TRI-COUNTY BAR

Buffalo, Jackson, Pepin & Trempealeau

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TRICOUNTY BAR NEWS

Hon. Dane Morey retired July 1, 2005 after serving 15 years on the bench as Circuit Judge for Pepin and Buffalo Counties. Commenting on the large number of persons in attendance at a dinner held in his honor, Judge Morey said, "I didn't know so many people were glad to see me retire." He now practices solely in a court of higher jurisdiction, his home.

Displaying an incredible lapse of judgment, Gov. James Doyle appointed James Duvall to fill the vacancy of the retiring Judge Dane Morey. At the Investiture (a.k.a. the infarction, the indigestion, the swearamony) Judge Morey transferred the symbols of office, the robe and the gavel, but he refused to turn over the judge's wig. (Like most virile men, Dane is really bald). He stated "I didn't get the judicial sideburns from Schosstein."

"I just love it when people call me 'Your Honor'", Duvall stated. "No one has ever suggested I had honor before."

Duvall seriously considered declining the appointment because the Judge's school (which he sorely needs) conflicts with the summer TCB meeting date, until he realized that after the first hour, no one will remember who was there anyway.

Rough winds do shake the darling buds of May, and summer's lease hath too short a date. To further mark the death of summer, the TCB Summer Meeting begins Thursday, August 25. Same Y Camp arrangements as last year.

The boat trip to Pepin will start Thursday at 1 p.m. TCB time in Alma as usual. Meet at the Red Ram (center of town, come on people, Alma is not that big). Call Jon "the Dog" Seifert with any questions on car shuttling.

Hagness, Pennow and Duvall will be gone, so it is safe if anyone wants to come down Wednesday night. Just check with the Dog.

Any questions about golf, call Chambers (Thursday)or Lister or Stutz (Friday), about canoeing call Fugina, about biking call Damon. They don't know anything, but it will be nice to visit.

The Y Camp has built a volleyball court in the area north of the lilac bushes and just to the east of the drive entrance immediately onto the Bar cabin property. (The lake is south of the cabin). It is an area where bar members have traditionally parked in past meetings. There are several small trees planted by the Y camp marking off the area. We have been in touch with the YMCA to clarify the location of the boundary line along the Bar cabin's north lot line. We will follow up with this, but meanwhile please respect that area and don't park there while discussions continue. Park in the lot north of the kitchen, or along the alley west of the traditional drive entrance to our lot, or on our lot by the back porch, or on our half of the Howard lot (Remember we only own half).

During the "Great Peanut

Caper" mock trial, the student attorney for the prosecution asked a question, to which the attorney coach for the defense, Allan "Bluto" Morgan, objected. Quickly considering everything he learned in law school, including the endless reruns of *Animal House*, "Walleye John" Newton, the other attorney coach, responded, "You object? Well I double secret object to your objection." The student judge turned to his coach, Steve "Buddha" Schultz, who wisely took the matter under advisement, adjourned the trial, and all three attorneys went out for beer. By the end of the evening everyone forgot about the entire matter. Once again justice was served. Everything worked out just fine, even if it was not the way envisioned by the drafters of the Constitution or the OLR committee.

CRIMINAL LAW

§973.195, which gives the DA veto power over a defendant's request for sentence adjustment, has been held unconstitutional. The Court should exercise its discretion whether to accept or reject a DA's objection to a Truth in Sentencing sentence adjustment petition. *State v. Stenklyft*, 2005 WI 71 (filed 6-9-05).

A warrant to search for child pornography based on one year old information is not lacking in probable cause because of staleness when there is testimony that pedophiles rarely destroy such material and therefore it is likely the material that was present ten months prior would still exist. *U S vs Ernest Newsom*, Nº 03-3366 (USCA 7th Dist.)

An unpublished Court of Appeals decision suggests that the *Crawford* type confrontation clause objection cannot be raised at the preliminary hearing stage. A *Crawford* objection is based on confrontation clause when a hearsay objection based an unavailable witness is used for admissibility. This case suggests there is no confrontation clause rights at the preliminary hearing stage as to persons other than witnesses who actually testify. *State vs. Mackin*, 2004 AP 1890 (filed 3-29-05, unpublished).

The new confrontation clause objections adopted in *Crawford vs. Washington* (2004) do not apply retroactively. *Bintz vs. Bertrand*, Nº 04-2682(USDC E.D. WI).

An allegation that sexual contact occurred "during the winter of 1989" did not adequately inform the defendant of the charge to permit her to prepare a defense when there was no evidence why the victim was unable to particularize a date other than the passage of time and the offense was an isolated occurrence, not part of a continuing pattern. *State vs. Magnuson*, Nº 2004 AP369 (filed 4-20-05, unpublished).

A vehicle stop was held illegal when the sole reason for the stop was that the vehicle drove around an unlit "road closed" sign. The sign did not meet the requirements of §86.06 that such signs be lit and the sign was not an "official traffic control device" within the meaning of §340.01(38). *State vs. Raymond Lyght*, Nº 2004 AP 2877 (filed 4-21-05, unpublished).

ESTATE PLANNING

After the mother's death, which automatically resulted in the termination of the durable power of attorney, two sisters sued their brother, the agent, under §243.07 for an accounting and breach of fiduciary duty. The court held that §243.07 does not authorize an action against an agent after the power of attorney has been terminated by death. The court did not answer whether such an action could be maintained after termination by voluntary resignation of the agent. However the court refused to find that only the estate, not the sisters, had standing to maintain an action for breach of fiduciary duty and conversion against their brother. *DeSalvo vs. Elegreet*, Nº 2003 AP 3535 (filed 4-28-05, unpublished).

The RPPT listserv has debated the effect of lifetime gifts on the

Wisconsin estate tax, a subject which is presently in a state of uncertainty. The collective wisdom suggests:

1. If the total taxable estate (taxable lifetime gifts over $11,000 per person and amounts remaining at death) is $675,000 or less, then no lifetime gifts are necessary because there is no Wisconsin Estate tax.

2. If the total taxable estate (taxable lifetime gifts and amounts remaining at death) is over $727,133, then lifetime taxable gifts will reduce the Wisconsin estate tax. This is because the effective rate of Wisconsin estate tax on estates in excess of $727,133 is the state death tax credit amount which is always less than the federal estate tax using the Wisconsin unified credit of $220,550, for estates over $727,133. The savings from the lifetime gifts will be equal to the amount of the reduction in the state death tax credit computed in Table B of Form W706. For example, a total taxable estate of $776,000 including $276,000 of taxable gifts and $500,000 of assets remaining at death saves $11,648 in Wisconsin estate tax by the taxable gifts, or 4.2%. This happens because the state death tax credit computation on Schedule TC of W706 does not take into account the lifetime gifts. Therefore in this example, the state death tax credit is based on only the $500,000 of assets remaining at death, resulting in a Wisconsin estate tax of $10,000, as opposed to the tax of $21,648 that there would have been if no gifts had been made, for a savings of $11,648.

3. If the total taxable estate (taxable lifetime gifts plus amount remaining at death) is between $675,000 and $727,133, then the lifetime gifts will only save Wisconsin estate tax if the gifts are large enough to reduce the state death tax credit to less than the federal estate tax computed using the $220,550 Wisconsin unified credit. For example, a total taxable estate of $710,000 results in a federal estate tax of $12,950 using the $220,550 Wis unified credit, so in order for the gifts to reduce the tax, the gifts must be large enough to reduce the state death tax credit amount in Table B to less than $12,950. In formula form, if x is the total taxable estate, the point at which the state death tax credit will be $12,950 based on table B is: [(x-60,000)-440,000] + 10,000 = 12,950. x will then be $573,750, so the gifts must reduce the estate to less than $573,750 to save tax. A gift of $140,000 reduces the $710,000 to $570,000, which results in a state death tax credit of $12,800, so there is a savings of $150 in Wis estate tax over the $12,950 tax there would have been without the gift. A gift of $120,000 would reduce the $710,000 to $590,000, which would result in a state death tax credit from Table B of $13,600, and there would be no savings from the gift as the federal estate tax of $12,950 would be less.

The savings from the gifts will only be at the relatively small tax rates shown in Table B, Form W706, of between 0 and 7.2% for estates under 2 million. The taxable gifts never save Wisconsin tax at the federal estate tax rates (37% or more) because taxable gifts are always included in the federal estate tax computation.

If the Dept of Revenue is going to start taxing the $11,000 annual exclusion gifts in addition to the gifts over $11,000 which are taxable for federal purposes, on the gifts in contemplation of death theory, that would change this analysis. And if the Dept changes Schedule TC so that the lifetime gifts are always taken into account, that would also make a difference.

FAMILY LAW

A good discussion of "shirking" and the factors to be considered in determining the reasonableness of a parent's decision to forgo employment outside the home to become an at-home full-time child care provider is found in *Chen v. Warner*, 2005 WI 54.

One of the grounds for terminating parental rights is a continued denial of placement rights. If that denial is done in the context of a juvenile court case under Chapter 48 or 938, certain TPR warnings must be given. However such warnings are not required if the denial is done in a family law action under Chapter 767. *In re: the TPR of Jillian K. L.*, № 04-3219 (filed 3-31-05, recommended for publication). Some commentators have criticized the reasoning of the decision and recommended that parties in this type of case preserve the issue for appeal.

GENERAL PRACTICE

The Community Spouse Income Allowance and the Shelter Base Amount have been increased from $2,081.67 to $2,138.33 and from $624.50 to $641.50 respectively effective 7/1/05. MEH 5-10-6, OM 05-17.

The Register of Deeds Association website has several useful forms available for download, including a fill-in Word form for HT-110 Termination of Decedent's Interest, the Rental Weatherization forms, and the Statement of Mineral Claim. www.wrdaonline.org.

Bob Hagness points out that the HT-110 form cannot be used to transfer a social security check in the decedent's name. As usual, I didn't know what he was talking about, but the Instructions to the HT-110 say the form can only used to transfer:
1. Real estate in Wisconsin. (Includes vendee's interest in a land contract as per OAG opinion 1/97).
2. Vendors' interest in land contracts.
3. Mortgagees' interests in mortgages.
4. Savings accounts and checking accounts.
5. Securities.
I hate it when he is right.

Judge Damon's finding that an answer and counterclaim were frivolous and awarding costs and fees was upheld, but the Supreme Court ruled that the Court of Appeals cannot find an appeal frivolous without first giving the parties and counsel a chance to be heard on that issue. *Howell v. Denomie*, 2003 AP 979.

Plaintiffs contracted with general contractor for a home. The general hired several subcontractors. The owners sued the subcontractors alleging negligence which caused the structure to leak. The Supreme Court held that the economic loss doctrine barred the claims against the subcontractors saying that the general contract, not the subcontracts, controls. The predominant purpose of the general contract was for the building of a custom built home for the plaintiffs and the subcontract has no independent value or use except as components of the house and therefore it was not a contract for services. However the Court suggested that perhaps a homeowner might have a third-party beneficiary action against a subcontractor. *Linden v Cascade Stone Company, Inc. et al*, № 2004 AP 4, filed 7-8-05.

A witness was personally served with a subpoena for an original trial date of February 26th. The trial was adjourned and the witness was mailed a subpoena for the subsequently adjourned trial date of May 21st. The witness failed to appear, but the Court found the witness "unavailable" for the purpose of a confrontation clause. A witness is bound by a subpoena until it is vacated and has a continuing obligation to appear even when the original date of the subpoena was continued to a later date. *State vs. Russell*, № 04 -0556 (filed 3-22-05, unpublished).

Release № 5-01 of the Medicaid eligibility handbook, paragraphs 8.1.2. Effective January 1, 2005, workers are told that they should use tax tables to determine life estate and remainder interest, rather than the old life estate tables from the handbook. The effect of this will be to allocate a greater percentage to the remainder interest and a lesser percentage to the life estate. This

would increase the divested amount when the life estate is created, but would reduce the amount that would have to be paid to the life tenant if the property is sold while the life tenant is living. One worker indicates that the new calculation first applies to MA Applications received on January 11th or later. Further, when the property is jointly owned, they are instructed not to use the joint tax tables but instead to split the value in half and apply the factors to each owner.

IRAs are exempt from the bankruptcy estate pursuant to §522(d)(10)(E). *Rousey vs. Jacoway,* (№ 03-1407, U S Supreme Court).

MUNICIPAL

Reversing the court of appeals decision in *Osterhues v. Board of Adjustment for Washburn County*, 2004 WI App 101, the supreme court held that when reviewing a decision to grant or deny a conditional use permit, a county board of adjustment can conduct a de novo review and substitute its judgment for that of the county zoning committee. *Osterhues v. Board of Adjustment for Washburn County* 2003 AP 2194

REAL ESTATE

Just when you thought you knew what you were doing. According to *Steiner v. Wisconsin Am. Mut. Ins. Co.,* 2005 WI 72 (filed 6-9-05) a court must issue a final order to confirm a land contract vendee's failure to redeem at the end of the redemption period. Only upon entry of the final order does a land contract vendee's equitable interest revert to the vendor. Equitable title does not pass as a matter of law upon the expiration of the redemption period.

A cotenant cannot convey so many fractional interests in a private road to other new common owners that it overburdens the common estate. *Nettesheim et al v. New Age Products, Inc.* № 2005 AP 287 (recommended for publication)

A standard house lease form cannot be used for a mobile home or a mobile home site. §710.15 contains mandatory provisions required to be in every mobile home lease or site lease.

When can you terminate an agricultural year-to-year tenancy? Client owns farm and leases it to a tenant who raises crops on the rented farm and also pastures his cattle. The arrangement is oral and very loose with no stated beginning date. Rent is paid annually but at different times.§704.19(3) requires 90 days notice. So termination notice required by October 1? The drafters' comments to §704.19 states that farm tenancies customarily turn over on March 1, and could be read to suggest that notice would have to be given by December 1.

It was proper for the County Zoning Authority to grant conditional use permits that satisfied the requirements of the county ordinance even though they violated the town land division ordinance and master plan. *Herman et al. v County of Walworth et al.,* № 2004 AP 2080 (Filed 7-13-05, recommended for publication).

An agent using his status as agent to make decisions for his own business interests is engaged in prohibited self dealing whether or not the principal suffered any harm or prejudice because the agent did not act solely for the benefit of the principal. *Losee v. Marine Bank,* 2004 AP 1938 (filed 7-13-05, recommended for publication).

The doctrine of acquiescence only applies to shorten the time for adverse possession if the description is ambiguous. A description by quarter sections is not ambiguous and the doctrine does not apply. The court also said that reformation for mutual mistake could not apply since an innocent third party had acquired intervening rights. *Chandelle Enterprises, LLC v XLNT Dairy Farm, Inc.,* № 2004 AP 2423 (filed 4/26/05, recommended for publication).

One party held an access

easement over a 75 foot strip of land but historically used a particular pathway approximately 10 feet wide.

The Court of Appeals upheld the trial court's interpretation of the easement by limiting the easement rights to a 20 foot wide strip of land in a particular location, rather than blocking development of the entire 75 foot width. *Deering vs. Wangerin*, № 2004 AP 950 (filed 4-26-05, unpublished).

MISCELLANEOUS

Want to type a web address, like www.google.com, quickly? In the address bar of Internet Explorer, type the word google and then press CTRL Enter, which will then automatically add the www in front and the .com at the end.

This newsletter reviews mostly unpublished cases, believing published cases are covered elsewhere. Ideas for this newsletter are sincerely appreciated. If you run across an interesting idea, have a question you would like others to consider, please send them. We all benefit by working together.

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.

Thanks to those that contributed to this newsletter.

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