Criminal Procedure

Sex Offender Registration – Court Orders Required Each Time Defendant Is Being Sentenced or Placed on Probation for Covered Offenses

***State v. Young*, 2024 WI App 65 (filed Oct. 29, 2024) (ordered published Nov. 22, 2024)**

HOLDING: Wis. Stat. section 973.048(2m) requires a circuit court to order a defendant to register as a sex offender each time the defendant is being sentenced or placed on probation for a crime listed therein, unless the court determines, as of that time, that the defendant qualifies for the underage-sexual-activity exception in Wis. Stat. section 301.45(1m)(a)1m.

SUMMARY: Young was convicted in 2014 of second-degree sexual assault of a child. The court withheld sentence and placed him on probation. It also found that Young met the requirements of Wis. Stat. section 301.45(1m)(a)1m. for an underage-sexual-activity exception to mandatory sex offender registration; however, the court limited the exemption to six months so that it could observe how Young did on probation. Six months later, Young was in the midst of probation revocation proceedings, and the court declined to issue any orders regarding sex offender registration until those proceedings were resolved. After Young's probation was revoked in 2015, the court imposed a sentence of confinement and also ordered Young to register as a sex offender.

After Young was released from confinement, the state charged Young with failing to comply with sex-offender-registration requirements. He moved to dismiss the charge, arguing that the circuit court did not have authority to make his exemption from registration temporary and that the exemption must therefore be deemed permanent. The circuit court agreed and dismissed the charge of failing to register. The state appealed. In an opinion authored by Judge Hruz, the court of appeals reversed.

The court of appeals concluded that "Wis. Stat. § 973.048(2m) requires a circuit court to order a defendant to register as a sex offender each time he or she is being sentenced or placed on probation for a crime listed therein, unless the court determines, as of that time, that the defendant qualifies for the underage sexual activity exception in Wis. Stat. § 301.45(1m)(a)1m. This requirement existed both when the court placed Young on probation in May 2014 and again when it sentenced him after revocation of his probation in November 2015. Given the court's determination at the latter hearing that Young did not satisfy the underage sexual activity exception's fourth requirement, we conclude that the November 2015 order requiring that he register as a sex offender remains valid" (¶ 2). In short, the 2015 order superseded the earlier 2014 order (*see* ¶ 21).

In a footnote, the court indicated that given its disposition in this case, "we need not, and do not, address the validity of a circuit court issuing a temporary suspension of the sex offender reporting requirements" (¶ 22 n.6).

Competency – Involuntary Medication

***State v. N.K.B.*, 2024 WI App 63 (filed Oct. 1, 2024) (ordered published Nov. 22, 2024)**

HOLDING: An order for involuntary medication cannot be based on a finding of dangerousness if the person is committed as incompetent under Wis. Stat. section 971.14.

SUMMARY: The defendant, to whom the court referred by the pseudonym "Naomi," was charged with various misdemeanors arising out of a fracas in a psychiatric hospital. While in jail, she slapped a nurse and then was charged with a felony for battery by prisoner. The court ordered a competency evaluation report. Before the competency hearing, the Department of Health Services requested an involuntary medication order for Naomi. After the competency hearing, which was contested, the court found Naomi incompetent to proceed and, later, ordered involuntary medication because further medical testimony showed her to be dangerous. In so ordering, the circuit court found that *Sell v. United States*, 539 U.S. 166 (2003), permitted this course (*see* ¶ 15).

The court of appeals reversed in an opinion authored by Judge Geenen. "The sole question is whether the circuit court had the authority – statutory or otherwise – to order Naomi involuntarily medicated based on its finding that she was dangerous and without applying the *Sell* factors" (¶ 17).

"We agree with Naomi that the Supreme Court cases relied upon by the circuit court do not create an independent judicial authority to involuntarily medicate defendants committed under Wis. Stat. § 971.14 based on dangerousness, and Wis. Stat. § 51.61(1)(g)1. and 3. do not apply to incompetent defendants committed under [Wis. Stat. section] 971.14. Defendants committed under [Wis. Stat. section] 971.14 cannot be involuntarily medicated based on dangerousness absent the commencement of proceedings under [Wis. Stat.] ch. 51 or some other statute that authorizes involuntary medication based on the defendant's dangerousness. Any request for involuntary medication due to dangerousness would then be made in the parallel proceedings and not under [Wis. Stat. section] 971.14. The request would not be subject to the *Sell* factors because the involuntary medication is being requested for a purpose other than rendering the defendant competent to stand trial" (¶ 20).

Family Law

Child Support – Credit When Child Placement Exceeds 60 Days Beyond That Ordered by Court

***Rose v. Rose*, 2024 WI App 64 (filed Oct. 30, 2024) (ordered published Nov. 22, 2024)**

HOLDINGS: 1) Wis. Stat. section 767.59(1r)(e) does not require, for a payer of child support to be eligible for child support credit, that the payer exercise placement for a period of 60 *consecutive* days beyond that ordered by the court. 2) The circuit court made a reasonable discretionary decision when it denied the plaintiff's motion for modification of his child support order to include an offset

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In this column, Prof. Daniel D. Blinka and Prof. Thomas J. Hammer summarize select published opinions of the Wisconsin Court of Appeals. Full-text decisions are available online at www.wisbar.org/wislawmag.

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for the children's health insurance costs.

SUMMARY: After 14 years of marriage, Christopher Rose filed a petition for divorce from Tammy Jo Rose. Christopher and Tammy Jo have four minor children. The divorce judgment was entered in 2019. The judgment incorporated the parties' agreement on custody and placement of the children. The agreement provided for "9/5" placement in favor of Tammy during the school year, which meant that the children would be placed with Tammy for nine overnights in comparison to Christopher's five overnights, with Christopher having the right to two additional evening placements during Tammy's nine-day block. The parties also agreed, and the circuit court ordered, that Christopher would "continue to cover the parties' minor children under a policy of health insurance and that he should be responsible for the premium costs associated with the same" (¶ 2).

The parties did not strictly adhere to the placement schedule ordered by the court. Due in part to Tammy's relocation to a residence an hour's drive from where the marital home had been, where the children attend school, and where Christopher lives, the children were in the primary care of Christopher from October 2022 through February 2023. Because of this, Christopher moved the court for credit for overpayment of child support pursuant to Wis. Stat. section 767.59(1r)(e) and for modification of the child support order to include an offset for health insurance costs.

The circuit court denied the motion. With regard to credit for overpayment of child support, the court concluded that, although the children were in the primary care of Christopher during the five months cited above, Wis. Stat. section 767.59(1)(r) was inapplicable because Tammy did not forgo placement of more than 60 *consecutive* days beyond the court-ordered period of placement. The circuit court also concluded that Christopher was not entitled to offset his child support obligation based on his payment for the children's health insurance. In an opinion authored by Judge Lazar, the court of appeals affirmed in part and reversed in part.

Wis. Stat. section 767.59(1r)(e) provides in part that the circuit court may grant credit for child support payments already paid if "the payer proves by a preponderance of the evidence that the child lived with the payer, with the agreement of the payee, *for more than 60 days beyond a court-ordered period of physical placement.*" (Emphasis added.) Contrary to the circuit court's ruling, this statute does not require that those 60 days be consecutive.

Said the court of appeals: "We conclude as a matter of law that Wis. Stat. § 767.59(1r)(e) does not require the payer of child support to exercise placement for a period of sixty consecutive days in order to be eligible for a child support credit. Thus, we remand to the circuit court for a determination of whether Christopher should be granted the credit he sought for overpayment of child support from October 2022 through February 2023" (¶ 18).

The court of appeals affirmed the circuit court's decision denying Christopher's motion for modification of the child support order to include an offset for health insurance costs. Whether to modify this aspect of a child support order is within the circuit court's discretion. The circuit

court's denial of the motion was based on the parties' agreement that Christopher would be solely responsible for health insurance costs and on the court's disinclination to disturb that bargained-for provision based on the facts presented and absent a substantial change in circumstances. The court of appeals concluded that "the [circuit] court analyzed the relevant facts and, in our view, made a reasonable decision based on a correct interpretation of the law" (¶ 21).

Insurance

Underinsured Motorist Coverage – Covered Vehicles

***Miller v. West Bend Mut. Ins. Co.*, 2024 WI App 66 (filed Oct. 22, 2024) (ordered published Nov. 22, 2024)**

HOLDING: For purposes of underinsured motorist (UIM) coverage, a county snowplow was not an "underinsured motor vehicle" under terms of the policy.

SUMMARY: While driving an employer-owned vehicle, Miller was injured in an accident with a county snowplow. Miller's auto insurance policy excluded government-owned vehicles, but the circuit court ruled that public policy and "reasonable expectations" of insureds trumped the policy's language.

The court of appeals reversed in an opinion authored by Judge Stark. The circuit court failed to apply the insurance policy's plain language, which controlled the coverage issue. UIM coverage is no longer mandatory in Wisconsin, and the controlling statute does not include a definition of the term "underinsured motor vehicle" (¶ 2).

"Based on our review of the statutes, the case law, and the legislature's amendments to the UIM statutory landscape, we conclude that the circuit court erred by determining that the policy's definition of the term 'underinsured motor vehicle' was void and unenforceable under Wis. Stat. § 632.32. Pursuant to the 2011 amendments, UIM coverage is no longer mandatory in this state, and [Wis. Stat. section] 632.32 no longer contains a definition of an 'underinsured motor vehicle'" (¶ 17).

"Our supreme court's decision in *Brey* [*v. State Farm Mutual Automobile Insurance Co.*, 2022 WI 7, 400 Wis. 2d 417, 970 N.W.2d 1] approved an insurer's ability to contractually define 'underinsured motor vehicle' when setting the scope of UIM coverage within an insurance policy. As the Millers do not point to any statutory provision currently in effect that clearly prohibits the policy's definition of an 'underinsured motor vehicle,' the policy's definition is not void or unenforceable. Under the plain language of the policy, a government-owned vehicle cannot be an 'underinsured motor vehicle'; therefore, no UIM coverage exists for damages resulting from Miller's accident" (*id.*).

The court rebuffed Miller's arguments, rooted in statutes, that the policy's definition violates Wis. Stat. section 632.32 (*see* ¶ 24). Said the court: "Because UIM coverage is no longer mandatory, West Bend's contractual decision not to provide UIM coverage for accidents with government-owned vehicles does not violate [section] 632.32" (¶ 25). The court also rejected Miller's argument that the policy's definition of "underinsured motor vehicle" is arbitrary and creates an absurd result. "[A]ny argument that the policy's definition is arbitrary is immaterial because the parties contracted for that result" (¶ 40).

Municipal Law

Zoning – Rezoning Land Out of Farmland Preservation Zoning District – Wis. Stat. section 91.48(1)(b)

***Defend Town Plans U.A. v. Jefferson Cnty. Bd. of Supervisors*, 2024 WI App 67 (filed Oct. 17, 2024) (ordered published Nov. 22, 2024)**

HOLDINGS: 1) The rezoning ordinance at issue in this case was invalid because the Jefferson County Board of Supervisors failed to make findings that are required by Wis. Stat. section 91.48(1) when land is rezoned out of a farmland preservation zoning district. 2) The court remanded the matter to the board for additional proceedings that are consistent with the requirements of Wis. Stat. section 91.48(1).

SUMMARY: This case involves a decision by the Jefferson County Board of Supervisors (board) to rezone a parcel of property from "exclusively agricultural" to "agricultural and rural business" such that a boat storage facility could be constructed on it. The property was located within a farmland preservation zoning district. Once land is included in such a zoning district, it can be rezoned through the process set forth in Wis. Stat. section 91.48. On certiorari review, the circuit court invalidated the rezoning ordinance because it found that the board did not make findings that are required by Wis. Stat. section 91.48.

In an opinion authored by Judge Graham, the court of appeals agreed that the board did not make the findings outlined in Wis. Stat. section 91.48. The statute requires the board to find all the following: "(a) The land is better suited for a use not allowed in the farmland preservation zoning district. (b) The rezoning is consistent with any applicable comprehensive plan. (c) The rezoning is substantially consistent with the county certified farmland preservation plan. (d) The rezoning will not substantially impair or limit current or future agricultural use of surrounding parcels of land that are zoned for or legally restricted to agricultural use." Wis. Stat. § 91.48(1)(a)-(d).

Making these findings is required unless the board asks the Department of Agriculture, Trade and Consumer Protection to certify the rezoning, which did not happen here (*see* ¶ 38). While it is true that the board could have adopted any findings that were made by the county zoning committee before the matter made its way to the board, the zoning committee did not make the required findings either (*see* ¶ 34). Accordingly, the court of appeals concluded that the board did not validly enact the rezoning ordinance (*see* ¶ 50).

Having concluded that the board did not validly enact the rezoning ordinance, the court next addressed whether it should remand the matter to the board for additional proceedings that are consistent with the requirements of Wis. Stat. section 91.48(1). The plaintiffs argued that remand would be futile because the board could not reasonably make one of the findings specified in the statute – that the proposed rezoning is compatible with the county's comprehensive plan (*see* ¶ 53). Such a plan is an advisory guide to the physical, social, and economic development of a community (*see* ¶ 4).

The court of appeals rejected the argument that a remand would be futile. "Rather, because the County Board did not make any of the required findings, including that a rezoning would be consistent with Jefferson County's comprehensive plan, there is no determination for us to assess within the limited scope of certiorari review" (¶ 2). Accordingly, the court of appeals remanded the matter to the board for additional proceedings that are consistent with the mandates of Wis. Stat. section 91.48(1). **WL**