REPORT

OF

REVISOR OF STATUTES

****

CONCERNING CERTAIN OPINIONS OF THE SUPREME COURT

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Submitted to the Legislature of the State of Minnesota

NOVEMBER 1990

Pursuant to MS 3C.04, sd 3

Minnesota Legislature
Office of the Revisor of Statutes

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November 15, 1990

The Honorable Jerome M. Hughes
President of the Senate

and

The Honorable Robert E. Vanasek
Speaker of the House of Representatives

State Capitol
Saint Paul, Minnesota 55155

Gentlemen:

Minnesota Statutes, section 3C.04, subdivision 3, requires the Revisor of Statutes to biennially report to the Legislature on statutory changes recommended or statutory deficiencies noted in opinions of the Supreme Court of Minnesota.

I am, therefore, pleased to transmit to you our report on opinions issued by the Supreme Court between September 30, 1988, and September 30, 1990.

Respectfully submitted,

Steven C. Cross
Revisor of Statutes
296-0949

SCC/rp
copies:

Chair and Members,
Senate Judiciary Committee

Chair and Members,
House Judiciary Committee

REPORT OF THE REVISOR OF STATUTES

TO THE

LEGISLATURE OF THE STATE OF MINNESOTA

CONCERNING CERTAIN OPINIONS OF THE SUPREME COURT

The Revisor of Statutes respectfully reports to the Legislature of the State of Minnesota, in accordance with Minnesota Statutes, section 3C.04, subdivision 3, which provides that the Revisor of Statutes shall:

> "report to the legislature any statutory changes recommended or discussed or statutory deficiencies noted in any opinion of the supreme court of Minnesota. The report must be made by November 15 of each even-numbered year. It must treat opinions filed during the two-year period immediately preceding September 30 of the year before the year in which the session is held. It must include any comment necessary to outline clearly the legislative problem reported."

The opinions of the Supreme Court of Minnesota concerning statutory changes recommended or discussed, or statutory deficiencies noted during the period beginning September 30, 1988, and ending September 30, 1990, together with a statement of the cases and the comment of the Court, are set forth on the following pages in numerical order, according to statutory section number.

As was the case with our last biennial report, there was a shortage of clear judicial discussion of statutory deficiencies and recommendations for change. Only one finding of unconstitutionality appeared during the biennium, though a second finding by the Court of Appeals was reversed by the Supreme Court and thus is not reported.

Comments made in the last report regarding the nature of

judicial statements on statutes construed remain valid. While the Supreme Court or Court of Appeals may call for legislative action in a given instance, as is the case with the "brain death" situation in State v. Olson, the legislature may well find it desirable to leave decisions on certain matters in the hands of the Court.

We have continued to note Court of Appeals decisions, despite the possibility of reversal upon appeal.

Sections 13.03, subdivision 1; and 13.43

ANNANDALE ADVOCATE v. CITY OF ANNANDALE

Annandale Advocate v. City of Annandale, 435 N.W.2d 24 (Jan. 20, 1989) was a case in which the local newspaper sought access to an investigative report discussed at a city council meeting concerning discharge of the city police chief. The dispute arose over two apparently conflicting provisions of the Minnesota Government Data Practices Act. Minnesota Statutes, section 13.03, subdivision 1, provides that all data maintained by a public body shall be accessible to the public unless expressly classified by law as nonpublic or private. Section 13.43 provides that all personnel data on public employees is private unless specifically listed otherwise.

The city council closed the meeting at which the report was presented, believing that the Data Practices Act required employee disciplinary proceedings to be closed. The District Court ordered and the Court of Appeals upheld release of portions of the report. Upon appeal, the Supreme Court reversed the lower courts, holding:

> "When it is necessary to discuss data classified as private by the Minnesota Government Data Practices Act at a meeting required to be open by the Minnesota Open Meeting Law, under Minn.Stat. § 471.705, subd. 1b (1986), that portion of the meeting in which private data is discussed must be closed. The remainder of the meeting shall be open pursuant to the Open Meeting Law."

In the course of a rather lengthy opinion, the public right to know is balanced against the individual's right to privacy, and the Court appears to come down on the side of the individual, stating in conclusion:

"If the legislature feels that we have failed to interpret its motives properly, then it must clarify these statutes."

In a dissent which is also somewhat detailed, Justice Popovich sides with the public's right to know, also concluding:

"I agree that the legislature should clarify these statutes to indicate what it intended."

Section 169.522

STATE v. HERSHBERGER

Back with us again through remand by the United States Supreme Court was State v. Hershberger, ... N.W.2d ... (Nov. 9, 1990) which involved the application of Minnesota Statutes, section 169.522, which requires a slow-moving vehicle emblem consisting of a fluorescent yellow-orange triangle with a dark red reflective border, to horse-drawn wagons operated by members of the Amish religion.

At an earlier hearing (444 N.W.2d 282), the Supreme Court held that the challenged statute:

> "as applied to individuals who entertain sincerely held religious beliefs prohibiting their compliance therewith, violates the rights afforded them by the Free Exercise Clause of the United States Constitution."

This decision was appealed to the United States Supreme Court and was remanded to the Minnesota Supreme Court for reconsideration in light of a recent United States Supreme Court decision.

The Supreme Court reversed the conviction of the Amish defendants and ordered charges against them dismissed, holding:

> "Minnesota Statutes, section 169.522 (1988), as applied to these appellants, violates rights protected by Article I, Section 16, of the Minnesota Constitution because the state has failed to provide a record which demonstrates that both values embodied by Section 16, freedom of conscience and public safety, cannot be achieved through alternative means, the use of white reflective tape and a lighted red lantern."

Because of the limited scope of this judicially imposed exemption to the slow-moving vehicle statute, legislative action may well not be required.

Section 260.181, subdivision 4

MATTER OF WELFARE OF J.D.P.

In Matter of Welfare of J.D.P., 439 N.W.2d 725 (Minn.App. 1989) (May 9, 1989) J.D.P., who was 17-1/2 years old at the time, shot his mother in the face, predictably resulting in her death. The prosecution moved to have J.D.P. referred to adult court for prosecution. The trial court found probable cause to believe that the juvenile committed the crime of first degree murder, that he was not suitable for treatment, and that the public safety would not be served under the provisions of laws relating to juvenile courts. These findings were required by Minnesota Statutes, section 260.125, subdivision 2, as a prerequisite to trial as an adult.

Subdivision 3 of this section provides that:

> "A prima facie case that the public safety is not served or that the child is not suitable for treatment shall have been established if the child was at least 16 years of age at the time of the alleged offense and:
>
> (1) is alleged by delinquency petition to have committed an aggravated felony against the person and (a) in committing the offense, the child acted with particular cruelty or disregard for the life or safety of another; or (b) the offense involved a high degree of sophistication or planning by the juvenile; or
>
> (2) is alleged by delinquency petition to have committed murder in the first degree; or * * * ."

While a majority of the three judges hearing the case appear to have had no difficulty in upholding the trial court's reference for trial as an adult, a rather extensive dissent by Judge Randall points out that:

> "I sympathize with the trial court which was looking at J.D.P.'s age and the small amount of time before his 19th birthday, at which time the juvenile court loses

jurisdiction. However, that shortness of time is the fault of the law regarding juvenile court jurisdiction, not the fault of the juvenile."

The dissent examines the maximum age for juvenile court jurisdiction stated in section 260.181, subdivision 4, which was age 25 prior to 1977, reduced to age 21 in 1977, and further reduced to the present age of 19 in 1982, and states that:

"If the legislature would again extend the juvenile court's control to some age between 19 and 25, the practical problem encountered in formulating a reasonable juvenile disposition for appellant would be mitigated."

Section 518B.01, subdivision 2

WOODIN v. RASMUSSEN

In Woodin v. Rasmussen, 455 N.W.2d 535 (Minn.App. 1990) (May 22, 1990) the issue was whether the Trial Court had jurisdiction to issue a protective order under Minnesota Statutes, section 518B.01, the Domestic Abuse Act, when the parties have never been married, have never lived together, have no children in common, yet do have an unborn child claimed to be in common.

Section 518B.01, subdivision 2, clause (b) provides:

> "'Family or household members' mean spouses, former spouses, parents and children, persons related by blood, and persons who are presently residing together or who have resided together in the past, and *persons who have a child in common* regardless of whether they have been married or have lived together at any time." (Emphasis added)

Petitioner stated that she was pregnant, that respondent was the father of her unborn child, and that he had threatened her with bodily harm and death.

In reversing the order of the District Court, which had issued the order, the Court of Appeals held that:

> "Under the Domestic Abuse Act, Minn.Stat. § 518B.01, persons who are not related by blood, who have never been married, who have never lived together, and who do not have a child in common, are not 'family or household members,' even though those persons may have an unborn child in common. Because Melissa and Daren did not have a 'family or household member' relationship, the trial court did not have jurisdiction to issue a domestic abuse protective order."

In so holding the Court stated:

> "The legislature may wish to extend the Act to include unborn children in common as a basis for protection under the Act. This, however, is a legislative determination and not an extension which can be reached by judicial interpretation."

Section 541.07(8)

RADLOFF v. FIRST AMERICAN NATIONAL BANK

In Radloff v. First American National Bank, 455 N.W.2d 490 (Minn.App. 1990) (May 15, 1990) the Court of Appeals had occasion to construe Minnesota Statutes, section 541.07(8) which provides:

> "* * *, the following actions shall be commenced within two years:
>
> (1) * * *
>
> (8) Against the person who applies the pesticide for injury or damage to property resulting from the application, but not the manufacture or sale, of a pesticide."

At issue was whether the two-year statute or a longer statute of limitations applied to actions by the bank in hiring a professional applicator to apply the pesticide which caused the damage.

The Court of Appeals held that the two-year statute of limitations for a person "who applies the pesticide" does not cover entities that contract for the application of pesticide. In so holding, the Court noted that the holding arbitrarily protected one class of defendants (the applicators) while withholding protection of the two-year limitation from the party who hired the applicators (the bank). In this regard the Court stated:

> "We realize that our interpretation of section 541.07(8) may undermine the statute's constitutional validity."

and, in a note concluding the opinion, added:

> "In any event, we have serious misgivings as to whether section 541.07(8) could withstand constitutional scrutiny even if we interpreted the statute to cover

persons who contract for pesticide services. By excluding manufacturers and sellers from coverage, the statute appears to suffer from the same infirmities identified in Thompson-Yeager, Inc." (260 N.W.2d 548)

Section 548.36, subdivision 1

IMLAY v. CITY OF LAKE CRYSTAL

Imlay, et. al. v. City of Lake Crystal, 453 N.W.2d 326 (Mar. 30, 1990) was a dram shop action against the city as operator of a municipal liquor store. After a jury verdict for appellants in the amount of $2.2 million, the trial court reduced this amount by certain collateral source payments appellants had received. The pertinent issue involved was just which payments to appellants were collateral sources under Minnesota Statutes, section 548.36, subdivision 1, clause (2), which listed "collateral sources" such as:

> "health, accident and sickness, or automobile accident insurance or liability insurance that provides health benefits or income disability coverage"

Of the quoted provision, the Supreme Court stated:

> "Automobile accident insurance clearly is covered by the statute and thus uninsured motorist benefits are a collateral source. (citation omitted) It is unclear, however, whether the rest of subdivision 1(2) limits automobile insurance or simply lists other types of collateral sources. Appellants contend the subpart is one type of collateral source and should be read as "automobile accident insurance which 'provides health benefits or income disability coverage.'" Conversely, respondent city asserts this subpart names four distinct types of collateral sources, one of which is "automobile accident insurance."
>
> Minnesota Statutes, section 548.36, subdivision 1(2), is poorly written, ambiguous, and could conceivably be read as providing for one, two, three or four different types of collateral source benefits. Since there are grammatical and analytical problems with each of the possibilities, the legislature may wish to reexamine this subsection to clarify its intentions."

Section 595.02, subdivision 2

STATE v. LARSON

State v. Larson, 463 N.W.2d 42 (Mar. 23, 1990) was an appeal from a conviction of criminal sexual conduct against a four-year old child. Defendant was convicted largely on the basis of out-of-court statements by the child, who was available but did not testify at the trial. The conviction was reversed by the Court of Appeals, but the Supreme Court again reversed the Appeals Court and affirmed the judgment of conviction.

Minnesota Statutes, section 595.02, subdivision 3, provides in pertinent part that:

> "An out-of-court statement made by a child under the age of ten * * * describing any act of sexual contact * * * is admissible as substantive evidence if:
>
> (a) * * * ; and
>
> (b) the child * * * , either:
>
> (i) testifies at the proceedings; or
>
> (ii) is unavailable as a witness * * * ."

The Supreme Court, with Justice Kelley dissenting, gave preference to its rules of evidence over the cited statutory provision when it stated:

> "By enacting section 595.02, subdivision 3, the legislature did not deprive the court of authority to admit extrajudicial statements of child complainants or witnesses pursuant to any court promulgated rule of evidence. As we have already noted * * * we have the primary responsibility under the separation of powers doctrine for the regulation of evidentiary matters. * * * Here the out-of-court statements were admissible under two different rules of evidence, Minn.R.Evid. 803(24) and 803(4)."

Sections 609.19, 609.20

STATE v. OLSON

Defendant in State v. Olson, 435 N.W.2d 530 (Jan. 31, 1989) was charged with second degree murder (609.19) and first degree manslaughter (609.20) for "causing the death" of his six-week old son by violently shaking the baby's head. The baby had been hospitalized, diagnosed as brain dead and placed upon life-support systems to sustain respiratory functions. After consulting with the family, the life-support systems were disconnected and the baby was declared dead a short time later.

Defendant contended that removal of the life-support systems and not defendant's actions were the cause of death. The question certified by the trial court to the Supreme Court for accelerated review was whether brain death was "death" as that term is used in our homicide statutes.

The Supreme Court, with Justice Wahl dissenting, declined to answer the question because the court stated that the answer was unnecessary to a disposition of this case and because

> "we think that the legislature should first be given an opportunity to consider the legal implications of brain death."

The court continued:

> "This appeal demonstrates the urgent need for legislative action."

and concluded:

> "The legislature is now (1989) in session and we trust it shares our sense of urgency. For the reasons given, we decline at this time to answer the certified question. If the legislature does not promptly act, however, we may have to provide an answer the next time the question comes before us."