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A Survey of Recent Developments in the Law: Family Law

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FAMILY LAW

A. *Minnesota Supreme Court Limits Grandparents' Visitation Rights*[1]

The *Santoro* case involved the adoption and visitation rights of two children, A.B. born on March 30, 1983, and N.B. born on December 20, 1984.[2] Their parents, Lisa and Michael Borgstrom, were killed in an automobile accident on September 18, 1987, when the children were four and two years old respectively.[3] On October 28, 1987, the court appointed the children's paternal grandparents, Stella and Kenneth Borgstrom, as the children's guardians.[4] Approximately five years later, when the children were nine and seven years old, the Borgstroms legally adopted the children.[5]

Prior to their deaths, Lisa and Michael Borgstrom were not close with Lisa's parents, Louis and Carole Santoro. Nevertheless, Lisa, Michael and their children still spent occasional family holidays with the Santoros.[6] In 1986, this occasional gathering ended when Lisa's younger sister, Elizabeth Santoro, alleged that Carole Santoro had abused her.[7] After Elizabeth left her parents' home on Thanksgiving Day of 1986 to live with Michael and Lisa, Louis and Carole Santoro severed all ties with their daughter Lisa despite Lisa's repeated attempts to contact her parents by

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1. *See In re* Santoro, 594 N.W.2d 174, 175 (Minn. 1999). The U.S. Supreme Court recently addressed the issue of grandparent visitation rights in the context of a Washington state statute. *See* Troxel v. Granville, ___ S. Ct. ___, 2000 WL 712807 (U.S. June 5, 2000). The Court found that the Washington statute swept too broadly and violated the Fourteenth Amendment's guarantee of substantive due process. *See id.* at *5-8. In addition, the Court specifically referenced the Minnesota Statute at issue in Santoro as an example of a statute that accorded protection for a parent's unconsitutional right to make decisions regarding the upbringing of his or her children. *See id.* at *8 (citing MINN. STAT. § 257.022(2)(a)(2) (1998)).

2. *See Santoro*, 594 N.W.2d at 175.

3. *See id.*

4. *See id.*

5. *See id.* The Borgstroms legally adopted the children on July 16, 1992. *See id.*

6. *See id.*

7. *See id.*

telephone.[8] Louis and Carole Santoro had no contact with Lisa, Michael or their children before Lisa's and Michael's deaths in 1987.[9]

During the guardianship hearing in 1987, Louis and Carole Santoro requested visitation rights.[10] Kenneth Borgstrom told Carole Santoro that he would not allow the children to visit the Santoros unless he was physically present.[11] Because the Santoros claimed they could not afford an attorney at the time, they declined to pursue their visitation rights any further than their original request.[12]

The Santoros asserted to the trial court that they had attempted to keep in contact with the children by phone calls and monthly letters beginning immediately after Lisa and Michael's deaths.[13] Nevertheless, the Borgstroms alleged that the Santoros did not attempt to contact the children until four years later, in April of 1991, when the Borgstroms received mail for the children from the Santoros.[14] The Borgstroms admitted that they returned this mail unopened to the Santoros.[15]

On September 26, 1994, the Santoros filed a petition for visitation[16] pursuant to Minnesota Statute section 257.022, which states in part, that grandparents "may be granted reasonable visitation rights . . . upon finding that visitation rights would be in the best interests of the child and would not interfere with the parent child relationship."[17] The statute mandates that the court

8. *See id.* This was not the first sign of the tumultuousness of the relationship between Lisa Borgstrom and her parents, Louis and Carole Santoro. *See id.* When Lisa was 16 years old, she also ran away from home and requested to be placed in foster care. *See id.* Lisa told her foster mother, and later told Stella and Kenneth Borgstrom, that her parents had physically abused her. *See id.* In addition, Lisa told the Borgstroms that she did not want her parents to have custody of her children in the event of her death. *See id.*

9. *See id.*

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.* at 175.

14. *See id.*

15. *See id.*

16. *See id.* at 176.

17. MINN. STAT. § 257.022, subd. 1 (1998). The statute provides:

> If a parent of an unmarried minor child is deceased, the parents . . . of the deceased parent may be granted reasonable visitation rights to the unmarried minor child during minority by the district court upon finding that visitation rights would be in the best interests of the child

"consider the amount of personal contact between the parents . . . of the deceased parent and the child prior to the application."[18]

On August 2, 1995, the trial court ordered supervised visitation for the Santoros.[19] The court also appointed a guardian *ad litem* who would file a report on the Santoros' home environment.[20] Before the guardian *ad litem* filed a report, the court held another hearing on June 26, 1996 during which set it out a supervised visitation schedule.[21]

From August of 1995 through September of 1996, the Santoros had ten visits with their grandchildren.[22] These visits ended in September of 1996 when the younger of Lisa and Michael's children, N.B., allegedly ran away to avoid visiting with the Santoros.[23]

Shortly after this incident, the Borgstroms produced a written statement by A.B. and an affidavit from N.B. requesting that the children not be required to visit with the Santoros.[24] On October 29, 1996, the trial court appointed an attorney for the children.[25] The attorney submitted two letters and a Memorandum of Law on Behalf of the Children urging the court to release the children from the visitation schedule.[26]

On April 17, 1997, the trial court held a hearing to determine if it was appropriate to continue the visitation against the wishes of the children.[27] Both children testified that they did not want to

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> and would not interfere with the parent child relationship. The court shall consider the amount of personal contact between the parents . . . of the deceased parent and the child prior to the application.

Id.

18. *Id.*

19. *See Santoro*, 594 N.W.2d at 176.

20. *See id.* After this report was filed, the court stated that it would allow the Santoros to file a petition requesting more extensive visitation. *See id.*

21. *See id.*

22. *See id.*

23. *See id.*

24. *See id.*

25. *See id.*

26. *See id.* The Memorandum of Law alleged the following: 1) that the children did not want to have contact with the Santoros; 2) that there was little indication that the guardian *ad litem* had paid credence to the children's thoughts and concerns in making his recommendations; and 3) that the Santoros had not met the statutory requirements of Minnesota Statute section 257.022, subdivision1. *See id.*

27. *See id.*

continue to see the Santoros.[28] The guardian *ad litem* also testified, alleging that "the Borgstroms were hostile to him, were not supportive of visitation, influenced the children's opinions of the Santoros by talking about them in front of the children, and coached the children to make disparaging statements about the visitation."[29] The guardian *ad litem* ended his testimony by stating that the Santoros were "good people today" and that visitation would be in the best interests of the children.[30]

On July 25, 1997, the trial court issued its final order, stating that the Borgstroms had "actively, vindictively, and without reason obstructed any contact whatsoever between the Santoros and the minor children" and that the Borgstroms' anger toward the Santoros was unfounded but "likely to continue to the detriment of the minor children."[31] The court concluded that visitation was in the best interests of the children and would not interfere with the parent child relationship as mandated by Minnesota Statute section 257.022, subdivision 1.[32] The Borgstroms appealed and in 1998, the Minnesota Court of Appeals ruled that the trial court had not abused its discretion in granting visitation rights to the Santoros.[33] The Borgstroms appealed again and the Minnesota Supreme Court granted their petition for review.[34]

The court began its discussion of the *Santoro* decision by emphasizing the grave consequences of children "becom[ing] pawns in the wars of adults."[35] The court then turned its attention

28. *See id.* At the time of the hearing, A.B. was 14 years old and N.B. was 12 years old. *See id.*

29. *Id.*

30. *See id.* at 177. The guardian *ad litem* also admitted that he had little familiarity with the children's home and school lives. *See id.*

31. *Id.*

32. *See id.* In the final written argument to the court, the Borgstroms alleged that Minnesota Statute section 257.022 was unconstitutional because it violated the due process, privacy, and equal protection clauses. *See id.* The trial court declined to hear this argument and the Borgstroms did not raise it on appeal. *See id.* The Minnesota Court of Appeals affirmed the trial court's finding of constitutionality in Petition of Santoro, 578 N.W.2d 369, 376-77 (Minn. Ct. App. 1998). However, because of the manner in which the Minnesota Supreme Court decided the *Santoro* case, the court never had to reach the issue of the constitutionality of the statute. *See Santoro*, 594 N.W.2d at 177, 179.

33. *See Santoro*, 594 N.W.2d at 177. The court of appeals based its decision mostly on the Borgstroms' interference with the Santoros' visitation rights. *See id.*; *see also* Petition of Santoro, 578 N.W.2d at 376-77.

34. *See Santoro*, 594 N.W.2d at 177.

35. *See id.* The court wrote that "it is difficult to adjudicate with the wisdom of King Solomon when both parties are willing to split the baby." *Id.* (citing I Kings

to Minnesota statute section 257.022 and its statutory "best interests" factors.[36] First, the court noted that according to the language of the statute, the trial court is supposed to consider two factors in determining the "best interests" of the child.[37] These factors are (1) the amount of contact between the grandparents and the children and (2) the reasonable preference of the children.[38]

The court then continued its discussion by admonishing the trial court for concentrating "almost exclusively" on the Borgstroms' conduct and "made only conclusory statements that the children's best interests would be served by visitation."[39] The Court noted that the trial court "neglect[ed]" the other express, statutory considerations in making its conclusions.[40]

Next, the court applied the statutory factors in order to determine the best interests of N.B. and A.B.[41] It noted that despite the possibility of the Borgstroms trying to prevent the Santoros from contacting the children, the record showed at least a four-year gap and most likely a seven-year gap in the contact between the Santoros and the children.[42] In addition, the children themselves had expressed their desire not to continue visitation.[43]

Finally, the Court concluded that due to the trial court's lack of findings on the statutory "best interest" factors, the gap in the amount of contact time between the children and the Santoros,

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3:16-28). The court also criticized both sets of grandparents for neglecting the children and "refus[ing] to bow to the children's desire and need for stability." *See id.*

36. *See id.*

37. *See id.*; *see also* MINN. STAT. § 257.022, subd.1 (1998).

38. *See Santoro*, 594 N.W.2d at 177-78; *see also* MINN. STAT. § 257.022, subd. 1.

39. *Santoro*, 594 N.W.2d at 178 (noting that the trial court should have placed more weight on the statutory mandate of considering the lapse of time between contact with the children and the application for visitation).

40. *See id.*

41. *See id.*

42. *See id.* The Santoros last saw the children prior to court-ordered visitation in November 1986. *See id.* at 175. The Santoros kept letters that they sent to the children and that were returned by the Borgstroms, which were dated April 1991, four years after the last time they had seen their children. *See id.* The Santoros did not file the petition for visitation rights until seven years after they had last seen the children, in September 1994. *See id.* at 176. Although the Santoros contend that they did send letters earlier and that they attempted to make phone calls, they had no evidence to substantiate this claim. *See id.* at 175-76.

43. *See id* at 178-79. The court noted that trial courts have often relied on the preferences of children as young as 11 years old, and that A.B. and N.B. are now 16 and 14 years old respectively. *See id.* at 178.

and the children's expressed preferences, it was an abuse of discretion for the trial court to order that the children continue the visitation with the Santoros.[44]

Justice Page, dissenting, chastised the majority for failing to "give guidance to [the] lower courts and the practicing bar to assist them in determining what constitutes the best interests of the child" in grandparent visitation cases.[45] He argued that the majority "g[ave] lip service to the requirements of section 257.022, subd. 1 and then substitute[d] its judgment for that of the trial court."[46]

The dissent asserted that the issue to be decided is "whether reasonable visitation between A.B. and N.B. and their maternal grandparents, the Santoros, is in A.B. and N.B.'s best interest."[47] Justice Page argued that the test is whether the visitation with the Santoros will provide some benefit to A.B. and N.B. and will not have some other negative impact on the children.[48]

In the remainder of the dissent, Justice Page attacked the reasoning behind the majority's opinion.[49] First, he argued that the majority "fail[ed] to explain what it is about the gap in contact that warrants denying visitation altogether."[50] Second, Justice Page stated that the preferences of the children "should not be considered in a vacuum" and must be examined in light of the Borgstroms' conduct.[51] Finally, the dissent criticized the court for articulating a rule that both "eviscerates" the grandparent visitation statute and "provides a roadmap of how to close the door on grandparents who, absent the obstructionist conduct of the custodial parents, would otherwise be legally entitled to visitation."[52] The dissent concluded by stating that the Borgstroms'

44. *See id.* at 179. In so ruling, the court noted that it did not have to address the constitutionality of the statute at issue. *See id.*

45. *Id.* at 179 (Page, J., dissenting).

46. *Id.*

47. *Id.*

48. *See id.*

49. *See id.* at 180-81.

50. *Id.* at 180 (stating that majority's reasoning, that due to a lengthy gap in conduct, visitation is per se not in the children's best interest, is unwarranted).

51. *See id.* (pointing out that the trial court had found that "[a]ll attempts at contact between the children and the [Santoros] were thwarted by the Borgstroms").

52. *See id.* at 181 (stating that the majority effectively rewarded the Borgstroms' obstructionist conduct to the detriment of both the children and the Santoros).

conduct would never be "in any child's best interest."[53]

B. *Minnesota Supreme Court Holds that Parents May Not Alter Statutory Endangerment Standard in a Marital Termination Agreement*[54]

Sherrie Giese and Ronald Frauenshuh were married in October 1986 and their son Logan was born in March 1991.[55] In November 1994, when Logan was three years old, the parties divorced and entered into a stipulated marital termination agreement (MTA).[56] The MTA granted sole physical custody[57] to Giese but granted both Giese and Frauenshuh joint legal custody.[58] The MTA also stated that Minnesota Statute section 518.18,[59] the modification statute, shall not be applicable for a modification "[i]f either party shall move a distance greater than fifty (50) miles. Under this circumstance, the best interest of the child will be thoroughly examined pursuant to Minn. Stat. § 518.17."[60]

In August 1996, Giese notified Frauenshuh that she had obtained new employment and was moving with Logan from Ortonville to Cambridge, a 150-mile move.[61] Frauenshuh brought a motion for modification of the MTA's physical custody provision and the parties engaged in a three-year battle in the courts before the Minnesota Supreme Court heard the case.[62]

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53. *Id.*

54. *See* Frauenshuh v. Giese, 599 N.W.2d 153 (Minn. 1999).

55. *See id.* at 154.

56. *See id.* (noting that while Frauenshuh was represented by counsel during divorce proceedings, Giese was not).

57. *See id.* Minnesota Statute section 518.003 defines "physical custody and residence" as "the routine daily care and control and the residence of the child." MINN. STAT. § 518.003, subd. 3(c) (1998).

58. *See Frauenshuh*, 599 N.W.2d at 154-55. Minnesota Statute section 518.003 defines "joint legal custody" as "both parents hav[ing] equal rights and responsibilities, including the right to participate in major decisions determining the child's upbringing, including education, health care, and religious training." MINN. STAT. § 518.003, subd. 3(b).

59. *See Frauenshuh*, 599 N.W.2d at 155; *see also* MINN. STAT. § 518.18(d).

60. *Frauenshuh*, 599 N.W.2d at 155.

61. *See id.*

62. *See id.* at 155-56. At the first district court hearing, the district court relied on the "endangerment standard" found in Minnesota Statute section 518.18 and rejected the "best interests" standard of Minnesota Statute section 518.17, which was the standard stipulated to in the MTA. *See id.* at 155. The district court found that there was no evidence showing that Logan's environment was endangering his physical or emotional development. *See id.* Frauenshuh appealed and the court of appeals remanded the case to district court, instructing the court to apply the best interests standard stipulated to by the parties in the MTA. *See* Frauenshuh

The majority began its discussion by setting out its limited standard of review.[63] It stated that an appellate court will not reverse a lower court's custody determination unless "the district court abused its discretion by making findings unsupported by the evidence or by improperly applying the law."[64]

The court then set out the requirements for modification of physical custody under Minnesota Statute section 518.18, as follows:

> A party seeking modification of physical custody under subdivision (iii) must establish four elements to make a prima facie case for modification: (1) circumstances have changed involving the child or custodial parent; (2) the modification would be in the best interests of the child; (3) the child's physical or emotional health or emotional development is endangered by his or her present environment; and (4) the harm associated with the proposed change in custody would be outweighed by the benefits of the change.[65]

In addition, the court noted that the legislature provided different standards for cases involving joint physical custody and cases involving sole physical custody.[66] The legislature specifically provided where joint physical custody has been awarded, the parties are free to determine their own standard for modification of the custodial agreement, which will be binding on the courts.[67]

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v. Giese, No. C8-96-2609, 1997 WL 275002, at *2 (Minn. Ct. App. May 27, 1997). On remand, the district court held that "(1) It [wa]s in Logan's best interest to reside with [Giese] in Ortonville, MN; (2) In the event #1 above is not a possibility, it is in Logan's best interests to reside in Ortonville, MN with [Frauenshuh]." *Frauenshuh*, 599 N.W.2d at 156. However, the court stayed this order pending appeal. *See id.* Finally, Giese appealed and the court of appeals affirmed the district court's order. *See* Frauenshuh v. Giese, No. C8-98-444, 1998 WL 481890, at *4 (Minn. Ct. App. Aug. 18, 1998), *rev'd*, Frauenshuh v. Giese, 599 N.W.2d 133 (Minn. 1999).

63. *See Frauenshuh*, 599 N.W.2d at 156.

64. *Id.* (citations omitted).

65. *See id.* at 157; *see also* MINN. STAT. § 518.18(d) (1998).

66. *See Frauenshuh*, 599 N.W.2d at 157.

67. *Id.* at 157-58. Minnesota Statute section 518.18(e) provides:

> In deciding whether to modify a prior joint custody order, the court shall apply the standards set forth in paragraph (d) unless: (1) the parties agree in writing to the application of a different standard, or (2) the party seeking the modification is asking the court for permission to move the residence of the child to another state.

In the case of sole physical custody situations however, the legislature did not enact any comparable provision allowing the parties to agree to different modification standards.[68] As a result, the majority concluded that the legislature intended to treat these custody situations differently.[69]

The court concluded that Minnesota Statute section 518.15 unambiguously mandates that the "endangerment standard" is to be applied in situations involving a modification of a sole physical custody award.[70] As a result, the Minnesota Supreme Court found that the court of appeals erred as a matter of law in remanding the case to the district court for use of the "best interests" standard.[71] The district court correctly applied the "endangerment" standard as enunciated in Minnesota Statute section 518.18.[72]

Three justices dissented.[73] The dissent disagreed with the majority's reasoning, arguing that the majority disregarded precedent and ignored the equities involved in the case.[74]

First, the dissent pointed out that "stipulations are heavily favored in dissolution and custody proceedings."[75] The dissent quoted the court's previous decision in *Ayers v. Ayers* in stating that "[c]ustody provisions contained in a stipulated decree must be accorded a good deal of deference, in that they represent the terms specifically agreed to by the parties and adopted by the court."[76] The dissent accused the majority of "paying lip service" to this precedent before disregarding the stipulation entered into between

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MINN. STAT. § 518.18(e).

68. *See Frauenshuh*, 599 N.W.2d at 158.

69. *See id.*

70. *See id.*

71. *See id.*

72. *See id.* at 155. The court did acknowledge the "importance of stipulations as a means for resolving marital dissolutions and in no way s[ought] to discourage the creative and amicable resolution of these cases . . . ." *Id.* at 158. But the court said that it would not "allow parties to contravene the plain and unambiguous intent of the legislature to provide permanence and closure in child custody matters." *Id.* The court refused to "equate decisions regarding child custody with decisions regarding property" when it stated, "[i]t is one thing to hold for another day issues related to money or property of a party; it is quite another to permit a stipulation which effectively holds for another day the decision of who has custody of a child." *Id.* at 159.

73. *See id.* at 159-61 (Gilbert, J., dissenting, joined by Justices Page and Stringer).

74. *See id.* at 159-60.

75. *Id.* at 159.

76. *Id.* at 159 (citing Ayers v. Ayers, 508 N.W.2d 515, 520 (Minn. 1993)).

the parties in this case.[77]

Next, the dissent discussed the equities involved in the case.[78] First, it accused the majority of "effectively . . . permitting Giese to unilaterally modify and eliminate an express condition" of the parties' custody agreement, which in turn undermines the parties' "well-settled rights and expectations."[79] Second, the dissent argued that the majority "fail[ed] to incorporate, and may in fact [have] violate[d], the best interests of the parties' minor child"[80] by "elevat[ing] a boilerplate standard . . . ahead of what has been determined to be in the best interest of the child in this particular case."[81] Finally, the dissent stated that the majority has abrogated the parents' rights to determine the factors that are "most important to the well-being of their child."[82] In sum, the dissent chastised the court for engaging in "micromanaging family relationships" when it should be "applaud[ing] [parents] for placing their child's interests above their own in dissolution and post-dissolution proceedings."[83]

C. *Minnesota Supreme Court Finds that Administrative Child Support Statute is Unconstitutional*[84]

In 1984, Congress mandated that the states create expedited administrative and judicial procedures for the distribution and enforcement of child support orders.[85] Despite the fact that Minnesota counties were originally exempted from some of the federal mandates, the state decided to implement a pilot program in 1988 in Dakota County designed to improve child support administration and enforcement in matters involving public authority.[86]

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77. *See id.*
78. *See id.* at 159-61.
79. *Id.* at 160.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 160-61.
84. *See* Holmberg v. Holmberg, 588 N.W.2d 720, 720 (Minn. 1999) [hereinafter *Holmberg II*]. One Minnesota case has distinguished the *Holmberg II* decision because of its prospective application. *See* Nash-Kadechka v. Kadechka, 1999 WL 343863, *3 (Minn. Ct. App. June 1, 1999).
85. *See Holmberg II*, 588 N.W.2d at 722; *see also* 42 U.S.C. § 666(a)(2) (1994).
86. *See Holmberg II*, 588 N.W.2d at 722. This pilot program provided that administrative law judges from the Office of Administrative Hearings presided over child support hearings when the Dakota County human services department

Due in part to the success of Dakota County's pilot program, the Minnesota legislature expanded the reach of the administrative hearings and implemented a more expansive program for several Minnesota counties in 1989.[87] As part of this more expansive program, administrative law judges had the ability to make findings of fact and conclusions of law, issue final decisions without a review by the chief administrative law judge, and hear uncontested parentage cases.[88] In 1990, the legislature changed the process by mandating that orders by an administrative law judge could be appealed to the court of appeals in the same manner as district court opinions, instead of by writ of certiorari as previously provided in the pilot program.[89] By 1995, the Minnesota legislature required all counties to implement administrative programs to resolve child support matters where the county was either a party to the action or represented a party to the action.[90]

As part of the then statewide program, matters were divided into contested and uncontested proceedings.[91] If a matter was an uncontested proceeding, the public authority issued a written notice to the parties requesting information to prepare a child support order and the parties were given thirty days to respond.[92] The public authority prepared the order for the parties to sign and for the administrative law judge to ratify.[93]

If either party contested the child support order prepared by the public authority and ratified by the administrative law judge,

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either was a party to the action or represented a party to the action. *See* MINN. STAT. § 518.551, subd. 10 (Supp. 1987). Administrative law judges were empowered to make findings of fact, conclusions of law and recommendations, but only the chief administrative law judge was allowed to render final decisions and orders. *See id.* Final orders could be appealed to the court of appeals by writ of certiorari. *See id.* The statute also authorized non-attorney Dakota County employees, called child support officers, to prepare motions, medical support orders and related documents and to participate in hearings before the administrative law judge. *See id.*; *see also Holmberg II*, 588 N.W.2d at 722.

87. *See Holmberg II*, 588 N.W.2d at 722. The federal government also played a part in the Minnesota's decision to implement a more broad administrative procedure. The federal government withdrew from sixteen Minnesota counties the previous exemption from the congressional mandate. *See id.*

88. *See id.*

89. *See id.*

90. *See id.*

91. *See id.*

92. *See* MINN. STAT. § 518.5511, subd. 2 (1996); *see also Holmberg II*, 588 N.W.2d at 722.

93. *See supra* note 87 and accompanying text.

then the matter became part of the contested hearing process.[94] As part of the contested hearing process, child support officers, non-attorney county employees, drew up pleadings and appeared at hearings without the supervision of an attorney.[95] During the administrative law hearings, administrative law judges had "all powers, duties, and responsibilities conferred on judges of district court to obtain and enforce child and medical support and parentage and maintenance obligations."[96]

Three child support obligors filed post judgment petitions for review of administrative law judges' granting of awards of child support, arguing that process mandated in Minnesota Statute section 518.5511 violated the separation of powers doctrine.[97] The obligors alleged that the process impinged upon the original jurisdiction of the district court, created a tribunal that was not inferior to the district court, and permitted child support officers to engage in the practice of law.[98] The court of appeals held that the process did violate the separation of powers and the Minnesota Supreme Court granted a limited review of the constitutional issues raised by the administrative process.[99]

The court began its analysis by discussing the history and origin of the separation of powers doctrine.[100] Minnesota's embodiment of the separation of powers doctrine appears in Article VI of the state constitution, which gives district courts original jurisdiction in all civil and criminal cases.[101]

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94. *See supra* note 87 and accompanying text.

95. *See* MINN. STAT. § 518.5511, subd. 5 (1996).

96. *Id.* This power includes the power to issue subpoenas, conduct proceedings, and issue warrants for failure to appear. *See id.*

97. *See* Holmberg v. Holmberg, 578 N.W.2d 817, 819 (Minn. Ct. App. 1998) [hereinafter *Holmberg I*].

98. *See Holmberg II*, 588 N.W.2d at 723.

99. *See id.* The court of appeals held that the child support administrative process violated the separation of powers doctrine (1) because it allowed administrative law judges to make decisions that were not reviewable by the district courts; and (2) because it permitted direct appeal to the court of appeals rather than by writ of certiorari. *See id.* The appellate court stated that the process placed administrative law judges "in the constitutionally untenable position of reviewing and modifying judicial decisions." *Holmberg I*, 578 N.W.2d at 821; *see also Holmberg II*, 588 N.W.2d at 723.

100. *See Holmberg II*, 588 N.W.2d at 723-24.

101. *See* MINN. CONST. art. VI, §§ 1 and 3. Article VI, section 1 states in part, "[t]he judicial power of the state is vested in a supreme court, a court of appeals, if established by the legislature, a district court and such other courts, judicial officers and commissioners with jurisdiction inferior to the district court as the legislature may establish." MINN. CONST. art. VI, § 1.

The court discussed the *Wulff v. Tax Court of Appeals* case in which the statutory creation of a tax court was upheld against a separation of powers challenge because "taxation is primarily a legislative function, and the steps taken under the authority of the legislature are administrative in character."[102] The court noted that the functions of the tax court were "not judicial" in the strict sense.[103] The court pointed out that the child support administration statute was entirely different from the tax court creation because it "encompasse[d] an area of law [that] arises in equity."[104] Family-related decisions "rely on the district court's inherent equitable powers" and as a result, the child support administrative process required "close scrutiny."[105]

In applying close scrutiny, the court found several "grave separation of powers concerns."[106] First, the legislature delegated the district court's inherent equitable power to the Office of Administrative Hearings, an executive agency.[107] Second, the delegation infringed on the district court's original jurisdiction because (1) the process is mandatory for many parties, thereby removing a class of cases from the district court's jurisdiction,[108] (2) administrative law judges' orders are given the same deference as district court orders because they could be appealed by right,[109] and (3) administrative law judges are given the power to modify district court decisions.[110] Finally, the court also came to the "inescapable conclusion" that child support officers were practicing law because of their authority to draft pleadings and represent public authority without attorney supervision.[111] As a result, the court determined

102. *Holmberg II*, 588 N.W.2d at 723; *see also* Wulff v. Tax Court of Appeals, 288 N.W.2d 221, 222-23 (Minn. 1979).

103. *See Holmberg II*, 588 N.W.2d at 723; *Wulff*, 288 N.W.2d at 224.

104. *Holmberg II*, 588 N.W.2d at 724.

105. *Id.* The court also noted that the Nebraska Supreme Court struck down a similar expedited child support process because the court found that the process infringed on the district court's inherent equitable jurisdiction. *See id.* (citing Drennen v. Drennen, 426 N.W.2d 252, 259 (Neb. 1988)).

106. *Id.* at 725-26.

107. *See id.* at 725-26.

108. *See id.* at 724.

109. *See id.* at 725.

110. *See id.*

111. *See id.* at 726. The court noted that it is the courts themselves who have the power to regulate the practice of law "to maintain discipline over attorneys and to protect the public." *Id.* Despite the appellant's argument that the child support process encourages efficiency, the court said that it could not "sacrifice its supervisory powers in the pursuit of efficiency." *Id.*

that the child support administration process violated the separation of powers and was thus unconstitutional.[112]

The court then discussed the retroactivity of its ruling.[113] The court found that giving the *Holmberg* ruling retroactive effect would not protect the separation of powers any more than a prospective application would protect it.[114] In addition, retroactive application would "swamp" the district courts with litigants whose cases were determined by orders of administrative law judges.[115] The court decided that the *Holmberg* ruling was to be applied prospectively, except that it was to apply to the parties in the *Holmberg* case.[116] Finally, the court decided to stay its decision until July 1, 1999, to give the "legislature time to amend the laws in accordance with this decision."[117]

D. *Minnesota Appellate Court Finds No Attorney-Client Relationship Between a Minnesota County and a Child of Recipient of Public Assistance*[118]

In 1979, Julie Gramling gave birth to Misty Jo Gramling.[119] When Misty Jo was four months old, St. Louis County arranged for paternity testing as part of paternity proceedings.[120] The paternity test erroneously excluded Joseph Jerulle as the father.[121]

In 1996, St. Louis County initiated a second round of paternity proceedings.[122] As part of this paternity proceeding, Misty Jo, Julie

112. *See id.* As part of its analysis, the court rejected the appellants' insistence that the court follow the separation of powers test outlined in *Breimhorst v. Beckman*, in which the central principles are efficiency, public policy and the availability of judicial review. *See* Breimhorst v. Beckman, 227 Minn. 409, 420, 35 N.W.2d 719, 734 (1949). However, the court noted that judicial review does not provide enough judicial oversight of this process to justify its seemingly efficient advantages. *See Holmberg II*, 588 N.W.2d at 726.

113. *See Holmberg II*, 588 N.W.2d at 726-27.

114. *See id.* at 727.

115. *See id.*

116. *See id.*

117. *Id.* The court relied on *Northern Pipeline Construction Co v. Marathon Pipe Line Co.* for its authority to stay its decision. *See id.* (citing Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 (1982)).

118. *See* Gramling v. Memorial Blood Centers of Minn., 601 N.W.2d 457, 461 (Minn. Ct. App. 1999).

119. *See id.* at 458.

120. *See id.*

121. *See id.*

122. *See id.*

Gramling and Joseph Jerulle again underwent a paternity test.[123] The results of the test indicated that Joseph Jerulle was Misty Jo's biological father with a 99.99% probability.[124]

In 1998, Misty Jo sued St. Louis County for legal malpractice for "negligent failure to establish her paternity" in the original 1979 paternity test.[125] The district court granted St. Louis County's motion for summary judgment on the grounds that Misty Jo had not established the existence of an attorney-client relationship with St. Louis County.[126] Misty Jo appealed.[127]

The appellate court addressed the issue of the creation of an attorney-client relationship between Misty Jo and St. Louis County under both the contract and the tort theories of representation.[128] The court stated that "[u]nder the contract theory of representation, the parties to the alleged attorney-client relationship must have either explicitly or implicitly agreed to a contract for legal services."[129] Misty Jo alleged that an express contract existed when Julie Gramling "executed an assignment of support in order to obtain public assistance."[130] However, the court noted that federal law requires each AFDC applicant to sign an assignment of support clause.[131] The assignment arises as by an operation of law and not by the execution of the assignment provision.[132] The court concluded that St. Louis County was merely fulfilling a statutory mandate, and the fulfillment of this mandate did not create an express contract between Misty Jo and St. Louis County.[133]

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123. *See id.*

124. *See id.* (stating that after Misty Jo initiated her lawsuit against the county, an additional paternity test confirmed the 99.99% probability of Joseph Jerulle being Misty Jo's biological father).

125. *See id.*

126. *See id.*

127. *See id.*

128. *See id.* at 459-60. The court began its discussion by stating the elements of a claim of legal malpractice as follows: "(1) the existence of an attorney-client relationship; (2) that defendant breached the contract or acted negligently; (3) that the breach or negligence proximately caused plaintiff's damages; and (4) but for the attorney's conduct, the plaintiff would have been successful in the prosecution of the underlying claim." *Id.* at 459 (citing Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686, 692 (Minn. 1980)).

129. *Id.*

130. *Id.*

131. *See id.* (citing Iverson v. Schulte, 367 N.W.2d 570, 572 (Minn. Ct. App. 1985)).

132. *See id.*

133. *See id.* (stating that Misty Jo was alleging that the express contract created

In addition, the court quickly dispensed of any implied contract for legal services claim.[134] First, the court noted that neither Misty Jo nor Julie Gramling ever requested legal representation and that the county attorney never agreed to represent Misty Jo or Julie Gramling.[135] Second, the court noted that "a party's mere expectation that an attorney will represent him or her is insufficient to create an attorney-client relationship."[136] The court concluded that, despite a "mere expectation" by either Misty Jo or Julie Gramling, no implicit attorney-client relationship arose between St. Louis County and Misty Jo or Julie Gramling.[137]

The court then analyzed the existence of an attorney-client relationship under the tort theory.[138] The court noted that under a tort theory, "an attorney-client relationship is created whenever an individual seeks and receives legal advice from an attorney in circumstances in which a reasonable person would rely on such advice."[139] The district court found that Julie Gramling never sought legal advice from the county.[140] As a result, the appellate court concluded that one of the essential elements of the creation of an attorney-client relationship under the tort theory was missing and that no attorney-client relationship existed between Julie Gramling and St. Louis County on behalf of Misty Jo.[141]

Finally, the appellate court addressed Misty Jo's claim that two statutes established an affirmative duty on the part of the county to accurately determine her paternity.[142] Minnesota Statute section 257.175 states that it is the "duty of the commissioner of public welfare to promote the enforcement of all laws for the protection of defective, illegitimate, dependent, neglected, and delinquent children . . . and to take the initiative in all matters involving the interests of such children where adequate provisions therefore has

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an attorney-client relationship between Julie Gramling and St. Louis County on behalf of Misty Jo).

134. *See id.*

135. *See id.*

136. *Id.* at 460 (citing Spannaus v. Larkin, Hoffman, Daly & Lindgren, 368 N.W.2d 395, 398-99 (Minn. Ct. App. 1985)).

137. *See id.*

138. *See id.*

139. *Id.* (quoting TJD Dissolution Corp. v. Savoie Supply Co., 460 N.W.2d 59, 62 (Minn. Ct. App. 1990)).

140. *See id.*

141. *See id.*

142. *See id.*

not already been made."[143] In addition, Minnesota Statute section 257.33 states that it is the "duty of the commissioner of public welfare . . . to take care that the interests of the child are safeguarded, that appropriate steps are taken to establish his paternity . . . ."[144]

The court noted that neither Minnesota Statute section 257.175 nor section 257.33 affirmatively "require[d] the county to conclusively establish paternity."[145] The only duty of the county was to represent the state's interest in paternity actions.[146] In addition, the court noted that even if the original paternity test correctly identified Misty Jo's father, Minnesota Statute section 257.33 allowed the county the discretion not to proceed with a paternity action.[147] As a result, the appellate court held that the county was under no statutory duty to correctly establish Misty Jo's paternity.[148]

Because the appellate court found no attorney-client relationship and no statutory duty to establish paternity, the court affirmed the district court's granting of summary judgment for St. Louis County.[149]

E. *Eighth Circuit Rules that Courts Have Jurisdiction Over Challenges to the Board of Immigration Appeal's Determinations and Denies Wife's Petition to Grant Resident Status to Alien Husband*[150]

On November 23, 1993, Ali Sabhari entered the United States on a six-month, non-immigrant, visitor's visa.[151] Sabhari's visa expired on May 25, 1994 and he remained in the United States illegally.[152] At this time, Sabhari was legally married to Khadijah Mohammed, who was in Kuwait during the majority of Sabhari's stay in the United States.[153]

Despite his existing marriage, Sabhari became romantically

143. MINN. STAT. § 257.175 (1978).
144. *Id.* § 257.33.
145. *Gramling*, 460 N.W.2d at 461.
146. *See id.*
147. *See id*; *see also* MINN. STAT. § 257.254.
148. *See Gramling*, 460 N.W.2d at 461.
149. *See id.*
150. *See* Sabhari v. Reno, 197 F.3d 938, 943-44 (8th Cir. 1999).
151. *See id.* at 940. Ali Sabhari was a citizen of Kuwait. *See id.*
152. *See id.*
153. *See id.* Sabhari and Mohammed had four children. *See id.* Mohammed did visit the United States briefly when one of the children needed medical treatment. *See id.*

involved with Susan Sherry in the fall of 1994.[154] On June 18, 1995, approximately eight months after Sabhari met Sherry, Sabhari obtained a proxy divorce from Mohammed.[155] Sabhari and Sherry were married in July 1995, four weeks after Sabhari obtained the divorce from Mohammed.[156]

On July 31, 1995, Sherry filed a visa petition requesting the Immigration and Naturalization Service (INS) to classify Sabhari as a relative of a United States citizen.[157] The INS conducted an investigation, which included reviewing supporting documents provided by Sabhari and Sherry, and interviewing the couple regarding the nature of their relationship.[158] As part of its investigation, the INS interviewed Mohammed, who told the INS that she and Sabhari agreed to divorce and remarry once Sabhari received permanent residency in the United States.[159] Mohammed stated that Sabhari had come to the United States in order to become a citizen and that both Mohammed and Sabhari had kept the divorce a secret from their children.[160] In addition, Sabhari's sister, brother and sister-in-law each wrote unsolicited letters to the INS corroborating Mohammed's explanation.[161]

As a result of the discovery of this evidence, the INS denied Sherry's petition and refused to classify Sabhari as a relative of a United States citizen.[162] The District Director of the INS determined that Sabhari "had failed to show his marriage to Sherry was entered by both parties on good faith."[163]

Sherry appealed to the Board of Immigration Appeals (BIA), which affirmed the INS decision.[164] The BIA determined that "Sherry presented insufficient evidence to 'overcome the evidence of fraud raised by the record'—evidence which suggested that Sabhari 'contrived to remarry his ex-wife after having acquired lawful permanent residence in the United States through his present marriage.'"[165]

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154. *See id.*
155. *See id.*
156. *See id.*
157. *See id.*
158. *See id.*
159. *See id.* at 940-41.
160. *See id.*
161. *See id.* at 944.
162. *See id.* at 941.
163. *Id.*
164. *See id.*
165. *Id.*

Sherry and Sabhari then filed suit in the United States District Court for the District of Minnesota requesting that the court compel the INS to approve Sherry's petition for Sabhari's reclassification.[166] Both parties filed motions for summary judgment and the district court granted the INS's motion for lack of subject matter jurisdiction and on the merits.[167] Sabhari and Sherry appealed the district court's decision to the Eighth Circuit Court of Appeals.[168]

The appellate court first addressed the jurisdiction issue.[169] The appellate court noted that the only plausible jurisdictional theory raised by the Sherry and Sabhari was 8 U.S.C. section 1329.[170] Section 1329 states in part,

> The district courts of the United States shall have jurisdiction of all causes, civil and criminal, brought by the United States that arise under the provisions of this subchapter. . . . Nothing in this section shall be construed as providing jurisdiction for suits against the United States or its agencies or officers.[171]

The district court held that the language in section 1329 provided a basis for jurisdiction over the lawsuit filed by Sherry and Sabhari because it was instituted against an officer of the United States.[172]

The appellate court agreed with the district court's interpretation, but the appellate court added that "it [wa]s clear that § 1329 does nothing to foreclose any other jurisdictional mechanism . . . ."[173] The appellate court noted that "the phrase 'nothing in this section shall be construed [to provide] jurisdiction' does not preclude jurisdiction under other provisions of law."[174]

The INS argued that even if jurisdiction was not precluded

166. *See id.*
167. *See id.*
168. *See id.*
169. *See id.* at 941-43.
170. *See Sabhari*, 197 F.3d at 941; *see also* 8 U.S.C. § 1329 (Supp. III 1997).
171. 8 U.S.C. § 1329.
172. *See Sabhari*, 197 F.3d at 942 (citing Sabhari v. Reno, No. 97-1534 (D. Minn. Aug. 21, 1996)). Sabhari and Sherry filed suit against Janet Reno, Attorney General of the United States, and Curtis Aljets, Acting District Director of the United States Immigration and Naturalization Service. *See id.* at 938.
173. *See id.* at 942.
174. *Id.* (quoting 8 U.S.C. § 1329).

under section 1329, 8 U.S.C. § 1252(g) strips the district court of its jurisdiction nonetheless.[175] Section 1252(g) provides:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any aliens under this chapter.[176]

However, the appellate court noted that section 1252(g) has been read narrowly and precisely by both the Eighth Circuit Court of Appeals itself and the United States Supreme Court.[177] The United States Supreme Court had held that section 1252(g) only applied in specific instances that arose in deportation cases.[178] The appellate court ruled that because Sabhari was not involved in any deportation process, section 1252(g) did not apply to this case.[179]

Finally, the court noted that under the Administrative Procedure Act (APA), "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review."[180] In addition, the APA provides that "person[s] suffering a legal wrong because of agency action . . . [are] entitled to judicial review thereof."[181] On that basis, the appellate court noted that federal question jurisdiction under section 1331[182] for actions arising under the Constitution, laws, or treaties of the United States in conjunction with the waiver of the government's sovereign immunity in the APA was enough to provide jurisdiction for the case at issue.[183] The appellate court ruled that the district court did

175. *See id.*
176. 8 U.S.C. § 1252(g) (Supp. III 1997).
177. *See Sabhari*, 197 F.3d at 942 (citing Reno v. American-Arab Anti-Discrimination Comm'n., 525 U.S. 471, 474 (1999) (holding that section 1252(g) only applies to specific actions of the Attorney General undertaken in the deportation process)); Shah v. Reno, 184 F.3d 718, 722 (8th Cir. 1999) (noting that section 1252(g) does not proscribe review over even general deportation matters).
178. *See American-Arab Anti-Discrimination Comm'n.*, 525 U.S. at 474.
179. *See Sabhari*, 197 F.3d at 942.
180. *Id.* at 943; *see also* 5 U.S.C. § 704 (1994).
181. 5 U.S.C. § 702 (1994).
182. 28 U.S.C. § 1331 (1994).
183. *See Sabhari*, 197 F.3d at 943.

have jurisdiction to decide the Sherry and Sabhari case on the merits.[184]

Next, the appellate court proceeded to review the merits of the Sabhari and Sherry complaint.[185] The court reviewed the process by which an alien may become a United States citizen after marrying a United States citizen.[186] The court stated that "it has long been recognized that the INS may combat fraud by refusing to confer benefits where a marriage has been entered so as to circumvent the immigration laws."[187]

The court noted that conflicting evidence existed regarding the propriety of the Sherry and Sabhari marriage but that substantial evidence indicated that Sabhari married Sherry for the purpose of becoming a United States citizen.[188] In making this conclusion, the court emphasized the testimony of Mohammed, the testimony of Sabhari's relatives, and the fact that Sabhari had looked into several ways of becoming a United States citizen before settling on a scheme to marry a citizen.[189]

As a result, the appellate court determined that the district court had ample evidence upon which to base its dismissal of the action.[190] The appellate court therefore affirmed the summary judgment in favor of the INS and remanded the judgment to show that it is dismissed with prejudice.[191]

Tiernee L. Nelsen

184. *See id.*

185. *See id.* at 943-44.

186. *See id.* (referencing the following statutes: 8 U.S.C. § 1154, 8 U.S.C. § 1151(b)(2)(A)(I) and 8 U.S.C. § 1255(a)).

187. *See id.* at 943 (citing Lutwak v. United States, 334 U.S. 604, 611 (1953)).

188. *See id.* at 944. The court noted that the Sherry and Sabhari presented testimony recalling the history of their relationship and financial records to support their claims of cohabitation and co-mingling of funds. *See id.*

189. *See id.*

190. *See id.*

191. *See id.*

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