

# TRI-COUNTY BAR

## Buffalo, Jackson, Pepin & Trempealeau

Vol. 12, N<sup>o</sup> 1

Winter, 2006

### TRICOUNTY BAR NEWS

Despite security threats, rumors of ballot stuffing and allegations of election fraud, the following were elected to serve as TCB officers for 2006:

President: Paul Bohac  
Vice President: John Damon  
Secretary: Paul Millis  
Treasurer: Steven Schultz

Recently a suicide bomber detonated an large roadside explosion near Vice President John Damon's motorcade, injuring several innocent bystanders. Damon, who was not hurt, was heard to say "I didn't know we had any innocent people in Trempealeau County!"

There were several new faces at the winter meeting. Scott Swanson, Hamline 2005, joined the Sherman firm in Black River Falls this fall. He claims he is doing everything in the office (which I interpreted as Jon is doing nothing) and that when he has more time he looks forward to developing an outside interest. I would suggest women. He is single.

Also representing the Hamline tradition of academic excellence (think Bruce Kostner) and calm demeanor (think Tom Clark), Justin Silcox, Hamline 2000, joined Kostner, Koslo and Brovold, Arcadia, after working since graduation as a litigator in Bloomington, MN. In sharp contrast to Scott, Justin brings a well developed set of perversions to the TCB, being both married to another lawyer and a Viking fan to boot. Justin said he found the winter meeting informative and that those he met seemed like "good guys" so we know he also has issues with honesty, judgment or experience. His wife is due with their first child on April 22 and I am sure, now that Brovold is in charge (or so he told me), Justin will enjoy his three month paternity leave.

Molly French, John Marshall 2005, joined Bilski and Wright, Osseo. Originally from Galesville, she previously worked for 12 years for the UW Medical Foundation, which I understood to be the business office for the

doctors at UW. Her exposure to the legal side of the medical business fostered her interest in the law. Her previous personal interests of antiques and jogging have been replaced with the personal interests of her 2 year old son, which is anything to do with Hot Wheels. She is interested in doing criminal defense, GAL work, and workers compensation. Because John Marshall Law School is in Illinois, Molly sat for and passed the Wisconsin Bar. She said any UW or Marquette grads who have never passed the Bar exam are free to call her with any questions.

This will be the first time we are distributing this newsletter electronically. If you did not receive this, call me.

### CIVIL

Where there was no contractual privity between two contractors on the same construction project, the economic loss doctrine does not bar tort suits between the two. *Trinity Church et al v. Edward Radtke and Sons*, 2006 WI APP 22.



When the plaintiffs' tort claim is dismissed pursuant to the economic loss doctrine, the plaintiff must be allowed to amend his complaint to add contract claims. *Tietsworth v. Harley Davidson*, 2006 WI APP 5.

A new mandatory state form GF-175, Affidavit of Nonmilitary Service, is to be used when default judgment is requested upon the defendant's nonappearance.

How do you find out if someone is in the service, for the purpose of the Affidavit of Nonmilitary Service for default judgments? Try [www.dmdc.osd.mil/scra/owa/home](http://www.dmdc.osd.mil/scra/owa/home), a site that lets you enter a name, DOB and other information to verify whether someone is in the military or not. Also an informational sheet with contact numbers for the Department of Defense and National Guard to help determine if the defendant is on active military duty is available through the Clerk of Court offices.

A guilty plea in a criminal case is no longer issue preclusion on the civil case, similar to a no contest plea. *Mrozek v. Intra Financial Corp.*, 2005 WI 73

Mortgage foreclosure judgments do not get docketed because, while the judgment of foreclosure indicates an amount due, it does not direct or order the payment of any money. *Commercial*

*Mortgage & Finance Co. v. Clerk of the Circuit Court*, 2004 WI APP 204.

A bankruptcy discharge allows a debtor to apply to the circuit court to satisfy a judgment in full, even if the equity exceeds the homestead exemption. *Megal Development Corporation v. Shadof*, 2005 WI 151.

Even though a confidentiality agreement may be enforced between the parties, once the documents are filed with the Clerk of Court they become public record. *Krier v. EOG*, 2005 WI APP 256. The Court does have inherent authority to seal records, but someone needs to ask. Apparently even though the record may be sealed, the case docket will still show up on CCAP.

A reducing clause in an underinsured motorist endorsement does not permit reductions for amounts paid by a second tortfeasor who is not an underinsured motorist. *State Farm Mutual Insurance Company v. Bailey*, 2003 AP 2482 (filed 12-1-05, recommended for publication).

## CRIMINAL LAW

Expert testimony of a witness who relies on test results performed by a colleague who

does not testify does not violate the Confrontation Clause. *State v. Barton*, 2006 WI App 18.

The falsus in uno jury instruction can be used only in situations where a witness willfully and intentionally gives false testimony, and is not proper where there are mere discrepancies most likely attributed to defects of memory or mistake. *State v. Karla J.*, 2005 AP 2422 (filed 12-20-2005, unpublished) citing *Ollman v. Wisconsin Health Car Liab. Ins. Plan*, 178 Wis. 2d 648.

A claim of abuse of sentencing discretion cannot be raised in a §974.06 Motion. *State v. Toran*, 2003 AP 3026 (filed 12-6-05, unpublished).

Read-in offenses are a collateral consequence of a plea and failure of the court to discuss the read-in charges with the defendant at the time of the plea and the defendant's claimed failure to understand the effect of read-in charges does not make the plea not knowing, intelligent or voluntary. *State v. Lackershire*, 2005 WI APP 265.

The Court and attorneys' scheduling conflict is good cause sufficient to allow scheduling a TPR Fact-Finding hearing beyond the 45 day limit. *State v. Robert K.*, 2005 WI 152.

Appearance of a prisoner by telephone at a TPR hearing is not the functional equivalent of a personal appearance because the



parent could not assess witnesses, confer with counsel, or hear everything as well as if personally present. *State v. Lavelle W.*, 2005 WI APP 266.

Even though the Affidavit in support of a search warrant was insufficient to establish probable cause, the good faith exception to the exclusionary rule applied because the affidavit contained sufficient "indicia of probable cause". *State v. Marquardt*, 2005 WI 157. What the heck does that mean?

Psychologists can opine about the future behavior of an individual. Therefore expert testimony was admissible in a TPR case on whether a mother will be able to meet the conditions. *In re the TPR of Daniel R.S.*, 2005 WI 160.

A casual statement about cocaine overheard by someone the declarant did not know was a police informant was not "testimonial" within the meaning of Crawford. *State v. Savanh*, 2005 WI APP 245.

2005 Act 25 amended §973.09, effective 7-27-05, to provide that, with certain exceptions, the maximum term of probation for a misdemeanor is one year (reduced from two years) and that misdemeanors other than Class A now have no minimum period of probation (formerly 6 months).

## ESTATE PLANNING

A case discussing efforts to rebut the presumption that an account established by the decedent in the decedent's name along with the name of her sister was not a true joint account with right of survivorship, but instead an account of convenience is found at *Estate of Mae Neugart v. Bell*, 2005 AP 1106 (filed 12-8-05, unpublished)

On October 18, 2005, the Circuit Court in Rock County held that the Wisconsin Department of Revenue has no statutory authority to assert a Wisconsin estate tax on gifts in contemplation of death. The name of the case is the *Ott Schweitzer Estate*.

## FAMILY LAW

2005 Wis Act 101 adds another factor to be considered in custody and physical placement determinations. The court must consider whether a person with whom the parent has a dating relationship or who has resided in the home has a criminal record and has ever engaged in child abuse or neglect. The new act became effective January 20, 2006 and first applies to proceedings to modify a judgment or order commenced on that date.

2005 Wis Act 104 defines the predominant aggressor for domestic abuse to mean the most significant, but not necessarily the first, aggressor in an incident. Law enforcement officers are required to arrest the predominant aggressor, and the act lists factors to consider in identifying the predominant aggressor. Persons arrested are required to post bail or appear before a judge before being released from custody. Law enforcement agencies are required to adopt policies to reflect the new requirements. The new act becomes effective on April 1, 2006.

Is support paid to a spouse per a temporary order deductible maintenance, or a nondeductible division of community income?

Specifically address the tax treatment as part of the temporary order.

A court is required to assess guardian ad litem fees against the interfering parent arising from a §767.242 placement enforcement proceeding. *In re the Marriage of Bernier v. Bernier*, 2006 WI App 2.

§854.15 states a divorce presumptively revokes a beneficiary designation. *Dahm v. City of Milwaukee*, 2005 WI App 258 discusses the burden of production and burden of proof in trying to rebut the presumption.

Maintenance is based on the financial circumstances at the time



the maintenance decision is made. Also, financial benefit as a result of cohabitation is an appropriate consideration in setting maintenance, but the court can consider the likelihood of the cohabiting relationship ending in the near future. *Woodard v. Woodard*, 2005 WI App 65.

A post judgment lump sum pension payment which neither party had no knowledge of at the time of the divorce was an unexpected windfall and not sufficient to warrant relief from property division under §806.07. *Winkler v. Winkler*, 2005 WI App 100.

There are numerous changes in the family law area because of the bankruptcy reform act that interested persons should find out more about. "Domestic support obligations" are nondischargeable (except under Ch. 13) and this term is expanded to include all economic obligations to former spouses, including apparently obligations to the former spouse under property division and are enforceable against exempt assets. Further, domestic support obligations are given first priority. A proof of claim may be required to assure proper treatment. Under Ch. 11, 12 and 13, a plan must fully pay all domestic support obligations. Further, both at the time of confirmation and at the time of discharge the debtor must certify all such obligations are current. Bankruptcy trustees are required to notify former spouses and others to whom

domestic support obligations are owed of their right to seek services of the state child support agency. This is a very brief and undoubtedly incomplete summary of some of the provisions relative to family law.

Does a stipulation to make child support non-modifiable violate public policy? According to the famlaw listserv, three cases which address this issue, one of which (naturally!) seems to contradict the other two. *Krieman v. Goldberg*, 214 Wis. 2d 163 (Ct. App. 1997), *Ondrasek v. Tenneson*, 158 Wis.2d 690, (Ct. App. 1990), and *Honore v. Honore*, 149 Wis. 2d 512 (Ct. App. 1989).

H and W were married for 10 years and get divorced. H and W reconcile and actually re-marry approximately one year after divorce. Unfortunately, H and W divorce again after one year of new marriage. H makes a considerable amount more than W, supported W in his career, etc. How long is their "marriage"? The answer, at least as far as maintenance is concerned, can be found in *Wolski v. Wolski*, 210 Wis. 2d 184 (Ct. App. 1997). Arguably the same rule would apply to property division.

Who wins if there is a disagreement between the parents and a GAL on access to a child's

counseling records? *State v. S.H.*, 159 Wis. 2d 730 (Ct. App. 1990) suggests that the GAL can assert privilege to supersede father's authorization.

Can a court order a lien or mortgage on a client's property for fees that an attorney has earned? *Stacey v. Stacey*, 168 Wis.2d 37 (1992) seems to say that that a circuit court does not have subject matter jurisdiction in a divorce action to determine attorney fees between an attorney and a client whom the attorney continues to represent in the divorce action.

## GENERAL PRACTICE

Wisconsin law allows a judge to "expunge" a case in only two situations, both involving youthful offenders. Misdemeanors committed by a person under 21 can be expunged if the judge ordered expunction upon successful completion of the sentence. §973.015. A juvenile who has been adjudged delinquent can, upon reaching age 17, petition the judge for expunction of the juvenile adjudication. §938.355 (CCAP does not display juvenile adjudications because they are not public records). If the judge properly orders a case expunged, any reference to it will be removed from CCAP. But currently a judge has no other authority or power to expunge cases, and therefore cases will continue to appear on CCAP even if a case is dismissed or a person



is found not guilty.

## REAL ESTATE

A wife agreed to sell her half of a house owned jointly with her husband with the agreement that she receive one half of the proceeds. At the closing, the escrow agent said their instructions were to give the full proceeds to the husband. The wife protested, but left the closing without any funds. The husband squandered the money but the court found that because the wife was not party to the escrow agreement for closing services the closer had no duty to the wife and was required to disburse the funds in accordance with the closing instructions from the lender. *Black v. Metro Title*, 2005 AP 1423 (filed 2-15-06, recommended for publication).

If a description is missing or inadequate in a purchase agreement, extrinsic evidence cannot be used to supplement the writing to avoid the statute of frauds. However promissory estoppel might allow the court to enforce a definite promise, which if established is not barred by the statute of frauds. *Zweber v. Melar Ltd*, No. 2005 AP 1084 (filed 2-7-06, unpublished)

## MISCELLANEOUS

A computer helps us make mistakes faster than anything else, with the possible exceptions of handguns and tequila.

This is a reprint of an article that appeared in the newsletter for the Fellows of the Wisconsin Bar Foundation, reprinted with permission of Magardette Demet, the author.

### FELLOW PROFILE: THOMAS E. FAIRCHILD

Born on Christmas Day, 1912, in Milwaukee, Wisconsin, Thomas E. Fairchild grew up to be one of Wisconsin's outstanding lawyers, a noted judge, and one of Wisconsin's most distinguished citizens. His father became a circuit judge when Thomas was only four years of age, and later a Justice of the Wisconsin Supreme Court. From early on the young Thomas was exposed to political and judicial traditions and was made aware of the important issues of the day. He studied at Deep Springs College in California, and Princeton University before graduating from Cornell University in 1934, and from the University of Wisconsin Law School in 1938. After graduation, he married his college sweetheart, Eleanor. They have four children and eight grandchildren.

Following law school Judge Fairchild worked as law clerk and secretary to his father at the Wisconsin Supreme Court, where he did extensive legal research and provided other services to the

Justices. He practiced law in Portage, Wisconsin with Daniel H. Grady who was a long time member of the Board of Regents of the University of Wisconsin, and Dorothy Walker. During World War II he was tapped to serve as attorney for the U. S. Office of Price Administration from 1942-1945, and then returned to Milwaukee to practice law. Although his early political experience was with the conservative Republican party of his father, he joined the Progressive Party when it split from the Republican party of Wisconsin. In 1948, he began with others to work toward revitalizing the Wisconsin Democratic Party and he was elected to the office of Wisconsin Attorney General in 1948. His successful run was a surprise to many because of his Republican background. That year, he and President Harry S. Truman were the only two Democrats to win election. President Truman appointed him as U.S. Attorney for the Western District of Wisconsin in 1951. In 1951, he also served as a consultant to the Office of Price Stabilization.

In 1952, after an unsuccessful run for the U.S. Senate against Joseph McCarthy, he returned to private practice in Milwaukee joining forces with Irvin Charne and Floyd Kops. Always a champion of the downtrodden, Judge Fairchild was one of the attorneys who appeared before the House Unamerican Activities Committee in defense of alleged



"communists" during the "witch hunt" years. During his years as Attorney General for the State of Wisconsin he also issued controversial opinions targeting, among other things, the "white only" practices common at that time.

He was elected to the Wisconsin Supreme Court in April of 1956, and served there for ten years until tapped by then President Lyndon B. Johnson to join the United States Court of Appeals for the 7th Circuit. He served as Chief Judge from 1975 to 1981, and has continued to serve as a Senior Judge since that time. His reputation for hard work, and a willingness to take on the tough issues has served him well wherever he has been assigned. During his time on the Wisconsin Supreme Court steps were taken to improve tort rules and the court ordered reapportionment of legislative districts based upon population. While he was on the Seventh Circuit his work ethic remained apparent to all. In the "Chicago Seven" case he read 22,000 pages to prepare for trial.

In 1997, the Wisconsin Supreme Court appointed him Chairperson of the Commission on Judicial Elections and Ethics. He continues to hear appeals in the Seventh Circuit and in other Circuits to this day.

He is a member of the Thomas E. Fairchild American Inn of Court named in his honor. He is an active master in the James E.

Doyle American Inn of Court in Madison, and an associate of the Wisconsin Equal Justice Fund. He has been the recipient of many awards, including: Doctor of Laws from St. Norbert's College, DePere, Wisconsin in 1966; Carthage College, Kenosha, Wisconsin, in 1972; University of Wisconsin, Madison, Wisconsin, in 1975; and John Marshall Law School, 1978. He is also the author of a number of law review articles and other publications. The University of Wisconsin Law School has for the past 13 years sponsored a prestigious free public lecture in his honor. The most recent lecture was on Friday, November 2, 2004, when Professor Elizabeth Warren of Harvard Law School spoke on "The Role of Social Science in Shaping the Law."

Judge Fairchild's intelligence, integrity, courage, humility, and his strong advocacy for the poor and the powerless have won him the respect of the entire bar and have brought him national acclaim.

---

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.

Jaime Duvall, Editor,  
Alma, WI.

