EVIDENCE

SUPREME COURT REVIEW

WITNESSES

In *Murdock v. Murdock*,[1] the Nebraska Supreme Court faced the issue of whether children of the parties in a divorce action were competent as witnesses. The court by implication ruled that this decision was left to the discretion of the trial court.[2] Factors which the trial court should consider were listed by the court, and included consideration of the children's best interest, the necessity for their testimony, and the emotional effect on the children of testifying.[3]

The physician-patient privilege is set out in section 27-504 of the Nebraska statutes.[4] In the recent case of *Branch v. Wilkinson*,[5] the supreme court thoroughly discussed the privilege as applied to blood samples taken in the course of emergency room treatment.[6] The *Branch* court required that before a court may apply this privilege, a party must establish that (1) a physician-patient relationship existed; (2) the type of evidence sought to be excluded comes within the protective scope of the privilege; (3) the physician needed the information to properly discharge his duties.[7]

The existence of the physician-patient relationship in *Branch* was established despite the fact that the patient was unconscious during the physician's treatment. The court held that the "relationship can be formed by the fact of treatment of an injured person by a physician,"[8] and that "[t]he defendant's unconscious state did not militate against the relationship."[9]

The second essential element of the privilege was satisfied when the court defined the privilege's protective scope to include blood samples.[10] In the court's opinion, the distinction between oral communications and physical evidence was relevant only to

1. 200 Neb. 429, 264 N.W.2d 183 (1978).
2. *Id.* at 432, 264 N.W.2d 185-86.
3. *Id.* at 432, 264 N.W.2d 186.
4. NEB. REV. STAT. § 27-504 (Reissue 1975).
5. 198 Neb. 649, 256 N.W.2d 307 (1977).
6. *Id.* at 655-63, 256 N.W.2d at 312-16.
7. *Id.* at 655, 256 N.W.2d at 312.
8. *Id.*
9. *Id.* at 656, 256 N.W.2d at 312.
10. *Id.* at 657, 256 N.W.2d at 313.

fifth amendment analysis and had no application to the privilege.[11] The court therefore held that "[t]he physician-patient privilege protects not only statements made by the patient to the physician, but also facts obtained by the physician by observation or examination."[12]

The final element of the physician-patient privilege is that the information must be "necessary to enable the physician to properly discharge his duties."[13] The *Branch* court held that the party claiming the privilege had established this element based on two factors. First, the doctor testified that the blood was withdrawn for medical reasons.[14] Second, no law enforcement officer requested that a blood sample be taken.[15] It is interesting to note that in one of the cases cited by the court, blood samples taken from an unconscious patient at the request of a police officer were not within the privilege's protection.[16]

HEARSAY

Section 27-803(2) of the Nebraska statutes codifies the hearsay exception that a statement of the declarant's then existing state of mind is admissible to show intent.[17] In the recent case of *Fite v. Ammco Tools, Inc.*,[18] the supreme court incorporated into the statutory provision an early Nebraska case law interpretation of this hearsay exception.[19] "[A] statement of intent related to the destination and purpose of a journey," the court held, "is only admissible if it is made at or about the time of the act or departure."[20] This rule was originally adopted in *Gering v. School District*,[21] decided in 1906.

PROOF OF AGE

The Nebraska Criminal Code provides that a "person shall be guilty of sexual assault in the first degree when such person subjects another person to sexual penetration and . . . the actor is more than eighteen years of age and the victim is less than sixteen

11. *Id.*
12. *Id.* at 656, 256 N.W.2d at 313.
13. *Id.* at 658, 256 N.W.2d at 313.
14. *Id.* at 660-61, 256 N.W.2d at 315.
15. *Id.* at 661, 256 N.W.2d at 315.
16. *Id.* at 658-59, 256 N.W.2d at 314.
17. NEB. REV. STAT. § 25-803(2) (Reissue 1975).
18. 199 Neb. 353, 258 N.W.2d 922 (1977).
19. *Id.* at 359, 258 N.W.2d at 925.
20. *Id.*
21. 76 Neb. 219, 227-28, 107 N.W. 250, 253-54 (1906).

years of age."[22] Proof of the defendant's age is therefore an essential element of the crime which the state must establish beyond a reasonable doubt.[23] The Nebraska Supreme Court, in *State v. Lauritsen*,[24] held that the state's presentation of circumstantial evidence was sufficient to satisfy this burden of proof. The circumstantial evidence upon which the court relied consisted of: the defendant's physical appearance on the witness stand;[25] testimony that the defendant frequented a tavern where he purchased beer for three or four weeks prior to the crime;[26] a witness' description of the defendant as a "man";[27] and the defendant's status as a Wizard in the Ku Klux Klan.[28] The court also noted that the jury was properly instructed on the elements of the crime, and therefore "[o]bviously the jurors reached the conclusion from their observations and from the evidence that the defendant was over eighteen years of age."[29] The court cautioned that it was doubtful that any one of these factors was sufficient; however, in combination, they were.[30] In a strong dissent, Judge White did not agree that the state's failure to offer direct proof of the defendant's age could be remedied "by gleaning random evidence from the record, from which references to the defendant's age can be indirectly inferred."[31] In Judge White's opinion, "[t]he cumulative effect of such tenuous evidence does not render the evidence sufficient when measured by the standard 'beyond a reasonable doubt.' "[32]

LEGISLATION

During the past session of the legislature two statutes were enacted which govern the presentation of evidence in criminal trials. L.B. 276[1] amends section 28-401 of the Nebraska statutes and provides that no conviction under the Uniform Controlled Substances Act[2] shall be based on the uncorroborated testimony of a

22. NEB. REV. STAT. § 28-408.03 (Reissue 1975).
23. *See* Hubert v. State, 74 Neb. 220, 223, 104 N.W. 276, 278 (1905).
24. 199 Neb. 816, 261 N.W.2d 755 (1978).
25. *Id.* at 818-19, 261 N.W.2d at 757.
26. *Id.* at 819, 261 N.W.2d at 757. The court took judicial notice of Nebraska statutes which require that no one under 19 be permitted to purchase beer. *Id.*
27. *Id.* at 819-20, 261 N.W.2d at 757.
28. *Id.* at 820, 261 N.W.2d at 757. A witness testified that a person must be 18 years or older to join the Ku Klux Klan. *Id.*
29. *Id.*
30. *Id.* at 820-21, 261 N.W.2d at 758.
31. *Id.* at 821, 261 N.W.2d at 758. (White, J., dissenting).
32. *Id.* at 822, 261 N.W.2d at 758 (White, J., dissenting).

1. L.B. 276, 1978 Neb. Laws 169 (to be codified in NEB. REV. STAT. § 28-401).
2. NEB. REV. STAT. §§ 28-401 to -438 (Reissue 1975) (amended 1978).

"cooperating individual."[3] The amendment defines cooperating individual as: "any person, other than a commissioned law enforcement officer, who acts on behalf of, at the request of, or as agent for a law enforcement agency for the purpose of gathering or obtaining evidence of offenses punishable under [the Uniform Controlled Substances Act]."[4]

In this session the legislature also enacted L.B. 618,[5] which requires that in all cases arising under sections 28-801 to 28-804 of the Nebraska statutes,[6] no person shall be excused from testifying against another because such testimony may tend to be self-incriminating.[7] However, such testimony cannot later be used against the person required to testify.[8]

3. L.B. 276, § 2, 1978 Neb. Laws 173.
4. *Id.* §1 at 173.
5. L.B. 618, 1978 Neb. Laws 418.
6. NEB. REV. STAT. §§ 28-801 to -804. These provisions deal with prostitution and pandering. *Id.*
7. L.B. 618, § 1, 1978 Neb. Laws 418.
8. *Id.*