

2003

Civil Procedure—Court Inflexibility Puts Appellant in a Bad Position Regarding Attorney Mistake—In re Welfare of J.R., Jr.

Douglas L. Pfeifer

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Available at: <http://open.mitchellhamline.edu/wmlr/vol30/iss2/11>

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**CIVIL PROCEDURE—COURT INFLEXIBILITY PUTS
APPELLANT IN A BAD POSITION REGARDING
ATTORNEY MISTAKE—*IN RE WELFARE OF J.R., JR.***

Douglas L. Pfeifer[†]

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I. INTRODUCTION

A widely accepted ancient legal maxim¹ states that “ignorance of fact may excuse; ignorance of law does not excuse.”² But what if the

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1. BLACK’S LAW DICTIONARY 883 (5th ed. 1979) (defining *maxim* as “[a] principle of law universally admitted as being a correct statement of the law, or as agreeable to reason”).

2. *Advanced Estimating Sys., Inc. v. Riney*, 130 F.3d 996, 999 (11th Cir. 1997) (citation omitted) (holding that an attorney’s misunderstanding of a rule’s plain language

ignorance is that of the attorney and not the client? The common remedy for clients in civil matters who are denied their day in court due to negligence or mistake on the part of their counsel is to seek damages through a malpractice suit.³ While Minnesota courts have long stated the liberal policy of declining to penalize litigants for neglect or mistakes of their attorneys,⁴ the courts are not always equally liberal in applying that policy.⁵

Recently, in the case of *In re Welfare of J.R., Jr.*,⁶ a proceeding involving the termination of a mother's parental rights, the Minnesota Supreme Court was faced with the issue of whether to affirm a court of appeals order dismissing the mother's appeal for failure to timely serve notice on the child's guardian ad litem,⁷ or to excuse the delay under an analysis similar to that required when a party seeks relief from a final judgment or order under Minnesota Rule of Civil Procedure 60.02 ("Rule 60.02").⁸ The appellant argued that in cases involving the termination of

cannot constitute excusable neglect); *see also* *Midwest Employers Cas. Co. v. Williams*, 161 F.3d 877, 879 (5th Cir. 1998) (overruling the magistrate's holding that late filing of an appeal was excusable because counsel misread a rule).

3. *See, e.g.*, *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 n.10 (1962); *Pryor v. U.S. Postal Serv.*, 769 F.2d 281, 289 (5th Cir. 1985); *Murray v. Solidarity of Labor Org. Int'l Union Benefit Fund*, 172 F. Supp. 2d 1134, 1143 (N.D. Iowa 2001); *State v. Linder*, 33 P.3d 1023, 1025 (Or. Ct. App. 2001).

4. *See, e.g.*, *Nguyen v. State Farm Mut. Auto. Ins. Co.*, 558 N.W.2d 487, 491 (Minn. 1997) (agreeing that a client "should not be a victim of his attorney's carelessness"); *Charson v. Temple Israel*, 419 N.W.2d 488, 491 (Minn. 1988) (recognizing that even though under the general principles of agency where attorney neglect is chargeable to the client, the court has scrutinized the client's actions apart from that of the attorney); *Duenow v. Lindeman*, 223 Minn. 505, 518, 27 N.W.2d 421, 429 (1947) ("Courts will relieve parties from the consequences of the neglect or mistakes of their attorney when it can be done without substantial prejudice to their adversaries.").

5. *See, e.g.*, *In re Welfare of J.R., Jr.*, 655 N.W.2d 1, 3-6 (Minn. 2003) (refusing appellant's request that the court excuse late filing of appeal by one of the parties to the matter when the late filing was due to error on the part of the attorney); *In re D.B.*, 463 N.W.2d 301, 303 (Minn. Ct. App. 1990) (dismissing appellant's untimely appeal where error was committed by appellant's attorney).

6. 655 N.W.2d 1 (Minn. 2003).

7. BLACK'S, *supra* note 1, at 635 (defining *guardian ad litem* as "a special guardian appointed by the court to prosecute or defend, on behalf of an infant . . . a suit to which he is a party, and such guardian is considered an officer of the court to represent the interests of the infant . . . in the litigation"). In Minnesota, a guardian ad litem is a party to a termination of parental rights action. MINN. R. JUV. P. 57.01 subd. 1. The guardian ad litem is appointed by the court to protect, monitor, and advocate for the child's best interests throughout the judicial proceeding. MINN. STAT. § 260C.163 subd. 5(b)(4) (2002).

8. *J.R.*, 655 N.W.2d at 4. Although the appeal had not been timely filed with the guardian ad litem, the appeal had been timely served with the court of appeals and with the respondent. *Id.* at 2.

parental rights, a technical violation of the rules should not prevent the appeal from proceeding.⁹ However, the court refused to apply a Rule 60.02 type analysis and chose not to exercise its inherent power to hear an untimely appeal in the interests of justice.¹⁰ Basing its decision largely on the policy that child protection cases need to be handled expeditiously, the court held that an untimely appeal deprives the appellate court of jurisdiction and affirmed the court of appeals order.¹¹

Part II of this note explores the primary legal concepts raised in *J.R.*: the application of a Rule 60.02 analysis,¹² the effect that an untimely appeal has on jurisdiction of Minnesota appellate courts,¹³ and extensions for time to appeal under the federal rules.¹⁴ Part III reviews the pertinent facts of *J.R.* as well as the court's holding and stated policy for reaching that decision.¹⁵ Part IV analyzes the court's decision and current precedent from other jurisdictions that may provide insight and guidance.¹⁶ It also examines the policy behind *J.R.* and provides a context in which the effectiveness of that policy should be judged.¹⁷

Finally, this note suggests that in the case of *J.R.*, the Minnesota Supreme Court should have recognized that in some civil cases, such as those involving termination of parental rights, the accepted civil remedy of allowing clients to recover for the failure of counsel through a malpractice suit is inadequate.¹⁸ The court should have used an excusable neglect analysis rather than a Rule 60.02 analysis to examine the reason for the attorney's failure to file a timely appeal.¹⁹ Upon satisfaction of the excusable neglect analysis, the court should have exercised its constitutional power to hear a late appeal in the interests of justice.²⁰

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9. *Id.*
 10. *Id.* at 4.
 11. *Id.* at 5-6.
 12. *See infra* Part II.A.
 13. *See infra* Part II.B.
 14. *See infra* Part II.C.
 15. *See infra* Part III.
 16. *See infra* Part IV.A.1-2.
 17. *See infra* Part IV.A.3.
 18. *See infra* Part IV.B.
 19. *Id.*
 20. *Id.*

II. BACKGROUND

A. *Relief Under Minnesota Rule 60.02*

Traditionally, the subject of granting relief from a judgment was denominated as equitable relief.²¹ Infused with notions associated with equity jurisdiction, equitable relief included the familiar concepts of: “discretion on the part of the court, due diligence on the part of the applicant for relief, and the balancing of interests as between the parties . . . and the public concerns for both just adjudication and the finality of judgments.”²² Modern procedures, particularly those similar to Federal Rule of Civil Procedure 60(b), have largely superseded the need for an independent suit in equity.²³

The Minnesota Rules of Civil Procedure became effective on January 1, 1952, and were in large part taken verbatim from the corresponding Federal Rules of Civil Procedure.²⁴ Minnesota Rule 60.02, like its federal counterpart Rule 60(b), provides in part that on motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons: mistake, inadvertence, surprise, excusable neglect, or any other reason justifying relief from the operation of the judgment.²⁵

In determining whether relief should be granted under Rule 60.02, Minnesota courts traditionally have employed a four-prong test that requires the party seeking relief to demonstrate: “(1) a reasonable defense on the merits; (2) a reasonable excuse for . . . failure to act; (3) that [the party] acted with due diligence after notice of the entry of judgment; and (4) that no substantial prejudice will result to the opposing

21. RESTATEMENT (SECOND) OF JUDGMENTS ch. 5, introductory note (1982).

22. *Id.*

23. JAMES FLEMING, JR. & GEOFFREY C. HAZARD, CIVIL PROCEDURE § 13.15 (2d ed. 1977). The suit in equity still has a function where the attack on the judgment is made by a person who was not a party to the suit or where the person who obtained the judgment sues on it in another jurisdiction. *Id.*

24. 1 DOUGLAS D. MCFARLAND & WILLIAM J. KEPPEL, MINNESOTA CIVIL PRACTICE § 131 (2d ed. 1990).

25. Compare MINN. R. CIV. P. 60.02 with FED. R. CIV. P. 60(b). “The federal courts’ interpretation of federal rules of civil procedure often provide guidance to state courts in their interpretation of parallel rules.” Edward T. Matthews, Case Note, *The Unfortunate Elevation of Finality Over Validity—Bode v. Minn. Dep’t of Natural Res.*, 28 WM. MITCHELL L. REV. 1217, 1226 n.78 (2002) (citing *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997)). Rule 60(b) of the Federal Rules of Civil Procedure was modeled after section 473 of the California Code of Civil Procedure. 12 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 60 App.100[1] (3d ed. 1999).

party if the motion to vacate is granted.”²⁶ In Minnesota, all four prongs must be satisfied in order to justify relief.²⁷ If the district court fails to apply the four-prong test, the appellate court will do so de novo.²⁸

Because a Rule 60 motion²⁹ is part of or a continuation of the original action, it generally must be made in the court that rendered judgment.³⁰ The court that entered judgment has automatic jurisdiction and is in the best position to judge the merits of the motion.³¹ However, the right to be relieved of judgment is not absolute, even upon a showing of the prerequisites for relief.³² Whether to vacate a judgment is at the trial court’s discretion, and the decision will not be reversed on appeal absent a clear abuse of discretion.³³

B. *Untimely Appeals and Appellate Court Jurisdiction in Minnesota*

The Minnesota Rules of Civil Appellate Procedure were adopted by the Minnesota Supreme Court in 1967, and in large part they superseded previous statutory provisions relating to appeals.³⁴ Prior to the adoption, although appellate procedure was generally regulated by statutory provisions, commentary and case law suggest that the court’s acceptance of these legislative prescriptions was a result of comity³⁵ and not a result of legislative power over the supreme court.³⁶

26. *Nguyen v. State Farm Mut. Auto. Ins. Co.*, 558 N.W.2d 487, 490 (Minn. 1997) (citation omitted). The four-prong test has been used in Minnesota since the late 1800s. *See Brown v. Brown*, 37 Minn. 128, 129, 33 N.W. 546, 547 (1887) (using similar elements in a relief for good cause analysis).

27. *Charson v. Temple Israel*, 419 N.W.2d 488, 491-92 (Minn. 1988).

28. *Carter v. Anderson*, 554 N.W.2d 110, 115 (Minn. Ct. App. 1996).

29. “Rule 60 motion” refers to a motion for relief from final judgment under federal or state law.

30. *MOORE*, *supra* note 25, at § 60.60[1]; *see also United States v. Shaughnessy*, 175 F.2d 211, 212 (2d Cir. 1949) (refusing to transform improper collateral attack on denaturalization decree into a Rule 60(b) motion because it was not filed in the court that rendered original judgment); *Bankers Mortgage Co. v. United States*, 423 F.2d 73, 78 & n.9 (5th Cir. 1970) (noting that a motion for relief from final judgment must be filed in the court in which the original judgment was entered).

31. *MOORE*, *supra* note 25, at § 60.60[1].

32. *See Bentonize, Inc. v. Green*, 431 N.W.2d 579, 583 (Minn. Ct. App. 1988).

33. *See, e.g., Safeco Ins. Co. of Am. v. Dain Bosworth, Inc.*, 531 N.W.2d 867, 873-74 (Minn. Ct. App. 1995); *Riley ex rel. Swanson v. Herbes*, 524 N.W.2d 523, 526 (Minn. Ct. App. 1994).

34. 3 ERIC J. MAGNUSON & DAVID F. HERR, *MINNESOTA PRACTICE* § 101.4 (3d ed. 1996).

35. *BLACK’S*, *supra* note 1, at 242 (defining *comity* as “a willingness to grant a privilege, not as a matter of right, but out of deference and good will”).

36. *State v. M.A.P.*, 281 N.W.2d 334, 336-37 (Minn. 1979); *MAGNUSON & HERR*, *supra* note 34, at § 101.4.

Rule 104.01 of Civil Appellate Procedure sets forth the rules for determining timeliness of appeals in Minnesota for most civil cases.³⁷ Under Rule 104.01, an appeal must be taken within sixty days after the entry of a judgment.³⁸ This time limit applies in all cases, unless a different time is specified by statute.³⁹ In juvenile protection cases, such as the termination of a natural parent's parental rights, Minnesota Rule of Juvenile Procedure 82.02 subdivision 2 controls the time allowed to take an appeal.⁴⁰ Under Rule 82.02 subdivision 2, an appeal must be taken within thirty days of the filing of the appealable order.⁴¹ "Limitations on time to appeal are designed to expedite the final resolution of litigation, with due consideration to fairness and certainty of procedure."⁴² Failure to file a timely appeal with the court is a defect that deprives the appellate court of jurisdiction to hear the appeal.⁴³ Furthermore, under case law and statute, the appellate courts may not extend the time to appeal.⁴⁴

Rule 103.01 of Civil Appellate Procedure requires that in addition to serving notice on the court, "adverse parties" must also be served within the appeals period.⁴⁵ In contrast, Rule 82.02 subdivision 3 of the Rules of Juvenile Procedure states that in addition to the court and county attorney, "all parties" or their counsel, if represented, must be served within the appeals period.⁴⁶ Failure to properly serve a required

37. See MINN. R. CIV. APP. P. 104.01; see also LAURA S. UNDERKUFFLER & DAVID W. LARSON, CIVIL APPELLATE PRACTICE IN THE MINNESOTA COURT OF APPEALS 47 (1986).

38. MINN. R. CIV. APP. P. 104.01 subd. 1.

39. MAGNUSON & HERR, *supra* note 34, at § 104.1.

40. *In re Welfare of J.R., Jr.*, 655 N.W.2d 1, 2-3 (Minn. 2003).

41. MINN. R. JUV. P. 82.02 subd. 2.

42. *E.C.I. Corp. v. G.G.C. Co.*, 306 Minn. 433, 435, 237 N.W.2d 627, 629 (1976) (stating that a modification of judgment does not extend the time to appeal issues that could have been raised in an appeal from the first judgment; holding that an incorrect original judgment justified an equitable exception to the rule).

43. See, e.g., *Tischendorf v. Tischendorf*, 321 N.W.2d 405, 409 (Minn. 1982) ("In Minnesota, the failure to make a timely appeal is a jurisdictional defect."); *Township of Honner v. Redwood County*, 518 N.W.2d 639, 641 (Minn. Ct. App. 1994) (holding that court of appeals lacks jurisdiction to hear a late appeal); *Nichols v. Meilahn*, 444 N.W.2d 872, 875 (Minn. Ct. App. 1989) (stating the limitation of time to appeal is jurisdictional).

44. *Schaust v. Town Bd.*, 295 Minn. 571, 573, 204 N.W.2d 646, 648 (1973) (holding that the court cannot extend the time for an appeal); *In re LeBrun*, 458 N.W.2d 139, 143 (Minn. Ct. App. 1990) (holding that the limitation of time to appeal is jurisdictional and the court cannot extend the time for appeal). Minnesota Rules of Civil Appellate Procedure 126.02 allows appellate courts to extend time periods but specifically prohibits extending the time to appeal. MINN. R. CIV. APP. P. 126.02.

45. See MINN. R. CIV. APP. P. 103.01(1).

46. Compare MINN. R. CIV. APP. P. 103.01 subd. 1 with MINN. R. JUV. P. 82.02 subd. 3(a). Rule 57.01 subdivision 1 of the Rules of Juvenile Procedure expressly

party within the proper time period is a jurisdictional defect requiring dismissal on the part of the appellate court⁴⁷ and jurisdiction may not be waived by the parties.⁴⁸

Although older case law is strict in stating that the Minnesota Supreme Court lacks jurisdiction when an appeal is not timely filed,⁴⁹ the court in recent years has carved out an exception that it may hear any appeal in the interests of justice whether the appeal was timely or not.⁵⁰ The court, recognizing that this power appears to contravene statute and previous case law, justified its newly stated authority by questioning whether the court's jurisdiction to hear suits on appeal could be denied by the legislature.⁵¹ The court noted that article 6, section 2 of the Minnesota Constitution grants the Minnesota Supreme Court "original jurisdiction in such remedial cases as may be prescribed by law, and appellate jurisdiction in all cases . . ."⁵² The court has stated that regulations enacted by the legislature are acceptable on comity principles to assist the court in the procedural aspects of appellate review, but not to deny the court of its independent appellate authority to review any matter it finds necessary in the interests of justice.⁵³ Although the court has

provides that the child's guardian ad litem is a party to a juvenile protection matter. MINN. R. JUV. P. 57.01 subd. 1.

47. See *Johnson v. Nessel Town*, 486 N.W.2d 834, 837 (Minn. Ct. App. 1992) (dismissing appeal for failure to serve one of the respondents); *Petersen v. Petersen*, 352 N.W.2d 797, 797 (Minn. Ct. App. 1984) (deciding against appellant who failed to serve notice of appeal on respondent within time limit).

48. See, e.g., *Arndt v. Minn. Educ. Ass'n*, 270 Minn. 489, 490, 134 N.W.2d 136, 137 (1965) ("[P]arties cannot waive the objection or by stipulation clothe this court with authority to determine a belated appeal."); *Indep. Sch. Dist. No. 857 v. Seem*, 263 Minn. 170, 174, 116 N.W.2d 395, 398 (1962) (holding parties cannot waive objection to untimely appeal).

49. See, e.g., *Arndt*, 270 Minn. at 490, 134 N.W.2d at 137 (holding the supreme court loses jurisdiction on an untimely appeal); *Schaust*, 295 Minn. at 573, 204 N.W.2d at 648 (holding the supreme court cannot extend the time for an appeal).

50. See, e.g., *Ruberg v. Skelly Oil Co.*, 297 N.W.2d 746, 749 (Minn. 1980) (accepting untimely appeal as an appeal from judgment); *Krug v. Indep. Sch. Dist. No. 16*, 293 N.W.2d 26, 29 (Minn. 1980) (taking a late appeal in the interests of justice); *State v. M.A.P.*, 281 N.W.2d 334, 336-37 (Minn. 1979) (declining to take jurisdiction of late appeal, but stating the authority to do so); *E.C.I. Corp. v G.G.C. Co.*, 306 Minn. 433, 435-36, 237 N.W.2d 627, 629 (1976) ("The rules of this court are designed to effectuate the orderly administration of justice and do not control its jurisdiction, for it retains the constitutional power to hear and determine, as a matter of discretion, any appeal in the interest of justice.").

51. *State v. M.A.P.*, 218 N.W.2d 334, 336 (Minn. 1979).

52. *Id.*; MINN. CONST. art. VI, § 2.

53. *M.A.P.*, 281 N.W.2d at 336-37; see also *In re O'Rourke*, 300 Minn. 158, 175, 220 N.W.2d 811, 821 (1974) (stating that past cases do not hold that the legislature may by regulation deny the court its constitutional authority to review); *MAGNUSON & HERR*, *supra* note 34, at § 101.4 (discussing that by exercising the power to hear untimely

used this power to hear late appeals very sparingly, some commentary has suggested that lower appellate courts may have the same inherent power as the supreme court to take any appeal.⁵⁴ Appellate courts have so far refused to exercise that power.⁵⁵

C. Federal Rules for Extending the Time to Appeal Due to Excusable Neglect

Federal Rule of Appellate Procedure 4(a)(5) permits the district court to extend the time for filing an appeal in a civil case if the party seeking the extension shows excusable neglect or good cause.⁵⁶ A party may make a motion for an extension before the time for appeal has run or within a thirty-day grace period after the time for appeal has expired.⁵⁷ The good cause standard applies in situations where the delay was not due to fault, excusable or otherwise.⁵⁸ Traditionally, the excusable neglect standard is applied in situations where there is fault or the delay is within the control of the movant.⁵⁹ The authority to grant an extension under Rule 4(a)(5) is limited to the district court; the court of appeals cannot extend the time for filing notice of appeal.⁶⁰

In the 1993 United States Supreme Court decision of *Pioneer Investment Services v. Brunswick Associates*,⁶¹ the Court moved beyond the traditional excusable neglect standard and adopted a flexible standard that takes into account all the relevant circumstances.⁶² Such circumstances include: “the danger of prejudice to [the nonmoving party], the length of the delay and its potential impact on judicial

appeals, the Minnesota Supreme Court is perhaps blurring the constitutional separation of powers).

54. MAGNUSON & HERR, *supra* note 34, at § 101.4.

55. See *Limongelli v. GAN Nat'l Ins. Co.*, 590 N.W.2d 167, 169 (Minn. Ct. App. 1999) (holding time to file notice of appeal may not be extended); *Township of Honner v. Redwood County*, 518 N.W.2d 639, 641 (Minn. Ct. App. 1994) (holding that even though the Minnesota Supreme Court has indicated it has the authority to accept untimely appeals, that authority has not been extended to the lower appeals courts).

56. FED. R. APP. P. 4(a)(5)(ii).

57. FED. R. APP. P. 4(a)(5)(i).

58. *Gibbons v. United States*, 317 F.3d 852, 854 n.3 (8th Cir. 2003) (explaining advisory notes to 2002 amendment to rule 4(a)(5)).

59. *Ponterelli v. Stone*, 930 F.2d 104, 111 n.10 (1st Cir. 1991).

60. See, e.g., *United States v. Detrich*, 940 F.2d 37, 38 (2d Cir. 1991) (holding, however, that timely communication from a *pro se* litigant constituted a request justifying extension); *In re Hoag Ranches*, 846 F.2d 1225, 1229 (9th Cir. 1988); *Savage v. Cache Valley Dairy Ass'n*, 737 F.2d 887, 889 (10th Cir. 1984). Federal rules prevent appellate courts from enlarging the time for notice of appeals. FED. R. APP. P. 26(b).

61. 507 U.S. 380 (1993).

62. *Id.* at 395.

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proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.”⁶³ The Court held that “excusable neglect is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence.”⁶⁴ Furthermore, the determination of whether failure to abide by a specified time limit constitutes excusable neglect is an equitable one.⁶⁵ The *Pioneer* decision makes it clear that in some circumstances, attorney neglect, mistake, or carelessness can constitute excusable neglect.⁶⁶

Although *Pioneer* was based on bankruptcy law,⁶⁷ its excusable neglect standard has been adopted by a majority of the federal circuits as the proper standard for district courts to apply when exercising the discretion of whether or not to extend the time to appeal a civil case under Rule 4(a)(5).⁶⁸ The Eighth Circuit adopted the *Pioneer* standard in *Fink v. Union Central Life Insurance Co.*⁶⁹ The *Fink* case was a major departure from previous case law, which held that excusable neglect could not be found when the failure to timely appeal was caused by oversight or clerical error of the attorney or the attorney’s staff, or due to the attorney’s busy schedule.⁷⁰

Several states have enacted rules that are similar to Rule 4(a)(5) and

63. *Id.*

64. *Id.* at 394.

65. *Id.* at 395.

66. *See id.* at 388 (stating that where the courts were empowered to accept late filings due to excusable neglect, “Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party’s control”); *see also* MOORE, *supra* note 25, at § 60.41[1][a] (interpreting effects of *Pioneer* to include attorney neglect or negligence).

67. *Pioneer* actually defined excusable neglect as applied to FED. R. BANKR. P. 9006(b)(1). *Pioneer*, 507 U.S. at 382.

68. *See, e.g.*, Halicki v. Louisiana Casino Cruises, Inc., 151 F.3d 465, 469 (5th Cir. 1998); Prizevoits v. Indiana Bell Tel. Co., 76 F.3d 132, 134 (7th Cir. 1996); Thompson v. E.I. Dupont de Nemours & Co., 76 F.3d 530, 533 (4th Cir. 1996); Advance Estimating Sys., Inc. v. Riney, 130 F.3d 996, 997-98 (11th Cir. 1996); Virella-Nieves v. Briggs & Stratton Corp., 53 F.3d 451, 454 (1st Cir. 1995); Fink v. Union Cent. Life Ins. Co., 65 F.3d 722, 724 (8th Cir. 1995); Reynolds v. Wagner, 55 F.3d 1426, 1429 (9th Cir. 1995); Weinstock v. Cleary, 16 F.3d 501, 503 (2d Cir. 1994); City of Chanute v. Williams Natural Gas Co., 31 F.3d 1041, 1046 (10th Cir. 1994); *see also* David N. May, *Pioneer’s Paradox: Appellate Rule 4(a)(5) and the Rule Against Excusing Ignorance of Law*, 48 DRAKE L. REV. 677, 695-96 (2000) (discussing federal courts that have applied the *Pioneer* analysis to Rule 4(a)(5) and the effects of that application).

69. 65 F.3d 722, 724 (8th Cir. 1995) (finding that past decisions defining excusable neglect are no longer controlling precedent).

70. *See* Vogelsang v. Patterson Dental Co., 904 F.2d 427, 431 (8th Cir. 1990) (listing circumstances in which excusable neglect will not be found).

allow the trial court to extend the time for appeal under a showing of excusable neglect.⁷¹ Of these states, Hawaii has adopted the *Pioneer* standard of excusable neglect in reviewing untimely appeals.⁷² Additionally, Colorado allows appellate courts to extend the time for appeal;⁷³ Iowa allows only the Iowa Supreme Court to extend the time for appeal;⁷⁴ while Pennsylvania allows late appeals in instances of non-negligence.⁷⁵

Jurisdictions that either allow an extension for the time to file an appeal due to excusable neglect or make similar allowances for late appeals offer an obvious advantage to appellants compared with jurisdictions that make no such accommodations. Minnesota falls into the latter category. Although Rule 104.01 of the Minnesota Rules of Appellate Procedure is comparable to Federal Rule 4, Rule 104.01 differs from Rule 4 in that it contains no express provision allowing for the extension of a party's time to appeal under any circumstance.⁷⁶

71. See, e.g., D.C. CT. APP. R. 4(a)(4); HAW. R. APP. P. 4(a)(5); ME. R. APP. P. 2(b)(3); MISS. R. APP. P. 4(g); MONT. R. APP. P. 5(c); N.M. R. APP. P. 12-201(E)(2); N.D. R. APP. P. 4(a); R.I. SUP. CT. ART. I, R. 4(a); UTAH R. APP. P. 4(e); VT. R. APP. P. 4.

72. *Enos v. Pac. Transfer & Warehouse, Inc.*, 910 P.2d 116, 123-25 (Haw. 1996).

73. COLO. R. APP. P. 4(a).

74. *Home-Crest Corp. v. Albright*, 414 N.W.2d 89, 90 (Iowa 1987) (noting in dicta that an order of the court allowing an extension of time had the effect of ratifying the previous notice of appeal).

75. *Bass v. Commonwealth*, 401 A.2d 1133, 1135 (Pa. 1979) (holding that where papers were prepared for filing six days prior to expiration date and the secretary in charge of filing became ill, there was non-negligent failure to timely file an appeal). Previous to *Bass*, Pennsylvania courts had only allowed *nunc pro tunc* appeals in situations involving "fraud or some breakdown in the court's operation." *Id.* (citing *West Penn Power Co. v. Goddard*, 333 A.2d 909, 912 (Pa. 1975)). The court in *Bass* granted the appellant's petition for an appeal *nunc pro tunc* based on its determination that counsel for the appellant was in some degree a "public officer" and that an appellant should not lose the day in court due to the non-negligent failure to timely file an appeal. *Id.* The opinion in *Bass* elicited a vitriolic dissent that decried what it felt was a wholesale disregard for the rules and a signal to litigants that timeliness requirements had been abandoned. *Id.* at 1136-38 (Roberts, J. dissenting). Portions of the dissent bear a remarkable resemblance to portions in the *J.R.* opinion. Compare *Bass* 401 A.2d at 1136-38 with *In re Welfare of J.R., Jr.*, 655 N.W.2d 1, 4-5 (Minn. 2003). An appeal *nunc pro tunc* will be allowed if: (1) the appeal was untimely due to non-negligent circumstances relating to appellant or to appellant's counsel, (2) the appeal is filed within a short time after the appellant or appellant's counsel learns of the delay and has an opportunity to address the untimeliness, (3) the time period is very short, and (4) the appellee is not prejudiced by the delay. *Cook v. Unemployment Comp. Bd. of Review*, 671 A.2d 1130, 1131 (Pa. 1996).

76. Compare MINN. R. CIV. APP. P. 104.01 with FED. R. APP. P. 4. See also MAGNUSON & HERR, *supra* note 34, at § 104.2 (comparing Rule 104.01 of the Minnesota Rules of Appellate Procedure with federal counterpart Rule 4).

III. THE *J.R.* DECISIONA. *The Facts as Presented by the Court*

Dena Rodacker⁷⁷ (“Appellant”) is the natural mother of six children.⁷⁸ Due to a lengthy history of mental illness and substance abuse, her parental rights to four of her children were involuntarily terminated in two separate proceedings in 1996 and 1997.⁷⁹ J.R., Jr., Appellant’s fifth child, was born on April 13, 1998.⁸⁰ Both Appellant and J.R., Jr. tested positive for cocaine at the time of his birth.⁸¹ Initially, Appellant’s parental rights were terminated and J.R., Jr. was placed in foster care where he remained for two and one-half years.⁸² Subsequently, the court vacated the termination order, and J.R., Jr. was returned to Appellant in December 2000.⁸³ On May 29, 2001, Appellant claimed that she could not keep J.R., Jr. or A.I.R., her sixth child, safe and voluntarily placed the children in foster care.⁸⁴ Less than two months later, Appellant suffered a drug-induced psychotic episode, which resulted in her being committed to the Willmar Regional Treatment Center.⁸⁵ Upon discharge, Appellant continued to use drugs and alcohol in a manner that violated the conditions of her provisional release.⁸⁶

In December 2001, a trial was held on a petition to terminate Appellant’s parental rights.⁸⁷ Sheila Thomas, a licensed child psychologist, testified that J.R., Jr. appeared anxious about having a permanent place to live and that he viewed his sister and foster family as

77. Ms. Rodecker is engaging and well spoken. Telephone Interview with Dena Rodecker, Appellant (June 27, 2003) (on file with the author). She strongly disputes the facts of the case as presented by the court, still considers herself to be the mother of her children and cares very much for their welfare. *Id.* Ms. Rodecker has spoken with other attorneys about her case but cannot afford the requested fees. *Id.* She resides in Meeker County and currently has custody of her seventh child. *Id.*

78. *In re Welfare of J.R., Jr.*, 655 N.W.2d 1, 7 (Minn. 2003).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 7-8.

85. *Id.* at 8. Two days prior to appellant’s psychotic episode, appellant had refused an attempt to be reunited with J.R., Jr., and suggested that he instead stay with his foster parents. *Id.*

86. *Id.*

87. *Id.*

his family.⁸⁸ Thomas stated that another “disruption” in J.R., Jr.’s placement would have a negative impact on his ability to trust and relate to adults.⁸⁹ The children’s guardian ad litem also testified that it would be in the best interest of the children to terminate Appellant’s parental rights.⁹⁰ On Feb. 5, 2002, the trial court terminated Appellant’s parental rights to J.R., Jr. and his sister A.I.R.⁹¹

Appellant filed an appeal with the Minnesota Court of Appeals contending that the trial court erred on several issues.⁹² The notice of appeal was timely filed with respondent Meeker County and the court of appeals, but the guardian ad litem was not served until fourteen days after the thirty-day appeal deadline due to the attorney’s neglect.⁹³ In determining the proper time period to take an appeal, the court of appeals relied on Minnesota Statutes section 260C.415, which provides in part that an appeal from juvenile court must be taken to the court of appeals within thirty days of the appealable order.⁹⁴ The court then relied on Rule 103.01 of the Rules of Civil Appellate Procedure, which requires in part that “adverse parties” must be served with notice of appeal within the appeal period.⁹⁵ The appeal was dismissed for lack of jurisdiction after the court of appeals determined that the guardian ad litem was indeed an adverse party,⁹⁶ and failure to serve a timely notice of appeal was a jurisdictional defect.⁹⁷

Appellant then filed an appeal with the Minnesota Supreme Court seeking a reversal of the court of appeals order, claiming that because termination of parental rights cases are of such importance, a technical violation of the rules of court procedure should not have prevented the original appeal from proceeding.⁹⁸ Appellant’s counsel stated that

88. *Id.* at 8-9.

89. *Id.* at 9.

90. *Id.*

91. *Id.*

92. *Id.* at 9-11.

93. *Id.* at 2.

94. *Id.* at 2-3; MINN. STAT. § 260C.415 (2002).

95. *J.R.*, 655 N.W.2d at 3; MINN. R. CIV. APP. P. 103.01 subd. 1. A child’s guardian ad litem is a party to a juvenile-protection matter. MINN. R. JUV. P. 57.01 subd. 1(a).

96. Older Minnesota case law has held that in some instances a guardian ad litem is not an adverse party. *See In re Welfare of J.B.* 623 N.W.2d 640, 643 (Minn. Ct. App. 2001) (holding that a guardian ad litem was not an adverse party because the guardian was not adverse to the appeal), *overruled by In re Welfare of J.R., Jr.*, 655 N.W.2d 1 (Minn. 2003); *Hofseth v. Hofseth*, 456 N.W.2d 99, 102 (Minn. Ct. App. 1990) (holding that guardian ad litem was not an adverse party because guardian ad litem was appointed after the trial and had not previously taken an adverse position to the appellant).

97. *J.R.*, 655 N.W.2d at 3.

98. *Id.* at 1-3.

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Appellant did not cause the delay and was in total reliance on the services of her counsel; therefore, it was contended that Appellant should not be punished for the attorney's error.⁹⁹

B. The Minnesota Supreme Court's Analysis

The Minnesota Supreme Court affirmed the court of appeals order and held that the failure to abide by the rules of procedure deprived the appellate court of jurisdiction.¹⁰⁰ Therefore, because the appeal was not timely served on the guardian ad litem, the appeal was not perfected and dismissal was required.¹⁰¹ In doing so, the court noted that the appellate court erred in applying Minnesota Statutes section 260C.415 and Rule 103.01 of the Rules of Civil Appellate Procedure, and should have instead relied on Rules 82.01 and 82.02 of the Rules of Juvenile Procedure.¹⁰² The court stated that the end result was not affected in that the thirty-day appeal period of Rule 82.01 subdivision 2 is identical with that of the statute, and there was no dispute that the guardian ad litem was an adverse party.¹⁰³

The court cited numerous cases where it had recognized its inherent authority to take an appeal in the interests of justice, even when filing or service requirements set forth in a rule or statute had not been met.¹⁰⁴ However, the court distinguished those cases from the case at hand by emphasizing that such deviations were based upon peculiar facts, such as recent changes in the law or interpretation issues, but not on the basis of attorney negligence or oversight.¹⁰⁵ In doing so, the court rejected

99. Appellant's Brief and Appendix at 17, *In re Welfare of J.R., Jr.*, 655 N.W.2d 1 (Minn. 2003) (No. C2-02-378). Counsel for the appellant was appointed on March 1, 2002, six days prior to the deadline for filing an appeal. *Id.* at 16-17. Though counsel represented Ms. Rodecker in the trial phase of *J.R.*, counsel did not believe he had authority to pursue an appeal prior to his court appointment as appellate counsel. *Id.* at 17.

100. *In re Welfare of J.R., Jr.*, 655 N.W.2d 1, 3 (Minn. 2003).

101. *Id.* at 3, 6.

102. *Id.* at 2-3.

103. *Id.* at 3.

104. *Id.* at 3-4 (citing *Ruberg v. Skelly Oil Co.*, 297 N.W.2d 746, 749 (Minn. 1980); *Krug v. Independent School Dist. No. 16*, 293 N.W.2d 26, 29 (Minn. 1980); *State v. M.A.P.*, 281 N.W.2d 334, 336-37 (Minn. 1979); *E.C.I. Corp. v G.G.C. Co.*, 306 Minn. 433, 435-36, 237 N.W.2d 627, 629 (1976)).

105. *J.R.*, 655 N.W.2d at 4; *see also* *Ruberg v. Skelly Oil Co.*, 297 N.W.2d 746, 749 (Minn. 1980) (holding that even though appeal was technically defective, the appeal would be taken in the spirit of a recent rules change); *Krug v. Indep. Sch. Dist. No. 16*, 293 N.W.2d 26, 29 (Minn. 1980) (taking late appeal in the interests of justice because district court amendment raised issue of whether the appeal ran from the original order or the amended order); *E.C.I. Corp. v G.G.C. Co.*, 306 Minn. 433, 436, 237 N.W.2d 627,

Appellant's request that the court excuse the delay by adopting an analysis similar to that used in Rule 60.02 motions to vacate default judgments.¹⁰⁶ The court expressed doubts as to the utility of a Rule 60.02 good cause exception made at the appellate level because the court had traditionally used a four-prong test that required a reasonable defense on the merits—an issue better evaluated by the trial court.¹⁰⁷ Furthermore, the court stated, “a good cause exception at the appellate court level would eviscerate the uniform, impartial application of the rules.”¹⁰⁸

The court emphasized the policy of placing the interests of the child¹⁰⁹ foremost in a termination of parental rights case and the fundamental need to strictly enforce the rules as a means of avoiding unnecessary delays that could seriously affect a child's opportunity to have a permanent home.¹¹⁰ Although the court recognized that such a policy could result in some cases not being heard on appeal, it stated that to do otherwise could equally inflict injustice upon the child.¹¹¹

Justice Paul H. Anderson, joined by Justice Page, filed a separate opinion that concurred in part and dissented in part.¹¹² The dissent argued that while a strict interpretation of the rules required dismissal, such an interpretation was too restrictive in the context of terminating a natural parent's parental rights.¹¹³ “We must be wary of a broom that sweeps too broadly and rules that are so strictly enforced that justice has the very real potential of being denied.”¹¹⁴ The dissent recognized the

629 (1976) (holding that the parties knew the first judgment entered by the court was incorrect and though notice of appeal was not timely filed with the first judgment, it was timely filed with the amended judgment).

106. *In re Welfare of J.R., Jr.*, 655 N.W.2d 1, 4-5 (Minn. 2003) (stating that allowing a good cause exception for failure to follow the rules would strip the rules of their impartial meaning and needlessly delay final resolutions).

107. *Id.* at 4 n.3 (quoting *Nguyen v. State Farm Mut. Auto. Ins. Co.*, 558 N.W.2d 487, 490 (Minn. 1997)).

108. *Id.* at 4.

109. Minnesota courts balance three factors in determining the best interests of a child: “(1) the child's interest in preserving the parent-child relationship; (2) the parent's interest in preserving the parent-child relationship; and (3) any competing interest of the child.” *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. Ct. App. 1992). “Competing interests include such things as a stable environment, health considerations, and the child's preferences.” *Id.* The interests of the parent and the child are not given equal weight, and the best interests of the child are the leading consideration for the court. *In re M.H.*, 595 N.W.2d 223, 227 (Minn. Ct. App. 1999).

110. *J.R.*, 655 N.W.2d at 5.

111. *Id.*

112. *Id.* at 6 (Anderson, J., concurring in part, dissenting in part).

113. *Id.* at 6-7.

114. *Id.*

court's constitutional power to hear any appeal in the interests of justice and stated that the court should have reached the merits of the case.¹¹⁵ After reviewing the findings of the district court, the dissent agreed with the order to terminate Appellant's parental rights.¹¹⁶

IV. ANALYSIS OF THE *J.R.* DECISION

A. *A Correct Answer to the Wrong Question*

The decision of the court that an untimely appeal deprives the appellate court of jurisdiction is correct and widely supported by Minnesota case law.¹¹⁷ Additionally, Minnesota case law holds that failure to timely serve an adverse party is in and of itself a jurisdictional defect.¹¹⁸ This holding finds wide support among state courts; it is universally held that untimely appeals in civil actions are void for lack of subject matter jurisdiction.¹¹⁹ This holds true even among cases that involve termination of parental rights.¹²⁰ Furthermore, though the Minnesota Supreme Court has the inherent authority to take jurisdiction of an untimely appeal, this power has not been conferred to lower appellate courts.¹²¹

While the Minnesota Supreme Court was correct in its decision that

115. *Id.*

116. *Id.* at 11.

117. *See, e.g.*, *Tischendorf v. Tischendorf*, 321 N.W.2d 405, 409 (Minn. 1982); *Schaust v. Town Bd. of Hollywood Township*, 295 Minn. 571, 573, 204 N.W.2d 646, 648 (1973); *Township of Honner v. Redwood County*, 518 N.W.2d 639, 641 (Minn. Ct. App. 1994); *In re Welfare of D.B.*, 463 N.W.2d 301, 302 (Minn. Ct. App. 1990).

118. *See, e.g.*, *Johnson v. Nessel Town*, 486 N.W.2d 834, 837 (Minn. Ct. App. 1992) (dismissing appeal for failure to serve one of the respondents); *Petersen v. Petersen*, 352 N.W.2d 797, 797 (Minn. Ct. App. 1984) (holding against the appellant who failed to serve notice of appeal on the respondent within time limit).

119. *See, e.g.*, *McCormack v. AmSouth Bank*, 759 So. 2d 538, 541 (Ala. 1999); *Hahn v. D.C. Water & Sewer Auth.*, 727 A.2d 317, 319 (D.C. 1999); *Hays v. Hays*, 612 N.W.2d 817, 819 (Iowa Ct. App. 2000); *State v. Bassham*, 762 N.E.2d 963, 965 (Ohio 2002). Even in jurisdictions that allow a trial court to extend the time for filing a late appeal due to excusable neglect, the failure to timely file deprives the appellate court of jurisdiction. *See, e.g.*, *In re Ak.V.*, 747 A.2d 570, 573-74 (D.C. 2000).

120. *See, e.g.*, *Wright v. Montgomery County Dep't of Pensions and Sec.*, 423 So. 2d 256, 258 (Ala. Civ. App. 1982); *In re Alyssa H. v. Charles H.*, 27 Cal. Rptr. 2d 809, 812 (Ct. App. 1994); *In re A.E.*, 994 P.2d 465, 467 (Colo. Ct. App. 1999); *In re C.P.*, 777 So. 2d 470, 472 (La. 2001); *In re Jasso v. Jasso*, 752 P.2d 790, 791 (N.M. Ct. App. 1987).

121. *See Township of Honner v. Redwood County*, 518 N.W.2d 639, 641 (Minn. Ct. App. 1994) (holding that even though the supreme court has indicated that it has the authority to accept untimely appeals, that authority has not been extended to the lower appeals courts).

an untimely appeal deprived the lower appellate court of jurisdiction, the court erred by not exercising its constitutional power to look beyond the procedural rules in order to act in the interests of justice and hear the appeal. In refusing to act, the court stated three primary objections: (1) *J.R.* was distinguishable from previous cases where the court had elected to deviate from the rules,¹²² (2) an analysis similar to a Rule 60.02 good cause exception is unworkable at the appellate level,¹²³ and (3) child protection cases are in particular need of expeditious treatment.¹²⁴ Each of these objections will be examined in turn.

1. Distinguishing Termination of Parental Rights Cases from Other Civil Cases

The Minnesota Supreme Court distinguished *J.R.* from past cases in which it had elected to deviate from the rules and hear an untimely appeal based on the peculiar facts of those cases.¹²⁵ In particular, the court noted that when it had deviated from the rules, it did so only after recent changes in the law or interpretation issues and not amid attorney negligence or oversight.¹²⁶ In his dissent, Justice Paul H. Anderson suggested that termination of parental rights cases should be distinguished by their subject matter.¹²⁷ This concept that termination of parental rights cases may at times be treated differently than other civil cases is most apparent in situations where counsel has been appointed, as it was in *J.R.*, and there has been a claim of ineffective assistance of counsel.¹²⁸

When a state court allows an untimely appeal in a termination of parental rights case due to a finding of ineffective assistance of counsel, the substantive theory runs that because due process requires counsel appointed under a statutory directive to provide effective assistance, the same standards for counsel appointed in a criminal proceeding may be applied to counsel appointed in a termination of parental rights

122. *In re Welfare of J.R., Jr.*, 655 N.W.2d 1, 4 (Minn. 2003).

123. *Id.*

124. *Id.* at 5.

125. *See supra* note 105.

126. *J.R.*, 655 N.W.2d at 4.

127. *Id.* at 6 (Anderson, J., concurring in part, dissenting in part) (“This is a too restrictive interpretation of the law, especially in the context of termination of a natural parent’s parental rights.”).

128. BLACK’S LAW DICTIONARY 48 (2d Pocket ed. 2001) (defining *ineffective assistance of counsel* under *assistance of counsel* as “[a] representation in which the defendant is deprived of a fair trial because the lawyer handles the case unreasonably [usually] either by performing incompetently or by not devoting full effort to the defendant, [especially] because of a conflict of interest”).

proceeding.¹²⁹ The party claiming ineffective assistance of counsel must show that counsel's performance was deficient and that actual prejudice resulted.¹³⁰ In cases where ineffective assistance of counsel is shown, courts have used a variety of methods to extend the time for appeal, such as remanding the case back to the trial court for resentencing¹³¹ or designating that a writ of habeas corpus¹³² be filed with the trial court.¹³³

Ineffective assistance of counsel cases from other jurisdictions are applicable to *J.R.* in that they stand for the proposition that termination of parental rights proceedings affect important due process rights protected by the Fourteenth Amendment of the United States Constitution¹³⁴ and such cases may at times be treated in a manner different from other civil cases.¹³⁵ Cases such as these also recognize that when a parent loses his or her parental rights due to an attorney's actions, there is little recourse for the parent and monetary damages in a malpractice suit are wholly inadequate.¹³⁶

129. See, e.g., *Farley v. Dep't of Servs. for Children, Youth & Their Families*, 765 A.2d 951, 951 (Del. 2000) (stating parallel remedy between criminal and parental rights termination cases); *In re E.H.*, 609 So. 2d 1289, 1290-91 (Fla. 1992) (determining that a writ of habeas corpus is the proper procedure in a civil parental rights termination case where the appeal has been untimely); *In re T.M.C.*, 988 P.2d 241, 243 (Kan. Ct. App. 1999) (extending fundamental fairness exception to termination order cases where it has not been extended to other civil proceedings).

130. "The defendant must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)).

131. See, e.g., *Farley*, 765 A.2d at 951.

132. BLACK'S, *supra* note 1, at 638 (defining *habeas corpus* as "[t]he name given to a variety of writs . . . having for their object to bring a party before a court or judge").

133. *In re E.H.*, 609 So. 2d 1289, 1290-91 (Fla. 1992).

134. See *In re T.M.C.*, 988 P.2d 241, 243 (Kan. Ct. App. 1999) ("Termination of parental rights proceedings affect important substantive due process rights."); see also U.S. CONST. amend. XIV, § 1 (stating in part that no state shall "deprive any person of life, liberty, or property, without due process of law"). But see *In re Joshua R.*, 657 N.W.2d 209, 214 (Neb. 2003) (holding that a claim of ineffective assistance of counsel does not extend to untimely appeal, and due process is not denied when appellant was given fair and full opportunity to litigate).

135. See *supra* note 129 and accompanying text.

136. See *In re AK.V.*, 747 A.2d 570, 576-77 (D.C. 2000) (stating that the usual remedy of money damages in a civil case for misfeasance or nonfeasance of counsel is "wholly inadequate in a neglect case"); *In re K.L.*, 91 S.W.3d 1, 11 (Tex. Ct. App. 2002) (stating that money damages are inadequate in termination cases where the effect of counsel's deficiencies may be irrevocable). In presenting its holding, the court in *K.L.* cited to *Santosky v. Kramer*, 455 U.S. 745, 759 (1982) for the proposition that termination of parental rights cases differ from other civil cases in that once affirmed, the result is final and irrevocable. *K.L.*, 91 S.W.3d at 11.

In *J.R.*, the Meeker County District Court initially rejected Appellant's request for the appointment of appellate counsel.¹³⁷ Rule 61.02 of the Rules of Juvenile Procedure does not explicitly state that counsel may be appointed in an appeal proceeding, and the court found it lacked authority under the rule to do so.¹³⁸ Later, after taking a broad view of Rule 61.02 and recognizing the substantial rights at stake in a termination of parental rights proceeding, the court reconsidered its position and appointed appellate counsel.¹³⁹

Recently, the Minnesota Supreme Court Juvenile Protection Rules Committee proposed amending the Rules of Juvenile Procedure "to extend through appeal, if any, the basic principle that each person appearing in court has the right to be represented by counsel."¹⁴⁰ Additionally, the committee proposed that the same attorney represent the client in both the trial court and appellate court proceedings.¹⁴¹ The committee chose to delete the latter proposed amendment in part due to concern by public defenders that such a rule could hinder an ineffective assistance of counsel claim and that many trial court attorneys are not necessarily experienced appellate court attorneys.¹⁴²

The concerns of the district court that an appeal be made available in this case, and the concerns of public defenders that some trial court attorneys are not experienced appellate court attorneys, suggest that the Minnesota Supreme Court should have taken a more lenient view of counsel's failure to timely serve one of the parties to a juvenile matter. Three unpublished cases indicate that Minnesota recognizes the possibility of an ineffective assistance of counsel claim in a termination of parental rights case, though none of the cases was in the context of an untimely appeal.¹⁴³ Furthermore, the appellant in *J.R.* did not bring a

137. *In re Welfare of J.R., Jr.*, 655 N.W.2d 1 (Minn. 2003), Amended Order, No. J7-01-50206 (Minn. 8th Jud. Dist. Ct. Feb. 27, 2002), *rev'd*, Order Appointing Appellate Counsel, No. J7-01-50206 (Minn. 8th Jud. Dist. Ct. Feb. 28, 2002).

138. *Id.* See also MINN. R. JUV. P. 61.02 subd. 2(a) ("If the child's parent or legal custodian desires counsel but is financially unable to employ it, the court shall appoint counsel to represent the parent or legal custodian in any juvenile protection matter in which the court determines that such appointment is appropriate.").

139. *In re Welfare of J.R., Jr.*, 655 N.W.2d 1 (Minn. 2003), Order Appointing Appellate Counsel, No. J7-01-50206 (Minn. 8th Jud. Dist. Ct. Feb. 28, 2002).

140. MINN. S. CT. JUV. PROTECTION RULES COMM., FINAL REPORT AND PROPOSED AMENDMENTS TO THE MINNESOTA RULES OF JUVENILE PROCEDURE JUVENILE PROTECTION RULES 15 (Apr. 7, 2003), available at http://www.courts.state.mn.us/cio/public_notices/Juv_%20Prot_Rules_Report.doc (last visited Nov. 15, 2003).

141. *Id.*

142. *Id.* at 15-16.

143. *In re D.F.*, No. C1-02-114, 2002 Minn. App. LEXIS 868, at *12 (Minn. Ct. App. July 23, 2002); *In re B.M.S.*, No. C5-98-708, 1998 Minn. App. LEXIS 1124, at *10

motion for ineffective assistance of counsel and may not even have known such an action was possible.¹⁴⁴

2. *Looking to the Federal System for a Workable Analysis*

The Minnesota Supreme Court denied appellant's request that the court adopt an analysis similar to that used in Rule 60.02 motions to vacate default judgments.¹⁴⁵ The court took this to mean a "good cause" exception, which requires a four-prong test that provides in part that the party seeking relief must demonstrate a reasonable defense on the merits.¹⁴⁶ The court denounced the workability of such an analysis at the appellate level largely because a trial court is better suited to judge the merits of any particular case.¹⁴⁷ Though not mentioned by the court, this argument is buoyed by the suggestion that judging the merits of a defense prior to arguments by the parties may appear to prejudice the appeal.¹⁴⁸ Additionally, the court was correct in denying a "good cause" exception largely based on the fact that a good cause standard applies in situations where the delay was not due to fault, excusable or otherwise.¹⁴⁹ Counsel for the appellant admitted that he was responsible for the delay,¹⁵⁰ and thus an excusable neglect exception would be more appropriate.

Had the court chosen to review the reasons for failure to serve a timely appeal under the mantle of excusable neglect, a more suitable standard would be similar to that adopted by the United States Supreme Court in *Pioneer Investment Services v. Brunswick Associates*.¹⁵¹ Under *Pioneer*, "excusable neglect" is understood to encompass situations in

(Minn. Ct. App. Oct. 6, 1998); *In re L.N.*, No. C8-90-698, 1990 Minn. App. LEXIS 969 at *3 (Minn. Ct. App. Oct. 9, 1990).

144. Appellant has stated that even though other attorneys have indicated they may be able to help her, she is not able to afford their services. Telephone Interview with Dena Rodecker, Appellant (June 27, 2003) (on file with author).

145. *In re Welfare of J.R., Jr.*, 655 N.W.2d 1, 4 (Minn. 2003).

146. *Id.* See also *Nguyen v. State Farm Mut. Auto Ins. Co.*, 558 N.W.2d 487, 490 (Minn. 1997) (stating elements of four-prong good cause test).

147. *J.R.*, 655 N.W.2d at 4 n.3.

148. "[T]his court must avoid any appearance of prejudging an appeal without the record and arguments of the parties." *Maddox v. Dep't of Human Servs.*, 400 N.W.2d 136, 139 n.1 (Minn. Ct. App. 1987).

149. "[T]he good cause standard 'applies in situations where there is not fault—excusable or otherwise;' i.e., 'the need for an extension is . . . occasioned by something that is not within the control of the movant.'" *Gibbons v. United States*, 317 F.3d 852, 854 (8th Cir. 2003) (citations omitted).

150. Appellant's Brief and Appendix at 17, *In re Welfare of J.R., Jr.*, 655 N.W.2d 1 (Minn. 2003) (No. C2-02-378).

151. 507 U.S. 380 (1993).

which failure to comply with a filing deadline is attributable to negligence.¹⁵² The *Pioneer* standard takes into account all the relevant circumstances, including prejudice to the other party, the reason for the delay, the duration of the delay, and whether the movant acted in good faith.¹⁵³ Additionally, *Pioneer* suggests that in some circumstances, negligence on the part of an attorney can constitute excusable neglect.¹⁵⁴

A majority of federal circuits, including the Eighth Circuit, have adopted the *Pioneer* standard when reviewing untimely appeals due to excusable neglect.¹⁵⁵ Admittedly, the federal system is operating under appellate rules that allow district courts to extend the time for appeal, whereas Minnesota rules make no similar allowance.¹⁵⁶ However, the strength of the *Pioneer* standard is that it does not rely on a meritorious defense and, even more favorably, *Pioneer* states that the determination of whether the failure to abide by a specified time limit constitutes excusable neglect is an equitable one.¹⁵⁷

The *Pioneer* standard is similar to a possible use of discretion as described in dicta in the Minnesota Supreme Court decision of *Nguyen v. State Farm*.¹⁵⁸ In *Nguyen*, the court analyzed a defendant's failure to file a proper request for trial and stated that if the matter was discretionary with the court, reasons for exercising discretion would include: (1) that failure to file was inadvertent and a result of oversight, (2) the party acted with diligence upon learning of the oversight, and (3) the opposing party was not prejudiced.¹⁵⁹

3. *Conflicting Policy After J.R.*

The Minnesota Supreme Court's emphasis on the rights of the child to a timely appeal largely shaped the court's decision not to exercise its inherent authority to take an untimely appeal in the interests of justice.¹⁶⁰ The court evidenced the importance of this policy by comparing Rule 82.02 of the Juvenile Rules of Procedure, which provides thirty days to

152. *Id.* at 394-95.

153. *Id.* at 395.

154. *See id.* at 394; *see also* MOORE ET AL., *supra* note 25, at § 60.41[1][a] (interpreting the effects of *Pioneer* to include attorney neglect or negligence).

155. *See supra* note 68 and accompanying text.

156. *See supra* Part II.C.

157. *Pioneer Inv. Servs. v. Brunswick Assoc.*, 507 U.S. 380, 395 (1993).

158. 558 N.W.2d 487, 491 (Minn. 1997).

159. *Id.* at 491.

160. *See In re Welfare of J.R., Jr.*, 655 N.W.2d 1, 5 (Minn. 2003) (stating that making an exception to the Rules of Procedure for child protection cases would be in direct conflict with the policy that such cases in particular need to be expeditiously handled).

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appeal juvenile protection matters, with Rule 104.01 of the Rules of Civil Appellate Procedure, which provides sixty days to appeal in other civil cases.¹⁶¹

While the emphasis on such a policy may be outwardly admirable, it may be equally shortsighted in that the United States Supreme Court has stressed the importance of the appeals process in cases where parental status is in question.¹⁶² “Parental status termination is ‘irretrievably destructive’ of the most fundamental family relationship. And the risk of error . . . is considerable.”¹⁶³ Additionally, the Court has said that it shares a strong interest with the parent in a correct decision and that in some cases, it even has a stronger interest in informal procedures.¹⁶⁴

The policy carried forward from *J.R.*—that cases involving the termination of parental rights are in particular need of expeditious handling¹⁶⁵—runs contrary to the policy previously stated by the Minnesota Supreme Court that favors granting relief when a judgment is entered through no fault of the client.¹⁶⁶ By the court’s own admission, this new and strongly stated emphasis on strict application of the rules of procedure in cases involving the termination of parental rights may result in some cases not being heard on appeal.¹⁶⁷ The new policy has quickly been adopted by the lower courts¹⁶⁸ and has been extended beyond the situation of untimely filings to include a situation where the court refused to give a mother more time to prove herself to be drug free.¹⁶⁹

161. *Id.* Compare MINN. R. JUV. P. 82.02 with MINN. R. CIV. APP. P. 104.01.

162. See *M.L.B. v. S.L.J.*, 519 U.S. 102, 121 (1996) (commenting in a termination of parental rights case where a mother’s appeal was denied due to her inability to afford court records).

163. *Id.*

164. See *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 31 (1981) (discussing the right of an indigent parent to receive court-appointed counsel in a termination of parental rights proceeding).

165. *J.R.*, 655 N.W.2d at 5.

166. See *Nguyen v. State Farm Mut. Auto. Ins. Co.*, 558 N.W.2d 487, 491 (Minn. 1997) (agreeing that a client “should not be a victim of his attorney’s carelessness”); *Charson v. Temple Israel*, 419 N.W.2d 488, 491 (Minn. 1988) (recognizing that even under the general principles of agency where attorney neglect is chargeable to the client, the court has scrutinized the client’s actions apart from that of the attorney); *Duenow v. Lindeman*, 223 Minn. 505, 518, 27 N.W.2d 421, 429 (1947) (“Courts will relieve parties from the consequences of the neglect or mistakes of their attorney, when it can be done without substantial prejudice to their adversaries.”).

167. *J.R.*, 655 N.W.2d at 5.

168. *In re Children of S.C.*, 656 N.W.2d 580, 584 (Minn. Ct. App. 2003) (stating the policy of *J.R.*—that child protection cases in particular need to be expeditiously handled—in its holding that a motion to vacate judgment in termination of parental rights proceeding was untimely filed).

169. *In re Children of J.J.*, No. C9-02-1592, 2003 Minn. App. LEXIS 367 at *7 n.4 (Minn. Ct. App. Apr. 8, 2003) (citing to *J.R.* for the proposition that each delay in

While the court was correct in stating that delays in termination of parental rights can seriously affect a child's chance for permanent placement,¹⁷⁰ the termination of a parent's rights by no means guarantees that a child will be adopted. The 2003 Adoption and Foster Care Analysis and Reporting System Report (AFCARS Report) released by the U.S. Department of Health and Human Services shows that on a national level, the number of children living in foster care whose parents have had their parental rights terminated was more than thirty percent higher than the total number of children adopted in the same year.¹⁷¹ The hard facts are that many children are never adopted,¹⁷² and the national mean time for those who are adopted is sixteen months after their parents' parental rights have been terminated.¹⁷³ In Minnesota, the mean is 25.65 months, the second highest in the nation.¹⁷⁴

Legal scholar Martin Guggenheim examined two states that have expedited termination proceedings and found that as the number of children freed for adoption soared, the number of actual adoptions failed to keep pace.¹⁷⁵ In Minnesota, the state ward population rose by fifty-one percent from 1993 to 1998.¹⁷⁶ In light of these statistics, the stated

terminating a parent's rights equates to a delay in a child's opportunity to have a permanent home, while discussing a mother's inability to stay with a treatment program and the need to eliminate such a delay).

170. See *J.R.*, 655 N.W.2d at 5 (paraphrasing NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES 14 (Spring 1995), available at <http://www.pppncjfcj.org/html/publications.html>) (last visited Nov. 15, 2003).

171. U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT 3, 5 (Mar. 2003), available at <http://www.acf.hhs.gov/programs/cb/publications/afcars/report8.pdf> (last visited Nov. 15, 2003). The 2003 AFCARS Report compiles statistics for fiscal year 2001. *Id.* at 1. States are required to submit AFCARS data semi-annually. U.S. DEP'T OF HEALTH & HUMAN SERVS., *About AFCARS*, <http://www.acf.hhs.gov/programs/cb/dis/afcars/about.htm> (last visited Nov. 15, 2003).

172. U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADOPTION FACT SHEET 2, at <http://www.hhs.gov/ocr/adoption.html> (last visited Nov. 15, 2003); Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 129 (1995).

173. U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 170, at 5.

174. U.S. DEP'T OF HEALTH AND HUMAN SERVS., *Table 04-ADOPT*, at <http://www.acf.hhs.gov/programs/cb/dis/tables/time02.htm> (last visited Nov. 15, 2003). This table is current as of Sept. 30, 2002. *Id.*

175. Guggenheim, *supra* note 172, at 127-34. The two states surveyed, Michigan and New York, were chosen because they have a significant foster care population and maintain statewide statistics. *Id.* at 126. Michigan data was from 1986 through 1992 and New York data from 1987 through 1991. *Id.* Mr. Guggenheim was a professor of Clinical Law and the Director of Clinical and Advocacy Programs at New York University School of Law when he wrote the article. *Id.* at 121.

176. ESTHER WATTENBERG & MEGHAN KELLEY, A MEMO ON LEGAL ORPHANS: ARE

policy of *J.R.* that cases involving the termination of parental rights are in particular need of expediency,¹⁷⁷ loses some of its intended luster.

It is not the intent of this case note to speculate on whether *J.R.*, Jr. would or would not have been adopted, nor is it the intent that the court should have taken into account such a speculation when making its decision on whether to allow an untimely appeal.¹⁷⁸ Rather, it is the position of this note that in light of the above facts, an expeditious termination of parental rights may not always be in the best interest of the child, and it was unwise for the court to generalize that parental rights termination cases are in particular need of such handling.¹⁷⁹

B. A Proposed Excusable Neglect Analysis for Untimely Appeals in Termination of Parental Rights Cases

Jurisdictions that allow a trial court to extend the time for appeal due to an attorney's excusable neglect offer a distinct advantage to appellants over a system such as Minnesota's, which makes no comparable exception for an extension. The Minnesota Supreme Court should have identified this shortcoming and noted that in cases involving the termination of parental rights, the accepted civil remedy allowing a client to recover for the failure of counsel through damages in a malpractice suit is wholly inadequate.¹⁸⁰ Furthermore, the court should have recognized that particularly in Minnesota, the policy generalizing that child protection cases are in particular need of expediency is not statistically accurate.¹⁸¹ By noting the above, the court would have had a means of distinguishing termination of parental rights appeals from appeals in other civil cases.

WE CREATING A NEW CLASS OF CHILDREN IN LIMBO? 2 (Apr. 30, 1999), <http://ssw.che.umn.edu/cascw/Various%20Articles/orphan5.pdf> (last visited Nov. 15, 2003). Ms. Wattenberg is the Director of the Center for Advanced Studies in Child Welfare at the University of Minnesota and a Professor at the School of Social Work. *Id.* at 4.

177. See *In re Welfare of J.R., Jr.*, 655 N.W.2d 1, 5 (Minn. 2003) (stating that making an exception to the Rules of Procedure for child protection cases would be in direct conflict with the policy that such cases in particular need to be expeditiously handled).

178. Martin Guggenheim has suggested that before a parent's parental rights are terminated, "courts should require evidence regarding the probability of adoption and insist that termination should not be ordered unless a high probability for adoption exists." See Guggenheim, *supra* note 172, at 135-36.

179. "[T]hese cases in particular need to be expeditiously handled." *J.R.*, 655 N.W.2d at 5 (emphasis added).

180. See *supra* Part IV.A.1.

181. See *supra* Part IV.A.3.

Having distinguished *J.R.*, the court should have looked to the federal system for a workable analysis and reviewed the appellant's untimely notice of appeal using a flexible excusable neglect standard similar to that introduced in *Pioneer Investment Services v. Brunswick Associates*.¹⁸² Under such an analysis, the court would determine: (1) the prejudice to the appellee; (2) the length of the delay and its impact on judicial proceedings; (3) the reason for the delay, including whether it was within reasonable control of the appellant; and (4) the good faith effort by the appellant. As stated in *Pioneer*, the court would take into account all relevant circumstances. If the analysis was satisfied, the court would then exercise its inherent authority to take an appeal in the interests of justice even when the filing or service requirements of the appeal are not timely.

While adopting an excusable neglect standard similar to that of *Pioneer* would not have guaranteed the success of appellant's request to excuse the untimely notice of appeal on the guardian ad litem,¹⁸³ such an analysis would allow the court to make an equitable decision and give the court much-needed flexibility in the area of parental rights termination appeals. Furthermore, this analysis would relieve the court of having to base its analysis on the merits of the case itself as is required in a Rule 60.02 "good cause" analysis.¹⁸⁴

V. CONCLUSION

It is difficult to fault the Minnesota Supreme Court for strictly following the rules of appellate procedure. In doing so, it made what could have been a troublesome ethical decision much easier to swallow. Add in the dismal facts of the case as presented, and the decision in *J.R.* actually becomes quite palatable. However, had the mother been more sympathetic or the trial court made some grievous error of law, then

182. 507 U.S. 380 (1993).

183. It has been suggested that under the *Pioneer* standard, attorney negligence may constitute excusable neglect. MOORE ET AL., *supra* note 25, at § 60.41[1][a]. However, case law has not shown this to be an accurate interpretation of *Pioneer*. See, e.g., Lowry v. McDonnell Douglas Corp., 211 F.3d 457, 464 (8th Cir. 2000) ("Notwithstanding the 'flexible' *Pioneer* standard, experienced counsel's misapplication of clear and unambiguous procedural rules cannot excuse his failure to file a timely notice of appeal."); Advanced Estimating Sys., Inc. v. Riney, 130 F.3d 996, 998 (11th Cir. 1997) (holding that attorney's misunderstanding of plain language of a rule cannot constitute excusable neglect).

184. The court discussed its doubts as to the usefulness of a Rule 60.02 type analysis to an appellate court because the analysis requires a reasonable defense on the merits and the issue is better suited for the trial court. *In re Welfare of J.R., Jr.*, 655 N.W.2d 1, 4 n.3 (Minn. 2003).

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quite possibly the *J.R.* decision would be viewed as a travesty. Someday the described situation may arise—such a mother or father may be put in such a situation. When that day comes and the aggrieved parent enters the harsh spotlight of the court, the precedent¹⁸⁵ of *J.R.* will be looming in the shadows.

In *J.R.*, the Minnesota Supreme Court had the opportunity to adopt an analysis that would have allowed it to “look beyond procedural rules in order to act in the interests of justice.”¹⁸⁶ The court’s initial reliance and subsequent rejection of a Rule 60.02 analysis provided the court with a convenient and outwardly legitimate means of turning away a parent who has lost the right to appeal the termination of her parental rights due to a mistake of her attorney. But at what cost? Certainly implementing an excusable neglect analysis similar to that used by the federal system would have been a judicial leap, but the court by its own admission stated that under a strict application of the rules of procedure, some cases likely will not be heard.¹⁸⁷ Surely this does not provide justice for the child or the parent. The power to terminate a parent’s rights has been described as “the family law equivalent of the death penalty in a criminal case.”¹⁸⁸ By adopting a flexible analysis tailored to termination of parental rights cases, the court would be in a better position to make equitable decisions in the best interests of justice and not be tethered to a difficult precedent.

185. “Particularly where a precedent or series of precedents has been treated as authoritative for a long time, courts are generally reticent to deviate from that policy, even if they would rule otherwise if the question were one of first impression.” 20 AM. JUR. 2D *Courts* § 147 (1995). “We should not be quick to overrule long-standing precedent We can overrule a previous decision only when there is good reason to do so. Only if we are convinced that the prior decision is erroneous should we not let that decision stand.” *State v. Hamm*, 423 N.W.2d 379, 380 (Minn. 1988).

186. *J.R.*, 655 N.W.2d at 6 (Anderson, J., concurring in part, dissenting in part).

187. *Id.* at 5.

188. *In re Hoffman*, 776 N.E.2d 485, 487 (Ohio 2002); *see also In re K.D.L. v. State*, 58 P.3d 181, 186 (Nev. 2002) (stating that termination of a parent’s rights is “tantamount to imposition of a civil death penalty”).