

2021

Hidden in Plain Sight: Kerri S. and Nebraska's Non-court Child Welfare System

Claudia W. Brock
University of Nebraska College of Law

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

Recommended Citation

Claudia W. Brock, *Hidden in Plain Sight: Kerri S. and Nebraska's Non-court Child Welfare System*, 99 Neb. L. Rev. 988 (2020)
Available at: <https://digitalcommons.unl.edu/nlr/vol99/iss4/6>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Comment*

Hidden in Plain Sight: *Kerri S.* and Nebraska's Non-court Child Welfare System

TABLE OF CONTENTS

I. Introduction	989
II. Background	991
A. The Rise of Non-court Involved Cases in Nebraska's Child Welfare System	991
B. How a Hotline Call Becomes a Non-court Case	992
C. Benefits and Pitfalls of Non-court Involved Cases ..	994
D. Circuit Split: When Are Due Process Rights Triggered in Non-court Arrangements?.....	997
1. Constitutional Due Process Protections and Fundamental Rights	997
2. A Broad Approach: <i>Croft v. Westmoreland County</i>	998
3. A Narrow Approach: <i>Dupuy v. Samuels</i>	999
III. <i>State v. Kerri S. (In Re Joseph S.)</i>	1001
A. Facts	1001
B. Procedural History	1002
C. Nebraska Supreme Court Holding	1004
D. Analysis of the Nebraska Supreme Court's Opinion	1005
1. The Nebraska Supreme Court Erred in Rejecting a Broad Approach	1005
2. The Elevation of Form Over Function	1007
IV. The Need for Legislative Reforms	1009

© Copyright held by the NEBRASKA LAW REVIEW. If you would like to submit a response to this Comment in the *Nebraska Law Review Bulletin*, contact our Online Editor at lawrev@unl.edu.

* Claudia W. Brock, J.D., University of Nebraska College of Law, 2021. I would like to thank Allison Derr, Sarah Helvey, and Robert McEwen of Nebraska Applesseed for their mentorship and meaningful work in child welfare policy. I would also like to thank Sarah O'Neill for her friendship and support. Finally, thank you to the NEBRASKA LAW REVIEW, especially Executive Editor Zachary Van Kovering and Editor-in-Chief Shayna Bartow, for their work in preparing this Comment for publication.

A. An Opportunity to Provide Representation to Non-court Families.....	1010
B. Economic Solutions to Prevent the Need for Engagement with the Child Welfare System	1012
V. Conclusion	1012

I. INTRODUCTION

“[T]he attachment between parent and child forms the basis of who we are as humans . . .”¹ Not only is the parent-child relationship socially sacred, it is legally significant. Courts have broadly recognized that parents have a fundamental right to make decisions as to the care and custody of their children.² This right is a protected liberty interest under the Due Process Clause of the Fourteenth Amendment.³ As a result, there can be no doubt that due process is owed whenever the government seeks to separate a parent from his or her child. Due process principles generally require the right to notice and a hearing before the state initiates the separation.⁴ In Nebraska juvenile courts, a judge will determine whether the facts of the case fall within the child abuse and neglect statute,⁵ and parents have the opportunity to respond to the petition by admitting or denying the allegation of maltreatment alleged by the county attorney.⁶ However, the possibility also exists that the state may effectuate a familial separation without the involvement of the juvenile court in a child welfare case. This arrangement, which curtails due process rights, is a non-court involved child welfare case.

In Nebraska, following a child abuse and neglect investigation, a child welfare case progresses down one of three pathways: the case is filed in juvenile court; the case is closed; or the case is kept open as a non-court involved case.⁷ In 2020, the Nebraska Legislature defined a “non-court involved [case]” as:

-
1. *Nicholson v. Williams*, 203 F. Supp. 2d 153, 199 (E.D.N.Y. 2002) (describing the testimony of expert witnesses who testified about the primacy of the parent-child bond).
 2. *See infra* note 53 and accompanying text.
 3. *See infra* note 53 and accompanying text.
 4. *Hollingsworth v. Hill*, 110 F.3d 733, 739 (10th Cir. 1997).
 5. NEB. REV. STAT. § 43-247(3)(a) (Reissue 2016).
 6. NEB. REV. STAT. § 43-279.01(1)-(2) (Reissue 2016).
 7. For the purposes of this Comment, “non-court involved cases” will refer to voluntary cases operating outside of the juvenile court, and not to alternative response cases. *See* NEB. APPLESEED, KNOW YOUR RIGHTS: A PARENT’S GUIDE TO NON-COURT CHILD WELFARE CASES (2017), <https://neappleseed.org/wp-content/uploads/2017/09/AR-KYR-Guide-Final-.pdf> [<https://perma.unl.edu/T248-MAZ5>] (noting that non-court includes the subset of alternative response cases but that not all non-court cases are alternative response cases); *see also* NEB. REV. STAT. § 28-712.01 (Reissue 2016 & Cum. Supp. 2018) (codifying definitions, rules, and De-

[A]n ongoing case opened by the department following a report of child abuse or neglect in which the department has determined that ongoing services are required to maintain the safety of a child or alleviate the risk of future abuse or neglect and in which the family voluntarily engages in child protective services without a filing in a juvenile court.

Non-court arrangements allow for increased flexibility and an offering of family-specific voluntary services, but at what cost? Non-court cases bypass procedural protections typically provided to a family involved in juvenile court proceedings.⁸ While avoiding unnecessary home removals is a noble policy goal, the lack of clarity as to what constitutes non-court involved cases as well as a lack of regulation and oversight has increasingly become a cause for concern. Child welfare advocates and stakeholders have questioned the voluntary nature of non-court arrangements, the safety of the placements, and the lack of services and supports provided to children and families in non-court involved living arrangements. Additionally, because non-court arrangement terms, standards, and procedures are unclear and uncodified, there is a risk that parents who “voluntarily” participate in these arrangements without knowing or understanding the implications will unintentionally undermine their own procedural due process protections.

The Nebraska Supreme Court recently held that procedural due process protections only attach for parents in non-court arrangements when the state causes a familial separation through explicit agency coercion.⁹ The Court’s holding is consistent with the narrow approach of the Sixth¹⁰ and Seventh Circuits¹¹ in determining when a family’s due process rights attach in non-court involved child welfare cases. This narrow approach may be contrasted with the broader approach of the Third Circuit,¹² which holds that due process protections attach whenever the state alters the custodial relationship between a parent and child. This Comment will argue that the broad standard of the Third Circuit creates stronger protections for families and is easier for courts to apply. Additionally, a legislative solution is needed to bring this frequently used practice out of hiding through codification.

Part II of this Comment will provide relevant background information including the benefits and detriments of non-court arrangements, data quantifying their increased use by the state, and a comparison of

partment of Health and Human Services directives for alternative response cases).

8. Soledad A. McGrath, *Differential Response in Child Protection Services: Perpetuating the Illusion of Voluntariness*, 42 U. MEM. L. REV. 629, 631–32 (2012).
9. *State v. Kerri S. (In re Joseph S.)*, 288 Neb. 463, 470, 849 N.W.2d 468, 474 (2014) (holding coercion exists when a caseworker improperly threatens to remove a child from the home as a consequence of non-compliance with agency directives).
10. *Smith v. Williams-Ash*, 520 F.3d 596, 598 (6th Cir. 2008).
11. *Dupuy v. Samuels*, 465 F.3d 757, 760 (7th Cir. 2006).
12. *Croft v. Westmoreland Cty. Children & Youth Servs.*, 103 F.3d 1123, 1125 (3d Cir. 1997).

both sides of the circuit split regarding when procedural due process rights attach in non-court settings. Part III will provide the facts and holding of the recent Nebraska Supreme Court case *State v. Kerri S.*, which followed the Sixth and Seventh Circuits' jurisprudence and denied the due process protections the Nebraska Court of Appeals had previously granted to the parent engaged in a non-court involved child welfare arrangement.¹³ Finally, Part IV will propose legislative solutions to provide heightened standards and procedures in non-court cases.

II. BACKGROUND

A. The Rise of Non-court Involved Cases in Nebraska's Child Welfare System

Only a few years ago, Nebraska removed children from their homes at a rate twice the national average.¹⁴ The goal of reducing the number of children in the state's foster care system was first pursued in 2006 by then Governor Dave Heineman.¹⁵ A few years later, a 2008 report from the Department of Health and Human Services (the department) mentioned the goal of reversing the proportion of out-of-home to in-home placements of children involved in the state's child welfare system; this policy goal became known as "flipping the pyramid."¹⁶ Child welfare advocates cautioned against "flipping the pyramid," as reform should not be centered on percentages of children being in one place rather than another.¹⁷

Since the goal of "flipping the pyramid" was announced by the department and the Governor, a flip has indeed occurred. Today the state has the same number of children involved in non-court arrangements as are involved in child welfare cases formally filed in juvenile court.¹⁸ Despite its shadowy existence in Nebraska statutes and regu-

13. *Kerri S.*, 288 Neb. at 471, 849 N.W.2d at 474.

14. VOICES FOR CHILDREN IN NEB., KIDS COUNT IN NEBRASKA REPORT 9 n.4 (2012) (noting the U.S. rate of entry into foster care during 2011 was 3.4 children in every 1000 while Nebraska's rate between April 2011 and March 2012 was 5.6 children in every 1000); VOICES FOR CHILDREN IN NEB., AN ALTERNATIVE RESPONSE TO CHILD PROTECTION IN NEBRASKA 3 (2017).

15. PERFORMANCE AUDIT COMM., DHHS PRIVATIZATION OF CHILD WELFARE AND JUVENILE SERVICES, Leg. 102-1, 1st Sess., at 29 (Neb. 2011).

16. *Id.*

17. *Nebraska's Child Welfare Pyramid*, VOICES FOR CHILD. NEB. (Oct. 18, 2011), <https://voicesforchildren.com/nebraskas-child-welfare-pyramid/> [<https://perma.unl.edu/49S6-N55T>].

18. *Floor Debate on LB 1061*, 106th Leg., 2d Sess. 38-39 (Neb. 2020) (statement of Sen. Sue Crawford) ("Over half of our child welfare cases are now noncourt-involved cases, and these have been operating without sufficient statutory or regulatory standards."). It is unclear when the department began using non-court involved cases. The first Voices for Children in Nebraska *Kid's Count in Ne-*

lations, the department widely effectuates non-court involved cases.¹⁹ In 2011, 63% of child welfare cases started with an entry in a court process, and in 2018, those numbers reversed with 64% of children entering Nebraska's child welfare system through a non-court case.²⁰ Child welfare stakeholders have commented on the substantial increase in the use of voluntary cases in recent years.²¹ The Inspector General of Nebraska Child Welfare stated that the increase in serving families through non-court cases instead of court cases contributed to "an uneasiness permeating across our state regarding the welfare of children."²²

B. How a Hotline Call Becomes a Non-court Case

To appreciate the distinction between court involved and non-court involved child welfare cases, one must understand the origins of any child welfare case. The Department of Health and Human Services is the state agency that provides children and family services in Nebraska.²³ The department aims to respond to reports of child maltreatment in the least intrusive manner while still providing the appropriate level of service necessary to meet the needs of the family.²⁴

braska Report to make note of the practice was the report published in 2009. See VOICES FOR CHILDREN IN NEB., KIDS COUNT IN NEBRASKA REPORT 16 (2009).

19. Only in the summer of 2020 was "non-court cases" defined by the Nebraska Legislature. See *infra* note 152 and accompanying text.
20. *Hearing on LR 239 Before the Health and Human Servs. Comm.*, 106th Leg., 1st Sess. 43 (Neb. 2019) (statement of Juliet Summers, Policy Coordinator, Voices for Children).
21. *Hearing on LB 1061 Before the Health and Human Servs. Comm.*, 106th Leg., 2d Sess. 32 (Neb. 2020) (statement of Sen. Sue Crawford) (noting "shift toward increased noncourt" cases); *Hearing on LR 239, supra* note 20, at 8 (statement of Kim Hawekotte, Director, Foster Care Review Office) (noting a "huge increase in the state over the last year or two in the use of voluntary services"); *id.* at 27 (statement of juvenile court J. Roger Heideman) (noting that the juvenile court has seen a "push towards voluntary cases").
22. OFFICE OF INSPECTOR GEN. OF NEB. CHILD WELFARE, ANNUAL REPORT 2018–2019, at 3–4 (2019).
23. 390 NEB. ADMIN. CODE § 4-010.01 (2018).
24. *Id.* This mission dovetails with that of the Nebraska juvenile court. See *Hearing on LR 239, supra* note 20, at 24 (statement of juvenile court J. Roger Heideman) ("What our charge is, so to speak, and that we're to ensure the rights of all juveniles to the care, protection, and safe and stable living environment to development of their capacities for a healthy personality, physical well-being, and useful citizenship, and to protect the public interest. And to achieve that purpose, then it goes on to say that we're to maintain the juveniles in their own home whenever possible, but to separate them when it's necessary for their health, safety, and welfare or the paramount concern for that.").

Child welfare policy on both a state and national level has long reflected a singular focus on safety.²⁵ In Nebraska, allegations of child maltreatment are screened at the Child Abuse and Neglect Hotline for initial assessment.²⁶ Through this investigation, the department gathers evidence to determine whether the allegation of child abuse and neglect is substantiated or unfounded.²⁷ Over 80% of substantiated cases involve physical neglect.²⁸ Physical neglect is defined under Nebraska law²⁹ as a failure to provide, “necessary food, clothing, shelter, or care” and is often an indication of economic issues or a lack of familial resources.³⁰

After a call comes into the department’s Child Abuse and Neglect Hotline, calls are screened using a structured decision-making tool, designed to determine the safety and risk involved, and are either accepted for further assessment by the department or rejected, meaning no case is opened.³¹ Following further investigation, a case initially accepted for further assessment goes down one of three pathways: the

25. AN ALTERNATIVE RESPONSE TO CHILD PROTECTION IN NEBRASKA, *supra* note 14, at 1.

26. 390 NEB. ADMIN. CODE § 4-005-07 (2018).

27. 390 NEB. ADMIN. CODE § 4-008.01 (2018) (noting that the department worker makes a case status determination based on “whether there is credible evidence to support the finding that child abuse or neglect as defined by state statute has occurred”). In 2018, there were 36,480 reports of alleged maltreatment made to the Child Abuse and Neglect Hotline. Of those, 12,808 were assessed and only 2,048 of the total reports were substantiated. *See* VOICES FOR CHILDREN IN NEB., KIDS COUNT IN NEBRASKA REPORT 63 (2019) [hereinafter KIDS COUNT IN NEBRASKA 2019 REPORT].

28. KIDS COUNT IN NEBRASKA 2019 REPORT, *supra* note 27, at 64. After physical neglect, the most common substantiated cases involve physical abuse (14.9%), sexual abuse (10.7%), emotional abuse (0.5%), and emotional neglect (0.4%). The report also notes that some children experienced more than one type of maltreatment. *Id.*

29. NEB. REV. STAT. § 28-710(b)(iii) (Reissue 2016).

30. VOICES FOR CHILDREN IN NEB., KIDS COUNT IN NEBRASKA REPORT 63 (2016) [hereinafter KIDS COUNT IN NEBRASKA 2016 REPORT].

31. The “Structured Decision Making tool” is a set of research-based decision-support assessments designed to provide structure for assessing current and future harm to the child. *See* NEB. DEP’T OF HEALTH & HUMAN SERVS., NEBRASKA CHILD AND FAMILY SERVICES REVIEW ROUND 3 PROGRAM IMPROVEMENT PLAN 2 (2018). Standardizing the assessment for harm is critical since, in Nebraska, there is disproportionality in reports of child abuse and neglect with Black youth being 5.7% of the population and 14.1% of reports, and American Indian youth being 1.1% of the population but 3.6% of reports. Reports involving Black youth were less likely than average to be substantiated by the agency or filed in juvenile court. *See* VOICES FOR CHILDREN IN NEB., EQUALITY BEFORE THE LAW: RACE & ETHNICITY IN THE FRONT END OF NEBRASKA’S CHILD WELFARE SYSTEM 2-3 (2019) [hereinafter EQUALITY BEFORE THE LAW]. However, some child welfare advocates assert that the Structured Decision Making tool has a race and class bias. *See* NAT’L COAL. FOR CHILD PROT. REFORM, NEVER MIND THE DECK CHAIRS, SAVE THE SHIP: HOW TO SAVE NEBRASKA’S SINKING CHILD WELFARE SYSTEM 19 (2012).

case is filed in juvenile court; the case is closed; or the case is kept open as a non-court involved case in which the family voluntarily participates in child protective services.³² Voluntary cases then go down one of two pathways: for lower risk cases, alternative responses may be offered; for higher risk cases, parents may voluntarily agree to participate in services offered by the department to avoid engagement with the juvenile courts.³³

C. Benefits and Pitfalls of Non-court Involved Cases

Non-court involved cases represent a trend towards a flexible approach to child welfare. When there have been allegations of child maltreatment which pose only a low to moderate risk of harm to the child, non-court cases allow the state to respond in ways other than filing a case in the juvenile court.³⁴ Additionally, the ability to provide voluntary services to parents before having to remove a child from the home reduces the frequency of familial separation. This is beneficial for children as traumatic separation from parents creates toxic stress in children and adolescents that can profoundly impact their development.³⁵ This disruption in the development of the nervous system increases the risk for stress-related disease and cognitive impairment well into adult years.³⁶ Though not all court involved cases result in the removal of a child, non-court involved arrangements build parental capacity and maintain family routines and relationships by allowing children to remain in their own homes *while* their family receives voluntary services.³⁷

A non-court arrangement relies on a family to voluntarily participate in agency services beyond the oversight of the juvenile court.³⁸ In these non-court cases, the state will attempt a more collaborative or family-focused approach in which the department must create a case plan that specifies the unique services to be provided to the family.³⁹

32. See *Hearing on LB 1061*, *supra* note 21, at 31(statement of Sen. Sue Crawford).

33. See *Hearing on LR 239*, *supra* note 20, at 4–5 (statement of Sen. Sara Howard).

34. AN ALTERNATIVE RESPONSE TO CHILD PROTECTION IN NEBRASKA, *supra* note 14, at 3.

35. *Ms. L. v. U.S. Immigration & Customs Enft*, 310 F. Supp. 3d 1133, 1147 (S.D. Cal. 2018).

36. *Id.* (reviewing evidence stating that studies “have shown that children who experience such traumatic events can suffer from symptoms of anxiety and post-traumatic stress disorder, have poorer behavioral and educational outcomes, and experience higher rates of poverty and food insecurity”).

37. VOICES FOR CHILDREN IN NEB., KIDS COUNT IN NEBRASKA REPORT 70 (2018) (noting the process of removal includes the uprooting of familiar caregivers and surroundings which may create a serious form of traumatic stress for the child with long-term health and social consequences, leaving the child vulnerable to continued trauma).

38. NEB. APPELEED, *supra* note 7.

39. *Id.*

These non-court arrangements appear to be beneficial to all parties involved: the family volunteers to receive offered services and the state is able to conserve resources.⁴⁰ Especially since physical neglect—the cause for the majority of child maltreatment cases in Nebraska—may be quickly addressed through voluntary services.⁴¹

However, while non-court arrangements allow for increased agency flexibility, the voluntary nature of the program allows the department to circumvent legal procedural protections otherwise provided to parents when a traditional investigatory response triggers court proceedings.⁴² Additionally, the degree of parental voluntariness in non-court arrangements may be questionable due to an imbalance of power between the state and the parent, or the use of agency coercion when removal of the child is threatened.⁴³ The lack of regulatory guidelines and procedures for non-court involved cases creates a legal issue when such cases result in the state removing children from their homes without the involvement or oversight of the juvenile court. For example, voluntary placement agreements occur when a family is involved in a non-court, voluntary case and the department places their child with a relative or family friend as part of a caseworker developed safety plan.⁴⁴ In February 2019, there were fifty-three children involved in voluntary placement agreements in

40. McGrath, *supra* note 8, at 633 (explaining that conserved state resources may then be spent to manage more severe cases of maltreatment, which are most appropriately served by actions that address immediate safety concerns, such as removal).

41. See AN ALTERNATIVE RESPONSE TO CHILD PROTECTION IN NEBRASKA, *supra* note 14, at 2 (noting physical neglect is often related to poverty and financial stress); KIDS COUNT IN NEBRASKA 2016 REPORT, *supra* note 30, at 63.

42. McGrath, *supra* note 8, at 636–37 (describing the court’s oversight and protection, including, “if during the pendency of an investigation a child is removed from the home, the parent has a right to a judicial hearing to review the agency’s decision to remove the child”). At this hearing, the agency bears the burden of proving that there is probable cause to suspect the child has been abused or neglected and that immediate removal was warranted. *Id.* This procedural protection ensures that the agency meets its burden of establishing the necessity of the removal of the child from the home and also allows parents an initial opportunity to respond to the allegations that brought the family to the attention of the CPS agency in the first place. *Id.* Throughout the life of a case, there may also be several review hearings to help the court monitor the situation. *Id.*

43. Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 STAN. L. REV. 841, 861 (2020).

44. The Foster Care Review Office refers to these voluntary placement agreements as “Approved Informal Living Arrangements” (AILAs). References to AILAs will be found in the Foster Care Review Office’s reports and legislative testimony. See NEB. FOSTER CARE REVIEW OFFICE, QUARTERLY REPORT 3 (2019). However, because the Nebraska Court of Appeals and Nebraska Supreme Court use the term “voluntary placement agreement” in the case of *Kerri S.*, this Comment will use the same term for clarity.

Nebraska.⁴⁵ Children in voluntary placement agreements comprised 15% of the 797 non-court cases opened in Nebraska between July 1, 2018, and June 30, 2019.⁴⁶

These voluntary placement agreements resemble court-involved foster care, as custody of the child has been transferred from the parent to another caregiver at the request of the department. It may be questioned whether non-court involved cases which result in voluntary placement agreements are truly *voluntary* since parents may be reluctantly agreeing to participate in services when faced with the alternative of the department filing in juvenile court.⁴⁷ The Foster Care Review Office (FCRO), an independent state agency responsible for the oversight of the permanency, safety, and well-being of all children in out-of-home care in Nebraska, found that in a sample of thirty mothers who were receiving services through the department, eighteen mothers, or 60%, were either minimally or not at all engaged with services.⁴⁸ Of a sample of nine fathers who were receiving services through the department, six fathers, or 67%, were likewise minimally or not at all engaged with services.⁴⁹ Katherine Bass, Research Director for the FCRO, recently stated to the Nebraska Legislature, “Most parents do not welcome DHHS or court involvement, so they feel like they’re getting a great deal . . . The problem is that they lack the legal knowledge of their rights and options.”⁵⁰

Most concerning is the lack of procedural due process protections granted to parents in non-court involved cases. Unlike court involved cases, non-court cases exist beyond the reach of the juvenile courts meaning that there is no court oversight as to the appropriateness of the safety plan, no oversight of unnecessary removals, and no oversight of whether there have been reasonable efforts to reunify.⁵¹ The FCRO found that parents are signing legal documents based on information from department caseworkers without the time or money to seek legal advice, or awareness of the importance of such legal advice.⁵² In other words, parents are making long-term decisions regard-

45. *Id.* at 7–8.

46. NEB. ALLIANCE OF CHILD ADVOCACY CTNS., ANNUAL NON-COURT CHILD WELFARE REPORT 4 (2019).

47. NEB. FOSTER CARE REVIEW OFFICE, *supra* note 44, at 9 (“One of the most concerning and prominent issues that transpires while reviewing AILA cases is the lack of real cooperation by parents in many of the cases, calling into question their voluntary nature.”).

48. *Id.* (noting that “not engaged with the services” generally means the family did not elect to participate in the voluntary services provided by the department).

49. *Id.*

50. *Hearing on LB 1061*, *supra* note 21, at 33 (statement of Katherine Bass, Research Director, Foster Care Review Office).

51. NEB. FOSTER CARE REVIEW OFFICE, *supra* note 44, at 9.

52. *Id.*; *Hearing on LR 239*, *supra* note 20, at 16 (statement of Kim Hawekotte, Director, Foster Care Review Office) (“[Y]ou’re having parents sign documents they

ing who maintains both legal and physical custody of their children while relying only on the lay legal advice offered by department caseworkers.

D. Circuit Split: When Are Due Process Rights Triggered in Non-court Arrangements?

Because non-court arrangements have the potential to interfere with the constitutionally protected parent-child relationship, ensuring procedural due process is essential. While serving families outside the constraints of the juvenile court system can be an effective way to provide early intervention, flexible non-court arrangements side-step procedural protections that are triggered by court proceedings.

1. Constitutional Due Process Protections and Fundamental Rights

Any state action that interferes with parental authority over children or alters the parent-child relationship raises issues of due process. The Supreme Court of the United States has recognized that parents have a fundamental right to the care, custody, and control over their children.⁵³ The Supreme Court's jurisprudence regarding parental rights dates back nearly a century, and courts have also recognized that fundamental liberty rights extend to both parents and children in their familial relationship.⁵⁴ In an effort to safeguard these fundamental rights, the Supreme Court and state actors have adopted familial due process protections.⁵⁵ These due process rights are evidenced in states' child welfare agency procedures, such as the inquiry a state must launch when investigating whether a parent is unfit or whether to remove a child from the home.⁵⁶ However, parents' right to the care, custody, and control over their children is not

don't even know what it is they're signing or what it is they're doing, they have not been told. I think that for case managers has to be difficult for them because you're giving legal advice as to sign this document and then your kid, child can go live over here. There are no attorneys involved in any voluntary case. It is strictly the department and the, and the family.”)

53. *Troxel v. Granville*, 530 U.S. 57, 57 (2000).

54. *Id.* at 65; *Santosky v. Kramer*, 455 U.S. 745, 753, 758–59 (1982); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981); *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

55. *Stanley*, 405 U.S. at 649 (holding parents were entitled to a “hearing on [their] fitness as a parent before [their] children were taken from [them]”); *In re Juvenile Appeal*, 455 A.2d 1313, 1319–20 (Conn. 1983) (holding that because of the fundamental interest a parent has in raising their children, a showing of serious physical illness, serious physical injury, or immediate physical danger must be demonstrated before children may be removed from a family).

56. Gupta-Kagan, *supra* note 43, at 866.

absolute and must be balanced against the state's interest in ensuring the safety and health of children.⁵⁷

While formal foster care includes constitutionally required court hearings and judicial oversight, non-court foster care avoids these hearings. But, like formal foster care, involvement in non-court foster care can lead to the state separating a parent from his or her child. The issue of whether procedural due process protections must accompany this familial separation turns on the voluntariness of parents participating in a non-court arrangement with the state.⁵⁸ If the state coerces parents in a non-court arrangement through unjustifiable threats to remove the children or initiate court proceedings against the parent, then no voluntary choice exists, and the state has acted unconstitutionally.⁵⁹ However, if the arrangement between the parent and the state is truly voluntary, then no violation of the Due Process Clause has occurred.⁶⁰ The federal circuits are split by the question of whether a state's legally justifiable threats to remove a child from the home are so coercive by their nature that they make any subsequent "voluntary" agreement by the parent to enter into a non-court arrangement essentially involuntary.⁶¹

2. *A Broad Approach: Croft v. Westmoreland County*

The Third Circuit has held that procedural due process rights must apply when parents enter an agreement with the state that separates the parents from their children.⁶² *Croft v. Westmoreland Cty. Children & Youth Servs.* involved a state agency investigation into whether the Crofts were abusing their four-year-old daughter after a vague report was made to a child protection hotline.⁶³ The Crofts denied the abuse and offered an explanation for their daughter's behavior, but the agency investigator presented Mr. Croft with "an ultimatum."⁶⁴ Mr. Croft could either leave his home and voluntarily separate himself from his daughter for the duration of the investigation, or his child would be removed from her home and placed in foster care.⁶⁵

57. Tara Grigg Garlinghouse & Scott Trowbridge, *Child Well-Being in Context*, 18 U. PA. J.L. & SOC. CHANGE 105, 108 (2015).

58. Katherine C. Pearson, *Cooperate or We'll Take Your Child: The Parents' Fictional Voluntary Separation Decision and a Proposal for Change*, 65 TENN. L. REV. 835, 837 (1998).

59. *Id.*

60. *Id.*

61. Ryan C. F. Shellady, Note, *Martinis, Manhattans, and Maltreatment Investigations: When Safety Plans Are a False Choice and What Procedural Protections Parents Are Due*, 104 IOWA L. REV. 1613, 1628 (2019).

62. *Croft v. Westmoreland Cty. Children & Youth Servs.*, 103 F.3d 1123, 1125 (3d Cir. 1997).

63. *Id.* at 1124.

64. *Id.*

65. *Id.*

The Third Circuit held the state agency had acted beyond its legal authority by removing the child absent evidence beyond an anonymous phone call to a tip line.⁶⁶ However, the holding of the court went beyond examining the authority necessary for state actors to effectuate a family separation.⁶⁷ *Croft* also held that there can be no voluntary non-court arrangement when an agency threat to remove a child has occurred. While the state agency repeatedly characterized the father's decision to leave the home as voluntary, the Third Circuit found the caseworker's ultimatum was coercive, and the defendant's attempts to color the father's decision as voluntary were "not well taken."⁶⁸

Following district court cases in the Third Circuit have expanded the holding in *Croft* to regard any non-court child welfare arrangement which results from a state agency's threat to remove a child as coercive. For example, *Starkey v. York County* held that coercing parents to enter into a non-court arrangement with the implicit threat that the agency will initiate an emergency removal raises procedural due process concerns.⁶⁹ *Starkey* is distinguishable from *Croft* in that the facts of *Starkey* included significantly more evidence of alleged abuse and neglect.⁷⁰ The variety of case facts further illustrates that the Third Circuit's holding is not dependent on the strength of the state's evidence of maltreatment.⁷¹ Thus, in the Third Circuit, procedural due process rights apply *whenever* parents enter into an arrangement with a governmental entity which creates a family separation.

Additionally, the trial court in *Starkey* expressly rejected the holding of the Seventh Circuit, discussed below, which examines how coercive the voluntary agreement is to determine whether due process rights attach.⁷² Courts in the Third Circuit have interpreted *Croft* to reject any argument that voluntary non-court arrangements entered under threats to remove a child were not "blatantly coercive."⁷³

3. A Narrow Approach: Dupuy v. Samuels

In contrast to the broad holding of the Third Circuit, the Seventh Circuit held in *Dupuy v. Samuels* that procedural due process rights are not triggered unless a parent has been "coerced" to enter into a

66. *Id.* at 1126–27.

67. *Id.* at 1127.

68. *Id.* at 1125 n.1.

69. *Starkey v. York Cty.*, No. 1:11-cv-00981, 2011 U.S. Dist. LEXIS 157646, at *20 (M.D. Pa. Sept. 21, 2011).

70. *Id.* at *2–5, *8.

71. *Id.* at *9.

72. *Dupuy v. Samuels*, 465 F.3d 757 (7th Cir. 2006).

73. *Starkey*, 2011 U.S. Dist. LEXIS 157646, at *22.

non-court arrangement resulting in the child being placed out of the home.⁷⁴ Without coercion by the state, there is insufficient state interference to merit due process protections.⁷⁵ *Dupuy* was a class action suit filed by parents which challenged a range of practices used by the Illinois child-welfare agency that allegedly infringed on parental rights protected by the due process clause.⁷⁶ Like *Croft*, *Dupuy* involved non-court arrangements which led to family separations. However, the Seventh Circuit determined that non-court arrangements are the result of voluntary choices by the parent and that engagement in this non-court arrangement is merely an offer of an alternative to juvenile court.⁷⁷

The holding of the Seventh Circuit differs from that of the Third Circuit in that the Seventh Circuit held that legitimate or well-evidenced threats to remove the child or to involve the juvenile court are not coercive.⁷⁸ It is only if the state agency lacks the factual basis or evidentiary findings to make a threat to a parent that the parent's subsequent agreement to a non-court arrangement can be characterized as coercive.⁷⁹ The court distinguished legitimate legal threats from objectionable state coercion on the basis of whether a threat is unjustifiable.⁸⁰

Other federal courts have ruled similarly including the Sixth Circuit in *Smith v. Williams-Ash*.⁸¹ Following concerns articulated by the state that the Smiths' home was too dirty and cluttered to be a safe place for children, a social worker persuaded the Smiths to enter into a non-court arrangement which resulted in the removal of their children.⁸² The Smiths stated that they promptly cleaned their home and inquired about additional measures they should take in order to be reunited with their children, but that the state official ignored the parents' request for additional information and threatened to permanently remove their children if they stopped abiding by their voluntary non-court agreement.⁸³ The state allowed the Smith children to return to the custody of their parents only after the parents filed a federal lawsuit alleging a due process violation.⁸⁴

74. *Dupuy*, 465 F.3d at 760.

75. *Id.* at 763.

76. *Id.* at 758.

77. *Id.* at 760.

78. *Id.* at 763.

79. *Id.* at 762; *see also* Gupta-Kagan, *supra* note 43, at 863 (noting there is no consideration by the Seventh Circuit as to whether it is reasonable to expect parents to evaluate the legitimacy of a state agency threat to remove their children).

80. *Dupuy*, 465 F.3d at 762.

81. *Smith v. Williams-Ash*, 520 F.3d 596 (6th Cir. 2008).

82. *Id.* at 598.

83. *Id.*

84. *Id.* at 599.

In the opinion of the Sixth Circuit, the lower court relied heavily on form language involved in the voluntary agreement between the state and the Smiths.⁸⁵ The Sixth Circuit followed the reasoning in *Dupuy* and determined that the custody change was a voluntary choice by the parents, and therefore, procedural due process rights did not attach.⁸⁶

III. *STATE V. KERRI S. (IN RE JOSEPH S.)*

Nebraska courts had not ruled on when procedural due process must be provided to parents who are participating in a non-court involved child welfare case until the case of *Kerri S.* in 2014.⁸⁷ *Kerri S.* was a case of first impression for the Nebraska Supreme Court, and its opinion aligned Nebraska courts with the narrow approach utilized by the Seventh Circuit in *Dupuy* and the Sixth Circuit in *Ash*. The case concerned a non-court involved child welfare case in which a parent entered an arrangement with the state without the involvement or oversight of the juvenile court. Specifically, the agreement between the parent and the department resulted in the removal of the children from the parent's custody and also required the parent to participate in services provided by the state and its contractor, the Nebraska Families Collaborative (NFC), which included testing for controlled substances.⁸⁸

A. Facts

Kerri is the biological mother of three children: Joseph S., born in January 2000; William S., born in November 2005; and Steven S., born in December 2006.⁸⁹ In March 2009, the department took notice of Kerri and her children due to concerns about Kerri's drug use and improper supervision of the children.⁹⁰ Shortly after Melissa Misegadis, a family permanency supervisor with NFC, became involved in the case, the children entered foster care where they remained for one year.⁹¹ Kerri received drug testing and mental health services while her children were in foster care.⁹² Misegadis testified that Kerri did not always consistently participate in services offered by the department, but that Kerri completed a court-ordered and court-monitored

85. *Id.* at 598 (noting that such agreement stated that the "decision to sign this safety plan is voluntary" and that "[i]f you cannot or will not be able to continue following the plan, [CPS] may have to take other action(s) to keep your child(ren) safe").

86. *Id.* at 600.

87. *State v. Kerri S. (In re Joseph S.)*, 288 Neb. 463, 849 N.W.2d 468 (2014).

88. *Id.*

89. *Id.* at 464, 849 N.W.2d at 471.

90. *Id.* at 465, 849 N.W.2d at 471.

91. *Id.*

92. *Id.*

plan.⁹³ Kerri's children were returned to her care and the case was closed in November 2011 after being open for thirty-two months.⁹⁴

In January 2012, the department received reports that Kerri was once again not properly supervising her children.⁹⁵ Kerri entered into a voluntary agreement with the department and the case was transferred to NFC.⁹⁶ Kerri's voluntary services included drug testing and placing her children in temporary foster care for a period of 180 days.⁹⁷ NFC asserted that during this period Kerri was not consistent in participating in weekly visitation or attending therapy sessions.⁹⁸ Kerri's scheduled drug testing also resulted in positive readings during this period.⁹⁹

An NFC specialist conducted a drop-in visit to Kerri's home before the children were to return.¹⁰⁰ The specialist testified that she found the home in disarray and five non-familial adults appeared to be residing in the home.¹⁰¹ NFC then requested that the department be granted temporary custody of Kerri's children.¹⁰² On August 9, 2012, the State filed a motion for temporary custody. The juvenile court granted the department temporary custody of the children the same day.¹⁰³

B. Procedural History

In December 2012, the State filed an amended petition. Counts I and II of the amended petition alleged that the children were at risk of harm due to Kerri's drug use, failure to participate in voluntary services, failure to provide safe housing, and failure to provide proper parental care.¹⁰⁴ Counts III and IV alleged that Kerri had refused to give the children necessary parental care and protection, and sought termination of Kerri's parental rights.¹⁰⁵

The juvenile court held a hearing on March 13, 2013.¹⁰⁶ Kerri moved to dismiss after the State presented evidence.¹⁰⁷ The court denied the motion as to counts I and II.¹⁰⁸ But the court granted Kerri's

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 466, 849 N.W.2d at 471-72.

106. *Id.* at 466, 849 N.W.2d at 472.

107. *Id.*

108. *Id.*

motion to dismiss as to counts III and IV, after finding the State failed to present a prima facie case.¹⁰⁹ The juvenile court ordered the children to remain in the department's temporary custody.¹¹⁰ The State appealed, arguing it had proved by clear and convincing evidence that Kerri's parental rights should be terminated because Kerri had substantially and continuously neglected her children and refused to provide necessary parental care, and that termination was in the children's best interests.¹¹¹

The Court of Appeals found that Kerri had been denied due process of law and therefore held that Kerri's noncompliance during the voluntary phase of the case was not acceptable evidence to satisfy the requirements of a termination of parental rights.¹¹² The Court of Appeals noted that this was a case of first impression, as Nebraska courts had not previously considered any cases where the removal of children and the subsequent petition to terminate parental rights stemmed from a voluntary agreement.¹¹³ The court also stated that due process law is well established and can thus be used to examine the "nuances of a voluntary basis agreement."¹¹⁴

The Court of Appeals determined that the Nebraska Juvenile Code explicitly provides due process protections for both parents and children and that, based on the record, there was little evidence that Kerri or her children were afforded due process during the voluntary phase of the case.¹¹⁵ Because the voluntary placement agreement was not entered into evidence, the Court of Appeals was unable to determine whether Kerri was made aware that the state's concern about her alleged drug use and alleged inability to provide a safe environment for the children placed them at risk for harm.¹¹⁶ There was no evidence to show that Kerri was advised to consult with an attorney regarding the implications of a voluntary placement of her children's custody with the state.¹¹⁷ The record was also unclear as to whether Kerri was informed that she had the right to request the return of her

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 467, 849 N.W.2d at 472.

113. *State v. Kerri S. (In re Joseph S.)*, 21 Neb. App. 706, 707, 842 N.W.2d 209, 211 (2014), *rev'd*, 288 Neb. 463, 849 N.W.2d 468 (2014).

114. *Id.* at 713, 842 N.W.2d at 215.

115. *Id.* at 714, 842 N.W.2d at 215; NEB. REV. STAT. § 43-246(7) (Cum. Supp. 2012) (stating the Nebraska Juvenile Code provides such due process protections for both parents and children; the code specifically cites that it is to "provide a judicial procedure through which these purposes and goals are accomplished and enforced in which the parties are assured a fair hearing and their constitutional and other legal rights are recognized and enforced").

116. *Kerri S.*, 21 Neb. App. at 714, 842 N.W.2d at 215.

117. *Id.*

children at any point during the 180-day voluntary period.¹¹⁸ Additionally, there was no evidence that Kerri was represented by an attorney during the voluntary period or consulted with an attorney prior to voluntarily participating in services, there was no hearing in which Kerri could address or refute the allegations before an impartial decisionmaker, nor was Kerri made aware that entering into a voluntary agreement could result in evidence of her level of compliance with the agreement that could then be used to terminate her parental rights.¹¹⁹

The Court of Appeals concluded that Kerri was denied due process as the voluntary placement agreement circumvented the established statutory process for removal and petitions for termination of parental rights.¹²⁰ Because Kerri's compliance during the voluntary basis period was not acceptable evidence to be used to satisfy the statutory requirements necessary to terminate her parental rights, the State had failed to present a prima facie case.¹²¹ The Nebraska Supreme Court then granted the State's petition for further review.¹²²

C. Nebraska Supreme Court Holding

The Nebraska Supreme Court reversed the Court of Appeals and held that Kerri had been afforded due process protections during the voluntary phases of her case.¹²³ The Court agreed that the use of coercive tactics by the department could trigger due process requirements, but the Court found no due process violations in the case.¹²⁴

The Court examined the Third Circuit's holding in *Croft*, noting the court's emphasis of the fact that the caseworker lacked objectively reasonable grounds for believing any abuse had occurred when holding the caseworker's ultimatum violated the father's rights.¹²⁵ The Court also discussed *Starkey*, in which a Third Circuit district court found a procedural due process violation after another ultimatum offered by the state.¹²⁶ The Court distinguished these two Third Circuit cases with Kerri's case by noting that Kerri was not given an ultimatum when the state first offered voluntary services in 2012.¹²⁷ The Court linked state ultimatums and coercion, and because the record

118. *Id.*

119. *Id.*

120. *Id.* at 715, 842 N.W.2d at 216.

121. *Id.*

122. *State v. Kerri S. (In re Joseph S.)*, 288 Neb. 463, 849 N.W.2d 468 (2014).

123. *Id.* at 471, 849 N.W.2d at 475; *Kerri S.*, 21 Neb. App. at 715, 842 N.W.2d at 216.

124. *Kerri S.*, 288 Neb. at 471, 849 N.W.2d at 475.

125. *Id.* at 469, 849 N.W.2d at 474.

126. *Id.*

127. *Id.*

did not evidence an ultimatum, the Court held that the state had not employed coercive tactics.¹²⁸

The Court contrasted the holdings of the Third Circuit with that of the Seventh Circuit. In *Dupuy*, the Seventh Circuit found no due process violation where parents had their children placed out of the home without being afforded a hearing.¹²⁹ The Seventh Circuit acknowledged in its holding that while any threat of formal removal proceedings may be slightly coercive in nature, it is not enough to invalidate a parent's consent to participate in a non-court arrangement. The Court also noted that the Sixth Circuit adopted the reasoning of the Seventh Circuit in *Smith*.¹³⁰

The Nebraska Supreme Court found the reasoning of the Seventh and Sixth Circuits to be persuasive and concluded there was no evidence in the record demonstrating Kerri was coerced into voluntary services by NFC.¹³¹ The Court noted the state did not seek to terminate Kerri's parental rights based on her failure to comply with voluntary state-offered services.¹³² Rather, the state sought to terminate Kerri's parental rights based on the evidence that Kerri had "substantially and continuously or repeatedly neglected and refused to give necessary parental care and protection."¹³³ The Court held that the State made a prima facie case for the termination of Kerri's parental rights and remanded the case to juvenile court to consider the evidence presented and determine if a termination of Kerri's parental rights was in the best interests of her children.¹³⁴

D. Analysis of the Nebraska Supreme Court's Opinion

The Nebraska Supreme Court failed to provide procedural due process protections to parents participating in a non-court arrangement by limiting the circumstances under which these protections attach. This standard will require a fact-intensive inquiry into the circumstances of the state-effectuated familial separation and ignores the practical realities and challenges of families engaged in the child welfare system.

1. The Nebraska Supreme Court Erred in Rejecting a Broad Approach

The line of cases from the Third Circuit rightly hold that non-court involved arrangements in which the government effectuates the sepa-

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 471, 849 N.W.2d at 474.

132. *Id.*

133. *Id.* at 471, 849 N.W.2d at 475.

134. *Id.*

ration of a child from his or her parent must be accompanied by procedural due process protections. Additionally, these cases present a more realistic and practical analysis than the approach advanced by the Sixth and Seventh Circuits. The approach used by the Third Circuit better appreciates the realities of the parent-state relationship in non-court settings and more easily applies to a variety of cases and circumstances.¹³⁵

The approach taken by the Third Circuit strikes a better balance between protecting the parent-child relationship, providing clear guidance to state agencies regarding how to administer non-court involved cases in a constitutional way, and supporting judicial efficiency in the review of these cases. In contrast, the approach articulated by the Sixth and Seventh Circuits requires an in-depth factual analysis of the language used by caseworkers and the factual circumstances related to how the state separated a parent and child.¹³⁶ This approach is flawed for two reasons. First, the Sixth and Seventh Circuits' approach elevates form over substance and ignores the impact a "voluntary" arrangement has on a parent's relationship with his or her child. Second, the approach fails to consider the reality of the situation when a state caseworker arrives at a family's home and informs the parent that a court action could be filed against the parent if he or she does not agree to allow a state actor to place his or her child outside of the home. When the state arrives at a home or meets with a parent, it is reasonable for the parent to assume that the state's actions are grounded in proper legal authority. Even if the services or the out-of-home placement suggested by the state are presented to the parent as voluntary, a parent is likely to perceive his or her compliance as mandatory.

135. Inequities exist in the frequency of reporting, the administration of services, and the response time of agency caseworkers for families of color and families living in poverty. *See* EQUALITY BEFORE THE LAW, *supra* note 31 (noting children of minority groups are more likely to be the subject of maltreatment reports to the state's child abuse and neglect hotline). Maltreatment reports made about Black children were the least likely to result in a finding that the parents were abusive or neglectful but were the most likely to be recommended for interventions by the state. *Id.* Poverty is frequently mistaken for neglect, resulting in increased rates of child maltreatment reports for low-income families. *Id.* Because of disparate treatment by the state and in the services offered, a broad application of due process protections would allow families to maintain their constitutional rights regardless of circumstance. *See generally* Gupta-Kagan, *supra* note 43, at 843 (noting that a parent's education level, income, and language proficiency may contribute to an imbalance of power in the parent-state relationship).

136. *See* Smith v. Williams-Ash, 520 F.3d 596, 598 (6th Cir. 2008) (reporting form language threatening that should parents "not be able to continue following the plan, [CPS] may have to take other action(s) to keep your child(ren) safe"); Dupuy v. Samuels, 465 F.3d 757, 763 (7th Cir. 2006) (stating coercion is dependent on legally unjustifiable threats from a caseworker to be determined by the facts and circumstances of each case).

Child welfare agencies are only permitted to suggest action to parents to address child maltreatment concerns when there is a low level well-being concern that does not rise to a safety threat requiring the involvement of the juvenile court.¹³⁷ Suggestion of action and offering of voluntary services may also occur in instances where there is a report of abuse or neglect that has not been substantiated by the agency.¹³⁸ In these cases, an agency official should make it clear to parents that the recommendations and suggestions are not mandatory.

Should a state caseworker not make it clear that the recommendations are merely suggestions, the offering of voluntary services when there are no serious safety concerns for the child may raise the question of whether “voluntary services” are in fact voluntary.¹³⁹ Parents may reasonably believe that their compliance with agency recommendations is required to keep their children or that noncompliance may result in an agency filing a petition in juvenile court.

2. *The Elevation of Form Over Function*

In *Dupuy v. Samuels*, the Seventh Circuit analogized the offering of a safety plan to both a prosecutor’s offer of a plea agreement and an interim agreement in a tort settlement.¹⁴⁰ The court reasoned that in all of these instances the outcome would be more beneficial if the individual accepted the offer, but acceptance is not required.¹⁴¹ However, it should be highlighted that non-court involved foster care cases cannot be analogized to other civil cases as they involve the fundamental liberty interest of parental rights over children. Furthermore, the only check on an overzealous state agency is a parent’s willingness to risk the removal of the child, say “no,” and insist on a day in court, which is an unlikely path of recourse.¹⁴²

Additionally, this decision of a parent to refuse voluntary services should be examined in both its legal and social context. In the *Dupuy* opinion, Judge Posner flippantly suggested that a parent accepting or rejecting the offer of a safety plan is no different than having a choice in cocktails:

We cannot see how parents are made worse off by being given the option of accepting the offer of a safety plan. It is rare to be disadvantaged by having more rather than fewer options. If you tell a guest that you will mix him either a Martini or a Manhattan, how is he worse off than if you tell him you’ll mix him a Martini?¹⁴³

137. Garlinghouse & Trowbridge, *supra* note 57, at 116–17.

138. *Id.*

139. *Id.*

140. *Dupuy*, 465 F.3d at 763.

141. *Id.*

142. Gupta-Kagan, *supra* note 43, at 861.

143. *Dupuy*, 465 F.3d at 762.

This line in the opinion has been rightly criticized for its condescension, and it underscores the Seventh Circuit's assumption that parents have the legal foresight to know whether agency investigators have substantiated claims and may initiate removal proceedings.¹⁴⁴ Parents engaged in the foster care system in any capacity are often legally unsophisticated and are trapped in a situation with unequal bargaining power.¹⁴⁵ In practice, few parents are willing to gamble with their parental rights, especially in instances where they are being asked to sign safety plans or consent to voluntary services on the spot.

Non-court involved cases are not cocktail parties. The two actors, parents and agency officials, have grossly unequal positions of power. Parents involved in child welfare cases are typically without counsel and often of low socioeconomic status and low social capital.¹⁴⁶ Other factors such as a parent's disability, immigration status, or language barrier may reinforce the existing power imbalance. The Seventh Circuit, in its opinion, was greatly reductive when it analogized the safety plan agreement to other civil offers or a cocktail party. In instances of non-court involved cases there is usually no negotiation due to the fundamentally coercive relationship between parents and agency officials. An agreement is only voluntary if the other party believes they have an option. Whether parents have an actual option is beyond the point if, for practical purpose, parents are unaware of their due process protections and their ability to refuse without repercussions.

The Nebraska Supreme Court should adopt the standard articulated by the Third Circuit: all non-court involved arrangements in which the government effectuates the separation of a child from a parent must be accompanied by procedural due process protections. This standard is consistent with the holding of the Nebraska Court of Appeals: that Kerri was denied her procedural due process rights because the voluntary placement agreement circumvented the established statutory process for removal and petitions for termination of parental rights.¹⁴⁷

144. Shellady, *supra* note 61, at 1628 (“The Seventh Circuit’s *Dupuy* opinion lacks empathy and understanding. By comparing a high-pressure, emotional situation (like a parent being forced to choose who gets their child when the government takes the child away) to a low-stakes, routine decision (like one’s drink of choice), the Seventh Circuit revealed how easy it is for our legal system to become blinded by legal technicalities at the expense of human compassion.”).

145. VOICES FOR CHILDREN IN NEB., KIDS COUNT IN NEBRASKA REPORT 65 (2017) (“The majority of children who come into Nebraska’s child welfare system are identified because their family is unable to meet their basic needs, which is often related to symptoms of poverty.”).

146. Gupta-Kagan, *supra* note 43, at 843.

147. *State v. Kerri S. (In re Joseph S.)*, 21 Neb. App. 706, 713, 842 N.W.2d 209, 215 (2014), *rev’d*, 288 Neb. 463, 849 N.W.2d 468 (2014).

Regardless of how such an arrangement is characterized, whether it be as voluntary, coercive, a safety plan, or a voluntary placement agreement, the effect of the arrangement is the same for the family. In all these scenarios, a state actor has inserted itself into, and interfered with, the family's constitutionally protected relationship. In many of these cases, parents may not be aware of their rights, their ability to have their children returned to them, or their ability to be heard and challenge an aspect of the state's case plan or the state's legal basis for interfering in the parent-child relationship. Therefore, procedural due process protections should be provided to parents who are involved in non-court involved child welfare cases, particularly when those arrangements result in the out-of-home placement of their children.

IV. THE NEED FOR LEGISLATIVE REFORMS

Meaningful non-court involved procedures are necessary to protect the constitutional right to family integrity. For years, Nebraska's Foster Care Review Office has recommended the establishment of "clear and concise policy and procedures" for non-court involved child welfare cases.¹⁴⁸ Recently, non-court cases gained initial legislative legitimacy with the passage of Senator Sue Crawford's Legislative Bill (LB) 1061 in the summer of 2020.¹⁴⁹ The Bill was the product of a broad coalition of child welfare stakeholders including the FCRO, child advocacy centers, non-profit groups, provider groups, county attorneys, and the department.¹⁵⁰ Senator Crawford acknowledged that "[o]ver half of our child welfare cases are now non-court-involved cases or alternative response cases, and these have been operating without sufficient statutory or regulatory standards"; therefore, there was a need for statutory parameters as a means to protect children engaged in non-court cases.¹⁵¹

The law established by LB 1061 provides a definition for non-court cases, the first definition of "non-court" to exist anywhere in Nebraska statutes or department regulations.¹⁵² The law also details procedures for processing reports and investigations for non-court cases and requires the department to provide written notice of rights to all parents engaged in a non-court involved case.¹⁵³ Additionally, it explicitly outlines parents' rights when their children are in voluntary placements.¹⁵⁴ The department is also required by the law to promul-

148. NEB. FOSTER CARE REVIEW OFFICE, ANNUAL REPORT 2018–2019, at xvi (2019).

149. LB 1061, 106th Leg., 2d Sess. (Neb. 2020) (codified as amended at NEB. REV. STAT. § 28-713.02 (Cum. Supp. 2020)).

150. *Hearing on LB 1061*, *supra* note 21, at 32 (statement of Sen. Sue Crawford).

151. *Id.*

152. *Id.*; see 390 NEB. ADMIN. CODE (2018).

153. *Hearing on LB 1061*, *supra* note 21, at 33 (statement of Sen. Sue Crawford).

154. *Id.*

gate rules and regulations for any department action in a non-court involved case. This is a necessary requirement as nowhere in the department's child welfare regulations is the word "non-court" used.¹⁵⁵ Promulgation of non-court regulations is an essential step in protecting the rights of parents and children in non-court arrangements as procedures will be clarified and the authority of the department cabined. However, the department has historically demonstrated an unwillingness to create and maintain robust child welfare regulations, so the Legislature must ensure this directive from LB 1061 is carried out.¹⁵⁶

A. An Opportunity to Provide Representation to Non-court Families

Some child welfare advocates have questioned whether a rights notification provided by the department is sufficient to protect the legal rights of parents. Counsel is critical for parents to effectively navigate voluntary services, especially when a voluntary placement agreement is created.¹⁵⁷ Knowledge of substantive legal standards necessary to determine whether the factual and legal basis for the threat of removal exists would equalize the power imbalance between parents and the department.¹⁵⁸ Additionally, legal representation typically enhances a parent's engagement and leads to more individualized case plans.¹⁵⁹ Recent studies demonstrate that when a non-court involved

155. 390 NEB. ADMIN. CODE (2018) (nowhere in the twelve chapters of administrative code for Child Welfare and Juvenile Services is the word "non-court" used); see also *Hearing on LR 239*, *supra* note 20, at 36 (statement of Sarah Helvey, Child Welfare Program Director, Nebraska Appleseed) (noting there is no statute on non-court involved cases; "there's no statutory authority, nor is there any regulatory guidance, to guide decision making in these cases that involve thousands of children who previously had the protection oversight of juvenile court").

156. In 2019, the department proposed repealing nearly 200 pages of child welfare regulations, to be replaced by less than twelve pages of department policies and practices. See Martha Stoddard, *Foes Slam HHS Proposal to Repeal Bulk of Nebraska's Child Welfare Regulations*, OMAHA WORLD-HERALD (Sept. 17, 2019), https://www.omaha.com/news/nebraska/foes-slam-hhs-proposal-to-repeal-bulk-of-nebraska-s/article_1e810301-bd24-517c-9415-ecdf1da20ee4.html [https://perma.unl.edu/D7UE-AVJS] (comparing regulations, which must go through a public process to be approved, to policies and practices, which may be changed more frequently by DHHS and without public consideration); JoAnne Young, *Advocates Raise Red Flag on Proposed Repeal of Majority of Nebraska Child Welfare Regulations*, LINCOLN J. STAR (Sept. 15, 2019), https://journalstar.com/news/state-and-regional/govt-and-politics/advocates-raise-red-flag-on-proposed-repeal-of-majority-of-nebraska-child-welfare-regulations/article_1f9e0da9-1043-5ce7-97e1-cd625b591959.html [https://perma.unl.edu/GSN9-GNCX].

157. Gupta-Kagan, *supra* note 43, at 902.

158. *Id.*

159. *Id.* (describing that the Children's Bureau, a federal agency organized under the United States Department of Health and Human Services' Administration for Children and Families, has found that legal counsel enhances parents' engage-

parent has legal counsel, reunification occurs more quickly, time in the child welfare system is reduced, and the safety of the child is not compromised.¹⁶⁰

During a Health and Human Services Committee hearing, child welfare advocates recommended Nebraska examine the opportunity under the Family First Act to draw down federal funding for legal representation for both parents and children involved in non-court cases.¹⁶¹ This reform would open the door to significant increases in funding for parent and child representation. New federal funding covers 50% of the cost of representation in eligible cases.¹⁶² Families who come to the attention of the child welfare system deserve to be supported and have their rights protected. Advocates have said that legal representation in non-court cases would, “go a long way to ameliorating some of our concerns.”¹⁶³

ment in case planning and leads to more individualized plans). Gupta-Kagan also supposes that similar benefits to the quality of safety plans, including accuracy of department findings and specificity of safety plans, may be expected with access to counsel.

160. *Id.* at 903 (citing Lucas A. Gerber et al., *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 CHILD. & YOUTH SERVS. REV. 42, 42 (2019); Mark E. Courtney & Jennifer L. Hook, *Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care*, 34 CHILD. & YOUTH SERVS. REV. 1337, 1338, 1340–42 (2012)).
161. *Hearing on LR 239*, *supra* note 20, at 38 (statement of Sarah Helvey, Child Welfare Program Director, Nebraska Appleseed); *id.* at 44 (statement of Juliet Summers, Policy Coordinator, Voices for Children). The Children’s Bureau expanded IV-E funding eligibility in 2019 to include legal representation for parents. Through the January 2019 guidance, the Children’s Bureau determined that providing independent legal representation by an attorney for both children and parents qualifies as an expenditure necessary for the administration of state services and so was entitled to one-half reimbursement. Federal funding is available both to children subject to an open family court case *and* those who are “candidates” for foster care, and a child subject to a non-court involved case seems to fit in the statutory definition of a foster care “candidate.” Thus, the new Children’s Bureau guidance establishes that federal funds may support the provision of counsel to the parents of children involved in non-court cases. *See* CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD WELFARE POLICY MANUAL § 8.1B(30) (2019).
162. 42 U.S.C. § 674(a)(3) (2018).
163. *Hearing on LR 239*, *supra* note 20, at 44 (statement of Juliet Summers, Policy Coordinator, Voices for Children).

B. Economic Solutions to Prevent the Need for Engagement with the Child Welfare System

Finally, it is necessary to consider how the state can better prevent families from entering the child welfare system in the first place.¹⁶⁴ Since the leading cause of child maltreatment in the state is directly linked to poverty, it is worth considering how the state can provide economic support to under resourced families.¹⁶⁵ Nebraska ranks near the bottom of states in terms of direct economic assistance for families in poverty.¹⁶⁶ Making reforms to Nebraska's economic assistance programs might be the optimal way to alleviate incoming tensions in the child welfare system. To start, Nebraska should direct more funds from the federal Temporary Assistance for Needy Families (TANF) grant to provide direct cash assistance to families. Additionally, the gross income eligibility threshold within the Supplemental Nutrition Assistance Program (SNAP) should be raised to allow people who are utilizing SNAP to take higher paying jobs without losing more in nutrition assistance than gained in new income.¹⁶⁷ Application processes should be simplified to combat the state's overreliance on imposing sanctions for noncompliance with program requirements.¹⁶⁸ Investment in a robust array of economic assistance is an effective way to prevent a family from entering the child welfare system. Providing economic stability to families returns power to the parents and reduces the need for engagement in "voluntary" services.

V. CONCLUSION

Because non-court involved child welfare cases are commonplace in Nebraska and such arrangements may lead to a child being placed

164. See Sarah Helvey et al., *Universal Mandatory Reporting of Suspected Child Abuse and Neglect in Nebraska: Current Law and Future Considerations*, NEB. L., July 2020, at 15.

165. See *supra* notes 28–30 and accompanying text.

166. *State and Local General Expenditures, Per Capita*, TAX POL'Y CTR. (June 18, 2020), <https://www.taxpolicycenter.org/statistics/state-and-local-general-expenditures-capita> [<https://perma.unl.edu/D3MZ-FJ2Z>]. Currently Nebraska only directs a quarter of the state's available TANF funds to direct cash assistance. See CTR. ON BUDGET AND POLICY PRIORITIES, NEBRASKA TANF SPENDING (2018), https://www.cbpp.org/sites/default/files/atoms/files/tanf_spending_ne.pdf [<https://perma.unl.edu/J55U-MQU9>].

167. DAVID COOPER, BALANCING PAYCHECKS AND PUBLIC ASSISTANCE 17 (2016); see also CTR. ON BUDGET AND POLICY PRIORITIES, IMPROVING SNAP AND MEDICAID ACCESS: FILLING INCOME ELIGIBILITY GAPS TO MAXIMIZE HEALTH COVERAGE (2020), <https://www.cbpp.org/research/health/improving-snap-and-medicaid-access-filling-income-eligibility-gaps-to-maximize> [<https://perma.unl.edu/KM44-6S69>] (demonstrating that the eligibility gap likewise exists in Medicaid coverage).

168. See NEB. APPLESEED, BASIC QUESTIONS AND ANSWERS ABOUT EMPLOYMENT FIRST ACTIONS (2015), <https://neappleseed.org/wp-content/uploads/2016/01/Trifold-EJ-EF-Sanctions-20151208.pdf> [<https://perma.unl.edu/E9UF-R7JW>].

outside of the family home, more must be done to protect the due process rights of families in these cases. The holdings of the Sixth and Seventh Circuits, that due process rights do not attach to voluntary, non-court agreements, are not practicable when the inherent coercion of the child welfare system is considered in its entirety. External checks on the non-court system as well as regulatory language which outlines explicit non-court terms, standards, and procedures are necessary to ensure non-court arrangements are truly voluntary and constitutional rights are protected. Lastly, robust investment in economic assistance programs may reduce poverty and prevent families from entering the child welfare system altogether.