

### Criminal Procedure Nonprosecution Agreements – Public Policy – Termination of Parental Rights

*State v. Rippentrop*, 2023 WI App 15 (Feb. 23, 2023) [ordered published March 29, 2023]

**HOLDING:** A nonprosecution agreement between the defendants and the state is enforceable.

**SUMMARY:** The state charged the Rippentrops with crimes based on their alleged abuse of their son. The defendants moved to dismiss on the ground that they had entered into an unwritten nonprosecution agreement with the former district attorney of that county, who later filed an affidavit confirming the agreement and its terms.

The circuit court eventually found that the agreement was unenforceable (see ¶ 31) but also that the charges had to be dismissed because of prosecutorial misconduct (see ¶ 32).

The court of appeals affirmed the dismissal of the charges in an opinion authored by Judge Graham. The opinion discussed the law on nonprosecution agreements and the role of judicial oversight in the process. “First, this court has expressly rejected the argument that a court must approve of a nonprosecution agreement before it can bind the State” (¶ 43). “Second, Wisconsin cases suggest that any prosecutorial promise – whether embodied in a nonprosecution agreement or an unexecuted plea agreement – may become binding if a party detrimentally relies upon it” (¶ 45). The record showed that the Rippentrops had relied to their detriment on the agreement (see ¶ 46).

As to public policy, the state failed to meet its burden of proving that the nonprosecution agreement violated the public’s interest (see ¶ 50). The parents had agreed to terminate their parental rights, but the terms of the agreement did not violate the voluntariness standard of Wis. Stat. section 48.41. The parents admitted their agreements were voluntary and informed (see ¶ 56). In sum, the parents performed their end of the agreement (see ¶ 60).

Nor did the agreement amount to withholding information from the court (see ¶ 62). “If anything, the evidence in the record belies any suggestion that the parties to the nonprosecution agreement agreed to keep its existence secret” (¶ 64). The court of appeals criticized the parties’ failure to expressly advise the court that had granted the termination of parental rights about the nonprosecution agreement, but

there was no evidence that this was deceitful, especially in light of references to a “global resolution” and “agreement” with the county (¶ 66).

Finally, “[a]lthough we need not weigh the policies in favor of enforcement, we note that the public policy in favor of enforcing the nonprosecution agreement is compelling. Generally speaking, public policy favors the enforcement of contracts. And here, substantive due process and principles of fundamental fairness render the enforcement of this prosecutorial promise even more compelling” (¶ 68).

### Motor Vehicle Law Operating While Intoxicated – Stayed Sentence With Imposition of Probation Not Permitted

*State v. Shirikian*, 2023 WI App 13 (filed Feb. 1, 2023) [ordered published March 20, 2023]

**HOLDING:** For a fifth or sixth operating-while-intoxicated (OWI) offense, the law does not authorize the circuit court to stay the sentence and place the offender on probation.

**SUMMARY:** Shirikian was charged under the statute that deals with fifth and sixth OWI offenses. These crimes are classified as Class G felonies with a maximum penalty of 10 years of imprisonment, a \$25,000 fine, or both. For a fifth- or sixth-offense OWI, Wis. Stat. section 346.65(2)(am)5. provides as follows: “The court shall impose a bifurcated sentence under s. 973.01, and the confinement portion of the bifurcated sentence imposed on the person shall not be less than one year and 6 months. The court may impose a term of confinement that is less than one year and 6 months if the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record.” Wis. Stat. section 973.01 provides that the confinement portion of a bifurcated sentence cannot be less than one year.

In this case the circuit court imposed but stayed a sentence of three years of confinement followed by two years of extended supervision. The circuit court placed the defendant on probation for three years with a condition that she serve nine months in jail with work-release privileges. The state moved for resentencing, contending that the circuit court imposed an unlawful sentence. The circuit court denied the motion.

In an opinion authored by Judge Grogan, the court of appeals reversed. It concluded

that Shirikian’s sentence was unlawful “because the law does not authorize the circuit court to: (1) stay the sentence; (2) place Shirikian on probation; or (3) allow her to serve nine months in jail rather than a minimum of one year in prison. Rather, the plain language of Wis. Stat. § 346.65(2)(am)5. requires a circuit court to impose a bifurcated sentence that includes a minimum of eighteen months of initial confinement served in prison, unless the circuit court finds the exception allowing the court to impose a minimum of one year of initial confinement applies and states its reasons for doing so on the record. However, even if the court imposes sentence under the exception, the court’s sentence must still comply with the bifurcated sentence minimum – that is, it must have at least one year of initial confinement in prison. The law does not authorize the circuit court to stay the sentence and instead place the offender on probation” (¶ 43).

The court of appeals further concluded that because Shirikian’s sentence was not lawful, “she has no legitimate expectation of finality in it, and resentencing her does not violate double jeopardy” (¶ 42).

Accordingly, the court of appeals remanded the case to the circuit court with directions to resentence Shirikian to a lawful sentence consistent with this opinion (¶ 44).

### Taxation Real Property – Challenging Assessments – Statutory Duties

*Wal-Mart Real Est. Bus. Tr. v. City of Merrill*, 2023 WI App 14 (filed Feb. 14, 2023) [ordered published March 29, 2023]

**HOLDING:** A taxpayer failed to show that it complied with statutory duties to make a good-faith presentation of evidence, and the city did not waive this objection.

**SUMMARY:** Wal-Mart objected to the city’s assessment of its property. The circuit court dismissed Wal-Mart’s claims on the ground that Wal-Mart had failed to “present evidence ... or sworn testimony” before the city’s board of review as required by Wis. Stat. section 70.47(7)(a).

The court of appeals affirmed in an opinion authored by Judge Stark. “We conclude that Wal-Mart’s complaint did not sufficiently allege compliance with the requirements in Wis. Stat. § 70.47(7)(a). Specifically, it did not allege or contain any facts that suggest that Wal-Mart ‘in good faith presented evidence’ to the Board in support of its objection. The complaint also failed to allege that the

Board waived the hearing, that Wal-Mart appeared at the hearing in person or by telephone, or that Wal-Mart submitted written statements under oath (much less with approval to do either of the latter two actions). Because Wal-Mart's complaint failed to allege compliance with § 70.47(7)(a), the circuit court properly dismissed Wal-Mart's complaint for failing to state a claim upon which relief could be granted" (¶ 30) (footnote omitted).

Nor did the city waive its "statutory noncompliance" argument. "To the contrary, the undisputed facts show that the Board expressly denied Wal-Mart's request under § 70.47(8m) to waive the hearing on Wal-Mart's objection. This action alone demonstrates the Board's intent to hold Wal-Mart to its burden of proof and to uphold the statutory process of appealing an assessment to the Board before seeking judicial review.... Further, none of the Board's actions - i.e., holding the hearing, relying on the presumption of correctness, or issuing a notice of decision - waived the City's right to argue that Wal-Mart did not 'in good faith present[ ] evidence' to the Board. See Wis. Stat. § 70.47(7)(a). Indeed, it is undisputed that Wal-Mart was entitled to a hearing and that the Board denied

Wal-Mart's requests to waive the hearing. Furthermore, Wal-Mart ignores that the Board was required 'to presume that the assessor's valuation [was] correct' at the hearing, see § 70.47(8)(i), and, prior to final adjournment, issue a notice detailing 'the amount of the assessment as finalized by the board and an explanation of appeal rights, see § 70.47(12). Thus, the Board's actions simply appear to comport with the procedures set forth in § 70.47" (¶¶ 35-36).

Finally, the board of review did not violate Wal-Mart's due-process rights by not notifying Wal-Mart that the board had denied Wal-Mart's request to waive the hearing or to appear by telephone (see ¶ 40).

**Unemployment Compensation Religious-Purposes Exemption – Wis. Stat. section 108.02(15)(h)2 Catholic Charities Bureau v. LIRC, 2023 WI App 12 (filed Feb. 14, 2023) (ordered published March 29, 2023)**

**HOLDING:** The Labor and Industry Review Commission (LIRC) correctly determined that the petitioners are not organizations operated primarily for religious purposes and therefore do not qualify for the religious-

purposes exemption under Wisconsin's unemployment compensation law.

**SUMMARY:** This case involved interpretation of the religious-purposes exemption under Wis. Stat. section 108.02(15)(h)2 and whether the petitioners are exempt from Wisconsin's Unemployment Compensation Act, Wis. Stat. chapter 108. The Act provides an exemption for those "in the employ of an organization operated primarily for religious purposes and operated, supervised, controlled, or principally supported by a church or convention or association of churches."

Every Roman Catholic diocese in Wisconsin has a Catholic Charities entity that functions as the diocese's social ministry arm. One of the petitioners in this case is the Catholic Charities Bureau (CCB), which is the Catholic Charities entity for the Diocese of Superior. The other petitioners are separately incorporated nonprofit sub-entities operating under the CCB's umbrella. The CCB provides management services and consultation to its sub-entities, establishes and coordinates the sub-entities' missions, and approves capital expenditures and investment policies (see ¶ 11). The sub-entities primarily provide charitable

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aid to individuals with developmental and mental disabilities. This includes work training programs, life skills training, in-home support services, transportation services, subsidized housing, and supportive living arrangements (see ¶ 59). These services are provided to all people in need, regardless of their religion (see ¶ 11).

LIRC determined that the CCB and its sub-entities do not qualify for the religious-purposes exemption of the Unemployment Compensation Act. The circuit court disagreed.

In an opinion authored by Judge Stark, the court of appeals concluded that the reviewing body must consider the non-

profit organization's motives *and* activities to determine whether the organization is "operated primarily for religious purposes" under Wis. Stat. section 108.02(15)(h)2., such that the religious-purposes exemption to unemployment taxation applies (¶ 3).

The court of appeals held that LIRC correctly determined that the CCB and its sub-entities are not organizations operated primarily for religious purposes under the statute (see *id.*). The reviewing body must consider the purpose of the nonprofit organizations - not the church's purpose in operating the organization (see ¶ 24).

The court concluded that the nonprofit organizations in this case have a professed

religious *motivation* (a conclusion that is clearer with respect to the CCB and less so for its sub-entities) (see ¶ 57). However, as to whether the *activities* of the organizations are primarily religious, the court agreed with LIRC "that the activities of CCB and its sub-entities are the provision of charitable social services that are neither inherently or primarily religious activities" (¶ 58). Thus, the CCB and its sub-entities have not demonstrated that they qualify for the religious-purposes exemption to unemployment taxation.

The court acknowledged that the result in this case "would likely be different if CCB and its sub-entities were actually run by the church, such that the organizations' employees were employees of the church. Instead, CCB and its sub-entities are structured as separate corporations ... so we must view their motives and activities separate from those of the church" (¶ 60).

Lastly, the court concluded that the First Amendment was not implicated in this case. "Neither the statute nor any purported interpretation of the statute seeks to penalize, infringe, or prohibit any conduct of the organizations based on religious motivations, practice, or beliefs" (¶ 49). An interpretation of the statute that considers both the motivations and activities of the organization "appropriately balances an employee's ability to receive unemployment benefits with a religious organization's right to be free from state interferences," thereby avoiding excessive state entanglement with church matters (¶ 53). **WL**

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