TRICOUNTY BAR

Buffalo, Jackson, Pepin & Trempealeau

Volume 10, Nº 1 *Winter 2004*

TRICOUNTY BAR NEWS

It was a day of journeys. Most of the members of the TriCounty Bar journeyed through a snow storm to attend the funeral of Robert Olsher, who passed away on January 21, 2004. During the service and afterwards those gathered remembered Bob's journey through life, including many years within the legal community of Black River Falls. It was a journey of a full life, marked by friendships and accomplishments, a life of love, laughs and a connection to other human beings. Bob's life reminds us to keep our eyes, ears, and hearts open. The classroom is everywhere. The exam comes at the very end. Bob passed his. We wish Bob well as he journeys onward.

Incredibly, a slate of incoming officers was elected unanimously for 2004:
President: Wild Bill Nemer (Assistant God in Trempealeau for more than 20 years)
Vice President: Jaime Duvall
Secretary: Paul Millis (Elected without his knowledge, will serve without knowledge)
Treasurer: Larry Broeren (No money, so what possible harm?)

The Spring cabin cleanup work day is set for the afternoon of Friday, May 14, 2004 at 1 p.m.. Jon Seifert will be sending our further information as the date approaches.

The Summer Meeting dates are August 26-28, 2004. The details of the camp rental are not yet finalized. The committee will be meeting again on April 22.

The 2004 TriCounty Bar Winter Meeting was approved for 3 CLE credits (no ethics credits once again this year).

CRIMINAL LAW

Once an individual has provided a satisfactory and usable blood sample, the exigent circumstances that justify a warrantless and non-consensual blood draw no longer exist. *State v. Faust*, Nº 03-0952 (10-1-03, recommended for publication).

An incriminating statement coerced by a Pastor's threat to report the incident if the defendant did not self-report was not suppressed because the course of conduct was of a private person who was not a state agent. *State vs. Moss*, Nº 03-0436 (10-1-03, recommended for publication).

A certified copy of the defendant's drivers record is sufficient to prove prior offenses in a third offense OWI case. The more rigid procedure in §973.12 for proving repeater offenses does not apply to OWIs, given prior case law. *State vs. Van Riper*, Nº 03-0385-CR (filed 10-1-03, recommended for publication).

Even though there is no statutory provision for waiving the 45 day time limit to hold the disposition hearing in a TPR case, a parent's stipulation to waive the applicable time limits is good cause to continue the disposition hearing under §48.424(4). *Ashland County vs. Lisa R.*, Nº 03-0926 (filed 10-7-03, unpublished).

Normally restitution in a

delinquency case for a minor age 13 and under is limited to $250.00. However that limit does not apply when the minor has turned age 14 after the petition and before the dispositional hearing. *In re: James G.L.*, № 03-1328 (filed 10-07-03, unpublished).

Street preaching and sidewalk evangelizing are protected speech even if loud or boisterous. However when protesters use "fighting words" and formed a semi-circle around a person blocking their progress and refusing to move when requested by an officer such actions are conduct not protected by the 1st Amendment and prosecution for disorderly conduct is appropriate. *State vs. Ovadal*, № 03-0377-CR (filed 10-7-03, unpublished).

While the manner and method of obtaining evidence is governed by the law of the jurisdiction in which the evidence is secured, the rules of evidence covering admissibility are those of the forum state. Therefore an interrogation held in Minnesota without audio recording in violation of Minnesota's rule that all custodial interrogations be tape recorded does not make such interview inadmissable in Wisconsin. *State v. Yeng Vang*, № 02-3372-CR(filed 10-28-03, unpublished).

While a defendant's own beliefs and personality traits are relevant on the issue of provocation, inquiry into the generalities of Cuban culture are irrelevant because it invited the jury to focus on the inappropriate question of whether the defendant's reaction was that of a typical Cuban man. *State v. Gonzalez*, № 03-0725-CR (filed 10-28-03, unpublished).

In an interesting case, a person charged with OAR before May 1, 2002 argued his offense should be a forfeiture, not a crime, because the predicate OAR offenses were under a local ordinance as opposed to the state statute. The defendant pointed to the fact that the words "for a local ordinance in conformity with" are omitted in the statute when stating the requirement of a prior OAR conviction in order to make a later one a crime. The Court of Appeals agreed and found that criminal penalties do not apply with a prior OAR conviction where the prior convictions were for ordinance violations. *State vs. Shannon Patraw*, № 03-1308-CR (filed 12-02-03, unpublished).

2003 Wis Act 97 created a new "controlled substance absolute sobriety" offense of operating a vehicle with any detectable amount of certain restricted controlled substances in his or her blood regardless of whether ability to operate has been impaired. A similar prohibition has been created for operating o

r going armed with a firearm. Restricted substances includes marijuana and methamphetamines. Penalties are the same as for OWI offenses.

Although the Court of Appeals rejected a per se rule requiring parents to be present during interrogation of juveniles, the Court expressed serious concern about voluntariness issues in juvenile cases and reviewed authorities from surrounding jurisdictions. It encouraged the Supreme Court to make new law to address the concerns. *In the Interest of Jerrell C.J.*, № 02-3423 (filed 12-23-2003, recommended for publication).

The procedure to be used in deferred prosecution agreements is covered by §971.39. However deferred entry of judgment agreements are not covered by statute and therefore such agreements are not required to follow the procedure of §971.39. *State vs. Wollenberg*, № 03-1706 (filed 12-09-03, recommended for publication).

In 1993, §767.32(1r) was created to prohibit retroactive modification of support with several limited exceptions. The statute was held to have retroactive effect in *Barbara B. vs. Dorian H.*, № 03-1877 (filed 12-10-03, unpublished). The court found that Dorian was not entitled to credit for sums paid directly to Barbara prior to 1993 outside the terms of a 1982 judgment for support.

To avoid the prohibition of extension of dispositional orders terminating after a juvenile reaches age 17, before the juvenile reached age 17 the court modified a dispositional order to shorten its length to make it expire prior to age 17 and then in the same hearing extended it for a one year period. This procedure was upheld in *State vs. Eugene G.*, № 03-1937 (filed 12-09-03, unpublished).

The jury deliberated several days without reaching a decision. At the State's request and over the defense's objection, the Court gave for the first time a jury instruction on a lesser included offense. Neither side had requested the lesser included instruction during the instructions conference or prior to deliberation. For several reasons cited in the opinion, this procedure was held improper and the conviction reversed. This case was distinguished from cases in other jurisdictions where a jury itself asked whether there were any lesser included offenses. *State vs. Thurmond,* № 03-0191 (filed 2-4-04, recommended for publication).

FAMILY LAW

2003 Wis Act 130 provides that if a court finds that a parent engaged in a serious incident (or pattern) of spousal or domestic abuse, there is rebuttable presumption that it is contrary to child's best interest for that parent to have sole or joint legal custody. The presumption may be rebutted by certain listed factors. Initial mediation must now include screening for domestic abuse. The Court must inform parties in an action contesting legal custody or physical placement that the court may waive mediation if attendance will cause undue hardship or endanger the health or safety of one of the parties. The Act requires mediators and guardian ad litems to have domestic violence training and requires guardian ad litems to investigate whether there is evidence of interspousal battery or domestic abuse and to report to the Court on the results.

Where unemployment is involuntary, it is inappropriate to base child support on earnings from prior employment or on earnings potential. Further any order requiring payment of day care costs in addition to support according to guidelines is a deviation from guidelines which requires the statutory findings for deviation. Finally, an order to contribute towards the "moral obligation" to repay a debt to the spouse's parents is improper. Property division can only enforce legal obligations. *In re: the Marriage of Wiseman vs. Wiseman,* № 03-1316-FT (filed 9-30-03, unpublished).

A divorce presumptively terminates beneficiary designations in favor of the former spouse. This presumption can be rebutted by extrinsic evidence of the decedent's contrary intent. In *Estate of Jerome Unger,* № 03-0230-FT (filed 9-30-03, unpublished) the court declined to rule on whether an "affirmative act"was required to show the contrary intent. The decedent told his estate planner to leave his former spouse as beneficiary after divorce while he discussed certain separate financial arrangements. The Court found this sufficient to rebut the presumption because it indicated that the decedent knew the former spouse was still the beneficiary and that he desired to not change beneficiaries at that point.

During the pendency of a divorce the parties orally agreed that the husband would pay the wife one half of his net pay. Although the trial court declared that any agreement, if made, was not enforceable because it was not in writing or on the record, the Court of Appeals assumed without deciding that the circuit court was obliged to consider the agreement as potentially enforceable because both parties testified that the agreement was made and there was correspondence between counsel suggesting that the agreement was made in lieu of a temporary order. However such an agreement, even if proved, is

merely a joint recommendation to the court suggesting the outcome on a particular issue. The court is vested with discretion to accept or reject such a stipulation. Therefore for reasons cited in the opinion, the Court of Appeals upheld the trial court's rejection of the oral agreement as a proper exercise of its discretion to refuse to accept a stipulation of the parties. *In re: the Marriage of Thomas v. Thomas*, № 03-0346 (filed 11-05-03, unpublished).

After a maintenance recipient received a substantial increase of income, the maintenance payer moved for reduction or elimination of maintenance. The court found no change of circumstances because maintenance was initially set at a very low amount because of lack of income of the payer to pay the proper amount. Even though the recipient's income had increased, she was still having difficulty paying all of her expenses and the payer testified the current level did not significantly affect his ability to meet his budget. *In re: the Marriage of Dailey vs. Dailey*, № 03-0268 (filed 12-3-03, unpublished).

Child Support Bulletin CSB04-01, dated 1-16-2004 states that when support paid for a first born child is reduced because of shared placement calculation, the support for a subsequently born child by another relationship should be reduced under the serial family calculation by the full percentage amount, rather than the dollar amount of the shared placement order for the first born child.

CSB 04-01 also mentions that agencies can (but is not required to) track payments made towards variable expenses ordered by the court in the KIDS systems. Either party may wish to document expenses paid and therefore might consider reporting them to the agency. Further agencies are only responsible for enforcing unreimbursed medical expenses or other variable costs if the court orders a party to pay a specific amount (e.g. $50.00 per month for dental expenses). The memo also takes the position that uninsured medical expenses are not technically included in the term of "variable costs" because they are specifically dealt with in a separate section §767.25 (m).

While there is a statutory presumption of joint legal custody, there is no presumption of equal physical placement. *Arnold vs. Arnold*, № 03-1547 (filed 2-4-04, recommended for publication).

General Practice

You can't cite unpublished Court of Appeals decisions. Can you cite Circuit Court decisions in the appellate courts? Section 809.23(3), Stats., permits reference to circuit court decisions. *Kuhn V. Allstate Ins. Co.*, 181 Wis.2d 453 (Ct.App. 1993).

Congress has updated the Soldiers & Sailors Relief Act and renamed it the Servicemembers Civil Relief Act, expanding its protections. A new provision allows the termination of vehicle leases upon entry into active duty for 180 days or more. Interest that exceeds 6% must be forgiven, not just deferred, and payments must be reduced as well, preventing creditors from insisting that payments remain the same. It prevents eviction of service members for most house leases. The service person receives an automatic 90 day stay of proceedings if the commanding officer sends a letter to the court applying for it, with longer stays possible depending on particular facts. GAL may be appointed also. A complete discussion of the Act as changed is available at www.military.com.

The SSP listserv recently discussed whether an auto mechanic has a lien on a vehicle in his possession for an unpaid bill for past work done on a different car owned by the same customer. The consensus was that once the car worked on was released, the mechanic's lien ended. However Bob Hagness reminded us of a case which many of us may have either forgotten or never known about.

M&I Western State Bank v. Wilson, 172 Wis.2d 357 (Ct.App. 1992) held that a *conditional* release of a vehicle (so owner could use it to earn money to pay mechanic's bill) doesn't result in a waiver of lien upon subsequent possession of the same vehicle. The lien is enforceable against all parties except a bona fide purchaser for value or a subsequent attaching or levying creditor who has no notice of the mechanic's interest. Upon the resumption of possession, the lien is revived and retains its priority as before the release, except it is subordinate to the bona fide purchaser or attaching or levying creditor.

A review of the case law on whether "shall" is mandatory or directory is found in *In re: The Commitment of Elizabeth M. P.*, № 02-3221 (filed 10-1-03, recommended for publication). In that case the court held that the term was mandatory and failure to hold a hearing within 10 days of a transfer of a Chapter 51 placement to a more restrictive setting because of a violation of a conditional release requires immediate release of the individual.

The owner of a mobile home park or other interested person can request motor vehicle registration information about the ownership of a manufactured home (mobile home) by filing a manufactured home/owner record information request, Form № SBD-10752 with the Wisconsin Department of Commerce, Division of Safety and Buildings. There is a $3.00 fee per record. However records more than five years old may be purged if there is no activity.

Decedent's Will said "it is my wish that if any child of mine wishes to reside in the home, he or she shall be allowed to do so by my other children". The Court of Appeals determined these words to be precatory and discussed when precatory words are imperative in nature, becoming a mandatory condition of the Will. In this case the court held these words to give the children discretion and therefore were non-binding. *In re: The Estate of Barbara Sanger*, № 03-1018 (filed 10-23-03, unpublished).

2003 Wis Act 65 creates a new procedure to permit one parent to petition for the name change of a minor under age 14. A copy of the petition must be served on the child's other parent. If the other parent does not answer the petition or does not prove that he or she has not abandoned the child or failed to assume parental responsibility, the court can order the name change only with petitioning parents' consent.

"In this case we are called on to determine whether a cow is an uninsured motor vehicle under the appellants' insurance policy. We hold that it is not." *Mayor vs. Wedding*, 2003 Ohio 6695 (true case, but dismissed for lack of probable cows).

2003 Wis Act 105 provides that, during the pendency of an appeal of a judgment in a civil action, the Court must set bond furnished by the appellants collectively in order to obtain stay of execution during the appellate review.

The famlaw listserv discussed whether an action could be started under Chapter 766 or 767 by the community spouse against the institutionalized spouse to recover the portion of the institutionalized spouse's income being paid to the nursing home and not otherwise available to the community spouse under the spousal impoverishment rules. One participant said he had successfully done it in a case where the family had large monthly debts due to a necessary repair situation with the homestead. However this might only work with a true demonstrated need for more income to the community spouse than available under the spousal impoverishment rules.

A building contractor constructed a large warehouse. The contract contained a warranty that the design and structural components of the building would be free of defects. After construction the

building began to sink because of subsoil conditions. The contractor had relied upon faulty advice of a soils engineer. Finding that the sinking was "accidental", rather than intentional or anticipated, the Supreme Court in *American Family vs. American Girl*, 2004 WI 2, held that the commercial general liability insurance policy must respond. It also held that the "contractually assumed liability" exclusion excludes coverage only for indemnification or hold harmless agreements.

The time limit for filing an appeal of an eviction action is 15 days from entry of judgment. §799.445. After a trial on an eviction action one party filed a motion for reconsideration which was denied. The party then filed an appeal from the motion for reconsideration arguing that the time limit for initiating an appeal commenced when the court denied the motion for reconsideration, citing §805.17 (3). However the court *Highland Manor Associates vs. Bast,* 03 WI 152, held that the specific appeal time limits under Chapter 799 controlled over the more general limits of Chapter 805 and that the motion for reconsideration did not extend the 15 day time limit for filing an appeal.

Beginning in January 2004, LLCs will have to file an annual report similar to that required for business corporations. LLCs formed in the first quarter of a year will report at the end of the first quarter each year with LLCs formed in subsequent quarters reporting at the end of their respective quarters. The report will be available online or in paper form. The filing fee will be $25.00.

The economic loss doctrine does not bar recovery in tort for damages allegedly caused by the negligent performance of a service contract. Unlike a contract for goods, a contract for services does not limit a party's remedies to those sounding in contract. The economic loss doctrine, which bars recovery in tort when a contract for goods is in place between parties, does not apply to contracts for services. *Insurance Company of North America vs. Cease Electric, Inc.*, Nº 03-0689 (filed 12-17-03, recommended for publication).

Where a trust evinces an attempt on the part of the settler to confer upon the trustee discretion to act beyond the bounds of reasonable judgment, such as an "absolute" or "unlimited" discretion, then the trustees actions will be upheld unless it is proven they are taken in bad faith, fraudulently or were arbitrary. The trustee in such situation is not held to the test of "reasonable judgment". *DEI vs. DEI,* Nº 03-1471 (filed 12-17-03, unpublished).

A law firm's filing a Summons and Complaint on behalf of a creditor was an "initial communication" that triggered the obligations to inform the debtor of his validation rights under the FDCPA. *Thompson vs. Law Firm of Sampson & Cybak, et al* Nº 02-1113(CA 7th Dist). The court found that the Debt Validation Notice should have been attached to a regular Civil Summons.

MUNICIPAL

2003 Wis Act requires any fee imposed by a county, city, village or town to bear a reasonable relationship to the service for which imposed.

In *State ex rel. Ziervogel v. Washington County Board of Adjustment*, Nº 02-1618, the Wisconsin Supreme Court overturned the "no reasonable use of the property" standard for measuring unnecessary hardship in "area" zoning variance cases. This overruled in part the 1998 *Kenosha County* decision which had merged previously distinct legal standards for "unnecessary hardship" in "use" and "area" variance cases that had existed since 1976, establishing a single "no reasonable use" standard for unnecessary hardship in all variance applications. It said *Kenosha County*'s "no reasonable use" standard for area variances, conflicts with the statute and is therefore unenforceable as

applied to area variances.

REAL ESTATE

Many landowners are putting woodlands into Managed Forest Law contracts. Tax parcels in MFL cannot be used when filing for Farmland Preservation Credit or for Homestead Credit on Wisconsin income tax returns.

In the 19th century, railroads were given grants of land as inducements to build railroads. Typically the railroad would build their track, sell and convey the fee simple interest to the land and retain a 100 foot wide right of way. What happens when the railroad then abandons the line and removes the track? According to a recent memo from a title company, unlike other railroad lines that were acquired by purchase of easements or eminent domain proceedings, the land in a land grant right of way does not revert to the adjacent owner. In *Northern Pacific Railroad v. Townsend*, 190 US 267 (1903) the U.S. Supreme Court ruled that the land grants originally given to the railroads contained the implication that when the railroad stopped using the land for railroad purposes, ownership of the land would go back to the United States.

In a real estate foreclosure action, it is error for a court to accept a plan of redemption that does not provide for an immediate full payment, but instead establishes a payment plan over a six month period. *M & I Marshall and Isley Bank vs. Kazim Investment Inc.* Nº 03-0404 (filed 12-23-03, recommended for publication).

An easement of necessity does not always arise as a matter of law whenever the two required elements are proven, but is created through the exercise of the court's discretion. The court can decline to recognize an easement of necessity for a grantor who has landlocked his/her own property. Further a bonafide purchaser of the land of the grantor who created the landlocked parcel may have a defense to an easement of necessity if they can show lack of actual or constructive knowledge of either the right of way access or the landlocked condition of the severed parcel. Relevant factors for when a court should recognize an easement of necessity are discussed in *McCormick vs. Schubring*, 2003 WI 149.

The question of whether the 30 year rule for real estate title under §706.09 or the 40 year statute of limitations for enforcing a recorded easement under §893.33 applied in an action to eliminate an easement recorded more than 30 but less than 40 years earlier was discussed in *Turner vs. Taylor*, Nº 03-0705 (filed November 25, 2003, recommended for publication).The court held that a purchaser without actual knowledge takes land free and clear of any interest not recorded in the prior 30 years, including a written easement recorded less than 40 years previous. The court reasoned that the 40 year easement statute establishes a time limit to commence an action to enforce an easement, but once commenced various defenses can be asserted within the action, including the 30 year statute under §706.09.

Many mineral leases have rights of first refusal written in the fine print, a fact of which many farmers are unaware and something that should be carefully looked at in any title examination. In *Wilbur Lime Products vs. Ahrndt*, Nº 03-0838 (filed 11-25-03, recommended for publication) a daughter purchased a farm from her parents' estate, which farm was subject to a mineral lease containing a Right of First Refusal. Wilbur Lime commenced an action to enforce its right and the court granted specific performance but then discussed how the price should be determined when a larger parcel is sold with a Right of First Refusal in effect only on a portion. The court found that Wilbur Lime was entitled to buy the smaller portion, but at a fair market value determined by

appraisal, rather than a simple pro rata formation.

A seller sold a home listing no relevant defects in the property condition report. After closing the buyers discovered defective electrical work and commenced suit. That action was settled for $8,500.00 and a general release was signed. Later, an addition to the house which had been built without valid permits, broke away from the rest of the house resulting in damage in excess of $100,000.00. The court in *Gielow vs. Napiorkowski*, № 03-0050 (filed 11-26-03, recommended for publication) examined the release from the first action to determine whether that document also released the unknown defect which was the subject of the second action. The court found the release ambiguous and construed against the seller who did the drafting and also noted the disparity between the amount paid for the release and the damages claimed from the second cause of action. Further, the court remanded the case to determine whether there was fraud in the inducement.

The "owner in possession" exception applicable to adverse possession does not apply to stay the running of the 30 year statute of limitations for prescriptive easement claims. Therefore it appears prescriptive easements cannot be based on any act which occurs more than 30 years prior to the earlier of the commencement of the action or the date in which there is a notice of claim recorded at the register of deeds. *Schauer vs. Baker,* № 02-1674 (filed 2-5-04, recommended for publication).

TAXATION

Frequently parents who do not reside together wish to (or are ordered to) alternate the children as dependents. A custodial divorced parent can use Form 8332 to release the right to claim the child as dependent to the noncustodial parent. A revision to Form 8332 and Publication 504 now clearly allows this procedure for never-married parents (i.e. paternity). The famlaw listserv recently discussed whether a parent who signs a Form 8332 releasing the dependent to the noncustodial parent is able to fund their cafeteria (Flexible Spending Accounts, Section 125 etc.) plan for day care expenses. Several contributors took the position that such plans are only available is the child is claimed as a dependent. Further a custodial parent may wish to be careful about signing a Form 8332 for *future* years. The IRS does not appear to have a procedure to revoke the release of a claim for exemptions.

Family Practice Fee Schedule

Legal Work: $___/hour

Extras Charges:
Whining (regular)$35.00
Whining (nights and weekends) $70.00
Squabbles over items valued at $50 to 250 $50.00
Squabbles over items valued under $5 $150.00
Squabbles over pets $500.00
Saying something I told you not to say $ 35.00
Doing something I told you not to do $250.00 (min.)
Concealing facts (per fact) $50.00
Revealing concealed fact on way to Court $150.00 (min.)
Learning concealed fact from opposing Counsel $500.00 (min.)
Learning concealed fact from opposing Counsel while in Court 1 body part

---

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, Alma, WI.