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# Justice Rosalie E. Wahl: Breaking New Ground

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## JUSTICE ROSALIE E. WAHL: BREAKING NEW GROUND

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### I. INTRODUCTION

In her seventeen years on the supreme court bench, Justice Wahl has been involved in numerous decisions and has authored over 400 opinions. To extract from this number only the “monumental” decisions or to gauge the impact of her efforts is virtually impossible. Consequently, no pretense is made as to the comprehensiveness of the scope of this review.

Upon reviewing her decisions, one is impressed with the number of opinions that can be labeled as “firsts.” One should not be. As the first woman on the Minnesota Supreme Court, Justice Wahl has brought a new vision to an old establishment.

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† Author’s credits go here.

## II. JURISPRUDENCE

### A. *On Disparate Treatment: Sigurdson v. Isanti County*, 386 N.W.2d 715 (Minn. 1986)

In *Sigurdson v. Isanti County*,<sup>1</sup> Justice Wahl authored the first Minnesota opinion requiring the lower courts to apply the *McDonnell Douglas* test in disparate treatment cases.<sup>2</sup> The plaintiff brought a disparate treatment claim alleging that her training opportunities, assignments, and compensation were limited by her gender.<sup>3</sup> The plaintiff also claimed that she was the victim of reprisal for bringing discrimination charges.<sup>4</sup>

The employee filed her complaint with the Minnesota Human Rights Department.<sup>5</sup> This complaint was dismissed for lack of probable cause,<sup>6</sup> and the employee subsequently brought a civil action under the Minnesota Human Rights Act.<sup>7</sup> The lower court did not find discrimination and ordered the plaintiff to pay attorney fees.<sup>8</sup> The court of appeals affirmed the trial

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1. 386 N.W.2d 715 (Minn. 1986).

2. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The *McDonnell Douglas* case specifically addressed disparate treatment based on race and formed a three-part test for establishing a prima facie case of discrimination. *Id.* at 807.

3. *Sigurdson*, 386 N.W.2d at 716-19. The United States Supreme Court has defined two basic types of employment discrimination cases: "disparate treatment" cases and "disparate impact" cases. Disparate treatment cases involve allegations that the employer has treated "some people less favorably than others because of their race, color, religion, sex, or national origin." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Disparate impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Id.* In the instant case, the claim is one of disparate treatment. Ms. Sigurdson claimed that the county assessor's office treated her less favorably based on her gender. *Sigurdson*, 386 N.W.2d at 716.

4. *Sigurdson*, 386 N.W.2d at 716. Ms. Sigurdson's supervisor testified that typical field appraisal work was done in teams. He was concerned that a man and woman team would present a bad public image. *Id.* at 717. The facts of the case presented numerous incidents of alleged harassment. *Id.* at 716-19.

5. *Id.* at 716.

6. *Id.* at 719.

7. The Minnesota Human Rights Act provides that it is unfair employment practice "(a) to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or . . . (c) to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment" because of an individual's sex. MINN. STAT. § 363.03 subd. 1(2) (1992). This Act also provides that it is an unfair discriminatory practice to act in reprisal against an employee who brings a charge of employment discrimination. MINN. STAT. § 363.03 subd. 7 (1992).

8. *Sigurdson*, 386 N.W.2d at 716.

court's finding of no discrimination, but reversed the award of attorney fees.<sup>9</sup>

On appeal, Justice Wahl remanded and instructed the lower court on the three-part test established in *McDonnell Douglas*.<sup>10</sup> This test had been previously adopted in cases involving the Minnesota Human Rights Act<sup>11</sup> and consists of a prima facie case, an answer, and a rebuttal.<sup>12</sup> Justice Wahl, recognizing the importance of flexibility in applying this standard, noted that the specific elements of *McDonnell Douglas* must be altered depending on factual patterns and employment settings.<sup>13</sup>

In *Sigurdson*, the trial court decision did not enumerate the particular elements of the *McDonnell Douglas* test. Justice Wahl recognized the potential problems a loosely constructed analysis could create and discussed her concerns:

Employment discrimination cases often involve intricate factual issues in which only the trial court . . . can meaningfully assess . . . the evidence . . . . [The supreme court has] traditionally accorded great deference to the trial court in making findings of fact . . . [however,] it is important that the basis for the court's decision be set forth clearly and explicitly so that an appellate court can conduct effective and meaningful review.<sup>14</sup>

The case was remanded with the requirement that the lower court apply the correct standard and more explicitly detail the decision.<sup>15</sup>

9. *Sigurdson v. Isanti County*, 363 N.W.2d 476, 483 (Minn. Ct. App. 1985).

10. The supreme court instructed the court of appeals to apply the *McDonnell Douglas* analysis for evaluating a disparate treatment claim. *Sigurdson*, 386 N.W.2d at 721-22.

11. The *McDonnell Douglas* standard was well-established in Minnesota. See, e.g., *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 444-46 (Minn. 1983); *Danz v. Jones*, 263 N.W.2d 395, 400 (Minn. 1978). Minnesota continues to apply this standard. See, e.g., *Feges v. Perkins Restaurants, Inc.*, 483 N.W.2d 701 (Minn. 1992).

12. *Sigurdson*, 386 N.W.2d at 720.

13. *Id.* at 720. Justice Wahl believed explicit application of fact-dependent tests was necessary to accord deference to the lower court's findings of fact, "recognizing that much must necessarily be left to [the trial court's] sound judgment and discretion." *Id.* at 721.

14. *Id.* at 721.

15. *Id.* at 721-22. *Sigurdson* has since been cited in more than 30 Minnesota cases. *Sigurdson* has also been cited in the Eighth Circuit. See *Kypke v. Burlington N. R.R.*, 928 F.2d 285, 286 (8th Cir. 1991) (citing *Sigurdson* and noting that Minnesota courts have applied the same standards for discrimination under the Minnesota Human Rights Act that the federal courts have applied under federal anti-discrimination statutes).

The *Sigurdson* dissent strongly criticized the decision to remand this case.<sup>16</sup> Although agreeing that the lower court had not articulated the *McDonnell Douglas* standard, the dissent advocated for avoiding needless litigation and argued that judicial energy would be wasted if the lower court were required to re-draft the findings in accordance with the appropriate standard.<sup>17</sup>

Nevertheless, Justice Wahl refused to abandon the principles of an effective appellate review and required a sound basis on which to consider the reliability of a witness or the weight of the testimony.<sup>18</sup> She often chose to remand lower court decisions that did not apply the correct standard<sup>19</sup> or made inconsistent findings.<sup>20</sup>

Justice Wahl continually emphasized the significance of factual issues in employment discrimination cases.<sup>21</sup> In addition, she chose not to succumb to the pressures of avoiding litigation. Although she recognized the legal system's struggle to avoid or limit litigation, she also considered the importance of encouraging lower courts to use correct standards and write clear deci-

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16. Justice Yetka, authoring the dissent, concurred in the majority's affirming the reversal of the award of attorney fees, but dissented in the order to remand for specific findings under the *McDonnell Douglas* analysis. *Sigurdson*, 386 N.W.2d at 723.

17. *Id.* Justice Yetka stated:

At some point, litigation must come to an end. In this case, a remand will do the appellant no good because the result will be the same . . . We should affirm this case, but warn that all findings in future employment discrimination cases are to be clearly set forth according to the *McDonnell Douglas* analysis.

*Id.*

18. *See, e.g., id.* at 721 (stating that for appropriate appellate review a trial court must "clearly and explicitly" set forth the court's basis for a decision).

19. *See, e.g., Minnesota v. Blacksten*, 507 N.W.2d 842, 847 (Minn. 1993) (finding that consent is a credibility issue for the trial court absent a clearly erroneous finding); *Serbus v. Serbus*, 324 N.W.2d 381, 385-86 (Minn. 1982) (reversing trial court findings on the weight of testimony); *Minnesota v. Williams*, 324 N.W.2d 154, 160 (Minn. 1982) (holding that the jury could not properly weigh evidence absent instruction on the need to find intent to defraud).

20. *See, e.g., Minnesota v. Moore*, 458 N.W.2d 90, 94 (Minn. 1990) (holding jury findings inconsistent); *Wright v. M.B. Hagen Realty, Co.*, 269 N.W.2d 62, 66 (Minn. 1978) (holding findings inconsistent).

21. *See, e.g., Feges v. Perkins Restaurants, Inc.*, 483 N.W.2d 701, 707, 711 (Minn. 1992) (noting that breach of contract and age discrimination claims require factual determinations by the jury); *Shockney v. Jefferson Lines*, 439 N.W.2d 715, 720 (Minn. 1989) (holding that no race discrimination occurred in discharge of employee when treatment of all employees reviewed); *Minneapolis Police Dep't. v. Minneapolis Comm'n of Civil Rights*, 425 N.W.2d 235, 239-40 (Minn. 1988) (finding lack of sufficient evidence to establish prima facie case of employment discrimination); *Lewis v. Metro Transit Comm'n*, 320 N.W.2d 426, 431 (Minn. 1982) (relying upon presentation of substantial evidence establishing need for bona fide occupational qualification).

sions. In *Sigurdson*, as in most of her decisions, she chose clarity and completeness over convenience.

*B. On Environmental Rights: Powderly v. Erickson, 285 N.W.2d 84 (Minn. 1979)*

In 1979 the Minnesota Supreme Court, on first hearing, in an opinion authored by Justice Wahl,<sup>22</sup> decided the first case regarding historical preservation under the Minnesota Environmental Rights Act (MERA).<sup>23</sup> *Powderly v. Erickson* concerned the MERA provision that protects buildings, structures, and sites “possessing historical, archeological, or architectural value.”<sup>24</sup>

In *Powderly*, a group of citizens brought an action under MERA to enjoin the demolition of row houses in Red Wing, Minnesota.<sup>25</sup> These houses had been designated as “historic resources” under MERA by the Minnesota Historical Society.<sup>26</sup> In spite of this designation, the property owner planned to demolish the houses to provide for parking to expand a retail space.<sup>27</sup>

The property owner argued at the trial level that there was no feasible and prudent alternative to demolition that would effec-

22. Justice Otis authored the second decision. See *Powderly v. Erickson*, 301 N.W.2d 324 (Minn. 1981).

23. MINN. STAT. § 116B.01-.13 (1992). For purposes of MERA, natural resources are defined as “all mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational and historical resources.” MINN. STAT. § 116B.02 subd. 4 (1992). At the time of the *Powderly* decision, no case had defined “historical resources” despite the prevalence of local, state, and federal programs that addressed historical preservation. See 16 U.S.C. §§ 461-470t (1976); MINN. STAT. §§ 138.51-.65; 138.71-.75 (1978). Today, guidance for MERA application is most frequently found in a trio of cases: *Powderly v. Erickson*, 285 N.W.2d 84 (Minn. 1979); *People for Env'tl. Enlightenment and Responsibility (PEER) v. Minnesota Env'tl. Quality Council*, 266 N.W.2d 858 (Minn. 1978); *County of Freeborn v. Bryson*, 297 Minn. 218, 243 N.W.2d 316 (Minn. 1976). *State v. County of Hennepin*, 495 N.W.2d 416, 422 (Minn. 1993).

24. *Powderly*, 285 N.W.2d at 88. A number of factors were identified for consideration in defining a historical resource: (1) who built the structure; (2) who lived in it; (3) its location; (4) its architecture; (5) whether unique materials were used; (6) the quality of workmanship; (7) the structure's association with builders or important people or events in the area; and (8) its interaction with other buildings. *Id.*

In the opinion of Russell Fridley, Director of the Minnesota Historical Society and State Preservation Officer, the row houses in question were historical resources because of their age, construction, and association with local historical events. *Id.*

25. *Id.* at 85.

26. *Id.*

27. *Id.* at 86. The defendant, Erickson Diversified Corporation, operated a food market, pharmacy, and gasoline service station. *Id.* The corporation purchased the land adjoining the parcel on which the row houses stood in 1964. *Id.* In 1978, Erickson sought and was awarded a demolition permit. *Id.* at 87.

tuate the expansion plans<sup>28</sup> and asserted that preventing the demolition of the houses was an unconstitutional taking of property.<sup>29</sup> The district court found the row houses to be historical resources but held that demolition was consistent with public health, safety, and welfare because of building code and fire safety violations.<sup>30</sup>

On first hearing,<sup>31</sup> the supreme court determined that the respondent, in raising the MERA affirmative defense, had failed to rebut the plaintiff's prima facie case.<sup>32</sup> The court further determined that an injunction of the demolition was not an unconstitutional taking because the injunction did not deprive the respondent of all effective uses of the property.<sup>33</sup> Therefore, demolition of the row houses was enjoined and the case was remanded to the trial court.<sup>34</sup>

The trial court modified the injunction and held that if there was competent evidence that a reasonable time had lapsed and the row houses had not been sold, renovated, or otherwise acquired, demolition would be allowed.<sup>35</sup> On rehearing, the supreme court upheld the district court's modified injunction.<sup>36</sup> However, the supreme court remanded again and held that the

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28. The property owner claimed there was a need for additional parking space and that the expansion would not work without this space. *Id.* at 90.

29. *Powderly*, 285 N.W.2d at 87. Under MERA, the plaintiff has the burden of proving (1) the existence of a protectable natural resource, and (2) the pollution, impairment, or destruction of that resource. *County of Freeborn v. Bryson*, 297 Minn. 218, 228, 210 N.W.2d 290, 297 (Minn. 1973); MINN. STAT. § 116B.04 (1992). In the alternative, however, section 116B.04 allows a defendant who does not rebut the plaintiff's case to raise an affirmative defense. Under MERA, the defendant may establish that (1) there is no feasible and prudent alternative and that (2) the conduct at issue is consistent with and reasonably required for the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of natural resources. MINN. STAT. § 116B.04 (1992).

30. *Powderly*, 285 N.W.2d at 87.

31. The issues raised on appeal were: (1) whether the court erred in denying the petition for intervention; (2) whether the row houses were historical resources; (3) whether defendant had established an affirmative defense; (4) whether the demolition permit was valid; and (5) whether defendant's property had been unconstitutionally taken without just compensation. *Id.* at 87.

Appellate jurisdiction was with the supreme court prior to 1982. Since 1982, appellate jurisdiction has been divided between the Minnesota Supreme Court and the Minnesota Court of Appeal. See Court of Appeals Act, 1982 Minn. Laws ch 501, §§ 3-13 (codified at MINN. STAT. §§ 480A.01-.11 (1992)).

32. *Powderly*, 285 N.W.2d at 87.

33. *Id.*

34. *Id.*

35. *Powderly v. Erickson*, 301 N.W.2d 324, 325 (Minn. 1981).

36. *Id.* at 327.

respondent may apply for an order dissolving the injunction. The continuing injunction was conditioned on the appellant's posting a bond to indemnify respondent for damages resulting from continued litigation.<sup>37</sup>

Justice Wahl carefully noted that *Powderly* did not determine the application of MERA to "historic resources"<sup>38</sup> in all situations.<sup>39</sup> She wrote that the court had a duty to enjoin destruction of protected historic resources until parties interested in preserving them have an opportunity to protect the resources through legislative or administrative processes.<sup>40</sup>

There is still no formal standard for interpreting MERA.<sup>41</sup> However, *Powderly* proved a valuable starting point for defining and labeling historic resources and property and the opinion set the stage for what continues to be an important issue.<sup>42</sup>

37. *Id.*

38. Historic resources are not defined in MERA. However, in *Archabal v. County of Hennepin*, 495 N.W.2d 416 (Minn. 1993), the court discussed *Powderly* and the definition of "historic resources." "In *Powderly* . . . we identified certain factors that should be taken into account in determining whether a building falls under the protection of MERA. [Included is the] quality of significance in American history, architecture, archeology, and cultures . . . local importance . . . integrity of location, design, setting, materials, feeling and association." *Id.* at 421.

39. *Powderly*, 285 N.W.2d at 90.

40. *Powderly*, 301 N.W.2d at 324. She went on to state that in the absence of such measures,

[W]here neither the owners nor any public body after a reasonable length of time in which to act has lapsed, elect to preserve from demolition structures which are historical resources, the owners have a constitutional right to destroy the buildings or to put the property to any other lawful use, free from the restrictions otherwise imposed . . . .

*Id.* Justice Wahl apparently knew the row houses would eventually be demolished but chose to provide an opportunity for those interested to try to prevent the demolition.

41. One commentator has suggested that *Powderly* stands for the proposition that economic considerations alone may allow MERA to be used as a defense under certain circumstances. Timothy Murphy, *Environmental Law—Protection of Scenic and Aesthetic Resources under the Minnesota Environmental Rights Act [State ex rel. Drabik v. Martz]*, 451 N.W.2d 893 (Minn. Ct. App. 1990)), 17 WM. MITCHELL L. REV. 1190, 1200 (1991). Mr. Murphy states, "the economic hardship limitation is ambiguous because it opens for discussion the questions of when, if ever, economic considerations are truly 'alone.'" *Id.* at 1201 (citing Bryden, *Environmental Rights in Theory and Practice*, 62 MINN. L. REV. 163 (1978)). "The question is whether the intent of MERA to ignore economic considerations can be bypassed based on the 'social' concerns such as the livelihood of the community. *Id.* at 1201 n.62. As he indicates, "it is not difficult to identify scenarios where an activity otherwise damaging to the environment could be justified on grounds that the activity could benefit local economies. Opponents of MERA could argue that such benefits are 'social' rather than 'economic.'" *Id.* at 1201 n.63.

42. See, e.g., *Archabal v. County of Hennepin*, 495 N.W.2d 416, 418 (Minn. 1993) (citing *Powderly* as the standard for considering whether a structure is a historic re-

C. *On Family Law: Pikula v. Pikula, 374 N.W.2d 705 (Minn. 1985)*

In 1985, the Minnesota Supreme Court assessed the suitability of the legal standards used to determine custody in child custody cases. What began as a typical custody case,<sup>43</sup> has become a landmark decision in family law.<sup>44</sup>

Justice Wahl, in *Pikula*, expressed the court's firm preference for placement of a child with that child's primary caretaker.<sup>45</sup> The opinion stressed the importance of the stability of the child's relationship with the parent and the importance of continuing that relationship.<sup>46</sup> She reasoned that the "guiding principle in all custody cases is the best interest of the child."<sup>47</sup>

The *Pikula* trial court heard testimony that the mother planned to move the children into her sister's apartment until she was able to afford an apartment of her own.<sup>48</sup> The father

source). The *Archabal* court applied the *Powderly* standard to determine the fate of the Minneapolis Armory. *Id.*

43. If a custody case can ever be considered "typical."

44. As of March 1994, *Pikula* has been cited in 219 Minnesota cases, numerous other jurisdictions, and thirty-three law review articles. *See, e.g.,* Wopata v. Wopata, 498 N.W.2d 478 (Minn. Ct. App. 1993) (stating the *Pikula* developed a standard that serves the best interests of the child); Westphal v. Westphal, 457 N.W.2d 226 (Minn. Ct. App. 1990) (citing the well-settled policy under *Pikula* that stable custody is usually in the child's best interest). *See also* In re Mr. & Mrs. J.M.P., 528 So. 2d 1002 (La. 1988) (agreeing with the existence of a child's psychological parent and the importance thereof to development of the child); Jaramillo v. Jaramillo, 823 P.2d 299 (N.M. 1991) (finding no presumption in favor of the mother as primary caretaker); Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 784 n.236 (1993) (citing *Pikula* for the proposition that even mothers who "work outside the home" can be primary caretakers); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1849 n.445 (1993) (discussing the gender-neutral aspect of *Pikula*).

45. *Pikula v. Pikula*, 374 N.W.2d 705, 711 (Minn. 1985). The court followed the reasoning of appellate decisions in Ohio, Oregon, Pennsylvania, and West Virginia. *See* In re Maxwell, 456 N.E.2d 1218 (Ohio 1982); VanDyke v. VanDyke, 618 P.2d 465 (Or. 1980); *Commenwealth ex. rel. Jordan*, 448 A.2d 1113 (Pa. 1982); Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981).

46. *Pikula*, 374 N.W.2d at 711.

47. *Id.* Justice Wahl wrote that the importance of the emotional and psychological stability to the child's sense of security is a notion that faces little dispute. *Id.* (citing J. GOLDSTEIN ET AL., *BEFORE THE BEST INTEREST OF THE CHILD* 31-35 (1979); Martha F. Leonard & Sally Provence, *The Development of Parent-Child Relationships and the Psychological Parent*, 53 CONN. B. J. 320, 326 (1979); Sheila Rush Okpaku, *Psychology: Impediment or Aid in Child Custody Cases?*, 29 RUTGERS L. REV. 1117, 1121-22 (1976) (cited in Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335, 348 (1982))). *Pikula*, 374 N.W.2d at 711.

48. *Pikula*, 374 N.W.2d at 708.

testified that he intended to remain in his home town and that his mother would be the principle caregiver.<sup>49</sup> The trial court placed the children, ages three and four, in the custody of the father.<sup>50</sup>

On appeal, the court of appeals concluded the placement was erroneously premised on care by the father's extended family and that the evidence was improperly ignored.<sup>51</sup> The court of appeals overturned the lower court and awarded custody of the children to the mother.<sup>52</sup> The supreme court affirmed the reversal of the choice of the father, but reversed in part the award of custody to the mother.<sup>53</sup> The court remanded for a determination as to the primary caretaker.<sup>54</sup>

With guidance from other jurisdictions, Justice Wahl formulated the Minnesota primary caretaker preference.<sup>55</sup> She stated that the primary caretaker preference comported with the state's welfare concerns in the face of the numerous interests enumerated in the Minnesota multi-factor custody statute.<sup>56</sup>

Emphasizing the importance of the child's bond to a primary parent, she reasoned that four of the nine statutory interests were essential to primary caretaking.<sup>57</sup> She found the remaining

49. *Id.* The father reported that his work schedule would sometimes keep him away from the children from 3:00 a.m. until 7:00 p.m. As a truck driver, he had a layover from 7:00 a.m. until 3:00 p.m. and, occasionally, he would be able to return home during this time. *Id.*

50. *Id.* The trial court found that the father's strong, stable and religious family group was "like a bedrock throughout the depression years and post-war years of plenty and permissiveness. The environment has inbred in the family a unity, respect, loyalty and love that for the most part has been destroyed and lost in most modern American families." *Id.* at 709 (citing Trial Court Finding 11).

51. *Pikula v. Pikula*, 349 N.W.2d 322, 325 (Minn. Ct. App. 1984). The court specifically cited social worker reports showing that the mother was the primary caregiver and that her care was best for the children. *Id.* at 326.

52. *Id.*

53. *Pikula*, 374 N.W.2d at 710-14.

54. *Id.* at 714.

55. *Id.* at 713-14 (adopting the indicia of primary parenthood set forth in *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981)). Justice Wahl was also guided by the appellate decisions cited *supra* note 65.

56. "Four of the nine statutory criteria rest on the centrality of continuity of care and environment to the best interest of the child." *Pikula*, 374 N.W.2d at 711 n.1 (citing MINN. STAT. § 518.17 subd. 1(c-f) (1984)).

57. These four statutory best interests factors were: (1) the child's relationships with others; (2) the adjustment to home and community; (3) the length of time in a satisfactory placement; and (4) the permanence of family unity. *Id.* (citing MINN. STAT. § 518.17 subd. 1(c-f) (1988)).

factors "inherently resistant of evaluation and difficult to apply."<sup>58</sup>

Justice Wahl's opinion in *Pikula* involved more than just an effort to establish the primary caretaker preference. Woven throughout this opinion is her concern for promotion of certainty and a fear that the best interest standard may reflect the individual standards of the decision-maker.<sup>59</sup> Justice Wahl expressed her concern with the ineffectiveness of appellate review in custody cases by stating

The inherent imprecision heretofore present in our custody law has, in turn, diminished meaningful appellate review. We have repeatedly stressed the need for effective appellate review of family court decisions in our cases, and have required specificity in written findings based on the statutory factors . . . . We are no less concerned that the legal conclusion reached on the basis of those findings be subject to effective review.<sup>60</sup>

*Pikula* has since been the source of much citation, as well as much criticism.<sup>61</sup> One well-known commentator has written that "[i]n almost every aspect of its rationale, the primary caretaker preference proved ineffective in Minnesota."<sup>62</sup> That commentator's concern surrounded the failure to find a viable definition of primary caretaker necessary to achieve the standards required by the statute and the court.<sup>63</sup>

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58. *Id.* at 712.

59. This was not the first custody opinion that mandated highly particularized trial court findings. In *Rosenfeld v. Rosenfeld*, 311 Minn. 76, 249 N.W.2d 168 (1976), Justice MacLaughlin noted that custody decisions by lower courts required particularized findings to show both the consideration of statutory factors and that the decision was fairly rendered. *Id.* at 82, 249 N.W.2d at 171.

60. *Pikula*, 374 N.W.2d at 713.

61. See, e.g., *Maxfield v. Maxfield*, 452 N.W.2d 218, 223 (Minn. 1990) (stating that *Pikula*'s primary caretaker preference is still the most important criteria in determining the child's best interest); *Sefkow v. Sefkow*, 427 N.W.2d 203, 212 (Minn. 1988) (acknowledging that Minnesota's multi-factor statute, MINN. STAT. § 518.17 (1990), providing for a child's best interest means "all relevant factors," mandates a "multifaceted inquiry" into all statutory factors).

62. Judge Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427; 452 (1990).

63. *Id.* Subsequent to *Pikula*, the Minnesota Legislature attempted to reject the primary preference rule by declaring that the primary caretaker is only one of several factors to consider in custody disputes. MINN. STAT. § 518.17 subd. 1 (1990).

In 1988, the Minnesota Supreme Court retreated from its original support of the preference.<sup>64</sup> Recently, however, there has been renewed judicial support for the standard, evidencing the continuing struggle in this area of the law.<sup>65</sup>

D. *On Federalism: O'Connor v. Johnson*, 287 N.W.2d 400 (Minn. 1979); *In re Estate of Turner*, 391 N.W.2d 767 (Minn. 1986); *State v. Russell*, 477 N.W.2d 886 (Minn. 1991)

Justice Wahl is a staunch supporter of the Minnesota Constitution's applicability in criminal cases<sup>66</sup> and, as such, has authored several opinions construing the state constitution expansively.<sup>67</sup> While not always the primary author of such opinions,<sup>68</sup> Justice

64. See *Sefkow v. Sefkow*, 427 N.W.2d 203, 212 (Minn. 1988).

65. In *Maxfield v. Maxfield*, 452 N.W.2d 219 (Minn. 1990), Justice Wahl maintained that "the golden thread running through any best interest analysis is the importance, for a young child in particular, of its bond with the primary parent as this relationship bears on the other criteria, such as the need for a stable, satisfactory environment and the desirability of maintaining continuity." *Id.* at 223 (citing *Rosenfield v. Rosenfield*, 311 Minn. 76, 81, 249 N.W.2d 168, 170-71 (1976)).

The Legislature reiterated its intent to terminate the caretaker preference by restating the 1989 prohibition against exclusive use of any statutorily based factor. "The primary caretaker factor may not be used as a presumption in determining the best interests of the child." MINN. STAT. § 518.17 subd. 1 (1990).

66. See, e.g., *Nyflot v. Commissioner of Public Safety*, 369 N.W.2d 512 (Minn. 1985), cert. denied, 474 U.S. 1027 (1985). In *Nyflot*, the Minnesota Supreme Court declined to label chemical testing under the implied consent statute (MINN. STAT. § 169.123 subd. 2(b) (1992)) as a critical stage because formal adversarial proceedings had not yet begun. *Id.* at 515-16. Justice Wahl joined in Justice Yetka's lengthy dissent characterizing the majority's holding as an "intrusion on the dignity of the individual . . . [and] is more akin to the laws prevailing in totalitarian states." *Id.* at 521.

67. See, e.g., *State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991) (holding that the due process clause of the state constitution was violated by state statute imposing disparate penalties for possession of crack cocaine as opposed to powder cocaine).

68. See *State ex rel. Cooper v. French*, 460 N.W.2d 2, 9-10 (Minn. 1990) (holding that the freedom of conscience clause protected defendant landlord from being penalized for asserting right to exclude cohabitating tenants); *State v. Hamm*, 423 N.W.2d 379, 385-86 (Minn. 1988) (holding that the state constitutional right to a jury was violated by statute providing for six-person jury in misdemeanor and gross misdemeanor cases); *Jarvis v. Levine*, 418 N.W.2d 139, 148 (Minn. 1988) (holding that the forcible administration of drugs to an involuntarily committed patient without prior judicial authorization was a constitutional violation of the right to privacy clause of the state constitution); *State v. Guminga*, 395 N.W.2d 344, 346 (Minn. 1986) (holding that the imposition of vicarious criminal liability for state liquor violations was an infringement of the due process clause of the state constitution). In *Hamm*, Justice Yetka wrote, "[w]hile a decision of the United States Supreme Court interpreting an identical provision of the federal constitution may be persuasive, it should not be automatically followed or our separate constitution will be of little value." *Hamm*, 423 N.W.2d at 382.

Wahl has written, and concurred in, a number of notable decisions involving the state constitution.

1. *O'Connor v. Johnson*, 287 N.W.2d 400 (Minn. 1979)

In *O'Connor v. Johnson*,<sup>69</sup> the supreme court invoked Article 1, section 10 of the Minnesota Constitution. Section 10 states that to be valid, a search warrant "must be based on probable cause, be supported by oath or affirmation, and describe with particularity the place to be searched and the items to be seized."<sup>70</sup>

The *O'Connor* case arose from an investigation into liquor establishments. The St. Paul police department had reason to believe that a local establishment falsified a liquor license application.<sup>71</sup> Relying on information from the establishment's accountant, authorities believed the falsified records were in the office of attorney O'Connor.<sup>72</sup> The police obtained a search warrant for O'Connor's office, but the attorney refused to allow a search of his records on the grounds of the attorney work product doctrine.<sup>73</sup>

After being ordered to leave the records with the court, O'Connor sought a writ of prohibition to quash the search warrant.<sup>74</sup> Justice Wahl, writing for the court, examined the validity of the search warrant:

This case thus presents us with the very difficult and delicate issue of reasonableness of searching an attorney's office for documents and files of a particular client to find evidence of criminal wrongdoing . . . . Even the most particular warrant cannot adequately safeguard client confidentiality, the attorney-client privilege, the attorney's work product, and the criminal defendant's constitutional right to counsel of all of the attorney's clients. It is unreasonable, in any case, to permit law enforcement officers to peruse miscellaneous documents in an attorney's office while attempting to locate documents listed in the search warrant . . . . It will not unrea-

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69. 287 N.W.2d 400 (Minn. 1979).

70. MINN. CONST. art. I, § 10. Justice Wahl wrote, "[t]here is no question in the instant case that the warrant is based on probable cause and supported by an affidavit. We must decide, however, whether the proposed search was reasonable, even though there was compliance with the literal terms of the constitutional and statutory provisions . . . ." *O'Connor*, 287 N.W.2d at 402.

71. *O'Connor*, 287 N.W.2d at 400.

72. *Id.* at 400.

73. *Id.* at 401.

74. *Id.*

sonably burden prosecutors' offices and effective law enforcement to require officers to proceed by subpoena duces tecum in seeking documents held by an attorney.<sup>75</sup>

She found the facts of *O'Connor* distinguishable from the United States Supreme Court's ruling in *Zurcher v. Stanford Daily*,<sup>76</sup> a case decided under the federal constitution. In *Zurcher*, the Supreme Court relied on the Fourth Amendment of the United States Constitution which does not prevent a state from issuing a warrant to search for evidence simply because the owner or possessor is not reasonably suspected of criminal wrongdoing.<sup>77</sup> Hence, a search warrant is appropriate in these situations.<sup>78</sup>

Justice Wahl distinguished *Zurcher* on the grounds that, in that case, the defendant newspaper had announced a policy of destroying documents that could aid in the prosecution of protesters.<sup>79</sup> In *O'Connor* there was no indication that the attorney would attempt to destroy the documents.<sup>80</sup> This distinction obviated the need for a search warrant instead of a subpoena duces tecum.<sup>81</sup>

She further distinguished *O'Connor* by focusing her analysis on the state constitution:

A more important distinction between this case and *Zurcher* is that our decision rests not only on the Fourth Amendment of the United States Constitution, but also on Article I, section 10 of the Minnesota Constitution. The states may, as the United States Supreme Court has often recognized, afford their citizens greater protections than the safeguards guaranteed in the Federal Constitution. Indeed, the states are independently responsible for safeguarding the rights of citizens.<sup>82</sup>

Thus Justice Wahl diverged from the United States Supreme Court in interpreting the requirements for a search warrant, and

75. *Id.* at 404-05.

76. 436 U.S. 547 (1978).

77. *Id.* at 565-66.

78. *Id.* The *Zurcher* court held that a rule denying a search warrant for the premises of a third party and requiring a subpoena duces tecum was not constitutionally mandated. *Id.* at 560.

79. *O'Connor*, 287 N.W.2d at 405.

80. *Id.*

81. *Id.*

82. *Id.* at 408 (citations omitted).

the *O'Connor* decision demonstrated her continued support for an independent state constitution.

2. *In re Estate of Turner*, 391 N.W.2d 767 (Minn. 1986)

In *In re Estate of Turner*,<sup>83</sup> the supreme court upheld the constitutional validity of an estate collection statute allowing the state to recover from a decedent's estate any medical assistance payments made to the decedent after the decedent's sixty-fifth birthday.<sup>84</sup> Former Chief Justice Amdahl authored this opinion which explored whether the statutory provision in question was rationally related to a legitimate state interest and thus was not an unconstitutional denial of equal protection.<sup>85</sup>

The opinion suggested an intent to treat the federal guarantee of equal protection coextensively with the state guarantee of equal protection.<sup>86</sup> This view was addressed in a footnote that stated "the rational basis standard used in Minnesota equal protection analysis is the same as the standard used in federal equal protection analysis."<sup>87</sup>

Justice Wahl concurred specially in the *Turner* decision.<sup>88</sup> While agreeing that the statute would pass muster under both the Minnesota and federal constitutions, she was concerned that the *Turner* footnote "perpetuates confusion and continues a 'battle of footnotes' " regarding the rational basis test.<sup>89</sup>

83. 391 N.W.2d 767 (Minn. 1986).

84. *Id.* at 770 (upholding MINN. STAT. § 256B.15 (1986)).

85. *Id.* at 768.

86. Lisa Weinke, Note, *Invoking the State Constitution to Invalidate Legislation: Who's Guarding the Guardians?*, 18 WM. MITCHELL L. REV. 1073, 1093 (1992).

87. *Turner*, 391 N.W.2d at 770 n.2 (citing *AFSCME v. Sundquist*, 338 N.W.2d 560, 569 n.11 (Minn. 1983) (stating "the prohibition against arbitrary legislative action embodied in the state equal protection clause, Minn. Const. art. I, § 2, the state uniformity clause, Minn. Const. art. X, § 1, and the state special legislation clause, Minn. Const. art. XII, § 1, are coextensive with those afforded by the federal equal protection clause, U.S. Const. amend. XIV, § 1")).

88. *Id.* at 771.

89. *Id.* She wrote,

By footnote in a 1981 opinion, *Wegan v. Village of Lexington*, 309 N.W.2d 273, 281 n.14 (Minn. 1981), we indicated the rational basis standard under the Minnesota constitution differed from the federal standard. By footnote in 1982, *AFSCME v. Sundquist*, 338 N.W.2d 560, 570 n.12 (Minn. 1983), we stated that the federal and Minnesota state standards were "coextensive." By footnote in 1984, in *McGuire v. C & L Restaurant, Inc.*, 346 N.W.2d 605, 613 n.10 (Minn. 1984), we again declared that the state and federal standards are different.

*Id.* at 771.

Justice Wahl was troubled by the existence of conflicting footnote statements that left the legal community uncertain about the relationship between the state and federal rational basis standards. She stated, “[t]o say that the wording of the rational basis test in Minnesota case law merely represents a different way of stating an identical federal test . . . distorts and minimizes significant distinctions in . . . Minnesota cases [that] have applied rational basis analysis.”<sup>90</sup>

The justice concluded her concurrence with a query to the court: “I would question whether we should harness interpretation of our state constitutional guarantees of equal protection to federal standards and shift the meaning of Minnesota’s constitution every time federal case law changes.”<sup>91</sup>

*Turner* provided an opportunity for Justice Wahl to present her definition of the Minnesota rational basis standard and to distinguish this test from the federal rational basis test. She insisted that the independent Minnesota constitutional standard be adopted in order to “move toward realism and protection of constitutional rights, [the] court’s proper function.”<sup>92</sup>

### 3. *State v. Russell*, 477 N.W.2d 886 (Minn. 1991)

In *State v. Russell*,<sup>93</sup> Justice Wahl had occasion to respond to the query she raised in *Turner*. The *Russell* court articulated and applied the independent Minnesota constitutional rational basis standard.<sup>94</sup> Justice Wahl, writing the majority opinion, cited her final query in *Turner* and added that the continual shift in mean-

90. *Id.* at 771 (citing *Guilliams v. Commissioner of Revenue*, 299 N.W.2d 138, 142 (Minn. 1980) (providing the framework for the Minnesota rational basis test)).

91. *Id.* at 773. Justice Wahl acknowledged that scholars disagree as to whether a state court’s interpretation of a state constitutional requirement of equal protection should be tied to a similar provision in the federal constitution. *Id.* (citing a comparison between authors favoring the federal-state uniformity and those favoring independent state standards).

92. *Turner*, 391 N.W.2d at 773.

93. 477 N.W.2d 886 (Minn. 1991).

94. *Id.* at 888. The court delineated a three-prong test:

(1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

*Id.* (quoting *Wegan v. Village of Lexington*, 309 N.W.2d 273, 280 (Minn. 1981)).

ing of the equal protection standards would “undermine the integrity and independence of our state constitution and degrade the special role of this court, as the highest court of a sovereign state, to respond to the needs of Minnesota citizens.”<sup>95</sup>

In *Russell*, the court upheld the invalidation of a state statute imposing a greater penalty on possession of cocaine base as opposed to powder base.<sup>96</sup> The defendants moved to dismiss the charges on the grounds that the statute violated federal and state guarantees of equal protection.<sup>97</sup> The trial court applied the federal rational basis test<sup>98</sup> and invalidated the statute on the grounds that there was no rational basis for the statutory classification.<sup>99</sup>

Justice Wahl’s opinion recognized that a rational basis standard was applicable, but reasoned that the state guarantee of equal protection imposed a greater test of scrutiny than did the federal constitution.<sup>100</sup> However, in a forceful dissenting opinion Justice Coyne argued that the Supreme Court has, with a few exceptions, treated the federal and state equal protection clauses similarly.<sup>101</sup> Citing *Turner*, Justice Coyne noted that the court has determined that the rational basis standards are the same and a review by the Court would be substantive at best.<sup>102</sup>

95. *Id.* at 889 (citing *In re Estate of Turner*, 391 N.W.2d 767, 773 (Minn. 1986)).

96. *Id.* at 888. MINN. STAT. § 152.03 subd. 2 (1989) provided in part:

A person is guilty of controlled substance crime in the third degree if:

- (1) the person unlawfully possesses one or more mixtures of a weight of three grams or more containing cocaine base;
- (2) the person unlawfully possesses one or more mixtures of a total weight of ten grams or more containing a narcotic drug.

*Id.*

97. *Russell*, 477 N.W.2d at 887.

98. *Id.* The federal rational basis test requires (1) a legitimate purpose for the challenged legislation, and (2) that it was reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose. *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 101 S. Ct. 2070, 2083 (1981).

99. *Russell*, 477 N.W.2d at 888.

100. *Id.* She wrote,

Even if we were to agree with the state’s argument as to the analysis under the federal test, we strike the statute as unconstitutional under the rational basis test as articulated under Minnesota law. Since the early eighties, this court has, in equal protection cases, articulated a rational basis test that differs from the federal standard.

*Id.*

101. *Id.* at 895.

102. *Id.* at 902. Justice Coyne stated:

The argument that Minnesota applies a rational basis test that differs from the federal standard has been put to this court before and emphatically rejected . . . . What the majority has actually done here is to engage in substantive

That *Russell* and other recent supreme court decisions<sup>103</sup> have met with severe criticism from the bench<sup>104</sup> suggests that the supreme court is polarized on the issue of whether or not the Minnesota Constitution should be expansively interpreted.<sup>105</sup> With Justice Wahl departing the bench, there may be a movement toward judicial restraint. However, Justice Wahl has left a long line of majority and dissenting opinions that cannot be overlooked should the court seek to move away from independent constitutional interpretation.

### III. CONCLUSION

Justice Wahl's decisions over the past seventeen years have had an effect in many areas, most notably in criminal constitutional law. That Justice Wahl has had her share of dissenters should come as no surprise. She is strong in her convictions and thoughtful in her decisions. These are traits that can breed conflict. Justice Wahl will, however, be missed on the bench. From the depth and expanse of her opinions, one can see that she successfully sharpened the vision of the Minnesota Supreme Court with the "second lens" she brought to the court.

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review—the kind of review epitomized by *Lochner v. New York* . . . . In short, substantive review replaces an appropriate standard of review, not with a stricter standard, but with no standard at all.

*Id.*

103. See, e.g., *Friedman v. Commissioner of Public Safety*, 473 N.W.2d 828 (Minn. 1991) (holding that under the Minnesota Constitution the right to counsel attaches at the time of arrest) (Coyne, J. & Keith, C.J., dissenting)).

104. In *Friedman*, Justice Coyne dissented emphatically in arguing that *Nyflot v. Commissioner of Public Safety*, 369 N.W.2d 512 (Minn. 1985) was controlling in the instant case:

Denying what seems to me the clear import of *Nyflot*, the majority has neither articulated a satisfactory rationale for disregarding the decision nor proposed a sound basis for interpreting the Minnesota constitution . . . . Bluntly stated, the majority has made no attempt to explain why a person arrested for drunk driving is entitled to special treatment: until today at least, no one arrested for any other crime has been accorded a constitutional right to consult a lawyer before submitting to a search.

*Friedman*, 473 N.W.2d at 838 (citations omitted).

105. See Weinke, *supra* note 101, at 1081 n.53. This same author suggests that the tension between Justice Coyne on the one hand and Justices Wahl and Yetka on the other was also apparent in *State v. Fuller*, 374 N.W.2d 722 (Minn. 1985). Weinke, *supra* note 101, at 1080 n.40. In *Fuller*, the court had an opportunity to use the state constitution to extend the double jeopardy doctrine. While acknowledging the right to use the state constitution, the court refused to do so. *Fuller*, 374 N.W.2d at 726-27. Justice Wahl dissented and argued that the court should not be inhibited from exercising the right and responsibility to apply the independent protection of the state constitution. *Id.* at 727 (citing William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977)).

