TRI-COUNTY BAR

Buffalo, Jackson, Pepin & Trempealeau

Vol. 14, Nº 3 *Fall, 2009*

TRICOUNTY BAR NEWS

The Midwinter Meeting of the TriCounty Bar Association will be held on Friday, January 8, 2010 at the Family Farms Market in Eleva. Seminars beginning at 1:00 pm include:

- When right to counsel attaches in civil matters;
- Things civil attorneys should know about criminal matters;
- Landlord/tenant from the tenant's perspective;
- The domestic partnership law;
- An ethics presentation by Nerino Petro, and;
- The ever popular and interminable Case Law Update.

Lunch is available before the meeting. There is no bar, so President Mark Franklin is stocking a couple coolers in the parking lot. First smoking, and now this!

Is this now-Pres. Franklin's effort to avoid the traditional purchase of after-dinner drinks? Is incoming president Mark Skolos part of a conspiracy? Will the Treasurer be inundated with requests for partial refunds of annual bar dues from irate bar members?

Bob Hagness is examining the TCB corporate bylaws to see whether holding a midwinter meeting at a location that encourages attendance during the CLE portion is grounds for impeachment. He is also considering technology needed to allow attendance at the educational portion of the meeting by teleconference from the tavern.

Julie Weber (formerly Julie Smith) of Menominee, who frequently appears in Buffalo and Pepin Counties, is due to deliver her first child on December 11. As if that is not enough change in her life, she is also ending her long association with Bill Schembera to start her own practice in River Falls in January. I hope she borrows Autumn Lindquist's slushy machine for margaritas at her office open house.

Susan Fisher has left Kostner Koslo and Brovold to join Legal Action of Wisconsin.
Altruism?
Fewer miles to commute?
Fewer guys named Bruce?
More guys, whatever the name?

Whatever the reason, we wish her well. Legal Action's gain is our loss of a truly gracious and talented attorney.

A residential foreclosure mediation program is likely to start in Buffalo and Pepin Counties for all 1-4 unit owner occupied residential foreclosures filed after January 1, 2010. A creditor must serve information on the mediation availability and an application form on the homeowner at the same time as the Summons and Complaint. If the borrower requests mediation, the lender must participate in person. The request does not stay the proceedings. Homeowners will work with a trained housing counselor to prepare their mediation proposal.

Jackson County has also started a foreclosure mediation program of slightly different design, which has been operating for some time now. Eau Claire is also working on finalizing one and La Crosse

is holding preliminary discussions.

Judge Damon is starting a Domestic Violence Review Court in Trempealeau County. Monthly in court probation reviews will monitor compliance with probation rules, assessment and treatment programing. Its goal is to increase victim safety by enhanced monitoring, combining offender treatment with regular court involvement and prompt consequences.

CIVIL

Where a contract provided attorneys fees to the successful party, and where the results of the litigation was mixed, the trial court properly awarded fees to each party based on the ratio of the amount recovered divided by the amount sought. *Shadley v. Lloyds of London*, 2008 AP 2861.

CRIMINAL LAW

Nothing in the criminal discovery statutes requires the State to provide the defense with a transcript of tape recordings. Providing a copy of the recordings themselves is sufficient. *State v. Daniel*, 2008 AP 2109.

Police with probable cause may conduct a warrantless entry into a home if exigent circumstances exist, such as prevention of the destruction of evidence. However they may not do so if the police created the exigent circumstances themselves. The Court of Appeals discussed, but did not decide, whether officers with sufficient probable cause created exigent circumstances by instigating a "knock and talk" rather than getting a warrant when the suspect answering the door retreated into the residence upon seeing the officers. *State v. Phillips*, 2009 AP 249.

A police officer's fear that he would lose his job if he refused to submit to a breath test does not make the test evidence involuntary and inadmissible. *State v McPike*, 2008 AP 3037.

A constructive trust can be imposed on life insurance proceeds passing to a person designated as beneficiary in violation of the MSA provision, unless the beneficiary is a bona fide purchaser. The life-insurance stipulation in the MSA need not be "support related". *Pluemer v. Pluemer*, 2009 AP 155

The use of federal poverty guidelines in determining whether to appoint postconviction council was approved in *State v. Adams*, 2008 AP 992.

Money located on the defendant's person which can be directly traced to illegal drugs may be used to calculate the defendant's offense level as to the quantity of drugs involved in the transaction. *State v. Edwards*, Nº 08-1125 (9-14-09, 7th Cir)

An Illinois "zero-tolerance suspension" does not count as a prior conviction for drunk driving for Wisconsin purposes. *State v. Carter*, 2008 AP 3144

Notwithstanding a defect in the guilty plea colloquy, a defendant's failure to allege that absent that defect he would not have pled guilty defeats a plea withdrawal motion. *State v. Shackelford*, 2008 AP 1896

An attorney's failure to advise the defendant of his right to request a different judge is not cause for reversal unless prejudice is shown, such as the sentence he received was fundamentally unfair. *State v. McGowan*, 2009 AP 291.

Where the trial court failed to conduct a waiver of counsel colloquy before denying a defendant's request to represent himself at trial, the jury verdict must be reversed. *State v. Imani*, 08 AP 1521.

A defendant has no reasonable expectation of privacy in a package sent to a nonexistent person from a nonexistent sender and delivered to a vacant home. However there may be an expectation of privacy when using an alias to send or receive mail. *State v. Earl*, 2008 AP 1580.

When a judge incorrectly grants a mistrial after the jury was sworn, any retrial would violate double jeopardy and the complaint must be dismissed. *State v. Davis*, 2008 AP 2189.

§971.20(5) allows for substitution of Judge only prior to that time that the defendant is determined to be guilty or not guilty, whether by a fact finder or based upon a guilty or no contest plea. When the issue of guilt or lack of guilt is resolved, a criminal trial is complete for the purpose of this statute. There is no authority for substitution prior to sentencing *State v. Wisth*, 2008 AP 1748.

Where a lesser included offense would not be inconsistent with the theory of defense, it was deficient performance for an attorney to not inform the defendant of the possibility of the lesser included offense. *State v. Miller*, 2007 AP 1052.

FAMILY LAW

If a spouse quitclaims his interest in a family home to the other spouse in exchange for a balancing payment to be received later, he may not be able to claim any homestead exemption in the balancing payment in a subsequent bankruptcy. Unless the spouse files bankruptcy within two years after moving out, or he reinvests the balancing payment in a new home, the homestead exemption will be lost and the right to receive the payment will belong to the bankruptcy estate. *In re: Fink*, 09-23299 (US Bankruptcy Court, ED Wis.).

A court may not award guardianship to a grandparent based only on a showing that it is in the child's best interest, reaffirming the *Barstad* standard of prior case law. *Cynthia H. v. Joshua O.*, 2008 AP 2456.

In a support enforcement action, the previous contempt order imposed and stayed jail conditioned upon payment of child support. The child support agency wrote a letter to the judge requesting a warrant because of nonpayment. The Court of Appeals found this procedure improper for four reasons: (1) the request was not signed by an attorney and §802.05 requires every motion filed in court must be signed by an attorney or it "shall be stricken"; (2) the letter request was not sent to the payer; (3) the judge did not wait the eight days for the statutory notice for service of motions by mail, and; (4) the letter request was sent to the judge directly, rather than filed with the clerk of court. *In re Meyer v. Teasdale*, 2008 AP 2827.

If there is a Paternity Affidavit on file, can a party still question paternity and request DNA tests? Apparently not. Federal law requires states to have laws under which judicial or administrative proceedings are not required or permitted to ratify an unchallenged acknowledgment of paternity. 42 USC 666(a)(5)(E). §767.805(1) Wis. Stats. provides that a statement acknowledging paternity is a conclusive determination which shall be of the same effect as a judgment of paternity. Doesn't seem right, does it?

Apparently one can change their name through consistent and continuous use, as long as the change is not effected for a fraudulent purpose. But absent proof that the defendant used a different name for the last 10 years, a motion to amend the judgment of conviction was properly denied. *State v. Smith*, 2008 AP 2106.

REAL ESTATE

A servient landowner was entitled to block the use of an easement "for access to a boat dock" when in fact there was no dock. The easement holder used the easement for river access for many years without constructing a dock. When he tried to build a dock, he was prohibited from doing so by §30.131(1), which prohibits nonriparian owners from constructing docks on navigable waters. No equitable reformation here! *Paulsen v. Wolff*, 2008 AP 1621.

Unexplained use of an easement for more than 20 years is presumed to be adverse use.

§893.28(3) reverses this presumption for "unenclosed" land and assumes the owner consented to the use. *Armstrong v. Fischer*, 2008 AP 2168, contains a good discussion of the meaning of the term "unenclosed" land. It also discusses the meaning of "hostile use", finding it does not require proof of unfriendly intent, evidence of controversy and does not consider the friendship or close social relations between the parties.

Where a deed's sand removal rights did not indicate an intention to limit the rights' transferability, then it is transferable despite the absence of the words "heirs and assigns". *Borek Cranberry Marsh v. Jackson County*, 08 AP 1144.

An express easement must contain an affirmative statement of exclusivity before the easement holder may exclude use of the easement by the fee owner of the underlying estate. Owner of the burdened land retains the right to use the property in common with the easement holder absent express language to the contrary. *Garrett v. O'Dowd*, 2008 AP 1756.

A nonconforming use of property is not "grandfathered in" where it began only after the municipality had begun proceedings to prohibit the use. The property owner did not reasonably rely upon existing law under these facts. *Town of Cross Plains v. Kitt's "Field of Dreams" Korner, Inc.*, 2008 AP 546.

MISCELLANEOUS

From Chapter XV, *Bench and Bar, History of Buffalo and Pepin Counties*, 1919:

When Buffalo County was created, July 6, 1853, it was included in the Sixth Judicial Circuit, and court was ordered held at such times as the Circuit Judge should appoint. Hon. Hiram Knowlton was the first judge. He was followed in 1857 by Hon. George Gale, of Galesville. Judge Gale, writing April 9, 1860, said of his earlier courts:

"The Circuit Court commenced its session yesterday with a small docket, but quite a large attendance of lawyers from La Crosse, Galesville, Trempealeau and Winona …. The forenoon was principally occupied by the court in empaneling the Grand Jury and in naturalizing 15 Germans, who were in attendance with their witnesses for that purpose.

"The Court House is at the lower town and is a very respectable brick building, but not yet plastered or finished inside. This building is, however, quite an improvement over the building in which Judge Gale held his first court in this County in 1857.

That building was the old pioneer log cabin, and the court was held in the parlor, 14 feet square, with the Judge Gale sitting behind a board table, in an old rocking chair, with a straight back, on a floor too rough for the chair to rock; the walls hung round with rifles, coon skins, powder horns, elk horns, and other collaterals of a hunter's shanty, with a docket of law cases numbering three, all standing on default, and one divorce case standing on a bill taken as confessed for want of an answer, with a bar consisting of one loud-voiced attorney, arguing strenuously for Judgment in all three cases without proof, and Judge Gale refusing them on account of the irregularities of the proceedings, for which George Gale's lack of knowledge of the practice is much deplored, and Judge Gale's predecessor, Judge Knowlton, often quoted and sustained with flattering comments for his wisdom in always granting Judgments in all such cases; and a small German audience, talking their own language loud in spite of the rebukes of the German sheriff-poor souls, supposing they did not disturb the court and bar with their noise, inasmuch as their conversation was not understood; - and you'll get a fair picture of the court held by Judge Gale. But Judge Gale is now law to the parties, audiences are still and kindly, the lawyers obedient and gentlemanly, jurors prompt, not only in attendance but in following instructions, and Judge Gale experiences as little trouble

among the Germans of Buffalo County as in any of the eight counties comprising his extensive circuit."

It is not the intent of this Newsletter to establish an attorney's standard of due care. Articles may make suggestions about conduct which may be well above the standard of due care. This publication is intended for general information purposes only. For legal questions, the reader should consult experienced legal counsel to determine how applicable laws relate to specific facts or situations. No warranty is offered as to accuracy.

Jaime Duvall, Editor.