



WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: REPRESENTATIVE CHRISTINE SINICKI

FROM: Anne Sappenfield, Senior Staff Attorney, and Anna Henning, Staff Attorney

RE: 2013 Assembly Bill 161, Relating to Injunctions Suspending or Restraining the Enforcement or Execution Statewide of a Statute of This State

DATE: May 1, 2013

This memorandum responds to your request for a description of 2013 Assembly Bill 161 (“the bill”), relating to injunctions suspending or restraining the enforcement or execution of a statute of this state, and an analysis of constitutional implications with respect to the bill. Under the bill, an injunction, restraining order, or any other final or interlocutory order¹ issued by a circuit court or the Court of Appeals that suspends or restrains the enforcement of any Wisconsin statute is stayed if a petition is filed with the Wisconsin Supreme Court or the Court of Appeals within 10 days. For reasons discussed in greater detail below, it appears possible that portions of the bill could be found unconstitutional under the Separation of Powers Doctrine.

CURRENT LAW

Under current law, a final judgment or a final order of the circuit court may be appealed as a matter of right to the Court of Appeals, unless otherwise expressly provided by law. [s. 808.03 (1), Stats.] The Supreme Court of Wisconsin may take jurisdiction of an appeal or any other proceeding pending in the Court of Appeals if the Supreme Court does one of the following:

- Grants direct review upon a petition to bypass filed by a party.
- Grants direct review upon certification from the Court of Appeals prior to the Court of Appeals hearing and deciding the matter.

¹ An interlocutory order is an order that relates to some intermediate matter in the case or any order than a final order. [*Black's Law Dictionary*, 1130 (8th ed. 2004).]

- On its own motion, decides to review the matter directly

[s. 808.05, Stats.]

A judgment is the determination of a legal action. It may be final or interlocutory. [s. 806.01 (1) (a), Stats.] A judgment in an action for an injunction² may not be stayed³ during the period after its entry and until an appeal is taken or during the pendency of an appeal, unless the court orders otherwise. When an appeal is taken from a judgment or an appealable order granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon the terms as it considers proper for the security of the rights of the adverse party. [s. 806.08 (1) and (3), Stats.]

Current law further provides that an appeal does not stay the execution or enforcement of the judgment or order appealed from except as otherwise provided in law. This section specifies that, during the pendency of an appeal, a circuit court or an appellate court may do any of the following:

- Stay execution or enforcement of a judgment or order.
- Suspend, modify, restore, or grant an injunction.
- Make any order appropriate to preserve the existing state of affairs or the effectiveness of the judgment subsequently to be entered.

[s. 808.07 (1) and (2), Stats.]

Under current law, circuit courts also have the discretion to issue temporary injunctions under certain circumstances. Specifically, current law provides that a temporary injunction may be granted to restrain an act: (a) when it appears from a party's pleading that the party is entitled to judgment and any part of the judgment consists of restraining some act, and the commission or continuance of that act would injure the party; or (b) when it appears during the litigation that a party is doing or threatens or is about to do, or is procuring or suffering some act to be done, in violation of the rights of another party and tending to render the judgment ineffectual. [s. 813.02 (1) (a), Stats.]

THE BILL

Under the bill, if a circuit court or the Court of Appeals enters an injunction, restraining order, or any other final or interlocutory order suspending or restraining the enforcement of any statute of this state, the injunction, restraining order, or other final or interlocutory order is immediately appealable as a matter of right.

² An injunction is a court order commanding or preventing an action. [*Black's Law Dictionary*, 800 (8th ed. 2004).]

³ To stay a proceeding or a judgment means to postpone or halt it. [*Id.* at 1453.]

The bill provides that any injunction, restraining order, or other final or interlocutory order that is appealable under this provision must be automatically stayed upon the filing of an expedited petition for interlocutory review with the Supreme Court or with the Court of Appeals. The bill permits the Supreme Court to take jurisdiction of the proceeding if it grants direct review upon an expedited petition for interlocutory review of an action pending in the Court of Appeals. In addition, the Supreme Court, under the bill, may take jurisdiction of a proceeding pending in a circuit court if it grants direct review of such a petition. A petition for interlocutory review filed no later than 10 days after the entry of the order suspending or restraining the enforcement of a state statute is an expedited petition for interlocutory review under this provision.

If an expedited petition for interlocutory review is filed, the automatic stay remains in effect until one of the following occurs:

- The Supreme Court or the appellate court with which the expedited petition for interlocutory review is filed grants the petition for interlocutory review and subsequently orders that the automatic stay be lifted.
- The Supreme Court or the appellate court with which the expedited petition for interlocutory review is filed denies the petition for interlocutory review and simultaneously orders that the automatic stay be lifted.
- Entry of a final and unappealable order disposing of the entire case.

The bill provides that a court may not otherwise modify or restore an injunction that is stayed as required in the bill during the pendency of an appeal.

The Supreme Court or the appellate court is permitted, under the bill, to enter such orders as are necessary and proper to the resolution of the petition for interlocutory review, including orders directing the preparation and filing of the record and the submission of briefs, appendices, and other materials by the parties.

The bill specifies that the newly created provisions do not require a party to seek an expedited petition for interlocutory review as provided in the bill and do not modify or otherwise affect the rights of any party to appeal from, or seek Supreme Court review of, an order otherwise subject to these provisions under the general statutes governing appellate review.

The bill would first apply to an injunction, restraining order, or other final or interlocutory order issued by a circuit court or by an appellate court on the effective date of the legislation.

ANALYSIS OF POTENTIAL CONSTITUTIONAL IMPLICATIONS

Separation of Powers Doctrine

The Wisconsin Constitution provides that the legislative power is vested in a Senate and Assembly. [Art. IV, sec. 1.] The judicial power is vested in a unified court system consisting of one supreme court, a court of appeals, a circuit court, such trial courts of general uniform statewide jurisdiction as the Legislature may create by law, and a municipal court if authorized by the Legislature. [Art. VII, sec. 2.] Under the Wisconsin Constitution, the Supreme Court shall have superintending and administrative authority over all courts. [Art. VII, sec. 3 (1).]

The Wisconsin Supreme Court has held that the state's three branches of government exercise both core powers and shared powers. When exercising shared powers, one branch of government may not unduly burden or substantially interfere with another branch. Further, an attempt by one branch to exercise the core power of another branch is impermissible, unless the branch having the core authority accedes to the intrusion as a matter of courtesy. In *State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 531 N.W.2d 32 (1995), the court made the following comments:

The doctrine of separation of powers, while not explicitly set forth in the Wisconsin constitution, is implicit in the division of governmental powers among the judicial, legislative and executive branches. "The Wisconsin constitution creates three separate coordinate branches of government, no branch subordinate to the other, no branch to arrogate to itself control over the other except as is provided by the constitution and no branch to exercise the power committed by the constitution to another."

Each branch has a core zone of exclusive authority into which the other branches may not intrude....

The separation of powers doctrine was never intended to be strict and absolute. Rather, the doctrine envisions a system of separate branches sharing many powers while jealously guarding certain others, a system of "separateness but interdependence, autonomy but reciprocity." ...The undue burden or substantial interference must be proven beyond a reasonable doubt....

[*Id.*, 531 N.W.2d at 36-40; footnotes and citations omitted.]

In another case involving an alleged intrusion of the legislative branch into judicial functions, the Wisconsin Supreme Court stated:

...To determine whether legislation unconstitutionally intrudes upon judicial power and therefore violates the separation of

powers doctrine, this court developed a three-part test. We must first determine whether the subject matter of the statute is within the powers constitutionally granted to the legislature. The second inquiry is whether the subject matter of the statute falls within powers constitutionally granted to the judiciary. If the subject matter of the statute is within the judiciary's constitutional powers but not within powers constitutionally granted to either the legislature or executive branch, the subject matter is within the judiciary's core zone of exclusive power. Any exercise of power by the legislature or executive branch within such an area is an unconstitutional violation of the separation of powers doctrine. The judiciary may recognize such an exercise of power but only as a matter of comity and courtesy, not as an acknowledgement of power.

If the subject matter of the statute is within the powers constitutionally granted to the judiciary and the legislature, the statute is within an area of shared powers. Such a statute is constitutional if it does not unduly burden or substantially interfere with another branch.

[See *State v. Horn*, 226 Wis. 2d 637, 644-645 (1999); citations omitted.]

Statutory Relationship Between the Legislative and Judicial Branches

Section 751.12 (1), Stats., provides that the Supreme Court must, by rules promulgated by it from time to time, regulate pleading, practice, and procedure in judicial proceedings in all courts, for the purposes of simplifying the proceedings and promoting speedy determination of litigation. The power of the Supreme Court in these matters extends to its ability to affect the work product of the Legislature; that is, the rules of the Supreme Court may modify or suspend existing statutes. [See s. 751.12 (2), Stats.]

However, the statutes reflect the shared power and interests of the judicial and legislative branches in these matters. Section 751.12 (4), Stats., provides that the authority of the Supreme Court to affect the statutes does not "abridge the right of the Legislature to enact, modify, or repeal statutes or rules relating to pleading, practice, or procedure."

Separation of Powers Analysis

It appears that the bill affects an area of the law over which the legislative and judicial branches exercise shared power, and that aspects of the bill could be found by a court to be under the exclusive power of the judicial branch or to unduly burden or substantially interfere with the judicial branch. If a statute is found, beyond a reasonable doubt, to be under the exclusive power of the judiciary or to be a power that is shared by the judiciary and the

Legislature but that unduly burdens or substantially interferes with the judicial branch, the court may rule the statute to be unconstitutional and overturn it. If a statute is found to be a shared power but is not found to unduly burden or substantially interfere with the judicial branch, the statute is not unconstitutional, but the judiciary may overturn the legislative action through future amendments.⁴

As noted above, courts use a three-part test to determine whether a statute is within the powers constitutionally granted to the Legislature or the judiciary, or is within an area of shared powers. As described above, the powers of the branches are not delineated in the Constitution, but there is guidance in case law.

Because the bill would affect court practice and procedure by requiring, in general, certain orders to be stayed, it likely would be difficult to persuade a court that it falls squarely within the powers granted the Legislature. However, whether the bill affects an exclusive judicial power or a power shared by the Legislature and the judiciary is less clear.

It should be noted at the outset that statutes enjoy a presumption of constitutionality, and a challenge on constitutional grounds must be proven beyond a reasonable doubt. [*Wisconsin Retired Teacher's Ass'n v. Employee Trust Funds Bd.*, 207 Wis. 2d 1 (1997); *Employers Health Ins. Co. v. Tesmer*, 161 Wis. 2d 733 (Ct. App. 1991).]

Arguably, the provision of the bill that would most likely be subject to legal challenge is the provision automatically staying a circuit or appellate court order that suspends or restrains the enforcement of any state statute. The circumstances under which an injunction may be granted by a court are currently set forth in case law and statute, as discussed above. In general, an injunction may be issued to preserve the status quo when there is no other adequate remedy at law and a showing that there will be irreparable harm without the injunction.

If the court views the power to stay a court order as exclusively within the power of the judicial branch, the court may rule the provision unconstitutional. The fact that the bill affects a circuit court's or appellate court's adjudication of a case may cause a court to find that the bill affects a core power of the judiciary. The Supreme Court stated in one separation of powers analysis:

It is well established that this court has express, inherent, implied and incidental judicial power. Judicial power extends beyond the

⁴ See, for example, legislative and judicial activity regarding ch. 756, Stats., relating to juries. In 1990, the Legislative Council established the Special Committee on Jury Service to review jury selection practice. The committee's deliberations resulted in the enactment of 1991 Wisconsin Act 271, relating to jury service as a civic duty, exemptions and excuses for jury service, jury commissioners, sources for jury lists, juror qualification forms, forfeitures for failure to attend as a juror, length of juror service, and periods of juror eligibility. The Supreme Court, apparently not satisfied with the decisions made by the Legislature, significantly amended ch. 756, Stats., in Supreme Court Order No. 96-08, 207 Wis. 2d xv (1997). The Legislature did not respond to the amendments effected by the Supreme Court.

power to adjudicate a particular controversy and encompasses the power to regulate matters related to adjudication.

[*State v. Holmes*, 106 Wis. 2d 31, 44 (1982).]

A court may also find that the provision automatically staying circuit court orders is unconstitutional if it finds that this provision violates the judiciary's independence in the fulfillment of its constitutional responsibilities. The Supreme Court of Wisconsin has held that "a truly independent judiciary must be free from control by the other branches of government." [*In re Grady*, 118 Wis. 2d 762, 782 (1984).] A law automatically staying a court order based upon the filing of a petition, without taking into account the purposes of injunctions currently recognized by the courts and in statute, may be found to violate the judiciary's independence.

The bill could also be found to govern an area that is within the judiciary and the Legislature's shared power. However, the provision could still be found unconstitutional on the basis of unduly burdening or substantially interfering with the judiciary. The Supreme Court of Wisconsin has described the power of the Legislature to regulate the courts as follows:

In Wisconsin jurisdiction and power of the court is conferred not by act of the legislature but by the constitution itself. While the legislature may regulate in the public interest the exercise of the judicial power, it cannot, under the guise of regulation, withdraw that power or so limit and circumscribe it as to defeat the constitutional purpose.

[*John F. Jelke Co. v. Beck*, 208 Wis. 650, 660 (1932).]

Because the bill would allow a circuit court or appellate court to enjoin a statute, under the requirements of current law, but would not permit the court system, as a whole, to enforce the order unless the Supreme Court or Court of Appeals lifts the stay, as provided in the bill, the court may find that this provision of the bill substantially interferes with the judiciary.

The same analysis may apply to the provisions of the bill relating to bypass of the Court of Appeals by the Supreme Court and specifying that appeals of relevant injunctions are appeals "as of right." Although the provision regarding bypass appears discretionary, the "appeal as of right" language suggests that the bill could be interpreted to *require* the Supreme Court to review a petition appealed under the bill. In addition, this might be viewed as a matter over which the Supreme Court has superintending and administrative authority under Art. VII, section 3 (1) of the Wisconsin Constitution.

On the other hand, courts have recognized that the Legislature has a role in assuring the fairness, and appearance of fairness, of the judicial system. For example, in cases relating to trial rights, such as speedy trial for criminal defendants and judge substitution, the court has held that the Legislature shares with the judiciary the authority to guarantee such rights. [See,

e.g., *State v. Holmes*, 106 Wis. 2d 31 (1982), upholding a statute requiring substitution of a trial judge.] On this point, the Supreme Court has stated:

While the legislature has no constitutional power to compel the court to act or, if it acts, to act in a particular way in the discharge of the judicial function, it may nevertheless with propriety, and in the exercise of its power and the discharge of its duty, declare itself upon questions relating to the general welfare...The court, as has been exemplified during the entire history of the state will respect such declaration and, as already indicated, adopt them so far as they do not embarrass the court or impair the constitutional functions.

[*Id.* quoting *Integration of Bar Case*, 244 Wis. 8 (1943).]

In conclusion, it is difficult to predict with certainty how a court may rule regarding the bill's constitutionality. However, because the bill limits the effect of a remedy issued by a circuit court or court of appeals in the state, and because it could be interpreted to require the Supreme Court to review orders over which its review is ordinarily discretionary, there appear to be credible arguments under the Separation of Powers Doctrine that the bill affects an exclusive power of the judiciary or at least falls within the shared powers of the judiciary and the Legislature. It is possible, therefore, that portions of the bill could be overruled by the court and it appears likely that the Supreme Court could overrule provisions of the bill by amending the statutes affected.

If you have any questions, please feel free to contact us directly at the Legislative Council staff offices.

AS:AH:ksm:jal