



CHILDREN'S LAW CENTER OF MINNESOTA

CLC Practice Point Utilizing Informal Child Testimony in Child Protection Matters

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As of 2019, Minnesota is one of twenty-two states¹ – only two states more than in 2014² – that have enacted statutory language acknowledging the heightened need for protection and privacy of child witnesses in civil matters such as family and juvenile court proceedings. Although there is an increased number of statutory provisions for child witnesses, there are also varying degrees of protection among states.³ Additionally, judges may vastly differ in their manner of conducting an informal child examination. For example, one study in Arizona found judges were split on the degree of informality to utilize when questioning youth.⁴ Given these variations in practice, this practice point will examine

¹ AK (ALASKA STAT. § 47.10.070 (2019)), AZ (ARIZ. REV. STAT. § 8-525 (2019)), CA (CAL. RULES OF COURT CODE § 5.250(d)(3) (West 2019)), CO (COLO. REV. STAT. § 14-10-126(1) (2018)), CT (CONN. GEN. STAT. § 46b-11 (2019)), FL (FLA. STAT. § 92.55 (2018)), HI (HAW. REV. STAT. § 587a-21 (2019)), ID (IDAHO CODE § 9-202 (2017)), IN (IND. CODE § 31-34-14-2 (2018)), KY (KY. REV. STAT. ANN. §§ 403.290, 645.070 (West 2019)), LA (LA. CHILD. CODE ANN. art. 329 (2019)), ME (ME. REV. STAT. ANN. tit. 22, § 4007 (2019)), MO (MO. REV. STAT. § 452.385 (2019)), NV (NEV. REV. STAT. ANN. § 62D.010 (West 2019)), NJ (N.J. STAT. § 2a:84A-21.4 (2019)), NM (N.M. STAT. ANN. § 38-6a-5 (2017)), OK (OKLA. STAT. tit. 10a, § 1-4-506 (2018)), OR (OR. REV. STAT. § 44.547 (2019)), RI (14 R.I. GEN. LAWS § 14-1-68 (2019)), SC (S.C. CODE ANN. § 15-28-30 (2019)), SD (S.D. CODIFIED LAWS § 19-19-806.1 (2018)), TX (TEX. FAM. CODE ANN. §104.002 (West 2018)).

² The Honorable Lauren D'Ambra, *The Importance Of Conducting In-Camera Testimony Of Child Witnesses In Court Proceedings: A Comparative Legal Analysis Of Relevant Domestic Relations, Juvenile Justice And Criminal Cases*, 19 RODGER WILLIAMS U. L. REV. 323, 349 (2014) (AZ, CA, CT, FL, GA, IN, KY, LA, MD, MA, MS, NJ, NY, OH, OK, PA, TN, TX, & VT).

³ *Supra* note 1. See also, ARIZ. REV. STAT. § 8-525(B) (proceeding to be closed to the public); COLO. REV. STAT. § 14-10-126(1) (allows testimony in chambers with all parties present, but a record must be created); CONN. GEN. STAT. § 46b-11 (allows the record and any other papers to be kept confidential); FLA. STAT. § 92.55 (may limit the times the child must testify by prohibiting depositions or requiring the submission of questions before the examination and may exclude any person); IDAHO CODE § 9-202 (only the judge may question the witness, but must do so in the presence of the parties); IND. CODE § 31-34-14-2 (allows testimony through closed-circuit television); LA. CHILD. CODE ANN. art. 329 (also allows testimony through closed-circuit television); KY. REV. STAT. ANN. §§ 645.070 (permits testimony in chambers or any other suitable location); ME. REV. STAT. ANN. tit. 22, § 4008 (permits exclusion of all parties except for the guardian ad litem and counsel); OR. REV. STAT. § 44.547 (allows break period, clothing less formal than judicial robes, relaxed formalities, altered courtroom layout, or an alternative location); S.C. CODE ANN. § 15-28-30 (permits testimony to be videotaped); S.D. CODIFIED LAWS § 19-19-806 (allows informal testimony only by children testifying to sexual or physical assault); TEX. FAM. CODE ANN. §104.002 (allows prerecorded testimony, even if no attorneys are present, as long as the person conducting the interview is present and the proceeding and is able to testify).

⁴ Barbara A. Atwood, *The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 ARIZ. L. R. 629, 631, 663-74 (2003). (A survey of forty-eight Arizona judges queried about their strategies in assessing the wishes of the child in child custody adjudications. The survey found that 81% of the responding judges never allow children to testify in court, while 25% never conduct in camera interviews with children, making those two options the least popular method of determining the child's best interests. Even for those who are willing to conduct in camera interviews, judges were split on the acceptable degrees of informality – about half believe that in camera interviews should be recorded, one third conduct the interviews without a court reporter present, and only one-fourth of those who place the testimony on the record share it with the parties. The survey also considered the best practices in asking a child during in camera interviews about their preferences: one-third never ask for the child's custodial preferences, a majority

the sensitive nature of a child's testimony along with the concerns and benefits of a child providing testimony, Minnesota's child protection provisions that permit informal child testimony, possible comfort options to use during a child's testimony, and Minnesota's assessment of competing arguments from parents and their counsel against utilizing informal testimony.

The Sensitive Nature of a Child's Testimony May Require Informal In Camera Questioning

Children can provide valuable insights into their circumstances and pending matters before the court. Research suggests that children as young as eight years old may have sufficient emotional and rational maturity to provide valuable input when appropriate.⁵ By age twelve, many children have developed formal reasoning capacity, an understanding of others' perspectives, and are able to weigh even hypothetical options objectively, which makes their testimony increasingly trustworthy on average.⁶ While a child's testimony may be a compelling factor in a case's resolution, it is critical to remember juvenile child protection matters in Minnesota are always argued to the bench and not a jury.⁷ Thus, it is the court that must consider the child's age, maturity, and possible parental influence in determining the weight of the child's testimony.

ATTY NOTE: The first step in deciding whether your client should testify is to ask your client whether she would like to testify. You must allow your client the opportunity to identify and discuss the means by which her objectives are to be met.

A child's right to appear and testify on her own behalf may provide certain benefits to the youth. Some experts theorize that voicing experiences and desires to a judge can help children psychologically heal from their trauma.⁸ In fact, studies have confirmed that youth often want to have their opinions heard in legal disputes, and those that do participate in court proceedings often have a more positive attitude towards the process.⁹

ATTY NOTE: Remember that your client's voice may easily get lost in child protection proceedings among the competing interests of the parents and their lawyers, assistant county attorneys, the guardian ad litem(s), the social worker(s), and the court itself. One way to ensure that your client is heard is to request your client testify.¹⁰

While child testimony can provide valuable clarity, there are concerns that such testimony may also cause emotional harm to the child. For example, experts have noted that by the time a child testifies in a family court custody proceeding, she has likely already undergone significant life changes and is

preferred indirect questioning to determine preferences. But despite the respondents' differing ideas on how to best find the balance, all seemed to highly value giving the child a voice.)

⁵ *Id.* at 657 (citing the works of Piaget – JEAN PIAGET, *JUDGMENT AND REASONING IN THE CHILD* (1928); BARBEL INHELDER & JEAN PIAGET, *THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD TO ADOLESCENCE* (Anne Parsons & Stanley Milgram trans., Basic Books 1958); and JEAN PIAGET, *THE CHILD'S CONCEPTION OF TIME* (A.J. Pomerans trans., Basic Books 1969) (finding that children between the ages of eight and twelve can reason from their own perspective, but struggle with deductive reasoning)).

⁶ *Id.* at 656 (citing LINDA WHOBREY ROHMAN ET AL., *THE BEST INTERESTS OF THE CHILD IN CUSTODY DISPUTES, PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS*, 76 (Lois A. Weithorn ed., 1987)).

⁷ Minn. Stat. §260.163, subdiv. 1 (2018).

⁸ Alan M. Levy, *The Meaning of the Child's Preference in Child Custody Determination*, 8 J. PSYCHIATRY & L. 221, 223 (1980).

⁹ Elizabeth A. Mulkey, *Confronting Legal and Technological Incongruity: Remote Testimony for Child Witnesses*, 17 VAND. J. ENT. & TEACH. L. 463, 465 (2015) (citing Phillips, A and Walters, *A Courtroom for All: Creating Child- and Adolescent-Fair Courtrooms*, National Child Protection Training Center, 3 (2013), available at <https://issuu.com/nibbana/docs/courtrooms-for-children-and-adolesc?e=1618168%2F56882185>).

¹⁰ "The only one who can actually say what the youth wants, definitively, or who can provide the necessary information to determine what is in the youth's best interests, is the youth." Jaclyn Jean Jenkins, *Listen to Me! Empowering Youth and Courts through Increased Youth Participation in Dependency Hearings*, 46 FAM. CT. REV. 163, 172 (2007).

experiencing a range of emotions.¹¹ Similarly, children in child protection matters experience significant trauma that can be aggravated or cause turmoil during testimony.¹²

ATTY NOTE: The relevance of your client’s testimony to the matter is important to consider when advising your client. If the content of your client’s testimony has already been conceded, consider what kind of emotional impact being a witness may have on your client. Also consider any emotional benefit your client may experience in having an opportunity to tell her story to the court.

With such emotional pressure, asking a child to recount her abuse or voice her preferences in the presence of her abusers and strangers could preclude effective testimony or cause long-term psychological damage.¹³ This kind of pressure can also present risks to the child and the case, including the child’s increased entanglement in conflict, incorrect or inaccurate statements, unreasonable preferences, and a sense of responsibility for the outcome of the case.¹⁴ Thus, it is easy to understand the potential for substantial emotional strain placed upon a child when the child is required to testify about her preferred choice of caretakers or against her loved ones.

In order to avoid inflicting such emotional pressure upon a child, as noted herein, many states provide statutory provisions permitting children to testify in less formal settings than in an open courtroom.¹⁵ One such method is to utilize in camera testimony which permits a child’s testimony to be presented to the court in chambers. The methods of presentation may range from having the child testify in the judge’s chambers with only the judge and the child present to having the child, the judge and all the parties present. Some have argued that those present for in camera child testimony should always include the judge and the child and may also include, a court reporter, the guardian ad litem, parties, and relatives or kin of the child.¹⁶ CLC maintains that court reporters should always be present for any child examination in order to ensure a proper record of the examination exists. Further, the use of in camera testimony is not always necessary and its use should be determined on a case-by-case basis.¹⁷

Minnesota Provides for Informal Testimony

Minnesota has placed statutory value on the best interests of the child, including the child’s health and safety.¹⁸ To protect these interests, Minnesota’s Juvenile Code gives a child an opportunity to testify

¹¹ See, Cynthia Lee Starnes, *Swords in the Hands of Babes: Rethinking Custody Interviews after Troxel*, 2003 WIS. L. REV. 115, 124 (2003) (citing JONATHAN W. GOULD, CONDUCTING SCIENTIFICALLY CRAFTED CHILD CUSTODY EVALUATIONS 145 (1998) (“Children are deeply affected by the breakup of their family. Their lives are profoundly altered by the anger, disappointment, and failure that characterize their parents’ marital breakdown. The child feels a loss of control over her environment. Suddenly, there is a group of strangers with whom they must talk, tests to take, and a judge who talks about choosing between mommy and daddy.”); see also Daniel C. Schuman, *The Unreliability of Children’s Expressions of Preference in Domestic Relations Litigation: A Psychiatric Approach*, 14 MASS. L. REV. 14 (1984) (“[Family litigation is one of the great stresses which can impact a child.”); Judith Wallerstein, *The Long-Term Effects of Divorce on Children: A Review*, 20 J. AM. ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY 349, 350 (1991)).

¹² See, Nat’l Child Traumatic Stress Network, <https://www.nctsn.org/what-is-child-trauma/about-child-trauma> (last visited July 30, 2019) (A traumatic event is a frightening, dangerous, or violent event that poses a threat to a child’s life or bodily integrity).

¹³ *Coy v. Iowa*, 487 U.S. 1012, 1032 (1988); see also Dorothy F. Marsil et al., *Child Witness Policy: Law Interfacing with Social Science*, 65 LAW & CONTEMP. PROBS. 209, 213 (2002).

¹⁴ *Supra* note 2 and Starnes, *supra* note 11 at 117.

¹⁵ *Supra* note 1.

¹⁶ *Supra* note 2 at 324.

¹⁷ *Id.*

¹⁸ MINN. STAT. § 260C.001, subdiv. 2(a) (2016) “The paramount consideration in all juvenile protection proceedings is the health, safety, and best interests of the child;” see also § 260C.001, subdiv. 2(a) (2016) (“the purpose of the laws relating to juvenile protection proceedings is... (2) to provide judicial procedures that protect the welfare of the child.”); There are numerous other recitations of the “paramount” nature of a child’s best interests. see, e.g. § 260C.301, subdiv. 7 (2016) (stating that, in a proceeding to terminate parental rights, “the best interests of the child must be the paramount consideration, provided that [a basis to terminate parental rights

informally when the court or parties motion to do so.¹⁹ Additionally, Minnesota courts determine the scope and manner of a proposed child’s testimony.²⁰

Whether a child will testify is usually determined at the pretrial hearing, which must take place at least ten days before litigation of a juvenile protection case begins.²¹ The purpose of a pretrial hearing is to determine whether the child will be present and testify at trial, and under what circumstances she will testify.²²

ATTY NOTE: You should consult with your client prior to the pretrial hearing to determine whether she wishes to appear at the trial and whether she wishes to testify. If she wants to testify, you should also discuss under what conditions she would feel most comfortable. To do so, inform your client about the breadth of options available to her.

ATTY NOTE: If your client wishes to testify, prepare her for how her testimony may be presented. Explain direct examination, cross-examination, questioning of the child’s character under Rule 608 of the Minnesota Rules of Evidence, and impeachment under Rule 607 of the Minnesota Rules of Evidence. Questioning the character or truthfulness of a child may be extremely traumatic and your client should be aware of this possibility before you formally list her as a witness.

ATTY NOTE: If your client wants to testify and you believe her testimony would be damaging to her and her case if she does so, her wishes may supersede your recommendations. A lawyer must abide by the client’s decisions concerning the means by which she will pursue her objectives;²³ however, an attorney also has a duty to consult with the client about the means by which her objectives are to be accomplished.²⁴ As an attorney, you are the expert and you are able to make strategic decisions. If your client is adamant about testifying despite your concerns regarding the content of her testimony, you have an obligation to advise your client that you will withdraw from representation if she does not testify truthfully.²⁵ Thus, as you discuss having your child client testify, it is critical that you explain to your client your concerns regarding the strategic implications of her testimony.

exists]”); *see also* § 260C.001, subdiv. 3 (2016) (“[t]he paramount consideration in all proceedings for permanent placement of the child . . . is the best interests of the child”); *id.*, subdiv. 4 (2016) (“[t]he laws relating to the juvenile protection proceedings shall be liberally construed to carry out these purposes”); *see also* MINN. R. JUV. PROT. P. 1.02 & 1999 advisory comm. cmt. (reciting the purpose of the rules of juvenile protection procedure and quoting the reference in § 260C.001, subdiv. 2(a), to the “paramount” weight of the best interests of the child, respectively); *In re Welfare of Children of N.F.*, 749 N.W.2d 802, 808 (Minn. 2008) (citing § 260C.001, subdiv. 2); *In re Welfare of J.M.*, 574 N.W.2d 717, 722 (Minn. 1998) (citing the predecessor to § 260C.001, subdiv. 2).

¹⁹ §260.163, subdiv. 6 (2018) (“In any child in need of protection or services proceeding, neglected and in foster care, or termination of parental rights proceeding the court may, on its own motion or the motion of any party, take the testimony of a child witness informally when it is in the child’s best interests to do so. Informal procedures that may be used by the court include taking the testimony of a child witness outside the courtroom. The court may also require counsel for any party to the proceeding to submit questions to the court before the child’s testimony is taken, and to submit additional questions to the court for the witness after questioning has been completed. The court may excuse the presence of the child’s parent, guardian, or custodian from the room where the child is questioned in accordance with subdivision 7.”)

²⁰ MINN. R. JUV. PROT. P. 36.02(d) (2018).

²¹ MINN. R. JUV. PROT. P. 36.01 (2018).

²² MINN. R. JUV. PROT. P. 36.02(d) (2018) (The 1997 advisory comment to rule 36.02(d) states that the rule “addresses the need to determine whether the child will testify” and that “[t]he intent of the rule is to provide that an order protecting the child from testifying or placing conditions on the child’s testimony can only be made after notice of motion and a hearing.”)

²³ MOD. R. PROF. COND. 1.2(a)

²⁴ MOD. R. PROF. COND. 1.4(a)(2)

²⁵ MOD. R. PROF. COND. 1.16(b)(2), *see also* *Id.* at 3.3(a)(3) & (b).

ATTY NOTE: If your client is listed as a trial witness, consult with her to determine whether there will be an objection to her testimony and possible methods of testifying. If so, contact CLC to assist you with bringing the proper motion for informal testimony or exclusion.

The court must conduct proceedings so as to provide fairness, eliminate unjustifiable expense and delay, ascertain the truth, and rule accordingly and appropriately.²⁶ The court may also exclude evidence if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues [...] or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”²⁷

Previous statements made by a child may be introduced through other witnesses properly under hearsay rules.²⁸ Additionally, other witnesses, such as the guardian ad litem or the child’s therapist, are able to describe the child’s existing mental and emotional state.²⁹ Thus, requiring a child to testify about the same information may be found to be cumulative and unnecessary with nominal probative value under Rule 403 of the Minnesota Rules of Evidence.

ATTY NOTE: In cases where the information to be provided in your client’s testimony will be presented by others, consider whether there is additional evidence or a unique point of view your client’s testimony may provide that would support having her testify.

Minnesota permits a child’s testimony to be presented through a variety of informal means. A child’s testimony may take place outside the courtroom and without the presence of the child’s parent, guardian, or custodian.³⁰ Further, the court may waive the presence of the child or the child’s parents or guardian at any stage of the proceedings if it would be in the best interest of the child.³¹ However, those whose presence may be excluded from the testimony have a statutory right to otherwise participate in the hearing.³² The judge may also require that all questions be submitted by the parties before the testimony and allow the parties to submit additional questions afterwards.³³

ATTY NOTE: When submitting your questions to the court, consider how you can format your questions to best allow your client to tell her story.

In addition to permitting a child’s informal testimony in a child protection matter, Minnesota’s Court of Appeals recently found that there is a statutory basis to permit exclusion of a child’s testimony in a

²⁶ MINN. R. EVID. 102.

²⁷ MINN. R. EVID. 403.

²⁸ MINN. R. EVID. 807.

²⁹ MINN. R. EVID. 803(4)&(5).

³⁰ Minn. Stat. §260.163, subdiv. 6 (2018).

³¹ Minn. Stat. §260.163, subdiv. 7 (2018) (“The court may waive the presence of the minor in court at any stage of the proceedings when it is in the best interests of the minor to do so. In any proceeding, the court may temporarily excuse the presence of the parent or guardian of a minor from the hearing when it is in the best interests of the minor to do so. The attorney or guardian ad litem, if any, has the right to continue to participate in proceedings during the absence of the minor, parent, or guardian.”).

³² §260.163, subdivs. 2(a). (“A child who is the subject of a petition, and the parents, guardian, or legal custodian of the child have the right to participate in all proceedings on a petition, including the opportunity to personally attend all hearings.”); *see also* §260.163, subdivs. 8 (“The minor and the minor’s parent, guardian, or custodian are entitled to be heard, to present evidence material to the case, and to cross-examine witnesses appearing at the hearing.”).

³³ §260.163, subdiv. 6.

child protection matter.³⁴ It is worth noting, however, that another Minnesota Court of Appeals suggested in a footnote – not its holding – that there is no statutory basis to exclude testimony.³⁵

Possible Use of Comfort Strategies During a Child’s Testimony

Due to the particularly delicate nature of a child’s testimony, criminal courts in some states allow child witnesses to hold a comfort item.³⁶ On appeal, defendants have objected to comfort items on the grounds that they cause undue prejudice, incite juror empathy, and are not absolutely necessary.³⁷ Courts consistently value the calming benefits of a comfort item that allow for more articulate testimony over a criminal defendant’s right to a fair trial.³⁸

Neither Minnesota Courts nor its legislature have affirmatively addressed the permissibility of comfort items or support persons for child witnesses in child protection matters.³⁹ Additionally, since child protection matters are not jury trials, any prejudicial concerns for allowing such items are substantially diminished.

ATTY NOTE: Since Minnesota has not expressly prohibited the use of comfort items for child witnesses in child protection matters, consider whether your client would benefit from having a small comfort item with her when testifying. If so, ensure you make a request for your client to have such an item prior to your client’s testimony. Examples of comfort items for children have included fabric pieces and small items of significance (coins, charms, etc.).

ATTY NOTE: Consider arguing that allowing your client to have a comfort item promotes the integrity of the case because:

- (1) a comforted witness will testify more readily and completely,**
- (2) a calm witness will need fewer breaks otherwise needed to recompose herself, and**
- (3) your client witness will feel less harassed or distraught when provided with elements of comfort.**

³⁴ *In re Welfare of Child of Q. S. M. and T.R.S.*, 2018 Minn. App. LEXIS 952, at *3, 12 (Minn. Ct. App. Nov. 13, 2018)(in a termination of parental rights case, the court found that the lower court incorrectly excluded the child’s testimony because it was unsupported by fact, but it held that “[b]ecause relevant evidence is generally admissible in juvenile protection cases absent a basis to exclude it, and because the relevant statutes and rules provide bases to exclude a child’s otherwise relevant testimony, a district court can, under appropriate circumstances, excuse a child from testifying.”).

³⁵ *In re Welfare of Child of G. G.*, No. A18-0788, 2018 Minn. App. LEXIS 932, at *7 n. 1 (Minn. Ct. App. Nov. 5, 2018) (this footnote is not controlling law because it was not included in the body of the opinion, the case is unpublished, and the content of the footnote was not at issue in the case).

³⁶ *E.g. State v. McPhee*, 755 A.2d 893, 896-98 (Conn. App. Ct. 2000) (allowing a twelve year-old witness to hold a large stuffed gorilla because it made her feel more comfortable and, thus her testimony was more reliable and finding that the defendant was not deprived of a fair trial nor deprived of his right to confrontation); *State v. Hakimi*, 98 P.3d 809, 811-12 (Wash Ct. App. 2004) (finding that children “have a peculiar need to find some security in an otherwise insecure setting” and the security a doll provided to the child witness outweighed any potential prejudice to the defendant); *Smith v. State*, 119 P.3d 411, 420 (Wyo. 2005) (finding that, absent an unequivocal rule of law barring a comfort item, a child witness holding a doll during testimony is not grounds for reversal); *State v. Cliff*, 782 P.2d 44, 46 (Idaho Ct. App. 1989) (trial court correctly allowed the child witness to hold a doll while testifying because the guardian ad litem testified that the doll was a source of comfort); see also *State v. Palabay*, 844 P.2d 1, 7 (Haw. Ct. App. 1992) (absent a finding of compelling necessity, holding a doll during testimony caused unfair prejudice).

³⁷ *Id.*

³⁸ *E.g. Cliff*, 782 P.2d at 47 (“The benefit of having coherent testimony...outweighed any possible prejudice to the defendant”); *Hakimi*, 98 P.3d at 811-12.

³⁹ All cases cited in footnotes 37-48 are derived from criminal cases and are not controlling law for civil, family, or juvenile hearings.

You must first, however, demonstrate that your client has a compelling need for emotional support and that the benefits during testimony outweigh the item(s) potential prejudice.

Minnesota Courts Have Addressed Parents' Due Process Objections to Informal Testimony

Parents of children who do not testify or who testify informally sometimes pursue claims rooted in the Fifth and Fourteenth Amendments' due process guarantees to fundamentally fair procedure⁴⁰ and the public policy behind the Sixth Amendment's right for a criminal defendant to confront an adverse witness.⁴¹ Thus, the rights of the parents and the rights of the child may be at odds when a request for a child to testify informally is made to the court.

When a parent brings a due process claim, the concerns of either party⁴² must be weighed, but are not weighed equally.⁴³ By statute, “[t]he paramount consideration in all juvenile protection proceedings is the health, safety, and best interests of the child.”⁴⁴ Consistent with Minnesota’s “paramount” priority, Minnesota also notes that “[t]he purpose[s] of the laws relating to juvenile protection proceedings” include “provid[ing] judicial procedures that protect the welfare of the child.”⁴⁵ This obligation to provide procedures that protect the welfare of a child requires the court to give a child’s health, safety and best interests “paramount” weight not just in its ultimate disposition of a case, but also at each step of the litigation leading to that ultimate disposition.⁴⁶

Further, Minnesota’s rules of evidence must be considered when addressing issues of permitting a child’s testimony. In Minnesota’s juvenile protections matters, “[e]xcept as otherwise provided by statute or these rules . . . the court shall only admit evidence that would be admissible in a civil trial pursuant to the Minnesota Rules of Evidence.”⁴⁷ Under these rules, relevant evidence is admissible “except as otherwise provided by the United States Constitution, the State Constitution, statute, by these rules, or by other rules applicable in the courts of this state.”⁴⁸

⁴⁰ U.S. CONST. amend. V, XIV. See also *Santosky v. Kramer*, 455 U.S. 745, 753-54(1982) (finding that “parents must receive due process before being deprived of their parental rights”); see also MINN. R. JUV. PROT. P. 1.02(f) (stating that one purpose of the Rules of Juvenile Protection Procedure is to “ensure due process for all persons involved”).

⁴¹ U.S. Const. amend. VI. See also *Cranford v. Washington* 541 U.S. 36 (2004); “the ‘Court has held that the state’s interest in safeguarding the physical and psychological well-being of child victims by . . . minimizing the emotional trauma [of] testifying’ something justifies modification of proceedings of defendants’ confrontation of witness under the Sixth Amendment” Lois A. Weithorn, *A Constitutional Jurisprudence of Children’s Vulnerability*, 69 Hastings L.J. 179, 188 (2017) (discussing the history of the vulnerability of the child in the legal system).

⁴² MINN. R. JUV. PROT. P. 23.01, Subdiv. 1 (A child who is the subject of the juvenile protection matter has a right to intervene as a party).

⁴³ *In re Welfare of H.G.B.*, 306 N.W.2d 821, 826 (Minn. 1981); see also *In re Welfare of S.R.A.*, 527 N.W.2d 835, 839 (Minn. Ct. App. 1995) (children’s best interests and their right to be raised in a secure home outweighed technical violation of parent’s right to due process), *rev. denied* (Minn. Mar. 29, 1995); see also *In re Welfare of J.W.*, 391 N.W.2d 791, 795 (Minn. 1986) (child’s interests in establishing parentage prevailed over father’s right to hearing on the merits).

⁴⁴ Minn. Stat. § 260C.001, subdiv. 2(a)(2018).

⁴⁵ *Id.*, subdiv. 2(b)(2) (2016).

⁴⁶ See *In re Welfare of R.D.L.*, 853 N.W.2d 127, 132 (Minn. 2014) (invoking the “paramount” nature of a child’s health, safety, and best interests, as well as the idea that one purpose of juvenile protection proceedings is to protect the welfare of the child, when addressing whether certain types of parents were similarly situated for purposes of that step in an equal protection analysis) (citing § 260C.001, subdiv. 2(a), (b)(2)); see also *Valentine v. Lutz*, 512 N.W.2d 868, 871 (Minn. 1994) (holding that a district court must be guided by the principle that the best interests of the child are paramount when considering whether to permit the intervention of foster parents).

⁴⁷ MINN. R. JUV. PROT. P. 3.02, subdiv. 1; see also § 260C.001, subdvs. 2-3 (creating exceptions to generally applicable rules regarding hearsay and judicial notice).

⁴⁸ MINN. R. EVID. 402; see also MINN. R. EVID. 403 (allowing district courts to exclude otherwise relevant evidence “if its probative value is substantially outweighed by the danger of,” among other reasons for exclusion, “unfair prejudice”).

So, a child's testimony may be argued as inadmissible evidence if it is (a) determined in the pretrial hearing that testimony of the child is contrary to the child's health, safety, and best interests or (b) if it is otherwise inadmissible by statute, U.S. Constitution, or State Constitution.

Additionally, Minnesota Courts have found that parental due processes rights do not supersede the child's best interests in allowing her to testify informally. The Minnesota Court of Appeals in 2009, held despite competing interests, "the paramount and primary consideration...is the welfare of the child and to that welfare the rights of the parents must yield."⁴⁹ The Court again confirmed in 2016 that the child's welfare is "paramount and primary over the rights of the parents."⁵⁰

Conclusion

Testifying in court can be a stressful situation for any witness, and it may be particularly so for a child in a child protection matter. Most children in child protection have experienced substantial trauma after being removed from their homes and placed with others. While children of different ages differ in maturity, children as young as eight have the mental capabilities to express well thought-out and specific desires. Additionally, aggravated trauma, emotional immaturity, and stress-induced memory problems create a risk that the complete accuracy of child's testimony may suffer when testifying in a formal courtroom setting.

To minimize these concerns, informal testimony is one solution that states, such as Minnesota, have used to calm a child's nerves so a child may testify to the best of her abilities. By excluding some parties and relocating the interview to a less threatening environment, informal interviews have proven to reduce the emotional and psychological trauma in a way that allows the court to determine the child's best interests more accurately.

The use of informal testimony in Minnesota has been interpreted by Minnesota's Court of Appeals. A district court must first decide at a pretrial hearing the parameters of the child's presence at trial. If there is a request for the child to testify, exclusion of a child's testimony may be consistent with Minnesota's Rules of Evidence. Moreover, if a child testifies, the district court may also exclude the parents when the child testifies pursuant to Minnesota law. As an extra measure, you can consider whether a comfort item may also be used during your client's testimony.

It is important to remember that the fundamental purpose of informal testimony is for the health and well-being of your client. Ask your client if she would like to testify and who she would like to be in the room. Consider what the testimony will address and how that information may be difficult to convey. Ensure that your client feels comfortable with the arrangement. As always, do not hesitate to contact CLC with any questions or concerns regarding your clients.

⁴⁹ *In re Welfare of S.S.W.*, 767 N.W.2d 723, 730 (Minn. App. 2009) (quoting *In re Booth*, 91 N.W.2d 921, 924 (Minn. 1958) (quoting *Molto v. Molto*, 64 N.W.2d 154, 156) (Minn. 1954)).

⁵⁰ No. A18-0662, 2018 WL 5915447, at *9.