Interview with Doris Ohlsen Huspeni
Minnesota Court of Appeals
Oral History Project
August 4, 2017
KH: It is August 4, 2017, and I’m here in Lindstrom, Minnesota, to do an oral history interview with retired Minnesota Court of Appeals Judge Doris Ohlsen Huspeni. The Minnesota Court of Appeals Oral History Project is sponsored by the Minnesota Supreme Court Historical Society with funding provided by a Minnesota Historical and Cultural Heritage Grant. My name is Kim Heikkila. I own and operate Spotlight Oral History and I will be conducting the interview today.

And just so we know, Judge Huspeni’s son, Mark, is in the room as well so if we hear another voice, that’s who that’s from.

DH: Yes, he keeps me on track.

KH: So thank you so much, Judge Huspeni, for agreeing to share your experiences and your insights regarding the founding and the early years of the court of appeals.

DH: And thank you for inviting us to share those experiences.

KH: Yes, it’s a great project about a great piece of Minnesota history.

DH: Good.

KH: All right, so I’m going to start by asking you some questions that you can give very brief responses to just so that we have them up front and then we’ll launch into the story at hand here. So I know I just said it, but if you could state and spell your full name that would be great.

DH: Okay. Doris, D-o-r-i-s Ohlsen, a Danish spelling, O-h-l-s-e-n, Huspeni, a Bohemian spelling, H-u-s-p-e-n-i.
KH: Thank you. And when and where were you born?

DH: I was born in St. Paul [St. Paul, MN], 2/19/29 and they—everybody looks surprised that anybody’s living that long, but they are so—

KH: Here you are.

DH: Here I am.

KH: Proof positive. And again, we’ll come back and fill in some of these details but if you could just start by telling us what law school you attended and when you finished law school.

DH: I attended what was then Mitchell [formerly William Mitchell College of Law; now Mitchell Hamline School of Law, 875 Summit Avenue, St Paul, MN 55105]. It was, I think we were solely a night school when I started in ’65, and because I had a law school baby, as I mentioned earlier, I graduated in ’70. So I took the scenic route that last year.

KH: Okay. And I know you have many other experiences in your legal career prior to your appointment to the court of appeals but how long did you serve on the court of appeals?

DH: I actually served from 1984 to 1998 as a full-time real judge, and then what they did for us and to us, we’d retire because we had to retire at seventy, and then they’d turn us around and bring us back as a senior judge or retired judge. So I worked as a senior judge from 1998 until I started my whack-a-mole journey with cancer in 2015.

MH: Two thousand.

DH: I was eighty-five when I left.

KH: Okay.

DH: So I worked for fifteen years then as a retired judge.

KH: Okay. And now you are fully retired?

DH: Yes, I’m finally and fully retired, right.

KH: Okay. All right. Thank you. So, Judge Huspeni, if you could start just by telling us a little bit about your own background and how you ended up making your way to law school.

00:05:00

DH: Well, I think I indicated to you that in 1961 we had three sons and I gave birth to my fourth baby in October that year and after three boys we had a daughter. She was perfectly formed on the outside but her diaphragm had not closed and so she died at birth. And my husband, who I describe as an angel—and he really was, for 1961, he was an angel, and he always was—but he said, “You always wanted to go back to school and I’m not going to let
you go home and be depressed about losing the baby,” so he practically lifted me out of the hospital bed and flipped me in the classroom.

Well, I graduated from the “U” [University of Minnesota, Minneapolis, MN] in 1964, and I had to take that degree in absentia because I was having a fourth son. And that son is now the Vice Provost at the University of Wisconsin at Stevens Point [University of Wisconsin Stevens Point, 2100 Main Street Stevens Point, WI 54481-3897]. So I then came home and I had four sons and still I thought, Well, I should be doing something, and so my husband again said, “Well, you know, there’s a night law school over there in St. Paul and you should think about that.” And it was all over before it began. And the—I forget what his title was—admissions something or other—was Jack Davies [Jack Davies, 1932-] and, of course, he has become a lifelong friend and is now a retired judge from our court.

KH: So Judge, what was your degree in from the University of Minnesota?

DH: From the university I took a sociology degree.

KH: Sociology? Okay.

DH: Yes.

KH: Now when you were growing up, you were born in ’29, when you were growing up kind of in the middle of twentieth century America, was it on your radar, or your family’s radar even, that you would go on as a young woman and a young wife and mother to pursue a college education?

DH: It was on my radar but it was not on my parents’ radar. My mother was a wonderful woman and I owe her so much. I wish I still had her to thank her. But she said, “Doris, you’ll never pin on a diaper any better with a college degree than without one.” That was her world. I wanted to be a doctor but I realized—well, when I started at the “U” in 1946, I took a German class because I wanted to be a doctor, and I fell in love with this fellow student and I don’t think we learned much German but we stayed together for sixty-four years. We were married in ’49. So then I—those were the days when you put your husband through college because that was what was important. And so for a husband to be—well, here’s what our social—we had a large social group—and those men said, Joe, you’re letting her go back to school. You know what she’ll do? She’ll get an education; she’ll get independent; and she’ll leave you.” And he said, “Oh, I don’t think so.”

I mean, he with his leather patches on his sweater and his pipe and engineer’s type. I had put him, well not me alone, but I had worked, taking my lunch hours off to have my babies, to get him through school. Then he said, “You know, now it’s your turn, and if you’d like to think about the law, you seem to be interested.” And I loved it; well, I love the helping profession and I knew I couldn’t, with a houseful of babies, I couldn’t go back into medicine and the long clinic hours so I thought, Okay, I’ve got to get through this; what can I get through? And so I chose that major. I owe those professors a lot just learning about life, I think, from them. So that degree, as I say, I took in absentia, because I even arranged with those professors to
take my last final early. I thought I had everything planned out and I’m a control freak. I have—and the baby came early, so I still had two finals to take and I came back after Todd was born.

So then in ’65, I started law school and in ’68, Laura was born. And interestingly enough, she graduated from St. Thomas [now University of St. Thomas, 2115 Summit Avenue, St Paul, MN 55105]. It was a college when she started; it was a university when she finished. She took some classes in my old law school building and I asked her if she ever felt, you know, like this was déjà vu all over again, like Yogi Berra says.

MH: Yes, November of ’68.

DH: Yes. And then when I graduated from law school in 1970. I probably knew the name of every lawyer, woman lawyer in Minnesota; if I did not know her personally, I knew her name. And so when governors began to look at women to put on the bench, they didn’t have very many to look at. But I’ve always felt, and Sue Sedgwick [Susanne C. Sedgwick, 1931-1988] was a real team leader. I always felt that we were—I won’t call it running scared, but I think we had the feeling that we can’t just be mid-performing or mid lawyers or on the bench. We had to be at least as good as [the men], if not better, and so we worked hard. And I think—well, I know I give a lot of credit to Sue and those early judges because if they hadn’t done a good job, it wouldn’t have opened the doors for so many.

KH: So tell me a little bit—and I know you were talking about this before we started recording as well, but you’re in law school from ’65 to ’70, so that’s right at the time that the second wave of the women’s movement is really starting to pick up and become very vocal. What were your experiences in law school and then maybe, even in your early legal career, as a woman? How many women do you remember being in your class at law school?

DH: I started with a class of one hundred six—I think that’s right—four of whom were women. At the end of the first year, two had dropped out so when we went into the second year, there were two of us in that. There were only eighty-six of that one hundred six left, two of whom were women. And the other one, and I admired her so, the other woman was Dr. Jane Hodgson [Jane Elizabeth Hodgson, 1915-2006]. She was going to law school—she was an OB-GYN [Obstetrician-Gynecologist] —and she was going to challenge the abortion law. She was going to perform what would have been then an illegal operation.

Well, to make a long story short, the one kind of humorous incident with her—she’d come to class at six o’clock and we’d be in class from six to ten and she’d tell me that she’d performed four OB-GYNs on that day and my mind would just boggle at how she could juggle. Well, as it happened then, she dropped out after the second year and I could see why because she was managing two careers. But the security people at the law school used to say, “Please tell Dr. Hodgson not to hang her mink coat out in the hallway because our security isn’t that strong and we don’t want her to have somebody steal it.” So, anyhow, she hired Stu Perry [Stewart R. Perry] then, I think, to argue her case before the Supreme Court. Then we all knew how Roe v. Wade (1973) and that whole story came.
This is very personal and I’ll leave it to you whether it stays in or goes out, here I was with the women’s movement really rising and I was very much in favor of full employment, full education, full everything for women. I struggled then, and I struggle now, as what? — well, I’m not even middle-aged anymore, but then I was—a middle-aged Catholic mother of five, and so I perceived the abortion issue to be the litmus test and because I struggled with that issue, I never was a fully welcomed member of the women’s movement. I think we’re more adult now about things. We don’t have the men haters that we had so vehemently in the sixties and seventies. But from the legal point of view, I think they decided Roe v. Wade too soon. If they’d have let that percolate up—and you hear legal scholars say that, Let the states be the experiment, and let that issue be fought in the states and percolate up.

But Harry Blackmun [Harry Andrew Blackmun, 1908-1999] was either the chief legal advisor or was on the legal staff of Mayo Clinic [Mayo Clinic, Rochester, MN], and he—and now this may be rumor somewhat—he sat in the Mayo Clinic Law Library and it was there that he came up with the trimester and that is, of course, running heavily through Roe v. Wade. So that is that story.

KH: So you just said that you had experienced some personal conflict between your role as a Catholic mother of five and a supporter of women’s equality in education and—

DH: Right, right. Yes, I was very much supportive and well, very much supportive of women in their full equality. When it came to the control over their body, I guess I kind of was stuck with seeing two people and so we’re still struggling with that issue but I wish so that I could—again, my friend Rosalie Wahl [Sara Rosalie Wahl, 1924-2013], used to say, “Doris, I never could probably have an abortion myself, but I don’t feel I have the right to say to my sisters or to my women friends that I have the right to keep them from having one.” I wish I could get that far and I pray that I can but I’m stuck—still struggling.

KH: Well, yes, we occupy multiple roles and multiple identities and sometimes they conflict.

DH: Right.

KH: So with that in mind, I guess my question for you is, did you have any similar kind of conflict being a wife and a mother of five and now a law student and then an attorney and then a referee, and then a judge? I mean, how did those roles work together?

DH: Well, obviously, there’s a built-in conflict. I raised my right hand and swore to uphold the Constitution and Roe v. Wade is part of that Constitution now, or part of our case law. We don’t—well, I am pretty unalterably opposed to capital punishment, too, and fortunately in Minnesota we don’t have in our state courts—we don’t have capital punishment. And we don’t have head-on issues with Roe v. Wade. I would have a difficult time both on the death penalty and with abortion cases in the federal court and I will not ever serve in the federal courts so I’m at peace with [those issues as they are heard in the federal court].

KH: Yes.
DH: And I remember there was one case that—and don’t get me started on the whole en banc thing—you’ve probably heard that from some of them already. But I remember a case that—I don’t know if I was on the panel or just—they circulated all the opinions—but it was a young girl who was developmentally delayed and was probably never going to reach more of a mental age than ten or twelve. And so there was a motion for—she was institutionalized—and there was a motion brought to sterilize her. And I accepted that, didn’t make any negative comment, and I know Harriet got back to me and she said, “Oh, I was surprised that you didn’t ask for a rehearing or something,” and I said that, Yes, what I struggle with is when there are two—when I see two people and in this case there wasn’t. There wasn’t a pregnancy and they were probably doing what was best for that young girl. She could be very vulnerable and so I did not see a conflict there. But it was thorough, what, forty years of events, it was always there, maybe not so much in my mind, as in the mind of my fellow women judges or fellow women lawyers.

KH: So how did your male colleagues, either in law school or in your legal practice or on the bench, how did they respond to this group of women who were finally making themselves known in the legal field?

DH: Oh, very, very good. As I say, I belonged to a group for a while called Feminists for Life and I don’t know what has happened to that group, but they were totally consistent with where I felt comfortable. But women were accepted and I think it was Sue Sedgwick who said, “Hey, we haul all these prostitutes into court and give them a trial or they plead guilty or whatever. Where are the Johns?” So that kind of raised—I think that was one of the good things when we say we are judge for all of the people, we have to remember that. But we, I think, we showed the practicing bar that we could be fair; that we were not biased.

I don’t know if I mentioned to you or not, the first six years on the bench I was a referee in family court in Hennepin County, and I did nothing but recommend resolving issues in marriage dissolution cases in which there were minor children in which there were minor children. And I’m glad I did that forty years ago—I guess it was forty years. I went on the family court bench in ’74, so how many years is that? That takes a little bit out of you every day of your life. And I remember saying to one of my colleagues, “You know, I wake up in the middle of night, especially when it was a custody determination,” and I’d wake up in the middle of the night and I’d turn it over one way. And, of course, this was the beginning of fathers in the delivery room so they were very nurturing right from the beginning and they were fighting for custody. And mothers, at the same time, were going into the work force, so really the babysitter had more hours with the child every day. So a lot of things were happening.

But anyhow, I said to my colleague, “I turn it over one way or the other.” And he very wisely answered and he said, “When you stop waking up in the middle of the night and turning the case over in your mind, get out of that work because you’re burning out.” And so I don’t know if I could do that now. Sometimes the lawyers would urge us to interview the children. If the child were fifteen you’d know in three years they’d be independent and able to go where they wanted, you probably answered one way, but I would think long and hard
about interviewing a five- or six-year-old. They’re suffering enough already. They feel guilty; they feel somehow that they’re to blame or they’re having to make a choice, and really all they want was the one thing I couldn’t do and that is to put mom and dad back together again.

So anyhow, I was six years in that court and you had to walk that fine line between being part of the solution or becoming part of the problem. It wasn’t helping anybody if I was crying; that was not my role. After that then I sat, you could figure it out I guess, two years on municipal and two years on district court. And district court I really, really liked because I liked the people contact. But it was kind of inevitable when I got to the court of appeals that I was viewed as the family law person. I didn’t really want to be that. I used to kid with Jack Davies that I had worked in insurance when Joe was in school and I was working, and I really liked insurance. And I said, “Jack, I’d love to be known as the insurance expert, but you already have that title,” and so we used to chuckle about that.

KH: So were you known as the family law expert on the court of appeals because of your six years as a referee?

DH: Well, I kind of think that was the perception but, you know, family law for many, many years was kind of the orphan. Judge Crane Winton once said to me as he explained why he avoided assignments to family court, “Oh, Doris, here I am an old bachelor. What do I know about marriage?” So he would never take that assignment and many judges didn’t really want that family law assignment.

KH: So was there—and I don’t want to suggest anything about this—but if family law was kind of the orphan in the legal world, were women who were rising through the ranks of the legal profession more likely to start there? Was there a correlation?

DH: That’s a wise question. Sue Sedgwick was our family law judge when she was still on the Hennepin County bench. It may have been—yes, I think it was a factor. When I first came out of law school I was—well, it was interesting. Rosalie Wahl, Roberta Levy [Roberta K. Levy, 1937-] and I had the good fortune of working—this would be anathema now—we were called “the Jones girls,” and Paul Jones [C. Paul Jones] hired the three of us for two full time positions as appellate criminal defense attorneys. And that way he would say, “I want one of you in this office at all times, a full-fledged lawyer, and I don’t care how you want to split your time, just so one of you is in this office at all times.” And it worked just beautifully. Yes, and so there were three women as criminal defense attorneys and every once in a while, we’d hear from some smart aleck, I suppose. Oh, are you a public defender or are you a real lawyer? And, you know, the people who work in the court system, the bailiffs and the clerks, they’d say, Well, we think you’re the best defense lawyers in the business and it’s just a shame we make too much money so we don’t qualify for you. So beauty is in the eye of the beholder I guess.

KH: So that’s what you did before you joined the—?

DH: Yes, before—
Before you became a referee? That was right after law school?

Right, and then I—what year was it? Seventy-three, I think—I was again, fortunate, maybe they were looking for women, but I became an associate professor at the “U” Law School. And they had just—I was on what they called soft money grant funds. Yes, I don’t know—was it grant money? And they had just hired me for another year when I got the call for the referee position.

Okay. So that’s—

And one of the—I always thought of it as a left-handed compliment—one of the professors at my college, at the “U” said, “Oh, Doris, you’ll do such a good job at that because that job requires a lot of common sense.” I thought, I don’t know whether I’ve just been insulted or complimented. But that isn’t, you can either leave this in or take it out. When Paul Anderson [Paul H. Anderson, 1943-] became our chief judge, he went around to all of us one by one to ask us how we saw our role in the court of appeals. And I said, “Oh, I see it as the mother of the court.” Well, he looked kind of puzzled and said, “Well, if that’s what you see yourself as.” So a couple of years later we happened to be meeting at the elevator or something and he said, “You know, Doris, remember when I asked you how you saw yourself as the mother of the court?” He said, “I think you weren’t fair to yourself; you’re really a good judge.” And I said to him, “Paul, you have never been a mother.” (laughter) He got more mileage out of that for several years.

Yep. So let’s talk about your appointment to the court of appeals. Before before all twelve of you in two chunks, the six and the six, were appointed, there had been this campaign. There had been a public conversation about whether or not Minnesota needed an intermediate appellate court. Do you remember hearing about that debate and, if so, what were you thinking about it at the time?

Well, I knew when the application process opened and I wish I had a clearer, maybe some of my colleagues will have a clearer memory of—there was in your history—by the way, I have to tell you this. If I weren’t a lawyer, I would be what you are. I just think if we don’t know where we’ve been, we sure as heck don’t know where we’re going.

Yes.

And we don’t know enough about history.

But there had been in ’83 an action, I guess, against one of the Supreme Court justices and I’m sorry I don’t remember his name [John J. Todd, 1927-], but I think he had taken the bar, was taking the Florida bar exam and he’d taken a book in. Anyhow, they were trying to impeach him and because he was a Supreme Court justice, as I recall, they decided to let the six new judges on the court of appeals decide that case. Well, then—this may be rumor; you’ve got to check me out on this—may be rumor, may be fact—anyhow, there was some publication of the thought or a rumor that they may be split. At that point, they knew that I had been announced, and so this had to be late fall of ’83, I think. So some wag said, Oh, well,
maybe we should advance Judge Huspeni’s appointment and let her be the tie breaker and I thought, Wow, what a—

KH: Welcome.

DH: what a welcome.

MH: Yes.

DH: You’re the tie breaker and everybody will hate you. Well, it turned out that they were able to resolve it so I didn’t get appointed, thank goodness. But we all six were appointed as of April 1, and as I say, again, it might have been rumor, but I think it was very wise that we didn’t have to run [for election] all [at once]. Six of them ran in ’84, did I say? And then the other six of us didn’t have to run until ’86.

KH: And why do you think that was a benefit to the court?

DH: Well, because—it’s kind of hard. That’s why I know—well, I don’t know whether that is rumor. I think it was a benefit because if there was opposition to one governor being able to appoint a whole court, that at least took a little bit of the steam out of that. So much has changed. The first twelve of us ran in—half in ’84 and half in ’86—we didn’t get any opposition. The first one I think to get opposition was Fred Norton [Fred C. Norton, 1928-2000] and Fred had been, oh, gosh, I think he had been Speaker of the House if I recall, but a very active legislative career. And I forget who ran against him. It was not a terribly—what should I say? It was a fairly close race, closer than anybody had thought. And after that, each year we got more and more opposition. And especially if we didn’t have anybody running from the Supreme Court. Then they’d look at our court and see, and your reference is probably better than mine on that. Jim Randall [R.A. (Jim) Randall, 1940-] had opposition. Terri Stoneburner [Terri J. Stoneburner, 1945-] had opposition.

I know a few years ago when Kathleen Blatz [Kathleen Ann Blatz, 1954-] was retiring, I happened to sit next to her at lunch—and her father, of course, was very active, a legislator—and she said, “You know, those were such good days. We used to reach across the aisle and, you know, compromise is the art of politics.” Yes it is. And she said, “We just don’t do that anymore.” And so I think, unfortunately, our judicial branch has become political and that’s unfortunate. I mean those forefathers of ours were so wise when they made three branches of government, each to be a check and a balance on the other. I’ve always felt that the judicial branch should be the quiescent branch that only invokes its authority when it’s called upon to do it. But I’m afraid it is becoming more politicized and I don’t think that is good for us. There’s a reason why the legislative branch is Article 1 of the Constitution. We didn’t want George III repeated here. We’d had enough of George III, and we wanted—I think, you’re the expert—we wanted a weak executive and when Congress doesn’t do its job, it leaves a vacuum, so we get all the executive orders that nobody seems to like no matter who
writes them. So I don’t know. Are we going to become more polarized or are we finally going to come around?

KH: I hope the latter. Sincerely.

DH: I’m with you.

KH: Backing up to when the first twelve of you were appointed, can you tell me a little bit—because I would like clarification myself as well as on record—did you have to submit—throw your hat in the ring, so to speak, apply for these positions that everybody knew was coming? That there would be these appointments to the new court of appeals? How did you get that appointment?

DH: My recollection is that we did submit and my memory is a bit foggy here, but I do remember Governor Perpich saying to a group of women at a meeting in January 1984, “Doris, I hope you and Judge Sedgwick are good friends and good colleagues because you’ll be sitting on the same court.” And he said, “This is not going to leave this room because it’s not for publication.” And I remember being proud of the ability of these women to keep that secret. But then I think when the case of Justice Todd was being decided by the first six judges of our court some source or publication suggested that maybe I should be added to the six to break a rumored tie. And I thought, Oh no, please not me, please not me. (laughter)

I was appointed to two courts by a Republican governor and one court by a Democratic governor. I was never political. A colleague said to me, “Doris, you sound proud of that. Maybe you shouldn’t be.” But I believe I was the first in seniority of the second six judges on the court of appeals.

And, oh, my goodness, how we are—well, I call it slaves [to seniority], how we abide by seniority. They wanted to know how you’re sworn in because even when there was a seminar and they had assigned rooms, they’re assigned by seniority.

KH: Very important. Justice Todd. Was that it? The Supreme Court justice who had been—?

DH: I’m sorry.

MH: Kim said, “Justice Todd.” Was he the one—

DH: Oh, yes.

MH: who maybe got in trouble with bringing a law book into the bar exam or something?

DH: Right, yes.

KH: So when you were appointed to that court of appeals, did you have a sense that you were making history in the state of Minnesota?
DH: Yes, and now my figures are probably off a little bit, but we were about the thirty-seventh state and we were by far, I think, the most populous state not to have an intermediate court. And what would happen—and here Justice Amdahl [Douglas K. Amdahl, 1919-2010] deserves so much credit—but what would happen we would have summary affirmances. The Supreme Court was the only appellate court that we had and we didn’t know what they were thinking.

End of Recording 1
01:02:08

Beginning of Recording 2
00:00:00

I mean, they were so overburdened that it was hard to do anything. So they made a strong appeal for an intermediate error-correcting court and they got approval by the legislature. And they perceived, I think, but you’ll see as you go through the legislative history, I think they were expecting some opposition to one governor appointing a whole new court. And so that was a sales challenge that was successfully accomplished. I’m not sure in today’s climate that we’d have gotten it.

But I think—well, it’s self-serving, but I think they made a good choice in that first twelve. And it was interesting that—and I think I mentioned this earlier—eight of us were former trial judges and four were former practicing attorneys. Randall and Nierengarten [Roger J. Nierengarten, 1925-2013] were practicing attorneys and who else? Harriet was a judge I think in St. Paul. Ed Parker [Edward J. Parker, 1927-2012] I think, was a judge in Hennepin. Dan Foley [Daniel F. Foley, 1921-2002] was a judge down in southeastern Minnesota. Oh, Don Wozniak [Daniel Donald Wozniak, 1922-2005] came out of private practice and Peter Popovich [Peter S. Popovich, 1924-1996] [was from private practice]. Is that four?

KH: Yes, that was four.

DH: Okay. And Peter Popovich for all his other qualities, he was a statistic keeper and after we’d been working together he mentioned, “Hey, you know, you who were prior district court judges, you reversed your former colleagues more often than those who came out of private practice.” And I thought to myself, Peter, you know more than you need—you’ve got time on your hands.

But I think it took a while for us to shake our district court—I don’t know how to put it—discretion. Just for example, I, and I think my memory is right here. I had a case early on, Moylan v. Moylan, and, oh boy, I can almost recite the language. I said, Oh, it would have been nice to have fuller findings but we can look—we feel confident that we can look and find support for what the trial court did. And so I think we affirmed, and it went up to the Supreme Court and they said, “No, you cannot sustain that reference and find support. You need to require full findings from your district court. And you have to remand.” Well, I don’t know—you can have this—do you want to take it? I wrote this article back in ’88 I think.
MH: Do you want your glasses on, Mom?

KH: So I can take this? Thank you.

DH: Wait a minute, not that. Oh, that’s it, yes.

KH: Okay.

DH: Anyhow, the Supreme Court got it and said, “Oh no, you’ve got to remand that.” So then we started remanding because the Supreme Court told us we had to and so then the attorneys got—family law attorneys are a close family and so they saw all of these reversals and so they said, If you don’t like your decision in your family law case, well, just give the court of appeals a few months. They’ll change or they’ll reverse or whatever. So somebody had to set them straight so to speak. And I don’t know whether I gave a speech—I was always on the rubber chicken circuit back then and I must have given a talk and somebody came up to me and said, “Will you set us straight about what your reversals really mean?” And so, you can have that.

KH: Okay. Thank you. I’m just going to read the title in so we can get it on the—

DH: Yes.

KH: This is an article that Judge Huspeni wrote called “Family Law: Appellate Opinions on Trial,” and it was published in the Bench & Bar of Minnesota [Bench & Bar of Minnesota, 600 Nicollet Mall #380, Minneapolis, MN 55402] in August of 1990. So we have that as well.

DH: Yes, that you can have.

KH: Okay.

DH: And then, too, well, tell me when to shut up—

KH: No, no, you’re good. So what do you remember of that first year? When I talked to Judge Crippen [Gary L. Crippen, 1936-] a couple of days ago he talked about just the relentless pace of the work in not just the first year but several years.

DH: Oh, yes, absolutely. And from 1983 to 1987, we’d publish everything and this is kind of an inside joke, but we, for a whole lot of reasons, we decided that we were filling some of the interstices of the law that needed filling up because we hadn’t had that intermediate court. It’s also that the attorneys were saying, Hey, our shelves are getting full. We were publishing everything. So then in late ’87, we decided to pull back. Of course I haven’t been on any panels since three years ago. Judge Randall is still taking cases and he would be good insight on that but I think we still have a very—well, discussion maybe, about how many we should publish through this pulling back and pulling back and a lot of times we’ll have lots of
these non-published cases cited to us and then that makes some of us think, Well, maybe we should publish more than we do, but we’re always trying to find the sweet spot I suppose.

KH: Is there a—what is the risk or the negative possibility if you don’t publish enough opinions?

DH: Well, I think that we have to be careful that we aren’t not publishing something that would really be helpful for publication. It’s a hard balance to find and especially during a family law case, it’s important to—you’ll see in that article they try—“they” meaning attorneys—try to find precedential value in a case that is simply recognizing the broad discretion of a trial court in affirming the trial court—Family law is unique. Every family is unique. And when we affirm, it’s pretty hard to squeeze anything precedential out of that because very, very often an affirmation means only a recognition of how broad this trial court discretion was.

KH: Rather than suggesting that that particular decision should apply therefore to every subsequent—

DH: Yes.

KH: similar case?

DH: Right, right. And, as I think I mention in the article, it’s when we outright reverse and say, Sorry, trial judge, you have erred and this is not a true statement of the law, that prevails as precedent until and unless the Supreme Court reverses as they did in Moylan.

KH: Right. So the court of appeals was founded to relieve this great burden that had fallen on the Supreme Court with just this overwhelming number of cases. But, as you said earlier, the court of appeals was designed to be expressly and to some degree, solely an error correcting court so you’re talking about the precedential value of some of the court of appeals cases. And I know in reading and getting ready for these interviews I came across an article, I think, where somebody was raising the issue about what she saw at the time as kind of the ambiguous position of the court of appeals’ decisions with regard to the precedential value of the decisions that it issues. So can you tell me a little bit about the relationship, whether about precedent or otherwise, the relationship between the court of appeals and the Supreme Court.

DH: That’s a very wise question and you probably have better statistics on this than I do, but I think decisions made by the court of appeals—I think in 80 percent of the cases, that is the end of it.

KH: I think it’s even higher. I think it’s like 90—

DH: Well, yes, I have to be careful. Either it’s the end of it because they don’t appeal any further or the attorneys do petition for cert [certiorari] but the Supreme Court denies it. And so of the—yes, my statistics are probably weak here, but of the very, very few cases, and it’s probably only about 5 percent that are petitioned for review, a very small percentage are
granted. Now we figured early on that they weren’t going to grant review of our cases just to tell us what a great job we did. (laughter) So it’s about two thirds.

And I’ll tell you who’s going to be your source of all that is interesting is Cindy [Lehr]. I have said for thirty years if Cindy were to ever vote with her feet we would have to close shop. She knows everything and she came on very early so she would be a good one [to talk to], but usually when we see that our Supreme Court has granted cert we know they’re going to do something. They’re either going to reverse us in saying we were wrong, which is their right to do, or they will at least tinker with something, modify something or clear up something. The Supreme Court is our doctrinal, our philosophical court, and we should remember what our role is—sometimes we remember better than others.

Dissents and concurrences appear occasionally in our opinions. They express a contrasting or clarifying view. All of our cases are heard by three-judge panels unless you’re writing a concurrence or dissent. And it is a lot of conferencing and sometimes re-conferencing because you want to hold a panel together if you can, if you can get everybody to agree. Now when you’re in panels of three—the Supreme Court sits, all of them sit on their cases—and so as our numbers grew, we were able to have a shorter timeline and wrote many more cases.

And hearing that rumor of—probably more than a fact—but questions we ask about the quality. Is the quality maintained when they have these huge numbers of cases? I think the fact that you’ve got—well, we started out with four panels of three and then when Fred came on, he was number thirteen and then I think we got fourteen, fifteen and sixteen altogether and then we got seventeen, eighteen and nineteen. Now the caseload has remained pretty steady so we are at nineteen now. I said, Hey, maybe we could—well, when we started pitching for new judges and the legislature has been very good to use and so has the governor, giving us nineteen. I’d sometimes talk with Ed Toussaint [Edward Toussiant, Jr., 1941-], our former chief judge, and say Well, how many judges do we need? “Well, Doris,” he said, “I’m a sharecropper’s son and you’re a daughter of the Depression, and all we know how to do is work.” And so, he said, “Maybe we have a different attitude.” I don’t know, but I think we’re issuing good opinions, well thought out opinions, and we’ve got nineteen judges to do it and that’s fine.

KH: So what do you hope, kind of moving towards wrapping up here, what would you like to see for the future of the court of appeals?

DH: Well, I’ll tell you the one thing that I was glad that we don’t have any more and I don’t think we do, is I think that en banc hearings in our court were not good. They tended, unfortunately, to form blocks where they shouldn’t be and when the possibility of en banc was there, it was possible that the en banc panel could actually take the case away from the original three who’ve heard it because in en banc, and you could check with Cindy, I think that the en banc panel would be the original three and then the chief judge and three others, I think, I could be wrong. But I think it was unfortunate choice. And, as I understand, we don’t have that anymore and I think that has been a good—

KH: A good thing?
DH: Yes.

KH: And so in what situations—?

DH: As far as the future, well, I hope we—you know, it’s kind of interesting. The first twelve of us came on, well, came on at six and six and then each additional one has been one by one or three by three. I think, fourteen, fifteen and sixteen came on together and seventeen, eighteen, nineteen came on. But it becomes a different court every time somebody joins it and so I used to say that we were not only a collegial court, but we were a congenial one and I hope that maintains and grows.

We are on panels. We used to be, I think, in the early years, we would be together for three months or so. Now I’m not sure what they do. But some panels were able to work together maybe—well, I don’t know how to say it, but probably more congenial than others. I always say to Jim Randall if we didn’t have him, we’d have to invent him because he keeps a very close eye on criminal defense appeals. And so when I was working, when I’d see him pass on or affirm a criminal defense case, I know that it has been given a very good looking over. And that’s good to have that and I hope that circulation continues. I don’t pretend to know what they are doing now but I think it’s good to have everybody included.

KH: What do you—do you think that congeniality that you were just talking about among the judges on the court of appeals, is that unique to the court of appeals? Is it unique to Minnesota? What do you think accounts for that congeniality?

DH: Well, I’d like to think that we can agree to disagree agreeably, if that makes any sense. There was a method to hearing cases in groups of three because, obviously, that permits us to be many courts, and my one friend, Roger Nierengarten, who—God rest his soul—when we were twelve, and we would circulate through all the judges, he’d say, “I want to dissent. I don’t like that opinion.” And I’d say, “Roger, you can’t dissent because you weren’t on the panel.” “Well, I’ll never follow that case if I was, with facts like that. I’ll just write my own.” And I don’t know if he ever had to or not, but that was kind of the lone wolf in him and he was—well, he had come out of private practice and he still had some of that lone wolf in him. He was a wonderful friend and colleague.

KH: So that took care of some of that

DH: Yes.

KH: potential conflict?

DH: Yes.

KH: So Judge, you have shared a lot about this history and I’m sure you have a lot more to share but in the interest of time, just to close up here, is there anything else that you want to say, to get on the record before we wrap things up? Anything we haven’t talked about?
DH: Don’t get me started. I wish—well, I always wish to hear my—well, I mean, I hope it wasn’t arrogance, but I like to hear my voice in my opinion and I didn’t always accomplish that. I wish I had put in more often my real allegiance, if that’s the word, to the tripartite vision of government. Occasionally I had the opportunity to say to—well, it was usually an appellant who was losing, I wish I’d had more of an opportunity to say to that person that maybe his or her more appropriate appeal would be to the legislature. And I’d occasionally say, and I didn’t mean it to sound arrogant but if it was the constitutionality of a statute that was being attacked, I’d occasionally say, The legislature can pass smart laws or they can pass dumb laws, but all we can do is tell you whether or not it’s constitutional. And if it’s constitutional, then if you want a change, you should get over there and put them to work. Nowadays it doesn’t seem like they could accomplish very much.

We’re not supposed to editorialize so you try not to but I always admired John Simonett’s [John E. Simonett, 1924-2011] writing because it’s just like you can hear him talking. And I knew his opinions were so readable and I mean—well, they told you what his opinion was and they told you in very clear and, I think, common sense. And when my law school colleague told me, “Oh, you’ll be just great because that job,” my first job, “is going to take a lot of common sense.” And I’ve thought about that through the years and it seems to me if the law doesn’t make common sense then it’s no wonder that we have people, hopefully peaceably, protesting, but it’s no wonder that people are saying, This is a crazy law, and it doesn’t make sense.

But, you know, you look back when you’re about ready to exit, and you say, Should we be thinking of a legacy at all or should we just say, I tried to do my best; I tried to keep matters from getting any worse? I’ve always had a sneaking suspicion that when you end up in court, some institution or some method of resolution—with the possible exception of criminal law, you may have to be there—but I think for all civil cases, and maybe this is my family law background, but I think the individuals can make far better decisions for themselves than we can make in court for them. If they can’t, that’s what we’re here for, but they’ve forgotten more about their case than I will ever know or that we as a court system will ever know. Therefore, for the future, I would like—oh, I would like to see more cases settled by the people themselves, whether it’s over a case of spoiled strawberries or most assuredly when it’s about what is best for their children, or the least detrimental alternative, because those children don’t deserve that. What they do deserve is a family that is together and loving; that’s what they want. And that the court can’t give them. Once in a great, great while the parties will hear my lecture about it’s never too late; it’s never too late to reconcile. Sometimes you can’t. I recognize that.

But just when I think I begin to have a glimmer of what the correct answer might be, we’ve become dinosaurs and nobody listens to us anymore. We’ve got a lot to say but not too many people are interested in hearing what we—and times change.

KH: Well, thank you so much, Judge Huspeni—
DH: Oh, thank you.
KH: for being part of this project.
DH: Thank you for coming up here.
MH: Thank you so much, Kim.
KH: No problem.
DH: And whenever you want my brain, you’re welcome to it.
KH: Thank you. I will keep that in mind.

End of Recording Two
00:45:42