compensatory time, then we indeed probably should look at that and find out if he's due some hours. But there was no intent there."

Trn.224 at 14 (emphasis added).

> "[T]o me, a denial is something that is ordered and being refused. So it does not rise to the level of what [Father] is presenting it as. Because according to **our** client's calculations and schedule, he has received all of the parenting time as of December 29th. **It did take a while to fill in some of those pieces there**."

Id. (emphasis added). Mother and her counsel and co-counsel all worked out how they would explain away that they denied Father and M.M.B. their rightful time together throughout 2020, certainly from March 24 through the January 5, 2021, hearing. It took them some time, but they figured it out. The district court erred as a matter of law in construing its unambiguous order as ambiguous.

> "So for those reasons -- and we did attach a legal memorandum, Your Honor, that, I believe, outlines the statutory provisions in following 518.175 -- we do believe relocation is appropriate and, in this case, is supported by the evidence. The biggest piece that I would like to point out in closing is part of the statutory requirements is we need to take a look at whether there's an established pattern of conduct of the relocating parent either to promote or thwart the relationship and the non-relocating parent. And she -- **my client has done everything she can to try to nurture and continue this relationship, while, on the other hand, the non-relocating parent, [Father], keeps doing everything he can in -- through other parties and through the child, most disturbedly,** *(sic.)* **to not promote or to thwart the parent-child relationship that [Mother] has with her son, [M.M.B.].**"

Id. at 15 (emphasis added).

Though the district court stated it was not concerned, Doc.226 at 4, Mother's counsel had been.

> "So we **[inaudible due to beeping interruption]** requesting we do not believe – by his first submissions I do not believe those were properly submitted. That is not the proper way to go about getting an Order to Show Cause. The Order to Show Cause unless Your Honor signed one of those that we're unaware of, the one we were served is an unsigned Order to Show Cause."

Trn.224 at 12 (emphasis added). The district court stated, "There was no Order to Show Cause signed." *Id.*

"Where the court or its officers are not involved, there is no fraud upon the court." *Lockwood v. Bowles*, 46 F.R.D. 625, 632 (D.D.C 1969). The privilege of one may not be extended to another so as to secure to them immunity to conceal facts she would have otherwise no option but to testify to. *Brown v. Walker,* 161 U.S. 591, 600, 16 S. Ct. 644, 648 (1896). "A witness having voluntarily and without

objection testified to part of a transaction in such a manner as favorably to affect the case of one side, cannot afterwards object to tell the remainder of the story, when such remainder might afford an explanation or an answer to the part already told. And this is again true, even though telling the remainder will tend to convict the witness of a crime." *Rea v. State of Missouri*, 84 U.S. 532, 533 (1873). The adjudicating of rights necessitates an adversarial proceeding "to the end that the truth might be ascertained." To this end, it is mandatory that the parties to the case "have full opportunity to present evidence bearing on the charges and to participate in the examination and cross examination of witnesses and in the argument before the court." *Root Ref. Co. v. Universal Oil Prod. Co.*, 169 F.2d 514, 520 (3d Cir. 1948).

"The district court denied the contempt motion because, it concluded, father failed to allege a provision of the district court order with which mother failed to comply." *Bachmayer II* at *2. The district court found this following a telephone motion hearing, Doc.226 at 2 ("Both parties appeared for the telephone motion hearing. Immediately following the hearing, by separate Findings of Fact, the Court ordered [Father's] parenting time to be supervised. All other issues before the Court were taken under advisement and are considered herein."), at which it instructed Mother's counsel to *not* address Father's allegations of contempt, "So, [Mother's counsel], ... I think that we can still do it just in two different arguments. If you would just like to address [Mother's] request to the Court," Tr.224 at 3, and told Father to "cover both your

motion for contempt and change of parenting time and also [Mother's] request to relocate," *Id.* at 15-16, but did not mention anything about addressing Mother's request to restrict his parenting time, and discouraged Father from making a through presentation of his case with false assurances such as that it had "reviewed all of your pleadings and the attachments," *Id.* at 2, 15, 16, 27, and asked Father to end his argument so that it could make its judgment, which it had already decided against M.M.B. *Id.* at 27.

Mother was adamant that Father's motion for contempt was "for denial of parenting time." *See supra* at 29. Father alleged by affidavit that Mother violated the parties' court-ordered parenting time schedule by denying him his court ordered parenting time, in entirety, on 18 occasions in 2020. Doc.154 at 2-23. Although it has never been disputed that Father *never* missed a parenting time that Mother did not deny him, in the March 2021 order, the district court found that, "[s]ince the parties' separation in mid-2018, Father has consistently exercised parenting time with [M.M.B.]." Doc.226 at 2.[17] The time M.M.B. had with his father was woefully *in*consistent.

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[17] This finding was contingent on the district court's conclusion, "Video and Skype **parenting time** is not comparable to in person parenting time." Doc.226 at 3 (emphasis added). "[E]lectronic-communication systems and the emergence of video-call programs such as Skype™ enhance the ability to maintain long-distance relationships," but "electronic communication is not parenting time," and "we observe that where such communications are recognized as a way to alleviate parent-child separation ..., some provision for such communication should be an

On March 23, 2020, Mother stated to Father, "**[Your] parenting time is on hold. There is no more discussion.**" Doc.193 at 53. On April 10, Mother declared, "**You may** call [M.M.B.] every tuesday *(sic.)* and Saturday via FaceTime at the beginning of your parenting time which is Tuesday 4:30pm and Saturday 9:45am." *Id.* at 54. After the district court gave Mother control over Father's parenting time schedule, on August 6, Mother dictated, "**You may** schedule your ordered parenting time every Tuesday beginning 09/01/2020 at 4:30-7:30pm. If that's not a good option, every other Sunday, 9:30am-4:00pm (6,5hrs) beginning 09/06/2020. Thanks." *Id.* Mother educated Father on August 18, "Scheduling one work day per week will not lower the cost of daycare. Daycare rates are not like a babysitter per hour or per day. I encourage to do some research if needed. Thank you." *Id.* And Mother frequently expressed as she did on October 12, 2020, "**The schedule is being changed. There is no exchange on Sunday** for the compensatory time. **I proposed the new schedule. Your time is not denied.** Please **stop creating untrue scenarios [of] denied parenting time.**" *Id.*

> "[M.M.B.] feels safe with me. [M.M.B.] feels loved by me. I treat [M.M.B.] with respect. I indulge [M.M.B.] in his interests. I am available to [M.M.B.] whenever he needs me. **I never miss our parenting times.** I meet [M.M.B.'s] needs. In making decisions, I consider [M.M.B.'s] needs *first*. I educate [M.M.B.]. I taught [M.M.B.] how to cross the street. I taught [M.M.B.] that cars are dangerous. I taught [M.M.B.] to keep his eyes forward when

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enforceable element of the order." *Hagen v. Schirmers*, 783 N.W.2d 212, 219 (Minn. Ct. App. 2010).

> running so he doesn't fall. I had the horrific experience of watching [M.M.B.] **try** to run across the street from corner to corner, and I calmly, but sternly, made *certain* that he understood *why* that was dangerous and that I had the expectation of him to *never* do that again. [M.M.B.] understood."

Doc.193 at 12 (emphasis added).

Mother's counsel did not approach Father's specific allegations of contempt but, at the January 5, 2021, telephone hearing, proposed that, alternatively, the district court had made an error in its order, that Mother had identified the error, and that Mother had been correct to deny Father one-and-one-half hours of *court-ordered* parenting time, every week for the preceding six months:

> "[I]n your order, there was a differential in what you ordered versus the original decree, and it was apparently my client's understanding that new parenting time, which added -- **made it ten-and-a-half hours instead of the nine hours**, that that was taking into consideration the compensatory time."

Trn.224 at 12 (emphasis added).

Mother offered no proof for anything she or her counsel alleged[18], but by her own admission, Mother, without warrant, had denied and interfered with Father's duly established parenting time for six months. "When a district court finds a 'denial of, or interference with, a duly established parenting time

[18] *See* Minn. R. Gen. Prac. 309.01(c) ("Any responsive affidavit shall set forth with particularity any defenses the alleged contemnor will present to the court")

schedule,' the court may modify custody." *Amarreh*, 918 N.W.2d at 232 (quoting Minn. Stat. § 518.18(d)). **But the district court had to "find" this, and it did not.**[19] The district court found, "**there is no evidence that Mother has interfered with or denied parenting time.**" Doc.226 at 6 (emphasis added).

D.

In the Minnesota case, *McElrath v. McElrath*, 120 Minn. 380, 139 N.W. 708 (1913), the plaintiff wished to have a dissolution decree vacated. The grounds alleged, "that the court was without jurisdiction to render the decree," and "that it was procured through [] willful perjury and deception," are similar. *Id.*, 120 Minn. at 381. The plaintiff waited 14 years to make this attempt and only after her ex-husband's death. "'A court that has been imposed on by a party, who has obtained its decree in his favor by fraud and imposition, will not be slow to vindicate the administration of justice by setting aside a decree so obtained, provided the injured party is diligent in invoking its aid in that behalf.'" *Id.*, 120 Minn. at 387, 139 N.W. at 711 (quoting *Earle v. Earle*, 91 Ind. 27).

Here, it "cannot be overlooked" that Father has at every opportunity disputed the validity of the findings supporting the district court's orders, testifying against the allegations in 2019, appealing from the resulting decree in 2020, hotly contesting the allegations against him in December 2020, moving for

[19] No Rule 309.02 hearing was held. Minn. R. Gen. Prac. 309.02.

amended findings in April 2021, appealing therefrom in October 2021, appealing therefrom in June 2022, and – as last exists on the record – moving to set aside all judgments and orders for fraud upon the court in November 2022, shortly after which the case was forcibly closed. At each attempt, Mother has appeared in furtherance of her frauds.

> "As to the question of laches, the pendency of the appeal taken in the [] suit suspended the control of the circuit court, and of every other court, except this court, over that decree, in respect to the relief sought in this suit, of setting that decree aside and declaring it fraudulent and void, all the other relief asked being consequent on that. The appeal appearing to have been taken and prosecuted in good faith, in view of what appears in the bill herein, and in the report of the case in this court, we cannot hold, on this demurrer, that the time during which that appeal was pending can be counted against the plaintiff on the question of laches."

Pac. R.R. of Missouri v. Missouri Pac. Ry. Co., 111 U.S. 505, 520, 4 S. Ct. 583, 591 (1884) (citing *Ensminger v. Powers*, 108 U.S. 292, 302–03, 2 S. Ct. 643, 652, 27 L. Ed. 732 (1883)).

> "A party is held barred by laches from the assertion of an equitable right when the delay is so long and the circumstances of such character as to establish a relinquishment or abandonment of the right, or when by reason of death of witnesses, loss of evidence, or other matter in the nature of estoppel, a situation arises which makes it clearly inequitable or unjust to enforce it."

Sweet v. Lowry, 131 Minn. 109, 111, 154 N.W. 793, 794 (1915).

> "[A] party is not to be barred by laches of the assertion of a right unless he have actual knowledge of the facts from which the right arises, or knowledge of such other facts as would put an ordinarily prudent man upon inquiry."

Brockman v. Brockman, 133 Minn. 148, 152–53, 157 N.W. 1086, 1088 (1916).

In *McElrath*, the plaintiff could not obtain what she requested. She claimed her ex-husband committed perjury in securing a default divorce against her, but the only perjury was hers, "at the trial, ... in establishing the issue pleaded." *McElrath,* 120 Minn. at 385. She claimed that "that the divorce decree is and always was a nullity for want of jurisdiction, in that the summons was not served on her," *Id.,* 120 Minn. at 382–83, 139 N.W. at 709, and "the complaint stated no cause of action," and "that the decree [had] been obtained by perjury and gross fraud on the court." *Id.,* 120 Minn. at 383. The record contained proof of service. The plaintiff had been handed "a copy of the summons and complaint," had "acquainted herself with the contents of the papers, and on the day the papers were so served upon her wrote to her husband, denying that she had deserted him, and in substance stating that the charge of desertion made by him in his complaint was wholly false and untrue." *Id.* The plaintiff had defaulted as to the divorce. *Id.,* 120 Minn. at 382. "'An independent action in equity to set aside a judgment cannot be resorted to as a substitute for a demurrer to a defective pleading.'" *Id.*, 120 Minn. at 384 (quoting *Kubesh v. Hanson*, 93 Minn. 259, 260–61, 101 N.W. 73, 73 (1904)).

The plaintiff in *McElrath* had not been misled and induced to "refrain from defending," *McElrath,* 120 Minn. at 385, 139 N.W. at 710, but the Court remarked that "there is much in plaintiff's case which strongly inclines a court in her favor.

Her long-continued mental and physical illness, aggravated by the apparent heartless conduct of the husband in abandoning her when an affliction came upon her which called for his most considerate care and tenderest attention, would incline a court to go to the limit in granting relief." *Id.*, 120 Minn. at 385–86. In Minnesota, "the submission of anything but a real controversy is recognized judicially as a fraud upon the court." *Halloran v. Blue & White Liberty Cab Co.*, 92 N.W.2d 794, 798 (1958). Mother, like the plaintiff in *McElrath*, had "much in [her] case which strongly inclines a court in her favor." Father remarked on this in his December 2020 answer:

> "[Mother's] evidence for her *very* serious allegations of abuse and parental alienation **is essentially her diary entries**. [Mother] used the OFW journal function to keep a personal, *private* diary in which she could write whatever she wanted. ... I was not aware of her alleged difficulties or her untrue beliefs about me. [Mother's] allegations are not true, and I would have gladly informed her of this and discussed with her had she reached out to me about them. She did not. [Mother's] allegations are ... conjecture. ... **[Mother's] allegations are made to shock the reader.** [Mother] offers no examples or evidence for many of her allegations, providing no context with which to form a response. **They are inflammatory remarks meant to defame me**. [Mother] does not supply any evidence to support her allegations against me because there is no evidence for her allegations against me. **[Mother's] affidavit is a sham meant to gaslight the Court into completely removing me from [M.M.B.'s] life so that [Mother] can move to Slovakia**."

Doc.193 at 1 (bolding added).

In bringing her action, Mother stated, "I am writing this affidavit to support my request to relocate [M.M.B.] to Slovakia. **I have been offered a good job opportunity in Slovakia** and I am at the point where I am seriously concerned

about [M.M.B.'s] emotional wellbeing. I am emotionally drained by [Father's] constant and unrelenting psychological abuse of me as well as [M.M.B.]." Doc.146 at 2-3 (emphasis added).[20]

The district court had found that "Mother has obtained a full-time managerial job opportunity in Slovakia," that money would not be "a stressor ... if the Court allowed [Mother's] relocation to Slovakia," and that "Mother and the child *would* live without roommates, which they currently have, and in their own apartment." Doc.226 at 4-5 (emphasis added); but it had also found that Mother has "obtained a full-time position" in Minnesota and "has a greater ability to earn a livable wage." Doc.226 at 5.

Mother's alleged improved financial situation was based on her allegations, internet printouts from "costofliving.com," Doc.147 (Ex.C) at 1-8 ("Slovakia has some amazing food and an array of local restaurants where you can try its exquisite cuisine. ... Alcohol in general is cheap"), and a government web-article on the minimum wage in Slovakia. Doc.147 (Ex.B) at 1-3. And Mrs. Bachmayer's new job, which Father felt "is fraud." Doc.232 at 5. Post-hearing, Father addressed Mother's alleged "job opportunity in Slovakia" that was extended to "Mrs. Dojcinovic Bachmayer", Doc.147 (Ex.A) at 1, Mother's married

[20] The latter arguments were addressed by the district court when it supervised Father's parenting time and all but eliminated communication between the parties.

name and frequent alias since her name was changed in the 2019 decree.[21] Doc.95 at 23.

Mother submitted a diary with "Entry" and "Created" dates of "10/03/2020." Because her diary entry is private, there is no way to determine when Mother edited it last, only that she altered it after October 3 and prior to submitting it as evidence on December 7, 2020. Mother testified that a journal entry (what Mother's diary entries purport themselves to be) is "what we do that day." Trn.114 at 64. But in her "10/03/2020" diary entry, Mother writes that "[M.M.B.] reported another Saturday that he didn't nap and he saw grandparents," Doc.147 (Ex.E) at 8,[22] and that "[a]t the drop off in the morning, father harshly removed the hoodie off of [M.M.B.] and unzipped the jacket it was 40F *[sic]*." *Id.*[23]

Following this, under *the heading*, "Sunday 10/04," Mother's states, "[M.M.B.] reported that father told him that I hurt [M.M.B.] that I use my fingers on him. **[M.M.B.] came home with a back wound which I didn't know about. I didn't see it at the time of departure**. ... [M.M.B.] was home and told me that his

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[21] In requesting her name change, Mother testified that "Dojcinovic" is her maiden name, but it is not. Trn.114 at 44-45.

[22] This conflicts with Mother's counsel's allegation: "It also does not appear that the child has significant contact with Father's extended family." Doc.150 at 3.

[23] The parties' exchanges were supervised and conducted in a manner so that they **never** saw each other.

father spoke ugly things about me and said that I hurt [M.M.B.] [M.M.B.] was ashamed of saying that and I didn't ask why."[24] *Id.* (emphasis added). But Mother *did* know about M.M.B.'s "back wound." Father sent her a message at "2:52 PM" – *during* his parenting time – that shows, "[Mother] (First View: 10/04/2020 2:53 PM)," and is titled "Gouges on [M.M.B.'s] back," in which he asked, "What happened to [M.M.B.'s] back?" Ex.178 (Ex.X) at 3. Mother did not respond.

There is no dispute that when M.M.B. left Father's care on 10/3 at 4 PM, he was unharmed. Father's parenting time on 10/4 began at 9 AM. Ex.176 (Ex.U) at 4, 10, 11. Although she alludes to the possibility of the injuries having occurred during Father's parenting time in her diary, Mother did not allege this. The only explanation provided by Mother, raised preemptively, is that on "October 6, 2020, ... [t]he CPS investigator told me that [M.M.B.] stated he scratched his back on Legos *[sic]* while playing on the bed." Doc.146 at 13.

Mother picked M.M.B. up from Father's parenting time on 10/3 and dropped him off for Father's parenting time on 10/4. Doc.147 (Ex.E) at 8. M.M.B. entered Father's care on 10/4 "fragile. He te[ar]ed up several times and then

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[24] Based on this and other diary entries, Mother alleged that Father was "coaching" M.M.B. Doc.146 at 3 ("I have witnessed apparent coaching where [M.M.B.] repeated that I am a bad mother"); *Id.* at 6 ("he appears to be coaching [M.M.B.] to say things like "you are a bad mama" or "mama hurt [M.M.B.]". Upon returning from parenting time, [M.M.B.] stated these things for several hours"); etc.

broke down into weeping. I did not understand why until I found the deep gouges in his back," Ex.178 (Ex.X) at 4; the injury was *fresh*. Hours later, they were still *fresh*. *Id.* at 1-2 (pictures). The injury occurred only shortly before Father's parenting time on October 4.

Mother's allegations were not found to be true.

Mother's counsel specifically requested that her client's allegations of endangerment, Doc.150 at 3-4, be heard *without* an evidentiary hearing. *Id.* at 1. As argued by Mother's counsel, *Id.*, the district court premised its 2021 restriction on the 2019 decree. Doc.226 at 5-6. From restriction to further restriction, the only intervening event found was an award of compensatory parenting time to Father, *Bachmayer II* at *1, because, on appeal, Mother recited 2021 findings reciting findings from the 2019 decree and urged discrimination.

Quoting *Clark* v. *Clark,* 346 N.W.2d 383, 385 (Minn. App. 1984), review denied (Minn. June 12, 1984), Mother's counsel expressed that "[i]t is well established that the ultimate question in all disputes over visitation is what is in the best interest of the child." Resp.Br. at 29. In her December 2020 memorandum, Mother's counsel made the request, "Mother is seeking permission to relocate to Slovakia subject to an award of parenting time to [Father] that will **continue a safe parent-child relationship that is in the child's best interests**," Doc.150 at 2, and the district court found in its March 2021 order, "The Court has no doubt that [M.M.B.] enjoys being with his father and has a

close relationship with him." Doc.226 at 2. The district court correctly found this relationship and correctly found that "[M.M.B.] does have a preference for more time with Father." *Id.* at 3. It also correctly found "[M.M.B.'s] close relationship with his paternal grandparents." *Id.* at 2.

Mother's counsel again cited *Clark,* 346 N.W.2d at 385-386 to explain that "a 'restriction' occurs when a reduction of parenting time will impair the parent-child relationship." She considered herself to have accomplished impairment of M.M.B.'s relationship with his father by reduction of his father's parenting time (on her client's behalf), but without statutory "restriction." Rather, Mother's counsel explained, "The number of hours per week of [Father's] parenting time is reduced *by the necessities of supervision*." Resp.Br. at 29 (emphasis added).

Citing *Danielson v. Danielson,* 393 N.W.2d 405, 407 (Minn. App. 1986), Mother's counsel stated that "[a] reduction in visiting time is not necessarily 'restriction,'" and expounded, "In this case, the reduction of [Father's] restricted parenting time was not a 'restriction', it was a modification of the restrictions already imposed by the previous parenting time order." Resp.Br. at 29.

Notwithstanding her argument that Father already had "a safe parent-child relationship" with M.M.B. "that is in the child's best interests" which she had managed to impair by circumventing the statute with the aid of the district court, Mother's counsel stated, "Arguably, limited, supervised parenting time between [Father] and the child may actually nurture a healthy relationship between the two." *Id.* "[T]his schedule is in the child's best interests and still

allows [Father] to maintain a relationship with the minor child." *Id.* Prima facie legally permissible harm to the child by fraud upon the court.

The Court of Appeals found that "[t]his case presents an unusual posture because the issue on appeal is whether the district court erred by *further* restricting father's parenting time without an evidentiary hearing," *Bachmayer II* at *3, and deemed it "harmless" error to further restrict a noncustodial parent's parenting time without an evidentiary hearing and without considering his evidence or contentions. *Id.* at *3-4. This was Mother's argument. "[Father's] parenting time was already restricted pursuant to a finding of endangerment; thus, no evidentiary hearing was required when the court imposed further restrictions." Resp.Br at 24. "The issue before this court is whether or not the district court can add new restrictions on [Father's] parenting time without holding an evidentiary hearing." *Id.* at 25.

The crux of Mother's argument, that an evidentiary hearing is for the parent, is not incorrect; however, that is not the sole purpose of the hearing. Mother's counsel touches on this, seemingly without realizing it, when she states, "A court may not 'restrict' parenting time unless **the child** will be endangered without such restriction," citing Minn. Stat. § 518.175, subd. 5(c), *Id.*; but Mother's counsel's focus was on the rest of her statement, "... or the **noncustodial parent** has unreasonably failed to comply with the court-ordered parenting time. There is no allegation that [Father], **the noncustodial parent**, has unreasonably failed to comply with the court-ordered parenting time." *Id.* A pointedly erroneous

misstatement of the statute, discriminating against Father, a noncustodial parent who has never had enough parenting time to be able to accomplish Mother's feat of violating the law. *See* Reply.Br at 12-14.

Mother's counsel's central argument hinged on her discrimination based on court-imposed familial status: "The Decree finding endangerment was issued only 14 or 15 months prior to the motion hearing. Under these circumstances, the district court was not required to hold another evidentiary hearing to make the same finding." Resp.Br at 27. The imposition of "additional restrictions on an already restricted parenting time schedule" is "an insubstantial modification" governed by "the child's best interests" standard "and not a restriction requiring an evidentiary hearing." *Id.*

Mother's counsel asked "the Court to issue unconscionable new precedent that discriminates on familial status and dismisses children's emotional safety," Reply.Br at 14, and, as it has been throughout this case, the court complied.

E.

> "Upon motion of a party ..., the court may amend its findings or make additional findings, and may amend the judgment accordingly if judgment has been entered. The motion may be made ... on the files, exhibits, and minutes of the court. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised."

Minn. R. Civ. P. 52.02.

> "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a referee, to the extent adopted by the court, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence."

Minn. R. Civ. P. 52.01.

On **motion to** amend, Father requested amended conclusions such that "Father is awarded full custody in accordance with Minn. Stat. §518.175, subd.6 (h)"; "Mother's parenting [time] is restricted to 1.5 hours supervised in accordance with Minn. Stat. § 518.175, subd. 5 (d). Father's parenting to be expanded reciprocally"; and that "[t]he Court finds Mother in contempt of Court for her repeated and intentional violations of Father's parenting time, her flagrant disobedience of Minn. Stat. § 518.175, subd. [6(c)(3)], violation of Minn. Stat. § 518.27, violation of Minn. Stat. § 609.48, subd. 1, all violations alleged by Father's December 22, 2020 Motion for Contempt for which Mother failed to make timely filings and for which Mother failed to refute any of, and fraud." Doc.231 at 2-3.

> "[E]veryone is in agreement that [M.M.B.], a three-year-old, has been and is actively being manipulated – yet I am the only party who suggested or supported a solution prioritizing [M.M.B.'s] safety and well-being and the real possibility of establishing truth."

Doc.232 at 8.

Embedded in Mother's responsive pleadings for reconsideration, drafted by her counsel, were instructions to the district court for the construction of its order denying Father's proper motion to amend findings as a motion to reconsider, denying Mother's responsive motion to reconsider in terms of its qualification as a motion to amend findings, and awarding Mother fees of $2455. The district court constructed its August 13, 2021, order accordingly.

i.

Mother's counsel claimed in her May 3, 2021, memorandum that Mother filed for amended findings. Doc.240 at 1. Paragraph 10 of the district court's August 13, 2021, findings, Doc.255 at 3-4, permits "either party" to move under "52.02" and recites the case law referenced by Mother's counsel. Doc.240 at 1.

Paragraph 5 of the district court's findings, Doc.255 at 2, states paragraph's 1-3 of Mother's motion. Doc.238 at 1.

Mother's counsel wrote, "[Father] fails to specifically identify which findings ... to amend, instead making sweeping statements that they are incorrect." Doc.240 at 1. In accordance with this and as specified in Mother's motion, paragraphs **4-15**, Doc.238 at 2-5, the district court summarized Father's requests in **15** bullets, in paragraph **4** of its findings. Doc.255 at 1-2. Bullets a-c, e-f, and m of paragraph 4 of the district court's findings exclude Father's evidence offers (as bolded in the following), such as, "The Court is to remove every suggestion that [Father] has endangered [M.M.B.]. **Any suggestion of this is**

wholly unfounded and equally preposterous," Doc.231 at 2; "The Court is to remove every suggestion that [Father] has behaved inappropriately **OR to cite the *evidence exhibit* upon which it has determined this fact so that [Father] can clearly show this to be false upon appeal**," *Id.*; "The Court will find endangerment of 'the child's physical' and 'emotional health' and 'emotional development' by [Mother] in accordance with Minn. Stat. § 518.175, subd. 5 (c) and **based on the indisputably credible and factual evidence, affidavits, and testimony of [Father] corroborating this finding**," *Id.*; "The Court will find that [Mother] 'has chronically and unreasonably failed to comply with court-ordered parenting time' in accordance with Minn. Stat. § 518.175, subd. 5 (c) and **based on the Court's June 2, 2020 order reinstating [Father's] parenting time after 2 months of [Mother] having denied him parenting time and the subsequent evidence and affidavits submitted to the Court by [Father] on December 22 and 29, 2020 factually proving the continuation of said behaviors by [Mother] following the Court's June 2, 2020 order**." *Id.*

But Father retorted that Mother's counsel did "not provide any basis for" her claims, and, "[b]ased on what is presented, 'sweeping statements' are admissible." Father specifically identified

> "the type of finding that truth dictates be amended, such as any suggestion that I have endangered [M.M.B.] or present a danger to [M.M.B.]. There is no fact to support this. [Mother's] evidence is fabricated hearsay or misrepresented or just hearsay. My evidence is the opposite – it's all fact, no misrepresentation. [Mother] would like me to individually select each of the potentially hundreds of false statements made by the Court, but that is not effective. I specify the information needed to realize

fact and achieve [M.M.B.'s] safety. There is no requirement that I specify an individual phrase I want to be fixed."

Doc.243 at 5-6.

"[Father] ... request[s] ... amend[ed] ... conclusions ... rather than [showing] the finding['s] defect." Doc.240 at 1. Bullets g-l of paragraph 4 of the district court's findings are Father's requests for conclusions that the district court prefixed with, "Find ...,"Doc.255 at 2, as discussed by Mother's counsel in paragraphs 9-12 of Mother's motion in terms of Mother's credibility. Doc.238 at 3-4 (i.e.; "'[Mother's] request to relocate is duly denied as 'the purpose of the move is to interfere with parenting time given to the other parent by the decree' as accorded by Minn. Stat. 518.175, subd. 3 ([a])'. [Mother] understands this to be a request **to amend the Court's finding** relative to Minn. Stat. § 518.175, subd 3 (e). ... The Court carefully analyzed this factor and **found [Mother's] evidence credible and persuasive**." (emphasis added)).

ii.

Mother's paragraphs 16-18, her "Requests for Reconsideration," are stated **with specificity** in paragraph 7-9 of the district court's findings. Doc.255 at 2-3.

In December 2020, Mother stated, "I am thankful we have supervised exchanges as I do not feel safe in [Father's] presence," Doc.146 at 5; that these exchanges were "to avoid subjecting [M.M.B.] to continued conflict," *Id.* at 1; and that, "Since... May 2019, [Father] and I have used a supervised exchange

site... per the Court order. This has reduced conflict at exchanges and I feel safer with the added buffer between [Father] and I." *Id.* at 5. Nevertheless, Mother proposed that she would "encourage [Father] to see [M.M.B.] in Slovakia whenever possible." *Id.* at 3. Father responded, "I do not feel safe in physical proximity of [Mother]," Doc.193 at 11, and, considering Mother's request that his "parenting time be supervised, ... [i]t is not clear to me how supervised exchanges – much less supervised parenting time – could be accomplished in Slovakia. I do not speak Slovak." *Id.* at 10-11. Mother's proposal "would *certainly* subject [M.M.B.] to conflict based" on her own account of "a co-parenting relationship that *remains extraordinarily high conflict*." *Id.* at 11. This "relationship is incompatible with such an arrangement." *Id.*

Mother's counsel argued that "[M.M.B.] can maintain a relationship. We do have Children that do that. It's not the best circumstances to have your parents in different countries," but "overall, ... [it] would be far more healthy for [M.M.B.] ... to see his father in a more supportive environment when he does get time with him." Trn.224 at 10. Mother's counsel opined that "at some point in his life" maybe "[M.M.B.] could end up spending more time here ... getting to know his father."[25] *Id.* at 11. In the meantime, "[w]e would have still those Skype visits

[25] "[Mother] states, 'I believe that it is feasible to travel back to the United States to facilitate in-person parenting time on a regular basis.' [Mother] does not provide any details as to how this kind of arrangement could be implemented. This is a very expensive proposition and does not seem feasible or practical especially given [M.M.B.'s] age." Doc.193 at 10 (emphasis added).

or FaceTime, you know, whatever, Zoom they want -- vehicle they would like to use to do that. [T]hat would still maintain the relationship."[26] *Id.*

The district court found, "Mother does not believe a move to Slovakia would negatively impact the child's health in any way," Doc.226 at 2, and that M.M.B. has a *need* for in-person parenting time with Father: "Given Father's current financial circumstances, the feasibility of preserving the relationship between him and the child may provide for some difficulties." *Id.* at 6. "[T]o pay for [the] travel expense" for international parenting time, the district court found that Mother suggested "reserving" and "using the child support funds." *Id.* at 3. In addition to paying for Mother's travel with M.M.B. to Minnesota this way, the district court found that Mother was proposing that child support funds would pay for "Father to visit the child in Slovakia," as well. *Id.* Mother's counsel explained that "Father's ongoing child support of $804 per month **as well as his daycare support**," would provide him with "well over $10,000 per year for **travel** that would occur for a minimum of one week, twice per year in Minnesota and other times in Slovakia." Doc.150 at 3 (emphasis added). Mother's counsel certified this proposal "a parenting time plan that is both feasible and affordable." *Id.* Mother was "more than willing to allocate [Father's] child support obligation to travel expenses." Doc.146 at 3. Mother's trial counsel

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[26] The district court found that "Mother **testified**" that M.M.B. and Father could "maintain a relationship," in part, "through Skype and telephone calls." Doc.226 at 3 (emphasis added). No testimony was taken.

approved, stating that "it's going to be expensive for travel," Trn.224 at 10, but having "spent some time in discussing this with our client,"[27] we decided "to not forgo child support but to use what would be paid in child support instead to be paid for the travel and to [e]nsure that travel happens and that [M.M.B.] does get to see [Father]." *Id.* at 11. The district court was concerned that "the cost of travel would most likely exceed" what was annually collected from Father in child support. Doc.226 at 6. The district court indicated willingness to make Father liable for Mother's expensive proposal but did not. Previously, Father had been made responsible for payment of child, child care, and medical support[28]

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[27] The billing statement is devoid of any such entry. Doc.250 at 4.

[28] Doc.95 at 20 ($828 monthly child support); *Id.* at 21 (77% medical and dental expenses); *Id.* at 15 ($229 monthly medical and dental insurance); Doc.129 at 3 ("$804 per month in basic support"; "$764 per month in child care support"; "Father shall be responsible for 70%" medical and dental expenses).

and, at various times, other recurring[29] and non-recurring[30] expenses, and the district court had remarked on Father's financial straits on multiple occasions.[31]

Post-order, Mother's counsel asked the district court to reconsider its denial, Doc.239 at 5-6, and find "that 'Given Father's current financial circumstances, the feasibility of preserving the relationship between him and the child may provide for some difficulties. The Court agrees with Father that virtual contact in lieu of in-person parenting time has been a good short-term solution but would likely not be sufficient to maintain a long-term parent-child

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[29] Doc.18 at 2 ("[Father] shall be responsible for both parties' subscription fees for Our Family Wizard"); Doc.77 at 2 ("Each party shall be solely responsible for his or her intake fee. ... [Father] shall be solely responsible for all supervised exchange costs."); Doc.135 at 1 ("Father agrees to pay to for a private exchange supervisor to enable his Tuesday night parenting time.").

[30] Doc.10 at 3 ("**$2,013** towards the cost of the custody and parenting time evaluation"); Doc.95 at 23 ("[Father] shall pay Wife the sum of $12,500 from [Father's] US Bank 401(k) Savings Plan")

[31] Doc.47 at 2 ("[Father's] net monthly income is $4,371.86. [Father] is currently paying the homestead mortgage, insurance and utilities. [Father] is also maintaining the car payments and debt payments. ... [Father] does not have the ability to pay for Wife's attorney's fees at this time. [Father] provided documentation that he is barely able to make minimum payments towards his necessary monthly expenses and towards the parties' homestead."); Doc.129 at 2 ("His current monthly living expenses are approximately $5,251. The Court is concerned that Father's expenses are untenable."); Trn.225 at 7 ("I can't tell [Father] how to live his life, but these expenses are unreasonable. I know that he's not going out every night, but just with the mortgage payments and the house payments, he might want to consider making a change about his housing situation.").

relationship' to read 'Given Father's current financial circumstances, the feasibility of preserving the relationship between him and the child may provide for some difficulties, but the reservation of his basic child support obligation, medical and child care support in the amount of $1,568 monthly will provide Father adequate funds to afford **travel to Slovakia**. The Court agrees with Mother that **virtual contact in lieu of in-person parenting time** has been a good short-term solution and **can maintain Father's relationship with the minor child in between in person parenting time. This will be sufficient to maintain a long-term parent-child relationship**.' In addition, Mother requests that the corresponding conclusion of law ... denying her motion to relocate be amended to 'Mother's motion for relocation is granted.'" Doc.238 at 6 (emphasis added).

Father argued that the request itself is evidence that

> "[Mother's] allegations of abuse by me have all been lies. I maintain that [Mother] abused me during our marriage, has abused [M.M.B.] consistently throughout, and has harassed me throughout. I have stated this many times on the record and in affidavit. The *Court* is mandated with protecting [M.M.B.]. [Mother] presents her plans as plausible and sensible. They are not. [M.M.B.] is three years old. He cannot defend himself, cannot fend for himself. He has needs that must be met, and [Mother] provides no evidence that she understands or can meet these needs."

Doc.242 at 6. Offering "no specifics" for Father's "intercontinental parenting time,"

> "[Mother] claims that my parenting time will be 'safe,' but does not indicate how she will accomplish that without a safe-exchange coordinator in Slovakia. [Mother], who claims I am serially abusive to her, has no fear of being in contact with me according to her proposal.

[Mother], who claimed in April and May of 2020 that we could not meet under any circumstance without the assistance of FamilyWise and that no other third party would suffice, (Exhibit L pages 1-2 & 7-8, 12/22/2020, ECF no. 154) now has no concern about meeting without FamilyWise or any other third party's involvement."

Id.

"So presumably [Mother] is fine to meet with me in the open with no safeguards in place just freely. [Mother] is not afraid of me, but she claims to be afraid of me when it suits her purposes. Then she claims abuse. But when it suits her purposes to not be afraid of me, she makes clear that she is not afraid of me. That's because her claims, her allegations are lies. [Mother's] plans are fantasies. There is no evidence that they are realistic. And the risk-taking behavior that she proposes is very dangerous for [M.M.B.]. [M.M.B.] needs reliability, stability, and he needs me and [Mother] to not be in situations without safeguards for contact. That would be dangerous for [M.M.B.]. He should not witness that. I do not feel comfortable. I do not feel safe being in situations where there are no safeguards in place for [Mother] and [me] to be meeting."

Trn.254 at 7-8.

Mother's trial counsel clarified,

"[**Mother**] feels safer there [in Slovakia]. **She** has support there. **She** has no familial support here because [Father's] family has been ... as nonsupportive as [Father] has about **her** being in the relationship and supporting [**her**]. ... So **she** would have more support in Slovakia, which is one reason that we don't need the same safeguards there in Slovakia because **she** has **her** family, **her** entire family there. **She** doesn't feel as safe here."

Id. at 18 (emphasis added).

Initially, Mother failed to propose "child care support" in her affidavit. Post-order, Mother, explaining in her affidavit that "[Father] would have $18,816 per

year to afford travel for in person parenting time," Doc.239 at 6, proposed that the district court find that "the reservation of [Father's] basic child support obligation, **medical** and child care support in the amount of $1,568 monthly will provide Father adequate funds to afford travel to Slovakia." *Id.* (emphasis added). Mother's trial counsel, in "clarifying or trying to explain the math", stated,

> "[W]e know what [Father] is paying currently in child support. And if that same dollar amount, which would add up to be about $12,000 in a year would certainly be sufficient funds for **nice travel** to Slovakia; airline tickets, places to stay, all of that. That's the only reason we broke that down a bit in our response in our responsive motion."[32]

Trn.254 at 18-19.

To account for Mrs. Bachmayer no longer having an employment offer in Slovakia, Mother's trial counsel explained that, initially,

> "instead of paying child support, that that be kept into a kitty *(sic.)* for [Father] to be able to make transportation to go see his son or be able to bring his son here to forgive the child support **because she would have in Slovakia her family members supporting her not just emotionally, but also financially**."

Id. at 18 (emphasis added).

> "[Mother's] claim that her family would be supporting her, that was not her claim. [Mother's] claim was that she would be supporting [M.M.B.] financially, not that her family would be supporting her and [M.M.B.]."

[32] This was not in the responsive portion of Mother's motion. Doc. 238 at 5-6.

Id. at 25-26.

Father had stated that his "concern at this time is **not** the financial means to see my son in Slovakia. ... **My concern is for [M.M.B.'s] emotional development** should his weekly times with me be suddenly severed. Video conferencing is **not a long-term solution** for a father's physical absence, and **[M.M.B.] and I have formed a strong attachment to each other**. I am deeply concerned that if the Court were to allow [M.M.B.] to live in Slovakia, there is no guarantee that [M.M.B.] and I will ever see each other again." Doc.193 at 11 (emphasis added). "As outlined in my *Affidavit in Support of Contempt of Court*, which I efiled and eserved on December 22, 2020, I detail the various ways in which **[Mother] has consistently denied or interfered with my FaceTime phone calls with [M.M.B.]**. [Mother] has made a consistent effort to interfere with my relationship with [M.M.B.]. There is no reason to believe [Mother] would be more cooperative after relocating to Slovakia. Further, with a child that small, even though we got through COVID with success with virtual visits, it is not a long-term solution as this is when bonding occurs, and it is difficult to bond over video." *Id.* at 10 (emphasis added).

Neither the appellate nor district court mentioned that Father had alleged denial of reasonable remote contact for M.M.B. and himself as a ground for contempt. Mother failed to pre-empt or answer these allegations. With no evidence to support a credibility determination in favor of Mother, the district court addressed these allegations by denying Mother's relocation motion, in

part, based on them. "The Court agrees with Father that **virtual contact in lieu of in-person parenting time** has been a good short-term solution but would likely not be sufficient to maintain a long-term **parent-child relationship**." Doc.226 at 6. "[I]t would be difficult for a child [M.M.B.'s] age to **remain** connected to a parent who lived overseas" in any case, but, in this case, "[M.M.B.] **needs** to **see** his father **on a regular basis** to maintain their relationship." *Id.* at 3 (emphasis added). For these reasons, "the Court ... does not find that a relocation is the solution at this time" to "Mother's concerns about Father" of which "the Court agrees with many." *Id.*

The district court **failed** to find on how its restriction of Father's parenting time would have any different of an impact to M.M.B. than Mother's preposterous proposition.

Mother's counsel stated Minn. Stat. § 518.175, subd. 3(b)(2) in her December 7, 2020, memorandum as, "Child's age, developmental needs, and the impact the move would have on the child's **social**, educational, and emotional development," Doc.150 at 2 (emphasis added), and also stated baselessly, "**Father's coercive control and intimidation** caused Mother fear and stress throughout the dissolution proceedings and **continues to this day**. It is Mother's position that the burden of proof shifts to Father given the history of **domestic abuse** in this relationship **that is now affecting the minor child's psychological and emotional wellbeing**." *Id.* at 3 (emphasis added).

The best interest factor of Minn. Stat. § 518.175, subd. 3(b)(2) is "the age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's **physical**, educational, and **emotional development**", (emphasis added), and of Minn. Stat. § 518.175, subd. 3(b)(6) is "whether the relocation of the child will enhance the general quality of the life for both the custodial parent seeking the relocation and the child including, but not limited to, financial or **emotional benefit** or educational opportunity." (emphasis added).

Mother's counsel requested reconsideration such that the district court would find that "Father has not met his burden to oppose the child's move to Slovakia. Mother has been the consistent and primary care taker of the child. The Court is convinced that **any negative impact on Father's parenting time** is outweighed by the financial, **social** and educational benefits of relocating to Slovakia as well as abating the negative impact on [M.M.B.] created by Father's **continued** coercive control and emotional abuse of both Mother and the minor child." Doc.238 at 5-6 (emphasis added).

Father pointed out that

> "I see [M.M.B.] for 1.5 hours each week under supervision. I have no contact with [Mother]. This allegation is impossible. This is also not available on the record and is an actively evolving situation – according to [Mother] – thus would not have been available at the time of the hearing. [Mother's] request can be neither a request for amended findings nor a request to reconsider. This statement is inadmissible. The Court can't reconsider something it has not ever considered."

Doc.244 at 4.

iii.

Father "argued that the Court's findings were 'clearly erroneous'"; that "the new evidence of my diagnosis with Autism Spectrum Disorder, in addition to other misconduct and bias," invalidated the divorce decree; that "I identified irregularity in the proceedings of the referee and abuse of the referee's discretion for which I had been deprived of a fair trial. I identified harassment by the Court. I identified a very high degree of judicial bias resulting in a miscarriage of justice. I identified that the Court definitively misapplied one law"; and that "I identified that there was no evidence to support the Court's judgement. I argued that the Court intentionally made incorrect findings for the purpose of not requiring itself to apply the applicable law. All this argument is valid for a Motion for Amended Findings." Doc.243 at 5.

Father "argued that [Mother] was not credible." To this end, he "conducted an exposé of the extent to which [Mother's] evidence was without credibility, had been fabricated, was misrepresented, likely constituted fraud on the Court, the net effect of which is that the Court's judgements are unsupported." Doc.243 at 5.

> "To identify one of [Mother's] hearsay diary entry exhibits, find the header. ... The evidence that is not fabricated has been manipulated to confuse the reader. [Mother] accomplishes her manipulations of evidence by using cell phone screen shots instead of using legitimate printouts. An example of this is seen in how she uses full printouts for her OFW diary

> entries in the initial exhibits, but later transitions to cellphone pictures which are difficult to follow and which she can manipulate so that message exchanges seem lengthier; or she places pages out of order or excludes them altogether to only present the information she wants to present in the disingenuous way that she uses to support her perjured narrative – [Mother] is gaslighting her audience: the Court. [Mother] mixes unaltered evidence with altered evidence to make her fabricated evidence seem credible. ... [Mother] applied for the job under an alias and therefore could never have begun legal employment under this offer. This is fraud. ... [Mother] claims financial distress, but her budget shows a monthly surplus – after subtracting all expenses – of more than $1000 ... based on her *previous* employment. Her latest employment is likely even more lucrative."

Doc.232 at 3-7 (etc.,).

Mother and her counsel agreed: It is a "fact that I [Mother] kept a 'diary' on Our Family Wizard [and submitted it as the evidence of my allegations]." Doc.239 at 2.

Paragraph 11 of the district court's findings, Doc.255 at 4, is a recitation of precedent stating total deference to the "credibility" and "evidence" determinations of the district court, as specified in paragraphs 4-15 of Mother's motion. Doc.238 at 2-5.

iv.

In Paragraph 12, Doc.255 at 4, the district court denied Father's motion, stating that "[Father] fails," he "simply rehash[es] ... prior arguments ... and restat[es] ... truthful findings." Mother's counsel had stated, "[Father] fails" to "satisfy ... amended findings." By "reargu[ing]" he asks "to reconsider." He

"states the findings are ... untruthful ... without discussi[on]." It "cannot be ... amended findings." Doc.240 at 1.

> "Did My Motion Reargue a Prior Motion? No. There's simply no basis for this claim. The motion is restricted to what is available on the record, and the information presented cannot be new. How the information is presented can be new. If a fact exists that disputes findings, then presenting that fact as evidence of incorrect finding is a valid argument and because it is being used to dispute a new finding it is inherently a new argument based on old fact. I make many new arguments and apply existing fact in my disputes of the Court's untrue findings. The purpose of amended findings is to present arguments based on existing fact that will assist in appeal or persuade the sitting official to pursue justice. Perhaps the issue that [Mother] is presenting is the same that I am experiencing: that the Court has readily dismissed facts when presented by me, but readily embraced [Mother's] lies as facts. This situation has the effect of requiring me to present the same information repetitively. My motion did much, much more than this, however."

Doc.243 at 6.[33]

In Paragraph 13, Doc.255 at 4, the district court denied Mother's motion to reconsider in terms of it failing "to meet the burden for amended findings."

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[33] "The cause of the incredible degree of error in the Court's finding could be caused by several things, but for the sake of preserving it for argument, I will make note that Judicial Bias, if the cause, would be to such a degree that the Court was debilitated and unable to discern reality from fiction. Another possibility is conspiracy with the other party. This is a criminal situation, and hopefully did not occur, but I include it in the hope that in doing so I preserve the arguments use for later. It could just be that the Court likes to wreak havoc on its constituents' lives or that the Court hates people, including children, and wishes them to suffer. *Further investigation is required.*" Doc.232 at 11 (emphasis added).

Mother's counsel stated that "[Father's] motion is ... a motion for reconsideration. However, ... [he] still must obey the same rules as an attorney. ... [Father's] motion [is] a request for reconsideration." Doc.240 at 1-2.

> "My motion is very clear that I do not believe the Court can provide the required and appropriate relief. I have experienced the Court's failure to find fact many times. The Court has proven to me that it is either unable to find fact or *unwilling* to find fact. I have experienced the Court's discrimination many times. Having this knowledge, I would not request the Court to reconsider as that would be a counterproductive request. I made my motion for amended findings to supplement the record for appeal – a practice that is in the spirit of the Motion for Amended Findings. A motion to reconsider must follow a unique set of requirements. [Mother] outlines the differences in her memorandum and identifies the proper way to request a motion to reconsider and the improper way to request a motion to reconsider. ... My motion is a motion for amended findings; it is distinctly different from a motion to reconsider. My motion is not a motion to reconsider."

Doc.243 at 6-7.

In paragraph 9, Doc.255 at 3, the district court found that Mother requested it to reconsider its finding, "Mother also made a motion for attorney's fees, but her pleadings were untimely," to read that "The Court finds, given **the lengthy affidavits and the volumes of exhibits** served and filed by Father, **it is just and equitable to waive the filing deadlines** and **hear Mother's request for attorney's fees**," – "*because Father filed his **voluminous** Responsive Affidavit of **December 29, 2020** at 11:**30** p.m. which gave Mother **no time to respond within the filing deadline***." Doc.238 at 6 (emphasis added).

Father identified that Mother's motion to reconsider was impermissible, Doc.244 at 3, and that because she made new claims that "cannot be

substantiated by 'the files, exhibits, and minutes of the Court,'" was impermissible as a motion to amend. *Id.* at 4.

> "Minn. Gen. R. Prac. 115.06 provides the mechanism for my requested relief: 'if responsive documents are not properly served and filed in a nondispositive motion, the court may deem the motion unopposed and may grant the relief requested without a hearing.' [Mother's] Motion should be denied, and the Court should grant the relief I have requested. ... [Mother] justified her request to reconsider the court order under scrutiny by the damage caused by the court order under scrutiny. This is not appropriate, nor does it make any sense. [Mother] has stated she wishes to save money on attorney fees. Minn. R. Civ. P. 1 states, 'These rules ... shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.' A hearing is not necessary. [Mother's] filing was made improperly, violates rules of post-trial motions, and does not contest the filing it responds to. Additionally, she makes unsupported statements and falsehoods. My case is only further proven. I move the Court to grant all relief requested expeditiously."

Id. at 5.

> "Justice is reuniting [M.M.B.] and me and [Mother] getting the assistance she needs to be a safe person for him to have contact, with or without supervision. If the Court is pursuing justice, it will provide me the relief I have requested. If the Court is pursuing injustice, it will continue to aid and abet [Mother's] fraud, cons, and abuse of our three-year-old son."

Doc.243 at 7. The district court altered no finding.

v.

With the hearing scheduled for May 18, on May 17 Mother's counsel filed an affidavit for attorney's fees. Doc.250. Mother's counsel wrote that the "attorney's fees and costs **incurred in responding** to Father's current motion

requests is **$2455.00**," *Id.* at 2 (emphasis added), bolding this number. But those fees amount to $2405, not $2455. Father filed his motion for amended findings on April 24. The "March 23" fees awarded by the district court are stated by Mother's counsel as for "Review and forward Court's Order re parenting time, move and contempt motions." *Id.* at 6.[34] However, although Mother's counsel stated that "the May 18th hearing is 1/2 hour," *Id.* at 2, and pre-billed the hearing for 30 minutes, *Id.* at 7, the district court opened the May 18 hearing,

> "So we are here -- again, I know that there are a lot of issues in front of me today. And I've reviewed the pleadings. I know that those were all part of the record. For timing purposes I'm just going to limit both of you to twenty minutes each. And then you can have a few minutes if you need to respond to the other person. You can take that time or not take that time, but just so we can keep on a schedule and make sure we don't start running late this afternoon."

Trn.254 at 2-3. At a rate of $250, a hearing that lasted 42 minutes would put the total fees "**incurred in responding** to Father's current motion requests" at "$2455.00," Doc.250 at 2, and according to the fees statement, Mother's attorneys billed her in 6-minute increments.

The district court closed the hearing,

> "I appreciate everyone being very efficient today and telling us their arguments and the paperwork. We'll take this under advisement. I think there are too many things for me to outline to try to rule on this today because there are so many opposed findings of facts and arguments. So

[34] The statement of fees provided by Mother's counsel does not mention or indicate anything pertaining to relocation -- until this.

you will both get a notice in the mail. [Father], you will get it in the mail. [Mother's counsel], you will get it by eService. And, [Mother], that is how you will get it. But we will close the record today and take it under advisement. But I appreciate everyone appearing early and getting their paperwork to me. Okay. We're adjourned."

Trn.254 at 27.

The district court found that it had discretion to not make any findings if it did not want to, but it found that Mother had made a motion to amend findings and that Father had not, that Father's pleadings were incomprehensible, and that Mother should be awarded conduct-based fees. Doc.255 at 3-4.

In paragraph 14 the district court found,

"Father's pleadings are **cumbersome and often nonsensical**. The Court finds that **Father has unreasonably contributed to the length and expense of this proceedings** *(sic.)*. The Court finds **it is equitable to order conduct based attorney's fees** based on the work completed on **March 23**, April 28, April 29, April 30, May 3, May 11, and May 18."

Id. at 4. It ordered,

"**Mother's motion for attorney fees is granted**. Father shall pay **$2,455** as and for attorney's fees. Payment shall be made within thirty **(30)** days of the date of this order and remitted to: Lynn Klicker Uthe, Ltd., 10501 Wayzata Boulevard, Suite 100-1, Minnetonka, MN 55305. **This amount may be reduced to judgment upon receipt of an affidavit of non-payment.**"

Id. [35]

[35] On September 13, Father filed to correct clerical errors, identifying that in paragraph 3, "(1) The order of events is not correct, (2) my May 18, 2021, filing was omitted, and (3) Mother's May

Father appealed.

vi.

The appellate court, though adopting Mother's argument, found Father had met the burden. *Bachmayer II* at *4. Recognizing that Father applied a criteria filter to identify the false findings that have no evidentiary support, the appellate court stated,

> "Father's motion does not identify which findings he wants amended or which evidence supports his proposed changes. Instead, father's motion broadly states that he wants the district court to remove 'every suggestion' that he endangered the child or behaved inappropriately, to apologize to him for 'character defamation[],' and find that mother endangered the child and 'has chronically and unreasonably failed to comply with court-ordered parenting time.' Father bears the burden both to prove that the initial findings are erroneous and 'explain why the proposed findings are appropriate,' based on the record evidence. *Lewis*, 572 N.W.2d at 315."

3, 2021, Motion to Reconsider which raised new issues was omitted or not specifically delineated." Doc.257/8 at 2. For items 1 and 2, Father had filed objections. On May 11, it was a "response and objection" to Mother's objection, Doc.246, but the district court listed the former as occurring prior to the latter. Doc.255 at 1. The district court **entirely omitted Father's May 18 objection to Mother's May 17 Affidavit in Support of Attorney Fees** in which he stated, "Based on the contents of the filings they may be an attempt to supplement the record with unfounded allegations meant to discredit me." Doc.251.

Id. "[T]he district court [abused] its discretion when it denied his motion to amend findings." *Id.*

V. Appeal, 2020

A.

"Beginning in June 2018, father exercised supervised parenting time for several hours per week. The parties asked the district court to temporarily modify the parenting schedule and waived their right to a hearing on the temporary modification." *Bachmayer I* at *1. Mother made many allegations of domestic abuse in her affidavit. Father also submitted an affidavit.

> "[Mother] was often angry and directed her anger with intention by using physical force, verbal threats, and harassment. [Mother] would rage for hours, yelling. She was unable to control herself and refused to leave the situation to calm down even when asked to. The fights only ended once both I and [Mother] were completely devastated. Physically, she would pursue me around our house, would restrain me from leaving an argument by grabbing my wrists so hard that her nails would puncture my skin, would use her body to block me from leaving a room, would hit me and slap me, would throw objects at me, would attack me ripping my skin and bruising me (Exhibit 3, Pictures of injuries). Verbally, [Mother] would threaten suicide, would threaten divorce, would threaten to run away, would threaten to leave for Slovakia, would threaten to let my cat out, would threaten to not care for my cat if I left the house to stay at my parents' (Exhibit 4: Texts). [Mother] would hyperventilate and hang on me, sagging to the floor, saying 'I'm not crazy! I'm not crazy! Don't say I'm crazy! You can't say I'm crazy!' with her face completely drawn and her eyes wide and frantic. During her rages [Mother] would rehash every grievance from our relationship. We were not able to make it to sign the papers to purchase our house because of one such rage. I had to call our realtor during a break in [Mother's] rage and tell her that I just could not make it - the seller threatened legal action. We missed many family

engagements with my family because [Mother] would become violently angry during the weeks, days, and hours leading up to them. I was always forced to make excuses for why we could not make it. [Mother] behaved this way in front of [M.M.B.] and when I questioned her about doing so, she would respond that he was a baby and did not understand and would not remember. During the argument in which I was arrested, [Mother] threw herself on top of me where I was at the foot of the bed. [M.M.B.] was at the head of the bed. [Mother] rolled over on me, flailing with her arms and legs. On a separate occasion, I tried to leave the house and drive away. [Mother] ran down the concrete steps onto the concrete landing, [M.M.B.] under one arm and the diaper bag under the other. I was brought up to address disagreements calmly and with compromise, and I will teach [M.M.B.] to do the same.

It is true that I was arrested for domestic assault on December 30, 2017. That morning, [Mother] and I got into an argument. During the argument, I kept trying to leave the room, and go to another room in the house. [Mother] followed me throughout the house, continuing to argue. I was concerned, because [M.M.B.] was present, and [Mother] would often leave him alone to follow me and continue arguing. I was trying to leave the room to end the argument, or at least make sure that [M.M.B.] was not exposed to it. At one point, I went into the kitchen. [Mother] followed me, and blocked my exit. [Mother] was angry and yelling at me. I asked [Mother] to go be with [M.M.B.]. I was eventually able to get past [Mother], and went to the bedroom where [M.M.B.] was. I lay on the bed to keep an eye on [M.M.B.], who was also on the bed. [Mother] followed me quickly, and threw herself on me, on the bed. My arms were pinned underneath us. I bit [Mother] on her back, once. After this, [Mother] got up, and called the police. [Mother] told the police a completely different story. In the end, I plead to disorderly conduct, and [Mother] and I reunited. I am currently following through with the requirements of my probation, including: attending domestic abuse programming, and sentence to serve. I have done four (4) weeks of the 18-week class.

Child protection was called as a result of the incident. [Mother] and I both met with CPS. No finding of maltreatment was made, and the case is closed.

[Mother] has required that my parenting time be supervised. I chose to see [M.M.B.] with the supervision requirement, because it was more important that I see [M.M.B.]. I am requesting that the Court order that supervision is not necessary. Supervision has become difficult, because [Mother] will only allow my parents to supervise. This has forced me to forfeit time if my parents are unavailable.

...

[Mother] has threatened to commit suicide with a kitchen knife and has locked herself in our bathroom with knives. [Mother] told me once that she

> was considering running into traffic. (Exhibit 4, Text Message.) [Mother] also has an issue with theft. She has stolen from my parents on multiple occasions, though they did not call the police. [Mother] sent an email apologizing for one of the thefts, but never returned the items (Exhibit 5). I am concerned that, until [Mother's] emotional and mental health issues are treated, she will continue to not focus on [M.M.B.'s] needs or safety.
> ...
> [Mother] manipulated me into signing papers granting [M.M.B.] a passport by raging and fighting with me non-stop and threatening to call the police on me. This was after I was already arrested for domestic assault. I was scared, because I knew there was no reason why the Police would need to be involved, but I did not want to go to jail. If [Mother] was upset with me after I was arrested, she would often threaten to call the police and tell them that I was abusing her. On the day that I moved out, [Mother] insisted that I sign a paper that stated that I would allow [Mother] to travel outside of the United States with [M.M.B.] and without me. I refused to sign. Also, [Mother] has not wanted my family in [M.M.B.'s] life."

Doc.14 at 3-8 (emphasis added). *See also Id.* at 19-21 (Mother threatening suicide, "I am happy. And I want to die. Now! Say everyone I deeply loved them. ... I am on the street. ... I am telling you I am so close from running under a car"); *Id.* at 22 (Mother apology for theft, "I am really sorry I took your black dress at the end of the exchange. ... You shared your place and family with me back then and I left you all with something that never belonged to me").

Along with her affidavit, Mother's counsel filed a memorandum citing a nonprecedential decision that would serve as template for the final judgment and decree and steps intermediate in this case, underlined to signify this role as template for the fraud upon the court that fit their client's need and that they wanted the district court to aid them in committing: "Phelps v. Sterling, 2015 Minn. App. A14-1107 (Minn. Ct. App. 2015), attached hereto." Doc.11 at 2; Doc.13 (attached copy) (herein "*Sterling*").

The fraud was immediately in play.

> "In Phelps, the court found that it was in the child's best interest to fashion a limited amount of parenting time without finding endangerment. The Phelps district court awarded the mother one (1) three (3) hour visit per week, and only with supervision. This initial parenting time award was upheld by the Minnesota Court of Appeals."

Doc.11 at 2. Under this scheme, Mother need not prove endangerment but only that restricting Father's parenting time was in M.M.B.'s best interests, for which her attorney alleged, "Father's limited relationship with the child; Father's limited parenting skills; Father's anger issues; and that the child has spent most of the time with Mother." Doc.11 at 4. But for the last, these allegations were not found true.

"On August 21, 2018, the district court issued an order temporarily granting father two overnights per week." *Bachmayer I* at *1. At the time, it found that "[Mother] is asking that [Father] be granted short, frequent, supervised parenting time," Doc.18 at 1, and in this regard – notwithstanding responsive affidavits from both parties – made its sole finding on domestic abuse as:

> "**[Mother]** contends this is best for [M.M.B.] due to the domestic abuse between the parties and due to **her belief** that *[Father]* cannot properly care for the child."

Doc.18 at 1 (emphasis added).

> "The Court finds it is in [M.M.B.'s] best interests to **increase [Father's] parenting time. There is no evidence that parenting time should be supervised.** The Court is concerned that [Father's] proposed schedule is

> too significant of a change for a child of [M.M.B.'s] age and development. The Court finds that [Father] should have two overnights a week until the parties agree otherwise."

Doc.18 at 2 (emphasis added).

More than one year later, the district court, in its divorce decree, stated, "Both parties allege domestic abuse by the other. The **issue of domestic abuse** was addressed ***in detail*** in the parties' affidavits for temporary relief," Doc.95 at 6 (emphasis added), and there made findings on domestic abuse from these affidavits.

> "In this appeal from a marriage-dissolution proceeding, father argues that the district court abused its discretion by ordering limited, supervised parenting time for father and clearly erred in its factual findings supporting an award of sole legal and sole physical custody to mother. We affirm."

Bachmayer I at *1.

> "On October 8, 2019, the district court permanently awarded father nine hours of supervised parenting time per week: three hours on Tuesday evenings and six hours on Saturdays. The district court noted that father may request a change in parenting time after completing one year of therapy. The district court found that it would be in the best interests of child to award sole legal custody and sole physical custody to mother."

Id.

B.

> "The district court scheduled an evidentiary hearing to determine permanent parenting-time and custody arrangements. The district court

> ordered mother and father to participate in a custody and parenting-time evaluation.[36] ... Between the date of the temporary order and date of the evidentiary hearing, mother and father interacted in person when exchanging child. Both parties describe conflict during at least some of these exchanges. Father started bringing family members and recording the exchanges. Mother also brought an observer to one exchange. At the evidentiary hearing, mother testified that the exchanges were uncomfortable and that she felt unsafe. The parties moved the exchanges to a public location to reduce the potential for conflict, but mother maintained that the exchanges remained uncomfortable and intimidating."

Bachmayer I at *1.

"Immediately at the conclusion of the hearing, the district court issued an interim order instructing the parties to move parenting-time exchanges to FamilyWise. The district court found the current exchange arrangement problematic, because child was getting older and 'picking up on things.'" *Id.* at

---

[36] "Based upon the agreements of the parties and counsel, and all the files, proceedings and records herein..." Doc.10 at 1. The objective of the "custody and parenting time evaluation" was undefined and its boundaries open-ended. What was made clear was that the parties "shall cooperate with" and "shall promptly follow the directions of the evaluator and complete all requested authorizations for release of information." The warrant threatened that if the parties were "non-cooperative," it "**shall be considered in the context of the Court's findings in this matter and the Court may draw adverse inferences from a failure to cooperate.**" *Id.* "The custody evaluator may contact the Court orally or in writing to seek direction and/or clarification about the evaluation." *Id.* at 2.

*2.[37] "The district court expressed particular concern with the continued recording by father of the exchanges, which seemed to increase the level of conflict," *Id.*, but did not find that father's recording was the cause of the conflict nor did it find that his recording was not reducing conflict. What the district court found was that the "parties have not been able to successfully exchange the child without incident or respectfully communicate about any issue." Doc.95 at 11. "[T]he district court specifically found that the exchanges—in which grandparents were involved—had a negative impact on child." *Bachmayer I* at *5.

> "The court found that the level of conflict during the exchanges had not improved over time and would likely worsen. Because FamilyWise is not open during the early morning hours, the district court determined that early morning exchanges would no longer be possible during the week, effectively removing one overnight from the temporary parenting time that father previously received. Father did not object at the time of this schedule adjustment."

Id. at *2.

The district court found that, "[a]t some point, [Father] started sending messages through Our Family Wizard to 'recap' the parenting exchanges," which "[Mother] contends" are "full of accusations and misstatements." Doc.95 at 12. The following interaction between Mother and her counsel proves this:

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[37] Father testified to M.M.B. being "able to pick things up very quickly. He has ... a great understanding for ... most things [] including human interactions." Trn.114 at 146-147.

Q. And this is where he gave you some of the recordings?

A. Yes.

Q. Is that correct?

A. Yes.

Q. According to what he wrote here, he felt the exchanges were going well?

A. **Again?**

Q. The exchanges are going well?

A. According to [Father].

Q. Yes. Because he wrote here, "I've learned that you've been lying to your attorneys, saying the exchanges have not been going well."

A. Yes, that's correct. That's what he wrote.

Q. So, he just wrote that. But the exchanges –

A. I don't think they were going well. I think recording, and picking up [M.M.B.] with family members, and, um, I think it's just not okay. And so I don't think it was going well. But and for [M.M.B.], I think the public space is much better.

Q. It is, better?

A. Yes.

Q. And in this same one on the first page of Exhibit 9, he states that he has offered and sent recordings, multiple times. I've offered to send them. Not sent, but I've offered to send them. Had he before this?

A. Yes. Yes, he did.

Q. Did he send them?

A. No. It was more of a -- when I would write that I do not agree with his statements about these updates of the exchanges, it would be more of like a -- like a threat that I have the recordings. So, you can have the recordings, if you wish to have them. And I would just ignore that message at that point, or I would just respond, "I received your message," because I didn't want to engage in any further conflict.

Q. Okay. Then the next page of Exhibit 9 is the actual attaching of some of those recordings?

A. Yes. Yes.

Q. Did you listen to those recordings?

A. Yes, I have.

Q. Do you think they show the things he says here, that [M.M.B.] does not acknowledge you, or that [M.M.B.] was happy to see him, or?

A. No. I -- no, I do not agree with those statements.

Q. Are they easy to hear on those recordings?

A. Some of them, yes. But most of them, not really.

Q. Difficult?

A. Difficulty, yeah.

Trn.121 at 218-220 (emphasis added).

"[Recording is] bullying. Because I did not -- I did not agree to be recorded. At first, I did not find it comfortable." *Id.* at 192. Mother testified that Father would "play them [the recordings] for me in my face." *Id.* at 198. He "holds the phone in his hand, ... **making sure that he gets every single word**," *Id.*, and "every time I speak, he would move his phone toward the direction of me. Or he would turn the phone at the speaker, faces in my direction that -- that, you know, he can record me." *Id.* at 193. These behaviors made Mother "feel very harassed ... like I need to call the police, because I needed someone to defend me, at that moment. And I ask him a couple of times to stop recording

during the recordings times," – which is to suggest that there were times that Father did not record Mother – "and he would not." *Id.* at 198. The district court found correctly that, "[a]lthough [Father] was asked to stop recording exchanges repeatedly, he continued to do so," which "[Mother] reports feeling intimidated" by. Doc.95 at 12. The following interaction occurred between Mother and Father's counsel:

Q. Have you ever told [Father] that you're going to call the police during exchanges?

A. Yes.

Q. Wouldn't you agree that having a recording of an exchange could avoid an issue with that?

A. No.

Q. So you would agree, though, then if you were to call the police if there's no recording it's your word versus [Father's]?

A. Yes.

Q. Do you understand why that could be concerning for either one of you?

A. What do you mean?

Q. Well, if it's your word versus [Father's] do you -- do you see how the police then are trying to interpret that?

A. That's normal, yes.

Q. Don't you think a recording could help if there was an issue with that?

A. Not when [M.M.B.] is involved, meaning it's not healthy for [M.M.B.] to see that the other parent is audio or video recording.

Q. How does [M.M.B.] know?

A. He can -- he is there, he can -- he can hear me say -- He can see his dad to be preoccupied with the phone.

Q. So he can hear you say because you're saying it to [Father]?

A. I ask him a few times to stop recording.

Q. So you call attention to it?

A. I stopped doing that.

Trn. 1-14 at 65-66. This interaction was recorded.

Mother alleged, "And then as they were walking, grandfather was carrying [M.M.B.], and [Father] was still punching *(sic.)* and recording, and he

would just say -- he would just say with a smirk on his face, 'See ya.' And he would walk away," but could not prove this had occurred; what she could do was "ask [her lawyer] to write them a letter to stop with the video recordings." Mother testified, "And [Father's] telling me ... that I have the same rights, and can take recordings of my own." Trn.121 at 204.

The district court found that

> "[Mother] describes trying to minimize conflict by waiting outside for [Father] to pick up [M.M.B.] from her home. If [M.M.B.] became upset or hesitant during an exchange, [Mother] reports that [Father] would hold his cell phone out to the child and tell him to pick between the parents. After the exchange, [Mother] reports [Father] would stay in his car in front of her house for up to thirty minutes."

Doc.95 at 12. Mother explained, "I tried to wait for [M.M.B.] outside to make it easier, that he doesn't come to the door and, you know, that exchanges are not as abrupt as they were," Trn.114 at 5, and also because "them knocking, and impatiently demanding [M.M.B.], was really unbearable behavior for [M.M.B.] to be around, and for me as well." Trn.121 at 212. Mother described a "major incident[]" where "[M.M.B.] and I, we were waiting outside" the house, alone. *Id.* at 200. "[Father] was alone that day" and M.M.B. cried and "would not -- he would not want to go." *Id.* Mother said that Father stated this behavior was "bizarre" and asked what she had "done to [M.M.B.]." *Id.* at 201.

> "And I ask him multiple times if he would like to take [M.M.B.] for his parenting time. And his response to that was, he -- he -- [M.M.B.] was between us on the sidewalk, and he would ask, 'So, [M.M.B.], you decide. Do you want to go to mom or dad? It's your choice.' And then [Father]

would take out again the phone, and [M.M.B.] likes to see a phone, so he would come to [Father]. And, um, um, I -- and, um, and then we said -- I said, 'Goodbye.' And I was walking back in a normal pace. And I would wave at [M.M.B.], because he saw me, and he was -- he was not feeling so well. Like he was kind of fussing. **But he was fine with dad**. So as I was waving by *(sic.)*, [Father] noticed that I am waving goodbye to [M.M.B.], and [Father] said, oh, let me start -- let's take some pictures of mama, or let's actually video record her. And then I said, '[Father], this is not okay. Please stop with this.' And I pretended that I am making a phone call. And then [Father] took pictures, and then he ran to the car, and remain in the car for 30 minutes. And then he left with [M.M.B.]."

Id. at 201-02 (emphasis added).

C.

The district court quoted the "custody evaluation" in finding "'poor interpersonal boundaries'" for Father. Doc.95 at 11. "Minnesota law recognizes the importance of the parent-child relationship and the need to protect it against interference from other parties." *Amarreh*, 918 N.W.2d at 232 (citing *SooHoo v. Johnson*, 731 N.W.2d 815, 820 (Minn. 2007); *In re C.D.G.D.*, 800 N.W.2d 652, 656 (Minn. App. 2011)). "The policy of our statute, as announced in In re Guardianship of Campbell, 216 Minn. 113, 11 N.W.2d 786, supra, is to afford protection to children residing here." *In re Pratt*, 219 Minn. 414, 423, 18 N.W.2d 147, 153 (1945).

"Protection of the child in its utterly helpless and neglected condition was **but a common duty of humanity**. It would be a strange reflection upon the power of the state if it could not be asserted to protect those who through no fault of their own happened to be in the unfortunate circumstances of this child."

Id., 219 Minn. at 424 (emphasis added).

"On December 6, 2018, a custody evaluator produced a report to the parties and the district court.[38] The evaluator recommended that mother have sole legal custody and sole physical custody of child and that father be granted daytime parenting time every Saturday." *Bachmayer I* at *1. Robert "Bob" J. Hyland (herein "Mr. Hyland") was the court-appointed custody evaluator.

The district court found that Mr. Hyland "adequately described his actions to validate his findings and recommendations in a professional manner" and "Mr. Hyland's work to be child-focused and neutral."[39] Doc.95 at 7. Notwithstanding "confusing cross-examination testimony from the evaluator regarding the meaning of the term 'neutral[,]' ... [t]his finding was not clearly erroneous." *Bachmayer I* at *5.

Q. Now, was it your understanding that you were performing a neutral evaluation?

---

[38] "The court shall mail the investigator's report to counsel and to any party not represented by counsel at least ten days before the hearing." Minn. Stat. § 518.167. The hearing was held on December 11. Doc.34, 35.

[39] In *Sterling*, the custody evaluator, Jason Chinander, is "court-appointed" and his "report was deemed to be 'very thorough and credible'" by the district court, Judge Jane Ranum. *Sterling* at *3.

A. Could you explain what that term "neutral evaluation" means to you?

Q. Well, my question is: Would you agree that you were appointed as a neutral custody evaluator, you weren't there to present just for one side or the other?

A. When you say to "present," do you mean in my report?

Q. Well, I guess, I'm not sure what you're not understanding. Would you agree that you are neutral?

A. Not necessarily, no.

Trn.121 at 28.

By Mr. Hyland's own admission, parts of his report were conjecture.

Q. So that was your own conjecture on that?

A. That's correct.

Id. at 37.

Based on his imagination, Mr. Hyland made hypothetical conclusions, which his experience helped shape. He used what the parties told him to make his fiction more believable.

> "[Father] argues that his aggressive and defensive behavior and statements during the custody evaluation were 'triggered' by Mr. Hyland and the process. The Court recognizes that all parties feel stressed during a divorce action and that a custody evaluation can be very invasive. However, [Father's] conduct towards Mr. Hyland, coupled with his statements about and accusations towards [Mother], are in line with the rest of his actions during this proceeding."

Doc.95 at 7.

"I trigger people. I assume I trigger people. And I talk with parents at the very beginning, and ... I tell them, 'Look, I'm going to challenge you. The court wants me to be skeptical.'" Trn.121 at 61-62.

In his report, he wrote that Mother took M.M.B. to the ER and did not inform Father until later. When asked about this, Mr. Hyland said that "if you're going to the emergency room" as opposed to "urgent care or something like that," then "[i]f it's an emergency, it's an emergency. You get there, you get the child the care that they need, and you contact the parent as soon afterwards as you can." *Id.* at 37-38. When asked if it "was an actual emergency" when this occurred, Mr. Hyland said that he "would defer to a parent [Mother] making an assessment and they are there. They consider it an emergency. ... If [Mother] thinks its an emergency, I think it's an emergency." *Id.* at 38.

This question was pertaining to M.M.B.'s "toe injury," a topic reopened by Mother's counsel on the second day of trial: "So what happened, the toe and the lip, and when was that?" Mother stated that M.M.B. had sustained a "toe injury" since the parties exchanged trial exhibits and proceeded to testify, in full,

again, to this injury. Trn.114 at 8.[40] The district court found further that "[Mother] testified she was concerned about the injury and took the child to **urgent care**. [Mother] testified the toenail had broken off." *Id.* (emphasis added). But Mother testified that she "took [M.M.B.] ... immediately to the emergency room," Trn.114 at 62; Trn.121 at 248 ("Within five or seven minutes" of M.M.B. entering her care, Mother had "decided, okay, I'm going to take him to the doctor, because I did not know if it's not broken. I did not receive updated journal entry, so what would be only the message that he thinks that it's not broken."), and that once "[M.M.B.'s pediatrician] had looked at this injury," Trn.121 at 251, he found that M.M.B.'s toe "is not broken," that "it doesn't have any infection," and "was [] kind of unsure ... why this doctor said the toenail was missing, [when] the toenail is there. *Id.* at 251- 52. Mother also testified to M.M.B. "having a pretty badly wounded toe, with bleeding and with breaking off his toenail." *Id.* at 247. The district court found that this was not the first time "[Mother] took the child to the emergency room rather than a regular doctor appointment." Doc.95 at 13. In 2018, after one such incident, Father, "'concerned for [M.M.B.'s] safety' in her care," had asked Mother if she was "'able to take responsible, mature, adult, parental care of [M.M.B.]?'" *Id.*

[40] The district court found that "**Both parties** testified to a foot injury [M.M.B.] sustained while in [Father's] care in May of 2019," and that "**[Father]** and [Grandfather] testified that [M.M.B.] fell and cut his lip that morning and then later dropped a robotic vacuum on his toe." Doc.95 at 5 (emphasis added). Father, however, did **NOT** testify this injury.

Mr. Hyland did not see an issue "if [M.M.B.] is repeatedly taken to doctors' appointments without notifying [Father] until afterward" while Father was sharing legal custody. *Id.* at 38-39. "When you have domestic abuse, it could be fear, it could be a number of things," but: "My guess would be that it's not one, but probably just a combination. But I wouldn't say that it's just not respecting the other parent." *Id.* at 39. Mr. Hyland discussed Mother as infallible. *Id.* at 37-39.

Mr. Hyland attributed much of his conjecture to "domestic abuse." Mr. Hyland stated that he gives "each parent ... the opportunity to give me additional information, to give me context to show how my thinking is incorrect," *Id.* at 62, but Mr. Hyland's thinking is rigid and distinctly his own.

> "[T]he purpose of domestic abuse programming is to be self-reflective about the actions that you have taken. It's not there to harden your view that the other parent is the domestic abuser. And so in my conversation with Father, that's the impression that he gave, was that he wasn't able to apply those principles to himself, but that he projected them onto Mother, and that's -- that's not the purpose of the domestic abuse counseling."

Id. at 60-61.

Mr. Hyland carefully phrased everything he said so that the emphasis was on suggesting that Father had perpetrated domestic abuse against Mother -- without ever saying so. The district court, in regurgitating Mr. Hyland, did the same:

> "[Father's] counselor at Eastside Neighborhood Services... also testified at trial[and] found that [Father's] was able to shift from blaming others to taking responsibility for some of his behaviors, but [Father] *did not* take responsibility for physical abuse. ... [Father] continues to deny he

> perpetuated domestic abuse, claim he is the sole victim of abuse in the relationship and blame [Mother] for manipulating the situation to harm him. Mr. Hyland found that [Father] used his domestic abuse programming as a 'cudgel' against Wife to 'support his narrative that she is the domestic abuser and he is the victim.' The Court believes this characterization is incredibly accurate. The Court is also concerned that even after [Father] completed domestic abuse programming, he continues to refuse to take responsibility for his abusive behaviors and continues to display coercive controlling behavior towards [Mother]."

Doc.95 at 7.

When Mr. Hyland was asked, "[I]n your report, you noted that [Mother] was... asked to leave her initial host family for unspecified reasons. Did you ever ask her what those reasons were?" he responded, "**No.**" *Id.* at 28-29 (emphasis added).

Mr. Hyland decided to not to interview Father's parents as part of his evaluation. *Id.* at 43. When asked if he agreed that Father's parents "could potentially be a very good collateral source," Mr. Hyland stated, "I don't." *Id.*

Q. When did you meet [Father's] parents?

A. At the parenting observation.

Q. [H]ow long of a conversation did you have with them?

A. On the way in and on the way out, maybe 5, 10 minutes.

Q. **So you never really had a very significant conversation with them?**

A. **That's correct.**

Id. at 43-44 (emphasis added).

Grandfather testified to witnessing Mother's tantrums while she held M.M.B. in her arms and refused to allow someone else to hold him. Trn.114 at 86-87, 89. Mr. Hyland was questioned about this:

Q. [D]id [Father] also report to you that during the marriage, [Mother] would scream and yell at him, quite frankly, for hours?

A. Yes

Q. And that the screaming and yelling went on to such a point that the parties missed functions and family events because the screaming just did not stop?

A. Yes

Q. **Did you have any reason to doubt that?**

A. **Yes**

Q. **Did you ever speak to anybody else to get any collateral information as to that?**

A. **No, I did not.**

Trn.121 at 32 (emphasis added). Mr. Hyland referred to Mother as "the model of early childhood awareness" even though he had been informed that Mother "would scream and rant at [Father] with [M.M.B.] in her arms." *Id.* at 52-53.

Q. [I]s that model parenting?

A. That particular incident, no.

Q. [D]id you ever ask if [M.M.B.] was present when [Mother] threw the hair brush at [Father]?

A. [N]o, I didn't ask for that.

Id. at 53. Mr. Hyland testified that he did not investigate **a number of** troubling issues revealed during his evaluation of Mother:

Q. ... Would you agree with me that [Father] informed you that [Mother] would run around the house with a knife, threatening to harm herself? Do you recall being told that?

A. Yes

Q. And would you agree that that, in fact, could be quite alarming?

A. Yes

Q. Would you also agree that [Mother] told you that she threatened [Father] with a knife?

A. I believe so.

Q. And [Mother] also admitted to you that she threw a hairbrush at [Father], and it hit him in the ear?

A. Yes.

Q. Okay. Did [Father] also provide you with pictures of scratches down his chest that he indicated [Mother] did to him?

A. Yes. ...

Q. ... Would you agree with me that [Mother] did, in fact ... threaten [Father] with a knife.

A. That's my understanding.

Q. And she also admitted to you that she did throw the hairbrush at [Father]?

A. Yes.

Id. at 31-33.

Mr. Hyland said, "I think [Father] needs some rehabilitation in regard to his mental health," specifically, "towards his taking responsibility for domestic

abuse" and "for the way that he treats his conceptualization of [Mother], which I ... felt was very distorted." Mr. Hyland agreed, he was discussing "mental health" concerns but "never did a psychological evaluation as part of this [his evaluation]." *Id.* at 55. For Mr. Hyland's "purposes," he "didn't feel that a psychological was needed" because of what "I observed." *Id.* at 19.

Mr. Hyland had no concerns that Father would physically abuse M.M.B. Mother had not made any allegations to Mr. Hyland that Father would physically abuse M.M.B. *Id.* at 57-58. Mr. Hyland testified, "I was not aware of negative statements made to the child about [Mother], no." *Id.* at 54. Rather, Mr. Hyland testified that Father's interactions with M.M.B. were "very appropriate." *Id.* at 58. Mr. Hyland was unable to answer questions of how M.M.B. would respond to his proposed schedule of "just having six hours per week" with Father, though he repeatedly stated that he was aware of the mandates of the applicable statues. *Id.* 54-57.

Mr. Hyland *might* have acknowledged a relationship for Father and M.M.B., but with Mr. Hyland, everything is a game.

Q. ... So now you testified a little bit about the observation, can you tell me a little bit more? I mean, you talked about [Father's] observation with [M.M.B.]. Did it look like they had a very comfortable relationship?

A. Yes.

Q. And that would you agree there was definitely some attachment there?

A. *I would say "attachment," to me, is a social service term of art, and I can say that there was reciprocity in the interactions between father and son. There was comfort between the two of them. I could say that.*

Id. at 46-47 (emphasis added).

Mr. Hyland is not clever. He is obnoxious and a criminal.

Mr. Hyland "recommended that father complete further domestic-abuse programming and work with a parenting coach to increase his early childhood developmental knowledge and develop constructive co-parenting behaviors." *Bachmayer I* at *1.

D.

The district court must consider "the willingness and ability of each parent to provide ongoing care for the child; to meet the child's ongoing developmental, emotional, spiritual, and cultural needs; and to maintain consistency and follow through with parenting time." Minn. Stat. § 518.17, subd. 1(a)(7). "[T]he court shall recognize that there are many ways that parents can respond to a child's needs with sensitivity and provide the child love and guidance, and these may differ between parents and among cultures." *Id.*,

subd. 1(b)(3) (2018). "Based on facts set forth in the custody evaluation, the district court found that father is unable to meet child's physical and emotional needs." *Bachmayer I* at *5. "[T]he district court should have also considered mother's purported inability to parent and the possibility of different parenting styles" as "the parties' differences in parenting style are [not] due to cultural differences or even deliberate choices." *Id.*

In considering M.M.B.'s "physical, emotional, cultural, spiritual, and other needs, and the effect of the proposed arrangements on the child's needs and development," Minn. Stat. § 518.17, subd. 1(a)(1),

> "[t]he district court expressly found that mother had 'clearly established a developmentally appropriate routine and care schedule for child.' Conversely, the district court found that father did not sustain a regular routine for child and pointed to identified problems with child's sleep schedule as an example. Father contends that he is taking classes to improve his parenting skills, but he presented no evidence at trial that he plans to implement any improvements to child's sleep schedule or otherwise."

Bachmayer I at *4.

The district court found that

> "Mr. Hyland was concerned about [Father's] ability to meet [M.M.B.'s] physical and emotional needs due to his immaturity and defensiveness. Mr. Hyland expressed concerns that [Father] was unable to distinguish his own needs from the child's. [Father's] reliance on [M.M.B.'s] 'cues' rather than setting boundaries himself will **negatively** impact a child who is rotating between two homes. The Court believes that [Father] will continue to ignore all of [Mother's] input and concerns about [M.M.B.'s] care. [Father's] distrust and loathing of [Mother] does not lend itself to coordinated care."

Doc.95 at 10. Still, "Mr. Hyland observed positive interactions between [M.M.B.] and both parents at their respective homes.[41] [M.M.B.] is developing appropriately and meeting all major milestones." *Id.*

Father testified that, in his care, "[M.M.B.] has his own toddler bed but he sleeps with me in my bed and ... loves to just cuddle up and read a book or watch a video." Trn.114 at 147. "I get to put [M.M.B.] to bed and wake up with him, make him breakfast and get him ready and change his diapers." *Id.* at 179.

M.M.B.'s paternal grandfather testified to how Mother's expectations for M.M.B.'s bedtime were a logistic impossibility at times and conflicted with M.M.B.'s emotional needs. "I know bedtime was a big issue. ... [Mother] was very strict about the schedule that she was keeping with [M.M.B.] and that included everything he ate, and how much he ate, and when he ate, and when he went to bed." Mother's schedule was

> "not only impractical, it was impossible because [Father] picked [M.M.B.] up at 5:00 and on Tuesday evenings he went to an [] ECFE class at 6:00 which ended at 7:00 so they arrived at our house at 7:30. And then you factor in time for adjustment and the happy dance and preparing some food and [M.M.B.] wouldn't be even eating dinner until 8 o'clock, so it was 8:30, 9:00 o'clock before it was even possible to get him to bed."

[41] The custody evaluation warrant gave Mr. Hyland "the discretion and authority to: Conduct home visits with the parties." Doc.10 at 1-2.

Id. at 99-100. However, Grandfather testified that this situation was relatively unchanged even without the ECFE class as Father "will play with [M.M.B.] outside or they'll go somewhere," then "[Father] prepares food for [M.M.B.] and when he's done eating [and] after playing and seeing the rest of us [his family members] it's pretty much bedtime so they're usually in bed by 8:30." *Id.*

Mother testified that she and M.M.B. sleep "in one bedroom, but he has his own crib," *Id.* at 18, and that she does "sleep train" him. *Id.* at 20-21. When asked if by "sleep train," Mother meant that she "would essentially let him cry it out," Mother answered that M.M.B. "never cries out" and answered affirmatively that "from the beginning [M.M.B. has] always just gone to sleep." *Id.* at 59-60. Mother also testified that

> "as soon as I lay him in his crib I can start working but wait until he falls asleep, and it usually takes him about 15 minutes to fall asleep and that's the same for the evening, we have a set bedtime. We do have our bedtime routine and he's usually in bed between 7:00 or 7:30 p.m. and asleep by either 7:30 or 8:00 p.m. the latest."

However, when M.M.B. "does not get enough sleep," Mother said that he's "tired" and "very emotional" and they both "have a lot of tantrums throughout the day" and once asleep, he sleeps longer. Mother testified that "[Father] continues to put [M.M.B.] to sleep whenever he feels like that's a good time, so it's usually 9:00 p.m. or later, the latest it's been 10:30," and that, as a result, "usually [M.M.B.'s] day nap is more than three hours and the night he is already

tired by 6:00 p.m. and he's asleep by 7:00 p.m. **sharp** and he sleeps ... the whole night until the morning and he wakes up around 7:00 a.m." *Id.* at 20-21.

Father's parenting coach, Michael Borowiak (Mr. Borowiak) testified to his work with Father and stated that "one of the struggles [Father] reported was that he wanted to make the most of the time he had with his son," but "the notion of bedtime during [Father's] parenting time" was "different from his co-parent's." Mr. Borowiak suggested that "[s]ometimes when parents get stuck the use of a third party can be helpful and a pediatrician can be a useful resource for just getting input on how best to handle things." In this case, "[Father] informed me that they had a pediatrician that they both trusted or had confidence in." Mr. Borowiak advised Father on strategies for making the appointment a productive and positive co-parenting experience. In following up, Father "stated that it went well. He indicated that both parents participated in the meeting and that he was able to get feedback from the pediatrician and indicated that ... things seemed to be okay with how they were managing them." *Id.* at 120-121. Mother agreed that she and Father had attended the appointment "and discussed the bedtimes together," or, as she testified, "slightly discussed," *Id.* at 60-61, and that M.M.B.'s pediatrician has "been helpful to" her and Father "in communicating medical, at least medical issues." Trn.121 at 220-221.

Despite having "Twenty-seven years of social service experience working with families," *Id.* at 48, Mr. Hyland did not "know of [any] situations" where

children "co-sleep with their parents" as Father was with M.M.B. *Id.* at 49. Theoretically, "if it's an intact family" or if there were "cultural or other reasons" he could find it acceptable if the child was co-sleeping with *both* parents in the same bed at the same time, but "the distinction would be," for Mr. Hyland, when the "child [is] living in two different homes," specifically, where the child shares a bed with his father, Mr. Hyland felt, "**this** is, I guess, a little different in my mind." *Id.* at 49-50. Mr. Hyland testified that by the "reading of literature" he tries "to keep current." *Id.* at 48. While Mr. Hyland testified, "I'm sure you could find that literature out there" that has "support for co-sleeping," he hadn't read any. *Id.* at 49. Neither could Mr. Hyland identify "any specific literature" to support his notions, that they are "developmentally appropriate" as he claimed, or that divergence from them was developmentally inappropriate as he pushed on Father and M.M.B. *Id.* at 48. Mr. Hyland's notion of "cooperative coparenting" is both parents putting the "child in a crib." Mr. Hyland stated this is "good sleep hygiene," in apparent contrast to "co-sleeping," that "the baby's going to benefit from," though he did not explain how. *Id.* at 48-49.

At the same time, Mr. Hyland stated that "the baby's going to benefit" when "the parents are tuned into the child." *Id.* at 49. Mr. Hyland found that Father was in tune to "where [M.M.B.] is at," which he determined by Father's waiting "to put the child down to bed until the child is ready." *Id.* at 66. Mr. Hyland also testified that this was not appropriate for Father to do, because consistency is important, "Yes, it is." *Id.*

Mr. Hyland agreed that Father and M.M.B. attended an evening ECFE class and that after "a child's been out and about, when they first get home, it does take some time to often settle them down." *Id.* at 51. Mr. Hyland also agreed that M.M.B. did not need "to be somewhere in the morning" when he came from Father's parenting time. Trn.121 at 50-51. When asked if he was "prioritizing this [bedtime] schedule over contact with his father," Mr. Hyland testified, "No," he was not suggesting that consistency was more important than a child's relationship with his father or the child's emotional well-being. *Id.* at 52. However, Mr. Hyland's recommendation was that there "should not be an overnight" for Father "during the middle of the week due to [] these bedtime issues." *Id.* When asked if Father should "have reduced parenting time" because of the "difference in opinion on bedtime," Mother said, "No, I didn't say that." Trn.114 at 52.

The sleep-arrangement that Mr. Hyland adamantly touted was stated in his report as, "[Mother] said that she only has [M.M.B.] sleep in his bed which is the custom in her country and also as a way to develop good sleep hygiene." CPTE at 12. Mr. Hyland described Father's approach as "a foreign sleeping arrangement." CPTE at 13. When asked why he deemed "[Father's] view less important," Mr. Hyland testified, "I wasn't looking at parental views. I was looking at what could benefit the child as far as consistency between the homes." Trn.121 at 48-51. But consistency wasn't the issue that Mr. Hyland had with Father's approach when he stated in his report, "Taking cues from a one year

old to set bedtimes and bedtime routines may sound child-centered on the surface, but just below the surface may lurk the anger and upset of a parent who feels they are not being treated fairly by the court system and the other parent." CPTE at 13.

The district court found that Father was interfering with Mother's routine by not adopting and strictly enforcing Mother's sleep schedule for M.M.B.

> "During the pendency of this case, [Mother] raised concerns about how tired [M.M.B.] was after parenting time with [Father]. When Mr. Hyland asked [Father] about the child's bedtime routine, [Father] stated that the only benefit to a child having an early bedtime was for a parent to have free time. When asked if a consistent bedtime would benefit [M.M.B.], [Father] told Mr. Hyland he should ask [M.M.B.]. [Father] reported he does not keep a regular routine for [M.M.B.] and instead looks for cues from [M.M.B.]."

Doc.95 at 5.

E.

The template case for fraud upon the court presented by Mother's counsel had a weakness. Besides the mandatory custody evaluator role, there was a need for expert mental health testimony. In *Sterling*, such testimony had been provided by Sarah Cross, "a licensed clinical social worker" who "specializes in 'play therapy,' which is based in part on her interpretations of a child's statements and demeanor while playing with toys, which may provide insight into the child's emotional well-being," but the appellate court had identified that testimony as inadmissible. *Sterling* at *3 ("Sterling does not appear

to challenge the admissibility of Cross's testimony"). To account for this weakness, the fraud necessitated enhancement.

It was within Mr. Hyland's purview to order psychological evaluations for the parties, [42] and Father had strenuously urged him to do so.[43] Instead, in his report, Mr. Hyland purported to diagnose Father himself with an alleged untreatable unnamed mental health ailment. Per his report, Mr. Hyland's unqualified diagnosis was inspired by Mother's stating to him that she thought Father might have trouble regulating his emotions. CPTE at 10. Mr. Hyland stated that Mother had not meant this to be an allegation regarding mental health. *Id.* Rather, Mother discussed this with her attorney at trial, indicating that it was a reason the "relationship started to break down." Trn.121 at 185. She couldn't recall if she "said it to Bob Hyland, or Dr. Rilen," but, "we had arguments ..., you know, mood swings of both of us or I thought it was ... honestly, like sometimes when he has high blood sugar, he, ... would get irritated by every single thing. And every little thing would irritate him. If he would be low, then it was hard for him to function or, you know, like hard for him to -- to just understand what's going on. So, I mean, I always made the joke like I -- I married a person with three personalities. Like saying that I have [Father], then I have the low blood sugar [Father], and the high blood sugar [Father]. So by saying that, I mean I

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[42] *See* Doc.10 at 2 ("discretion and authority to ... Refer parties to Fourth Judicial District Court Psychological Services for psychological evaluations").

[43] *See ante* at 144.

loved him for who he was."[44] *Id.* Mr. Hyland stated in his report that "[a]fter reviewing [Father's] medical records I concur with him that his medical condition should not be a consideration in custody or parenting time recommendations." CPTE at 9. Subsequently, the district court found "no physical health or chemical health concerns for either parent." Doc.95 at 5.

"The district court ordered mother and father to participate in ... individual psychological evaluations." *Bachmayer I* at *1. With Mr. Hyland's invented mental health condition for Father and Father's continued fervent allegations of Mother having serious mental health issues, the parties returned to the district court referee who ordered psychological evaluations.

> "The parties participated in a custody and parenting time evaluation with Hennepin County Family Court Services and a report issued on **December 6, 2018**. While the Evaluator did not refer the parties for psychological evaluations, he did raise concerns about [Father's] mental health. In addition, throughout the course of the evaluation [Father] reported repeated concerns about [Mother's] mental and emotional health and how it affects her ability to parent."

Doc.35 at 1 (emphasis added). The psychologist was to receive "the custody evaluation." *Id.* at 2.

> "At the conclusion of the examination, a written report shall be prepared and eFiled as a sealed document and as such, only available for review by the Court. ... This written report shall contain ... the evaluator's opinion as to whether the condition (s), if any, would interfere with **his** ability to safely and effectively care for the parties' child."

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[44] Mother testified that, "Yeah," she "tried to make it work." Trn.121 at 185.

Id. at 2 (emphasis added).

"The psychological evaluations were filed on February 14, 2019." *Bachmayer I* at *1. "Both parties participated in psychological evaluations through Hennepin County Psychological Services. Dr. Sebastian Rilen completed both evaluations and testified at trial. Dr. Rilen reviewed some collateral information during his evaluations, but did not review the custody evaluation prior to completing his testing and interviews." Doc.95 at 8. Sebastian Rilen, county psychologist, received Mr. Hyland's "custody evaluation" and drafted false documents purporting to be "psychological evaluations." Dr. Rilen, like Mr. Hyland, found an unknown, untreatable mental health ailment for Father.

> "The evaluator opined that father lacked the ability to effectively co-parent and stated that, absent significant intervention, father would likely continue to perpetuate themes of intimidation against mother 'without insight into the potential harm this can cause to a child.' The evaluator recommended clinical intervention but lacked sufficient information to make a precise diagnosis or determine the likelihood that clinical intervention would be successful."

Bachmayer I at *1. "The report emphasizes that father *currently* lacks the ability to effectively co-parent. Further, the evaluator expressed uncertainty that father would improve, even with clinical intervention." *Id.*, at *4. Dr. Rilen diagnosed Father with "adjustment disorder with mixed disturbance of emotions and conduct," Doc.95 at 9, – but he also realized Mr. Hyland's diabetes-mental-health invention, describing Father as having "interpersonal conflicts" of an "extreme nature" possibly caused by "something more integral to his character

that both causes and perpetuates relational turmoil," *Id.*, – Father's chronic diabetes and, as Mother testified, living with a person with such a chronic health condition. According to the district court, it led Dr. Rilen to "also consider[] personality pathology" for Father. *Id.*

Dr. Rilen perjured himself at trial. Although seemingly mystified as to Father's mental health, Dr. Rilen was unmistakably clear when he lied about there being no evidence that Mother was personality disordered. "Dr. Rilen did not observe any evidence of any of the significant disorders alleged by [Father]." Doc.95 at 8. But Dr. Rilen also testified that he had found evidence satisfying each of the criteria he mentioned for when he would consider possible personality pathology. Dr. Rilen testified that he "asked [Mother] in much greater depth about" these areas of concern. Trn.121 at 126. "Dr. Rilen reports that [Mother] has exhibited impulsive behavior and **prior** willingness to be deceitful." Doc.95 at 8 (emphasis added). Dr. Rilen testified that "anytime" there is "impulsive behavior, deceitful behaviors, or theft" he considers "things like personality disorder." Trn.121 at 126. "[W]eapon use is concerning," *Id.*, and "the level of violence between both [parties] was actually quite alarming to me." *Id.* Dr. Rilen testified that it "was, obviously, a moment of concern" that Mother "had taken some of [M.M.B.'s paternal grandmother's] clothing." Father's discovery of this was "a major incident in their relationship." *Id.* "Dr. Rilen's evaluation recognized that [Mother] may exhibit anxious tendencies, which could have an effect on her ability to co-parent." Doc.95 at 8-9.

The district court found that "[d]uring his psychological evaluation, [Father] ... reported that he told [Mother] he **was going to** kill her and **wanted to** strangle her." Doc.95 at 7 (emphasis added). Dr. Rilen's report contains Father stating: "I did tell her some things. I said I want to kill you. I'm going to kill you. I want to strangle you. I was beyond my wits. She was planning this. It's what she wanted." But Dr. Rilen testified that Father "acknowledged at one point [that] he did say he ***wanted*** to kill [Mother]," Trn.121 at 113 (emphasis added). Father did not say to Mother that he was "going to kill you." The phrase, "I'm going to kill you," is sandwiched between father's expressions of "want," which matches Father's recollection and Dr. Rilen's testimony. "I was beyond my wits," is a phrase that Father has never used; he would have said "at my wits end."

Yet the district court found that Father had admitted to having "twisted [Mother's] wrist, bit her in the back, slapped her, placed his hand on her throat to keep her back and put her in a chokehold," all forms of violence. Doc.95 at 7. "Dr. Rilen points to several examples of how [Father] denied violent behavior but then acknowledged specific violent acts." *Id.* at 9. The district court made further findings of violence by Father based on Mother's year-old affidavit, including that Father "bit her hand and shoulder" and "squeezed her hand and arm so hard she lost feeling in her fingers." *Id.* at 6. Mr. Hyland wrote,

> "[Mother] said that [Father] also told [Mother] that he **would** strangle her today. ... [Mother] claimed that she put her hand over [Father's] mouth to make him stop saying those things and that is when [Father] grabbed her and bit her on the left arm, just below the shoulder."

CPTE at 6 (emphasis added). Father most absolutely did not bite Mother on her shoulder, if nothing else. Dr. Rilen testified, "I understood that even if [Father] did bite her, she orchestrated a different bite mark on her body to show the police." Trn.121 at 113. The district court found that "[Mother] is self-involved and manipulative," but "the information [Father] provided to Dr. Rilen" was not the basis it found this on. That Father believed that this "information" showed this, the district court found "illuminates [his] lack of clarity in his perceptions," supporting Dr. Rilen's "concerns about [Father's] perceptions of [Mother] which are not based in reality." Doc.95 at 9. The district court also independently found "allegations credible" that Mother is "mentally ill and an unfit parent," and that she is prone to "constant complaining, 'tantrums,' and 'tirades.'" *Id.* at 11. The district court found that Father alleged that Mother has "antisocial personality disorder and psychosis," *Id.* at 13, and that she is "a narcissist, a sociopath and a manipulator with control issues." *Id.* at 8. Dr. Rilen testified that "[Father] had continued to make the case that [Mother] had these problematic personality characteristics that I hadn't seen evidence of in my own evaluation." Trn.121 at 109- 110. However, as just discussed, Dr. Rilen had "seen evidence" of "problematic personality characteristics" in his "own evaluation" of Mother and testified to it. After meeting with Mother **once**, Dr. Rilen concluded that the evidence he had encountered was of the past. "[S]he acknowledged these shortcomings." Doc.95 at 8.

> "The voluntary confessions and admissions of a party are regarded as the best possible evidence."

Wood, 39 U.S. at 434–35. "Dr. Rilen found this anxiety was not the predominant issue in managing the co-parenting dynamics within this family considering the toxicity of the relationship." Doc.95 at 9.

> "Dr. Rilen found that both [Father] and [Mother] behaved immaturely, jumped to conclusions, failed to consider the perspective of the other parent, placed his or her needs above [M.M.B.] and engaged in angry and hostile behavior. Dr. Rilen distinguishes the parties here by noting that [Mother] has admitted her negative behavior."

Id. at 9. "Dr. Rilen opined that" while "individual therapy may be helpful for [Mother], ... such treatment should [not] be mandatory." *Id.* at 8.

F.

The order setting trial was "[b]ased upon the arguments of the parties and counsel, and all the files, proceedings and records herein," Doc.34 at 1, and stated, "The matter will not be continued, except upon request of a party **and a showing of** dire necessity." *Id.* at 2 (emphasis added). The order <u>continuing</u> the trial from "the dates of **March 5, 2019 and March 6, 2019, commencing at 9:00 a.m.**," *Id.* at 1, until "**May 16, 2019 and May 30, 2019, commencing at 9:00 a.m.**," Doc.52 at 1, "[b]ased upon the files, proceedings and records herein," *Id.*, states the reason for granting continuance as, "The above-entitled matter came on **administratively** before the Honorable Holly B. Knight, Referee of District Court.

Both attorneys have requested a continuance, which was granted by the Court." *Id.* (emphasis added). Neither party was present nor represented. *Id.*

One explanation given was that the psychological evaluations were not complete in time to prepare for trial. Doc.50. The initial order stated that "[expert's] reports are due in chambers no later than **February 26, 2019.**" Doc.34 at 2. "The psychological evaluations were filed on February 14, 2019," *Bachmayer I* at *1, but not ordered released until **April 17, 2019**. Doc.59. The parties were permitted to receive their own evaluation but not to see their opponent's, only counsel could. *Id.* "Witnesses requiring a subpoena shall be served with the subpoena no later than one (1) week prior to trial or by **February 26, 2019.** This includes Robert Hyland at Family Court Services." Doc.34.

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> "Phelps and Sterling began a romantic relationship in 2006. Sterling gave birth to a girl in November 2008. Phelps and Sterling lived together and shared parenting responsibilities for approximately two years until they separated. In 2010, Sterling moved to Arizona for six months to pursue an employment opportunity, and Phelps assumed the daily responsibilities relating to the child."

Sterling at *1. When left "with Phelps" for these six months, beginning the month of her second birthday, "the child had 'regressed' by no longer being able to count beyond ten or to use the bathroom." *Id.* The child lived "with Sterling upon her return to Minnesota in the spring of 2011 until shortly before the custody proceeding began." *Id.* at *3. "[T]he parties agreed to a parenting-time schedule. But the agreement later fell apart. In April 2013, Phelps petitioned for

joint legal custody and sole physical custody. Sterling answered, requesting sole legal custody and sole physical custody." *Id.* at *1. A custody evaluation was ordered.

Phelps obtains temporary and then permanent custody. From the situation, the only conclusion is that Sterling has not been meeting her daughter's needs. But she has been. Cross' description of this relationship, that it is "symbiotic," supports Cross' allegations that the relationship is harmful to Sterling's daughter. Though not the most apt term, "symbiotic" also connotates a very close relationship, so close, that cutting this relationship off is *certain* to do harm to the child. By disregarding *this* testimony, the district court can and does ignore this effect of its order.

The district court did find Cross' testimony that the child's relationship to Sterling may endanger its "psychological safety," presenting a "risk of psychological problems during the child's development," credible. These "concerns" are adopted by "the key non-party witnesses agree[ment] that the child's relationship with Sterling was unhealthy and placed the child's mental and emotional health at risk," and this in turn is adopted by the district court. *Id.* at *4. But this was the concept behind the custody evaluator's recommendation, made months prior to the trial, of sole custody to Phelps "primarily because the child's relationship with her mother was emotionally unhealthy." *Id.* at *1. And subsequently, in November 2013, a temporary order

was issued suddenly awarding Phelps custody. Three months later, "[t]he case went to trial in January 2014." *Id.* at *1.

There is no definite statement in the opinion as to the date of the evaluator's appointment or when his report was issued, but these events happened. "In April 2013, Phelps petitioned for **joint legal custody** and sole physical custody," but the custody evaluator recommends **sole legal** and physical custody to Phelps. *Id.* Sterling's claim that "she was **entirely** responsible for the child's care until she turned two years old," *Id.*, is not adopted, but based on the facts of the case, it is entirely possible that she was responsible for the vast majority of the child's care during this time. That "Phelps and Sterling lived together and **shared** parenting responsibilities for approximately **two years** until they separated," does not specify the degree to which parenting responsibilities were shared during this time and the same ambiguity is present in the district court's finding "that the parties shared child-care responsibilities before and after they separated." Sterling's daughter resides with her for the two-and-one-half years prior to Phelps securing temporary custody. There is no dispute that Sterling has cared for her daughter at all times and has lived with her daughter at all times – except for the six-month period when the child was two and during which the child experienced marked declines *while in Phelps' care* – during the three years prior to trial.

In its review of the case, the appellate court found the "evidence in the record ... in conflict," *Id.* at *5, regarding Phelps' abuse of the child, with "some

of the evidence favoring Phelps." *Id.* at *4. It found that "Phelps dragged the child up a staircase by her forearm in November 2013," *Id.* at *5, and that "Phelps hit the child's head on one occasion in December 2013." *Id.* Both Sterling and the child's maternal grandfather "testified that the child told them that Phelps was responsible for her injuries." *Id.* Sterling testified "that Phelps had abused the child." *Id.* at *1. The child's maternal grandfather "described Phelps favorably but also testified that the child once had a bump on her head, which the child attributed to Phelps." *Id.* And this all happens in the short period before trial when the child is trapped in Phelps' custody. But the district court found Phelps' perjury credible. Though Cross "expressed concern" that the child's "reports of abuse" were "coached," she did not testify to them. *Id.* at *5. The child-protection worker[45] failed to perform her function and perjured herself when testifying to having "found no evidence of maltreatment by Phelps" despite her involvement. *Id.* at *1. The custody evaluator's disbelief of the "reports that Phelps had abused the child," *Id.*, he premised on Cross' "concern" that sterling had "coached" the child into making them, thus having no "reason to fear for the child's safety in [Phelps'] care." *Id.* at *5. But because Phelps did abuse his daughter, *Id.*, Cross' testimony that Sterling had "coached" the child is false, invalidating the CE's belief "that Sterling had caused the child

[45] Kelly Vang, Ramsey County Senior Child Protection Worker

to make false reports of abuse." *Id.* at *1. "The [guardian *ad litem*][46] testified that she did not credit the reports of abuse, in part because 'none of the professionals in this case have corroborated that.'" *Id.* Neither the witnesses that should be neutral nor Phelps seemed to have any qualms about lying in court and perverting Phelps' physical abuse of his daughter into the means by which he obtains custody.

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At trial, Mother's counsel, leading Mother, attributed the continuation to a "Dr. Hyland's" file being unavailable, but the record shows that is false. Doc.50.

Q. Now, we were scheduled for trial initially --

A. In March.

Q. -- in March. Early March --

A. Yes.

Q. And that didn't happen. We all decided on a continuance for various reasons. We didn't have a lot of Dr. Hyland's -- or Mr. Hyland's file --

A. That's correct.

Q. -- was one, things like that.

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[46] Jean Peterson

Trn.121 at 222-23. On July 25, 2018, the district court had ordered a custody evaluation through Family Court Services with "a written report" due "**November 29, 2018**," Doc.10 at 1, but the bolded, underlined date of **November 29** indicated what day Mr. Hyland's signal would appear in the record. *Id.* Father filed certification that he had completed the required coparenting/divorce class on **November 27**. Doc.***20***. However, the record purports that it was filed on **November 29**, the same date the custody evaluator's report was due. The custody evaluation does not go to the record. Mother filed her certificate on **November 28**. Doc.***21***. The record was altered.

The January 24, 2019, order states, "The above-entitled proceeding came on for a Pre-Trial hearing before Referee Holly B. Knight, **on the 12th day of December 2018**," Doc.46 at 1 (emphasis added), and ordered that "the custody evaluation file should be released to counsel for the parties" on condition that

> "[t]he lawyers shall not further disseminate the contents of the file except to experts, consultants, as submissions to the Court, and opposing counsel in this litigation. Any expert or consultant is subject to the same conditions of confidentiality as the lawyers. A party may review the file at his/her lawyer's office but a copy of the contents of the custody evaluation file shall not be released into the party's possession."

Id.

In *Sterling* at *1, there are eight months between Phelps' petition for custody in April 2013 and the trial in January 2014. In this case there are eight

Months between Mother's petition for dissolution in May 2017 and the *initial trial dates* scheduled for March 2018. In *Sterling*, Phelps was awarded temporary custody of his daughter **two months before trial** on the recommendation of the custody evaluator. *Id.* **In those two months**, he physically abuses his daughter twice. There is a record of one instance of abuse each month. *Id.* at *5. The continuation in this case extended the final date of trial **three months** out – because M.M.B., at barely one-year-old, was too young to be blamed as causing to himself the injuries Mother would inflict on him. The following exchange occurred between Mother and her counsel at trial:

Q. ... **So things have happened since that continuance date, right? Incidents?**

A. Yes.

Q. **A lot of things.**

A. Yes.

Q. **Doctors' appointments?**

A. Yes.

Q. **Things like that.**

A. Yes.

Trn.121 at 222-23 (emphasis added).

In *Sterling*, in an order devoted to credibility determinations, that the maternal grandfather "described Phelps favorably" and also testified that the child told him "that Phelps was responsible for her injuries," *see supra* at 114, show no reason to impugn his credibility, yet the district court did not find his testimony credible. It found contrary testimony credible, testimony alleged on appeal the result of prejudicial taint. *Sterling* at *3.

M.M.B.'s injuries also occurred following issuance of a custody evaluation. The concept is according to the template case presented by Mother's counsel, Doc.13, that Father would inform Child Protection Services (CPS) that M.M.B. had been abused, and that he would accuse Mother. The CPS investigator would close the case without finding abuse and testify to this at trial. To obtain the benefits of Mr. Hyland's fraud, Mother was required to physically abuse M.M.B. Ordered on the 27th day of February, during the continuation period, M.M.B. suffered a series of progressively worse injuries, until CPS opened an investigation. Physical abuse results in physical injuries, and M.M.B.'s injuries needed explanation. At trial, CPS was not represented.

Q. *And so this all happens in April?*

A. *Yes.*

Q. *These injuries, and then the Child Protection.*

A. *Yes.*

Trn.121 at 245 (Mother and her counsel) (emphasis added).

First, M.M.B. sustained a chipped tooth. The district court found, "[M.M.B.] chipping a tooth." Doc.95 at 5. Next, he sustained a burn to his finger. The district court found, "[M.M.B.] receiving a burn on his finger." *Id.* Regarding the third injury M.M.B. sustained, in her examination of Mother, Mother's counsel read (well enough) Father's OFW journal entry describing M.M.B.'s facial injury: "[M.M.B.] got a black eye, with an open wound the size of a dime, bruise below his left eye, open wound, approximately an inch. And [Father] goes on to describe it." But the district court found "[M.M.B.] getting a **bruise on his forehead**." Doc.95 at 5.

G.

At least one picture of this injury was submitted as evidence for trial, and it matched the description given by Mother's counsel. Mother agreed with her trial counsel. There was no "bruise on [M.M.B.'s] forehead" as the district court stated.

The district court's dismissive mischaracterization of a far more concerning injury seems confounding, especially as a picture, presumably the "Exhibit 14" mentioned by Mother's trial counsel in the following questioning, was submitted as evidence. As shown by the following testimony, there is concurrence between the parties. However, Mother's other counsel wrote in a May 9 memorandum: "As recently as April 2019 Father repeatedly questioned Mother

regarding three relatively minor injuries that the child sustained in Mother's care, including a burn on the finger, minor chipped tooth and bruise near the eye." Doc.67 at 4 (emphasis added). A "bruise on [M.M.B.'s] forehead" may be a "bruise near the eye."

But Mother's trial counsel didn't ask if Father's description was correct, she asked Mother how one-year-old M.M.B. had sustained a black eye and an open-wound the size of a dime below his left eye while in Mother's care. The district court published Mother's other counsel's lie as its own finding.

Q. [M.M.B.] got a black eye, with an open wound the size of a dime, bruise below his left eye, open wound, approximately an inch. And [Father] goes on to describe it. Can you turn to Exhibit 14?

A. Yes.

Q. **Is that the picture of what he's talking about?**

A. Yes.

Q. And *** **how did that happen?** ***

A. [M.M.B.] was reading a book while he was walking. And my grandma was in the kitchen. I was in the main room, asking him what's he's doing. And then -- then he was walking, and reading his favorite book, and he decided to run. And I

guess he didn't see that the dresser -- our big dresser was there. And he fell as he hit the dresser. So he fell on it, and he hit the soft tissue under his eye on the metal handle. And the metal handle has a round -- roundish ends, and that round **the circle bruise, the visible bruise**, was from the handle. And it did swell up. It was red. It did -- it did not look good. **It bled a little**, but not concerning that he would need a stitching. But, um, it was definitely scary to see that happen.

Q. But he's still learning to -- I mean, he walks –

A. He walks but --

Q. -- runs, but --

A. -- I mean, who knew he's going to start running this close from a dresser? So, and while reading a book. So... *[sic]*

Q. Okay.

A. He's exploring what he is capable of doing, I would say.

Q. And did you tell [Father] about this right after it happened?

A. Yes, I did. I did tell him. Yeah.

...

Q. Then you had an exchange the next day.

A. Yes, that's correct.

Q. And there's a journaling of that exchange, as Exhibit 13. That's another OFW journal.

A. Yes, that's -- that's actually a message. That's an update of which I was already saying that I was receiving updates of exchanges.

...

Q. ... So, do you agree that this exchange went the way that he explains it here in this --

A. **No. No, I don't agree with that**. Because when we arrived to the bookstore, I was afraid. I was afraid what [Father] would say or how he would act. And I was prepared that more likely he will have more than one person with him there. Yes, it was also mom and dad. And he is saying here that [M.M.B.'s] -- half of [M.M.B.'s] face was intentionally, awkwardly covered. First thing, it was windy outside, so I had a hoodie on his head. That's why he was wearing a hoodie. And as I saw [Father] already there, I was nervous, and I haven't had a chance to remove the hoodie. So, it stayed on his head, and which, I assume, looked like I was covering

it up. And then here he is claiming that **[M.M.B.] was -- was leaning off of my body with his hands outstretched to [Father]. And he's claiming about the fastest handoff he have ever had. [M.M.B.] came right into my arms.** I think it was a quick exchange. I'm not sure if he was leaning out, but **it was a quick exchange. I agree on that one.** But here where [Father's] making a statement that **[M.M.B.] seemed overwhelmed with relief to be in my arms, he was motionless for a good five minutes**, and it goes on, and on, and on. But I remember when I was leaving, hearing his -- rushing to his parents, and his mother asking, "How is his eye?" And all his parents were, like, went like, "Oh, what did happen to you?" So, I'm not sure who caused this overwhelming feeling or, you know, what part of the exchange was overwhelming for [M.M.B.].

...

Q. Exhibit 15 is -- appears to be a doctor's visit. Just notations from a doctor's visit on 4/12.

A. It was a telephone -- telephone call.

Q. It's just a phone call?

A. Yes, that's correct.

Q. So, you did not take [M.M.B.] in for that bump on his eye?

A. No, I just called.

Q. And what -- and this is just the phone call in?

A. Yes. That I called right after it happened to discuss if I should be taking him to be seen, because I was concerned that he hit his head. ... And then the way how it looked, and where he hit himself, I just wanted to make sure that it doesn't cause anything serious or, you know, just to be on the safe side that [M.M.B.] is fine. So I discussed it with the -- with the nurse. ... So, [M.M.B.] was fine. He was playful. He slept well. And then he woke up and, well, he didn't look the best. It ... looked like a black eye because the swelling and the bruise kind of move --

Q. (Crosstalk.) When you --

A. Yeah, where he hit it. But it's the soft tissue, so, I guess, that's what I was supposed to be expecting, but I was not. So I called again, and I told him, okay, so it's now it seems like it's swelled more, and it's bruised more, and but I mentioned that he slept well, he was not unconscious or nothing, and they

> just said, it's fine. It's just a -- just -- they asked me if I applied some cold press. I said, yes, I did. ... [T]hey asked me if I think that will need stitches? And I said, no, it's fine. And we just discuss, and we concluded that [M.M.B.] is fine. That it was not a -- not a injury to go to see a doctor or, you know."

Trn.121 at 233-37, 240-42 (emphasis added).

Mother's testimony indicates that exchanges typically took longer,[47] but this "was a quick exchange." M.M.B. was in Mother's possession entering the exchange, and so Father would have no ability to control the speed of the exchange except to prolong it. Mother had the ability to extend the length of the exchange, but, otherwise, it was only M.M.B. who could control the speed of the exchange. Mother wasn't paying attention to M.M.B. or his experience. Mother was paying attention only to Mother. Given the speed of the exchange, M.M.B. was leaning off Mother with his hands outstretched to his father because he was feeling overwhelmed *going into the exchange* and sought relief in his father's arms and with his paternal family.

On April 16, child protection interviewed Mother. On April 18, Father contacted [M.M.B.'s] pediatrician. [M.M.B.] was **18 months old** as of April 11, 2019. Sterling's daughter was **six-and-one-half years old** when Phelps obtained

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[47] Mother testified to willfully extending exchanges. *See supra* at 51.

temporary custody, and when "Phelps dragged the child up a staircase by her forearm in November 2013," *Sterling* at *5, she could and did speak to her mother and maternal grandfather about what Phelps had done to her. Sterling reported Phelps' abuse to child protection services. Sterling's mistake was loving her daughter.

> "The district court's finding that no abuse had occurred is primarily a matter of credibility, and we generally give broad deference to a district court's credibility determinations."

Id. (citing *Braith v. Fischer,* 632 N.W.2d 716, 724 (Minn. App. 2001); *Vangsness v. Vangsness,* 607 N.W.2d 468, 474 (Minn. App. 2000)). The predatory "witnesses" each in their turn harassed Sterling with their false testimony, turning the child's words to its mother and maternal grandfather into Sterling's "coaching" of her. It's a lie that harasses Sterling for caring and **blames the child *for speaking*** – for speaking the truth. That is a dangerous lie.

The key similarities between this case and *Sterling* are the overarching prevalence of a "court-appointed custody evaluator" and the emphasis on testimony as to mental health, in that case provided by Sarah Cross. Father's parenting coach also testified, but his professional testimony was admonished by the district court. The Guardian *ad litem* and Ramsey County child-protection worker in *Sterling* are distinguishing.

The age of the child in *Sterling* was, at the time Phelps filed for custody, five-and-one-half years. M.M.B. was eight months old when Mother filed for

divorce. Because of the child's age, and because Sterling provided parental primary care, there was a relationship. Phelps' scant and suspect history of "caring" for the child necessitated him *obtaining* custody *suddenly* just before the date of the trial. M.M.B. was newborn. Mother was primary caretaker for M.M.B. for all eight months preceding the trial and retained this station throughout the dissolution proceedings. M.M.B. was not developed enough to use words to describe Mother's abuse of him, even after the three-month delay. M.M.B. couldn't tell his father how his tooth had been chipped. M.M.B. couldn't tell his father how his finger had been burned. M.M.B. couldn't tell his father how he had sustained "a black eye, with an open wound the size of a dime, bruise below his left eye, open wound, approximately an inch." In *Sterling*, the abuse takes place as soon as Phelps gets custody. In this case, the abuse occurs right after the three-month continuance is ordered. The continuance in this case was a delay to allow M.M.B. to develop more so that when Mother abused him, her abuse could be explained. If M.M.B. was not walking, he couldn't trip on a rug and chip his tooth, as Mother said. He couldn't find the blazing hot tiny light to touch at Como Zoo, as Mother said. He certainly couldn't walk while reading a book and then run with the book, fall, and smash his face on a dresser in his own home, as Mother said. Mother's counsel got it:

Q. But he's still learning to -- I mean, he walks –

A. He walks but --

Q. -- runs, but --

A. I mean, who knew he's going to start running this close from a dresser? So, and while reading a book. So... *[sic]*

Q. Okay.

A. He's exploring what he is capable of doing, I would say.

Trn.121 at 233-34.

The abuse was just one of the plays. It served an important purpose. It was the evidence used to reduce Sterling to an alienating parent. But it wasn't used that way in this case. In fact, it was hardly used at all. Father was found impossible because he would not stop recording the parties' exchanges. Father was found impossible for his not enforcing the rigid bedtime schedule Mother was constantly demanding of him. The real purpose of their child abuse is to initiate them into the crime. Once they abuse their child, there is no backing out, no going to the police. It is a measure to ensure that this unworthy parent can prove that they will take the fraud to the end. But for Mother, the plan fell apart. The child-protection worker did not appear at trial.

A. I received a phone call from Child Protection Services that someone accused me of physically abusing [M.M.B.]. And Natalie was the social worker. She told me that she was --

[Father's counsel]: Objection. Hearsay.

THE COURT: Sustained.

Q. You talked to a child protection worker.

A. That's correct.

Q. Did somebody come to your home?

A. Yes, within 30 minutes.

Q. They came to your home?

A. And asking me questions, if I physically abused [M.M.B.].

Q. What were the things that they were asking about?

[Father's counsel]: Objection, hearsay.

THE COURT: Overruled.

Q. You can answer.

A. They were asking about **injuries that happened when [M.M.B.] was with me**.

Q. And are those the same three injuries that are identified in Exhibit 10?

A. Yes. That is correct.

Q. So **two days later, those same injuries were being reported to the doctor [Dylan Bindman] by [Father]**?

A. Yes. Yes, that's correct.

Q. Did [Father] know about all of these injuries at the time they happened?

A. Yes, that's correct.

Q. Was he aware of the injuries, like he'd seen the photos? You had --

A. Yes.

Q. -- communications?

A. Yes.

Q. All of those things --

A. Everything. And within -- within one or two hours after the incidents that happened.

Q. Okay. Let's talk about each one here. We still have time today.

Trn.121 at 223-225 (emphasis added). The district court sustained the first objection. It is unfortunate about that. But she overruled the second. "Natalie" got cold feet, or something. Maybe the injury was too significant for, "Natalie", or whomever, to risk perjury. Mother's trial counsel was determined to find out who called, though.

Q. Do you have any idea who called Child Protection? They don't usually tell you, but --

A. They don't tell you, but I think that --

[Father's counsel]: Objection.

Q. Okay. So you don't know?

THE COURT: They won't tell you.

Trn.121 at 232-233 (emphasis added).

Q. How did you -- yeah, how did you feel about this after Child Protection had just been out investigating on the 16th?

A. That it was probably [Father] who called the Child Protection on me. That he's --

Q. But you don't know that?

A. I don't know that, but after --

Q. Yeah. Okay.

A. -- keep receiving this, that was my thought, that he's collecting --

[Father's counsel]: Your Honor, objection. All of this is speculation at this point.

[Mother's counsel]: **I agree.**

THE COURT: **Sustained.**

Trn.121 at 245 (emphasis added). The allegation arrived on the record. Mother's counsel questioned M.M.B.'s paternal grandfather:

Q. Are you aware that the other three injuries that happened to [M.M.B.] were turned into Child Protection?

A. Yes.

Q. Did you have anything to do with that?

A. No.

Q. Calling Child Protection?

A. No.

Q. Do you know if [Father] did?

[Father's counsel]: Objection, Your Honor, under statute the identity of the reporting --

THE COURT: Sustained.

Trn.114 at 107.

The district court found:

> "[Father] has **made numerous allegations of child abuse by [Mother] towards [M.M.B.]**. On April 18, 2019, [Father] used the parent communication portal at [M.M.B.'s] pediatrician's office to **allege three instances of abuse towards [M.M.B.]**. Child protection **later** investigated the same three allegations. [Mother] credibly described all three incidents that led to [M.M.B.] chipping a tooth, [M.M.B.] receiving a burn on his finger and [M.M.B.] getting **a bruise on his forehead**. [Mother] appropriately informed [Father] of the minor injuries and sought suitable health care. Child protection closed its case **with no findings**."

Doc.95 at 5 (emphasis added).[48] Consequently, the district court found, "There is no credible evidence that [M.M.B.] is any way endangered or neglected in [Mother's] care." *Id.* at 9.

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[48] The district court found that "[Mother] appropriately informed [Father] of the minor injuries and **sought suitable health care**." *Id.* at 5 (emphasis added). Mother's other counsel stated that Mother informed Father, and "Mother immediately **consulted with medical providers** regarding two of the three injuries." Doc.67 at 4 (emphasis added). When M.M.B.'s finger was burned in her

"**[T]he district court erred** by finding that father had accused mother of child abuse." *Bachmayer I* at *4 (emphasis added). "On April 18, 2019, father **notified** child's pediatrician of three **incidents in which child sustained injury while in the care of mother**. Two days **earlier**, child protective services had contacted mother regarding **an anonymous report** of potential child abuse."[49] *Id.*, at *1 (emphasis added). "[T]he record does not conclusively establish that [father] made the accusation that led to the investigation by child protective services. Rather, **the record shows that child protective services received an anonymous report**." *Id.*, at *4 (emphasis added). "The investigation was **closed with no substantiation** of the allegations, and **the district court** later **found that mother credibly described all three incidents**." *Id.*, at *1 (emphasis added). "The district court does not appear to rely on its finding regarding *who made the report* **to assess the impact on the emotional health of child**. Instead, the district court considered whether **mother had actually engaged in child abuse**." *Id.*, at *4 (emphasis added). "*The district court found* that mother credibly described all three incidents underlying the abuse allegation and observed that child

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care – one of the three injuries – Mother did not seek any medical care. Trn.114 at 62. Mother's other counsel is correct, the district court is not. For M.M.B.'s facial wound and black eye, Mother called the doctor's office, but did not seek "suitable," or any health care.

[49] This is confirmed by Mother's testimony, *supra* at 130, and her counsel's memorandum which provided specific dates. Doc.67 at 4.

protective services had closed the file with **no findings of abuse**." *Id.* (emphasis added).

But the district court stated, "Child protection closed its case with **no findings**." Doc.95 at 9. "First, the statute requires the district court to consider 'a child's physical, emotional, cultural, spiritual, and other needs, and the effect of the proposed arrangements on the child's needs and development.'" *Bachmayer I* at *4 (citing Minn. Stat. § 518.17, subd. 1(a)(1)). **The district court did not find emotional needs for M.M.B.** *It did not consider M.M.B.* "Instead, the district court considered whether **mother** had actually engaged in child abuse" and found that "**[mother]**" had not abused M.M.B. based on *its* credibility determination. It saw only the effect on "**[mother]**" of the investigation. As further proof of its credibility determination, the district court found that the CPS file was empty, not that it vindicated Mother. At the time, the appellate court wrote, "Father does not dispute the ultimate finding that mother did not engage in child abuse." *Bachmayer I* at *4. Mother abused M.M.B. then, later, and there is absolutely no reason to consider that she does not still.

VI.

A.

As the appellate court stated it shall, the district court found that

> "Minn. Stat. § 518.17 requires the court to use a rebuttable presumption that joint legal custody or joint physical custody is not in the best interests of the child **if domestic abuse has occurred between the parents**. [Father] has failed to rebut this presumption. Based upon the above analysis, the Court finds an award of sole legal and sole physical custody to [Mother] is in the best interests of the child."

Doc.95 at 13 (emphasis added).

> "Domestic abuse has occurred between the parties," *Id.* at 11; this "is undisputed."

Bachmayer I at *4.

In its order continuing the 2019 divorce trial, the district court stated, "Witnesses requiring a subpoena shall be severed *(sic.)* with the subpoena no later than one (1) week prior to trial or by **May 9, 2019.** This includes Robert Hyland at Family Court Services." Doc.52 at 2. On **May 9, 2019**, Mother's counsel filed a memorandum on how to repurpose by manipulation the best interest statutes' domestic abuse safeguards into weapons defeating the child's best interests and thereby deliver the child into the permanently secured custody of their abuser. Doc.67.

"[A] district court must consider two presumptions concerning joint custody in certain situations." *Id.* at 2. When both parties seek sole custody, "[t]he second and third sentence[,] regarding situations where domestic abuse has occurred[,] is the proper statutory framework in which to decide custody." *Id.* at 1.

"The second sentence ..., which sets forth the presumption against joint custody in cases with a history of domestic abuse between the parties, does *not* state that the presumption operates for or against any particular party. Rather, that provision simply states that, if domestic abuse has occurred between the parties, there is 'a rebuttable presumption that joint legal custody or joint physical custody is not in the best interests of the child.' Minn. Stat. § 518.17, subd. 1(b)(9). The presumption does not necessarily favor one party over the other party. The presumption simply expresses a preference for sole custody in one parent or the other parent, unless the presumption has been rebutted."

Id. at 3.

"This meaning is confirmed by nearby statutory provisions. The existence of domestic abuse between the parties is one factor among the 12 statutory factors that a district court must consider before making a custody award. *See id,* subd. 1(a)(4). A district court 'may not use one factor to the exclusion of all others.' *Id.,* subd. 1(b)(1)."

Id.

"Accordingly, a person who has **committed domestic abuse** may be awarded custody of a child, notwithstanding his or her commission of domestic abuse, ** if 'all relevant factors' ** indicate that such a custody award is in the child's best interests. *See id,* subd. 1(a). Furthermore, the presumption in the second sentence of section 518.17, subdivision 1(b)(9), is no impediment whatsoever to an award of *sole custody* to a person who has **engaged in domestic abuse** because the presumption is concerned solely with awards of *joint custody*."

Id. at 3-4 (asterisks added).

"In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser v. Randall,* 357 U.S. 513, 525, 78 S. Ct. 1332, 1342, 2 L. Ed. 2d 1460 (1958) (citing *Cities Service Oil Co. v. Dunlap,* 308 U.S. 208, 60 S. Ct. 201, 84 L. Ed. 196 (1939); *United States v. New York, N.H. & H.R. Co.,* 355

U.S. 253, 78 S. Ct. 212, 2 L. Ed. 2d 247 (1957); *Sampson v. Channell*, 110 F.2d 754, 758 (1st Cir. 1940)). "To experienced lawyers it is commonplace that ... the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *Speiser*, 357 U.S. at 520–21, 78 S. Ct. at 1339 (citing Cf. *Powell v. State of Alabama*, 287 U.S. 45, 71, 53 S. Ct. 55, 65, 77 L. Ed. 158 (1932) ("the ignorance and illiteracy of the defendants, their youth, the circumstances ..., the imprisonment ..., the fact that [communication with] their friends and families [was made] necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable [accommodation] was a clear denial of due process")). "[T]he validity of the restraint may turn on the safeguards" afforded by the "procedures by which the facts of the case are adjudicated." *Speiser*, 357 U.S. at 521, 78 S. Ct. at 1339.

"In determining whether the presumption is rebutted, **the court shall consider the nature and context of the domestic abuse and the implications of the domestic abuse for parenting and for the child's safety, well-being, and developmental needs**." Doc.67 at 3 (quoting Minn. Stat. § 518.17, subd. 1(b)(9)) (emphasis added).

> "Father will contend that Mother did not rebut the presumption, but Mother does not bear the burden of rebutting the presumption. ... The presumption in the second sentence of section 518.17, subdivision 1(b)(9),

> is the type of presumption that does not necessarily impose a rebuttal burden on one party or the other party. ... [O]n the issue of the best interests of the child ... a district court must determine that issue without regard for burdens of proof. *See* Minn. Stat. § 518.17, subd. 1."

Doc.67 at 4. The presumption "operates **only** to **limit the court's discretion** in *determining the best interest of the child* by directing the court to not award joint custody." *Id.* (emphasis added).

"Disagreement alone over whether to grant sole or joint custody does not constitute an inability of parents to cooperate in the rearing of their children as referenced in paragraph (a), clause (12)." Mother's counsel proceeded to claim that

> "[t]he Custody Evaluator determined that domestic abuse did occur between the parties, and that Father was the perpetrator. In this case there is ample evidence that Father has superior power and control over Mother. Father alleges that he was the victim of domestic abuse by Mother. However, any abusive actions by Mother were in the context of how powerless she felt in the relationship. While these actions are not acceptable, Mother took ownership over her behavior. There is evidence that Mother sought counselling to understand and improve her relationship with Father, and showed remorse for her actions that contributed to the family's discord. On the other hand, Father was arrested for domestic assault and has inconsistently admitted to various acts of physical assault. Father pled guilty to and was convicted of the lesser included crime of disorderly conduct. He completed probation, including extensive domestic abuse programming. He admitted to assaulting Mother to his Probation Officer, Ms. Ortega; his domestic abuse counselor, Ms. Klatt; the custody evaluator, Robert Hyland; and Dr. Rilen during his psychological evaluation among others. There is no dispute that Father committed acts of domestic abuse against Mother. Under these circumstances, the Court must find that the presumption against joint legal custody is not overcome. As noted above, there is ample evidence that Father will use joint legal custody as a weapon and will continue to engage in coercive control and manipulation of Mother as he has done throughout their entire relationship. Even if the Court were persuaded that

> Father was also a victim of domestic abuse, he has still maintained the power and control in the parties' relationship."

Doc.67 at 3.

But the district court's findings did not altogether corroborate the unfounded premonitions Mother's counsel stated as facts. Even in a record as false as this one, there is no support for Mother's counsel's claim that Father "admitted to assaulting Mother to his Probation Officer, Ms. Ortega; his domestic abuse counselor, Ms. Klatt; the custody evaluator, Robert Hyland; and Dr. Rilen during his psychological evaluation among others," or that "[t]here is no dispute that Father committed acts of domestic abuse against Mother."

Mother was found to have admitted acts of domestic abuse to Mr. Hyland, not that Father was "the perpetrator." Mother threw a hairbrush at Father "which caused [him] to sustain an ear injury." Doc.95 at 6. Mother brandished a knife at Father but did so while telling "[him] to stay away from her." Doc.95 at 6. Minn. Stat. § 518B.01, subd. 2, defines "Domestic abuse" as including "the infliction of fear of imminent physical harm, bodily injury, or assault" by "spouses." Dr. Rilen testified that "[Mother] acknowledged brandishing a knife at [Father]" to him. Trn.121 at 127. Mother's "therapist" was unaware. *Id.* at 85. Mother testified,

> "I remember that I took a knife whe[n] we were already living in our house and it was -- I think it was in December 2017 during that month and there was a lot of physical abuse. ... I just took the knife ... It was a small knife, I don't think it was a big knife, it was just a small knife. I just took it out to just say stay away, please stop."

Trn.114 at 26. Mr. Hyland found in his report that "[Mother] acknowledges threatening [Father] with a knife when she was eight months pregnant stating she was afraid of him. [Mother] expressed remorse for her actions and said she was concerned that she went to that level." Dr. Rilen found in his report that "[Mother] admitted to ... threatening [Father] with a knife. ... She expressed remorse ... and acknowledged that she should not have done so." The district court found that Mother "testified that she grabbed a knife and told [Father] to stay away from her ... in late 2017. [Mother] testified that at the time, she was afraid [Father] would physically hurt her again." Doc.95 at 6. Father's recollection was that, later, Mother had threatened herself again with a pairing knife. Trn.114 at 175.

Father testified to his allegation that "[Mother] has threatened to commit suicide with a kitchen knife and has locked herself in our bathroom with knives." Doc.14 at 5.

> "[T]hese outbursts, tantrums, they would get to a point and -- where [Mother] was -- was upset enough that she would go to the kitchen and she would open the knife drawer and pull out a chef knife, and she would put the point of the blade into her -- the skin of her stomach and -- and, you know, say comments like, 'I just want to kill myself,' or 'I want to end my life, I don't want to live.' And -- and she would not do it but she would then run -- run around the apartment. And this is kind of the same behavior as is typical except that she had a knife now. So she would run around the apartment with a knife screaming and crying and no way to, you know, satisfy her."

Trn.114 at 154.

When asked, "[H]ave you ever pulled a knife on yourself [and threatened to kill yourself]?" Mother answered, "No." When asked again, Mother answered, "No, I don't remember." When asked "You don't remember or it never happened?" Mother answered, "No." *Id.* at 58. In her responsive affidavit, Mother stated, "I **do not recall** threatening to commit suicide with a kitchen knife. I do remember feeling helpless and wanting out of the situation but I **never had a plan to truly kill myself**." Doc.17 at 3. Mother's statement that this was a feint corroborates Father's later testimony,

> "It ended when -- one time after this happened many times [Mother] pulled the knife out of the knife drawer, put it to her stomach and said she was going to kill herself, and I turned around away -- face away from her and I plugged my ears, I closed my eyes and I said, 'just do it then.' And she didn't -- after 30 seconds or so, I don't know how long, I uncovered my eyes and I turned around and ... I looked and I remember her just looking at me, and then she did not do it again for a very, very long time."

Trn.114 at 155. In her responsive affidavit, Mother agreed with Father's description, "I remember that I closed myself in the bathroom ... and kept crying and crying," albeit reasoning otherwise. Doc.17 at 3. Father's testimony was that "with the knife she would wind up locking herself in the bathroom with the knife, and I was outside the door and I could just hear her screaming and crying inside the bathroom." Trn.114 at 154.

Throughout the 2019 Judgment and Decree, the district court kept the focus on Father while subtly finding domestic abuse by Mother and *not* by Father. The district court was dismissive of Mother's domestic assaults because

she "disclosed" them, Doc.95 at 6; "[Mother] 'feels bad for her behavior' [and] acknowledged her acts of violence and showed actual insight and remorse," *Id.* at 7; "Dr. Rilen reports that [Mother] has ... acknowledged [] shortcomings," *Id.* at 8; "Dr. Rilen acknowledged that during family court proceedings, it is common that both parties will behave poorly at some point [but] distinguishes the parties here by noting that [Mother] has admitted her negative behavior and has altered her reactions through intervention." *Id.* at 9. While for Father, the district court made the frequent point that he "describes himself as the victim on this date, but agreed he pled guilty to disorderly conduct," Doc.95 at 6; "*did not* take responsibility for physical abuse," *Id.* at 7; "continues to deny he perpetuated domestic abuse[and] claim he is the sole victim of abuse in the relationship," *Id.*; "continues to refuse to take responsibility for his abusive behaviors and continues to display coercive controlling behavior towards [Mother]," *Id.*; "is clearly the primary aggressor in this relationship. His continued denial of abuse and irrational justifications for his controlling behavior undermine his credibility and call into question his emotional intelligence," *Id.*; "denied all physical abuse to Mr. Hyland and at trial. [Father] stated he was 'never aggressive,' but then admitted to 'aggressive behavior' in December of 2017," *Id.* at 7-8; "Ms. Carlson reported that [Father] did not take responsibility for any acts of domestic abuse and expressed his belief that the "system" is 'sexist' and rigged against men," *Id.* at 8; "Subsequent emails between [Father] and Mr. Hyland included [Father] denying committing domestic abuse and stating that

allowing [Mother] unsupervised time with [M.M.B.] without addressing her mental health issues would be a 'disservice to [M.M.B.].'" *Id.* at 12.

Mr. Hyland located a "cudgel" – in Father's mind. The district court found, as predicted by Mother's counsel, Mr. Hyland's "characterization [] incredibly accurate" that Father would use "his domestic abuse programming as a 'cudgel' against [Mother] to 'support his narrative that she is the domestic abuser and he is the victim.'" *Id.* at 7.

Father was found to be powerful and controlling and also the victim of domestic abuse Mother's counsel had provided as alternative to him being the domestic abuser. Doc.67 at 3. The district court found that by communicating to Mother about her handling of M.M.B.'s medical care, recording her during exchanges, accusing "[her] of 'visa fraud,'" Doc.95 at 12, attempting "to rescind his sponsorship of [her]," *Id.* at 13, stating to her that, "[i]n the US, it is easily discoverable if a child is maltreated and the punishment is surely prison time," *Id.*, and telling others about her mental disorders, *Id.* at 13, Father "display[ed] coercive controlling behavior towards [Mother]" that was "abusive." *Id.* at 7. The district court found that this supported Dr. Rilen's "concern[] about [Father's] lack of insight regarding his behavior towards and comments about [Mother]," *Id.* at 9, and his finding "that without significant intervention, [Father] "is apt to perpetuate themes of intimidation in further contact with [her]." *Id.* at 10. "[Father's] mistrust of and animosity towards [Mother] cannot be overstated." *Id.* at 12.

Some of these findings relate to Mother's testimonies to M.M.B.'s toe injury. *See supra* at 89.

"Both Dr. Rilen and Mr. Hyland had significant concerns about [Father's] ability to effectively co-parent and minimize [M.M.B.'s] exposure to conflict." *Id.* at 12. It was found to be problematic for Mother's pre-determined custody of M.M.B. that Father "does not believe [Mother's] opinion would help him in making decisions because he does not trust her," *Id.*; "'can't imagine [Mother] is a good parent,'" *Id.*; stated "that allowing [Mother] unsupervised time with [M.M.B.] without addressing her mental health issues would be a 'disservice to [M.M.B.],'" *Id.*; and "stated to [Mother] 'I'm not a co-parent. I'm not a co-custodian. I don't trust you – period. I talk to you, I don't trust you. I don't want to talk to you.'" *Id.* "Mr. Hyland warned that [Father] would likely use [sole custody] to 'control' [Mother] and would feel justified in doing so because of his 'perception of her parenting deficits.'" *Id.*

> "[T]he district court should have also considered mother's purported inability to parent."

Bachmayer I at *5.

The district court found that "[t]he parties have not been able to successfully exchange the child without incident or respectfully communicate about any issue." *Id.* at 11. But the district court also found that "[Father] sent [Mother] a photo of the toe injury and was then one hour late to the scheduled exchange." *Id.* at 5. Mother's testimonies provide that at "7:15" Father sent

Mother "a message through OFW" letting her "know there was an issue," and that he would "be late" to the parenting time exchange. At "around 7:30 he [sent] me picture of the toe and explaining what happened, that they will be late, and I just said okay," Trn.114 at 9-10; "'I hope [M.M.B.] is fine.'" Trn.121 at 247. Father's parenting coach testified that "[Father] indicated and shared with me that he had used a BIFF strategy[50] to communicate to his co-parent that here's what had happened as a way to inform his co-parent about the incidents that had happened." *Id.* at 125. Mother testified that, when Father arrived for the exchange, "[M.M.B.] was kind of sleepy but half awake." *Id.* at 10.[51] "So we exchanged [M.M.B.], and I took him. ... And then I put him in a car seat." Trn.121 at 247.

Mother's counsel rested her memorandum on her contention that "Father's request for sole legal and sole physical custody are **not in the best interest of the minor child** and **are contrary to the clear statutory requirements set forth in Minn. Stat. § 518.17, subd. 1.**" *Id.* at 1 (emphasis added). "Accordingly, there is no basis for imposing on Mother a burden of rebutting the presumption against joint custody arising under the second sentence of section 518.17, subdivision 1(b)(9)." *Id.* at 4. "Accordingly, the statute does not provide

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[50] "BIFF stands for Brief, Informative, Friendly, and Firm." BIFF, Billy Eddy, 2011.

[51] On the first day of trial, Mother started saying that, when Father dropped M.M.B. off, "[M.M.B.] was halfly –" when her attorney told her to "-- stop." Trn.121 at 247.

any support for Father's challenge to the award of sole legal and sole physical custody to Mother." *Id.* So found the district court.

When Mother's counsel authored her memorandum, both parties were seeking sole custody, and she wrote that where "both parties seek an award of sole legal and sole physical custody" whether joint custody is appropriate is not a factor for consideration. *Id.* at 1. However, near the very end of the trial, Father's counsel asked, "[I]f the Court were to order joint [custody], would you be asking for joint?" To which he replied, "I am ready to parent in whatever capacity the Court determines is the best." Trn.114 at 186 (emphasis added). The district court found, "At the commencement of this proceeding, both parties asked to be awarded sole legal and sole physical custody," Doc.95 at 4, but by "the conclusion of trial" Father had reduced his request to "joint legal and joint physical custody with an equal parenting time schedule." *Id.* But Mother's counsel had left no potential for M.M.B. to be placed in safe care:

> "Assuming without deciding that a party may bear a burden of rebutting the presumption in the second sentence of section 518.17, subdivision 1(b)(9), the burden most naturally would fall on the party or parties who request an award of joint custody. If a party seeks a ruling that is inconsistent with the statutory presumption that joint custody is *not* in the child's best interests, that party naturally must persuade the district court that joint custody *is* in the child's best interests."

Doc.67 at 4. Accordingly, in concluding its purported findings on M.M.B.'s best interests, the district court stated,

> "Although [Father] testified that 'many things have been said about me that don't represent my character,' he failed to rebut the voluminous evidence to indicate he has perpetrated domestic abuse, terrorized [Mother], failed to meet [M.M.B.'s] emotional and physical needs and shown no insight into the effects of his behavior on the child."

Doc.95 at 13. This critique of Father did not go unnoticed by him.

B.

In December 2020, when Mother brought a motion to both (1) **relocate** to her country of origin, Slovakia, and (2) **restrict** Father's parenting time, her counsel filed another memorandum. Doc.150.

Anh Phuong Le v. Holter, a case in which "the district court erred by **failing to hold an evidentiary hearing** before ruling on the merits of her removal motion," was cited prominently in Mother's counsel's memorandum for its holding that "Minn. Stat. § 518.175 does not require district courts to hold an evidentiary hearing to determine whether relocation is proper." 838 N.W.2d 797, 800 (Minn. App. 2013) (emphasis added). "The statutory section governing removal motions does not impose a requirement on district courts to hold an evidentiary hearing." *Id.* (citing Minn. Stat. § 518.175, subd. 3 (2012) (lacking any mention of an evidentiary hearing requirement)). "Whether to hold an evidentiary hearing on a motion generally is a discretionary decision of the district court, which we review for an abuse of discretion." *Anh Phuong Le*, 838 N.W.2d at 800 (quoting *Thompson v. Thompson*, 739 N.W.2d 424, 430 (Minn. App. 2007)). Under "the Rules of Family Court Procedure ... [r]equests for oral

testimony must be submitted to the district court by motion prior to or contemporaneously with the filing of initial motion papers." *Anh Phuong Le*, 838 N.W.2d at 800. Mother's counsel made no request for oral testimony.

> "The district court may not restrict parenting time unless it first schedules an evidentiary hearing for the 'earliest possible time,' and then finds that (1) parenting time is likely to endanger the child's physical or emotional health or impair the child's emotional development; or (2) [a] parent has chronically and unreasonably failed to comply with court-ordered parenting time."

Matson v. Matson, 638 N.W.2d 462, 466 (Minn. App. 2002) (citing Minn. Stat. § 518.175, subd. 5 (2000); *Courey v. Courey*, 524 N.W.2d 469, 472 (Minn. App. 1994) (holding an order restricting parenting time will not be upheld where no evidentiary hearing was conducted)); Minn. Stat. § 518.175, subd. 5(c),(d) (2020). But the district court held a ***telephone*** "hearing at the earliest possible time to determine the need to modify the order granting parenting time." Minn. Stat. § 518.175, subd. 5(d).

> "If the court **finds**, **after a hearing**, that parenting time with a parent is likely to endanger the child's physical or emotional health or impair the child's emotional development, **the court shall restrict parenting time** with that parent as to time, place, duration, or supervision and may deny parenting time entirely, as the circumstances warrant. The court shall consider the age of the child and the child's relationship with the parent **prior to** the commencement of the proceeding."

Minn. Stat. § 518.175, subd. 1(b) (emphasis added). Prior to the hearing, the district court considered that M.M.B. was three-years-old, and it had not found any relationship for him and his father in the 2019 decree to consider. Also prior

to the hearing, the district court determined that there was a need to modify parenting time. At the hearing and in the order following, the district court restricted M.M.B.'s time with his father.

> "The Court finds that unsupervised or unrestricted parenting time with Father is likely to endanger the child's physical or emotional health or impair the child's emotional development. Father is granted parenting time as set forth below."

Doc.223 at 1.

> "Father's parenting time shall supervised *(sic.)* parenting time at FamilyWise. Parenting time shall occur once a week. Until supervised parenting time can begin at Family Wise, Father shall have video chat contact with the child. These video/Facetime calls shall occur on Tuesdays from 6:30 p.m. to 7:00 p.m. These video calls shall begin Tuesday, January 12, 2021.
>
> FamilyWise: The parties shall update their intakes at FamilyWise by Friday, January 8, 2021. Father shall be solely responsible for the costs of supervision. Both parties shall fully comply with all rules, policies and regulations of FamilyWise. Father's parenting time at FamilyWise shall be at the high level of supervision."

Id. at 2. Without reason, Father's parenting time was reduced from 10.5 hours unsupervised to 1.5 hours at the highest level of supervision.

In this January 2021 temporary order and in the March 2021 final order, the district court found the current parenting time schedule was that of the 2019 Decree and not that of the June 2020 Order. Doc.223 at 1 ("In the decree, Father was granted parenting time every Tuesday from 5:00 p.m. to 8:00 p.m. and every Saturday from 10:00 a.m. to 4:00 p.m. The parenting time exchanges

were to occur at FamilyWise."); Doc.226 at 6 ("Pursuant to the divorce decree, Father has parenting time every Tuesday from 5:00 p.m. to 8:00 p.m. and every Saturday from 10:00 a.m. to 4:00 p.m."). In her memorandum, Mother's counsel stated that "Father has parenting time approximately **9 hours per week** in the Judgement and Decree entered October 8, 2019, over one year ago," Doc.150 at 1 (emphasis added), that "[Father] has court awarded parenting time [of] **9 hours per week**," *Id.* at 2 (emphasis added), and that "[t]he minor child has parenting time with Father **9 hours per week**." *Id.* at 3 (emphasis added).

In the June 2020 order, the district court found that FamilyWise had "reopened in a limited capacity," Doc.135 at 1, and increased Father's Saturday parenting time by 1.5 hours. *Id.* at 2. FamilyWise's "limited capacity" schedule may be found in a letter from FamilyWise's supervised parenting time director, Ms. Fruetel, issued shortly after the June 2 order. Ex.180 (Ex.AA). Ms. Fruetel described FamilyWise's scheduling dilemma, stating that, prior to FamilyWise's COVID-19 closure, the parties' exchanges occurred on Tuesdays for 3 hours and Saturdays for 6 hours, but FamilyWise's *COVID-19 schedule* couldn't accommodate this parenting time schedule. *Id.* However, "Since FamilyWise has re-opened... [t]he Saturday 9am to 4:30pm [option] comes closest to meeting the needs of the family's current agreement." *Id.* The "Saturday 9am to 4:30pm" option identified by Ms. Fruetel is the same Saturday schedule found in the district court's June 2 order. Doc.135 at 2. The 1.5 hour increase to Father's Saturday parenting time was to accommodate FamilyWise's strictly limited

availability.[52] Where "a substantial change in circumstances [] render[s] the parties' parenting time schedule and exchanges unworkable," modification that is in the best interests of the child is not an abuse of discretion. *Suleski*, 855 N.W.2d at 337. Mother did not appeal the June 2, 2020, order.

The following exchange took place following oral argument at the January 2021 telephone hearing:

THE COURT: [Mother's counsel], are there any FaceTime calls right now? Or is it just the parenting time with supervised exchanges?

[Mother's counsel]: In-person -- in-person parenting time that's going on.

THE COURT: Okay.

[Mother's counsel]: I'm not sure I understood your question here.

THE COURT: Oh, in addition to the in-person parenting time, are there any other weekly phone calls or video calls? And [Mother] may be able to answer that as well.

[Mother's counsel]: Yeah. I think she would need to answer to that.

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[52] Mother agreed that "Family Wise reopened on a limited basis." Doc.146 at 6.

[Mother]: This is [Mother]. And to answer your question, no, we are doing in-person unsupervised parenting time.

THE COURT: Okay. And that's according to the old -- the order from 2019, which is the Tuesday and Saturday, right?

[Mother]: Yeah. We are doing Tuesdays. And when we are compensating Tuesday, [Father] observed extending -- extended Tuesdays when we agreed on days. And then there were also sometimes when we did Sundays as a compensatory time. So we kind of spread it around to make sure that everything is compensated. But as of right now, since we exhausted all the 66 hours, we are following the Tuesdays and Saturdays. So *** **Tuesdays he has [M.M.B.] from 4:30 till 7:30, and then Saturday at the FamilyWise is open. Now it's open for seven hours. So that's what we are observing.** ***

Trn.224 at 30-31. In her December 7, 2020, affidavit, Mother stated, "[M.M.B.] has parenting time with [Father] approximately nine hours per week." Doc.146 at 3.

A motion to relocate has its own standard.

"Minnesota Statutes § 518.175, subd. 3, governs a custodial parent's relocation of a child to another state, providing as follows:

> (a) The parent with whom the child resides shall not move the residence of the child to another state except upon order of the court or with the consent of the other parent, **if the other parent has been given parenting time by the decree**. * ***
>
> (b) The court shall apply a **best interests standard** when considering the request of the parent with whom the child resides to move the child's residence to another state. * * * *
>
> (c) The burden of proof is upon the parent requesting to move the residence of the child to another state...,"

Goldman v. Greenwood, 748 N.W.2d 279, 283 (Minn. 2008) (emphasis added, asterisks in original),

> "...**except that if the court finds that the person requesting permission to move has been a victim of domestic abuse by the other parent, the burden of proof is upon the parent opposing the move.**"

Minn. Stat. § 518.175, subd. 3(c) (emphasis added).

The parenting time scheduled from the decree satisfied Minn. Stat. § 518.175, subd. 3(a) and conveniently ignored the existence of the June 2020 parenting time order.

Mother's counsel made the same patently false claim she made in her May 9, 2019, memorandum that Father did not contest Mother's fabricated allegations of domestic abuse by him during the marriage. Doc.150 at 1 ("It is undisputed that Mother was a victim of domestic abuse by Father."). By affidavit, purportedly written by Mother, Mother claimed that the appellate court had "specifically found that the facts supported a finding that domestic

abuse against me by [Father] occurred." Doc.146 at 2. It had not. In the decree, the district court found that Mother had engaged in acts of domestic abuse against Father, before M.M.B. was born. Doc.95 at 6. The appellate court found that "[b]oth parties describe incidents of domestic abuse throughout the marriage, and child was present during some of the incidents. One such incident resulted in the arrest of father, leading to a criminal conviction of disorderly conduct and a probationary order for domestic-abuse programming." *Bachmayer I* at *1.

The district court stated in the March 2021 order, "In the decree, the Court made a finding of domestic abuse perpetrated by Father against Mother." Doc.226 at 5. The decree does not contain a "particularized findings of fact" that Father perpetrated domestic abuse. *Andrasko v. Andrasko*, 443 N.W.2d 228, 230 (Minn. Ct. App. 1989) (citing R. Family Ct. P. 7.05 (1988); *Rigwald v. Rigwald*,423 N.W.2d 701, 704 (Minn.Ct.App.1988); *Wallin v. Wallin*, 290 Minn. 261, 267, 187 N.W.2d 627, 631 (1971) (in view of broad discretion of trial court in domestic relations cases generally, it is "especially important" that basis for trial court decision be set forth with a high degree of particularity)). The district court did not otherwise discuss domestic abuse or make any pertinent findings related to domestic abuse,[53] except to recite Minn. Stat. § 518.175, subd. 3(c),

[53] However, Mother alleged "egregious [] domestic abuse by [Father]," Doc.146 at 1, and the district court, "incredibly concerned about Father's behavior towards Mother," Doc.226 at 5, found that "Mother's motions are directly related to Father's egregious behaviors." *Id.* at 7.

> "The burden of proof is upon the parent requesting to move the residence of the child to another state, except that if the court finds **that the person requesting permission to move has been a victim of domestic abuse by the other parent**, the burden of proof is upon the parent opposing the move. **The Court finds Father has met the burden to oppose the child's move to Slovakia."**

Doc.226 at 6 (emphasis added). Minn. Stat. § 518.175, subd. 3(c) does not specify the scope of its application nor does it differentiate between cases where the requester has also been found to have perpetrated domestic abuse. In this case, the silence of the statute to this scenario, where both parties are found to have perpetrated domestic abuse, was key to its manipulation to M.M.B.'s defeat.

In her memorandum, Mother's counsel recited the best interest factors of the relocation statute, some with minor alterations such as the replacement of "physical" with "social" in subd. (3)(b)(2) and "residence, of" with "residence, out of" in subd. (3)(b)(7). Doc.150 at 2. She stated that these "best interest factors ... apply to this matter," they are "more specific" than those "applied to custody and parenting time determination," and the district court should apply the "best interest standard as found in Minnesota Statute §518.175 subd. 3" to these factors in considering Mother's motion. *Id.*

No evidentiary hearing was held, only the January 5 telephone hearing. In the March 2021 order, the district court now found M.M.B.'s relationship with his father as it finally restricted their time together, stating,

> "In the decree, the Court ... had significant concerns about Father's lack of insight about the effects of his behavior on [M.M.B.]. Father consistently attempted to undermine Mother's parenting and failed to meet [M.M.B.'s] emotional and physical needs." Doc.226 at 5. "These behaviors have worsened." *Id.* at 4 "Mother believes that the child's emotional development is in jeopardy and that he has been negatively impacted by Father's mental health. Mother supports her argument with examples of Father coaching the child to repeat that she is a 'bad mother' and repeatedly subjecting the child to unnecessary child protection claims," *Id.* at 2; "she is dealing with another investigation." *Id.* at 5. "Mother also states that she is negatively impacted due to Father's behaviors." *Id.* at 2. "[T]he Court agrees with many of Mother's concerns about Father," *Id.* at 3, and "is incredibly concerned about Father's behavior towards Mother." *Id.* at 5 "Father has not sought appropriate assistance as ordered in the decree. Father's Our Family Wizard messages and entries, as well as the pleadings he filed with the Court, show a fixation on proving Mother is abusive and a bad parent. There is no credible evidence to support this is true." *Id.* at 4. "Father's problematic behaviors have not improved since the decree. Father continues to contact child protection and make unfounded child abuse allegations to medical providers and others. Father is clearly exposing [M.M.B.] to his excessive hostility to Mother by asking about Mother's care and physically examining him at every turn. The Court would love to see Father spend as much energy on improving his ability to safely parent as he does on trying to prove Mother is incompetent. The Court finds that unsupervised parenting time will likely endanger [M.M.B.'s] emotional health and impair his emotional development." *Id.* at 6.

The district court interpreted Minn. Stat. § 518.175, subd. 1(b) to mean that once it has held an evidentiary hearing and found endangerment it must restrict that parent's parenting time as it had done in the 2019 decree, **and**, if the other parent later alleges the same endangerment criteria it found at that evidentiary hearing, it may reflect on that it found endangerment for said criteria and find itself required to restrict that parent's parenting time, again. The district court, under the Clearly Erroneous Standard, has near limitless discretion to determine what "the circumstances warrant." *See* Minn. Stat. § 518.175, subd. 1(b).

Because it could, it took unjustified drastic action, while at the same time, "the Court has no doubt that [M.M.B.] enjoys being with his father and has a close relationship with him." Doc.226 at 2. "[M.M.B.] is a bright three (3) year-old," *Id.* at 2, who "does have a preference for more time with Father," *Id.* at 3, and "needs to see his father on a regular basis." *Id.* at 3. "Mother argues that she is hopeful that Father's relationship with [M.M.B.] would *improve* if she and [M.M.B.] lived in Slovakia." *Id.* at 3. "Father argues that it is not realistic to maintain his current relationship with [M.M.B.] if the child resides in Slovakia. The Court agrees." *Id.* at 3. "The Court has no concerns that Mother has thwarted [M.M.B.'s] relationship with Father." *Id.* at 4 "Mother has done what she can to promote [Father's] relationship with [M.M.B.]," *Id.* at 4, considering that "[she] does not believe a move to Slovakia would negatively impact the child's health in any way." *Id.* at 2 "The Court has no concerns about Mother's parenting of [M.M.B.]." *Id.* at 5. The district court also found "[M.M.B.'s] close relationship with his paternal grandparents." *Id.* at 2

"The Court notes that Father provided a copy of an autism screening. ... The Court notes that Father told the provider that his 'ex-wife framed him for abuse and he has been struggling with the judicial system.'" *Id.* at 4.

"Father has failed to show a change of circumstances, endangerment, how a modification is in [M.M.B.'s] best interests or that the potential harm in changing custody is outweighed by the potential benefit. As stated above,

there is no evidence that Mother has interfered with or denied parenting time. Therefore, Father has not shown a prima facie case to modify custody." *Id.* at 6.

C.

M.M.B.'s expression of emotional need in 2019, a day after sustaining a facial wound Mother claimed herself blameless of, is remarkably reminiscent of the emotional devastation that Father witnessed in M.M.B. following Mother's gouging M.M.B.'s back with her fingernails on October 4, 2020, when he was one-and-one-half years older and the injury much more recently inflicted.

Mother's explanations of M.M.B.'s injuries in her custody always find her completely uninvolved or completely ignorant of them. Mother could not explain M.M.B.'s bruised and swollen testicles and 24-hour erection. Mother claimed that M.M.B. caused himself a blackeye and dime-sized facial wound. Mother blamed M.M.B.'s burned finger on M.M.B. for touching a light that she would not or could not describe. When she dug her nails into M.M.B.'s back so hard that she left gouges, Mother rested her case on the explanation she claimed she was given by the child protection investigator who she claimed was relaying what M.M.B. told him – that he rolled on his bed, in her care, on LEGOs, which, at three-years-old, she apparently allows him to play with unattended, that somehow dug deep gouges that left picturable scar tissue at the doctor's visit 10 days later, but that he had not cried out. Or he was in someone else's care – not Father's care, which Mother does not allege. Mother

purported that she had no idea about this injury even after Father sent her a message asking her about the wounds; a message to which she did not respond. Mother tells a lot of lies. The district court chose Mother's lies over hard evidence, ignored M.M.B.'s injuries entirely, and buried them while Mother failed to explain them or to respond to them at all, or it made up its own version of events that defies Mother's own recitation of the facts, as it did when it found M.M.B.'s black eye and facial wound to be a bruise on his forehead despite the parties' agreement on the fact that it was a black eye and facial wound. There was a picture of M.M.B.'s face.

In its March 2021 Order, the district court found "no credible evidence to support" that "Mother is abusive and a bad parent,"[54] Doc.226 at 4, while finding that Father's communications with Mother and his pleadings "show a fixation on proving Mother is abusive and a bad parent," *Id.*; that, "[i]n July of 2020, [Father] demanded that he be allowed to speak with [M.M.B.] on the phone to 'verify' Mother had not abused him," *Id.*; and that "[Mother] **is** dealing with **another** [child protection] investigation." *Id.* at 5. (emphasis added).

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[54] A claim of Mother's counsel no less, alluded as defeat of Father's claims. *See* Doc.150 at 3 ("Mother provides credible evidence that Father is sending negative and false messages regarding Mother to the minor child, including that **she is a bad mother and hurts the child.** This is the precise concern regarding Father cited by professionals and it will certainly cause grave harm to the child's psychological and emotional health if it continues.") (emphasis added).

It's the same lie the district court told in its 2019 decree when it stripped from M.M.B. his escape to safety in Father's care and forced him further into the nightmare-hell he was powerless to escape and Father was powerless to protect him from – Mother's care: "There is no credible evidence that [M.M.B.] is any way endangered or neglected in [Mother's] care." Doc.95 at 10. In 2021, it made the equivalent finding, "The Court has no concerns about Mother's parenting of [M.M.B.]." Doc.226 at 4. Mother's illegal custody does not qualify as "parenting." Father could have – and did, though it is not found in the transcript – veritably yelled over the telephone, "He's not safe with her," and the district court would not find any cause for concern. When it did find concerns, it found evidence overruling them, such as its finding credible allegations that Mother is mentally-ill and overruling that finding based on Dr. Rilen's perjury.

The district court knew that Mother, in 2019, physically abused M.M.B., but covered it up in the form of misleading and false findings against Father that the appellate court found. When Father brought volumes of evidenced allegations of physical, emotional, psychological abuse of M.M.B. by Mother at the end of 2020, the district court was not unaware of them. It found that "Father attests that Mother is 'gaslighting' [M.M.B.], who is three years old," *Id.* at 4, but that finding is from a paragraph that reads:

> "I allege that [Mother] is alienating [M.M.B.]. **I allege that [Mother] is gaslighting [M.M.B.]**. [Mother] has done everything she can to interfere with my relationship with [M.M.B.], and her efforts did not end at denying me parenting time."

Doc.193 at 11 (emphasis added). The district court selectively read only the second sentence. Two sentences after, Father wrote, "[M.M.B.] *is*, however, old enough to state a preference regarding parenting time matters; [M.M.B.] states his preference to me *every parenting time*," which the district court also found: "[M.M.B.] does have a preference for more time with Father." *Id.* at 3.

In the decree, the district court asserted that Father had made the child protection report, and he had, but there was no evidence of it at the time. Mother's counsel asked Mother if she had "any idea who called Child Protection." Trn.121 at 232-233. Mother *thought* it might be Father. *Id.* at 245. A year and a half later, Mother was again under investigation by CPS. This time, Mother preemptively minimized or dismissed M.M.B.'s injuries, claiming that Father was attempting to frame her for child abuse with what she claimed were or would be Father's allegations against her.

Mother stated, "**I am** responding to **yet another** report to child protective services accusing me of child abuse." Doc.146 at 3. The district court found this evidence of child abuse. Mother's counsel alleged:

> "Mother sets forth numerous **examples** of Father's *current behavior* that has *escalated* since the time of the **Decree**. Indeed, *the exact* type of behavior that prompted this Court to order supervised exchanges, restricted parenting time for Father and an award of sole legal and sole physical custody to Mother *continue to impact Mother* and, more significantly, the child. These *behaviors* include a recent, **unfounded report to Child Protection alleging child abuse by Mother**."

Doc.150 at 3 (emphasis added). Mother's counsel's "proof" of this allegation was M.M.B.'s pediatrician's notes reflecting that "per [M.M.B.'s] Mom, [Father] called CPS regarding the [gouges] on his back." Doc.147-149 (Ex.V) at 3.

Mother's trial counsel repeatedly feigned as though she was prepared to present the CPS report as hard evidence only to excuse herself for *not* presenting the report. In their late December 30, 2020, filing, Mother and her counsel moved "the Court for an Order as follows

> 1. Denying [Father's] Motion dated December 22, 2020 and his responsive Motion dated December 29th in their entirety;
>
> **2. Opening the recent child protection file for in camera review by the court.**"

Doc.214 at 1 (emphasis added); at the January 5, 2021, telephone hearing:

> Mother's counsel: ... So that's why we then sent something briefly out the next day very quickly. And in that, the update that would be critical to the Court is between the time that we filed our initial pleadings and today, we did receive a closure letter from child protection. And there was -- they investigated, and there was no finding of maltreatment.
>
> THE COURT: And that was one question I did have; so I appreciate that. That was one thing I wanted to follow up on if there was a

result of that investigation. So proceed whenever you're ready.

Mother's counsel: So aside from that ...

Trn.224 at 4; and at the May 18, 2021, video hearing:

Mother's counsel: ... We did not get the actual -- and we still don't have the full report. We have a redacted report that was finally submitted to us after the hearing that we had on January 5th on the initial motion. All we had at that time was the letter saying that they found no maltreatment or abuse. We do have the redacted records. But the redacted records have huge pieces missing. And I assume those were statements made by [Father]. So we are still not privy to those. But at any rate child protection looked into this. This is not simply things that [Mother] has made up. **This has been looked into. This has been combed over. ... Child protection has known everything. And no one has found any harm yet.** At this point in time it is very disturbing that [Father] is still insisting that the Court find harm by [Mother].

Trn.254 at 21 (emphasis added).

At both hearings, Mother's counsel followed her defense of Mother's abuse of M.M.B. by harassing Father about his disabilities.

> Mother's counsel: [Father] was supposed to be engaging in therapy [for this]. He presents us now with a new assessment, new diagnosis, that apparently happened about six, seven months after we were all in trial. We had Dr. Rilen's reports on both parties' mental health. And at that time, Dr. Rilen was looking at whether or not -- and suspecting that there was some level of personality disorder going on. Now [Father's] new analysis in December of 2019 -- so that's over a year ago now -- saying that he is somewhere on the autism spectrum. Your Honor, I'm not equipped to understand the overlay of those two diagnoses and if they are compatible or if they conflict. But what I will say is I don't know if it matters what we call his diagnoses or what we call his mental health status. It's creating a problem. It's creating harm to mother and child. It is creating a toxic, toxic environment and creating a almost impossibility of trying to co-parent effectively.

Trn.224 at 6-7.

Mother's counsel: He clearly whatever therapy has been going on for the last year and a half has not gotten to the salient issues. **With or without an autism diagnosis I do not know how that plays into [Father's] ability to have some self-awareness or self-introspection about his behavior and his vitre[o]l towards [Mother]. But I don't believe that autism alone would be a reason for that.** There were items identified in the initial process that have yet to be addressed in this matter. And we see that his persistence in trying to prove that [Mother] is **a bad mom** in some respect or some **danger to her child** is very concerning, that this is still going on at this point in time.

And the appendix case day care and school were made aware by this office -- day care, not school, I would say. But the day care and the doctor's office and [Father] had -- we were all in the loop of communication about what appendix A did and did not entitle [Father] to do. And we covered that in the initial motion. But in processing like pediatric appointments the problem is not -- appendix A he is entitled to the information. He is entitled to doctor's reports. He is certainly entitled to know what is going on with [M.M.B.]. But

having him appear at meetings or appear at the doctor's appointments was just another opportunity to have undue conflict and in front of the child and involving **Dr. [Dylan] Bindman, who is already very weary at the time we did the initial trial** of trying to be an intervenor between the two parties at all times. And so **medical appointments were not something that [Father] was entitled to under appendix A. So therefore, there is no violation of appendix A.**

The contempt motion I would just remind the Court that he brought that improperly. For proper contempt motion you need to have fit certain filing requirements that were not met. The Court summarily found that in its last order, and we would agree that that is appropriate. We tried to provide a response because we got some pleadings the 29th of December. On the heels of that on the 30th even though we were all on vacation in different parts of the country we tried to provide a response, and the Court said that that was untimely. And I understand that. But honestly we didn't feel a huge response was needed because the contempt motion wasn't brought properly in the first place. And even if it had been, as we've said, **[Mother] was following court orders.** She was providing -

- ***we painstakingly spent a lot of time*** **trying to figure out the compensatory parenting time that was missed during COVID, trying to reschedule with COVID restraints.** There were arguments back and forth about choices, who we were going to use when **FamilyWise** was unavailable. We agreed to use Ms. Davis. Then [Father] didn't want to spend the money for Ms. Davis. So things were put on hold. But in the end result he did receive **according to our calculations** all of the compensatory time he was entitled to. So there has been no malfeasance on the part of [Mother]. ***The Court made the proper decisions in assessing its credibility the last time.*** And if we consider [Father's] motion **a motion for reconsideration** rather than amended findings, **we request that the Court also reconsider [Mother's] request for the move to Slovakia**.

Trn.254 at 21-24 (emphasis added). To some of that, Father responded:

[Father]: Yes. First of all, most of opposing counsel's arguments, **I don't believe they are substantiated by any evidence** specifically claims of Dr. [Dylan] Bindman being weary. **Dr. [Dylan] Bindman did not testify**.

I'm not familiar with the errors -- any errors in my contempt motion. **The Court did not mention that as a reason for having not found for contempt. It was not because of any filing errors. That motion was filed on December 22nd, which allowed [Mother] seven days to respond, which she did not respond until the eighth day. The claim that the [Mother] follows the court order, I don't believe that to be considered true. [Mother] currently has listed as her address my own address at my house, which she hasn't lived here in two years. And that is in the court order. So that's just a basic example, I mean, not even including that she uses her previous name. That's in the court order. And she has made -- everything else in my contempt motion is thoroughly evidenced.**

The argument for formatting for a motion for [amended] findings, I am not familiar with that. **My memorandum of law did address the court rules that I used. I believe those are applicable.** If there is further legal guidance for that, that I am not aware of, then I am not aware at this time.

Id. at 25 (emphasis added).

All agreed, CPS had investigated Mother for child abuse, again. There was no support for the claim that the report was unfounded. That was a matter for the trial that, at the urging of Mother's counselors, the district court never held, subverting the laws mandating it hold trial. Instead, the district court found that "Father **continues** to contact child protection and **make unfounded child abuse allegations** to medical providers and others," Doc.226 at 6, and – just as Mother's counsel alleged – that Mother presented "**examples** of Father ... subjecting the child to **unnecessary child protection claims.**" *Id.* at 2 (emphasis added). As has been shown, those original findings from the decree are **false.** Father *did not* "make unfounded child abuse allegations to medical providers" as the district court had falsely accused him of doing in the decree, *supra* at 134, nor did he do so in 2020.

Although unaware of the implications of the fraud Mother was perpetrating, Father addressed the very findings the district court so errantly made:

> "In response to [Mother's] Affidavit Paragraph 32 of her *affidavit*, [Mother] states, 'He [Father] was quite rude and oppositional.' I am sorry if I was rude. I was upset. [M.M.B.] was injured, and he had told me that [Mother] had caused him that harm. **Dr. [Dylan] Bindman was providing [Mother] with the 'evidence' she needed to hand to the [] referee so that the referee would absolve her of her abuse of our three (3) year old son.** [Mother] is distracting the reader – taking the focus *off* of [M.M.B.'s] injuries **and placing it on my behavior.** Focus should be on the incidents detailed in item 111.6 above. I do what is in [M.M.B.'s] best interest, and [M.M.B.] *needs* the truth of his abuse to come to light. ... [Mother] states, '[Father] was concerned because Dr. [Dylan] Bindman noted that [Father] made the CPS report. However, it seems clear to me that he did.' **It was inappropriate for Dr. [Dylan] Bindman to do this. It was inappropriate of**

> **[Mother] to accuse me of this. [Mother] states that she does not know if it was me or not.** Having this conversation in [M.M.B.'s] presence was *not in [M.M.B.'s] best interest.* ... I regret being rude to Dr. [Dylan] Bindman. ... I was frustrated, frightened, and concerned for [M.M.B.'s] safety and wellbeing."

Doc.193 at 52 (emphasis added).

D.

Following the May 16 opinion, in her motion for costs and fees, Mother disputed the appellate court, claiming that the substance of Father's motion for contempt was "denial of parenting time," *ante* at E.265; that she had motioned "to relocate ***or in the alternative*** to order that [Father's] parenting time be supervised," *Id.* at 2 (emphasis added); that the appellate court was incorrect "that [Father's] 'affidavits do not allege that the child is endangered either physically or emotionally' in [Mother's] care," but that "[Father] continues to allege that [Mother] **is a harmful parent,**" – so harmful that his "assertions in his appeal are so specious as to force the conclusion that such unfounded[55] positions could be advanced only to harass.[56]" *Id.* at 5 (emphasis and footnotes added). Mother agreed that Father had requested "sole custody of the minor child and [] equal parenting time," *Id.* at 2; and that "[o]n April 22, 2021 [Father] timely filed a motion **for amended findings**"; "[Father's] Motion **for Amended**

[55] (In reality, well-founded)

[56] (In reality, as a desperate plea for help)

Findings was denied in an Order filed August 13, 2021"; and "[Father] appealed the district court's denial of his Motion **for Amended Findings.**" *Id.* at 3, 5 (emphasis added). Mother acknowledged that she had "filed a responsive motion for amended findings and memorandum of law" and that Father "filed two memorandums of law" in response. *Id.* at 3.[57] She also agreed that the district court ordered Father's parenting time supervised on "January 5, 2021, ... took all other matters under advisement," *Id.*, and without any further proceedings, on "March 23, 2021," granted Mother's "request that [Father's] parenting time be supervised and den[ied] [Father's] motion[s]." *Id.* Mother's counsel boasted that Mother prevailed on both appeals taken by Father, that "both times this Court upheld a finding that [Father] is abusive" while Father has done "nothing to rehabilitate himself," *Id.*, and that both times "the restriction of [Father's] parenting time" was "specifically affirm[ed]." *Id.* at 2, 3.

The district court, despite finding that "[t]here is no credible evidence to support" that "mother is abusive and a bad parent," Doc.226 at 4, agreed with Mother that Father had alleged that she is a harmful parent. *Id.* at 6. Regarding Father's motion for contempt, it supported the appellate court's determination. Although Father had not, the district court recited the requirements that it had

[57] By May 3, such a motion was impermissible by post-trial rules; however, Mother's was a motion to reconsider, forbidden -- all of which Father disclosed in the "two memorandums of law" he filed on the subject. Doc.243, 244.

placed on "Father to request expanded parenting time." Father was required to have

> "'consistent participation of at least one year of individual therapy with a provider who has experience with perpetrators of domestic abuse.' Father was ordered to focus on his emotional intelligence and how domestic abuse affects children. Father was ordered to provide the therapist with a copy of the custody evaluation and the psychological evaluation that were conducted during the dissolution. The Court also required Father to be assessed for a personality pathology. As outlined above, Father's problematic behaviors have not improved since the decree. Father continues to contact child protection and make unfounded child abuse allegations to medical providers and others. Father is clearly exposing [M.M.B.] to his excessive hostility to Mother by asking about Mother's care and physically examining him at every turn. The Court would love to see Father spend as much energy on improving his ability to safely parent as he does on trying to prove Mother is incompetent. The Court finds that unsupervised parenting time will likely endanger [M.M.B.'s] emotional health and impair his emotional development."

Id.

ARGUMENT

I.

A.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v.*

Eldridge, 424 U.S. 319, 332, 96 S. Ct. 893, 901, 47 L. Ed. 2d 18 (1976). However, this statement assumes that those at risk of deprivation are party to the dispute. The due process analysis set forth in *Mathews*, 424 U.S. at 96 S. Ct. 893 is inadequate to safeguard the child's substantive rights in custody proceedings. The child is not party to a custody dispute. Their interests are represented by third-parties, usually their mother, father, and the State. Through legislation, the State has attempted to formulate a framework to adequately protect the child from deprivation of their rights in their removed place from this triad. The child's warring parents also have rights regarding the child, and they tend to pursue those rights, as the Court has observed. The child's welfare then is in the hands of the State to safeguard, especially in considering that the rights of the parent may not align with the rights of the child.

Thus, the child may not be "be heard before being condemned to suffer grievous loss," *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 168, 71 S. Ct. 624, 646–47, 95 L. Ed. 817 (1951) (Frankfurter, J., concurring); "[t]he fundamental requirement of due process." *Mathews*, 424 U.S. at 333, 96 S. Ct. at 902. This may occur under otherwise fundamentally fair proceedings, unlike those of this case. Regardless of whether the parents receive due process, without further guidance the child remains inadequately protected as "[t]he law 'leaves scant if any room' for [an appellate court] to question the balancing of [the child's] best-interests considerations by the district court." *Bachmayer I* at *3 (quoting *Vangsness v. Vangsness*, 607 N.W.2d 468, 477 (Minn. App. 2000)).

The Court's precedents provide the necessary considerations for establishing a preliminary Best Interests of the Child Standard of Review. "We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objection[] of [a] parent[] [or] their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'" *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 554–55, 54 L. Ed. 2d 511 (1978) (quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 862–863, 97 S. Ct. 2094, 2119, 53 L. Ed. 2d 14 (1977) (Stewart, J., concurring in judgment)). The Court has "recognized on numerous occasions that the relationship between parent and child is constitutionally protected." *Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49 (2000) (quoting *Quilloin*, 434 U.S. at 255, 98 S. Ct. at 554).[58] "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include

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[58] See, e. g., *Trimble v. Gordon*, 430 U.S. 762, 769, 97 S. Ct. 1459, 1464, 52 L. Ed. 2d 31 (1977) (recognizing child's relationship with biological father as "legitimate family relationship[]"); *Michael H.*, 491 U.S. at 141–42, 109 S. Ct. at 2352 (BRENNAN, J., dissenting) (The child-parent relationship, is an interest that undeniably warrants deference and "that society traditionally protects") (citing *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042 (1923); *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S. Ct. 1110, 1113, 86 L. Ed. 1655 (1942); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 442, 88 L. Ed. 645 (1944)); *Wisconsin v. Yoder*, 406 U.S. 205, 231–233, 92 S. Ct. 1526, 1541–42, 32 L. Ed. 2d 15 (1972).

preparation for obligations the state can neither supply nor hinder." *Quilloin*, 434 U.S. at 255, 98 S. Ct. at 554–55 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 442, 88 L. Ed. 645 (1944)). "And it is [] firmly established that 'freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.'" *Quilloin*, 434 U.S. at 255, 98 S. Ct. at 554–55 (quoting *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639–640, 94 S. Ct. 791, 796, 39 L. Ed. 2d 52 (1974)). A relationship important to a child and thus protected may be established by the existence of a "significant custodial, personal, or financial relationship" or "a legal tie," *Lehr v. Robertson*, 463 U.S. 248, 262, 103 S. Ct. 2985, 2994, 77 L. Ed. 2d 614 (1983), and "'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212, 31 L. Ed. 2d 551 (1972) (quotation omitted). "In cases involving individual rights, ... 'the standard of proof at a minimum reflects the value society places on individual liberty.'" *Santosky v. Kramer*, 455 U.S. 745, 756, 102 S. Ct. 1388, 1396, 71 L. Ed. 2d 599 (1982) (quoting *Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 1809, 60 L. Ed. 2d 323 (1979) (quoting *Tippett v. State of Md.*, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part), cert. dismissed *sub nom. Murel v. Baltimore City Criminal Court,* 407 U.S. 355, 92 S.Ct. 2091, 32 L.Ed.2d 791 (1972)).

In this case, Mother's custody would not have survived a requirement that she show at least interest in preparing M.M.B. "for obligations the state can neither supply nor hinder." Father's custody would not have been defeated had it been required that there be a showing of unfitness in his custody. M.M.B.'s interest in his relationship with his father would have been secured in this way, but not all children have a legally established biological relationship with their father.

B.

In *Michael H. v. Gerald D.*, the Court remarked on how "Michael reads the landmark case[s]" – "as establishing that a liberty interest is created by biological fatherhood plus an established parental relationship" – and finds that his reading "distorts the[ir] rationale." *Michael H.*, 491 U.S. at 123, 109 S. Ct. at 2342. This is because Michael does not belong to "*the* family unit" recognized as deserving respect, "the 'unitary family.'" *Id.* (emphasis added). This in a case in which such a "traditional" societal staple is by virtue of State law obliterated. The Court failed to consider how its landmark cases are "read" and acted upon by the legislators. The Court's analysis of *Michael's* appearance in Carole's escapades is peculiar in its parallelism to Gerald's involvement but fails to identify the distinguishing feature that Michael is the child's biological father while Gerald is an extension of Carole through their illegitimate relationship. *See Org. of Foster Fams.*, 431 U.S. at 846, 97 S. Ct. at 2110 (n. 53). A biological father is

a staple of the "traditionally respected relationships." *Michael H.*, 491 U.S. at 124, 109 S. Ct. at 2342. Michael cannot be blamed for the legislature's devaluing of his new-era familial role, a byproduct of inadequate legislation exploited by those who profit from the weakening – or destruction – of a child's family ties.

"[T]he rights of the **parents** are a counterpart of the responsibilities they have assumed." *Lehr*, 463 U.S. at 257, 103 S. Ct. at 2991 (emphasis added); *Quilloin*, 434 U.S. at 256, 98 S. Ct. at 555 ("legal custody of children is, of course, a central aspect of the marital relationship, and even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage. Under any standard of review, the State was not foreclosed from recognizing this difference in the extent of commitment to the welfare of the child.") The traditional family relationship, the unitary family, evokes an ideal image, but the image itself is not what is of value to society. It is the inherent dimensions of the traditional family that society values, and those values are not all lost by the broken homes and adultery of today until the State robs the Nation of them. The family exists in its relationships. The family that consists of husband and wife is without presence in the future generations. Therefore, the relationships that society is concerned with are those of the offspring. What is broken today may be fixed someday provided it is not made "too obsolete to be relevant any longer." *Michael H.*, 491 U.S. at 138, 109 S. Ct. at 2350 (BRENNAN, J., dissenting).

"[T]he Court has emphasized the paramount interest in the welfare of children." *Lehr*, 463 U.S. at 257, 103 S. Ct. at 2991. Strict adherence to tradition in defiance of the existing state of affairs conflicts with the paramount interest.[59] The solidarity and reliability of the traditional family unit cannot be enforced but nurtured. Those qualities of the family that are of such great value to American society may be strengthened only by promoting their development in those who will become the families of the future, such as Father's educating M.M.B. *See supra* at 8, 45, 38, 99, 74; discussed *ante* at 236. This approach embraces the fluid family form of today, accepting it as it is, and adapting to it. *See Michael H.*, 491 U.S. at 133, 109 S. Ct. at 2347 (STEVENS, J., concurring) ("enduring 'family' relationships may develop in unconventional settings." (citing *Stanley,* 405 U.S. 645, 92 S. Ct. 1208; *Caban v. Mohammed,* 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979)); and 491 U.S. at 141, 109 S. Ct. at 2351 (BRENNAN, J., dissenting) (In "a facilitative, pluralistic [society], ... 'liberty' must include the freedom not to conform.").

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[59] *See Quilloin*, 434 U.S. at 251, 98 S. Ct. at 553 (child's interests ignored in favor of mother; established relationship with father severed); *Org. of Foster Fams.*, 431 U.S. at 841, 97 S. Ct. at 2108 ("[T]he State, the natural parents, and the foster parents, all [] share some portion of the responsibility for guardianship of the child, ... and all contend that the position they advocate is most in accord with the rights and interests of the children." (citation omitted) All "have sufficient attributes of guardianship that their views on the rights of the children should at least be heard.").

The "family" should therefore be defined in terms of the child's relationships. *Org. of Foster Fams.*, 431 U.S. at 842–47, 97 S. Ct. at 2108–11. Biological relationships are implied[60] beyond the natural parents[61] but "are not exclusive determination of the existence of a family." *Id.*, 431 U.S. at 843, 97 S. Ct. at 2109. "The basic foundation of the family in our society, the marriage relationship, is of course not a matter of blood relation. Yet its importance has been strongly emphasized in our cases." *Id.*, 431 U.S. at 843–44, 97 S. Ct. at 2109 (citing *Griswold v. Connecticut,* 381 U.S. 479, 486, 85 S. Ct. 1678, 1682, 14 L. Ed. 2d 510 (1965) ("We deal with a right of privacy older than the Bill of Rights older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our

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[60] *Stanley,* 405 U.S. at 651, 92 S. Ct. at 1212; *Meyer,* 262 U.S. 390, 43 S. Ct. 625; *Skinner,* 316 U.S. 535, 62 S. Ct. 1110; *Prince,* 321 U.S., at 166, 64 S. Ct., at 442.

[61] *Prince,* 321 U.S., at 159, 64 S. Ct., at 439 (The "parent" was the child's aunt and legal custodian); And *see Moore v. City of E. Cleveland, Ohio,* 431 U.S. 494, 504, 97 S. Ct. 1932, 1938, 52 L. Ed. 2d 531 (1977) (plurality opinion) ("Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family."); 507-511, 97 S. Ct., at 1939-1942 (Brennan, J., concurring) ("The 'extended' [family] is especially familiar among black families.")

prior decisions."); *See also Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 1823, 18 L. Ed. 2d 1010 (1967).

> "Thus the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promoting a way of life' through the instruction of children, Wisconsin v. Yoder, 406 U.S. 205, 231-233, 92 S. Ct. 1526, 1541-1542, 32 L. Ed. 2d 15 (1972), as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship."

Org. of Foster Fams., 431 U.S. at 844, 97 S. Ct. at 2109–10 (emphasis added).

Where the relationship is of such importance to a child as to be considered familial, it requires protection. By reforming the Court's statements in *Org. of Foster Fams.* to account for the child's interest in maintaining important relationships, the procedural and substantive issues may be resolved.

> "[T]he natural parent of a foster child in voluntary placement has an absolute right to the return of his child in the absence of a court order obtainable only upon compliance with rigorous substantive and procedural standards, which reflect the constitutional protection accorded the natural family."

Org. of Foster Fams., 431 U.S. at 846, 97 S. Ct. at 2110. The right of the parent is unaltered, but the child has right to retain any relationships established.

> "[O]rdinarily procedural protection may be afforded to a liberty interest of one person without derogating from the substantive liberty of another. Here, however, such a tension is virtually unavoidable."

Id. Thus, the foster family has at least the right to seek visitation on behalf of the child.

> "Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents."

Id., 431 U.S. at 846–47, 97 S. Ct. at 2111.

But there is a basic relationship that has been sorely disregarded by the State: that of the child and their biological father.

C.

"In applying the Equal Protection Clause to social [] legislation," while "we give great latitude to the legislature in making classifications[62] we have been extremely sensitive when it comes to basic civil rights[63] and have not hesitated to strike down an invidious classification even though it had history and tradition on its side."[64] *Levy v. Louisiana*, 391 U.S. 68, 71, 88 S. Ct. 1509, 1511, 20 L. Ed. 2d 436 (1968). Discrimination is invidious where the basis for the classification made

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[62] *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 489, 75 S. Ct. 461, 465, 99 L. Ed. 563 (1955)

[63] *Skinner*, 316 U.S. at 541, 62 S. Ct. at 1113; *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 669-670, 86 S. Ct. 1079, 1082-1083, 16 L. Ed. 2d 169 (1966).

[64] *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954); *Harper*, 383 U.S. at 669, 86 S. Ct. at 1082.

against a particular class is not "a rational one." *Levy*, 391 U.S. at 71, 88 S. Ct. at 1511 (citing *Skinner*, 316 U.S. at 541–42, 62 S. Ct. at 1113–14).

A biological parent has a right to a legal relationship with their child and must be given due regard, not "as a stranger to his children" but as their parent. "The Due Process Clause of the Fourteenth Amendment entitle[s] the biological [parent] to a hearing on his fitness before his [] children [are] removed from his custody." *Michael H.*, 491 U.S. at 158, 109 S. Ct. at 2360 (citing *Stanley*, 405 U.S. 645, 92 S. Ct. 1208). Michael H. was prevented from establishing his legal status as biological parent, precluding him from taking "the first step in any [visitation or custody] proceeding," *Michael H.*, 491 U.S. at 160–61, 109 S. Ct. at 2361–62 (WHITE, J., dissenting), regardless of his established parental relationship. "'State intervention to terminate such a relationship must be accomplished by procedures meeting the requisites of the Due Process Clause,'" *Lehr*, 463 U.S. at 258, 103 S. Ct. at 2991 (quoting *Santosky*, 455 U.S. at 752, 102 S. Ct. at 1393 (alt. in original)), – but not if that *legal* relationship does not exist.

The Court was open that "California law not only deprives Michael of a legal parent-child relationship with his daughter" but of "any real opportunity to be heard" regarding the "demonstrable fiction" that another was the father of his daughter. *Michael H.*, 491 U.S. at 160–61, 109 S. Ct. at 2361–62 (WHITE, J., dissenting). The California district court relied on State-asserted "interests in the integrity of the family ... and in protecting Victoria from the stigma of illegitimacy and [a] balancing away [of] Michael's interest in establishing that he is [her]

father," *Id.*, in denying the discretionary visitation rights requested by Michael and Victoria and rejecting their constitutional challenges, *Michael H.*, 491 U.S. at 115–16, 109 S. Ct. at 2338, – "refusing [Michael] the opportunity to rebut the State's presumption that the mother's husband is the father of the child" and "to prove that he is Victoria's biological father." *Michael H.*, 491 U.S. at 160–61, 109 S. Ct. at 2361–62 (WHITE, J., dissenting).

The district court obviated Michael's "*full-blown [] biological connection between parent and child.*" *Lehr*, 463 U.S. at 260, 103 S. Ct. at 2992 (quoting *Caban*, 441 U.S. at 397, 99 S. Ct. at 1770). In *Lehr*, a "mere biological relationship" was held to be insufficient to establish paternal parental rights while in *Michael H.*, under the State law, "the *husband* is to be held responsible for the child." *Michael H.*, 491 U.S. at 119–20, 109 S. Ct. at 2340 (quotations omitted) (emphasis added). While Michael H. was legally precluded from asserting constitutional rights, M.M.B.'s father was also denied a hearing on his fitness. The district court failed to treat M.M.B.'s father as a parent, *see ante* at B.31-B.72 (referred to as "Husband", not finding relationship), in its effort to circumvent the requirement that it afford him "protection against arbitrary state action as a matter of due process" based on the developed "relationship between a father and his natural child." *Lehr*, 463 U.S. at 260, 103 S. Ct. at 2993 (quoting *Caban*, 441 U.S. at 414, 99 S. Ct. at 1779).

The outcomes in *Lehr, Michael H., Quillion,* and here are the same. In each case, the parent-child relationship with the father succumbed to the

mother's interests which exclude the father's relationship. "There is a natural difference between men and women: Only women have the capacity to bear children." *Hodgson v. Minnesota*, 497 U.S. 417, 434, 110 S. Ct. 2926, 2936, 111 L. Ed. 2d 344 (1990). As such, there is no such thing as a putative mother registry. *Lehr*, 463 U.S. at 250, 103 S. Ct. at 2988. A mother has no need of notice of her child's birth, but the father may not be present and may not have knowledge of the pregnancy at all. A male who is unaware that he is the child's father would not notify a putative father registry. In *Lehr*, the unregistered father was legally kept ignorant of his child's adoption despite his filing intent to establish paternity and visitation prior to the adoption. *Id.*, 463 U.S. at 250–53, 103 S. Ct. at 2988–89. In Michael H., a statutory limitation on a *father's* ability to establish a legal parental relationship prevented Michael from doing so unless the *husband* or mother filed a motion or experts agreed that he was the father. "[T]he statutory scheme ... requires the putative father and the mother to act *together* within two years to overcome the presumption." *Michael H. v. Gerald D.*, 191 Cal. App. 3d 995, 1011, 236 Cal. Rptr. 810, 820 (Ct. App. 1987), *aff'd*, 491 U.S. 110, 109 S. Ct. 2333, 105 L. Ed. 2d 91 (1989). A claimant of "*any other person having an interest in the welfare of the child*" is preferable to that of biological putative father, *Michael H.*, 491 U.S. at 133–36, 109 S. Ct. at 2347–49 (STEVENS, J., concurring), unless the claimant is the putative father. *Michael H.*, 491 U.S. at 149–50, 109 S. Ct. at 2355–56 (BRENNAN, J., dissenting). "Adoption ... is recognized as the legal equivalent of biological parenthood," *Org. of Foster Fams.*, 431 U.S. at 845, 97 S.

Ct. at 2110, but notably, one adoptive parent cannot be denied their parentage.

Under Georgia law, the putative father of 11 years who had provided child support to the mother without a court order and had established and maintained a relationship with his son, was like in *Lehr* unable to prevent his child's adoption by the mother's husband. Georgia law "entitled [the mother] to the possession of the child" born out of wedlock. *Quilloin*, 434 U.S. at 249, 98 S. Ct. at 552 (quotation omitted) (emphasis added); *see also Stanley*, 405 U.S. at 650, 92 S. Ct. at 1212 (natural illegitimate mother of child accorded parental status). Adoption, requiring "consent of the living [legally recognized] parents of a child," *Quilloin*, 434 U.S. at 249, 98 S. Ct. at 552, could be satisfied by "consent of the mother alone." *Id.* If the putative father moves to have his paternity recognized, which under Georgia law was in terms of "legitimizing" the child, even allowing for the child's name to be changed, the mother "shall have notice." *Id.* In *Quilloin*, the father "was not aware of the legitimation procedure until after," *Id.*, 434 U.S. at 254, 98 S. Ct. at 554, being "notified by the State's Department of Human Resources that an adoption petition had been filed." *Id.*, 434 U.S. at 250, 98 S. Ct. at 552. However, his son already bore his name. *Id.* Having "failed to obtain a court order granting legitimation, [the father] was found to lack standing to object to the adoption." *Id.*, 434 U.S. at 251, 98 S. Ct. at 553.

Because these mothers are given property rights to their children by virtue of the State, they *treat* the children as possessions, disregarding and overriding their interest in their relationship with their father. This case is no exception. "[H]umans, liv[ing] and hav[ing] their being ... are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." *Levy*, 391 U.S. at 70, 88 S. Ct. at 1510–11. Included in this are children of unmarried parents, *Id.*, and their parents. *See Id.*, 391 U.S. at 71–72, 88 S. Ct. at 1511 (drawing no discernable difference between children born in or out of wedlock where there is an "intimated, familial relationship" with the parent). "Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the [parent]," *Id.*; one's birth is "no action, conduct, or demeanor of theirs," and it "is invidious to discriminate against them" on that basis. *Id.*, 391 U.S. at 72, 88 S. Ct. at 1511.

A parent who has participated in raising their children and has developed a relationship with them has constitutionally protected parental rights. "[T]he existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child." *Lehr*, 463 U.S. at 266–67, 103 S. Ct. at 2996. The moral of *Lehr* is that the mother of a child born-out-of-wedlock has to notify every man she has slept with during some adequate time frame preceding conception so that they have an opportunity to assert their rights as a parent. If the true father

is not notified, he may come forward at any time after discovery.[65] To have equal protection of law, the father must be provided equivalent notice of the child as the mother. Opportunity to develop a parent-child relationship must be allowed the desirous parent.

D.

When a child is or children are placed in a situation where their circumstances *are* endangered – whether this is known or not – can, should, and/or must a court take cognizance of this and act upon it, under Minn. Stat. § 518.18(d)(iv) AND under general equitable principles to ensure the safety of the child?

Without restating and rearguing the district court's findings supporting its ultimate finding of endangerment by Father under Minn. Stat. § 518.175, subd. 5(c), did the district court have jurisdiction to tender a finding of endangerment and to restrict parenting time *without* making findings on *all* of the related statutory best interest factors?

Was the January 5, 2021, telephone hearing adequate under Minn. Stat. § 518.175, subd. 5(d) AND Minn. Stat. § 518.175, subd. 1(b) AND under general equitable principles providing for the child's safety, for it to restrict Father's parenting time or for determining issues affecting a child's safety and/or welfare?

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[65] Potentially subject to limitations, such as laches, perhaps, appropriately defined as cases arise.

Also under Minn. Stat. § 518.175, subd. 5(c), which states that "the court may not restrict parenting time unless it **finds** that: (1) parenting time is likely to endanger the child's physical or emotional health or impair the child's emotional development; or (2) the parent has chronically and unreasonably failed to comply with court-ordered parenting time," AND under general equitable principles providing for the child's safety, can, as was done in this case, the district court make a finding of endangerment, whether based on a prior finding or not, without first holding an evidentiary hearing in the present on the matter?

Can a district court refuse to "find" that a "parent has chronically and unreasonably failed to comply with court-ordered parenting time" under Minn. Stat. § 518.175, subd. 5(c)(2) AND under general equitable principles providing for the child's safety?

Can a district court refuse to "find" that "parenting time is likely to endanger the child's physical or emotional health or impair the child's emotional development" under Minn. Stat. § 518.175, subd. 5(c)(1) AND under general equitable principles providing for the child's safety?

In this case, Father, as a noncustodial parent, was faced with a situation where the district court reserved "a determination as to the future establishment or **expansion of**" his parenting time. Minn. Stat. § 518.175, subd. 1(a) (emphasis added). Father may have requested an expansion of his parenting time under Minn. Stat. § 518.175, subd. 1(a) which states that, "[i]n that event, **the best**

interest standard set forth in subdivision 5, paragraph **(a)**, shall be applied to a subsequent motion to establish or expand parenting time." *Id.* Minn. Stat. § 518.175, subd. 5**(a) does not contain any standard of proof**. Minn. Stat. § 518.175, subd. 5(b) states, "If modification would serve **the best interests of the child**, the court shall modify the decision-making provisions of a parenting plan or an order granting or denying parenting time, if the modification would not change the child's primary residence. Consideration of a child's best interest includes a child's changing developmental needs." (emphasis added). "In ascertaining the intention of the legislature the courts may be guided by" the presumption that "the legislature does not intend a result that is absurd, impossible of execution, or unreasonable." Minn. Stat. § 645.17. Did the legislature intend for Minn. Stat. § 518.175, subd. 5(a) to state that, "[i]n that event, the best interest standard set forth in subdivision 5, paragraph **(b)**, shall be applied to a subsequent motion to establish or expand parenting time?" Otherwise, would general equitable principles providing for the welfare of the child require that such a request is held under a best interest standard such as that of Minn. Stat. § 518.17, subd. 1(b)?

"The statutory section governing removal motions does not impose a requirement on district courts to hold an evidentiary hearing." *Anh Phuong Le*, 838 N.W.2d 797 (citing Minn. Stat. § 518.175, subd. 3 (2012) (lacking any mention of an evidentiary hearing requirement)). In this case, counsel to Mother cited *Anh Phuong Le v. Holter* for the proposition that the district court was not

required under the statute to hold an evidentiary hearing on a motion to relocate. There is no contention that the statute states otherwise. Under general equitable principles providing for the welfare of children, though, is a district court not required to hold an evidentiary hearing when presented with such a proposition?

Minn. Stat. § 518.175, subd. 3(a) states, "if the other parent has been given parenting time by the decree." In this case, counsel to Mother and the district court interpreted this statement to support ignoring the district court's later order, the June 2020, order, modifying the parenting time schedule in the 2019 decree. Considering this statement, in conjunction with general equitable principles and/or the best interest of the child, how is it applied in cases where subsequent orders have granted or modified parenting time after issuance of the decree or where there is no decree, but the other parent has parenting time?

In Minn. Stat. § 518.175, subd. 3(b), does the statement, "The court shall apply a **best interests standard** when considering the request of the parent with whom the child resides to move the child's residence to another state," apply in the presence of allegations of endangerment, from either party?

Minn. Stat. § 518.175, subd. 3(c) states that "if the court ***finds*** that the person requesting permission to move has been a victim of domestic abuse by the other parent, the burden of proof is upon the parent opposing the move." In this case, the district court had not made a finding of domestic abuse by Father

in its 2019 dissolution order, but it found that it had found domestic abuse perpetrated by Father in its 2019 dissolution order in its March 2021 order. Where a final order has been entered that contains or does not contain a finding of domestic abuse perpetrated by some person, can the district court make such a finding against such a person without first holding an evidentiary hearing on the matter in the present?

What is the procedure for allocating the burden of proof in Minn. Stat. § 518.175, subd. 3(c) in a scenario such as that found in this case, where both parents are found to have perpetrated domestic abuse, and would this be a scenario where an evidentiary hearing is appropriate?

Minn. Stat. § 518.17 defines "the best interests of the child," but is there a supplemental definition under principles of equity further clarifying the statutory definition?

Minn. Stat. § 631.52, subd. 1(a) addresses the situation in which "a person who has court-ordered custody of a child **or** parenting time rights is convicted of a crime listed in subdivision 2." (emphasis added). In said situation, "[t]he family court shall" **either** "(1) grant temporary custody to the noncustodial parent, unless it finds that another custody arrangement is in the best interests of the child; **or** (2) suspend parenting time rights, unless it finds that parenting time with the convicted person is in the best interests of the child." *Id.* (emphasis added). The reading of this statute is ambiguous such that the considering court may apply only Minn. Stat. § 631.52, subd. 1(a)(1) or only Minn. Stat. § 631.52, subd.

1(a)(2). If such a construction were applied, the needs of the child could well be jeopardized. Again, applying the presumption that "the legislature does not intend a result that is absurd, impossible of execution, or unreasonable," Minn. Stat. § 645.17, would the statute be appropriately construed by applying Minn. Stat. § 631.52, subd. 1(a)(1) to a situation in which "a person who has court-ordered custody of a child ... is convicted of a crime listed in subdivision 2" and Minn. Stat. § 631.52, subd. 1(a)(2) to "a person who has ... parenting time rights [and] is convicted of a crime listed in subdivision 2?"

Should the burden of proof defined in Minn. Stat. § 631.52, subd. 1(a) – "The defendant has the burden of proving that continued custody or parenting time with the defendant is in the best interests of the child" – be subject to application of the endangerment standard in Minn. Stat. § 518.18(d)(iv) in situations which a family court would otherwise apply the endangerment standard?

In *Sterling*, A14-1107, 2015 WL 5088926, a guardian *ad litem* took part in bearing false-witness, knowingly contributing to great harm resulting to the child, *delivering* the child to the custody of its abuser. Minn. Stat. § 631.52, subd. 1(a) states, "A guardian ad litem must be appointed in any case to which this section applies." What protections does a child have against a malicious guardian *ad litem*?

E.

In *Moore v. City of E. Cleveland, Ohio*, 431 U.S. at 504–05, 97 S. Ct. at 1938, the Court stated, "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. ... [T]he accumulated wisdom of civilization, gained over the centuries and honored throughout our history, [] supports a larger conception of the family." There it expanded constitutional protection to expanded-family ties the disruption of which would have been detrimental to a child. In *Michael H.*, where the child sought "to preserve her *de facto* relationship with" her mother's husband and her relationship with her biological father, the Court should have extended and now should extend protection to both, as both relationships are essential to the child. *Michael H.*, 491 U.S. at 116, 109 S. Ct. at 2338. This approach supports the societal objectives. By validating the child's relationships, the child is encouraged to form them, and those who would seek to create them for profit must contribute to assuaging the difficulties that ensue. Additionally, the child has the benefits of broader family, *Moore*, 431 U.S. at 505, 97 S. Ct. at 1938–39, importantly in this case, the protection from abuse inherent to more versus fewer relationships. Broader family also means more resources to draw on for advice as children often need throughout childhood. There is the concern that comes with such a disjointed family tied to a child where the child goes to one family member to draw on, manipulatively, but this difficulty already exists, and could just as well promote stronger ties through forced communication of the disjointed members. Finally, if

only to satisfy a requirement with some melancholy, with *Stanley v. Illinois* in 1972, *Org. of Foster Fams. For Equal. & Reform* in 1977, *Quilloin v. Walcott* in 1978, *Caban v. Mohammed* in 1979, *Lehr v. Robertson* in 1983 and *Michael H. v. Gerald D.* in 1989, "the institution of the family [remains] deeply rooted in this Nation's history and tradition" and those relationships between persons need treatment "as a protected family unit under the historic practices of our society." *Michael H.*, 491 U.S. at 124, 109 S. Ct. at 2342.

II.

A.

Is it controversial that child abuse does "perceptibly create a danger of antisocial conduct, or will probably induce its recipients to such conduct?" *Ginsberg v. State of N. Y.*, 390 U.S. 629, 643, 88 S. Ct. 1274, 1282, 20 L. Ed. 2d 195 (1968). "'[Y]outh ... is a time and condition of life when a person may be most susceptible to influence and to psychological damage.'" *Thompson v. Oklahoma*, 487 U.S. 815, 834, 108 S. Ct. 2687, 2698, 101 L. Ed. 2d 702 (1988) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S. Ct. 869, 877, 71 L. Ed. 2d 1 (1982)). "Education is a kind of continuing dialogue, and a dialogue assumes, in the nature of the case, different points of view. ... [I]nstead of shooting one another when you differ, you reason things out together." *Wieman v. Updegraff*, 344 U.S. 183, 197–98, 73 S. Ct. 215, 221–22, 97 L. Ed. 216 (1952). "[O]ffenses by the

young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." *Eddings*, 455 U.S. at 116, 102 S. Ct. at 877 (quotation omitted). "It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed [adult] citizens." *Prince*, 321 U.S. at 165, 64 S. Ct. at 441–42. The State has, in furthering society's interests in the welfare of its children, *Id.*, apart from parents an "independent interest in the well-being of its youth" that "is of course a subject within the State's constitutional power to regulate." *Ginsberg*, 390 U.S. at 639-40, 88 S. Ct. at 1280-81.

The Nation risks the States' failing its Posterity being its hallmark to bear. In *Application of Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), the Court discussed the failure of the States to provide adequate protections to their youth in a juvenile system that "has spread to every State in the Union, the District of Columbia, and Puerto Rico." *Id.*, 387 U.S. at 14, 87 S. Ct. at 1437. By promoting its actions with misleading, disarming phrases such as "that the state was proceeding as parens patriae," and that "good will, compassion, and similar virtues are * * * admirably prevalent throughout the system * * *" while there being no dispute that "expertise" – of all kinds, including in practice of law – "is lacking," the States "accord[ed] them [children] fewer procedural rights than adults." *Id.*, 387 U.S. at 15-17, 87 S. Ct. at 1437-38.

> "The right of the state, as parens patriae, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right 'not to liberty but to custody.' He can be made to attorn to his parents, to go to school, etc. If his parents default in effectively performing their custodial functions—that is, if the child is 'delinquent'—the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the 'custody' to which the child is entitled. On this basis, proceedings involving juveniles were described as 'civil' not 'criminal' and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty."

Id., 387 U.S. at 17, 87 S. Ct. at 1438. But as this case is proof, the State's complacency in denying children their due rights did not cease at semi-criminal functions, it denies them liberty *and* custody in civil "family" court. "Under our Constitution, the condition of being a boy does not justify a kangaroo court." *Id.*, 387 U.S. at 28, 87 S. Ct. at 1444. The state is a potent foe for a wronged adult, but a child has far less ability to defend itself, if any. The child's best hope is in their parent, the adult, if that option exists. All adults were children once. And the children defeated, some will become adults, some have become adults. *Gault* was decided 56 years ago.

Throughout this case, *ab initio*, there has not been a due process hearing, there has been only fraud. First, during the divorce proceedings, the custody evaluator, psychologist, the district court referee, the opposing counsel and the opposing party all took part in "permanently" depriving M.M.B. of his father. One marked element of this fraud is the abuse of these children by the parent who is awarded custody. Once this act has been committed so that the other parent reports them to CPS, the fraud is consumated. The result is the commission of

crimes against nature, to say nothing of laws. In *Sterling*, No. A14-1107, 2015 WL 5088926, the fraudsters were a custody evaluator, guardian *ad litem*, child protection worker, play therapist, the child's father and his attorney, and, of course, the district court, there a judge. The hearing was theatre, but the finale of these performances, the orders that follow, are of enormous consequence felt most immediately by the abused and cruelly imprisoned child and their compassionate but hapless and permanently defeated guardian; but that damage bleeds into society. The consequences of permitting such a failure were warned against by the Supreme Court of Minnesota in *True* v. *True* in 1861:

> "[T]he most important consideration[] ... is, which parent shall have the care and custody of the infant children; and the public has even a deeper interest in the decision of that question, than in the matter of the divorce. **The training and culture of the youth of a State ***may exert a much more potential influence upon its future prosperity and character for good or evil*****, than the separation of a man and his wife whose habits are formed, and whose social status is determined. This delicate trust is the special province of a court of equity and cannot be taken from it."

6 Minn. 458, 467 (1861) (emphasis added). The State is deeply interested in the welfare of children, specifically as their custody is concerned. Minnesota courts have recognized the importance of the family.

> "It is the foundation of civil society. ... It provides not only shelter, food, comfort, family life, happiness, and security for its members, but also instruction in, and example of, virtue, morality, and character. Not only the permanent welfare of the human race, but also the great advances of civilization, such as the elevation of woman to social equality, the education of children, the refinement of manners, the awakening of the finer things and subjugation of the gross in man, may be directly traced to it as an institution. **Human Society could not endure without it**."

Miller v. Monsen, 228 Minn. 400, 401–02, 37 N.W.2d 543, 544–45 (1949) (emphasis added). Again, the State is deeply interested in its protection. *Id.* And Minnesota has recognized the rights of the Family as those of its members; the parent's rights, in "providing his child with support, education, and protection," *Id.*, and the parent's "natural duty to maintain his child: 'Providence' has implanted in man instincts, feelings, and affections which move him more effectually than municipal law to support and care for his child," *Miller*, 228 Minn. at 410, 37 N.W.2d at 549; the child's right to parental care, "flow[ing] ordinarily as a matter of course from the parental relationship, unless it is interfered with," *Id.*; that "every member of the family has a right to protect family rights against outside interference," *Miller*, 228 Minn. at 401–02, 37 N.W.2d at 544–45, and that among the family, such rights are equal.

> "[T]he child's interest in an undisturbed family life **is of at least equal importance** with that of the parents, **and is entitled to equal consideration**."

Miller, 228 Minn. at 409, 37 N.W.2d at 548 (emphasis added).

M.M.B. received no consideration. His mother and father returned to the district court 14 months later, and M.M.B. was again defrauded of his right to his relationship with and the care of his father. This time no false experts were involved, only M.M.B.'s mother, her counsel, and the district court. "It is the proud boast of our democracy that we have 'a government of laws and not of

men.'" *Morrison v. Olson*, 487 U.S. 654, 697, 108 S. Ct. 2597, 2622 (1988) (SCALIA J., dissenting) (quoting Part the First, Article XXX, of the Massachusetts Constitution of 1780). In the district court, there are no laws; there is a façade of law, a pretend hearing on matters predetermined.[66]

B.

"[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone," *Gault*, 387 U.S. at 13, 87 S. Ct. at 1436, but "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner;

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[66] The appellate court stated, "A district court has broad discretion to hold a party in civil contempt when the party 'has acted contumaciously, in bad faith, and out of disrespect for the judicial process.'" *Bachmayer II* at *1 (quoting *Newstrand v. Arend*, 869 N.W.2d 681, 691 (Minn. App. 2015) (quotation omitted), *rev. denied* (Minn. Dec. 15, 2015)). In this case, the district court used its broad discretion to *not hold* Mother in civil contempt, so much so that *the district court* acted contumaciously, in bad faith, and out of disrespect for the judicial process. A public employee may be deprived of his position "if evilly motivated, [they] create serious danger to the public safety," thereby violating their oath of office. *Speiser*, 357 U.S. at 527-28, 78 S. Ct. at 1342-43. While "[t]he oath of office to be taken by members and officers of either branch of the legislature" is that found in the State Constitution, and "[e]very [other] person elected or appointed to any other public office ... shall take and subscribe the oath defined in the Constitution of the state of Minnesota, article V, section 6," Minn. Stat. § 358.05, the district court referee took a statutory oath. Minn. Stat. § 358.06. Minn. Const. art. V, § 6 requires "oath or affirmation to support the constitution of the United States and of this state."

and the importance of the parental role in child rearing" are reasons why the constitutional protections of children are greater than those of adults. *Bellotti v. Baird*, 443 U.S. 622, 633–34, 99 S. Ct. 3035, 3043, 61 L. Ed. 2d 797 (1979). The nation was founded on the premise of "secur[ing] the Blessings of Liberty to ourselves and **our Posterity**." U.S. Const. Preamble. The States were permitted the opportunity to meet this paramount responsibility, and the States have failed dismally.

> "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States. As to the right to the control and possession of this child, as it is contested by its father and its grandfather, it is one in regard to which neither the congress of the United States, nor any authority of the United States, has any special jurisdiction. Whether the one or the other is entitled to the possession does not depend upon any act of congress, or any treaty of the United States or its constitution."

Ex parte Burrus, 136 U.S. 586, 593–94, 10 S. Ct. 850, 853, 34 L. Ed. 500 (1890). That is because Congress has failed to exercise its "Power To ... provide for the ... general Welfare of the United States," U.S. Const. art. I, § 8, regarding the custody of children.

> "WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America."

U.S. Const. Preamble. The founding elements of this nation are absent from this case involving all save "the common defence." Congress' failure presents an

issue of the separation of powers, the most sacred "'principle in our Constitution, ... which separates the legislative, executive and judicial powers.'" *Myers*, 272 U.S. at116, 47 S. Ct. at 25 (quoting 1 Annals of Congress, 581).

> "Power must include jurisdiction, which is generally used in reference to the exercise of that power in courts of justice. But power, as used in the constitution, would seem to embrace both. Thus, all legislative power shall be vested in congress. The executive power shall be vested in a President. The judicial power shall be vested in one Supreme Court, and in such inferior courts as congress shall, from time to time, ordain and establish: and this judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, &c. This power must certainly embrace jurisdiction, so far as that term is applicable to the exercise of legislative or executive power. And as relates to judicial power, the term jurisdiction is not used, until the distribution of those powers among the several courts, is pointed out and defined."

Kendall v. U.S. ex rel. Stokes, 37 U.S. 524, 622–23, 9 L. Ed. 1181 (1838). "From this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires." *Myers*, 272 U.S. at 116, 47 S. Ct. at 25 (citing Madison, 1 Annals of Congress, 497; *Meriwether v. Garrett,* 102 U. S. 472, 515, 26 L. Ed. 197; *Kilbourn v. Thompson,* 103 U. S. 168, 190, 26 L. Ed. 377; *Mugler v. Kansas,* 123 U. S. 623, 662, 8 S. Ct. 273, 31 L. Ed. 205). "[S]o far as these powers are derived from the constitution, the departments may be regarded as independent of each other." *Kendall*, 37 U.S. at 610.

The State court was supposed to "occup[y] the position of a third party charged with the duty of protecting the public welfare," *Baskerville v. Baskerville*, 246 Minn. 496, 504, 75 N.W.2d 762, 768 (1956), but it knowingly sanctioned Mother's abusive custody of M.M.B., issuing court orders intending this result, and thereby grave injustice creating domestic suffering. Such failure infringes on the President's duty to ensure that the laws are faithfully observed, U.S. Const. art. II, § 3, and "[t]he judicial Power" to deliver Justice and ensure the President's obligation is not frustrated. U.S. Const. art. III, § 1. How can it be expected that children will become "well-developed" adults – expressing "moral standards ... and elements of good citizenship" if they are burdened with the accountability of their absconding parents' failures as was the case in *Michael H.*, 491 U.S. 110, 109 S. Ct. 2333 (California), or if they are forced into the known abusive imprisonment of a known-to-be "incompetent" parent as is the case here, all ties to those they love cut? The current state of affairs is a *less* perfect Union, and even *this* Union is at risk.

> "That our democracy ultimately rests on public opinion is a platitude of speech but not a commonplace in action. Public opinion is the ultimate reliance of our society only if it be disciplined and responsible. It can be disciplined and responsible only if habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens. The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards.
>
> To regard teachers ... as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public

> opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government."

Wieman, 344 U.S. at 196–97, 73 S. Ct. at 221 (FRANKFURTER, J., concurring).

C.

Justices Harlan and Clark dissented in *Malloy* against the Court's extending Fifth Amendment protection in that case while providing that "development of the community's sense of justice may in time lead to expansion of the protection which due process affords." *Malloy v. Hogan*, 378 U.S. 1, 15, 84 S. Ct. 1489, 1497, 12 L. Ed. 2d 653 (1964) (HARLAN, J., dissenting). But their concern that extending Fifth Amendment protection would be "inevitabl[e] disregard of all relevant differences which may exist between state and federal [systems]" by "compelled uniformity, which is inconsistent with the purpose of our federal system and which is achieved either by encroachment on the States' sovereign powers or by dilution in federal law enforcement of the specific protections found in the Bill of Rights," *Malloy*, 378 U.S. at 16–17, 84 S. Ct. at 1498 (HARLAN, J., dissenting), is itself concerning. First, the Bill of Rights is a

Constitutional Amendment. The federal system existed without it. If the distinction between the two levels of government is in the rights or lack thereof of its citizens, justification of such a system is difficult if not impossible. But "[t]he theory upon which our political institutions rest is, that all [] have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law." *Cummings v. Missouri*, 71 U.S. 277, 321–22, 18 L. Ed. 356 (1866).

The federal system resembles an ongoing legal dispute with the State arguing its claim against the Nation arguing against the State's.

> "The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad."

United States v. Cruikshank, 92 U.S. 542, 549–51, 23 L. Ed. 588 (1875) (citing *Slaughter-House Cases*, 83 U.S. 36, 74, 21 L. Ed. 394 (1872)). And yet it is the frequent dispute that the State claims power to invade the rights of the people. This system of dual government was necessary to ensure the welfare and protection of the people. To its citizens, government owes a duty to promote "their general welfare and [protect] their individual as well as their collective rights [and] may, and when called upon should, exercise all the powers it has for

the protection of the rights of its citizens and the people within its jurisdiction; but it can exercise no other. The duty of a government to afford protection is limited always by the power it possesses for that purpose." *Cruikshank*, 92 U.S. at 549–51 (citing *Slaughter-House Cases*, 83 U.S. at 74).

> "Is there any part of this description, which intimates, in the remotest manner, that a State, any more than the men who compose it, ought not to do justice and fulfil engagements? It will not be pretended that there is. If justice is not done; if engagements are not fulfilled; is it upon general principles of right, less proper, in the case of a great number, than in the case of an individual, to secure, by compulsion, that, which will not be voluntarily performed? Less proper it surely cannot be. The only reason, I believe, why a free man is bound by human laws, is, that he binds himself. Upon the same principles, upon which he becomes bound by the laws, he becomes amenable to the Courts of Justice, which are formed and authorised by those laws. If one free man, an original sovereign, may do all this; why may not an aggregate of free men, a collection of original sovereigns, do this likewise? If the dignity of each singly is undiminished; the dignity of all jointly must be unimpaired. A State, like a merchant, makes a contract. A dishonest State, like a dishonest merchant, wilfully refuses to discharge it: The latter is amenable to a Court of Justice: Upon general principles of right, shall the former when summoned to answer the fair demands of its creditor, be permitted, proteus-like, to assume a new appearance, and to insult him and justice, by declaring I am a Sovereign State? Surely not."

Chisholm v. Georgia, 2 U.S. 419, 456, 1 L. Ed. 440 (1793). And so, in spite of the prohibition that "Congress shall make no law ... abridging the ... right of the people ... to petition the Government for a redress of grievances," U.S. Const. amend. I, the Eleventh Amendment came into being: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const.

amend. XI. "[H]ow true it is, that States and Governments were made for man; and, at the same time, how true it is, that his creatures and servants have first deceived, next vilified, and, at last, oppressed their master and maker," *Chisholm*, 2 U.S. at 455, – the citizen. A citizen of the United States may also be a citizen of one of its States, each State having its own distinct government from that of the United States. "[R]ights of citizenship under one of these governments will be different from those he has under the other." *Cruikshank*, 92 U.S. at 549–51 (citing *Slaughter-House Cases*, 83 U.S. at 74). Undoubtedly the States may expand the rights of the people beyond those found in the Bill of Rights and established by law, but the State cannot detract from them. "The perverted use of genus and species in logic, and of impressions and ideas in metaphysics, have never done mischief so extensive or so practically pernicious, as has been done by States and sovereigns, in politics and jurisprudence; in the politics and jurisprudence even of those, who wished and meant to be free." *Chisholm*, 2 U.S. at 454. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The "powers" of the people are in the Bill of Rights, thus the State's can have no claim to them. "As the State has claimed precedence of the people; so, in the same inverted course of things, the Government has often claimed precedence of the State; and to this perversion in the second degree, many of the volumes of confusion concerning

sovereignty owe their existence." *Chisholm*, 2 U.S. at 455. Parents bear equal responsibility for the safety and welfare of the child, who is supreme.

The first sentence of the first section of the Fourteenth Amendment – "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside" – is an unambiguous restatement for clarity of citizenship as defined by U.S. Const. art. I, §§ 2, 3; art. II, § 1; and art. III, § 2. U.S. Const. art. III, § 2 provides that there are "Citizens" of "States". Citizenship of the United States is found in U.S. Const. art. II, § 1, which provides that to "be eligible to the Office of President" a "Person" must be "a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution." Similarly, "a Representative" shall have "been seven Years a Citizen of the United States," U.S. Const. art. I, § 2, and "a Senator" shall have "been nine Years a Citizen of the United States." U.S. Const. art. I, § 3. The first part of the second sentence of the first section of the Fourteenth Amendment, building on the first sentence, was a restatement of U.S. Const. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States") in terms unmistakable: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." And the second part of the second sentence of the first section of the Fourteenth Amendment, building on the preceding, was a restatement of the Due Process clause of the Fifth Amendment. Only the third part of the second sentence of the first section of

the Fourteenth Amendment provided potentially new material, though inherent. *See Cummings, supra* at 206. Thus, the first section of the Fourteenth Amendment is no more than a declaration of what the law is without it. However, it provided clarity.

As Justice Frankfurter explained, "States thereafter could not 'abridge the privileges or immunities of citizens of the United States,' or 'deprive any person of life, liberty, or property, without due process of law', or 'deny to any person within its jurisdiction the equal protection of the laws.'" *State of La. ex rel. Francis v. Resweber*, 329 U.S. 459, 466, 67 S. Ct. 374, 377, 91 L. Ed. 422 (1947) (FRANKFURTER, J., concurring). The due process and equal protection clauses have received much attention, but the privileges and immunities clause has never been properly observed. "[The] specific provisions of the first eight amendments [were] formulated by the Founders to guard against recurrence of well-defined historic grievances, ... circumscribed partly by history and partly by the problems of government, large and dynamic though they be, with which they are concerned." *Resweber*, 329 U.S. at 466, 67 S. Ct. at 377 (FRANKFURTER, J., concurring). But "[t]he 'privileges or immunities of citizens of the United States'" did not *merely* "concern the dual citizenship under our federal system," *Id.*, 329 U.S. at 467, 67 S. Ct. at 377–78, – it eliminated the possibility that (mistaken) distinction between the two could be made in that regard. This correct conclusion was first urged shortly after adoption. "If that view had prevailed, the Privileges or Immunities Clause of the Fourteenth Amendment

would have placed upon the States the limitations which the specific articles of the first eight amendments had theretofore placed upon the agencies of the national government." *Id.*, 329 U.S. at 467, 67 S. Ct. at 378. However, this argument was errantly dismissed in *Slaughter-House Cases*, "because [the amendment] speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States," while "[t]he argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same." 83 U.S. 36, 74, 21 L. Ed. 394 (1872). Whatever the argument there, the fact that the citizenships are unique and that there was never any doubt that the Bill of Rights applied to the United States would, under that construction – "that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the object for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; [a construction that] then we cannot perceive the propriety of [], nor adopt [] as the rule by which the constitution is to be expounded," *Gibbons v. Ogden*, 22 U.S. 1, 188, 6 L. Ed. 23 (1824) – render this clause superfluous, a nullity.

> "[T]hese States, anterior to its formation[,] they were sovereign, were completely independent, and were connected with each other only by a league[,] ... [b]ut, when these allied sovereigns converted their league into a government, ... the whole character in which the States appear[] underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected."

Gibbons, 22 U.S. at 187. "The Fourteenth Amendment did not mean to imprison the States into the limited experience of the eighteenth century. It did mean to withdraw from the States the right to act in ways that are offensive to a decent respect for the dignity of man, and heedless of his freedom." *Resweber*, 329 U.S. at 466–68, 67 S. Ct. at 377–78 (FRANKFURTER, J., concurring). The intention was to make clear that the State is beholden to "immutable principles of justice, which inhere in the very idea of free government," *Holden v. Hardy*, 169 U.S. 366, 389, 18 S. Ct. 383, 387, 42 L. Ed. 780 (1898), "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Hebert v. State of La.*, 272 U.S. 312, 316, 47 S. Ct. 103, 104, 71 L. Ed. 270 (1926), "immunities ... implicit in the concept of ordered liberty." *Palko v. State of Connecticut*, 302 U.S. 319, 324–25, 58 S. Ct. 149, 151–52, 82 L. Ed. 288 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969). *See Resweber*, 329 U.S. at 470, 67 S. Ct. at 379 (FRANKFURTER, J., concurring). Yet "[t]he notion that the Privileges or Immunities Clause of the Fourteenth Amendment absorbed, as it is called, the provisions of the Bill of Rights that limit the Federal Government has never been given countenance by this Court." *Id.*, 329 U.S. at 467, 67 S. Ct.

at 378. Now the Court may reconsider that decision and, on a question of such import, should not be limited to merely the arguments made here.

III.

Whether a seizure and search were 'unreasonable' is determined by "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio*, 392 U.S. 1, 19–20, 88 S. Ct. 1868, 1879, 20 L. Ed. 2d 889 (1968). "The purpose of a warrant is to allow a neutral judicial officer to assess whether [] probable cause [exists] to make an arrest or conduct a search." *Steagald v. United States*, 451 U.S. 204, 212, 101 S. Ct. 1642, 1648, 68 L. Ed. 2d 38 (1981). "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd v. United States*, 116 U.S. 616, 635, 6 S. Ct. 524, 535, 29 L. Ed. 746 (1886).

> "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. ... 'The right to one's person may be said to be a right of complete immunity; to be let alone.'"

Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251, 11 S. Ct. 1000, 1001, 35 L. Ed. 734 (1891) (quoting Cooley, Torts, 29).

A.

A district court "arrests" a child when it assigns their custody. The scope of a search incident to such an arrest would extend to the limits of the allegations made by the parties, incumbent to determination of their reliability. But the district court had not yet "arrested" M.M.B. when it issued the order for a custody evaluation. The Fourth Amendment states that "no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The warrant for custody evaluation was "[b]ased upon the agreements of the parties and counsel," *supra* at 77, which constitutes nothing more than a belief and "'however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.'" *Coolidge v. New Hampshire*, 403 U.S. 443, 450–51, 91 S. Ct. 2022, 2030, 29 L. Ed. 2d 564 (1971), *holding modified by Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990) (quoting *Agnello v. United States*, 269 U.S. 20, 33, 46 S. Ct. 4, 6, 70 L. Ed. 145 (1925)); *Steagald*, 451 U.S. at 222, 101 S. Ct. at 1653.

However, the warrant was also substantiated by "all the files, proceedings and records herein." Having been recently arrested for but ultimately not charged with domestic assault, for the district court's purpose of establishing probable cause, Father would have fallen in the middle ground between the

oblivious citizen and the guilty criminal. "[I]f the officer who intercepts him [] knows that fact at the time he makes the interception and the circumstances under which it is made are not such as to indicate the suspect going about legitimate affairs," *Brinegar v. United States*, 338 U.S. 160, 177, 69 S. Ct. 1302, 1311, 93 L. Ed. 1879 (1949), there is probable cause to warrant a search. The facts go either direction. Though Father would consider an agreement of attorneys to disfavor probable cause, the district court was not so persuaded. Still, with nothing more, the initial warrant was issued on "mere suspicion" that *Father* had committed a crime. And yet, because "[t]he residue of the sentence is out of the case," *Stacey v. Emery*, 97 U.S. 642, 644, 24 L. Ed. 1035 (1878), for the warrant to be valid, the district court would have had to harbor suspicion of both parties as potential perpetrators of domestic abuse. Then there would have been probable cause to investigate both parties.

Shortly after issuance, the district court received the parties' affidavits, and it found "no evidence" to grant Mother's request to supervise Father's parenting time – but it found "domestic abuse between the parties" and that Mother carried a "belief that [Father] cannot properly care for the child." *Supra* at 76. Mere suspicion is not enough. *Brinegar*, 338 U.S. at 177–78, 69 S. Ct. at 1311–12. The district court not only expanded Father's parenting time but *un*supervised it, *supra* at 73, faulting "[M.M.B.'s] age and development" for its failure to make Father's parenting time equal, on the "facts."

The district court's failure otherwise to find on the contents of the affidavits *except to find domestic abuse without assigning responsibility* was necessary for sustaining the custody evaluation order's façade of legitimacy. But in so doing, it determined that Mother did not have standing. "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." *Henry v. United States*, 361 U.S. 98, 102, 80 S. Ct. 168, 171, 4 L. Ed. 2d 134 (1959) (citing *Stacey v. Emery*, 97 U.S. at 645). Without a case, there was no probable cause to pursue Mother's allegations. "The [prisoner] is to go free because the constable has blundered." *Elkins v. United States*, 364 U.S. 206, 216–17, 80 S. Ct. 1437, 1444, 4 L. Ed. 2d 1669 (1960) (quotation omitted). Rather, what the district court determined was that Father had a case against Mother. On domestic abuse, the district court maintained suspicion of Father – arrested for domestic assault but not charged with – but also suspected Mother. After reviewing Mother's affidavits, it found no evidence in them to support restricting Father's parenting time – none. Mother received no such finding. The district court had found that the sole reason to not grant Father equal or greater parenting time was because he had not had much parenting time to-date. Father was, then, deemed a safe parent. The sole reason that Mother maintained a greater share of the parenting time – or any parenting time at all – was because she had been exercising a much greater share. This was not an inherent finding that Mother was a safe parent. Prior to the district court's custody evaluation order there was no suspicion of Mother for

domestic abuse. That inherent finding was undiminished by the affidavits but inherently sustained. Mother had gone from the sole victim in the criminal proceedings to the prime and only suspect in the civil proceedings, and she had called the police.

These facts alone would likely constitute a violation of the rule established in *Johnson v. United States,* 333 U.S. 10, 13-14, 68 S. Ct. 367, 369, 92 L. Ed. 436 (1948) that whoever determines the existence of probable cause must be neutral and disinterested and must make such determination based on evidence. But as the facts of the case show, the district court was, like the attorney general in *Coolidge v. New Hampshire,* both "the officer engaged in the often competitive enterprise of ferreting out crime" and "magistrate." 403 U.S. at 449–50, 91 S. Ct. at 2029 (quoting *Johnson v. United States,* 333 U.S. at 13-14, 68 S. Ct. at 369). "[T]he search stands on no firmer ground than if there had been no warrant at all." *Coolidge*, 403 U.S. at 453, 91 S. Ct. at 2031. As a result, the warrant issued was inadequate and the searches and seizures that followed violated M.M.B.'s and his father's Fourth Amendment rights. *Sibron v. New York,* 392 U.S. 40, 59, 88 S. Ct. 1889, 1901, 20 L. Ed. 2d 917 (1968) (citing *Aguilar v. State of Texas,* 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Giordenello v. United States,* 357 U.S. 480, 78 S. Ct. 1245, 2 L. Ed. 2d 1503 (1958)).

In *Union Pac. R. Co. v. Botsford,* the Court held that in a civil action a warrant to inspect a person's body was invalid. Such an inspection could be conducted only on consent. "If he unreasonably refuses to show his injuries,

when asked to do so, that fact may be considered by the jury as bearing on his good faith, as in any other case of a party declining to produce the best evidence in his power." *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 255, 11 S. Ct. 1000, 1002, 35 L. Ed. 734 (1891) (and cases cited). The district court's warrant for custody evaluation accounted for this holding, threatening prejudice in its ultimate findings for noncompliance with the custody evaluator's intrusions. *See supra* at 77. "The end of litigation is justice. Knowledge of the truth is essential thereto." *Union Pac. R. Co.*, 141 U.S. at 258, 11 S. Ct. at 1003 (BREWER, J., dissenting). The dissent in *Union Pac. R. Co. v. Botsford*, raises the point that, if an examination of the person could be compelled it certainly could be "where the suit is by the party whose examination is sought," *Id.*, the purpose of the examination being to establish justiciability of the case. The dissent agreed that such an order could not be enforced by attachment, but noncompliance would be appropriately handled by "staying the trial or dismissing the case." *Id.*, 141 U.S. at 259, 11 S. Ct. at 1004 (BREWER, J., dissenting). Finding "no evidence" to support Mother's request, the district court should have dissolved the custody evaluation warrant and set the case for trial. Of course, it did not. The warrant persisted, and as it states, Father had consented to it. The warrant was invalid under the Fourth Amendment, but "he may thus disclose the actual facts to the jury if his interest require; but by this decision, if his interests are against such a disclosure, it cannot be compelled." *Id.* But still the search is invalid for it cannot be conducted without a warrant. Minn. Stat. § 518.167, subd. 1. The statute

authorizes the district court to "order an investigation and report concerning custodial arrangements for the child" in "contested custody proceedings." *Id.* The legislature is presumed to act "within its constitutional power." *United States v. Harris*, 106 U.S. 629, 635, 1 S. Ct. 601, 606, 27 L. Ed. 290 (1883). The presumptive construction of Minn. Stat. § 518.167, subd. 1, is that probable cause warranting investigation exists, not that the legislature has authorized the district court to violate the citizen's Fourth Amendment rights on request.

Finally, the warrant was invalid for its broad scope. "[A] search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Terry*, 392 U.S. at 17–18, 88 S. Ct. at 1878 (citations omitted). It was a warrant to investigate every nook and cranny of the parties' lives. "A search warrant ... is issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place, and therefore safeguards an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police." *Steagald*, 451 U.S. at 213, 101 S. Ct. at 1648. The district court's custody evaluation order was the kind of grievous and oppressive "general warrant" that the Court emphatically held unconstitutional in *Henry v. United States*, 361 U.S. at 101, 80 S. Ct. at 170.

B.

The district court's failure to make orders, findings, and judgments that are coherent complicates what would otherwise be reducible to a question "of

whether the initial intrusion is justified," *Coolidge,* 403 U.S. at 464, 91 S. Ct. at 2037, as subsequent searches were made and led to seizures.

With Mother squarely on defense the dissolution case remained justiciable. But Mother's grounds for requesting relinquishment of Father's parental rights were defeated by the district court's finding "no evidence" of them, *State ex rel. Smith v. Haveland,* 223 Minn. 89, 92, 25 N.W.2d 474, 477 (1946), unless the custody evaluation could unearth allegations after-the-fact to support the investigation into Father, and "evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation." *Terry,* 392 U.S. at 29, 88 S. Ct. at 1884 (citing Warden v. Hayden, 387 U.S. 294, 310, 87 S. Ct. 1642, 1652, 18 L. Ed. 2d 782 (1967) (Mr. Justice Fortas, concurring)). The only remaining allegations regarding custody and parenting time were those made by Father, but Mr. Hyland refused to pursue Father's allegations, dismissed them, and pursued Mother's claims and his own imagination.

When Father told Mr. Hyland that "[Mother] would scream and yell at him, quite frankly, for hours," Mr. Hyland doubted this and did not collect any collateral information on it. He described Mother as "the model of early childhood awareness" but admitted that screaming and ranting "with [M.M.B.] in her arms" was not model parenting. Mr. Hyland "didn't ask" whether "[M.M.B.] was present when [Mother] threw the hair brush at [Father]." Mr. Hyland did not investigate Mother's threatening to harm herself with a knife, threatening Father

with a knife, or any of Mother's admitted to or otherwise established acts of domestic violence. For Mr. Hyland, Mother was infallible. Mr. Hyland testified that Father's interactions with M.M.B. were "very appropriate," but he dodged answering whether Father and M.M.B. had a relationship like he avoided answering that he had failed to conduct a neutral evaluation. Mr. Hyland testified that his report contained his conjecture, and he did not interview M.M.B.'s paternal grandparents for his evaluation. Mr. Hyland was not able to answer to the devastating effect his proposal would have on M.M.B. *See supra* at 87.

One central search and seizure was Mr. Hyland's claim of mental health concerns for Father and *not* of Mother. "If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of 'Warrants * * * particularly describing * * * (the) things to be seized.'" *Coolidge*, 403 U.S. at 471, 91 S. Ct. at 2040. "This Court has never permitted the legitimation of a planned warrantless seizure on plain-view grounds. ... [T]he mere fact that the police have legitimately obtained a plain view of a piece of incriminating evidence is not enough to justify a warrantless seizure." *Id.*, 403 U.S. at 471, 91 S. Ct. at 2041.

First, viewing Mr. Hyland's claim facially, it appears the product of a seizure made on plain-view grounds. Mr. Hyland interviewed Mother and from that interview he obtained information that he used to support his conclusion.

See supra at 105. But as mentioned, the fraud-template case, *Phelps v. Sterling,* required testimony of a mental-health professional. *See supra* at 104. Assuming arguendo that Mr. Hyland was the disinterested neutral he was supposed to be, his inappropriate venture into diagnosing mental health could be the innocent unprofessionalism of an ignoramus or idiot. But Mother's testimony of what she told Mr. Hyland and that he based his diagnosis of Father on was that Father's physical disability could affect his cognitive functioning. Mr. Hyland did not discuss Father's diabetes as a consideration for determining custody but explicitly excluded it from consideration as did the district court. *Supra* at 106. This at least prima facie establishes that Mr. Hyland was operating with a motivation that was not M.M.B.'s best interests, and it is a difficult coincidence that he provided in this way the justification for the district court to issue the warrant to investigate Father's mental health mandatory to the fraud committed. Returning to *Coolidge*, Mr. Hyland knew the location of the object he intended to seize – a justification to investigate Father's mental health. The only thing that Mr. Hyland may not have known was what "particularly" he would present.

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance."

Boyd, 116 U.S. at 635, 6 S. Ct. at 535. Mr. Hyland conducted his seizure to take the appearance of a plain-view exception, but it was a "planned warrantless seizure on plain-view grounds," illegitimate. *Coolidge*, 403 U.S. at 471, 91 S. Ct. at 2041, 29 L. Ed. 2d 564. It cannot be that Mr. Hyland's remarkable imagination can defeat the Fourth Amendment guarantees. For the Court to explicitly declare as much would not alter existing Fourth Amendment law, but Mr. Hyland has made it apparent that it is necessary.

C.

Mr. Hyland could have ordered psychological evaluations himself. Instead, his evaluation prompted the district court to order them. Although the district court noted that, in addition to Mr. Hyland's "concerns about [Father's] mental health," Father had "repeated concerns about [Mother's] mental and emotional health and how it affects her ability to parent," the warrant it issued to investigate the concerns identified particularly that the evaluator was to provide a written opinion "as to whether the condition (s), if any, would interfere with **his** ability to safely and effectively care for the parties' child." *Supra* at 106. Mother's psychological evaluation was conducted according to this mandate. Only Father's mental health was under investigation.

> "[W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic

evidence, that finding, if not internally inconsistent, can virtually never be clear error."

Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 575, 105 S. Ct. 1504, 1512, 84 L. Ed. 2d 518 (1985).

This warrant was also defective. Mr. Hyland's mystery mental health concern was unspecific; his unqualified diagnosis opinion was so broad that it could encompass any emotional experience. The district court failed to state that the psychological evaluation was specifically to determine whether Father's diabetes constituted a mental health concern.[67] The Court in *Chimel v. California* extended its holding, that "[t]he scope of the search was [] 'unreasonable' under the Fourth and Fourteenth Amendments," to reject the State's "contentions as being without merit" that obtaining a specific warrant "would have been unduly burdensome." 395 U.S. 752, 768, 89 S. Ct. 2034, 2043, 23 L. Ed. 2d 685 (1969). The district court later recited Father's specific allegations regarding Mother's mental unhealth – that Mother has "antisocial personality

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[67] "[T]he ADA is designed 'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'" *Tennessee v. Lane*, 541 U.S. 509, 516–17, 124 S. Ct. 1978, 1984–85, 158 L. Ed. 2d 820 (2004) (quoting 42 U.S.C. § 12101(b)(1)). Public entities, "includ[ing] state and local governments, as well as their agencies and instrumentalities," are prohibited "from discriminating against 'qualified' persons with disabilities in the provision or operation of public services, programs, or activities." *Tennessee v. Lane*, 541 U.S. at 516–17, 124 S. Ct. at 1984–85 (citing 42 U.S.C. § 12131(1)).

disorder and psychosis," and that she is "a narcissist, a sociopath and a manipulator with control issues." *Supra* at 110. Had it issued a warrant for psychological evaluation of Mother on these grounds, the warrant may have been sufficient, and if the Court's statement in *Stacey*, 97 U.S. at 644, that "[t]he residue of the sentence is out of the case," and that "[t]he unusual form of the certificate should work on prejudice to the rights of the defendant," holds in this scenario, then only Father's psychological evaluation was unconstitutional. "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offence has been committed, it is sufficient." *Id.*, 97 U.S. at 645. Regarding Father, the district court did not have probable cause to continue with anything in the manner that it did following its decision on the parties' affidavits. *Id.* "'If malice is proved, yet if probable cause exists, there is no liability. Malice and want of probable cause must both exist,' to justify an action." *Id.* (quoting *Munn* v. *Dupont*, 3 Wash. 37).

Dr. Sebastian Rilen committed perjury when he testified to the psychological examination he conducted on Mother, *see supra* at 108, and the district court found as much – "Dr. Rilen did not observe any evidence of any of the significant disorders alleged by [Father]," and "Dr. Rilen reports that [Mother] has exhibited impulsive behavior and **prior** willingness to be deceitful." The district court failed to find Dr. Rilen's testimony on Mother's "weapon use" and "violence" and theft but found its own concerns regarding Mother's mental health in her "constant complaining, 'tantrums,' and 'tirades,'" that she is

"mentally ill and an unfit parent," "self-involved and manipulative." In effect, the district court and Dr. Rilen found Father's allegations of Mother's mental disorders merited. However, the district court and Dr. Rilen took an opposing course: they reduced Mother's prima facie personality disorder to a projected "diagnosis of adjustment disorder with anxiety" and found that "this anxiety was not the predominant issue in managing the co-parenting dynamics within this family considering the toxicity of the relationship" – that they put on Father. *Supra* at 111.

"The psychological evaluations were filed on February 14, 2019." *Bachmayer I* at *1. "Both parties participated in psychological evaluations through Hennepin County Psychological Services. Dr. Rilen reviewed some collateral information during his evaluations, but did not review the custody evaluation prior to completing his testing and interviews." *Supra* at 107. Clearly then, Dr. Rilen's procedure did not violate "the 'plain view' exception" since he did not know "[the item's] exact description and location well in advance." *Coolidge,* 403 U.S. at 472, 91 S. Ct. at 2041. Sebastian Rilen, county psychologist, received Mr. Hyland's "custody evaluation" and drafted false documents purporting to be "psychological evaluations." Like Mr. Hyland, he found that Father's diabetes presented an unknown, chronic mental health ailment for Father, legitimizing Mother's testimony that multiple "personalities" are found in people with diabetes which Mr. Hyland had based his medical opinion on. *See supra* at 107.

> "The evaluator opined that father lacked the ability to effectively co-parent and stated that, absent significant intervention, father would likely continue to perpetuate themes of intimidation against mother 'without insight into the potential harm this can cause to a child.' The evaluator recommended clinical intervention but lacked sufficient information to make a precise diagnosis or determine the likelihood that clinical intervention would be successful."

Bachmayer I at *1. "The report emphasizes that father *currently* lacks the ability to effectively co-parent. Further, the evaluator expressed uncertainty that father would improve, even with clinical intervention." *Id.*, at *4.

> "On October 8, 2019, the district court permanently awarded father nine hours of supervised parenting time per week: three hours on Tuesday evenings and six hours on Saturdays. The district court noted that father may request a change in parenting time after completing one year of therapy. The district court found that it would be in the best interests of child to award sole legal custody and sole physical custody to mother."

Id.

> "The district court restricted father's parenting time because it found that additional parenting time would 'endanger the child's emotional health and impair his emotional development' and that 'maximizing time between the child and father could be detrimental, while minimizing time could be beneficial.'"

Id. at *1 (alterations in original).

"[Father's] testimony failed to adequately rehabilitate the negative reports from both Mr. Hyland and Dr. Rilen. After denying domestic abuse and alleging [Mother] was incapable of caring for [M.M.B.], [Father] stated he 'was concerned about why we're all here today.'" Doc.95 at 13.

In summary, Father was denied custody based on the simple fact that he has diabetes.

D.

Whether Mr. Hyland fantasized that he physically "led [Father] out of the room" or that by close proximity he "led [Father] out of the room," CPTE at 16, it was evidently a "show of authority" that restrained Father's freedom of movement. *Terry*, 392 U.S. at 20, 88 S. Ct. at 1879. "Whenever [an] officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry*, 392 U.S. at 16–17, 88 S. Ct. at 1877. Mr. Hyland's claim is that he forced Father away. He correctly quoted Father as stating, essentially, just preceding this, that "'[Mother] can leave first as I'm the dangerous one. You can talk to me for fifteen minutes while she leaves.'" CPTE at 16. Mother, who claimed to be the victim of "egregious" domestic abuse by Father, *supra* at 156, and Mr. Hyland were not concerned for Mother's safety from Father. Mr. Hyland's alleged abrupt arousal from the table to lead Father immediately from the room, *Id.*, would be unreasonable conduct in this situation. *Terry*, 392 U.S. at 20, 88 S. Ct. at 1879. His restatement that Father was to leave first was adequate for Father to flee.

E.

The Fourth Amendment reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The part of the Fifth Amendment here involved reads: "No person ... shall be compelled in any criminal case to be a witness against himself."

> "It would not be possible to add to the emphasis with which the framers of our Constitution and this court have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two [Fourth and Fifth] Amendments. The effect of the decisions cited is: That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts."

Gouled v. United States, 255 U.S. 298, 303–04, 41 S. Ct. 261, 263, 65 L. Ed. 647 (1921), *abrogated by Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967) (citing *Boyd*, 116 U.S. at 6 S. Ct. at 29, *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L.R.A. 1915B, 834, Ann. Cas.

1915C, 1177, *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1920)).

The First Amendment as here involved reads: "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people ... to petition the Government for a redress of grievances."

Prior to the Court's decision in *Chimel v. California,* "under the law of search incident to arrest ..., 'law enforcement officials had the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere.'" *Coolidge*, 403 U.S. at 471, 91 S. Ct. at 2041 (quoting Chimel v. California, 395 U.S., at 767, 89 S. Ct., at 2042). Mr. Hyland was not acting in violation of *Chimel* when he "observed positive interactions between [M.M.B.] and both parents at their respective homes"; his authority was derived from the illegal warrant, which specifically authorized him to "[c]onduct home visits with the parties." *Supra* at **Error! Bookmark not defined.**. Once Mr. Hyland had gained entry to M.M.B.'s home with his father, Mr. Hyland began an unbounded 'plain view' search for evidence to support his incriminating narrative of Father. The central premise of Mr. Hyland's findings was again based on Mother's allegations, this time her discontent with Father's approach to M.M.B.'s "bedtimes." The district court found that "[w]hen Mr. Hyland asked [Father] about the child's bedtime routine, [Father] stated that the only benefit to a child having an early bedtime was for a parent to have free time. When asked if a consistent bedtime would benefit

[M.M.B.], [Father] told Mr. Hyland he should ask [M.M.B.]. [Father] reported he does not keep a regular routine for [M.M.B.] and instead looks for cues from [M.M.B.]." By these findings, the district court supported its determination in favor of Mother's and against Father's custody of M.M.B.

"[T]he 'unreasonable searches and seizures' condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which [] is condemned in the fifth amendment." *Boyd*, 116 U.S. at 633, 6 S. Ct. at 534. "'It is very certain that the law obligeth no man to accuse himself, because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that search for evidence is disallowed upon the same principle.'" *Id.*, 116 U.S. at 629, 6 S. Ct. at 532 (quoting *Entick* v. *Carrington and Three Other King's Messengers*).

> "Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit [the welfare of his child], is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other."

Boyd, 116 U.S. at 630, 6 S. Ct. at 532.

Of course, the Fifth Amendment's prohibition against self-incrimination is stated as specifically in the context of "in any criminal case." But "it has long been settled that the privilege protects witnesses in similar federal inquiries."

Malloy, 378 U.S. at 11, 84 S. Ct. at 1495. The relevant factor is not criminality but the imposition on the individual of the awesome power of the state.

Mr. Hyland and Dr. Rilen's state-sanctioned investigations, in this case state-run, were ordered without probable cause by the district court to "furnish a link in the chain of evidence needed to prosecute" against M.M.B.'s safety and against his father's safe care. Much of the evidence seized by them took the form of Father's own statements regarding M.M.B.'s self-expressions. "[I]t is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law." *Twining v. State of N.J.*, 211 U.S. 78, 99, 29 S. Ct. 14, 19–20, 53 L. Ed. 97 (1908), *overruled by Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964) (citing Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581). To not transgress the Constitution, "the judge must be 'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answers cannot possibly have such tendency to incriminate.'" *Malloy*, 378 U.S. at 12, 84 S. Ct. at 1496 (quoting *Hoffman v. United States*, 341 U.S. 479, 488, 71 S. Ct. 814, 819, 95 L. Ed. 1118 (1951)). This Constitutional dilemma was partially attended by the district court's final order, purporting that the purported "coerced confessions" by Mr. Hyland were merely supplemental evidence. *Supra* at 89. The district court purported to appraise the

claim on its "personal perception of the peculiarities of the case," *Hoffman*, 341 U.S. at 487, 71 S. Ct. at 818 (quotation omitted) –

> "The Court recognizes that all parties feel stressed during a divorce action and that a custody evaluation can be very invasive"

– and "by the facts actually in evidence," *Id.* –

> "However, [Father's] conduct towards Mr. Hyland, coupled with his statements about and accusations towards [Mother], are in line with the rest of his actions during this proceeding."

> "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

Id., 341 U.S. at 486–87, 71 S. Ct. at 818.

The Fifth Amendment's protection against self-incrimination should be extended to cases of child custody where the state becomes involved in such a way that this protection from undue government influence is necessary to protect litigants and their children.

F.

> "[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."

Griswold, 381 U.S. at 482, 85 S. Ct. at 1680 (citing *Pierce*, 268 U.S. 510, 45 S. Ct. 571 (choice of private and public school); *Meyer*, 262 U.S. 390, 43 S. Ct. 625 (right to study the German language in a private school)).

By the Ninth Amendment, the right of freedom of speech includes freedoms peripheral thereto – freedom of thought, to teach, to inquire, and to express one's attitudes, opinions, philosophies. *Griswold*, 381 U.S. at 482-83, 85 S. Ct. at 1681 ("while [] not expressly included in the First Amendment [their] existence is necessary in making the express guarantees fully meaningful"); *Wieman*, 344 U.S. at 194, 73 S. Ct. at 220 (BLACK, J., concurring) ("[I]ndividuals are guaranteed an undiluted and unequivocal right to express themselves. ... It means that courts are without power to appraise and penalize utterances upon their notion that these utterances are dangerous. ... Tyrannical totalitarian governments cannot safely allow their people to speak with complete freedom."). This would mean very little without the freedom of persons to associate. The First Amendment is made applicable to the States by the force of the Fourteenth. *Pierce v. Society of the Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925).

The district court, by the evaluations of Mr. Hyland and Dr. Rilen, sought to prevent M.M.B.'s exposure to the knowledge his father would impart on him, as that would enlighten him to Mother's abusive and incapable custody. The district court found this in Father's self-defense to Mother's abuse during their marriage, in his resisting her demands regarding M.M.B.'s bedtimes, in his

recording Mother when exchanging care of M.M.B. – and in the "cudgel" that Mr. Hyland's seized: The Cudgel of Domestic Abuse Education. *See supra* at 91.

Mr. Hyland perceived danger when he discovered that Father was absorbing the material from his court-ordered domestic abuse education class. The district court, Mr. Hyland, and Dr. Rilen were concerned that Father would shield M.M.B. from Mother's abusive custody. According to these three, Father was not supposed to learn about domestic abuse but was supposed to learn that there was no defense from it, and they enforced this sadism by turning Father's attempts to curtail Mother's abuse of M.M.B. against him. *See supra* at 145-147. In *Terry*, 392 U.S. at 29, 88 S. Ct. at 1884, the Court listed discovery of "guns, knives, clubs, or other hidden instruments for the assault of the police officer" or others as the "sole justification of the search" in that case in which it upheld the officer's search of Terry. But Mr. Hyland's "cudgel" was a shield, not a weapon. Mr. Hyland, sympathetic to Mother in her abuse of M.M.B., was keenly aware of the difficulty that Mother would face from Father after his having been educated in the forms of abuse that she perpetrated. To enable Mother to better-abuse M.M.B., he confiscated Father's domestic abuse knowledge, claiming it as seizure of a dangerous weapon, a "cudgel." The circumstances did not warrant belief that Mother's safety was in danger. *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883. Domestic abuse is a crime in Minnesota. Minn. Stat. § 609.2242.

"The limitations which the Fourth Amendment places upon a protective seizure and search for weapons [are] developed in the concrete factual

circumstances of individual cases." *Terry*, 392 U.S. at 29, 88 S. Ct. at 1884 (citing *Sibron*, 392 U.S. at 88 S. Ct. at 1912). Mr. Hyland's search and seizure of Father's domestic abuse education was malice with intent to harm the innocent in his custody and aid and abet the criminal. *Terry*, 392 U.S. at 28, 88 S. Ct. at 1883. Search and seizure may be constitutionally valid to **prevent** destruction of evidence of a crime. *See Preston v. United States*, 376 U.S. 364, 367, 84 S. Ct. 1642, 1652, 18 L. Ed. 2d 782 (1964). Mr. Hyland's "cudgel" was employed to misrepresent the facts of the case that he presented to the district court which it in turn used to obfuscate Mother's abuse. M.M.B.'s Shield of Domestic Abuse Education was seized to prevent his escaping Mother's custody, six months before trial.

> "The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape. ... [But o]nce an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest."

Preston, 376 U.S. at 367, 84 S. Ct. at 883 (citing *Agnello v. United States*, 269 U.S. 20, 31, 46 S. Ct. 4, 5, 70 L. Ed. 145 (1925)).[68]

And this continued in 2021. The district court got one thing right, "[M.M.B.] is ... bright." Mother was not meeting M.M.B.'s intellectual needs, but Father was doing all he could to. On approximately 9 hours of parenting time each week, it

[68] These remarks are not meant to intonate that there are not psychological 'weapons.'

was M.M.B.'s father that taught him how to cross the street, that cars are dangerous, to keep his eyes forward when running so he doesn't fall. "[M.M.B.] understood." Notwithstanding his being three, the district court found that M.M.B. had a preference for more time with his father as it all but eliminated his time with his father. The district court found that Mother perceived M.M.B. as mindless. Mother's fabricated diary-entry-allegations of "coaching" by Father were not expressly found, though the district court did them lip-service in stating that Mother had produced "examples of Father coaching the child to repeat that she is a 'bad mother' and repeatedly subjecting the child to unnecessary child protection claims." The district court found correctly that despite all of its confounding findings against Father from the decree, and its near depletion of his parenting time, M.M.B. had formed a "close relationship" with his father and was learning to recognize Mother's abuse and to defend himself in what way he could. When Mother dug her nails into M.M.B.'s back leaving gouges, when asked, M.M.B. confirmed that is what she had done. The district court, recognizing that M.M.B. might effect escape from his Mother's criminally abusive custody, further restricted his father's parenting time to prevent him from learning from his father.

The Constitution guarantees the children of this country the right to safety. The First Amendment guarantees them the right to knowledge, most importantly in this case, the knowledge to effect their Fourth Amendment right to safety. And children have freedom to learn, to exercise their First Amendment rights

"secur[ing] ... the liberty of each [] to decide for himself what he will read **and to what he will listen**. The Constitution guarantees, in short, a society of free choice. Such a society presupposes the capacity of its members to choose." *Ginsberg*, 390 U.S. at 649, 88 S. Ct. at 1285 (STEWART, J., concurring in result) (emphasis added). That society could not exist if the State was free to trample those rights. M.M.B. made his choice. He did not have to accept Mother's abuse as the way of the world, and he rejected it. "[T]he First Amendment itself prohibits a person from foisting his uninvited views upon the members of a captive audience." *Ginsberg*, 390 U.S. at 649, 88 S. Ct. at 1285 (STEWART, J., concurring in result). So, the district court intervened on Mother's behalf and took M.M.B.'s freedom to choose away from him, again, the same way it took everything from him, under colour of law. The district court took the proposition that

> "a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees[, and] upon such a premise, ... a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults,"

Ginsberg, 390 U.S. at 649–50, 88 S. Ct. at 1286, as opportunity to indulge in knowingly intolerable deprivations to those with no capacity to resist her. "Censors are, of course, propelled by their own neuroses." *Id.*, 390 U.S. at 655–56, 88 S. Ct. at 1289 (DOUGLAS, J., dissenting). In the context of *Ginsberg v. New York*, the district court may as well be forcing children to only view "pornographic materials." Unlike *Ginsberg v. New York*, there is no age at which

anyone wants to be abused. The knowledge that "appealed" to M.M.B. was to be free from Mother's abuse – he was trying to effect escape from her den of obscenity. But there is no strict distinction here between the rights of children and adults. Mother's abuse of her then husband was not sanctioned but is punishable by law; her abuse of her child is distinguished by his greater vulnerability, an aggravating factor. The district court rewarded Mother's abuse of both, but their freedom from Mother's abuse is the same under the Fourth. Cf. *Ginsberg,* 390 U.S. at 639, 88 S. Ct. at 1280 ("the power of the state to control the conduct of children reaches beyond the scope of its authority over adults") (quoting *Prince*, 321 U.S. at 170, 64 S. Ct. at 444).

The child's First Amendment rights are complemented by those of their parents, here the freedom to teach. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince*, 321 U.S. at 166, 64 S. Ct. at 442 (citing *Pierce*, 268 U.S. at 535, 45 S. Ct. at 573). "[T]he parents' [] authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg*, 390 U.S. at 639, 88 S. Ct. at 1280. By instructing M.M.B. in the standard lessons a parent must teach their child, including that it was not OK for anyone to hurt him, Father was acting within his authority by "assessing ... material harmful" to M.M.B. and, determining that Mother's abuse was harmful, mitigating its deleterious effects on M.M.B.'s well-being. *Id*. The district court aimed "to chill that free play of the

spirit" in Father "which all teachers ought especially to cultivate and practice" and make him cautious and timid. *Wieman*, 344 U.S. at 195, 73 S. Ct. at 221 (FRANKFURTER, J., concurring). "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power." *Wieman*, 344 U.S. at 191, 73 S. Ct. at 219. The district court's censorship was of Father's innocent speech in dutifully carrying out parental obligation.

> "We must have freedom of speech for all or we will in the long run have it for none but the cringing and the craven. And I cannot too often repeat my belief that the right to speak on matters of public concern must be wholly free or eventually be wholly lost."

Wieman, 344 U.S. at 193, 73 S. Ct. at 220 (BLACK, J., concurring).

IV.

A.

Rule 52(a) of the Rules of Civil Procedure, adopted 1937,

> "was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice ... that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court [but are] never conclusive."

United States v. U.S. Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1948).

> "Equity Rule 70 1/2... provides: 'In deciding suits in equity, including those required to be heard before three judges, the court of first instance shall find the facts specially and state separately its conclusions of law thereon; * * * 'Such findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court.'"

Interstate Cir. v. United States, 304 U.S. 55, 56, 58 S. Ct. 768, 769, 82 L. Ed. 1146 (1938). "[S]ound judicial discretion ... can be exercised only" in this way. *Pub. Serv. Comm'n of Wisconsin v. Wisconsin Tel. Co.*, 289 U.S. 67, 70–71, 53 S. Ct. 514, 515, 77 L. Ed. 1036 (1933). "[T]hat the trial judge make brief, pertinent findings in respect to contested matters and file the same in connection with his opinion ... puts the emphasis where it should be, namely, on brief and pertinent findings of contested matters." *Matton Oil Transfer Corp. v. The Dynamic*, 123 F.2d 999, 1001 (2d Cir. 1941). "The observations made in the course of [an] opinion are not, in any proper sense, findings of fact [neither are] [s]tatements of fact [that] are mingled with arguments and inferences." *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316, 60 S. Ct. 517, 520, 84 L. Ed. 774 (1940).

> "Findings of fact aid in the process of judgment and in defining for future cases the precise limitations of the issues and the determination thereon. Thus they not only aid the appellate court on review, but they are an important factor in the proper application of the doctrines of res judicata and estoppel by judgment."

Fed. R. Civ. P. 52, 1946 Amendment Advisory Committee Comments (citing *Hurwitz v. Hurwitz*, 136 F.2d 796 (D.C. Cir. 1943); *United States v. Forness*, 125 F.2d 928 (2d Cir. 1942), *certiorari denied*, 316 U.S. 694, 62 S. Ct. 1293, 86 L. Ed. 1764

(1942)). "[W]e are not called upon, unaided by opinion or findings, to search this voluminous record to find a basis for the court's decree. [Such] decree is accordingly vacated and the cause [] remanded to the District Court, as specially constituted, for findings and conclusions appropriate to a decision upon the application." *Pub. Serv. Comm'n of Wisconsin*, 289 U.S. at 70–71, 53 S. Ct. at 515.

Ever since enactment, Rule 52(a) has lessened a reviewing courts ability to review a trial court's findings.[69] In 1946, to resolve debate over whether "findings and conclusions could not be incorporated in an opinion," the rule was amended so that they could be. Fed. R. Civ. P. 52, 1946 Amendment Advisory Committee Comments. The result is that muddied judgments may be made, Cf. *U.S. Gypsum Co.*, 333 U.S. at 367, 68 S. Ct. at 529, seemingly resulting in the 1963 amendments to Rule 52(a) and 58.[70] Regardless of the incidental 1963 amendments, the 1983 amendments expanded the liberalities of the 1946 amendments, permitting "the district judge [to] make the findings of fact and conclusions of law [] in nonjury cases orally." Fed. R. Civ. P. 52, 1983 Amendment Advisory Committee Comments. Notwithstanding their importance as stated by

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[69] Excepting only the 2009 amendment, the value of which is seen in this case.

[70] The 1946 amendments also "remove[d] any doubt that findings and conclusions are unnecessary upon decision of a motion, particularly one under Rule 12 or Rule 56." Fed. R. Civ. P. 52. If findings are made on a motion, they are reviewed under the Clearly Erroneous Standard rather than *de novo*.

the 1946 Amendment Advisory Committee, "the amendment should reduce the number of published district court opinions that embrace written findings." Fed. R. Civ. P. 52, 1983 Amendment Advisory Committee Comments.

The *coup de gras* was delivered to Justice with the 1985 amendment. Rather than turn back from near fifty years of failed legislation, Congress, "to avoid continued confusion and conflicts" and not "undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority," – all occurrences within *this* case – amended the rule so that whether the evidence is documentary or testimonial, the district court had the final say. "[U]nbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." *Gault*, 387 U.S. at 18, 87 S. Ct. at 1439. The Clearly Erroneous Standard: unbridled discretion by elimination of principle and procedure.

U.S. Gypsum Co., concerned Rule 52(a) and the recent amendments made to it, and presents the importance of adequate findings of fact and of the ability of reviewing courts to review the evidence underlying them for ensuring the correctness of the judgment. In that case, at least some of the trial court's conclusions were incorrect; however, because the trial court held itself to the prior standard of making findings and conclusions, on appeal the Court identified with precision the district court's errors of fact and law and reversed the judgment acquitting those responsible for a long-running, wide-spread

conspiracy defrauding the public. If *U.S. Gypsum Co.* were before the Court today, the Court would be unable to review the findings. The irony of *U.S. Gypsum Co.* is that, if the Court were unable to review factual findings, the legislation involved would have been defeated. *U.S. Gypsum Co.*, 333 U.S. at 391–93, 68 S. Ct. at 540–41. Because the legislation involved in *U.S. Gypsum Co.* promoted the public welfare, its defeat would show that the Clearly Erroneous Standard works to an opposing end. Congress may not enact legislation contrary to the public welfare in absence of legitimating grounds of which, in the case of Rule 52(a), there are none.

The danger that a trial court reaches an incorrect result, narrowly averted in *U.S. Gypsum Co.*, has eluded review in this case in which the district court rewrote the truth.

B.

In 2019, the district court found that "[t]here is no credible evidence that [M.M.B.] is any way endangered or neglected in [Mother's] care." *Supra* at 134. POOF! Mother's physical abuse of M.M.B. for all intents and purposes disappeared. Still, the appellate court found the fraud upon the court, as well as "mother's purported inability to parent." *Bachmayer I* at *5. "First, the statute requires the district court to consider 'a child's physical, emotional, cultural, spiritual, and other needs, and the effect of the proposed arrangements on the child's needs and development.'" *Bachmayer I* at *4 (citing Minn. Stat. § 518.17,

subd. 1(a)(1)). The district court did not find emotional needs for **M.M.B.**, because *It did not consider M.M.B.* "Instead, the district court considered whether **mother** had actually engaged in child abuse" and found that "**[mother]**" had not abused M.M.B. based on *its* credibility determination. As further proof of its credibility determination, the district court found that the CPS file was empty, that "Child protection closed its case with **no findings**." But without more, this finding failed to vindicate Mother. The district court saw only the effect on "**[mother]**" of the investigation.

Mother's counsel's memorandum, leveraging Mother's domestic abuse to keep the burden of proof on Father, was based on the presumption that the district court would find Mr. Hyland's report impeccably credible – or "child-focused and neutral." This finding made Mr. Hyland's report the only considerable evidence for determining custody. Contrary evidence could not survive. The district court was free to find against Mother, and it did, but those findings succumbed to its determination that Mr. Hyland's report and anything based on it was credible. Corroborating evidence, such as Dr. Rilen's report, presumptively validated Mr. Hyland's report and bolstered the district court's findings on it; falsified documents, all façades of reliability. That the psychological evaluation warrant was to search only Father served an important purpose. Dr. Rilen found indications of significant mental disorder(s) for Mother and had the district court ordered him to investigate Mother's mental welfare it

appears from his testimony and the district court's findings that Dr. Rilen may have diagnosed her with at least one significant mental disorder.

> "Due process commands that no man shall lose his liberty unless the [claimant] has borne the burden of producing the evidence and convincing the factfinder of his guilt."

Speiser, 357 U.S. at 526, 78 S. Ct. at 1342. But Mr. Hyland and Dr. Rilen, masquerading as neutrals, made that impossible. Once Mr. Hyland was involved, neither Father nor Mother had any ability to affect the outcome of the case. Mother certainly did not meet the burden – within two months of her filing for divorce the district court found "no evidence" of her contentions. Mr. Hyland spent the following three-and-a-half months until December 6, 2018, fabricating a narrative that Dr. Rilen spent the three months after, from December 12 until February 14, 2019, supporting. The reports from these "professionals" were due in chambers February 26th for trial on March 5th and 6th. On February 27th, the case was continued until May, during which time Mother engaged in purposeful physical abuse of 1.5-year-old M.M.B. until, on April 16th, she was interviewed by child protection. The next day, the psychological evaluations were ordered released to the parties.[71] A sham trial was held, and the preposterous Judgment and Decree survived the appeal that concluded ten months later, reviewed under the Clearly Erroneous Standard.

[71] The custody evaluator was authorized to contact the district court. *See supra* at 46.

> "The district court has broad discretion in determining custody matters, although it must set forth the basis for its decision 'with a high degree of particularity.' *Durkin v. Hinich*, 442 N.W.2d 148, 151 (Minn. 1989) (quotation omitted). Our review 'is limited to whether the district court abused its discretion by making findings unsupported by the evidence or by improperly applying the law.' *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). We sustain findings of fact unless clearly erroneous. *Id.*; *see* Minn. R. Civ. P. 52.01. A finding of fact is clearly erroneous if we are left with 'the definite and firm conviction that a mistake has been made.' *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (quotation omitted). We defer to the district court in its assessment of witness credibility. *Id.* When balancing the best-interests considerations, 'the court may not use one factor to the exclusion of all others, and the court shall consider that the factors may be interrelated.' Minn. Stat. § 518.17, subd. 1(b)(1) (2018). The law 'leaves scant if any room' for us to question the balancing of best-interests considerations by the district court. *Vangsness v. Vangsness*, 607 N.W.2d 468, 477 (Minn. App. 2000)."

Bachmayer I at *3.

In summary, under the same Clearly Erroneous Standard found in Fed. R. Civ. P. 52, because she abused M.M.B. Mother obtained custody of him.

C.

Returning to the district court at the end of 2020 to further separate M.M.B. from his father, the strategy employed by Mother's attorneys was from *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). "[W]e are faced with a dependency statute that empowers state officials to circumvent [child endangerment] proceedings on the theory that [once parenting time has been restricted, that parent] is not a 'parent' whose existing relationship with his children must be considered. 'Parent[],' says the State, 'means the [one with

custody].'" *Id.*, 405 U.S. at 649–50, 92 S. Ct. at 1212. "Under [Minnesota] law, therefore, while the [custody of] children of all parents can be [modified] in [endangerment] proceedings, that is only after notice, hearing, and proof of such [endangerment] as amounts to neglect, [a noncustodial parent] is uniquely subject to [a] more simplistic [removal] proceeding [when the custodial parent asks to relocate out of state]. By use of this proceeding, [the custodial parent], on [asking to relocate with the child], need not prove unfitness in fact, because it is [simply not required] at law. Thus, the [noncustodial parent's] claim of parental qualification is avoided as 'irrelevant.'" *Id.*, 405 U.S. at 650, 92 S. Ct. at 1212.

In *Stanley*, the procedure was clear, but in this case the procedure and the fraud turned on judicial discretion under the Clearly Erroneous Standard.

> "In considering this procedure under the Due Process Clause, we recognize, as we have in other cases, that due process of law does not require a hearing 'in every conceivable case of government impairment of private interest.' Cafeteria and Restaurant Workers Union etc. v. McElroy, 367 U.S. 886, 894, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). That case explained that '(t)he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation' and firmly established that 'what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' Id., at 895, 81 S.Ct., at 1748; Goldberg v. Kelly, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970)."

Stanley, 405 U.S. at 650–51, 92 S. Ct. at 1212.

M.M.B.'s interest in retaining his relationship with his father is cognizable and substantial. Mother, for her part, made her interest quite plain: she wished to "impair the parent-child relationship." *Supra* at 48. But Mother had no cause to disrupt what her attorney described as "a safe parent-child relationship that is in the child's best interests" and that the district court found as "a close relationship" that it "has no doubt that [M.M.B.] enjoys" and would like more of. So, Mother's attorney asked the district court to hear Mother's false claims and consider her fabricated evidence without an evidentiary hearing.

In 2019, the district court had stated, "Although [Father] testified that 'many things have been said about me that don't represent my character,' he failed to rebut the voluminous evidence to indicate he has perpetrated domestic abuse, terrorized [Mother], failed to meet [M.M.B.'s] emotional and physical needs and shown no insight into the effects of his behavior on the child"; Father had listened, but the fault was never his. The district court had been disingenuous and continued to lie. *Supra* at 149.

The district court found that "[t]here is no credible evidence to support" that "mother is abusive and a bad parent," *supra* at 173, and "there is no evidence that Mother has interfered with or denied parenting time." *Supra* at 40. This time, however, not unlike the government in *U.S. Gypsum Co.* that, "to support its allegations, ... introduced in evidence ... more than 600 documentary exhibits consisting of letters and memoranda written by officers of the corporate defendants," 333 U.S. at 372, 68 S. Ct. at 531, the appellate court

found that during the proceedings from December 2020 to May 2021 in the district court, "Father submitted approximately 600 pages comprised of affidavits and additional documents." *Supra* at 9. But unlike *U.S. Gypsum Co.*, none of Father's submissions mattered, after the district court found that none of it was credible.

On appeal, Mother's counsel elected to argue the district court's findings and discrimination against M.M.B.'s noncustodial parent. Mother's counsel's arguments were cyclic absurdities. She claimed that Father's parenting time was *not* a restriction, it was an insubstantial modification because his parenting time was *previously* restricted *already*. According to Mother's counsel, "The number of hours per week of [Father's] parenting time is *reduced by the necessities of supervision.*" In support of this reduction, Mother's counsel proposed arguendo that it "*may* actually nurture a healthy relationship between the two" – who knows? Thus, "this schedule is in the child's best interests and still allows [Father] to maintain a relationship with the minor child." The district court, she argued, could make this sort of alteration at any time to a child in M.M.B.'s custody situation because "[Father's] parenting time was already restricted pursuant to a finding of endangerment; thus, no evidentiary hearing was required when the court imposed further restrictions." *Supra* at 49. Mother's entire case, dragging M.M.B. back to court, was a hoax.

The appellate court found that what the district court had considered was "all" of Mother's "more than 200 pages" of false submissions and that it had

decided the case based on its personal experience. Under the Clearly Erroneous Standard, "Father, therefore, was not prejudiced by the lack of an evidentiary hearing, and any error in failing to conduct an evidentiary hearing was harmless." *Supra* at 9.

The appellate court, so beleaguered by the Clearly Erroneous Standard, decided that it was better to deny M.M.B. and his father due process than to subject them to further clearly erroneous proceedings in the district court, and deemed it "harmless" error to further restrict a noncustodial parent's parenting time without an evidentiary hearing and without considering his evidence or contentions. This despite its having found Mother's perjury regarding "her failure to facilitate his compensatory parenting time," *supra* at 29 – a finding that alone merited granting Father's motions.

The appellate court in both appeals found that the trial and hearings were sham. At a minimum, due process requires "that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 656, 94 L. Ed. 865 (1950). "[A] person in jeopardy of serious loss [must] be given notice of the case against him and opportunity to meet it." *Mathews*, 424 U.S. at 348, 96 S. Ct. at 909 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. at 171–72, 71 S. Ct. at 649 (FRANKFURTER, J., concurring)). The appellate court in both appeals determined

that Father had not been given an opportunity to meet the case against him – and affirmed.

D.

It was the Clearly Erroneous Standard that failed George Roehrdanz and his three children in the 1980's. *Roehrdanz v. Roehrdanz*, 438 N.W.2d 687 (Minn. Ct. App. 1989). "This custody dispute has a long and complex litigation history." *Id.*, 438 N.W.2d at 688. From 1984 until October 6, 1986, George had full temporary custody of the children. *Id.* The 1984 "temporary order also provided that George would pay Barbro maintenance and attorney fees." *Id.* "Between the temporary order in 1984 and the actual filing of the dissolution decree on October 6, 1986, George [was not able to] pay the ordered maintenance and attorney fees. Although he is an attorney licensed to practice in this state, George has been found in contempt of court on three occasions for failure to pay sums he owed to Barbro." *Id.*

> "Under our system of jurisprudence, **the individual citizen has the right to toil and to accumulate wealth. His achievements are largely the incentive for aggressive activity. If he is to be deprived of the happiness he may find in attainments and achievements, he becomes less useful to his community and to society. The privileges, which he enjoys under our law, give him encouragement in his particular activity. Naturally he is ambitious to better provide for those who, by nature or law, are dependent upon him or entitled to his bounty. To what extent he is to be limited in providing safeguards for those who, by lack of experience, may be less provident, is for the determination of the Legislature.** That body will recognize the economic and political advantages resulting from a stimulation to toil, and from encouragement to thrift, and from the exercise of energy and diligence. ... The human race may well profit by

> using the busy honey bee as an example. The drone is held in little respect. No policy should be adopted that would tend to make us a nation of drones. Idleness is the father of moral delinquency. Vice is detrimental to society and to government. **It is better to adopt that policy that leads the citizen to vigilance and labor, and that every honorable successful achievement shall have its just reward. Such should be the inherent right of American citizenship.** It is best that the rash of ambition may develop on any citizen. The common law has always given an owner of property an extensive power of imposing his will with respect to his property—a power known as the power of dominion. **A citizen may do as he will with his own only when it is lawful, and whether it is lawful depends on whether the disposition conflicts with the rules of law which may be applicable to the transactions in question, and with the lawful restrictions imposed by the previous owner.**"

Congdon v. Congdon, 160 Minn. 343, 362–63, 200 N.W. 76, 83 (1924) (emphasis added). This most competent precedent has little force under the Clearly Erroneous Standard, but its predictive power – that we are to be a "nation of drones" – may be potent under the too-broad discretion the Clearly Erroneous Standard unconstitutionally grants the district court. *See supra* at 60 (child, child care, medical support).

"The Roehrdanz marriage was dissolved and the marital property divided on October 6, 1986. The court granted Barbro Roehrdanz sole legal and physical custody of the minor children and ordered George to pay $1,400 per month child support and $500 per month permanent maintenance. The court also ordered George to pay $20,000 in attorney fees. It found that the number of hearings required to enforce court orders and George's failure to cooperate with discovery justified the large award." *Roehrdanz*, 438 N.W.2d at 688.

"George's allegation that Barbro had been assessed as suffering from chronic alcoholism ... was later shown to be without evidentiary basis." *Id.*

"The custody determination was based on findings that Barbro Roehrdanz had been the primary parent during the marriage and that she had been the more cooperative parent when services for the children were suggested. The court found that George, on the other hand, had resisted any counseling suggested by professionals and placed an inordinate amount of stress on the children to excel." *Id.* The custody award did not find that "Barbro had been assessed as suffering from chronic alcoholism," *Id.*, only that George had alleged it and failed to satisfy discovery requests to provide documentation.

"George Roehrdanz unsuccessfully appealed the dissolution and custody order all the way to the Minnesota Supreme Court." *Id.*

"Barbro was unable to take custody of the children immediately after the order was filed" due to "an inability to afford a home large enough for herself and the three children." Regardless, "[i]n May 1987 she assumed custody of the youngest child." The "older children did not move in with her until December," after George had, again, "moved for modification of custody," his motion had been denied "because Barbro still did not have custody of the two older children," and "[t]he court ordered George to assist in the implementation of the original custody provision. The children finally moved into their mother's home in late December 1987." *Id.*, 438 N.W.2d at 688-89. "They resisted the move because they wanted to stay in the family home and their father had told

them they did not have to move." *Id.*, 438 N.W.2d at 688. "George was instrumental in the children's reluctance to move into their mother's home upon the original custody determination when he assured them that they did not have to live where they did not want to live." *Id.*, 438 N.W.2d at 691. "The psychologist stated that the children told him that they wanted to live with their father, that they were capable of making reasonable and mature decisions, and that to force them to live with their mother against their wishes could endanger their emotional health. The psychologist also stated that he believed that siblings of this age should not be separated." *Id.*, 438 N.W.2d at 689. "[T]he trial court ... found that the psychologist's affidavit essentially says only that it is not good for children to live where they do not want to live and that such a statement is not sufficient evidence of a change endangering the children's welfare." *Id.*, 438 N.W.2d at 690.

The children wanted to live with George. They were overruled by the district court's selective discretion, finding statements that furthered its initiative, finding not credible or disregarding statements that would not. In this way, it defeated the children. It cast everything George did in the negative light alleged by his opponent. George could do no right, only wrong. But there was nothing to show this once the facts of the record were reviewed. It is the same situation in this case. Father has done very little wrong, if any. Yet the district court describes his "behaviors" to shield M.M.B. from Mother's abuse, such as "examining" the injuries inflicted on [M.M.B.] by Mother, or to mitigate conflict,

such as by recording exchanges, in a manner that makes him to appear unfit, which it reflects in its decisions. By communicating with Mother about the chaotic situations she instigates, Father was described by the district court as "harassing." Using the OFW platform, Father *proved* how depraved and wrong M.M.B.'s situation is, so the district court eliminated OFW, describing it as "a tool for harassment" in a prolonged verbal accosting of Father, over the telephone, with Mother's fabricated claims, finding "fact" amidst Father's panic attack triggered by the unconscionable harm it was intentionally causing M.M.B. *Ante* at B.92-B.97. The finding is not false, but it was directed at Father. The reason Mother could use OFW for harassment was because the district court refused to take any measure to curb her inappropriate behavior. Even when it found *some* of her marital acts of abuse, it excused them. It was going to find against Father, and nothing could alter that. George Roehrdanz faced the same situation 40 years before, and more recently so did Lynnea Sterling in the case upon which the fraud upon the court in this case was based.

In these three cases, the district court defeated the laws and children by custom crafting irrebuttable presumptions that might be practical jokes if their significance was not so oppressive and the consequences so great. "The children have lived with their mother for little more than a year," and "[t]here is evidence [] of [the children] having conflicts with their mother," and "of abuse [and] of problems in school [and] with peers that might be attributable to the living situation." *Id.*, 438 N.W.2d at 691. But the district court found that "[n]othing

has changed during that time." *Id.* The district court was focused on George's "selecting schools and summer camps for the kids and telling them they can live where they want to," because it could use this positive parenting to support its finding, "He undermines petitioner's custodial authority." *Id.*, 438 N.W.2d at 689. Reminiscent of Mr. Hyland's cudgel, in this case, *supra* at 234, the district court also "found that George had a '**powerful weapon**' to influence the children's custodial preference in that he allegedly refused to continue to pay their tuition at private school if they lived with their mother" – private school they would no longer attend, in that scenario. *Id.*, 438 N.W.2d at 688 (emphasis added).

"Barbro Roehrdanz submitted an affidavit in opposition to the last motion to modify custody" that "discussed the financial and emotional toll caused by the continuous litigation. As of November 1988, Barbro Roehrdanz owed her attorneys more than $25,000." As to the concerns of her children, "[s]he stated, 'my policy throughout this proceeding has been not to use the children to oppose these numerous attacks on me.'" *Id.*, 438 N.W.2d at 689. "**The order stressed that the litigation in this case must end**." *Id* (emphasis added).

The outcomes of the *Roehrdanz* case and this case are the products of manipulable laws matched with untempered power in unworthy hands. In *Roehrdanz*, just as in this case, the district court placed the children in unfit, abusive custody. When George or Father went to the court to seek relief for their children, the court found the children's circumstances unchanged. The district court's defeat of the legislation in the decree precluded the noncustodial

parent from causes of action meant to serve the welfare of the children. The legislation purports an assumption that the district court is drafting orders "in the best interests of the child," not orders that seek to undermine the child by strategic disarmament of safeguards.

"The court further found that George failed to meet the threshhold under Minn. Stat. § 518.18 (c) (1986), which requires that the children's physical or emotional health be endangered by the current custody situation." *Id.*, 438 N.W.2d at 689.

> "The trial court denied George Roehrdanz's motion for an evidentiary hearing on the modification issue. It found that the affidavits George submitted with his motion were insufficient to prove a change of circumstances which endangers the children's emotional health."

Id.

Time after time "[t]he trial court found that [George] did not prove a substantial change of circumstances warranting modification." *Id.*, 438 N.W.2d at 689.

> "To warrant modification of custody under this section, the party seeking modification must first establish (1) that a change has occurred in the circumstances of the child or his custodian, *and* (2) that the modification of custody is necessary to serve the best interests of the child."

Id., 438 N.W.2d at 690. "**The change of circumstances must be a real change and not a continuation of ongoing problems.**" *Id.* (emphasis added).

In this case in 2021, the district court modified the parties' final custody order. To modify a final custody order, the district court must find "upon the basis of facts, unwarranted denial of, or interference with, a duly established parenting time schedule, that have arisen since the prior order *or* that were unknown to the court at the time of the prior order, that a change has occurred in the circumstances of the child or the parties and that the modification is necessary to serve the best interests of the child." Minn. Stat. § 518.18(d)(iv).

Father presented facts that Mother had, without warrant, denied him parenting time and interfered with his duly established parenting time schedule. The district court could have eliminated Mother's parenting time and made an invincible finding that doing so was in M.M.B.'s best interests, upon the basis of facts. But, like Mother's abuse of M.M.B., Mother's interference with and denial of Father's parenting time was *known* to the district court when it issued the prior order enabling Mother to *continue* to deny and otherwise interfere with Father's parenting time – and *continue* her abuse of M.M.B. Thus, no change had occurred in the circumstances of the child or the parties.

There were two changes found in the March 2021 order. For the very first time, the district court acknowledged Father and M.M.B.'s relationship. Parenting time is to be granted "on behalf of the child and a parent as will enable the child and the parent to maintain a child to parent relationship that will be in the best interests of the child." Minn. Stat. § 518.175, subd. 1(a). The deprivation of this relationship endangers M.M.B. Also, for the very first time, the

district court found falsely that Father had committed acts constituting domestic abuse against Mother prior to 2018. The district court modified the custody order, further restricting Father's parenting rights, and it did so without finding that doing so was in M.M.B.'s best interests.

The district court's twisting and winding of the statute defeated the reason for them, protection of the welfare of children of the state. Father's pleadings are rife with Mother's abuse of M.M.B., her negligence of his care, and her parental alienation of their relationship supported by conclusive documentary evidence. There is no sustainable evidence to support the district court's findings of endangerment against Father. Mother's allegations are fabrications. The district court's findings are fabrications. "[N]othing in this record indicates that [M.M.B.'s father] is or has been a neglectful father who has not cared for [M.M.B.]." *Stanley*, 405 U.S. at 655, 92 S. Ct. at 1214.

> "[The police power of a State] extends ... to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State; and persons and property are subject to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State."

Slaughter-House Cases, 83 U.S. at 62. Suppression of "violent crime ... has always been the prime object of the States' police power," *United States v. Morrison*, 529 U.S. 598, 615, 120 S. Ct. 1740, 1752, 146 L. Ed. 2d 658 (2000), and "we can think of no better [exercise of this] power ... than the suppression of violent crime and vindication of its victims." *Id.*, 529 U.S. at 618, 120 S. Ct. at 1754. Recidivism

can mean life imprisonment. *Ewing v. California*, 538 U.S. 11, 29–30, 123 S. Ct. 1179, 1190, 155 L. Ed. 2d 108 (2003).

The Court stated that "[t]his country witnesses more than a million acts of domestic violence, and hundreds of deaths from domestic violence, each year, *United States v. Castleman*, 572 U.S. 157, 159–61, 134 S. Ct. 1405, 1408, 188 L. Ed. 2d 426 (2014) (citing Dept. of Justice (DOJ), Bureau of Justice Statistics (BJS), J. Truman, L. Langton, & M. Planty, Criminal Victimization 2012 (Oct. 2013) (Table 1) (1,259,390 incidents of domestic violence in 2012)). "Domestic violence often escalates in severity over time." *Castleman*, 572 U.S. at 160, 134 S. Ct. at 1408. Because perpetrators of domestic violence are considered dangerous, "Congress forbade the possession of firearms by anyone convicted of 'a misdemeanor crime of domestic violence.'" *Id.*, 572 U.S. at 159, 134 S. Ct. at 1408 (quoting 18 U.S.C. § 922(g)(9)). A revocation of "the right of the people to keep and bear Arms," U.S. Const. amend. II, is representative of the gravity of the offense and Congress' desire to suppress its occurrence, for the safety and general welfare of the people. Mother's acts of domestic abuse, whether found by the district court or those suppressed by it, constituted "misdemeanor crime[s] of domestic violence." *Castleman*, 572 U.S. at 160-61, 134 S. Ct. at 1409. The district court ordered two phony investigations, then further extended the judicial proceedings for the purpose of facilitating – aiding and abetting – Mother's domestic abuse of M.M.B., and then granted Mother custody under a construction of the statute *rewarding* Mother for her domestic violence.

"[T]he power to enact police regulations operates upon all alike." *Chicago, B. & Q. Ry. Co. v. People of State of Illinois*, 200 U.S. 561, 588, 26 S. Ct. 341, 348, 50 L. Ed. 596 (1906) (quotation omitted). The district court, enabled by the Clearly Erroneous Standard, erected obstacles to progress and acted as a menace to the general welfare of State and Country. There is concern that the government may punish crime so severely as to be "cruel and unusual." U.S. Const. amend. VIII. Only under the Clearly Erroneous Standard is a notion that crime should be rewarded seriously considered. "Protection does not imply the destruction of the protected." *Worcester v. State of Ga.*, 31 U.S. 515, 552, 8 L. Ed. 483 (1832).

M.M.B. has been abused, and the district court, Mother's attorneys, Mr. Hyland, and Dr. Rilen treated his suffering as an amusing practical joke. M.M.B. has been abused by Mother his entire life because of the acts of these people. He has been emotionally tormented as he has been made powerless to be with those he loves. Mother has inflicted innumerable injuries to M.M.B. In 2019 Mother chipped M.M.B.'s tooth, burned his finger, and inflicted on him "a black eye, with an open wound the size of a dime, bruise below his left eye, open wound, approximately an inch" to coax his father into reporting her to Child Protection. For this, the district court rewarded Mother; For this, the district court sentenced M.M.B. to life in Mother's custody. In 2020, Mother picked M.M.B.'s skin on a constant basis; during Mother's custody M.M.B. sustained an unexplained testicle injury that Mother negligently handled and that the

physician considered possible "nonaccidental trauma"; when she was ready to return to the district court to have M.M.B.'s father's parenting eliminated, Mother dug her fingernails into M.M.B.'s back shortly before his father's parenting time. And this list is by no means exhaustive.

> "It cannot be less clear when the judgment affects personal liberty, and inflicts disgraceful punishment, if punishment could disgrace when inflicted on innocence. The plaintiff in error is not less interested in the operation of this unconstitutional law than if it affected his property. He is not less entitled to the protection of the constitution, laws, and treaties of his country. ... It is the opinion of this court that the judgment of the [district] court for the county of [Hennepin], in the state of [Minnesota], condemning [M.M.B. to abusive custody], for [the entirety of his youth], was pronounced by that court under colour of [] law which is void, as being repugnant to the constitution, treaties, and laws of the United States, and ought, therefore, to be reversed and annulled."

Id., 31 U.S. at 562–63.

The Clearly Erroneous Standard is dangerously erroneous. Our children's right to safety must not be defeated by their developmental inability to fend for themselves, to be taken advantage of in courts sworn to their protection under principles of law, equity, and ethics.

> "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize [malicious] government officials. ... Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past [fabrications], it [runs] roughshod over the important interests of both parent and child. It therefore cannot stand[, as it is repugnant to the Equal Protection

> Clause.] ... [The district court] insists on presuming rather than proving [M.M.B.'s father's] unfitness. ... Under the Due Process Clause that [] is insufficient to justify refusing a [parent] a hearing when the issue at stake is the dismemberment of [their] family."

Stanley, 405 U.S. at 656–58, 92 S. Ct. at 1215–16.

E.

The appellate court's strategic finding of the facts was a violation of Supreme Court precedent regarding application of the Clearly Erroneous Standard. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985). But prior to Rule 52, the appellate court's affirmance would have been error. It is because the appellate court found these facts that elements of this fraud were uncovered, and it has done the same in other cases. *See Roehrdanz v. Roehrdanz*, 438 N.W.2d 687 (Minn. Ct. App. 1989) (children defrauded of father); *Hemphill v. Anttila*, No. CX-89-2110, 1990 WL 92868 (Minn. Ct. App. July 10, 1990) (child defrauded of custody of father); *Froberg v. Froberg*, No. A04-2511, 2006 WL 330086 (Minn. Ct. App. Feb. 14, 2006) (children defrauded of mother); Phelps v. Sterling, No. A14-1107, 2015 WL 5088926 (Minn. Ct. App. Aug. 31, 2015) (child abused and defrauded of mother); *Thornton v. Bosquez*, 933 N.W.2d 781 (Minn. 2019) (child defrauded of father). "'How many innocent [children] have we known to be punished; and how many are there that we have not known of!'" *In re Fried*, 161 F.2d 453, 461 (2d Cir. 1947) (quoting Essays, Bk. III, Ch. 13).

The notion that the Clearly Erroneous Standard sustains the "legitimacy of the district courts" is false. That statement becomes preposterous when it is applied to "in the eyes of litigants." In this case alone, Mother committed knowing fraud via the illegitimacy of the court, realized by the Clearly Erroneous Standard. On appeal, in failing to reverse, the only accomplishment of the Clearly Erroneous Standard was to delegitimize the entire court system, the legislature, the government generally. Not only are the litigants fully disillusioned, but the fraud itself was carried out by the district court, several court employees, and attorneys – all of whom knew and understood what was occurring. By preventing the higher courts, court of review, from ensuring the validity of lower court and State court findings of fact, they cannot ensure the Constitutionality of those decisions, and the President cannot ensure that the laws are faithfully observed.

By the act of finding fact, under the Clearly Erroneous Standard the appellate court commits error of law. Fact-finding is a matter of "grave importance." *United States v. Forness*, 125 F.2d 928, 942 (2d Cir. 1942). Generally, all "decided cases necessarily rest upon the state of facts which existed in the particular case, and therefore furnish no certain criterion, since the conclusion that a given state of fact was adequate to have produced" a certain result. *Bram v. United States*, 168 U.S. 532, 548, 18 S. Ct. 183, 189, 42 L. Ed. 568 (1897). The fact of an appellate court's finding fact triggers application of the law against it. "The trial judge's major role is the determination of fact, and with experience in

fulfilling that role comes expertise. ... [T]he trial on the merits should be 'the main event ... rather than a tryout on the road.'" *Anderson*, 470 U.S. at 574–75, 105 S. Ct. at 1512 (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90, 97 S. Ct. 2497, 2508, 53 L. Ed. 2d 594 (1977)).

> "The correct finding, as near as may be, of the facts of a law suit is fully as important as the application of the correct legal rules to the facts as found. An impeccably 'right' legal rule applied to the 'wrong' facts yields a decision which is as faulty as one which results from the application of the 'wrong' legal rule to the 'right' facts. The latter type of error, indeed, can be corrected on appeal. But the former is not subject to such correction unless the appellant overcomes the heavy burden of showing that the findings of fact are 'clearly erroneous'."

Forness, 125 F.2d at 942. By permanently sequestering finding of fact in the trial court, the trial court can manipulate what laws are applied and how they are applied. The Clearly Erroneous Standard has destabilized the operation of the Judicial Branch, imprisoning its integrity in the abusive custody of the lowest of its courts – like the district court imprisoned M.M.B. in the abusive custody of Mother.

> "The trial court is the most important agency of the judicial branch of the government precisely because on it rests the responsibility of ascertaining the facts. When a federal trial judge sits without a jury, that responsibility is his. And it is not a light responsibility since, unless his findings are 'clearly erroneous', no upper court may disturb them. To ascertain the facts is not a mechanical act. It is a difficult art, not a science. It involves skill and judgment. As fact-finding is a human undertaking, it can, of course, never be perfect and infallible. For that very reason every effort should be made to render it as adequate as it humanly can be."

Id.

The facts section of this petition is 95 pages, *because* the Clearly Erroneous Standard permits the district to abridge every requirement of satisfactory fact-finding *and* to make false findings. The Clearly Erroneous Standard has caused a failure

> "to secure compliance with the constitution[] on the part of [trial courts] with the attendant result that the courts [of review] have been constantly required to participate in, and in effect condone, the lawless activities of [these lower] officers. Experience has demonstrated, however, that neither administrative, criminal nor civil remedies are effective in suppressing [the] lawless[ness of the Clearly Erroneous Standard]. The innocent suffer with the guilty, and we cannot close our eyes to the effect the rule we adopt will have on the rights of those not before the court."

Elkins, 364 U.S. at 220, 80 S. Ct. at 1445–46 (quotation omitted).

> "The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."

Hazel-Atlas Glass Co., 322 U.S. at 246. The public welfare demands that the agencies of public justice not be impotent, mute, helpless victims of *deception and fraud*. Not when it is plain to see and definitely not where the fraud concerns the life of a child. The appellate court found the fraud, but the most it could do was to secretly find the facts in its opinion upholding the fraud. What good is it for the "doors to the corrective processes of our judicial system" to be held "open to him as a guarantee that he should not, against his own free will, be denied of any of the necessary incidents of a fair trial," if there is no relief to be had beyond those doors? *State ex rel. Baker v. Utecht*, 221 Minn. 145, 151, 21

N.W.2d 328, 332 (1946). The fraud is plain, and the court cannot be impotent for the public demands that it not be, not in one case but in every case.

V.

M.M.B. applied to the Minnesota Supreme Court for habeas relief, but that court found itself without jurisdiction to consider the petition much less grant relief; a suspension of the privilege of the writ of habeas corpus violating Minn. Const. art. I, § 7, "The privilege of the writ of habeas corpus shall not be suspended unless the public safety requires it in case of rebellion or invasion," and U.S. Const. art. I, § 9, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

A.

The judicial Power of the United States extends "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority," U.S. Const. art. III, § 2, covering "every legislative act of Congress, whether it be made within the limits of its delegated powers, or be an assumption of power beyond the grants in the Constitution." *Ableman*, 62 U.S. at 520. It is vested "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. The Supreme Court has original jurisdiction "[i]n all Cases

affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party," but "[i]n all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact." U.S. Const. art. III, § 2. This appellate power "is not confined to suits in the inferior courts of the United States, but extends to all cases where such a question arises, whether it be in a judicial tribunal of a State or of the United States" – its essential function

> "to secure the independence and supremacy of the General Government in the sphere of action assigned to it; to make the Constitution and laws of the United States uniform, and the same in every State; and to guard against evils which would inevitably arise from conflicting opinions between the courts of a State and of the United States, if there was no common arbiter authorized to decide between them."

Ableman, 62 U.S. at 518-19. The Supreme Court's appellate power is subject only to "such Exceptions, and under such Regulations as the Congress shall make." U.S. Const. art. III, § 2.

The clause permitting exception to, and regulation of, the appellate power is mandatory, entailing that whatever exception or regulation Congress makes it makes because it must. This mandate is found, both as to law and fact, in U.S. Const. art. IV, § 1: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." (emphasis

added). This clause is evidently applicable here in that it is concerning "Judicial Proceedings" of lower courts for which Congress is required to "prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Congress fulfilled this function in 1789 when it made "all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8. But those laws are not of concern here.

> "[T]he First Congress, at its first session, passed the act of 1789, ch. 20, entitled '*An act to establish the judicial courts of the United States.*' . . . [M]any of the members of the Convention were also members of this Congress, and it cannot be supposed that they did not understand the meaning and intention of the great instrument which they had so anxiously and deliberately considered, clause by clause, and assisted to frame."

Ableman, 62 U.S. at 521–22. This Congress "thought proper to make a specific and positive provision" that writs of habeas corpus, that writ that is among **those "most beneficial and important powers which such courts usually possess,"** should issue, "not merely to aid the court in the exercise of its ordinary jurisdiction, but for the general purposes of justice and protection." *Bollman*, 8 U.S. at 83 (emphasis added). The power to issue writs of habeas corpus is absolute. *Id.*, 8 U.S. at 84.

B.

U.S. Const. art. I, § 9, cl. 2 consists of two parts. The first part identifies that the Writ of Habeas Corpus is a Privilege, and that this Privilege may not be suspended. Use of the term "Privilege" is significant. Discussed *supra* at 209-212, U.S. Const. art. IV, § 2 guarantees the "Privileges" of the Constitution to the citizens of State and Country alike, including the Privilege of the Writ of Habeas Corpus. It is of importance to the Executive branch that this is so, as one of the powers and duties of the President, in whom the executive Power is vested, U.S. Const. art. II, § 1, cl. 1, is that "he shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. "[T]he great object" of the writ of habeas corpus "is the liberation of those who may be imprisoned without sufficient cause" by examination of the legality of the commitment. *Ex parte Watkins,* 28 U.S. 193, 202, 7 L. Ed. 650 (1830).

Prior to the *habeas corpus* act, all the superior courts of record in England issued the writ of *habeas corpus,* as incident to their existence. *Bollman,* 8 U.S. at 80–82 (citing *Bushell's case*, Sir *Thomas Jones*, 18 (court of common pleas); *Wood's case*, 3 *Wilson*, 175 (court of exchequer); 3 *Bac. Ab.* 3 (court of chancery)). This was for the king, "bound to protect the personal liberty of his people," to inquire what has become of his subjects, as was his right to know." *Bollman,* 8 U.S. at 82. The courts were for the King of England "the instruments which the law has furnished him for discharging his high duty with effect." *Id.* However, when it existed only at common law, it failed to issue "where the

government entertained suspicions which could not be sustained by evidence" and "when issued was sometimes disregarded or evaded, and great individual oppression was suffered." *Watkins,* 28 U.S. at 202. "To remedy this evil the celebrated *habeas corpus* act of the 31st of Charles II. was enacted, for the purpose of securing the benefits for which the writ was given." *Id.*; *Ex parte Yerger,* 75 U.S. 85, 95, 19 L. Ed. 332 (1868) ("the famous Habeas Corpus Act of May 27, 1679, for the better securing of the liberty of the subject, ... frequently considered as another Magna Charta" (quotations omitted)).

"It was brought to America by the colonists, and claimed as among the immemorial rights descended to them from their ancestors." *Id.* The Constitution of the United States was formed "mainly to secure union and harmony at home," *Ableman,* 62 U.S. at 517, and in it the "great writ found prominent sanction" in terms necessarily implying judicial action. *Yerger,* 75 U.S. at 95. "In England, all the higher courts where open to applicants for the writ, and it is hardly supposable that, under the new government, founded on more liberal ideas and principles, any court would be, intentionally, closed to them." *Id.* Like the King of England, the courts are the instrument furnished the President for discharging his duty of protecting the citizens of the Nation from wrongful imprisonment, the citizen's exercise of the privilege of the writ of habeas corpus the means of accomplishing this.

Because

> "it is very certain that the State courts would not always agree in opinion; and it would often happen, that an act which was admitted to be an offence, and justly punished, in one State, would be regarded as innocent, and indeed as praiseworthy, in another, ... it was necessary that many of the rights of sovereignty which the States then possessed should be ceded to the General Government; and that, in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities,"

Ableman, 62 U.S. at 515–17 – one such right of sovereignty so ceded being any and all control over the privilege of the writ of habeas corpus. For the laws of the Nation were to be uniform: "this Constitution, and the laws of the United States which shall be passed in pursuance thereof... shall be the supreme law of the land, and the judges in every State shall be bound thereby." U.S. Const. art. VI. Where exception was expressly forbidden to the States it was so indicated. *See* U.S. Const. art. I, § 8, cl. 1 (uniform Duties, Imposts and Excises); U.S. Const. art. I, § 8, cl. 4 ("uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies").

C.

The second part of U.S. Const. art. I, § 9, cl. 2 defines the Cases for which the Privilege of the Writ of Habeas Corpus may be suspended as only "when in Cases of Rebellion or Invasion the public Safety may require it." There are several corollary provisions in the Constitution, the most directly being U.S. Const. art. IV, § 4: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against

Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

As to the first Case of potential exception, that of Rebellion, if domestic Violence is involved, the State may request Federal aid. *Id.* A "Republican Form of Government," guaranteed to the State by the Nation, may require protection from Rebellion. *Id.*; art. I, § 9, cl. 2. If the public Safety requires it, the privilege of the writ of habeas corpus may be suspended.

Also, in the Case of Invasion, if the public Safety requires it, the privilege of the writ of habeas corpus may be suspended. Federal protection is guaranteed to the state against Invasion. U.S. Const. art. IV, § 4. A State may not engage in War "without the Consent of Congress," but this restriction is excepted if "actually invaded, or in such imminent Danger as will not admit of delay." U.S. Const. art. I, § 10. Otherwise, Congress is empowered with providing "for calling forth the Militia to suppress Insurrections and repel Invasions." U.S. Const. art. I, § 8.

U.S. Const. art. IV, § 4's guarantee to "every State in this Union a Republican Form of Government" could be interpreted as working to distribute the power to suspend the writ of habeas corpus so that it is exercisable by the State in certain situations. Whether this is a correct interpretation may vary by State and is contingent on Congress' delegation of power "for calling forth the Militia to suppress Insurrections and repel Invasions." U.S. Const. art. I, § 8. If Congress prohibits the State from calling forth its Militia, suspension of the writ is

beyond the State. This situation does not present issue with U.S. Const. art. IV, § 2 because the Cases for which the Writ of Habeas Corpus may be suspended are the same in every State.

And yet a separate provision regarding suspension of the writ is found in every State Constitution, and these provisions vary considerably. Many of the States have habeas provision that differs from the Nation's only in their substitution of "in Cases of" for "in case of" – potentially a marked difference. Ark. Const. art. II, § 11; Colo. Const. art. II, § 21; Conn. Const. art. I, § 12; F.L. Const. art. I, § 13; Ga. Const. art. I, § 1, § 15; I.D. Const art. I, § 5; Ind. Const. art. I, § 27; Iowa Const. art. I, § 13; K.A. Const. art. I, § 8; Mich. Const. art. I, § 12; Minn. Const. art. I, § 7; M.S. Const. art. 1, § 3; Mont. Const. art. III, § 21; N.J. Const. art. I, § 14; N.D. Const. art. I, § 14; N.M. Const. art. II, § 7; N.Y. Const. art. I, § 4; Pa. Const. art. I, § 14; S.C. Const. art. I, § 18; S.D. Const. art. VI, § 8; Tenn. Const. art. I, § 15; Utah Const. art. I, § 5; W.A. Const. art. I, § 13; Wyo. Const. art. I, § 17; P.R. Const. art. II, § 13.

Is Maryland's provision, that "[t]he General Assembly shall pass no Law suspending the privilege of the Writ of *Habeas Corpus*," M.D. Const. art. III, § 55, an added guarantee, or is it a grant of power to the State Executive branch?

The Constitution of the State of Alaska, Art. I, § 13, claims the ability to suspend the privilege of habeas corpus in cases of "imminent invasion," a lesser threshold than the Constitution's of actual invasion. Perhaps this shift is offset by

the State's threshold that "the public safety **requires**" suspension – in contrast to "the public Safety **may require** it."

Massachusetts purports the ability to suspend "[t]he privilege and benefit of the writ of habeas corpus" whenever "upon the most urgent and pressing occasions." M.A. Const. pt. 2, c. VI, art. VII. A time limit is imposed on suspension "not exceeding twelve months." There is no assurance here given that suspension will not be renewed on expiration.

New Hampshire's Constitution is equivalent to Massachusetts' in regard to habeas corpus though the time suspended is limited to "three months." N.H. Const. pt. 2, art. 91.

Texas and Vermont likely have the most correct proclamations. "The writ of Habeas Corpus is a writ of right, and shall never be suspended. The Legislature shall enact laws to render the remedy speedy and effectual." Tex. Const. art. I, § 12. "The Writ of Habeas Corpus shall in no case be suspended. It shall be a writ issuable of right; and the General Assembly shall make provision to render it a speedy and effectual remedy in all cases proper therefor." V.T. Const. c. II, § 41.

North Carolina also makes a good showing. N.C. Const. art. I, § 21. Though well-intended, Louisiana, West Virginia, Nebraska, Missouri, like Texas, Vermont, and North Carolina, make promises that they may not be able to keep. L.A. Const. art. I, § 21; W.V. Const. art. III, § 4; Neb. Const. art. I, § 8; M.O. Const. art. I, § 12. The provision in the Constitutions of Delaware, Maine, Oregon, and Kentucky is identical to that of the U.S. Constitution, but an equivalent provision

by a State is a claim of assured power that is in fact subject to Congress and, if it exists at all, may change. Del. Const. art. I, § 13; M.E. Const. art. I, § 10; Or. Const. art. I, § 9; K.Y. Const. art. I, § 9.

The District of Columbia has no such provision. Minnesota's habeas provision substitutes "in case" for "in Cases," but purports a tougher measure of actual requirement to the public safety.

The danger of these false State provisions is seen by the Minnesota Legislature's usurpation of power by Minn. Const. art. I, § 7.

D.

"The [Minnesota] supreme court ... shall have original jurisdiction in such remedial cases as are prescribed by law, and appellate jurisdiction in all cases." Minn. Const. art. VI, § 2. In this case, appellate jurisdiction was defeated by the State Court of Appeals, *see supra* at 4, and M.M.B. was reliant on the State Supreme Court's original jurisdiction to hear his petition – which the legislature had revoked. To make sense of this, a narrow review of state and legislative history is necessary.

Minnesota was organized as a territory on March 3d, 1849. *State v. Batchelder*, 7 Minn. 121, 137 (1862). "On February 26, 1857, Congress passed an act authorizing the formation of a state government." *State of Minnesota v. Hitchcock*, 185 U.S. 373, 375, 22 S. Ct. 650, 651, 46 L. Ed. 954 (1902) (citing 11 Stat. at L. 166, chap. 60. Section 5). "On October 13, 1857, a Constitution was

formed." *State of Minnesota v. Hitchcock*, 185 U.S. at 376. "By an act of date May 11, 1858, Minnesota was admitted into the Union." *Id.* (citing 11 Stat. at L. 285, chap. 31).

The state's first version of what is today Minn. Stat. c. 589, Habeas Corpus, was enacted 1851. Rev. St. (Terr.), c. 83. The chapter was reorganized under Pub. St. 1858, c. 73, then under Gen. St. 1866, c. 80.

In 1891, the Minnesota Supreme Court discussed relevant sections of then chapter 80 in resolving whether the court had jurisdiction of the writ in any county of the state. *In re Doll*, 47 Minn. 518, 50 N.W. 607 (1891).

> "Gen. St. 1878, c. 80, § 23, prescribes that the application for the writ shall be made 'to the supreme or district court, or to any judge thereof, being within the county where the prisoner is detained, or if there be no such officer within such county, or if he is absent or from any cause is incapable of acting, or has refused to grant such writ, then to some officer having such authority residing in any adjoining county.'"

Id., 47 Minn. at 518-19. The court held the statute not to be "literally construed" for "then the statute by its terms might, in some cases, withhold the writ." *Id.*, 47 Minn. at 520. Under this construction, "it is hardly possible that one entitled to the writ can fail to obtain it." *Id.*, 47 Minn. at 519.

Subsequently, Gen. St., c. 80 was reorganized under Gen. St. 1894, § 5996; then under Rev. Laws 1905, § 4574; then under Gen. St. 1913, § 8284; then under Gen. St. 1923, § 9740; then under St. 1927, § 9740.

In 1949, the State Supreme Court addressed the statute at issue in *In re Doll, supra,* as revised in 1905. *Wojahn v. Halter*, 229 Minn. 374, 377-78, 39 N.W.2d

545 (1949) (citing R.L.1905, s 4574; Minn. Stat. § 589.02). "This court has original jurisdiction of a writ of habeas corpus under Minn. Const. art. 6, s 2, M.S.A., and M.S.A. s 589.02." *Id.*, 229 Minn. at 377, 39 N.W.2d at 547 (citing *State v. Grant,* 10 Minn. 39 (Gil. 22); *In re Snell,* 31 Minn. 110, 16 N.W. 692). "It would seem that by inserting a comma ... the legislature intended to make a distinction between the supreme court and the district court [but it] could hardly be that the legislative intent was that a judge of the supreme court must be in the county of detention before a writ could issue out of this court." *Id.*, 229 Minn. at 378, 39 N.W.2d at 547. "[W]e undoubtedly have the power to issue such writ in an appropriate case where a final and speedy decision is important to the preservation of the right to liberty of a citizen improperly restrained." *Id.*, 229 Minn. at 379, 39 N.W.2d at 548. In *Ex parte Yerger,* this Court held that "repeal [of habeas jurisdiction] is not to be presumed where the language left the intention of the legislature doubtful." 75 U.S. at 92.

In 1983, the State legislature codified its intent regarding Minn. Stat. c. 589, Habeas Corpus, as disbelieved by the court in *Wojahn v. Halter, supra.* "Laws 1983, c. 247, provided generally for appeal of various matters to the Court of Appeal and also provided for the manner of election of Court of Appeals judges. The Act revised this section which formerly read:

> "'Application for such writ shall be by petition, signed and verified by the petitioner, or by some person in his behalf, to the supreme court, or to the district court of the county within which the petitioner is detained. Any judge of the court to which the petition is addressed, being within the county, or, if addressed to the district court, the court commissioner of the

> county, may grant the writ. If there be no such officer within the county capable of acting and willing to grant such writ, it may be granted by some officer having such authority in any adjoining county.'"

Minn. Stat. § 589.02, Editor's and Revisor's Notes. The statute now read:

> "Application for the writ shall be by petition, signed and verified by the petitioner, or by some person in his behalf, to the supreme court, **court of appeals,** or to the district court of the county within which the petitioner is detained. Any judge of the court to which the petition is addressed, being within the county, ~~[or, if addressed to the district court, the court commissioner of the county,]~~ may grant the writ. If there is no ~~[such officer]~~ **judge** within the county capable of acting and willing to grant the writ, it may be granted by ~~[some officer having such authority]~~ **a judge** in any adjoining county."

Minn. Stat. § 589.02, Editor's and Revisor's Notes, Laws 1985, c. 265 (insertions bolded, deletions struck through).

The alterations to Minn. Stat. § 589.02 exceeded the stated scope of Laws 1983, c. 247 and were therefore insufficient to effect the repeal intended. I.N.S. v. St. Cyr, 533 U.S. 289, 299, 121 S. Ct. 2271, 2278–79, 150 L. Ed. 2d 347 (2001) ("Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal.") (citing *Yerger,* 8 Wall., at 105 ("Repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy; and never, we think, when the former act can stand together with the new act")). Nevertheless, the statute persists and as seen in this case, repeal effected.

The State legislature's suspension of the State Supreme Court's original jurisdiction detracted from the writ as it had existed in 1858 in the State Constitution, but the 1983 alterations to Minn. Stat. § 589.02 did not violate Minnesota and U.S. Constitution until 1996.

E.

Amidst civil war, Congress in 1863, "obliged to enact severe laws to meet the crisis," *Ex parte Milligan*, 71 U.S. 2, 130, 18 L. Ed. 281 (1866), approved the act "relating to *habeas corpus*, and regulating judicial proceedings in certain cases." *Id.*, 71 U.S. at 114 (quotation omitted).

> "This law was passed in a time of great national peril, when our heritage of free government was in danger. An armed rebellion against the national authority, of greater proportions than history affords an example of, was raging; and the public safety required that the privilege of the writ of *habeas corpus* should be suspended."

Id., 71 U.S. at 114–15. The Court in *Milligan* expressly distinguished between Congress' "suspension of the **privilege** of the writ of *habeas corpus*" and suspension of "the writ itself," stating, "The writ issues as a matter of course." *Id.*, 71 U.S. at 130–31 (emphasis added).

In 1867, Congress extended the writ of habeas corpus of 1789. The power to grant the writ remaining in every court of the United States, and every judge or justice of them, to this Congress took legislative cognizance of appeals from decisions made on such petitions and stated them go "'[f]rom the final decision

of any judge, justice, or courts inferior to the Circuit Court, *appeal* may be taken to the Circuit Court of the United States for the district in which the said cause is heard, and from the judgment *of said Circuit Court to the Supreme Court of the United States*.'" *Yerger*, 75 U.S. at 86–87. Prior to the act of 1867, but for some few classes of cases, appellate jurisdiction over judgments rendered on petitioners for writs of habeas corpus by inferior tribunals was exercised as it is today, by "the writ of *certiorari* in addition to the writ of *habeas corpus*." *Ex parte McCardle*, 73 U.S. 318, 324, 18 L. Ed. 816 (1867).

In 1868, Congress took cognizance of a capacity to alter the writ, exciting a cause "so important as that which now invokes the action of this court" as "to justify a reconsideration of the grounds upon which its jurisdiction has been heretofore maintained." *Yerger*, 75 U.S. at 95. "[I]f Congress had made no exceptions and no regulations, this court might not have exercised general appellate jurisdiction under rules prescribed by itself." *McCardle*, 74 U.S. at 513. Citing its decision in *Durousseau v. United States*, 10 U.S. 307, 318, 3 L. Ed. 232 (1810), the Court in *McCardle* found that Congress, by granting appeal in habeas cases in 1867, had negatived appeals in all other cases, and by repealing said grant in 1868, had negated McCardle's appeal also. *McCardle*, 74 U.S. at 513. Appeal to the Court in all cases was relinquished. The Court stated, however, that regarding habeas corpus, "[i]t does not affect the jurisdiction which was previously exercised." *Id.*, 74 U.S. at 514. *McCardle* was there on appeal.

> "What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."

Id.

"In interpreting a law, the motives which must have operated with the legislature in passing it are proper to be considered." *Milligan*, 71 U.S. at 114.

> "During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. *Now* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment. We approach the investigation of this case, fully sensible of the magnitude of the inquiry and the necessity of full and cautious deliberation."

Milligan, 71 U.S. at 109.

128 years later,[72] in the wake of "the bombing of the World Trade Center in New York City," *Hamdan v. Rumsfeld*, 548 U.S. 557, 688, 126 S. Ct. 2749, 2828, 165 L. Ed. 2d 723 (2006) (THOMAS, J., dissenting), in which, "[o]n February 26, 1993," terrorists "drove a bomb-laden van onto the B–2 level of the parking garage below the World Trade Center [and] set the bomb's timer to detonate minutes later[, exploding and] killing six people, injuring more than a thousand

[72] Intervening events are not necessary for consideration, here.

others, and causing widespread fear and more than $500 million in property damage," *United States v. Yousef*, 327 F.3d 56, 79 (2d Cir. 2003); and "an explosion in Oklahoma City, Oklahoma, on April 19, 1995, at 9:02 a.m." resulting in "the deaths of 168 identified men, women and children, injuries to hundreds of other people, the complete destruction of the Alfred P. Murrah Federal Office Building and collateral damage to other buildings, including the United States Courthouse, [and] immeasurable effects on the hearts and minds of the people of Oklahoma," *United States v. McVeigh*, 918 F. Supp. 1467, 1469 (W.D. Okla. 1996), Congress passed the ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 (AEDPA), PL 104–132, April 24, 1996, 110 Stat 1214.

The act states its purpose as "to deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes" but does not identify the context in which it will "provide justice for victims" or what its "other purposes" are. The first section of the first title is "HABEAS CORPUS REFORM." Under this title, in the seventh section, "CHAPTER 154—SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES," is added in furtherance of the objective of providing for an effective death penalty.[73] But in the six preceding sections

[73] Decisions "to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits, and rest in part on a faulty assumption about the retributive force of the death penalty." *Baze v. Rees*, 553 U.S. 35, 78, 128 S. Ct. 1520, 1546, 170 L. Ed. 2d 420 (2008) (STEVENS, J., concurring). "For example, family members of victims

alterations were made to the writ of habeas corpus that defeat justice for victims of illegal imprisonment. PL 104–132, 110 Stat 1214.

> "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and to advance the principles of comity, finality, and federalism. It furthered those goals in large measure by revising the standards used for evaluating the merits of a habeas application."

Shoop v. Twyford, 142 S. Ct. 2037, 2043, 213 L. Ed. 2d 318 (2022) (quoting *Woodford v. Garceau*, 538 U.S. 202, 206, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003); Williams v. Taylor, 529 U.S. 420, 436, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000)) (quotations omitted).

> "[T]he broader context of the statute as a whole ... demonstrates Congress' intent to channel prisoners' claims first to the state courts[,] ... leav[ing] primary responsibility [there]. Section 2254(b) requires that prisoners must ordinarily exhaust state remedies before filing for federal habeas relief. It would be contrary to that purpose to allow a petitioner to

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of the Oklahoma City bombing called for the Government to 'put [Timothy McVeigh] inside a bomb and blow it up.' Commentators at the time noted that an overwhelming percentage of Americans felt that executing McVeigh was not enough. For example, one survivor of the Oklahoma City bombing expressed a belief that 'death by [lethal] injection [was] "too good" for McVeigh.' Similarly, one mother, when told that her child's killer would die by lethal injection, asked: 'Do they feel anything? Do they hurt? Is there any pain? Very humane compared to what they've done to our children. The torture they've put our kids through. I think sometimes it's too easy. They ought to feel something. If it's fire burning all the way through their body or whatever. There ought to be some little sense of pain to it.'" *Id.*, 553 U.S. at 80–81, 128 S. Ct. at 1548 (quotations omitted).

> overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively *de novo*."

Cullen v. Pinholster, 563 U.S. 170, 182, 131 S. Ct. 1388, 1398–99, 179 L. Ed. 2d 557 (2011) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997); *Woodford v. Visciotti*, 537 U.S. 19, 27, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002)) (quotations omitted).

AEDPA is described as having a "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Pinholster*, 563 U.S. at 181, 131 S. Ct. at 1398 (quoting *Visciotti*, 537 U.S. at 24, 123 S. Ct. at 154). "The petitioner carries the burden of proof." *Pinholster*, 563 U.S. at 181, 131 S. Ct. at 1398 (citing *Visciotti*, 537 U.S. at 25, 123 S. Ct. at 154). "[H]arsh." *Shoop v. Cunningham*, 143 S. Ct. 37, 40, 214 L. Ed. 2d 241 (2022) (THOMAS, J., dissenting). "[D]ifficult to meet." *Harrington v. Richter*, 562 U.S. 86, 102, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011).

Cunningham, *Pinholster*, and *Twyford* each traversed the federal courts for over twenty years.

F.

In re Hood, 319 F.3d 755, 763 (6th Cir. 2003), *aff'd and remanded sub nom. Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 124 S. Ct. 1905, 158 L. Ed. 2d 764 (2004), across the courts involved, various opinions were presented on the effect of the term "uniform" in article I section 8 of the Constitution.

Summarily, there was consensus that the term was a grant of power to Congress. However, the term is a limitation on the States, not a limitation on Congress, and does not give Congress less or more power. This interpretation is supported by the quotations *In re Hood* of the Court in *Sturges v. Crowninshield,* where it stated that "establishment of uniformity is, perhaps, **incompatible with state legislation**, on that part of the subject to which the acts of congress may extend," 17 U.S. 122, 193–94, 4 L. Ed. 529 (1819) (emphasis added), and of Justice Marshall, "I see no reason to treat Congress' power under the Bankruptcy Clause any differently [than the power under the Commerce Clause], for both constitutional provisions give Congress plenary power over national economic activity." *Hoffman v. Connecticut Dep't of Income Maint.*, 492 U.S. 96, 111, 109 S. Ct. 2818, 2828, 106 L. Ed. 2d 76 (1989) (Marshall, J., dissenting); *see* 319 F.3d at 763.

Congress' power is not expanded by the term "uniform," the power of the states is contracted. Under the commerce clause, U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"), Congress may pass legislation, as can the states, if they so choose. Under the bankruptcy clause, U.S. Const. art. I, § 8, cl. 4 ("The Congress shall have Power . . . To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States"), Congress may pass legislation, the states may not. If there is a grant of power involved, it is power given to the legislation itself,

not to the legislature. The legislation on Bankruptcies, Naturalization, and Duties, Imposts, and Excises is supreme, it cannot be controverted. Congressional power is measured by the reach of its legislation. Requiring uniformity does not expand Congress' legislative reach, it merely makes its reach certain. *See Hood,* 319 F.3d at 763 ("no reason to inquire whether state law had created any valid claim, because the asserted claim was inconsistent with federal bankruptcy policies") (citing *Vanston Bondholders Protective Comm. v. Green,* 329 U.S. 156, 163–64, 67 S. Ct. 237, 240, 91 L. Ed. 162 (1946)).

The term "uniform" indicates that, on the subject concerned, Congress has supreme authority over the States. In this context, it is implicit that in all matters *not* involving the States that whatever *Congress* does must be uniform wherever there is overlap within federal law. Congress is prohibited by the Constitution from making convoluted law where it has unquestionable control over the laws involved. There is no need to indicate "uniformity" in those contexts because it is inherent. The objective of government cannot be anarchy.

Although the term "uniform" effects a prohibition on States from passing law conflicting with that of Congress, *see Sturges,* 17 U.S. 122, there is no power in Congress to stop a State from doing so. Congress has no more authority to abrogate State law except where the Constitution provides for uniformity and it had not passed law, the State had, and then Congress did; however, judicial action may be required. In all cases where the Constitution requires uniform law

and Congress has enacted legislation, an attempt to enact law by the State is a violation.

"The great and leading intent of the Constitution and the law must be kept constantly in view upon the examination of every question of construction." *Yerger*, 75 U.S. at 101. The Court in *Ex parte Yerger* held that to protect every citizen "from unlawful imprisonment," *Id.*, "every court of the United States should have power to issue the writ." *Id.* Until 1868, the laws had uniformly promoted this objective, "and it is in [this light] that we must determine the true meaning of the Constitution and the law in respect to the appellate jurisdiction of this court." *Id.*, 75 U.S. at 102. "The jurisdiction derived from the Constitution [is] defined by the act of 1789." *Id.* To deny

> "this court [] appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ, deprive the citizen in many cases of its benefits, and seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction, exercised upon the decisions of courts of original jurisdiction."

Id., 75 U.S. at 102-03. The appellate jurisdiction of *habeas corpus* extends to any case of imprisonment under color of authority of the United States alleged unlawful if the imprisonment is "by the order of an inferior court of the United States." *Id.*, 75 U.S. at 102. Where a prisoner is held by authority of a reviewing court, if unlawful, the imprisonment is "wholly without remedy unless it be found in the appellate jurisdiction of this court." *Id.*, 75 U.S. at 102–03. The Court's appellate jurisdiction operates the same in this case as it did in *Ex parte Yerger*.

Ableman, 62 U.S. at 518-19. "These considerations forbid any construction giving to doubtful words the effect of withholding or abridging this jurisdiction." *Yerger*, 75 U.S. at 102–03.

G.

The Court recently recalled that it has "often made the same point" – that habeas is "a means to 'remove the injury of unjust and illegal confinement,'" *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1969, 207 L. Ed. 2d 427 (2020) (quoting 3 W. Blackstone, Commentaries on the Laws of England 137); that it "'is the appropriate remedy to ascertain whether **any** person is rightfully in confinement or not.'" *Thuraissigiam*, 140 S. Ct. at 1969 (quoting 3 Commentaries on the Constitution of the United States § 1333, p. 206 (1833) (emphasis added)). "'It is clear from the common-law history of the writ that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody.'" *Thuraissigiam*, 140 S. Ct. at 1969 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 484, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973); citing *Wilkinson v. Dotson*, 544 U.S. 74, 79, 125 S. Ct. 1242, 161 L. Ed. 2d 253 (2005) (similar); *Munaf v. Geren*, 553 U.S. 674, 693, 128 S. Ct. 2207, 171 L. Ed. 2d 1 (2008) (similar)). But Congress enacted a limitation such that there is no means to "remove the injury of unjust and illegal confinement," *Thuraissigiam, supra*, from "a person in custody pursuant to the

judgment of a State court" having been so wrongfully restrained for "1-year." 28 U.S.C. § 2244(d)(1).

As was noted by the advisory committee in adoption of the Rules Governing Section 2254 Cases, that "the petitioner has exhausted his state remedies ... is a prerequisite to eligibility for the writ under 28 U.S.C. § 2254(b) and applies to every ground the petitioner raises." The short list of other possible justifications for seeking federal relief under 28 U.S.C. § 2254(b) is similarly conclusive that, at most, the relief available from the state is "ineffective to protect the rights of the applicant."

> "Before the adoption of a one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, the petitioner suffered no penalty, other than delay, if the petition was deemed insufficient. That Act, however, added a one-year statute of limitations to petitions filed under § 2254, *see* 28 U.S.C. § 2244(d)(1). Thus, a court's dismissal of a defective petition may pose a significant penalty for a petitioner who may not be able to file a corrected petition within the one-year limitations period."

SECT 2254 Rule 3 ADVISORY COMMITTEE NOTES, 2004 Amendments.

A life, wrongly confined by a state for a period of 1 year, is considered by state and country forfeit.

In 1998, amendments were made to Fed. R. App. P. 22 "to make the rule more easily understood." *Id.*, Advis. Comm. Notes, 1998 Amendments. Also, "substantive changes are made" to "bring[] the rule into conformity with 28 U.S.C. § 2253 as amended by [AEDPA]." *Id.* In other words, prior to these substantive changes the law and the rule were not in sync. 28 U.S.C. § 2253, as

amended by AEDPA, applied the same substantive requirements of Fed. R. App. P. 22(b) to federal habeas proceedings, but the rule purported to be applicable only to those cases originating from State judgment. *Id.*, Advis. Comm. Notes, 1998 Amendments.

Further, "[t]he language of section 2253 is ambiguous; it states that a certificate of appealability may be issued by 'a circuit justice or judge.'" *Id.* This ambiguity resulted in inconsistent law, only three circuits having "held that both district and circuit judges, as well as the circuit justice, may issue a certificate of appealability." *Id.* The rule was amended to resolve this lapse, providing that "a circuit justice or a circuit or district judge" has authority to issue a certificate of appealability. *Id.*

H.

28 U.S.C. § 2254(d)(1), a provision of a subsection inserted by AEDPA, confines "the source of doctrine on which a federal court may rely in addressing the application for a writ" to decisions of the Supreme Court. *Lindh v. Murphy*, 96 F.3d 856, 869 (7th Cir. 1996), rev'd, 521 U.S. 320, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). The concurrence explains that "[t]he statute does authorize issuance of a writ, if the state court has committed a pure error of law," *Lindh*, 96 F.3d at 878 (WOOD, CJ concurring), but where the Court has not considered the particular legal question there could be uncertainty. This could occur if statutory construction is required for determining whether a pure error of law occurred.

Many habeas applicants are self-represented, "lack [] legal expertise," SECT 2254 Rule 4 Advisory Committee Notes 1976 Adoption, and are unlikely to be able to locate adequate precedent. In the present case, for example, Father's claims and arguments in the district court from December 22, 2020 until September 19, 2021, were made solely by statutes and rules. *See e.g.* ECF no. 251 (Objection to late filings); ECF no. 243, 244 (Memoranda arguing motions to amend v. motions to reconsider). This restriction alone could serve to suspend the writ, but taken in conjunction with 28 U.S.C. § 2244(b), it is certain to result in permanent illegal restraint. Should the court that the petition is before not investigate whether apposite precedent exists or fail to locate as much, *see* e.g., *Jennings v. Stephens*, 574 U.S. 271, 274–75, 135 S. Ct. 793, 797, 190 L. Ed. 2d 662 (2015) (failure to cite precedent in support of contention remedied by court), the applicant may find their application for release from illegal restraint rejected. Arguendo, should the petitioner's claim warrant habeas relief but for failure to cite precedent of the Court, on reapplication the claim would be moot. 28 U.S.C. § 2244(b)(1).

I.

Continuing the same hypothetical example, if the unfamiliar petitioner were to seek relief in the district court, 28 U.S.C. § 2241(a), they would be required to first *motion* "in the appropriate court of appeals for an order authorizing the district court to consider the application," § 2244(b)(3)(A), to be

"determined by a three-judge panel of the court of appeals." § 2244(b)(3)(B).[74] Pending decision on said motion, the petitioner would spend up to 30 more days illegally confined, § 2244(b)(3)(D), without having initiated proceedings for relief. If § 2241(b) were misconstrued, a circuit judge might "transfer the application for hearing and determination to the district court having jurisdiction to entertain it" under § 2241(a) or § 2241(d), in which case the petitioner's hope would rest on the district court misconstruing § 2244(b) as not requiring the authorization order to hear the petition. But should the district court determine that authorization is necessary, the petitioner's case terminates, finally. § 2244(b)(3)(E).

If rather than misconstruing § 2241(b) the § 2244(b)(3)(A) motion were denied by the circuit panel, the petitioner's case terminates, finally. § 2244(b)(3)(E). The result is the same if the petitioner motions in a court of appeals other than "the appropriate court of appeals." § 2244(b)(3)(A). But if the motion is granted, the petitioner now must prove the grounds of the one of the niche exceptions permitting relief, § 2244(b)(2), requested in the appellate court. § 2244(b)(3)(C).

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[74] What was permissibly considered by a single district court judge on first application, now requires three appellate judges to consider and then requires the district court judge hear at least some of the same elements. The same protection could be obtained at less expense by leaving the application with a single judge of either court without imposition of a bar on non-frivolous reapplication.

But if the unfamiliar petitioner were to instead seek relief in the appellate court, the petition would be to a circuit judge, § 2241(a), who may decline to entertain it, § 2241(b), transferring to the district court which presumably will not entertain the petition. § 2244(b)(3). This would seemingly result in a defacto denial of authorization, and the petitioner's case terminates, finally. § 2244(b)(3)(E). The claim cannot be revived. § 2244(b)(1). Alternatively, the circuit judge may hear the petition, and the petitioner now must prove the grounds of the niche exception permitting relief. § 2244(b)(2).

If the petitioner succeeds, they are free. If the petition is denied, our petitioner's only hope is to find a new claim to satisfy § 2244(b)(2), **quickly**, § 2244(d) – else resign themself to their illegal imprisonment. If in the unlikely scenario that the pro se litigant successfully identifies grounds qualifying under § 2244(b)(2) again, they must move first in the appropriate court of appeals, again, § 2244(b)(3)(A), wait another 30 days, § 2244(b)(3)(D), and be subject to the many potential pitfalls just described derailing their application, finally. The above should not be presumed comprehensive.

J.

"By the Act of March 27, 1868, 15 Stat. 44, c. 34, s 2, the next Congress repealed a statutory provision as to appeals in habeas corpus cases, **with the design, as was avowed by Mr. Schenck, chairman of the House committee on ways and means, of preventing this court from passing on the validity of**

reconstruction legislation." *Myers*, 272 U.S. at 166, 47 S. Ct. at 42 (citing 81 Congressional Globe, pp. 1881, 1883; *McCardle, supra*). Congress abridged the People's First Amendment right to petition the Government in 1868 and again in 1996, and much of the argument from Part II, C applies here. *Supra* at 205.

Congress' historic success in curtailing habeas jurisdiction to prevent challenges to legislation inspired it to continue to pursue this course. AEDPA defeats nearly all petitions that are made, and then, after expiration of the 1-year limitation, stops them altogether.

This Court presumes "that congress will pass no act not within its constitutional power . . . unless the lack of constitutional authority to pass an act in question is clearly demonstrated." *Harris*, 106 U.S. at 635, 1 S. Ct. at 606–07. "The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people." *Cruikshank*, 92 U.S. at 551; *see also Harris*, 106 U.S. at 636, 1 S. Ct. at 606–07. If the constitution expresses the power in question, "'the question is decided. If it be not expressed,'" Congress may exercise power only as "'it is properly an incident to an express power and necessary to its execution.'" *Harris*, 106 U.S. at 636, 1 S. Ct. at 607 (quoting Commentaries on the Constitution, section 1243, referring to Virginia Reports and Resolutions, January, 1800, pp. 33, 34) (citing President Monroe's Exposition and Message of May 4, 1822, p. 47; 1 Tuck. Bl. Comm. App. 287, 288; 5 Marsh. Wash. App. note 3; 1 Hamilton's Works, 117, 121).

Limitations on the legislative power are found in U.S. Const. art. I, § 9, and in that section the limitation that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." This is not a grant of authority to alter the operation of the judicial branch in any way. It is a clearly defined limitation of the Cases under which Congress may suspend the Privilege of the Writ of Habeas Corpus. By the nature of its Acts, however, Congress has interpreted the habeas corpus limitation as a generalized grant of power to alter the writ but in so doing has violated the separation of powers.

The executive power and judicial power have boundaries that are quite certain. Where the legislative powers are concerned, however, "it is not infrequently a question of real nicety in legislative bodies whether the operation of a particular measure will, or will not, extend beyond the legislative sphere." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (quoting The Federalist No. 48, p. 256 (Carey and McClellan eds. 1990)). "[T]he writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of [the Suspension Clause] must not be subject to manipulation by those whose power it is designed to restrain." *Boumediene*, 553 U.S. at 765–66, 128 S. Ct. at 2259. While Congress may make any law, "if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land,

nor were the State judges bound to carry it into execution." *Ableman*, 62 U.S. at 519–20; *see* U.S. Const. art. VI.

> "The authority of congress must be tested by the constitution, and if they should appear to this court to have exceeded the limits there prescribed, this court must consider their act void. The power of the judiciary to collate an act of congress with the constitution, when it comes judicially before them, and of declaring it void if against the constitution, is one of the best barriers against oppression, in the fluctuations of faction, and in those times of party violence which necessarily result from the operation of the human passions in a popular government. In the violence of those political storms which the history of the human race warns us to expect, this shelter may indeed be found insufficient; but weak as it may be, it is our best hope, and it is the part of patriotism to uphold and strengthen it to the utmost. But it is a power, of a delicacy inferior only to its importance; and ought to be exercised with the soundest discretion, and to be reserved for the clearest and the greatest occasions."

Bollman, 8 U.S. at 85.

Defeat of justice for victims cannot provide a valid justification for legislation. This case satisfies Congress' requirements for habeas corpus, but the Court could hear this case regardless, as Congress' requirements are unconstitutional. Perhaps the legislature was hoping to send a strong reminder to the American people that the Constitution is

> "the most splendid, and by authority the most binding; the example of the most refined as well as the most free nation known to antiquity; and the authority of one of the best Constitutions known to modern times. With regard to one of the terms State this authority is declared: With regard to the other sovereign the authority is implied only: But it is equally strong: For, in an instrument well drawn, as in a poem well composed, mence is sometimes most expressive,"

Chisholm, 2 U.S. at 454, – by depriving them of liberty.

K.

"Power" is a term used throughout this discussion of habeas corpus. "The powers of the general Government are made up of concessions from the several states—whatever is not expressly given to the former, the latter expressly reserve." *United States v. Hudson*, 11 U.S. 32, 33, 3 L. Ed. 259 (1812). The act of 1789, in the fourteenth section, stated, "That all the beforementioned courts of the United States shall have power to issue writs of scire facias, habeas corpus." *See Kendall*, 37 U.S. at 649 (BARBOUR, J., dissenting). That legislation of judicial power was "necessary and proper for carrying into Execution the foregoing Powers" as found in the Constitution. U.S. Const. art. I, § 8.

Congress has power to legislate the jurisdiction of the federal courts and to them grant judicial "powers, import authority to issue certain writs, and do certain acts incidentally becoming necessary in, and being auxiliary to, the exercise of their jurisdiction," *Kendall*, 37 U.S. at 649 (BARBOUR, J., dissenting); *see Myers*, 272 U.S. at 129–30, 47 S. Ct. at 29–30, but "[o]f all the Courts which the United States may, under their general powers, constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it." *Hudson*, 11 U.S. at 33. Power is to jurisdiction, and Congress cannot deprive the Supreme Court of jurisdiction. "When the first legislature of the union proceeded to carry the third article of the constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate

jurisdiction of the supreme court." *Durousseau*, 10 U.S. at 314. "Independent of authority, it is clear, on principle, that the exercise of the appellate power is not limited to any particular *form*. When the object is to revise a judicial proceeding the *mode* is wholly unimportant." *Yerger*, 75 U.S. at 91. Following the act of 1789, without necessity, there has not been power in Congress to legislate the Supreme Court's jurisdiction. Following the act of 1789, there is no power in Congress to legislate judicial power. Congress has power to create lower courts and to them designate jurisdiction, *Hudson*, 11 U.S. at 33; U.S. Const. art. I, § 8, cl. 9 (power "To constitute Tribunals inferior to the supreme Court"); U.S. Const. art. III, § 1 (vesting "The judicial Power of the United States ... in such inferior Courts as the Congress may from time to time ordain and establish), and, as discussed, suspend the Privilege of the writ of habeas corpus.

"Certain implied powers must necessarily result to our Courts of justice from the nature of their institution, ... and so far our Courts no doubt possess powers not immediately derived from statute." *Hudson*, 11 U.S. at 34. The powers of Congress are defined in article I, the powers of the Executive in article II, but only the scope of application of the powers of the Judiciary is defined in article III. "If this court possessed no powers but those given by statute, it could not protect itself from insult and outrage. It could not enforce obedience to its immediate orders. It could not imprison for contempts." *Bollman*, 8 U.S. at 79–80. The implied powers of Courts of Justice "cannot be dispensed with in a Court, because they are necessary to the exercise of all others." *Chambers v. NASCO,*

Inc., 501 U.S. 32, 43, 111 S. Ct. 2123, 2132, 115 L. Ed. 2d 27 (1991) (quoting *United States v. Hudson,* 7 Cranch 32, 34, 3 L.Ed. 259 (1812)).

"[I]ncidental powers belong to this in common with every other court." *Bollman,* 8 U.S. at 80. "These powers are not given by the constitution, nor by statute, but flow from the common law, ... that code from whence we derive all our legal definitions, terms and ideas, and which forms the substratum of all our juridical systems, of all our legislative and constitutional provisions," and it is to the common law that "we look for the definition, enumeration and extent of those powers." *Id.*

> "The common law, in short, forms an essential part of all our ideas. It informs us, that the power of issuing the writ of *habeas corpus* belongs incidentally to every superior court of record; that it is part of their inherent rights and duties thus to watch over and protect the liberty of the individual."

Id.

> "The power to punish offences against the government is not necessarily incident to a court. But the power of issuing writs of *habeas corpus*, for the purpose of relieving from illegal imprisonment, is one of those inherent powers, bestowed by the law upon every superior court of record, as incidental to its nature, for the protection of the citizen."

Id.; and *see Watkins,* 28 U.S. at 201 (the same, issued 'for the purpose of inquiring into the cause of commitment.'). "The term [Habeas Corpus] is used in the constitution, as one which was well understood." *Id.*

In 1830, the Court stated that "[n]o law of the United States prescribes the cases in which this great writ shall be issued, nor the power of the court over the party brought up by it." *Id*. That changed in 1996. Congress cannot restrict or confuse or alter the writ in any way or in any aspect. The writ is itself a judicial power.

VI.

> "Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations."

Root Ref. Co. v. Universal Oil Prod. Co., 169 F.2d 514, 522 (3d Cir. 1948).

A.

"Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 822, 82 L. Ed. 1188 (1938). Because the States have failed to protect children, because this is an area that Congress constitutionally must legislate and has not, there is a "demonstrated need for a federal rule of decision." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 422,

131 S. Ct. 2527, 2536, 180 L. Ed. 2d 435 (2011); direction by the Court is necessary to direct procedure in child custody matters.

The Clearly Erroneous Standard violates the Separation of Powers and the rights of the citizens and jeopardizes the stability of the Nation. This is especially so in relation to children in custody disputes whose interests must be protected by courts of review. The current analysis of due process safeguards under *Mathews* is inadequate for protecting rights of those whose custody is determined by state action. Federal common law is needed to establish a Best Interests of the Child Standard of Review.

B.

"It is of the historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void." *Fay v. Noia*, 372 U.S. 391, 423, 83 S. Ct. 822, 840, 9 L. Ed. 2d 837 (1963), *overruled by Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977), and *abrogated by Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991).

The proceedings of this case have been so fundamentally lawless. The "evidence" supporting the initial order of imprisonment was seized in violation of the Fourth and Fifth Amendments. "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."

Silverthorne Lumber Co., 251 U.S. at 392, 40 S. Ct. at 183 (judgment reversed); *see also Coolidge*, 403 U.S. at 473, 91 S. Ct. at 2042 (reversed and remanded); *Elkins*, 364 U.S. at 223–24, 80 S. Ct. at 1447 (vacated and remanded). Even so, the evidence was "incompetent information or no information at all." *Speiser*, 357 U.S. at 528, 78 S. Ct. at 1343. "The aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence." *Lisenba v. People of State of California*, 314 U.S. 219, 236, 62 S. Ct. 280, 289–90, 86 L. Ed. 166 (1941).

> "If, by fraud, collusion, trickery and subornation of perjury on the part of those representing the state, the trial of an accused person results in his conviction he has been denied due process of law. The case can stand no better if, by the same devices, a confession is procured and used in the trial. The concept of due process would void [such] a trial."

Lisenba, 314 U.S. at 237, 62 S. Ct. at 290. Where "[c]olor [of law] had been given [to] those concerned in the act by an invalid subpoena ... relating to the charge in the indictment then on file ... it must be assumed that the Government planned or at all events ratified the whole performance." *Silverthorne Lumber Co.*, 251 U.S. at 390–91, 40 S. Ct. at 182.

The effect of the district court's orders has been the wrongful imprisonment of M.M.B. and his forced subjection to abuse by his mother. Where is M.M.B.'s entitlement "to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without

delay, conformable to the laws"? Minn. Const. art. I, § 8. The district court has denied M.M.B. remedy in all forms to the egregious harm inflicted on him by the joint frauds of it, Mother, and Mother's attorneys, resulting in all five years of M.M.B.'s life being filled with torment and abuse by Mother and spent without his father with whom he longed for and where there was ***no*** reason to deny him his right to this contact, custody, care, relationship. The district court made its courtroom into a vehicle of injustice.

Should the Court not strike down the district court's fraud-ridden judgments and orders made with intent to defraud M.M.B., it *shall* render itself obsolete and moot as a government institution. *McNabb v. United States*, 318 U.S. 332, 345, 63 S. Ct. 608, 615, 87 L. Ed. 819 (1943) ("a conviction resting on evidence secured through such a flagrant disregard [of due process or civility] cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law.") That is to say that Referee Holly Knight's catch 22 has us both and only by condemnation of Knight can we be rid of it.

> "[D]ue process of law ... refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by due process of law."

Hurtado v. People of State of Cal., 110 U.S. 516, 536, 4 S. Ct. 111, 121, 28 L. Ed. 232 (1884) (quotations omitted).

Certainly, in this case, M.M.B.'s loss of the first five years of compassionate, nurturing parental care has not been by "due process of law." Worse, it has been lost to him by fraud.

> "It must be not a special rule for a particular person or a particular case, but, ... the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. ... Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."

Id., 110 U.S. at 535–36, 4 S. Ct. at 121 (quotations omitted).

His parents' marriage is dissolved. The claims of so long past have been overshadowed by later claims which have been not heard at all, claims which have all the necessary elements, from both sides' submissions, egregious allegations, by which custody and parenting time in the child's best interest can be assuredly established. "[I]f he is held in custody in violation of the constitution or a law of the United States, ... he must be discharged." *Cunningham v. Neagle*, 135 U.S. 1, 41, 10 S. Ct. 658, 660, 34 L. Ed. 55 (1890). [M.M.B.'s] welfare has been disregarded for all five years of his life. It is for his sake that the Court is asked to disturb and throw out those judgments not conceived by fact and law

but by fraud and fraud on the court and correct the record so that truth is found.

"Since the entire statutory procedure, placing the burden of proof on the claimants, violated the requirements of due process, appellants were not obliged to take the first step in such a procedure. The judgments are reversed." *Speiser*, 357 U.S. at 528–29, 78 S. Ct. at 1343–44.

M.M.B. is entitled to the writ of habeas corpus and to be entrusted into the care of his father, post-haste, as this is an emergency situation long unaddressed. *Moore v. Sims*, 442 U.S. 415, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979).

C.

"The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question." *Universal Oil Prod. Co. v. Root Ref. Co.*, 328 U.S. 575, 580–81, 66 S. Ct. 1176, 1179, 90 L. Ed. 1447 (1946) (citing *Hazel-Atlas Glass Co.*, 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250 (1944)). "The power to unearth such a fraud is the power to unearth it effectively. Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation." *Universal Oil Prod. Co.*, 328 U.S. at 580–81, 66 S. Ct. at 1179. The Court should investigate the situation in Hennepin County where this fraud transpired, and *Rhoerdanz* and *Sterling,* to uncover the breadth of the fraud that has occurred and what remedial measures might be taken.

D.

This case does not involve illegal seizure of anything contraband, illegal, or even returnable. But because of illegal seizures, M.M.B. has permanently lost the five years that he has been deprived of his father and paternal family. *United States v. Jeffers*, 342 U.S. 48, 53, 72 S. Ct. 93, 96, 96 L. Ed. 59 (1951). The only possible remedy, beyond speedy reunification, is equitable damages.

> "It is a power inherent in every court of justice so long as it retains control of the subject-matter and of the parties, to correct that which has been wrongfully done by virtue of its process. What has been given or paid under the compulsion of a judgment the court will restore when its judgment has been set aside and justice requires restitution."

United States v. Morgan, 307 U.S. 183, 197–98, 59 S. Ct. 795, 802–03 (1939).

> "The attorney who attempts by personal influence to control a judge or jury in their decision in a pending case, or who merely holds himself out as able to do so, whether or not he actually makes the attempt, and whether or not he succeeds or fails in the attempt, in short, an apostate lawyer, who is false to the lawyers' creed that justice shall be undefiled, is ejected from the courts, and as a lawyer ceases to exist. The client who with evil intent employs such an agent fares no better. ... To [her] also the doors of the courts are closed. From the moment that [she] ceases to depend upon the justice of his case and seeks discriminatory and favored treatment, [she] becomes a corrupter of the Government itself and is fortunate if [she] loses no more than the rights [she] seeks to obtain."

Root Ref. Co., 169 F.2d at 541. "[T]here is something more to give character and degree to the crimes then the seeking of a felonious gain, and it may properly become an element in the measure of their punishment." *Weems v. United States*, 217 U.S. 349, 380, 30 S. Ct. 544, 554, 54 L. Ed. 793 (1910).

"The very fact that an act is characterized as negligent indicates that harm to another as the result of it was neither foreseen *nor intended,* although a reasonable [person] would have foreseen danger to others because of it and would have adopted another course of conduct." *Noske v. Friedberg*, 713 N.W.2d 866, 876 (Minn. Ct. App. 2006) (quoting *Hanson v. Hall,* 202 Minn. 381, 385, 279 N.W. 227, 229 (Minn.1938)). Bad faith is an element of fraud. *Noske*, 713 N.W.2d at 876 (citing *Prichard Bros., Inc. v. Grady Co.,* 436 N.W.2d 460, 466–67 (Minn.App.1989)). "Fraud is an intentional act that 'is distinguished from negligence by the element of scienter required.'" *Noske*, 713 N.W.2d at 876 (quoting *Florenzano v. Olson,* 387 N.W.2d 168, 173 (Minn.1986)). "'There is no doubt of fraudulent intent when the misrepresenter knows or believes the matter is not as he or she represents it to be.'" *Id.*

> "There is plausible concern about attorneys **who, having taken an oath to uphold justice**, engage in **fraudulent behavior intended to deceive a party to an action or proceeding before the court**. This type of fraud **damages the integrity of the judicial system and weakens the faith of the citizenry in the third branch of the government**. Reading section 481.071 as enforcing a more severe punishment on attorneys who commit fraud within an action or judicial proceeding is not an absurd or unjust interpretation."

Baker v. Ploetz, 616 N.W.2d 263, 272 (Minn. 2000) (emphasis added). "[B]ased on the plain meaning of the language used in Minn.Stat. § 481.07, we hold that the statute applies only to attorney fraud committed within the context of an action or judicial proceeding." *Id.*, 616 N.W.2d at 269. "Because section 481.071 makes attorney fraud a misdemeanor, it is a criminal statute." *Id.*, 616 N.W.2d at 272.

Both sections separately impose "treble damages on an attorney who intentionally deceives a court or a party to an action or judicial proceeding." *Id.*, 616 N.W.2d at 269 (quotation omitted). Both sections define "party" as "a person involved in an action or judicial proceeding." *Id.*

"Absent an attorney-client relationship, liability arises only if the attorney committed fraud, acted with malice, or otherwise committed an intentional tort." *McIntosh Cnty. Bank v. Dorsey & Whitney, LLP*, 726 N.W.2d 108, 119–20 (Minn. App. 2007), *rev'd*, 745 N.W.2d 538 (Minn. 2008) (citing *Eustis v. David Agency, Inc.*, 417 N.W.2d 295, 298 (Minn. App. 1987)). *In re Disciplinary Action Against Brehmer*, Brehmer "attempted to perpetrate fraud on the court by making false statements" by denying the existence of records and aided his client in violating provisions of the client's court orders and aided her in denying custody and parenting time to the other parent. He filed false affidavits and failed to comply with deadlines. "Brehmer's misconduct was consistent throughout the case, and he repeatedly violated the [] rules." 620 N.W.2d 554, 556–59 (Minn. 2001).

Father is party to this proceeding as is M.M.B., represented by his father. Lynn Klicker Uthe and Susan Ann Cragg participated in the proceedings of this case as attorneys for Mother. Said attorneys committed fraud "within the context" of this proceeding, and in so doing inflicted on **M.M.B.** and his father enormous damages. "A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with

or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1. Counsel to Mother knew that Mother's case was false and aided Mother in furthering it. Whether or not they knew the falseness of individual false acts is immaterial. "The prosecutor's affirmative misstatement that respondent did not have to believe the statements were untrue is clearly prejudicial." *State v. Grose*, 387 N.W.2d 182, 188 (Minn. App. 1986). "[I]f any of the allegations are upheld as within the statute of limitations, all of the allegations, even those involving incidents occurring more than three years before the indictments, may be prosecuted." *Id.*, 387 N.W.2d at 189.

Lynn Klicker Uthe of LYNN KLICKER UTHE, LTD., trial counsel to Mother, is "guilty of a misdemeanor" under Minn. Stat. § 481.07 and also again the same under § 481.071. "[I]n addition to the [criminal] punishment[s] prescribed therefor," under Minn. Stat. §§ 481.07 and 481.071, Lynn Klicker Uthe is "liable to [M.M.B. and Father] in treble damages" under Minn. Stat. § 481.07 and "shall forfeit to [M.M.B. and Father] treble damages" under Minn. Stat. § 481.071.

Susan Ann Cragg of LYNN KLICKER UTHE, LTD., other counsel to Mother, is "guilty of a misdemeanor" under Minn. Stat. § 481.07 and also again the same under § 481.071. "[I]n addition to the [criminal] punishment[s] prescribed therefor," under Minn. Stat. §§ 481.07 and 481.071, Susan Ann Cragg is "liable to [M.M.B. and Father] in treble damages" under Minn. Stat. § 481.07 and "shall forfeit to [M.M.B. and Father] treble damages" under Minn. Stat. § 481.071.

It is equitable to deny Mother "all relief." *Root Ref. Co.*, 169 F.2d at 535.

E.

> "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Mathews, 424 U.S. at 334–35, 96 S. Ct. at 903.

The Court has stated that "the overall rate of error for all denials" is necessary to gauge the "reliability and fairness of a system of procedure." *Mathews*, 424 U.S. at 347, 96 S. Ct. at 908 (citing *Fusari v. Steinberg*, 419 U.S. 379, 383 n. 6, 95 S. Ct. 533, 536-537, 42 L. Ed. 2d 521 (1975)). As this case is a testament, that rate, under the clearly erroneous standard, is definitively elusive; however, it may not be so difficult to gauge. As Justice White stated, "It is hardly rare in this world of divorce and remarriage for a child to live with the 'father' to whom her mother is married, and still have a relationship with her biological father," *Michael H.*, 491 U.S. at 162, 109 S. Ct. at 2362 (WHITE, J., dissenting), and as Justice Brennan, in the same case, stated, "[T]he suggestion that the situation confronting us here" – termination of a parent-child relationship without due process – "does not repeat itself every day in every corner of the country" is "one of make-believe." *Michael H.*, 491 U.S. at 156–57, 109 S. Ct. at 2359 (BRENNAN, J., dissenting).

On behalf of M.M.B., I, Kyle Dalke Bachmayer, declare under penalty of perjury that the foregoing is true and correct. Executed on March 26, 2023.

/s/ Kyle Dalke Bachmayer.