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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Anmarie Calgaro,)	File No. 16-CV-3919
)	(PAM/LIB)
Plaintiff,)	
)	
vs.)	St. Paul, Minnesota
)	January 26, 2017
St. Louis County; Linnea)	10:02 a.m.
Mirsch, individually and in)	
her capacity as Interim)	
Director of St. Louis County)	
Public Health and Human)	
Services; Fairview Health)	
Services, a Minnesota)	
nonprofit corporation; Park)	
Nicollet Health Services,)	
a nonprofit corporation;)	
St. Louis County School)	
District; Michael Johnson,)	
individually and in his)	
official capacity as Principal)	
of the Cherry School,)	
St. Louis County School)	
District; and J.D.K.,)	
)	
Defendants.)	

BEFORE THE HONORABLE PAUL A. MAGNUSON
UNITED STATES DISTRICT COURT JUDGE

(MOTIONS HEARING)

Proceedings recorded by mechanical stenography;
transcript produced by computer.

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APPEARANCES (Cont.)

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1 important for the rest of their lives. It's critically
2 important that families be permitted to gather on holidays,
3 that in times of emergencies in life that they be permitted
4 and be reconciled to be together; and that reconciliation is
5 critically important.

6 And I really seriously question has anybody,
7 anybody taken the time to sit down with the mother and the
8 child and find a neutral, safe place for them to be able to
9 communicate with one another relating to the reconciliation
10 and dealing with emancipation issues. I don't see any
11 indication it's ever been done and I think it's tragic if it
12 has not. If it has, fine, but if it has not, Counsel, that
13 is far more -- far, far more important than all the advocacy
14 we can have in this courtroom.

15 Okay. With that, lead off, Counsel.

16 MR. PONTO: Thank you, Your Honor. Your Honor, in
17 particular we appreciate your concern. Mike Ponto and with
18 me is Asaf Orr, both representing in this case the minor,
19 E.J.K., and certainly we share your view that it is the
20 individuals impacted by this lawsuit that the Court needs to
21 be thoughtful of.

22 I will tell you very candidly, Your Honor, that in
23 the course of this litigation we have not had an opportunity
24 to try to bring together E.J.K. and her mother and it has
25 been our hope that we can put aside what we believe to be

1 ill-considered litigation so that that becomes a chapter
2 behind both of them and both of them are able to move
3 forward in a forum and in a situation much more appropriate
4 to healing the family divide which unfortunately brings us
5 here today.

6 Your Honor, at 17 and a half years old now E.J.K.
7 is less than six months from Minnesota's age of majority.

8 THE COURT: Mr. Ponto, is your client any more
9 than just a nominal defendant in this case?

10 MR. PONTO: Our client is a nominal defendant.
11 Mr. Kaardal has suggested that she needed to be joined under
12 the rules of joinder. I think that's probably not correct.
13 I think the relief that Mr. Kaardal seeks could be granted
14 in her absence.

15 At the same time if you look at the injunctive
16 relief that Mr. Kaardal is asking for, I think it would be
17 equally clear that our client is entitled to intervene as a
18 matter of right and for that reason, because that relief
19 directly and seriously would impact E.J.K.'s life, her
20 ability to achieve a high school graduation, her ability to
21 make her own medical decisions and to pursue what to her are
22 very important -- is very important medical care, those are
23 directly impacted.

24 And while one might hope that this is a situation
25 where it was merely a mother who was dealing with a troubled

1 child and wanted to have some influence over that child, if
2 you look at the relief that Ms. Calgaro is asking for and
3 the relief that this Court might have an ability to provide,
4 it has nothing to do with enhancing the parent-child
5 relationship or providing some influence. Quite the
6 contrary --

7 THE COURT: The other thing is in representation
8 of the minor child, rather than continue to pursue it
9 through this, I don't have jurisdiction over it, but why in
10 the world haven't you just simply gone up to the district
11 court in St. Louis County and filed a declaratory judgment
12 action suggesting that this is an emancipated child?

13 Right now you've got nothing out there except a
14 letter signed by a lawyer. More power to lawyers, that's
15 what we do for a living, but, you know, it could be just
16 anybody that could have signed that.

17 MR. PONTO: I think the answer is there's
18 certainly reasons and circumstances that that might be a
19 critical and an important thing to do in representing this
20 minor, but I think really the question before the Court is
21 not whether E.J.K., the minor here, is emancipated or not.
22 There's a lot of discussion about that, but the issue that
23 is placed before the Court is whether the mother's rights,
24 constitutional rights as a parent, have been violated.

25 THE COURT: Counsel, it seems to me a mother's

1 rights are so much more well-defined by that determination.

2 MR. PONTO: That would be true, you know, and it
3 may be that there is a situation and that there is a
4 reason --

5 THE COURT: And I don't think I have the power to
6 make that determination, by the way. I think that's
7 exclusively a state court decision.

8 MR. PONTO: I think, Your Honor, you're probably
9 right and I think that that depends on -- it's a decision
10 that is dependent on the factual scenario. I don't think
11 that any of that helps us resolve the issue that's before us
12 today.

13 I appreciate very much that Your Honor is focused
14 on those issues. I think those are the very practical
15 issues that E.J.K. needs to work her way through and that
16 Ms. Calgaro needs to deal with. But the point is and the
17 reason we're all here today is that this is not an
18 appropriate forum for working through any of those issues.

19 So the question that is presented in this forum
20 and the question that comes primarily before the Court on
21 the motions of all defendants is whether Ms. Calgaro's
22 constitutional rights were violated and whether she has
23 otherwise stated any cognizable claim.

24 I am going to leave most of the time for the
25 defendants' arguments to counsel for the --

1 THE COURT: Sure.

2 MR. PONTO: -- other defendants. I don't want to
3 take up too much of the time.

4 THE COURT: Sure.

5 MR. PONTO: With the Court's permission, I do want
6 to address one issue and that is I think it might be helpful
7 to call the Court's attention once again to the line of
8 cases making clear that Ms. Calgaro cannot state a claim for
9 violation of parental rights where she's not alleged that
10 the state or a state actor has either required or prohibited
11 any activity. The Court has a lot of briefing and there are
12 numerous cites to cases that stand for that proposition,
13 most extensively in our initial brief at pages 14 through
14 19.

15 The Sixth Circuit case of Doe vs. Irwin I think is
16 helpful because it's the most factually analogous case.
17 That case involved a state's distribution of contraceptives
18 to minors without parental notification.

19 Here Ms. Calgaro, with respect to the medical care
20 that E.J.K. is seeking, clearly would like to have
21 notification and an opportunity to participate in those
22 medical decisions.

23 After first looking fairly comprehensively at the
24 state of the law, the Sixth Circuit I think correctly looked
25 at the contraception case before it and observed that in

1 that case there was no requirement that the minors avail
2 themselves of the right that was offered and that there was
3 no prohibition of any sort against the parents, the
4 plaintiffs in that case, participating in the decisions of
5 the minors.

6 The same is true here. There is a state statute
7 in place in Minnesota. It permits a very limited class of
8 minors, which our client fits into, to make their own
9 medical decisions. It does not require them to seek medical
10 care or to make their own decisions and it does not in any
11 way prohibit Ms. Calgaro from attempting to influence or
12 participate in those decisions.

13 The fact that that is not happening is a
14 reflection of the unfortunate family dynamics that are in
15 place and I would submit, Your Honor, nothing more than
16 that.

17 Unfortunately this action here in this court can't
18 remedy that family situation. I would hope that we have an
19 opportunity in our representation of E.J.K. to help her deal
20 with the many issues she faces in other forums, but there's
21 no constitutional violation here.

22 Had Calgaro identified a constitutional violation,
23 then I would submit Your Honor would be in a position where
24 it would be appropriate for this Court to balance her rights
25 as a parent with the equally clear and equally important

1 constitutional and statutory rights which our client has as
2 a minor and as every other person does.

3 Because there's no constitutional violation that's
4 been identified, no prohibition, no requirement, this Court
5 need not reach that issue, need not engage in that
6 balancing.

7 Unless the Court has questions on that issue, I'll
8 turn the remaining time for the defendants' argument to my
9 co-counsel.

10 THE COURT: Very well. Thank you.

11 Mr. Helmers.

12 MR. HELMERS: Good morning, Your Honor. Trevor
13 Helmers on behalf of Independent School District 2142,
14 St. Louis County Public Schools, and Principal Michael
15 Johnson.

16 First of all, I would like to say to your main
17 point this morning, I would echo the statements of counsel
18 for the student, that this is neither the proper forum nor
19 is the school district or the principal proper parties to be
20 involved and we would ask that you dismiss these claims in
21 order to allow time for the mother and child to seek
22 reconciliation without the involvement of all of the other
23 parties.

24 And as we are --

25 THE COURT: Counsel, I understand the arguments

1 that are coming, I understand, you know, Monell and all that
2 stuff that's out there, but on the practical side, what in
3 the world does it hurt to let a mother know the grades a
4 student is getting? What's wrong with that? I'm just
5 mystified.

6 MR. HELMERS: And I would share with you --

7 THE COURT: And again I am going to be candid. I
8 am mystified even more because -- it doesn't have anything
9 to do with this case, but I know that parents no longer get
10 a student's grades from college even though the parents are
11 paying \$50,000 a year to have the kid there. You know, it's
12 practical, that's all there is to it.

13 MR. HELMERS: And I would share with you that the
14 answer is going to differ based on whether I'm talking about
15 our motion to dismiss versus our summary judgment motion.

16 And on the response to the summary judgment
17 motion, the parent never asked. She never came in and asked
18 anyone for grades. She did not ask for access to their
19 student portal, which that student portal is the way that
20 parents sign in electronically and look at records, look at
21 attendance, look at grades. That's how parents get it.

22 And frankly, again, on the summary judgment side
23 of things, we have declarations to that effect in the
24 record, which calls into fact on the summary judgment motion
25 side the very reason why that must be dismissed, because the

1 very fundamental allegations that are being made in this
2 case are in dispute.

3 And, frankly, on the response there were more
4 facts brought in, which would just further show that the
5 facts are in dispute on the summary judgment argument. We
6 feel that that shows that summary judgment must be denied.

7 And turning back to the motion to dismiss
8 argument, it would be a matter that we're talking about --
9 it simply is not a constitutional right that a parent has
10 that's been outlined by any court.

11 I understand that it's certainly -- and I am a
12 parent as well and I feel the exact same way, that of course
13 a parent should have access, but what we're talking about
14 here is a claim of a constitutional violation.

15 And there is no constitutional right that's being
16 violated here, and that is the threshold issue. And
17 plaintiff has failed that test because there is no violation
18 by the school district or its principal of a life, liberty,
19 or property interest that violated the Due Process Clause.

20 What we're talking about here and what has been
21 repeated in plaintiff's briefing is the terminating parental
22 rights, considering the child emancipated. But these are
23 legal conclusions, not factual allegations.

24 And when looking only at the Complaint, the only
25 facts that are alleged are that the district denied access

1 to records and the ability to make educational decisions;
2 and neither of these is a constitutionally-protected right.

3 The constitutional right that has been cited
4 multiple times by plaintiff is the right to make decisions
5 regarding the care, custody, and control of the children and
6 in the educational realm that includes the right to direct
7 the education and upbringing of one's child, but that is a
8 very -- it is a very qualified and narrow right. As
9 discussed -- and I'd point you to the Stevenson case from
10 our briefing. This right is very narrow.

11 The holding in the Meyer and Pierce cases is only
12 that the Fourteenth Amendment prohibits a state from denying
13 parents the right to send their child to a private school.
14 Constitutionally a right to direct the education of one's
15 child extends only to that right to choose that private
16 versus public education under existing precedent.

17 And we don't have an argument about that here.
18 There's no argument, there's no claim that the district
19 interfered with her ability to send this student to a
20 private school and there's, thus, no constitutional
21 violation, which is the very foundational issue upon which
22 all of our arguments ultimately rely and upon which all of
23 the arguments the plaintiff has to prove before we can get
24 to any of those arguments.

25 And additionally, there's no court that's held

1 that there's any constitutional right to access a child's
2 education records as well; and that's from our briefing as
3 well.

4 And without this protected liberty of property
5 interest, plaintiff is simply not entitled to this due
6 process and cannot succeed upon her claims.

7 It sounds as though Your Honor is very well
8 familiar with the Monell arguments. I will not belabor
9 those points other than to point out merely that in response
10 to the district's arguments on the Monell claims, plaintiff
11 only repeated claims that the principal is the final
12 policymaker. But that is a question of law and the law is
13 quite clear that the principal, a school principal, is not
14 the final policymaker for a school district in the state of
15 Minnesota.

16 And with that, I would stand for any further
17 questions, but otherwise I'll cede my time to my
18 co-defendants.

19 THE COURT: Very well. Thank you, Mr. Helmers.

20 Mr. Wilk.

21 MR. WILK: Good morning, Your Honor. David Wilk
22 here on behalf of Park Nicollet. Your Honor, Park Nicollet
23 has an argument that's somewhat different from what you've
24 heard so far and it relates to this --

25 THE COURT: You're not a government entity.

1 MR. WILK: Yes, Your Honor. Thank you. I will
2 spend a moment on that because I do think that is key and
3 it's key to what the Court has to do here today because
4 absent plausible allegations that Park Nicollet is a
5 government actor or a state actor, the claim fails.

6 It fails for reasons that have nothing to do with
7 what Your Honor pointed out earlier about parents and
8 minors. As important as that relationship is, we have
9 constitutional limitations on a Fourteenth Amendment claim
10 and a 1983 claim.

11 And so we look here at the state actor notion and
12 when the Complaint was filed it seemed as though the
13 argument was, well, this entity, Park Nicollet, is a private
14 entity, but it's receiving some government funds. And
15 there's a host of cases from this court and the Eighth
16 Circuit and the United States Supreme Court going back
17 decades saying that is not enough.

18 Even entities that receive the vast majority of
19 their funding from government, even entities that receive
20 that funding and along with it licensure requirements and a
21 host of administrative requirements are not state actors.

22 And so at a minimum that's not enough to claim.
23 Now the issue becomes, well, you're really emancipating
24 people. Well, no. This is a physician-patient
25 relationship. It's different from the relationship Your

1 Honor focused us on at the beginning, but it is an important
2 relationship.

3 It's a relationship that requires the physician,
4 if he or she is doing their job, to disclose risks and to
5 obtain consent. And the State of Minnesota has identified
6 narrow circumstances under which minors may provide
7 effective consent and physicians and providers may rely on
8 it.

9 It doesn't mean anybody has been emancipated. It
10 means somebody is permitted to consent to care, somebody who
11 is providing for their own shelter, somebody who is
12 providing for their own finances.

13 And all the law has said is that somebody outside
14 of that physician-patient relationship does not get to
15 insert him or herself and dictate the care given to a minor
16 who has the authority to consent.

17 Your Honor, we've spilled a lot of ink and we've
18 discussed a lot of cases and I am more than happy to spend
19 time on it, but --

20 THE COURT: There is plenty here (indicating).

21 MR. WILK: I am seeing that the Court has held up
22 a stack of it, and I've got a stack just like it.

23 I appreciate your time. I appreciate your
24 observations. And if the Court has no questions, I will sit
25 down and listen to the remainder of the presentation.

1 THE COURT: Okay. Very well.

2 MR. WILK: Thank you, Judge.

3 THE COURT: Thank you very much.

4 MR. WILK: Thank you.

5 THE COURT: Mr. Peterson, welcome back on a
6 different subject. Are you going to say me too now?

7 MR. PETERSON: Thank you, Your Honor. May it
8 please the Court. It's good to see you. I represent
9 Fairview Health Services. We join in the arguments of the
10 prior defendants, particularly with regard to the state
11 action.

12 Fairview is a private entity and all I'd say about
13 the receipt of government funds is that every patient -- if
14 every medical decision involving every patient with
15 government-funded medical assistance becomes state action,
16 you'll be expanding federal jurisdiction dramatically and I
17 don't think --

18 THE COURT: I'd be busy, wouldn't I?

19 MR. PETERSON: I don't think the law supports that
20 either in this district or the Eighth Circuit or the Supreme
21 Court.

22 So we'd ask both that our motion to dismiss be
23 granted and that the plaintiff's motion for summary judgment
24 against us be denied. Thank you.

25 THE COURT: I thank you very much.

1 Just a minute, Mr. Kaardal. We'll get you --
2 we're just about there.

3 MR. CAMPANARIO: Good morning.

4 THE COURT: Good morning.

5 MR. CAMPANARIO: Nick Campanario on behalf of
6 St. Louis County and Linnea Mirsch. I just have three very
7 brief points.

8 First, with regard to Ms. Calgaro's motion -- I
9 apologize if I am pronouncing that wrong, but with regards
10 to Ms. Calgaro's motion for summary judgment, as we've
11 pointed out, her motion papers don't contain any discussion
12 or analysis of her claims against the county or Ms. Mirsch
13 and so from our perspective her motion is really a
14 nonevent --

15 THE COURT: Abandoned.

16 MR. CAMPANARIO: -- as far as we're concerned.

17 Second, we've moved for summary judgment on
18 Ms. Calgaro's due process claim relating to E.J.K.'s medical
19 assistance and that motion is based on the declaration of
20 Deborah Waldriff, which shows that all of the government
21 decisions and actions in this area were taken at the state
22 level and not at the county level. And there's no
23 admissible evidence suggesting that the county was involved
24 with the medical assistance piece in any way and so we would
25 ask the Court to grant summary judgment on that claim.

1 THE COURT: Counsel, it's a little difficult for
2 me to understand because somehow or another the state money,
3 the taxpayers' money, goes down through a series of pipes.
4 I kind of think of it like plumbing pipes and there are a
5 bunch of valves in there, you turn things on and off. Isn't
6 the county one of those valves that turns things on and off?
7 And if they do turn things on and off, then don't they
8 become involved in this?

9 MR. CAMPANARIO: In some cases they are involved
10 in that pipeline, but in a case like this, and this is all
11 fairly recent with the Affordable Care Act and the MNSure
12 process that's been put in place, when someone applies for
13 medical assistance through MNSure.org, the website, as
14 E.J.K. did, all of those responsibilities are handled by the
15 state and the county is not involved; and that's spelled out
16 and explained in Ms. Waldriff's declaration.

17 THE COURT: Okay.

18 MR. CAMPANARIO: My final point with respect to
19 the other claims against us, we've provided several reasons
20 why those claims fail at the pleading stage. We didn't see
21 anything by way of a convincing response in any of the
22 briefing and so we'd ask the Court to grant our motion for
23 judgment on the pleadings with respect to those claims.

24 THE COURT: Okay.

25 MR. CAMPANARIO: That's all I have.

1 THE COURT: Very well. Thank you very much.

2 Okay, Mr. Kaardal, now you can stand up.

3 MR. KAARDAL: Good morning, Your Honor. I
4 appreciated your remarks at the beginning. I want to assure
5 the Court that any action I've taken on behalf of
6 Ms. Calgaro is rooted in her unconditional love for her
7 child and if there's any questions about her credibility or
8 authenticity about that, I'd be glad to take them.

9 With respect to this case, this case is about
10 government action and I've been retained to lay out the
11 constitutional claims here in a careful way and although it
12 won't share the emotion --

13 THE COURT: But, Counsel, I really struggle in
14 this situation. You've drawn up a more than 200-paragraph
15 complaint kind of picking up all the mud and throwing it
16 against the wall and hoping something sticks. And for the
17 life of me I can't understand why in the world you just
18 didn't go up to the St. Louis County Courthouse, draw up a
19 two-page complaint and maybe about a three-page affidavit by
20 your client and file a declaratory judgment action and make
21 that emancipation determination. Once that's made, as far
22 as I'm concerned, 90 plus percent of this stuff falls in
23 line.

24 MR. KAARDAL: Judge, that is the hermeneutic key
25 in the sense of to interpret the legal aspects of this case

1 we have to get the fundamentals down correctly. Minnesota's
2 declaratory judgment action does not provide a cause of
3 action as you suggest. There has to be --

4 THE COURT: Well, it sure does. It makes the
5 right and it's an exclusive right in the state. As you
6 know, this is a court of limited jurisdiction. I don't have
7 jurisdiction over that. Once that determination is made,
8 then, as I say, I think things fall into place. I don't
9 know why in the world we've got to go monkeying around with
10 a lot of constitutional issues when there's a very
11 straightforward thing --

12 MR. KAARDAL: But, Judge, it --

13 THE COURT: -- to set it in place.

14 MR. KAARDAL: I'm very sympathetic. I want things
15 to be simple, but in this aspect the Court has gotten the
16 law on emancipation a little bit wrong. Just because we
17 throw the declaratory judgment action in there doesn't make
18 the Court right.

19 So in the very first instance -- you can check the
20 cases. You can check the Minnesota judicial website on the
21 issue. In the very first instance the common law provides
22 in Minnesota that a child can petition for emancipation.

23 THE COURT: Yes.

24 MR. KAARDAL: There's nothing in the common law,
25 not a thing, there's not one phrase in a Minnesota court

1 case, there's not one thing on the judicial website, there's
2 no treatise that authorizes a parent to file a petition to
3 de-emancipate a child. This hermeneutic key, this asymmetry
4 in common law is very --

5 THE COURT: Counsel, that's not what you're asking
6 for. You're asking that the child be -- well, yeah, the
7 child, in fact, is not emancipated. It's not
8 de-emancipated. You're saying that the child is not
9 emancipated.

10 MR. KAARDAL: The consequence of the government --
11 the agencies' actions in this case are the termination of
12 parental rights with respect to my client and what we're
13 talking about is a common law of Minnesota.

14 And you're right, this court is a court of limited
15 jurisdiction and it doesn't frequently visit issues of state
16 common law, but since here the original allocation of
17 parental rights is under Minnesota common law and we don't
18 have a statutory codification of the emancipation process,
19 which even the judicial website acknowledges by stating
20 Minnesota statutes do not specifically define a process by
21 which a minor can become emancipated, we're left with the
22 original common law allocation of parental rights over minor
23 children.

24 Granted, the state legislature has set the age at
25 18. I would agree with the Court that the state legislature

1 can lower the emancipation age, there's no question of that,
2 even by subject area.

3 But when the state legislature chooses by subject
4 area to authorize agencies, as here the county and the
5 school district claims that, and then also with respect to
6 the medical agencies, then we have a possible constitutional
7 issue because you have case-by-case determinations by third
8 parties.

9 The State of Minnesota has chosen --

10 THE COURT: Counsel, I'm not disagreeing with what
11 you're saying, but I think the difficulty in this entire
12 case arose because, you know, some well-meaning lawyer at
13 Southwest Legal Aid or whichever one it was wrote a letter
14 and, you know, that letter is worth probably the paper of
15 the fifth person he met on the street signing the letter,
16 but the fact is a bunch of people, inadvertently, properly,
17 with malice aforethought, or whatever else, obeyed it and
18 that's led to the difficulties we're into today.

19 MR. KAARDAL: Right. Professor Karl Llewellyn,
20 the great University of Chicago Law School professor, has
21 this great quote: Technique without ideals is a menace.
22 Ideals without technique is a mess.

23 I am not suggesting here any menacing thoughts on
24 behalf of the defendants or the agencies, but when you
25 have -- when things are done without technique, you can have

1 a mess and here there's a constitutional mess.

2 And the constitutional mess is, as I've stated,
3 under common law parental rights are allocated to the parent
4 over the child. There's a state statute that says that
5 occurs until 18.

6 And if the minor child, as the Court has
7 indicated, had filed a petition to emancipate the child, we
8 would have had that ideal. The ideal would have been we
9 would have had termination of any parental rights with due
10 process to the parent. There would have been notice for the
11 parent and an opportunity to be heard.

12 I know the Court would agree that parental rights
13 are constitutionally protected and that there are pages and
14 pages of parental due process rights described in state
15 statutes for marital dissolution, for paternity, and for
16 child protection.

17 So in Minnesota our statutes do not have
18 paragraphs of protection of parental due process rights in
19 the emancipation area as they do in these other subject
20 areas, so we're stuck with the common law.

21 And we can pretend -- and my friends representing
22 the defendants have not identified this absence of statutory
23 law as an issue, but the lack of codification means we have
24 the common law.

25 The common law allocates all the right to my

1 client over the child because the statute says until 18, and
2 then the U.S. Constitution says those parental rights can't
3 be terminated without due process. Now, we know the state
4 legislature in Minnesota believes that because in these
5 areas of marital dissolution, paternity, and child
6 protection the statutes are there.

7 Now, I know the Court has expressed discomfort,
8 but these are fundamentals. This is what we build a case
9 on. We build it on what the law is. And the common law of
10 Minnesota is and we know that the judicial website has said
11 we have no statutory process for emancipation.

12 And I'm testifying to the Court, and I know
13 because I had the same reaction that the Court had to me
14 when the previous attorneys Ms. Calgaro talked to said, I
15 can't do anything for you. I had the same reaction the
16 Court did. Well, go file in state court.

17 And then I did my research and I said to
18 Ms. Calgaro, I can't do anything for you in state court
19 either because in order to bring an action in state court
20 regarding Ms. Calgaro's rights with respect to her child,
21 she would need the common law on her side, which isn't on
22 her side for the reasons I stated; or two, a statute and
23 that doesn't exist either. And I can refer back to the
24 judicial website, but I already have two or three times.

25 THE COURT: Okay.

1 MR. KAARDAL: So here we are. So I'd have to ask
2 the Court: What would you have done?

3 THE COURT: I'll tell you.

4 MR. KAARDAL: All right. And this is what I've
5 done, and I think that my case is based on the lack of a
6 procedure in state court.

7 The declaratory judgment action, even I think some
8 of the fellow judges here in the U.S. District Court -- the
9 Minnesota Declaratory Judgment Act is not a cause of action.
10 You have to have something else, let's say a common law
11 claim, a statutory basis. The Minnesota Declaratory
12 Judgment Act does not provide a private cause of action.
13 Maybe I wish it would, but it doesn't. And there's several
14 recent U.S. District Court decisions for the District of
15 Minnesota that have indicated that.

16 So then with respect to how does that procedure
17 work in the state court, we have the judge determines,
18 according to the best interests, the fact questions
19 regarding emancipation and the termination of parental
20 rights can be full, partial, temporary, or conditional.
21 That is an ideal process.

22 The thing that's changed here, Judge, is that we
23 have a -- that process is not codified, but yet we have some
24 statutes that create a situation where the county and I'll
25 throw the school district in there, although they don't have

1 a statute, and then also the medical agencies rely on.

2 So as the Court would know, in Minnesota
3 administrative or judicial quasi -- excuse me,
4 administrative and quasi-judicial decisions are made
5 routinely with due process in mind.

6 In Minnesota we have, in fact, a whole department
7 called the Office of Administrative Hearings and they
8 conduct proceedings establishing or terminating rights all
9 over the place and they provide a due process.

10 I've been involved in township, municipal, county,
11 state, and federal quasi-judicial or administrative
12 processes where due process is provided. I would, in fact,
13 say it's sort of a constitutional norm that when there are
14 quasi-judicial or administrative decisions being made by the
15 executive branch, that notice and opportunity to be heard is
16 given to all affected parties.

17 Again, at this point I just want to stop for a
18 moment and mention that I do think there's a hermeneutic key
19 here in the sense that the common law provides E. with the
20 opportunity to petition for emancipation, which then
21 counsel, my friends representing the defendants, have
22 answered the question that he isn't ready to file that yet.
23 I think the Court asked that squarely because that is the
24 trigger for the due process rights that we're interested in.

25 And the Court's initial question ends up being the

1 gestalt. It ends up being -- yeah, it is. I mean, if the
2 Court recognizes under the common law in Minnesota a post
3 administrative decision right to file a petition in district
4 court to de-emancipate, I -- yeah, then that's what we're
5 looking for. And if the Court can assure us that we're
6 guaranteed a right to file a common law action in state
7 court to vindicate our position on de-emancipation, that's
8 it.

9 But I would assert to the Court -- and I know
10 these are the situations where the judge ends up making the
11 final decision. I would assert that is the procedural due
12 process claim, that we're here because we don't have that
13 process.

14 If the Court were to say you have that process in
15 state court -- we either have it under the Constitution or
16 we have it under the Court's view of the common law. My
17 interpretation of the common law is we don't have that right
18 under common law, but the Constitution requires us to have
19 that right and so the Court would be saying you have that
20 right.

21 Now, if we already have it -- but as I said
22 before, I haven't found one Minnesota Supreme Court
23 decision. Of course there's no statutory procedure, as
24 confirmed in the judicial website, that a parent has that
25 cause of action. So with respect to the defendants

1 justifying their conduct based on the statutes involved, the
2 statutes themselves do not provide the private cause of
3 action.

4 So the Court's position -- I'm just expanding on
5 the question -- would be that, well, why doesn't the
6 Declaratory Judgment Act under Minnesota law, why doesn't
7 that statute provide the cause of action under 265D.05 [sic]
8 and 144.341? And it's because the Declaratory Judgment Act
9 has been read by the U.S. District Court and the Minnesota
10 courts as not providing a private cause of action regarding
11 any statute.

12 In other words, like the Minnesota Environmental
13 Rights Act has a specific provision authorizing standing and
14 the right to sue, the Declaratory Judgment Act does not
15 provide a general right to sue under any statute.

16 So what we're complaining about with respect to
17 256D.05 and 144.341 in part is that the statutes don't
18 provide a process for notice and an opportunity to be heard
19 for the parent either prior or after the deprivation; and
20 then secondly, the common law doesn't provide it either.
21 And then now there's a third argument I guess I have to
22 respond to and that is, well, the Minnesota Declaratory
23 Judgment Act does. Well, that doesn't either.

24 So the specific statute doesn't provide it, the
25 common law doesn't provide it, the Minnesota Declaratory

1 Judgment Act doesn't provide it. So where are we?

2 With respect to the specifics of the school
3 district, and I guess it colors kind of everything, the
4 letter of emancipation, that the letter of emancipation
5 viewed in its best light would be the view that the author
6 is taking the position that the common law recognized the
7 rights of the child.

8 And, again, our view is that the common law,
9 absent a court order, recognizes that the parents have the
10 right over the minor child subject to the age of
11 emancipation, which is set by statute.

12 It's interesting with respect to the school
13 district and its finding of homelessness that the
14 McKinney-Vento Homeless Assistance Act actually provides,
15 after the school district determines the child is homeless,
16 that notice of the decision and a right to appeal or to
17 contest the decision is to be sent.

18 This is absolutely routine for state legislators,
19 drafters of administrative rules and so forth, when the
20 government makes a decision regarding a minor child, to
21 provide notice to the parent. That's part of that
22 procedural due process right and it makes sense.

23 So when we look again at how we do quasi-judicial
24 decisions, from the smallest township to the federal
25 agencies, or you can also call them administrative

1 decisions, there's always a notice and an opportunity to be
2 heard.

3 So what we like about the judicial process in
4 district court regarding the emancipation petition is that
5 it is one done with process, a notice and opportunity to be
6 heard.

7 Our concern is that under these statutes and the
8 way these defendants have acted, it's treated as if it were
9 optional. My client's parental rights and the attendant due
10 process rights are not optional.

11 Under Minnesota common law my client has the
12 rights over the minor child until they're terminated. Here
13 the defendants have acted as if my client's rights are
14 terminated and we haven't had that process, not even after
15 the fact.

16 And the Court would be aware that the type of
17 notice that we're talking about is even required when the
18 government takes things. So if the government takes a car,
19 that's a deprivation. Well, the government has to give
20 notice if they've seized a car as a result of an asset
21 forfeiture proceeding ancillary to a criminal prosecution.

22 So as the Court indicated at the beginning, the
23 parent-child relationship is important and I think it's more
24 important than a car and so we should take deprivation of
25 parental rights and attendant notice seriously.

1 The defendants have an easy way to respond with
2 respect to the remedy that we're seeking. The school
3 district, the county, and the medical agency providers could
4 simply say, no, not unless you have a court order of
5 emancipation.

6 The reason why that's possible, particularly with
7 256D.05, Subdivision 1(a)(1), is the phrase says, "legally
8 emancipated." One could even interpret that on the county's
9 behalf as requiring a court order of emancipation.

10 So strangely enough, the government has
11 interpreted a phrase like "legally emancipated" to deny my
12 client the notice that would be associated with a court
13 order of emancipation.

14 So the court would be uncomfortable when you have
15 a statute that has the phrase "legally emancipated" and then
16 the agency is interpreting it in such a way not to require a
17 court order of emancipation.

18 Similarly, the consequence of 144.341 regarding
19 medical services, it's true the word "emancipated" isn't
20 used, but under Minnesota common law the rights of --

21 THE COURT: Counsel, excuse me. Give me that
22 statute number again.

23 MR. KAARDAL: I'm sorry. Which one?

24 THE COURT: You just gave a statute.

25 MR. KAARDAL: I'm sorry. 144.341.

1 THE COURT: Okay.

2 MR. KAARDAL: And so indeed the word "emancipated"
3 is not used in the statute, but as a functional matter the
4 consequence of the medical service provider under 144.341 is
5 similar to the county under 256D.05 in the sense the
6 parental rights with respect to those decisions are being
7 cut off.

8 So the U.S. Constitution protects parental rights
9 from being terminated without procedural due process and so
10 as we filter through the statutes we see that, you know,
11 it's a mess and the defendants don't care it's a mess. I
12 mean, who cares? Does the state legislature --

13 THE COURT: Counsel, I don't --

14 MR. KAARDAL: What?

15 THE COURT: I think they care.

16 MR. KAARDAL: Well -- okay. Your Honor, then we
17 can disagree about whether I'm right on the common law
18 allocation of rights and the declaratory judgment action you
19 said, but these are big and powerful institutions. We're
20 talking about a school district. We're talking about a
21 county. We're talking about two significant healthcare
22 providers. And caring about a mother's decisions over a
23 child would require the law firms and these institutions to
24 find what I found, and what I found is that we're
25 emancipating children in these discrete areas without due

1 process.

2 This is not a game here where I'm finding
3 something that's private. What I found is something that's
4 public when I found the common law allocating the rights to
5 the mother, when I found the common law allowing the child
6 to emancipate by petition, when I found the common law did
7 not provide a process for her to de-emancipate after an
8 administrative decision, when I found out the statutes
9 didn't provide a cause of action for her to de-emancipate.
10 This is all something that we're, as a people, to work out
11 with respect to the constitutional parameters.

12 And so what I've done is present the case, and the
13 judge mentioned the many paragraphs and I think that I've
14 done a good job of presenting this case in an understandable
15 way if we come to agreement on what the common law of
16 Minnesota does in this regard and how the U.S. Constitution
17 protects those common law rights a parent has over a minor
18 child.

19 And the attorneys that represented Ms. Calgario
20 before who I responded to, I thought they had to be wrong,
21 but then I discovered, no, they're right, the Declaratory
22 Judgment Act does not -- only provides a remedy, not a
23 private cause of action to sue a school district regarding
24 the parental rights.

25 Finally, with respect to my friend Mr. Wilk

1 representing one of the medical clinics and my friend
2 Mr. Peterson representing Fairview, the case seems to neatly
3 fit within the idea of a traditional public function, so we
4 can associate state action with the clinics.

5 It's only this statute that I found where they
6 make decisions that in effect as a consequence terminate
7 parental rights in an important area of control, that is,
8 health care.

9 And so we have many, many cases supporting the
10 idea the public function exists and here I anticipated the
11 Court's concern about this and we asked to get an expert
12 opinion from Dr. Crabb, Kenneth Crabb.

13 And it's true based on that and what they've said
14 that they have a decision-making process, a custom and
15 policy and a decision-making process to determine whether
16 that child can make this decision on their own. And
17 apparently it's done at the front desk, whether they are
18 living on their own or whether they're able to pay it
19 regardless of the source. The issue of capacity, whether
20 they have the capacity to make the decision I guess might be
21 made later in the process. But all of that is done and that
22 sounds very, very much like what a court does as a
23 traditional function, traditional public function.

24 And so in the -- on the website, again, the
25 Minnesota court said the court reviews the petitions for

1 emancipation on a case-by-case basis if there's sufficient
2 evidence to find that a minor may live independently of his
3 or her parents or guardian.

4 So here you have the medical clinics determining
5 whether the child can make a healthcare decision independent
6 of the parent without parental consent and that is the very
7 same thing that a court may do in a petition for
8 emancipation.

9 And so we're not saying that everything they do is
10 subject to the state action analysis, but if they undertake
11 to make this determination under the statute, which they're
12 not required to do, but if they undertake that
13 decision-making process, then the parents have to be
14 afforded constitutional due process, notice and an
15 opportunity to be heard.

16 So to conclude, the Court asked at the beginning
17 of the oral argument a very difficult question regarding
18 bringing the Declaratory Judgment Act action in state court
19 and that was part of my analysis before filing the
20 Complaint, it's my principal argument here, and that is that
21 that's not available.

22 I'm asking the Court in this procedural Due
23 Process Clause complaint to find that that's the defect, and
24 the defect is the parent doesn't have a cause of action to
25 bring in district court to de-emancipate the child after

1 these administrative decisions are brought.

2 When we look at the specific statutes, 144.341 and
3 256, we find that those statutes don't provide a particular
4 cause of action, they don't require notice to the parent,
5 they don't require an opportunity to be heard, they don't
6 provide for appeal.

7 And as the Court would know, based on its vast
8 judicial experience, the U.S. Supreme Court has encouraged
9 the court to rely on its judicial experience when applicable
10 that due process associated with executive and
11 administrative decision-making in this country is simply
12 expected. We don't allow executive branch agencies,
13 administrative agencies to make decisions without notice.
14 We don't allow them to make decisions without an opportunity
15 to be heard and appeal.

16 And it seems here -- and I know the judge
17 disagreed with me with respect to saying that the defendants
18 have been inattentive to details with respect to parental
19 rights. I would suggest to the Court that their lack of
20 attentiveness to due process for the parents may mean that
21 we've forgotten how important parents are.

22 And we have to remember that parents are very
23 important in the child-rearing process, particularly with
24 teenagers and particularly with 17-and-a-half-year-olds, and
25 that we're going to do everything we can. It's not

1 something that can be done overnight, but we're going to
2 make a lifelong commitment.

3 In fact, yesterday I heard -- or this morning I
4 heard some lawyers being sworn in in the next courtroom by
5 Judge Frank making a lifelong commitment, when we become
6 admitted to this bar, to upholding the U.S. Constitution.

7 And my client's view is that because she never got
8 notice and the opportunity to be heard when the county and
9 the school district and the medical agencies deemed her
10 child emancipated, that her constitutional rights had been
11 violated.

12 Thank you, Your Honor.

13 THE COURT: Mr. Kaardal, before you go, I find
14 this kind of fascinating because the arguments that are
15 being made with respect to due process, et cetera, I
16 understand that, but underlying all of this is an extremely
17 serious matter and that is that there is contemplated a
18 surgical procedure for a sex change for the minor child. If
19 I read your responses correctly, you are not opposing that,
20 underneath it you're not opposing that procedure; is that
21 correct?

22 MR. KAARDAL: Yes.

23 THE COURT: Okay. I'm finding this entire thing
24 rather fascinating because it's not being discussed very
25 much.

1 I have to say anecdotally I've read articles to
2 the effect of people that have gone through this that have
3 been sorry of the decision that they made. I'm sure there
4 are many, many others that have not. But I get real
5 concerned when you have a minor child involved in that kind
6 of a life-changing experience making this kind of a
7 decision.

8 It's an old adage and you have all heard it a
9 million times. It happened -- in my case it happens to be
10 true. When I was 16 years old my dad was the dumbest guy I
11 ever met and by the time I was 26 he was the smartest. It
12 was amazing what he learned in that decade. It's just kind
13 of true.

14 And I'm very, very concerned about this, that
15 people -- even though it's not particularly in the documents
16 here, that this is critically important and that one has to
17 know that the right decision is being made. And I'm not --
18 I'm sitting here agnostic on that. I don't know anything
19 about the right decision. I just know the importance of it
20 and I'm a little concerned that it's being ignored. Now, if
21 I'm wrong, I'm wrong. I don't mind saying that. And I'm
22 also cognizant of what the real argument that you're
23 presenting today is.

24 MR. KAARDAL: My client is generally opposed to
25 it, but is so committed to the relationship that it would be

1 a joint decision-making process.

2 THE COURT: Okay.

3 MR. KAARDAL: And so that's what my client has
4 told me.

5 THE COURT: Okay.

6 MR. KAARDAL: And I think --

7 THE COURT: I appreciate that explanation.

8 MR. KAARDAL: And I think the only thing -- and I
9 just want to say that in light of the Court's first
10 comments, I also want to sort of apologize to my client. On
11 something that's personally significant to her, to legalize
12 it. And I warned her that that was going to happen, Judge.

13 Thank you.

14 THE COURT: Okay. Very well. Thank you.

15 Okay. Any responses, Counsel?

16 MR. PONTO: Yes, Your Honor. Thank you.

17 THE COURT: Mr. Ponto.

18 MR. PONTO: Your Honor, I think it might be
19 important first just to sort of clarify for the Court that
20 the medical care that E.J.K. is receiving does not involve
21 any surgical procedures and there are no surgical procedures
22 that she is currently seeking or that are contemplated.
23 Certainly any medical care is important and significant and
24 I can certainly understand a parent's desire to have input.

25 THE COURT: Thank you for that explanation,

1 Counsel. I have to confess I really didn't understand that.
2 When I see Fairview and Park Nicollet, I think of operating
3 rooms.

4 MR. PONTO: You know, I think everyone in this
5 courtroom can agree that we rely, among other things, on the
6 sound counseling and good medical care and there are things
7 I can't speak to and that are beyond my personal knowledge
8 regarding the doctor-patient relationships that are in
9 place, but I don't think anyone questions their
10 professionalism or their ability to provide good sound care.

11 THE COURT: Okay. Very good.

12 MR. PONTO: I had just three points, Your Honor.
13 One is with all due respect to Mr. Kaardal, I have to tell
14 the Court I think he is dead wrong that he does not have the
15 ability to seek any relief in state court.

16 And it may be that a declaratory judgment action
17 is not an appropriate action and it may be that the question
18 of emancipation is not really what this is all about, but
19 there is an entire chapter of the Minnesota statutes,
20 Chapter 260C, which involves juvenile safety and placement
21 and which provides parents who are concerned about their
22 welfare of their children all sorts of remedies, including
23 the ability to go to Child Protection Services and including
24 the ability to bring actions in juvenile court seeking state
25 assistance that would, among other things, provide the

1 possibility such as returning the child to a parent's home,
2 appointing a guardian. There are a number of things she
3 could do.

4 Obviously from our perspective these are not
5 things that are necessary, but for Mr. Kaardal to stand in
6 this courtroom and tell both Your Honor and his client that
7 there is no opportunity to be heard in any Minnesota court
8 is simply wrong.

9 The second thing I want to quickly address is just
10 that my thinking as I sat through the argument about the
11 wisdom of the case law that I spoke of briefly earlier this
12 morning that limits constitutional claims involving parental
13 rights to those cases where a state has required or
14 prohibited some activity, it seems to me if you think about
15 the reasoning for that requirement, it's particularly
16 applicable in this case.

17 Where a state merely offers a minor the right or
18 opportunity to do something, that is not an interference
19 with the parent-child relationship. None of the other
20 defendants in this action today have done anything to
21 interfere with that relationship or to cause that
22 relationship be what it is today, which I think we all
23 unfortunately have to agree is broken.

24 If that relationship is broken, then I have to
25 tell you it is the responsibility of the plaintiff and it is

1 the responsibility of my client and at the end of the day
2 it's going to be up to the plaintiff, the mother, and my
3 client, the child, to figure out how to mend that
4 relationship. Fairview can't do it. The school district
5 can't do it. And frankly, Your Honor, while we can be as
6 helpful as possible, we, as lawyers, can't do it and the
7 Court can't do it.

8 Finally, the last point I just want to remind the
9 Court of -- and Mr. Kaardal, I think, loses sight of the
10 fact that minors, like adults, have constitutional rights.
11 And even if Ms. Calgaro could identify some constitutional
12 right that had been violated on her part, nevertheless our
13 client has important constitutional rights which are also at
14 stake here and at a very minimum, if the Court reached that
15 point, it would be critical to balance those constitutional
16 rights, as occurred in numerous cases.

17 Thank you, Your Honor.

18 THE COURT: Okay. Thank you very much.

19 Anybody else have anything else to add for the
20 good of the order?

21 MR. HELMERS: Just very briefly, Your Honor. In
22 order to just echo what was just said, I would simply point
23 the Court to our reply brief where we discussed the many
24 opportunities that the parent would have had to challenge in
25 state court. We've outlined those in our briefing and we

1 won't discuss them again here other than to point the
2 judge's attention to those opportunities.

3 THE COURT: Okay. Thank you.

4 Anything else, Mr. Kaardal?

5 MR. KAARDAL: Just briefly. If the Court were to
6 check Minnesota Statute 260C, it would be inadequate to
7 restore the parental rights lost in the defendants'
8 administrative or quasi-judicial proceedings terminating my
9 client's rights.

10 Secondly and very important, again, is that the
11 common law of Minnesota provides expansive rights regarding
12 minor children. This would include the right to contract,
13 the right to apply to things, all sorts of rights. And the
14 U.S. Constitution protects those common law rights because
15 they're fundamental rights; and when those rights are
16 terminated by anyone legally, there's procedural due process
17 required.

18 And so the defendants have taken this position
19 that somehow the common law parental rights can be
20 disassembled or they're not constitutional rights. No. The
21 parental rights are a bundle. The U.S. Constitution
22 protects that bundle and they can't be terminated without
23 procedural due process.

24 THE COURT: Well, Counsel, I agree with you. What
25 I'm also looking at, and I'm sure you agree with me too, is

1 that if I can make a decision without reaching a
2 constitutional issue, that's a decision I need to make. If
3 I have to reach the constitutional decision, I'll reach the
4 constitutional decision, but I don't do that unless I have
5 to.

6 MR. KAARDAL: I agree. And the one thing I want
7 to note, too, is that -- sometimes the argument comes out,
8 you know, less is more. So the argument here is that,
9 again, with respect to each of these subject areas the state
10 legislature has the constitutional authority to reduce the
11 age. So if 144.341 said 16 years old, then we wouldn't be
12 here. The issue is when the state legislature --

13 THE COURT: They tried reducing the age of being
14 able to drink beer and found out it wasn't very smart, so
15 they raised it back up again.

16 MR. KAARDAL: Right. So the point here is that
17 when the state legislature authorizes a nonjudicial
18 decision-maker, and that's really what's happened here, to
19 make these decisions, does the parent have a right to due
20 process before the decision has the consequence of
21 terminating the parental rights.

22 Thank you, Your Honor.

23 THE COURT: Okay. Thank you.

24 Counsel, I thank you for the presentations this
25 morning. I'm going to take the matter under advisement and

1 I'll let you know as soon as I can.

2 In making that statement, because all of you have
3 heard me say that at the close of every motion I've ever
4 heard, I guess, I know that I have and I do my very best to
5 retain the reputation of being prompt at getting decisions
6 out.

7 I live by that and will continue to live by that
8 with this case, but I have to tell you that through
9 inadvertent circumstances or whatever you might say, my back
10 room is backed up and I'll get the decision to you as soon
11 as we can, but it may take a little while. And, frankly, if
12 it gets a little bit longer than you normally expect
13 something from me, know it's not with malice. It's just
14 mechanically where I'm at.

15 With that, we thank you very much for the
16 presentations.

17 And counsel on the next matter, let me step out
18 for just a minute and I'll be back with you.

19 (Court adjourned at 11:06 a.m.)

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I, Lori A. Simpson, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: s/ Lori A. Simpson

Lori A. Simpson, RMR-CRR