STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0662

In the Matter of the Welfare of the Child of:
Q. S. M. and T. R. S., Parents.

Filed November 13, 2018
Reversed and remanded
Smith, Tracy M., Judge
Concurring specially, Ross, Judge
Concurring specially, Johnson, Judge

Olmsted County District Court
File No. 55-JV-17-4326

Michael D. Schatz, Rochester, Minnesota (for appellant-mother Q.S.M.)

Mark A. Ostrem, Olmsted County Attorney, Debra A. Groehler, Senior Assistant County Attorney, Rochester, Minnesota (for respondent county)

David Haugen, Rochester, Minnesota (for respondent-child J.S.M.)

Vicki Duncan, Rochester, Minnesota (guardian ad litem)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Smith, Tracy M., Judge.

U N P U B L I S H E D O P I N I O N

SMITH, TRACY M., Judge

Appellant Q.S.M. (mother) had her parental rights to her child (J.S.M.) terminated following a trial. During the trial, the district court precluded J.S.M. from testifying in any

manner, even informally. Mother appeals, arguing that it was error to exclude the child's testimony. We reverse and remand.

FACTS

On June 28, 2017, Olmsted County Community Services (the county) petitioned for termination of Q.S.M.'s parental rights to J.S.M. It based its petition on the following facts, to which mother stipulated.

J.S.M. was born in 2003, to mother and T.R.S. (father). The county began providing services to J.S.M. in April 2013, following a report that J.S.M.'s brother had been masturbating over J.S.M. while J.S.M. was sleeping. In November 2013, the county received a report that mother's partner had committed domestic violence against mother on two occasions and that J.S.M. was present on one of those occasions. In January 2014, the county received another report that mother's partner had assaulted her; J.S.M. was in the home but did not see the assault. In February 2015, the Third Judicial District Court in Olmsted County awarded father permanent sole physical custody of J.S.M.; the order required that the county receive notice of any request to modify custody, and that no transfer of custody be made without the approval of the ordering court.

Nonetheless, in July 2015, the Third Judicial District Court in Winona County awarded mother temporary custody of J.S.M. for 90 days. No notice was provided to the county, nor was a hearing held in the original Olmsted County court file. Despite the 90-day limit in the Winona County court's order, J.S.M. lived with mother until March 2017.

The county also alleged, and mother did not stipulate to, these additional facts:

In September 2016, J.S.M. and mother were living in an apartment with mother's sister, J.R.M., and J.R.M.'s boyfriend, B.C. The Rochester Police Department received a report from another person who had been staying in the apartment that J.S.M. had been sexually assaulted by B.C.[1] J.S.M. initially denied the report, but once J.S.M. and mother had moved out of the apartment, J.S.M. confirmed it.

In March 2017, mother asked a case manager at the transitional housing where she and J.S.M. were living if the case manager believed it to be okay for J.S.M.—then 13 years old—to be having sex in their apartment with a 17-year-old.

Throughout her time in mother's care—from July 2015 until March 2017—J.S.M. rarely attended school and frequently missed appointments for various services.

Based on these allegations, the county argued that mother was either indifferent to J.S.M.'s sexual activity or knowingly allowed it to occur and that this constituted "egregious harm" justifying termination of parental rights. *See* Minn. Stat. § 260C.301, subd. 1(b)(6) (2016). It also argued that mother was palpably unfit to parent because she was incapable of ensuring that J.S.M. received education, mental health services, and social services. *See id.*, subd. 1(b)(4) (2016).

At trial, mother made two main arguments: first, that she was unaware of J.S.M.'s sexual activity until after it had occurred and that she stopped it when she learned of it; and, second, that J.S.M.'s nonattendance at school and failure to receive services were

[1] A witness for the county testified, and mother's attorney stated, that B.C. had been convicted of sexual assault based on these incidents. However, that conviction was not made part of the record in this case.

because of J.S.M.'s intransigence and not because mother was unfit. Mother testified that she asked the case manager about the propriety of J.S.M.'s sexual activity because she found J.S.M. and the 17-year-old with their legs intertwined one time and not because of any ongoing pattern of behavior. J.S.M.'s guardian ad litem testified that she had been told by J.S.M. that the 17-year-old would stay overnight and that mother knew about it—a claim that mother disputed. Mother also testified that there was no way to get J.S.M. out of bed in order to compel her to attend school or appointments.

In order to support these two arguments, mother attempted to introduce testimony from J.S.M. Mother argued that such testimony would support her arguments that she was unaware of any sexual contact until after it happened and that J.S.M.'s own unwillingness was the reason she did not attend school or her appointments. The county moved to exclude J.S.M. from testifying in any way. J.S.M.'s guardian ad litem agreed with the county that the child should not provide spoken testimony, but offered to deliver a letter from J.S.M. to the court. J.S.M., through her attorney, indicated that "[s]he was willing to talk to the court, but it would have to be in chambers." After asking about the general topics on which mother sought to inquire, the district court granted the county's motion to exclude J.S.M. from providing any testimony.

Following trial, the district court found that J.S.M. had attended 12 days of school between November 2016 and March 2017. It found that J.S.M.'s truancy was one instance of a larger pattern in which mother is unable to exert any influence over J.S.M. Further, the district court found that mother often enables some of J.S.M.'s negative behaviors, such as staying up until early in the morning and sleeping through social services appointments

and school. Because of this, the district court concluded that J.S.M. "control[s] the parent-child relationship," leaving mother unable to ensure that J.S.M. receives the therapy and education that she needs.

The district court found that the county had proved, by clear and convincing evidence, two statutory grounds for termination of parental rights. First, it found that mother was "palpably unfit to be a party to the parent and child relationship." *Id.*, subd. 1(b)(4). Second, it found that J.S.M. had suffered egregious harm while in mother's care, and that the nature, duration, or chronicity of the harm indicated "a lack of regard for [J.S.M.'s] well-being." *Id.*, subd. 1(b)(6). Finally, the district court found that terminating mother's parental rights was in J.S.M.'s best interests. It therefore terminated mother's parental rights; father's parental rights were terminated voluntarily, based on his affidavit. *See id.*, subd. 1(a) (2016).

Mother appeals from the judgment of termination.

D E C I S I O N

Mother asserts two main errors. First, she argues that the district court erred in excluding J.S.M.'s testimony. Second, she contends that the district court's findings of palpable unfitness and egregious harm were unsupported by the evidence. Because we conclude that the district court abused its discretion in precluding J.S.M. from testifying, we do not reach mother's arguments against the sufficiency of the evidence.

I. District courts may, in appropriate circumstances, prevent a child from testifying in any manner, even if that child's testimony could be relevant.

Parents have fundamental rights to the custody and companionship of their children; these rights "should not be taken away except for grave and weighty reasons." *In re Welfare of A.Y.-J.*, 558 N.W.2d 757, 759 (Minn. App. 1997). Parents must receive due process before being deprived of their parental rights. *Santosky v. Kramer*, 455 U.S. 745, 753-54, 102 S. Ct. 1388, 1394-95 (1982); *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"). In juvenile protection matters, parents are statutorily entitled "to be heard, to present evidence material to the case, and to cross-examine witnesses appearing at the hearing." Minn. Stat. § 260C.163, subd. 8 (2016).

Regarding admission of evidence in juvenile protection cases, the rules state that "[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." Minn. R. Juv. Prot. P. 3.02, subd. 1; *see id.*, subds. 2-3 (creating exceptions to generally applicable rules regarding hearsay and judicial notice). Under the Minnesota Rules of Evidence, 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." 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"). Thus, parties to juvenile protection cases can present relevant evidence, and that evidence is admissible unless a constitution, statute, or rule allows its exclusion.

By statute, "[t]he paramount consideration in all juvenile protection proceedings is the health, safety, and best interests of the child." Minn. Stat. § 260C.001, subd. 2(a) (2016).[2] Consistent with the "paramount" weight to be given a child's health, safety, and best interests, the juvenile protection statutes also state 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." *Id.*, subd. 2(b)(2) (2016). This obligation to provide procedures that protect the welfare of a child requires a district 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. *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

[2] There are numerous other recitations of the "paramount" nature of a child's best interests. *See, e.g.*, Minn. Stat. § 260C.301, subd. 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 exists]"); Minn. Stat. § 260C.001, subd. 3 (2016) (stating that "[t]he paramount consideration in all proceedings for permanent placement of the child . . . is the best interests of the child"); *id.*, subd. 4 (2016) (stating that "[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 Minn. Stat. § 260C.001, subd. 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 Minn. Stat. § 260C.001, subd. 2); *In re Welfare of J.M.*, 574 N.W.2d 717, 722 (Minn. 1998) (citing the predecessor to Minn. Stat. § 260C.001, subd. 2).

certain types of parents were similarly situated for purposes of that step in an equal protection analysis) (citing Minn. Stat.§ 260C.001, subd. 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).

One step in the litigation of a juvenile protection case is the pretrial hearing. *See* Minn. R. Juv. Prot. P. 36.01 (requiring a pretrial hearing "at least ten (10) days prior to trial"). The "purposes of a pretrial hearing" include "determin[ing] *whether* the child shall be present and testify at trial and, *if so*, under what circumstances." Minn. R. Juv. Prot. P. 36.02(d) (emphasis added). The comment to rule 36.02(d) is unambiguous; it 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." Minn. R. Juv. Prot. P. 36.02(d) 1999 advisory comm. cmt. (emphasis added). Thus, a district court's decisions at a pretrial hearing regarding "whether" a child will be present and testify at trial must be made in light of the paramount consideration of the child's health, safety, and best interests. Consistent with the possibility, under the rules, of a child not testifying at trial, the district court, by statute, 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." Minn. Stat. § 260C.163, subd. 7 (2016). Accordingly, exclusion of a child's testimony is consistent with the principle that, in juvenile protection cases, relevant evidence is admissible absent a basis in rule, statute, or a constitution for excluding it. Statute allows

the exclusion when the testimony would be inconsistent with the child's best interests, and the rules contemplate a district court's exclusion of a child's testimony when the exclusion is necessary to protect the child.

Such exclusion may create conflict between the rights of a parent and the rights of a child. The supreme court has stated, in the context of an appeal from an adjudication of children as neglected and dependent, that "[t]he paramount and primary consideration [in child-related matters] is the welfare of the child and to that welfare the rights of the parents must yield. The natural rights of the parents should be carefully safeguarded but not at the expense of their children." *In re Booth*, 91 N.W.2d 921, 924 (Minn. 1958) (quoting *Molto v. Molto*, 64 N.W.2d 154, 156 (Minn. 1954)); *see In re Welfare of S.S.W.*, 767 N.W.2d 723, 730 (Minn. App. 2009) (citing this aspect of *Booth* in a child-in-need-of-protection-or-services appeal); *In re P.T.*, 657 N.W.2d 577, 583 (Minn. App. 2003) (noting, in a termination appeal, that "parental rights are not absolute and should not be 'unduly exalted and enforced to the detriment of the child's welfare and happiness. The right of parentage is in the nature of a trust and is subject to parents' correlative duty to protect and care for the child.'" (quoting *In re Adoption of Anderson*, 50 N.W.2d 278, 284 (Minn. 1951)); *see also* Minn. Stat. § 260C.301, subd. 7 (2016) (noting that, in proceedings to terminate a parent's parental rights, "[w]hen the interests of the parent and child conflict, the interests of the child are paramount[,]" provided that a basis to terminate parental rights exists); Minn. R. Juv. Prot. P. 39.05, subd. 3(b)(5) (stating, regarding terminations of parental rights, that "[w]here the interests of parent and child conflict, the interests of the child are paramount").

Because 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. It should be noted, however, that a district court has options to protect a child's health, safety, and best interests short of completely excluding that child's testimony. The district "court may. . . take the testimony of a child witness informally when it is in the child's best interests to do so." Minn. Stat. § 260C.163, subd. 6 (2016). While subdivision 6 provides examples of some informal procedures—for instance, the court "may . . . tak[e] the testimony of a child witness outside the courtroom"—it does not mention any informal procedures that would be impermissible. *Id.* The resulting broad discretion of the district court, if "liberally construed" in favor of protecting the health, safety, and best interests of the child—the "paramount consideration" of all termination proceedings—gives the court the power to put limits on the manner of a child's testimony that are consistent with the child's health, safety, and best interests. *See* Minn. Stat. § 260C.001, subds. 3-4.

However a district court resolves the questions of whether a child will testify and, if so, under what circumstances, the district court must make findings explaining its exercise of its discretion on these matters. *See Rosenfeld v. Rosenfeld*, 249 N.W.2d 168, 171-72 (Minn. 1976) (holding that findings explaining a district court's exercise of its discretion are necessary to assure that the relevant factors have been addressed, to provide appellate courts with an adequate basis to review the exercise of that discretion, and to assure the parties that the relevant factors have been considered); *In re Welfare of C.*

Children, 348 N.W.2d 94, 97 (Minn. App. 1984) (applying *Rosenfeld* in a juvenile protection case).

II. The district court erred in precluding J.S.M. from testifying in any way.

We turn to the district court's decision in this case. The questions that we must answer are, first, whether the district court abused its discretion by excluding the child's testimony without making findings of fact as to why it did so and, second, whether its basis for the exclusion is contrary to the evidence. The district court here granted the county's motion to preclude J.S.M. from testifying without making written or oral findings. Instead, based on the county's motion and a relatively brief on-the-record argument, the court stated, "I am inclined to agree with the county. I have reviewed this file in its entirety. The motion to exclude the child from testifying is granted." Given the arguments made by the county and the guardian ad litem, it appears that this decision was made because the district court believed it to be in the child's best interests, but no finding actually states that as the reason. Even if we assume that the decision was based on the child's best interests, we are left without knowledge of what interests are protected or how allowing or requiring the child to testify would be contrary to those interests. The findings are therefore "inadequate to facilitate effective appellate review." *In re Welfare of M.M.*, 452 N.W.2d 236, 239 (Minn. 1990); *cf. Rosenfeld*, 249 N.W.2d at 171-72 (affirming where the findings, as a whole, were adequate to determine what the court considered).

Where a district court's findings are inadequate, this court may undertake "an independent review of the record" in order to effectively review the district court's ruling. *See M.M.*, 452 N.W.2d at 239. We conclude that, even if the district court had made

findings of fact in support of its conclusion that the best interests of the child required total preclusion of her testimony, this record would not support those findings.

The county's motion was supported by a letter from J.S.M.'s case manager, asserting that the child could be harmed if she was required "to testify in court in front of . . . mother as well as many other people." The letter also expressed concern that, if J.S.M. returned to the community to testify, she might run away. Additionally, the case manager noted that J.S.M. prefers phone conversations over face-to-face interactions and sometimes struggles to answer even yes-or-no questions. J.S.M.'s guardian ad litem also favored the exclusion of J.S.M.'s testimony. She testified that J.S.M. can become anxious in "settings" but did not specify what sort of "settings" cause anxiety. The guardian ad litem also testified that J.S.M. should not be put in the position of being forced to determine "if [her] actions were sexually appropriate or not."

However, counsel for mother stated that the intent was never to have the child testify in open court, but rather in chambers, via written questions. J.S.M.'s own attorney indicated that J.S.M. was "willing to talk with the court, but it would have to be in chambers." Additionally, when mother's attorney identified the topics on which he wanted J.S.M. to testify, he never expressed an intent to ask her whether her actions were sexually appropriate. Rather, the line of questioning he briefly described would have addressed whether mother knew of the sexual assaults against J.S.M or of J.S.M.'s conduct with the 17-year-old.

Thus, the objections raised by the county and the guardian ad litem did not address the way mother actually proposed to take J.S.M.'s testimony. Mother did not intend to

question the child in open court, to engage in real-time cross examination, or to ask her about the propriety of her conduct. Further, it is undisputed both that the court was authorized to take J.S.M.'s testimony informally and that nothing would have prevented the court from taking J.S.M.'s testimony by telephone, just as the child's case manager indicated would be best for the child. Indeed, this would also have prevented the child from needing to return to the community, thus eliminating any risk of running away.

The district court's ruling precluding all testimony from J.S.M. is therefore not only unsupported by adequate explanatory findings of fact but also unsupported by this record. Thus, the district court abused its discretion in precluding the testimony.

III. The district court's error was prejudicial.

Even if a district court errs in a proceeding to terminate parental rights, we will not reverse unless the party asserting the error shows that it had prejudicial effect. *In re Welfare of D.J.N.*, 568 N.W.2d 170, 176 (Minn. App. 1997). The erroneous exclusion of evidence is prejudicial if "the evidence 'might reasonably have changed the result of the trial if it had been admitted.'" *Becker v. Mayo Found.*, 737 N.W.2d 200, 214 (Minn. 2007) (quoting *Poppenhagen v. Sornsin Constr. Co.*, 220 N.W.2d 281, 285 (Minn. 1974)). Mother argues that she was prejudiced by the exclusion of J.S.M.'s testimony because the precluded testimony was material to the questions of whether mother was (1) palpably unfit, and (2) aware of any egregious harm suffered by J.S.M. until after the harm had occurred.

The district court found mother to be palpably unfit. A finding of palpable unfitness must be based on either a parent's "specific conduct before the child" or "specific conditions directly relating to the parent and child relationship." Minn. Stat. § 260C.301,

subd. 1(b)(4). The district court's finding of palpable unfitness was largely based on its finding that mother did not ensure that J.S.M. attended school and did not ensure that J.S.M. received mental health or emotional support services. Mother argues that J.S.M.'s testimony would have been that J.S.M. resisted attending both school and appointments. She argues that this testimony would have shown that J.S.M.'s nonattendance at school and appointments for services was a result of J.S.M.'s exercise of her own will. If J.S.M. testified that her truancy and missed appointments were not caused by mother's conduct but rather by J.S.M.'s own intent and the district court found her testimony credible, that testimony could have undermined the finding of palpable unfitness.

The district court also found that J.S.M. had suffered "egregious harm" within the meaning of Minn. Stat. § 260C.301, subd. 1(b)(6). To terminate parental rights based on "egregious harm" where the parent has not personally inflicted the egregious harm, "a court must find that the parent either knew or should have known that the child had experienced egregious harm." *In re Welfare of Child of T.P.*, 747 N.W.2d 356, 362 (Minn. 2008). Here, the district court found mother had allowed the 17-year-old to stay overnight and concluded that she therefore knew of the harm. However, the only evidence of that fact was the guardian ad litem's testimony as to what she had been told by J.S.M. Mother asserts J.S.M.'s testimony would have contradicted that of the guardian ad litem. J.S.M.'s testimony thus could have provided a basis for the court to find that mother neither knew nor had reason to know that J.S.M. was engaging in sexual conduct with the 17-year-old. The district court did not make any findings with regard to whether mother knew or should have known of B.C.'s assaults on J.S.M. If the district court had found that mother was

unaware of and had no reason to suspect the sexual contact between J.S.M. and the 17-year-old, then there would have been no findings that mother knew or should have known that J.S.M. was suffering egregious harm; termination on that basis would therefore not have been warranted.

J.S.M.'s testimony, if accepted and found credible by the district court, could have undercut the existence of both relevant statutory bases for termination. Because "parental rights cannot be terminated in the absence of at least one statutory ground for termination," *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 54 (Minn. 2004), introduction of J.S.M.'s testimony "might reasonably have changed the result of the trial," *Becker*, 737 N.W.2d at 214. The erroneous exclusion of that testimony was therefore prejudicial error.

We reverse the district court's judgment and remand to the district court to take J.S.M.'s testimony, which it may do informally consistent with Minn. Stat. § 260C.163, subdivision 6. The district court may, in its discretion, reopen the record for rebuttal evidence.

Because we reverse based on the exclusion of J.S.M.'s testimony, we do not address mother's arguments that the district court's findings regarding the statutory bases for termination were unsupported by the evidence.

Reversed and remanded.

ROSS, Judge (concurring specially)

I agree with the court's holding today that, even if the district court had made findings of fact to support its conclusion that the best interests of the child required total preclusion of her testimony, the record would not support those findings. In light of this agreement, I need not wade into the contest between the court's opinion and Judge Johnson's special concurrence about whether the statute's overarching "best interests of the child" standard in Minnesota Statutes, section 260C.001, subdivision 2(a) (2016), gives the district court the statutory authority to categorically exclude a child from testifying. I write separately to express my strong view that, assuming the statute purports to give the district court that authority, the district court may never apply that authority in a manner that fails to give full account of a person's fundamental, constitutionally protected right to present relevant evidence in a case that threatens to terminate that person's parental rights to her children.

The Supreme Court has been "unanimously of the view that the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." *M.L.B. v. S.L.J.*, 519 U.S. 102, 119, 117 S. Ct. 555, 565 (1996) (quotation omitted); *and cf. Johnson v. Hunter*, 447 N.W.2d 871, 876 (Minn. 1989) ("Establishment of the parent-child relationship is the most fundamental right a child possesses to be equated in importance with personal liberty and the most basic constitutional rights.") (quotation omitted). Applying this due process protection in the parental-rights realm, the Supreme Court has, for example, required at least a clear-and-convincing-evidence standard of proof before any state can terminate a

person's parental rights. *Santosky v. Kramer*, 455 U.S. 745, 769, 102 S. Ct. 1388, 1403 (1982). As to where that evidence comes from, I believe that, just as the Fourteenth Amendment protects a person's due process right to present relevant evidence when she is fighting for her own personal liberty in criminal trials, *see United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261, 1264 (1998) (discussing the right with reasonable limitations), she has at least the same right when she is fighting to retain her fundamental and constitutionally protected parental relationship with her children. In other words, just as the Supreme Court has found the exclusion of relevant evidence to be unconstitutional whenever the restriction infringes "upon a weighty interest of the accused," *id*., the district court may never categorically prevent a parent from calling a witness to present relevant evidence in a termination-of-parental-rights case unless it first considers whether, and finds that, the purported risks resulting from the witness testifying at trial are weightier than the perpetually significant interest of the parent and child in retaining the parent-child relationship.

Put succinctly, even if the statute does empower the district court with the overarching authority to restrict evidence based on "the best interests of the child," it can apply that authority only within the more overarching constitutional limits on the state's authority to terminate parental rights. I therefore believe that the district court could not properly consider categorically preventing Q.S.M. from calling her teenage daughter to testify without first analyzing whether, and finding that, the purported risk of allowing the teenager to testify outweighed the teenager's interest and Q.S.M.'s interest in retaining their parent-child relationship. Neither occurred here. And my view of the record suggests

that allowing the child to testify presented only highly speculative and easily avoidable risks. There is, by contrast, no need to speculate about what rests on the counterbalance, because we know that "parental status termination is irretrievably destructive of the most fundamental family relationship," and "few consequences of judicial action are so grave as the severance of natural family ties." *M.L.B.*, 519 U.S. at 119, 121, 117 S. Ct. at 565–66 (quotation and alteration omitted). Assuming the general "best interests of the child" provision affords the district court the statutory authority to prohibit a parent from calling a witness to present evidence relevant to whether to terminate parental rights, I believe the district court failed to construe and apply that authority as constitutionally limited.

Despite my different approach to the legal issue, I agree with our court's well-reasoned analysis of the facts and its reversing the district court's judgment to remand the case so the district court may receive the teenager's testimony.

JOHNSON, Judge (concurring specially)

I concur in the opinion of the court insofar as it concludes that the district court erred by ruling that Q.S.M. was not permitted to call the 14-year-old child as a witness at trial. But I reach that conclusion for a different reason. In my view, there is no authority in chapter 260C by which a district court may completely prevent a parent from introducing any testimony of a child who is the subject of a termination petition.

In this case, the county's motion was based on a statutory provision that permits a district court to "take the testimony of a child witness informally when it is in the child's best interests to do so." Minn. Stat. § 260C.163, subd. 6 (2016). Specifically, that provision allows a district court to "tak[e] the testimony of a child witness outside the courtroom" or to "require counsel for any party . . . to submit questions to the court before the child's testimony." *Id.* The provision also authorizes a district court to "excuse the presence of the child's parent, guardian, or custodian from the room where the child is questioned." *Id.* But the provision does not allow a district court to completely prohibit a parent from introducing the child's testimony. The absence of such a prohibition means that a district court may depart from the usual procedures only in the specified ways and only to that extent.

On appeal, the county argues that the district court's ruling is justified by the next subdivision of the statute, which states that a district 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." *Id.*, subd. 7. That provision should not apply when the child is called as a witness because such a scenario is governed by the previous provision, subdivision 6, which is the

more-specific provision with respect to the testimony of a child who is the subject of a termination petition. *See Connexus Energy v. Commissioner of Revenue*, 868 N.W.2d 234, 242-43 (Minn. 2015) (applying "principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling" (quotation omitted)).

Furthermore, both subdivision 6 and subdivision 7 must be interpreted in light of the next provision, subdivision 8, which states, without qualification, "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." Minn. Stat. § 260C.163, subd. 8 (emphasis added). The right to present material evidence should include the right to introduce the testimony of a child who is the subject of a termination petition, so long as the proffered testimony is relevant and otherwise admissible.

The opinion of the court reasons that the district court's ruling is justified by general statutory expressions of the overarching policy that "[t]he paramount consideration in all juvenile protection proceedings is the health, safety, and best interests of the child." *See* Minn. Stat. § 260C.001, subd. 2(a) (2016). I respectfully disagree. The statutory best-interests policy guides a district court in its determination of the substantive merits of a petition. This meaning is demonstrated by context. For example, one such best-interests provision states, "In any proceeding under this section, the best interests of the child must be the paramount consideration, *provided that* the conditions in subdivision 1, clause (a), or at least one condition in subdivision 1, clause (b), are found by the court." Minn. Stat. § 260C.301, subd. 7 (2016) (emphasis added). By its plain language and its cross-

references, the statute makes a child's best interests paramount only if a parent has voluntarily consented to the termination of his or her parental rights, *see id.*, subd. 1(a), or if the district court has found that a statutory ground for termination has been proved by the petitioner by clear and convincing evidence, *see id.*, subd. 1(b). If the statutory best-interests policy were interpreted more broadly, the policy would unjustifiably limit or negate procedural rights that are reflected in numerous statutory provisions and rules of court.

Even if such an expansive interpretation of the statutory best-interests policy were a reasonable interpretation, the canon of constitutional avoidance should cause us to "interpret a statute to preserve its constitutionality." *Hutchinson Tech., Inc. v. Commissioner of Revenue*, 698 N.W.2d 1, 18 (Minn. 2005). As Judge Ross observes, a person whose parental rights are at risk of termination has a constitutional right to due process, which includes a right to "fundamentally fair procedures." *See Santosky v. Kramer*, 455 U.S. 745, 753-54, 102 S. Ct. 1388, 1394-95 (1982). As a matter of statutory interpretation, it would be prudent for this court to interpret the above-described statutory provisions in a manner that would avoid any infringement on a parent's constitutional rights.

Thus, I conclude that the district court erred because it did not have statutory authority to prevent Q.S.M. from calling the child as a witness, with or without a finding concerning the best interests of the child. In addition, I concur in the opinion of the court insofar as it concludes that the district court's error is not harmless. Furthermore, I concur

in the penultimate paragraph of the opinion of the court, which directs further proceedings in the district court on remand.