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Domestic Relations

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when he is not.

Plea bargaining has a necessary function in the criminal justice system in that it terminates many criminal prosecutions with a guilty plea. This helps the courts to process more cases, which in turn tends to lessen the large backlog of cases experienced today. This function is becoming more important every day and an expansion of the scope of plea bargaining, but maintaining the rights of the defendant, does not seem unrealistic. The inclusion of a judge in the bargaining process, in an appropriate case, also does not seem improper. Such action would eliminate an extra step in the system and would benefit both the state and the defendant in that the matter could be disposed of immediately rather than proceeding to the court and informing the judge of what had transpired at the bargaining session.

JAMES A. WILKE

DOMESTIC RELATIONS

The most significant case of the Term in the area of domestic relations considered the termination of parental rights of a natural father to his illegitimate child, *State ex rel. Lewis v. Lutheran Social Services*.[1] In that case Jerry D. Rothstein sought to gain custody of a child born out of wedlock. Rothstein swore he was the natural father of the child, and had made his desire to take custody of the child known to the mother prior to the child's birth. However, the mother kept the birth and whereabouts of the child secret, until after her parental rights had been terminated at a hearing of the LaCrosse County Court. The child had subsequently been placed in a prospective adoptive home.

Because Rothstein had been given no notice of this hearing to terminate parental rights, he sought to vacate the county court order and petitioned that court for a hearing concerning his right to care, custody and control of the child. The county court denied his petition, and Rothstein appealed to the Wisconsin Supreme Court for a writ of habeas corpus to determine his rights to legal custody of the child.

In an earlier case,[2] the court had determined that Rothstein, as

1. 59 Wis. 2d 1, 207 N.W.2d 826 (1973).

2. State ex rel. Lewis v. Lutheran Social Services, 47 Wis. 2d 420, 178 N.W.2d 56 (1970).

father of an illegitimate child, had no parental rights and was not entitled to notice of a hearing to terminate his parental rights; the court felt that such a termination of parental rights without the consent of the father met the statutory requirements of Wis. Stats. Chapter 48,[3] and did not offend the equal protection clause of the Fourteenth Amendment to the United States Constitution. Chief Justice Hallows rigorously dissented from the majority position.[4]

In *Rothstein v. Lutheran Social Services*,[5] the father appealed the decision of the Wisconsin court to the United States Supreme Court. While on appeal, the Supreme Court in *Stanley v. Illinois*[6] held that the father of illegitimate children did have parental rights. The Wisconsin Supreme Court decision was vacated and remanded due to the *Rothstein*[7] appeal, with reconsideration to be based upon: the *Stanley*[8] decision, the goal of completing the adoptive proceedings in this case, and the fact that the child had lived with an adoptive family for a period of time.

Upon remand, the court referred the matter to a referee for a factual hearing. The referee found that Rothstein was the father and a fit person to have custody, but that the court should not grant him custody because the best interests of the child were served by remaining with his adoptive parents. In the *Lewis*[9] decision, the court considered the validity of the referee's findings and determined that:

1) It is not possible to give legal custody by adoption without a proper termination of parental rights.

2) Denial of the parental rights of a father due to mere illegitimacy violates his constitutional rights to equal protection under the law.

3) Termination of the rights of a natural father to an illegitimate child requires actual or constructive notice of a hearing to meet the requirements of due process.

4) To constitutionally meet the requirements stated by the United States Supreme Court in *Stanley*,[10] until the legislature

3. WIS. STATS. § 48.02(11) (1969). " 'Parent' means either a natural parent or a parent by adoption. If the child is born out of wedlock, 'Parent' means the mother."

4. State ex rel. Lewis v. Lutheran Social Services, 47 Wis. 2d 420, 437, 178 N.W.2d 56, 65 (1970).

5. 405 U.S. 1051 (1972).

6. 405 U.S. 645 (1972).

7. Rothstein v. Lutheran Social Services, 405 U.S. 1051 (1972).

8. Stanley v. Illinois, 405 U.S. 645 (1972).

9. State ex rel Lewis v. Lutheran Social Services, 59 Wis. 2d 1, 207 N.W.2d 826 (1973).

10. Stanley v. Illinois, 405 U.S. 645 (1972).

changed the violative sections in Wis. Stats. Chapter 48, the court required that notice given to the father of an illegitimate child must be the same as that given to other parents,[11] and secondly that consent or termination (with proper notice) of the rights of both parents must be achieved before a child may be adopted. The Wisconsin Supreme Court vacated the county court judgment, and Rothstein was entitled to have a hearing to determine the termination of his parental rights as natural father.

The importance of the *Lewis*[12] decision is clear. An attorney representing parties who seek to become adoptive parents must make a thorough inquiry into the nature of the consent of each natural parent, or the notice given of the hearing to terminate parental rights. This is to protect the rights of the clients as prospective adoptive parents, and to avoid the disruptive effect upon both "adoptive parents" and the child from the subsequent removal of the child from his adoptive home. Before proceeding with adoption, the attorney must determine whether the adoptive agency followed the constitutionally required steps to protect the natural parents.

Other cases in the August, 1972 Term considered problems in the area of the custody of children. *Freye v. Freye*,[13] for example, involved parties who entered into a stipulation giving the mother custody of their minor children when a divorce judgment was sought. After a number of years the father sought to gain custody of the three children; the trial court found both to be fit parents and able providers. It transferred custody of the two oldest children to the father, but the youngest child was to remain in the mother's custody. Upon the father's appeal of the custody of the youngest child, the Wisconsin Supreme Court stated its belief that once full inquiry into child custody has been made, a court ought not reconsider the matter again until there is a "substantial or material change in the circumstances of the parents or of the child." Then a change in custody may be made if "in the best interest of the

11. WIS. STATS. § 48.42(1) (1971).

The termination of parental rights under § 48.40 shall be made only after a hearing before the court. The court shall have notice of the time, place and purpose of the hearing served on the parents personally at least 10 days prior to the date of the hearing; or if the court is satisfied that personal service, either within or outside the state, cannot be effected, then such notice may be given by registered mail sent at least 20 days before the date of the hearing to the last known address of the parent, if an address is known, and by publication thereof. . . .

12. State ex rel Lewis v. Lutheran Social Services, 59 Wis. 2d 1, 207 N.W.2d 826 (1973).

13. 56 Wis. 2d 195, 201 N.W.2d 504 (1972).

child."[14] However, the court made it clear that the change of circumstances rule is not the proper test where the original custody award was based upon a stipulation, since all relevant factors were not considered. The court felt that the decision of the trial court had improperly applied the change of circumstances rule in favor of the mother in this case, and remanded with instructions that each parent have an equal burden of proof to show that custody with that parent was in the best interest of the youngest child.

Goembel v. Goembel[15] also involved a father who desired to obtain custody of a child from the mother; however, a complete determination of the fitness of both parents had been made in the divorce action (both parents had been deemed fit), and custody had been awarded to the mother. At a later hearing upon an order to show cause, the custody of the child was transferred to the father, prompting this appeal by the mother.

The Wisconsin Supreme Court asserted that where a complete determination of the fitness of parents in a divorce action found both to be fit to have custody of a child, the burden of proof is upon the party seeking to change the custody award. The basis of such a change in custody must be from evidence showing sufficient differences in the circumstances of the parents or the child to warrant such a transfer of custody. Much of the reasoning for the the trial court's transfer of custody was based upon alleged indiscretions of the mother, which had been considered in the original divorce action; the trial court had nonetheless deemed the mother fit to have custody of the child. The Wisconsin Supreme Court found the mere fact that the child was now two years older was not a material change in circumstances, and there was no proof that the mother's actions had any adverse effects upon the child. The Wisconsin Supreme Court reversed the county court order and the mother was permitted to maintain custody of the child.

In another case, *Ponsford v. Crute*,[16] the court considered a custody dispute between the grandparents and father of a child. In this case, the plaintiff/father and his wife had been married and had one minor child. They had separated and the father had been drafted into military service, with the mother having custody of the child. While the father was serving in the military, the mother died of accidental causes; after returning for the funeral, the father was

14. *Id.* at 196, 201 N.W.2d at 506.
15. 60 Wis. 2d 130, 208 N.W.2d 416 (1973).
16. 56 Wis. 2d 407, 202 N.W.2d 5 (1972).

not permitted to take the child by the maternal grandparents. The plaintiff began a habeas corpus proceeding to obtain custody, but the petition for the writ was denied because the court determined:

1) The grandparents were fit and proper persons to have custody.

2) The father was not suitable to have custody due to the nature of his military service obligation, his past indiscretions, and his failure to support the child.

3) The best interests of the child required remaining with the grandparents until the father showed he was fit to have custody.

Upon receiving an honorable discharge from military service, the father again sought custody of his child. Upon showing the court that he had paid most of his delinquent support payments, and that he had married the woman with whom he had been indiscreet, his request for custody was granted by the court with no visitation privileges granted specifically to the gransparents. The grandparents then brought an appeal.

The Wisconsin Supreme Court made it clear that the best interests of the child were the controlling considerations in a contest for custody between the parents of a child. However, before a trial court may deprive a natural parent of custody, there must be a showing that the parents are unfit or unable to adequately care for the child. Since at the time of the action the father was a fit and suitable parent, able to adequately care for his child, custody was properly awarded to him. However, the matter was remanded to the trial court to set reasonable visitation privileges for the grandparents. The court also would permit a temporary delay in the change of custody if the circumstances indicated it would be in the best interests of the child. For example, a trial court determination to delay the custody change until the end of a school term, rather than during the term, would be a legitimate delay.

Two cases in the Term, *Krause v. Krause*[17] and *Fritschler v. Fritschler*,[18] considered the duty to continue to make support payments when the parent with legal custody removes a child from the jurisdiction of Wisconsin without permission, thereby ending the other parent's visitation rights. In *Krause*,[19] the parents were divorced and the custody of their children was granted to the mother by the trial court; the father was to pay $100 per month for support

17. 58 Wis. 2d 499, 206 N.W.2d 589 (1973).

18. 60 Wis. 2d 283, 208 N.W.2d 336 (1973).

19. Krause v. Krause, 58 Wis. 2d 499, 206 N.W.2d 589 (1973).

of the children. The mother subsequently moved to Florida with the children, without informing the court or the father. After the father stopped making support payments, he sought an order to show cause why the divorce judgment shouldn't be amended to award him custody of the children, and to terminate support payments. The trial court cancelled the delinquent support payments, but ordered the father to pay the clerk of courts the same amount of monthly support ($100) to be held in trust for the children, until the mother received court permission to remove the children to Florida, or the mother returned with the children and again made Wisconsin her home. The father appealed the trial court order to continue to make support payments, but the Wisconsin Supreme Court felt the trial court had properly exercised its discretion in this respect. The basis for the decision was the father's duty to support his children, which rests upon his status as parent, and that a divorce doesn't affect the relationship or duties of a father to his children. In order to modify a divorce judgment, such as to modify support payments, there must be a material change in circumstances; in addition, the modification must be in the best interests of the children. While the wife's misconduct in frustrating the visitation rights of the father was clearly a change in the circumstances of the parties, the elimination of support was not in the best interest of the children. Also, the trial court was enabled to disburse these funds in its discretion, and the renewal of visitation rights and the residence of the mother and children were not requirements to such disbursement, but mere factors to be considered. The best interests of the children in such funds were to control their disbursement.

In *Fritschler,*[20] a judgment of divorce granted custody of two minor children to the mother and stated that the children were not to be removed from Wisconsin without permission from the court. However, Mrs. Fritschler moved to Colorado with the children, and later sought the court's permission for such an action; the move was supported by reports of two social workers and a family specialist who felt the move was in the best interests of both the mother and the children. The response of the father was a motion to transfer custody of the minor children to him. The mother and children returned to Wisconsin for the hearing of these motions,

20. Fritschler v. Fritschler, 60 Wis. 2d 283, 208 N.W.2d 336 (1973).

and the trial court declared both parents fit to have custody. The mother was to continue to retain custody provided that the children remain in Wisconsin; if Mrs. Fritschler did not wish to have custody of the children and remain in Wisconsin, then custody was to be awarded to the father. Once again the mother left for Colorado and the trial court suspended all support payments, granted custody to the father, and permitted the father to withhold a $5,000 alimony payment until the children were returned to Wisconsin. When the trial court refused to vacate this order, Mrs. Fritschler appealed.

The Wisconsin Supreme Court decision acknowledged that reports of social workers were helpful in determining the best interests of children, but were by no means binding upon a trial court. It felt the trial court had not abused its discretion by refusing to accept the recommendations in these reports, which advocated the mother's custody in Colorado of these children. The court pointed out that divorced parents may not be free to move about without restraint, if such movement is inconsistent with the best interests of the children and the rights of the other parent. Movement in light of such difficulties resulted in a forfeiture of rights of the mother to the custody of the children. The Wisconsin Supreme Court supported the lower court decision which granted custody to the father and permitted him to withhold a $5,000 alimony payment until the children were returned to Wisconsin. However, due to the *Krause*[21] decision, the suspension of support payments ordered by the lower court was reversed. This was due to the father's continuing duty to support his children even though denied visitation rights by a mother's actions in removing the children from the jurisdiction of Wisconsin.

Alaimo v. Schwanz[22] considered a different topic, that of an action for alienation of affections. The jury by special verdict found that the defendant had alienated the affections of the plaintiff's husband, and awarded compensatory damages of $15,000. Upon the defendant's appeal, the Wisconsin Supreme Court stated that this cause of action did not require the element of physical separation of the spouses: "Conduct which indicates a diminution of regard of one spouse for the other is sufficient to establish a loss of affection."[23] However, physical separation may be considered

21. Krause v. Krause, 58 Wis. 2d 499, 206 N.W.2d 589 (1973).
22. 56 Wis. 2d 198, 201 N.W.2d 604 (1972).
23. *Id.* at 201, 201 N.W.2d at 606.

with the possibilities for reconciliation or improvement of the marital situation as factors in the jury determination of damages. Factors which may mitigate damages include the prior institution of divorce proceedings and disputes involving physical violence between the spouses before the alleged alienation occurred.

In this case the supreme court felt the $15,000 damages awarded by the jury were excessive, and reduced them to $10,000 as the highest reasonable amount at which the plaintiff's damages could be set. This reduction of damages by the court under the *Powers*[24] rule gave the plaintiff the option of a new trial as to damages only or to have judgment for the amount as reduced.

One case during the Term considered the topic of property settlements in divorce actions. In *Ray v. Ray*,[25] a husband and wife agreed to a postnuptial settlement by which the wife would receive $2,000 from the sale of certain jointly owned property. This agreement was written by the husband's attorney and the wife was not represented by counsel; the agreement was to settle all property rights of the parties, including rights to future alimony. When the wife sued for divorce, the husband requested incorporation of this agreement in any subsequent judgment of divorce. The trial court found the agreement to be valid, and felt it was unnecessary to determine whether the plaintiff was adequately provided for under the settlement agreement.

Upon appeal the Wisconsin Supreme Court stated that Wis. Stats. 247.10[26] required approval of separation agreements to uphold the third party interests of the state in divorce cases. The court made it clear that a trial court has a duty to examine such postnuptial agreements carefully; the case was remanded to the trial court for a determination of the adequacy of the provisions made for the wife.

The subject of paternity was considered in *E——v.E——*.[27] The trial court granted a divorce and found as a fact in the judgment that a child was the issue of the marriage; there was no objection by the husband, but he was not represented by counsel at the trial. The husband later sought an order to show cause to reconsider the issue of paternity. At a hearing on the subject, the trial court found

24. Powers v. Allstate Ins. Co., 10 Wis. 2d 78, 102 N.W.2d 393 (1960).

25. 57 Wis. 2d 77, 203 N.W.2d 724 (1973).

26. WIS. STATS. § 247.10 (1971). ". . . [P]arties may, subject to the approval of the court, stipulate for a division of estate, for alimony, or for the support of children, in case a divorce or legal separation is granted or a marriage annulled."

27. 57 Wis. 2d 436, 204 N.W.2d 503 (1973).

that the defendant indeed was not the natural father of the child, and was not liable for support payments.

Upon the wife's appeal, the Wisconsin Supreme Court reversed the trial court decision and reinstated the original divorce judgment. The issue of paternity of the child was res judicata between the original parties to the divorce action, and the trial court may not vacate or modify the original judgment as to this finding of fact. The rationale for the decision was to give finality to divorce judgments. The failure of the defendant to raise the issue of paternity was not "excusable neglect" since the trial court had specifically questioned the defendant about this matter, and the defendant was not granted relief from this divorce judgment.[28]

JOHN KNUTESON

INSURANCE LAW

I. CASES OF FIRST IMPRESSION

A. "Accident" or "Occurrence"

Although the words "accident" or "occurrence" are found in most standard auto liability policies, it was not until this Term that the Wisconsin Supreme Court was called upon to decide exactly what was meant by such words; at least in reference to the extent of an insurer's liability for damage. The case which attempted to define these terms was *Olsen v. Moore*.[1] The defendant, Moore, was driving east on I-94 when he apparently lost control of his vehicle, crossed over the center median, and collided first with an automobile driven by Nancy Rauwald and then with an automobile driven by Bruno Janekowski. The defendant was insured by Badger State Mutual Casualty Co. which had issued a family combination auto policy providing bodily injury liability in the maximum of $10,000 per injured person and $20,000 per occurrence.[2]

28. WIS. STATS. § 269.46 (1971).

1. 56 Wis. 2d 340, 202 N.W.2d 228 (1972).

2. The Badger State Policy read as follows:

Limits of Liability. The limit of bodily injury liability stated in the declarations as applicable to 'each person' is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury sustained by one person as the result of any one occurrence; the limit of such liability stated in the declarations as applicable to 'each occurrence' is, subject to the above provi-