

A08 – 1042 and A08 – 1148

STATE OF MINNESOTA  
IN COURT OF APPEALS

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Shannon Murphy,  
Relator,

vs.

Cal Ludeman, Commissioner of Human Services,  
Respondent (A08-1042).

*and*

Shannon Murphy,  
Relator,

vs.

Dr. Sanne Magnan, Commissioner of Health,  
Respondent (A08-1148).

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RELATOR'S REPLY BRIEF

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## TABLE OF CONTENTS

	Page
Table of Authorities .....	<i>i</i>
Argument .....	1
I.    Respondents acted arbitrarily. Each agency refused to consider any fact but the 1986 termination of parental rights order. ....	1
A.    Declaring facts without considering evidence is an arbitrary action .....	1
B.    Permanent disqualification from employment twenty years after termination of parental rights is not a collateral consequence imposed in the interest of public safety .....	3
II.   Respondents fail to defend the classification that deprives relator of an individualized assessment of risk of harm .....	4
A.    The 1986 termination of parental rights order is not enough to distinguish relator from those whose risk of harm is individually evaluated .....	4
B.    The exception for chemical dependency counselors vitiates respondents' defense of the permanent disqualification .....	7
III.  Relator has been denied due process of law because Respondents provided no meaningful opportunity to be heard on the issue of risk of harm .....	9
A.    Due process requires a meaningful opportunity to be heard .....	9
IV.  The Legislature authorized Respondents to eliminate Relator's ability to be employed, and provided no alternative remedy. This violates the state Constitution .....	11
Conclusion .....	14

**TABLE OF AUTHORITIES**

**Page**

**MINNESOTA STATUTES**

Minn. Stat. § 245C.15, subd. 1(a) (2007) . . . . . 4, 7

Minn. Stat. § 245C.16, subd. 1(b) (2007) . . . . . 9

Minn. Stat. § 245C.22, subd. 4(b) (2007) . . . . . 9

Minn. Stat. § 245C.24, subd. 2(b) (2007) . . . . . 7

Minn. Stat. § 626.5572, subd. 21(a) . . . . . 8

**MINNESOTA CONSTITUTION**

Article 1, § 8 . . . . . 12, 13

**MINNESOTA SUPREME COURT CASES**

*IHLC of Eagan, L.L.C. v. County of Dakota*, 693 N.W.2d 413 (Minn. 2005) . . . . . 5

*Kaiser v. State*, 641 N.W.2d 900 (Minn. 2002) . . . . . 3

*Kipp v. Johnson*, 31 Minn. 360, 17 N.W. 957 (1884) . . . . . 13

*State v. Jones*, 729 N.W.2d 1 (Minn. 2007) . . . . . 3

*Wichelman v. Messner*, 250 Minn. 88, 83 N.W. 800 (1957) . . . . . 13

**MINNESOTA COURT OF APPEALS CASES**

*Fosselman v. Commissioner of Human Services*, 612 N.W.2d 456  
(Minn. App. 2000) . . . . . 10

*Rodne v. Commissioner of Human Services*, 547 N.W.2d 440  
(Minn. App. 1996) ..... 2

**UNITED STATE SUPREME COURT CASES**

*Mathews v. Eldridge*, 424 U.S. 319 (1976) ..... 10

## RELATOR'S REPLY BRIEF

### **I. Respondents acted arbitrarily. Each agency refused to consider any fact but the 1986 termination of parental rights order.**

Respondents avoid defending the effect of the permanent disqualification imposed on Relator, arguing that the state did not act arbitrarily because it “applied the law which does not grant it any discretion”. Resp. Br. at 8. Relator is challenging that lack of “discretion” because the respondents refused to look at the results of their own evaluation of relator. It is completely clear on this record that respondents applied the post-2005 statute to consider nothing other than the 1986 termination of parental rights order. Even though Relator had been evaluated by the Department of Human Services on five or more occasions, prior to 2005, and each time the evidence showed to the Commissioner’s satisfaction that relator “does not pose a risk of harm”, A-20, respondents’ brief baldly claims that “The State did not disregard any evidence,” Resp. Br. at 9. It is the cancellation, or nullification, of the respondents’ previous assessments of relator that makes the decision arbitrary. Respondents do not mention or defend their statement to relator that “your immediate removal was not based on any new facts, but on the new law”. A-36 (letter denying reconsideration). This is an arbitrary decision.

### **A. Declaring facts without considering evidence is an arbitrary action.**

The respondents’ action here decrees a permanent disqualification and disregards

all evidence about relator subsequent to the 1986 order. This is exactly what the court condemned in *Rodne v. Commissioner of Human Services*, 547 N.W.2d 440, 445 (Minn. App. 1996): “The Commissioner’s determination ... was made under the erroneous theory of law that the Commissioner may disregard information submitted by Rodne in support of his request for reconsideration.” Even if respondents claim that the present statute requires what *Rodne* rejected, the statute would still deny “a meaningful opportunity”, *id.*, to have the disqualification reconsidered. Respondents have failed to justify the arbitrary result from this statute to permanently bar relator from her work – regardless of what the facts show, and regardless that the Commissioner of Human Services already found relator poses no risk of harm.

Respondents minimize the Commissioner’s decisions to grant set-asides to relator prior to 2005, stating that the Background Study law requires review of the risk of harm for each specific program. Respondents suggest the possibility that “a person studied would not pose a risk of harm in one program or facility, but would present a risk of harm in another setting with a different type of client.” Resp. Br. at 10. But the misleading implication is that the permanent disqualification of relator comes because respondents had actually evaluated her for risk of harm and then made a reasoned decision. They did no such thing. Respondents have looked at nothing but the existence of the 1986 order. Respondents applied the statute, arbitrarily disregarding all facts and evidence after 1986 that would be relevant to assessing risk of harm.

**B. Permanent disqualification from employment twenty years after termination of parental rights is not a collateral consequence imposed in the interest of public safety.**

Respondents suggest that the post-2005 statute as applied to relator is merely “collateral consequences \* \* \* mandated by the law”. Resp. Br. at 12. Respondents cite *Kaiser v. State*, 641 N.W.2d 900 (Minn. 2002), in which a defendant sought to withdraw his guilty plea because he was not informed he would have to register for ten years as a predatory sex offender. But the permanent disqualification imposed on relator is far more onerous than having to “provide information to law enforcement authorities to assist in keeping track of them”. *State v. Jones*, 729 N.W.2d 1, 11 (Minn. 2007). Relator has been given a life sentence – the state has revoked her ability to be employed in her field and she can never be allowed to work as she has, regardless of the facts.

Relator has not been accused of or convicted of any crime. The collateral consequences analysis in *Kaiser* has only been used in assessing the effects that flow from a criminal conviction, such as the registration requirements for those convicted of predatory offenses or loss of a driver’s license for drunk drivers. No Minnesota case has cited *Kaiser* to justify a “collateral consequence” without a prior criminal conviction. Nor do respondents explain why the effect of the 2005 statute change, and the loss of relator’s employment, should be viewed as merely an appropriate collateral consequence, newly sprung up but flowing from the 1986 termination of parental rights.

Respondents’ application of the statute to permanently bar relator from her

employment, with disregard for the evidence and for respondents' own prior determinations, is arbitrary and unreasonable, and must be reversed.

**II. Respondents fail to defend the classification that deprives relator of an individualized assessment of risk of harm.**

Respondents' brief fails to address the fundamental unfairness of how relator has been classified by the Background Studies act. The 2005 amendments took away the set-asides that had allowed relator to work despite the 1986 termination of parental rights order. Each of those set-asides were based on the respondents' individualized evaluation that relator did not pose a risk of harm to anyone served by that licensed program or facility. What is the justification for the statute's taking away the ability to continue the set-asides based on relator's demonstration that she poses no risk of harm? The Background Studies act provides an opportunity for every individual affected by the disqualification statute to submit evidence bearing on the risk of harm – other than those who have committed the most serious criminal offenses listed in Minn. Stat. § 245C.15, subd. 1(a). Respondents' failure to defend the actual effect of the statute on appellant is a telling omission.

**A. The 1986 termination of parental rights order is not enough to distinguish relator from those whose risk of harm is individually evaluated.**

Relator's claim is that the predicate chosen by respondents as cause for her

permanent disqualification – solely the 1986 termination of parental rights order – is not a sufficient factual basis to justify the denial of an individualized risk of harm assessment. Relator is clearly similarly situated to many classes of individuals subject to the Background Studies act. Although the background study showed a disqualifying characteristic in her background, she has been able to demonstrate to the Commissioner’s satisfaction that she poses no risk of harm. Since this is exactly the purpose of the act, to identify individuals who can be safely authorized to work with vulnerable persons, relator is similarly situated to others who have no disqualification or who can nonetheless demonstrate the absence of risk of harm. Relator is deprived of the opportunity to be judged by what she has already shown – that she poses no risk of harm.

To meet the minimal rational basis test “requires that the challenged classification be genuine or relevant to the purpose of the law”. *ILHC of Eagan, L.L.C. v. County of Dakota*, 693 N.W.2d 413, 423 (Minn. 2005). Relator agrees that a termination of parental rights is relevant to the purpose of the Background Study act. Relator agrees that the state can properly impose a disqualification on individuals who are reasonably determined to pose a risk of harm to vulnerable children or adults. But the classification at issue is the one created by the 2005 amendment which takes away the opportunity relator previously had to be individually considered as to risk of harm. The statute provides the opportunity for an individualized assessment to persons whose disqualifying conduct is substantially more serious.

The existence of the 1986 termination of parental rights order supports a conclusion that relator *at that time* was unable to adequately protect or parent her children; it justifies a reasonable inquiry into relator's present fitness for work with vulnerable persons. But relator has subsequently established to the Commissioner's satisfaction on repeated occasions that she poses no risk of harm. Respondents do not even remotely justify this *re*-classification of relator to deny her the opportunity to work. There is no finding or evidence in this case about relator's current qualities as a caregiver that even approaches the culpability or potential harmfulness of individuals who have committed felony offenses with intent, including crimes against children. The state's brief provides no specific response to this glaring unreasonableness.

Respondents point out the obvious, that an involuntary termination of parental rights results from a contested proceeding, while voluntary termination of parental rights requires written consent and a finding of good cause. Resp. Br. at 17. Respondents claim this is a "vital" distinction, but give no rationale about how these procedural differences in how a person's parental rights have been terminated can be taken on face value as a reasonable proxy for measuring a person's risk of harm. The statutes make the disqualification permanent for involuntary termination, and 15 years for voluntary termination with opportunity for a set-aside during that time period, but the statute does not base this on an evaluation of the facts underlying a termination order in a particular case. This failure to articulate the statute's rationality reveals the hollowness of

respondents' argument.

**B. The exception for chemical dependency counselors vitiates respondents' defense of the permanent disqualification.**

Relator's brief points out the portion of the Background Studies act that allows variances to licensed programs so employers can hire chemical dependency counselors with what would otherwise be permanent disqualifications. Minn. Stat. § 245C.24, subd. 2(b). This exception was added by legislation in 2006, and grants the opportunity for an individualized assessment of risk of harm to people who have committed *any* of the offenses listed in Minn. Stat. § 245C.15, subd. 1, including first degree murder, murder of an unborn child, first degree criminal sexual conduct, causing great bodily harm from drug dealing, kidnapping, arson, or malicious punishment of a child. See A-62. This exception shows that refusal to exercise discretion is not the essence of the statutory scheme.

Respondents argue in justification of this special exception that it is based on "significant differences between the vulnerability of the group she seeks to work with, vulnerable adults, and those that individuals in the chemical dependency field may be allowed to work with" (Resp. Br. at 17), i.e., chemically dependent individuals who are "primarily \* \* \* adults". Minn. Stat. § 245C.24, subd. 2(b). But this explanation does not fit with the controlling law, because every person residing in an in-patient chemical dependency facility is defined as a "vulnerable adult" as a matter of law. Minn. Stat. §

626.5572, subd. 21(a). There is no objective difference between the two populations. This hypothesized rational basis is not a rational distinction, either.

Relator's claim is that it is not rational for the statutory scheme to permit only these individuals, but not relator, the opportunity to submit evidence to respondents that can result in granting a variance or a set-aside permitting the individual to work with, despite the permanent disqualification. Respondents completely fail to address the crucial problem: why does a murderer, a sex offender, or an arsonist get a chance to demonstrate that changes in their life show they are no longer a risk of harm, but relator does not? The statute took this opportunity away from relator, after she already had established that she poses no risk of harm. The justification for the statute's classification of relator cannot be hypothesized as the administrative burden of evaluating someone, because anyone, regardless of criminal history, can be hired under a variance to be a chemical dependency counselor if the person had gotten a set-aside prior to 2005. Respondents fail to even comment on the repeated set-asides that relator was granted prior to 2005, or that she would apparently qualify for this special exception for a variance, if she worked in chemical dependency instead of caring for persons with disabilities. There is no rational basis for taking the opportunity for individual consideration away from relator.

**III. Relator has been denied due process of law because Respondents provided no meaningful opportunity to be heard on the issue of risk of harm.**

Respondents have rejected and refused to consider relator's evidence on the only issue that is relevant to the statute's purpose – whether she poses a risk of harm to vulnerable persons. The purpose of the Background Study act is to protect from harm the vulnerable children and adults being served by state-licensed facilities and programs. Relator has already satisfied that primary state purpose.

The background study endeavor, and the reconsideration process provided to those for whom a disqualifying characteristic is found, are intended to evaluate the risk of harm an individual may pose to vulnerable adults and children in facilities and programs licensed by respondents. There are two separate risk of harm provisions under the Background Studies act – one for assessing the “immediate” risk of harm when a disqualifying characteristic is first identified, Minn. Stat. § 245C.16, subd. 1(b)(1)–(8) [reproduced at A–66]; and a separate analysis when a disqualified individual requests reconsideration and a set-aside, Minn. Stat. § 245C.22, subd. 4(b)(1)–(9) [reproduced at A–68]. Relator has passed both these assessments.

**A. Due process requires a meaningful opportunity to be heard.**

Relator's due process claim is that respondents have provided no meaningful opportunity for her to be heard on the issue of risk of harm. “The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a

meaningful manner.” *Fosselman v. Commissioner of Human Services*, 612 N.W.2d 456, 461-62 (Minn. App. 2000) [quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)].

Respondents’ brief states that relator “was given the opportunity to present evidence on the issue of correctness”, Resp. Br. at 25. By this respondents mean that relator could have tried to show that she was not the parent involved in the 1986 termination of parental rights order. But that fact is established and undisputed, and has already been taken account of through the Commissioner’s repeated set-asides prior to 2005.

What relator has been deprived of is the opportunity to be heard on the only real issue – whether she poses a risk of harm. This is the core legislative purpose behind the Background Studies act, to identify individuals who may pose a risk of harm, and to evaluate whether the suspicion of a risk can be substantiated or not. Under the post-2005 statute applied to relator, her risk of harm will never again be individually evaluated or assessed, despite the multiple set-asides prior to 2005. Respondents admit that they refuse to consider any evidence on this point: “It would be absurd to hold an evidentiary hearing or conduct a risk of harm analysis to consider a request that cannot be granted.” Resp. Br. at 27.

Respondents never defend that the statute after the 2005 amendments deprives relator of the right to be heard in any meaningful way. Relator’s challenge is that the standard being applied to her excludes all relevant evidence. Respondents have applied

the 2005 amendment so that relator is deprived of any meaningful opportunity to be heard on the fundamental issue of risk of harm. This due process violation is not just a technical flaw in the procedure set by statute. There is no process at all.

**IV. The Legislature authorized Respondents to eliminate Relator’s ability to be employed, and provided no alternative remedy. This violates the state Constitution.**

Respondents argue that there is no violation of the remedies clause in this case, but that does not accord with the facts. Relator had the right to work in her field – caring for persons with serious physical and mental impairments – because the respondents had reviewed her background, examined materials submitted on her behalf, and repeatedly determined that she “does not pose a risk of harm”. A-20. Relator’s ability to work over the years in a highly regulated field of employment is a valuable property interest created under state law. Without the respondents’ imprimatur, licensed employers cannot legally permit an individual like relator to work in her field.

Respondents’ application of the statute did not merely take away the value of the set-aside determinations that had allowed relator to work, depriving relator of her property interest. In addition, respondents affirmatively declared that “you pose an imminent risk of harm to persons receiving services”. A-1. Respondents notified relator’s employer that she could not work, and the licensed employer was “ordered to ensure that you are not returned to any position allowing direct contact with, or access to,

persons receiving services from their program”. A-53. When relator tried to dispute their declaration that she poses an imminent risk of harm, respondents stated that “your affidavit and the numerous letters of support that you submitted from your previous employers are not relevant to your disqualification.” A-36.

Despite the limiting construction applied in case decisions to art. 1, § 8, relator’s argument is that her situation falls squarely within the plain language of this amendment to the Minnesota Constitution: “Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property, or character ...”. Respondents have acted under the post-2005 statutes to inflict a serious injury to relator’s property interest because they have deprived relator of her ability to be employed in her field. Respondents have acted under the post-2005 statutes to declare that relator poses an imminent risk of harm to vulnerable people, and directed employers to immediately remove her from her job. These acts by respondents are a serious injury to relator’s reputation and character.

Under the prior statute, relator had successfully demonstrated that she poses no risk of harm, and had worked for years with state approval. Respondents argue that with the new disqualification statute, the opportunity relator had is gone. The Legislature has not provided a substitute remedy, because respondents say that all evidence is irrelevant. Respondents state that the Background Study act “did not eliminate an individual’s right to recover on a defamation claim”, Resp. Br. at 32, but a defamation claim would not

restore her ability to work, and would not undo the statute's disqualification.

It is the complete elimination of relator's remedy, coupled with the state's action to injure relator in her property and in her character, that brings this case within the scope of art. 1, § 8. "No one has a vested right in any particular remedy and the legislature may change or modify the existing remedies for the enforcement and protection of the contract rights as long as an adequate remedy remains." *Wichelman v. Messner*, 250 Minn. 88, 114, 83 N.W. 800, 821 (1957). Relator's vested interest is in protecting her ability to be employed under the state's regulation, and her good name.

The "remedies" clause is part of the Constitution that is a restriction on the Legislature's authority. "This is but another way of saying that a person cannot be deprived of his property by mere legislative enactment." *Kipp v. Johnson*, 31 Minn. 360, 361, 17 N.W. 957, 958 (1884). The statutes being applied to relator by respondents perpetuate a serious injury and deprive her of any meaningful remedy. The Constitution's plain language states this is something the Legislature cannot do.

## CONCLUSION

Relator cannot change what occurred in 1986, and respondents will not look at any other evidence including the state's own prior assessments of her background. Relator can never return to her work, without an act of the Legislature, or the judgment of this Court. The decisions by respondents are arbitrary and unreasonable, and the effect on relator violates her rights under the state Constitution. This Court must reverse the permanent disqualification.

Respectfully submitted,

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Dated: *24 September 2008*



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