

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0926/P1dn
TKK:eev:rs

January 18, 2013

Representative Craig:

On December 19, 2012, I spoke with Amy Lewis regarding the instructions for this bill. Per Amy's instructions, this bill requires a circuit court judge to immediately stay, for a period of 45 days, an interlocutory or final judgment that modifies, restores, or grants an injunction having the effect of enjoining the implementation or enforcement of a state law. A temporary stay imposed under the bill by the circuit court becomes permanent if not suspended or lifted by a court of appeals. Amy explained that a court of appeals could lift a 45-day stay imposed by a circuit court, but at that time the court of appeals would be required to immediately order another 45-day stay of the injunction. Amy also explained that a court of appeals that would be eligible to lift the temporary stay would be required to be randomly selected. Because I have questions surrounding the appeal of the 45-day stay, this draft does not include this last provision. Finally, a 45-day stay imposed in the court of appeals becomes permanent if not suspended or lifted by the Wisconsin Supreme Court.

As Amy instructed, the bill does not provide for an automatic appeal of a stay imposed under the bill. Amy also instructed me to prohibit a party aggrieved by the order from appealing the stay of the injunction.

The bill does not interfere with either a district court's or a court of appeals' ability to grant an injunction, nor does the bill modify the standards a court must consider prior to granting an injunction. Note that, under current law, an injunction may only be issued if a court has made specific findings, including that a party has no adequate remedy at law and will suffer irreparable harm in the absence of the injunction. *See, e.g., Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520 (1977).

The drafting instructions do raise several procedural impediments to due process for aggrieved parties and certain constitutional issues involving the separation of powers between the legislative and judicial branches.

1. Procedural impediments: In the absence of either an automatic appeal of the stay or the right of the aggrieved party to initiate an appeal of the stay, no court of appeals would be able to hear an appeal of the stay by the aggrieved party. A court of appeals has no inherent power to, on its own initiative, pursue a case in order to consider an matter raised in the case; a party must initiate an appeal. *See, for example, s. 808.03 (2) (b), stats.*, (which permits an appeal of a non-final judgment that would protect the

petitioner from substantial or irreparable injury). See also s. 808.04, stats., governing the timing initiating an appeal, and s. 808.075, stats., governing permitted court actions pending appeal. But see s. 809.70, stats., (permitting “a person . . . [to] request the supreme court to take jurisdiction of an original action by filing a petition which may be supported by a memorandum.”). Without an appeal to the court of appeals, any temporary stay imposed under this bill by a circuit court would become a permanent stay.

Current law s. 808.05 (3), stats., does permit the Supreme Court to take jurisdiction of an appeal on its own motion. However, for the Supreme Court to take this action, the matter must first be appealed (brought to the court of appeals): “The supreme court may take jurisdiction of an appeal or any other proceeding pending in the court of appeals if . . . [i]t, on its own motion, decides to review the matter directly.”

2. Constitutional Concerns: This bill may be subject to a constitutional challenge as in violation of the separation of powers provisions of the Wisconsin Constitution. As you are aware, article IV, section 1, of the Wisconsin Constitution vests the legislative powers in the senate and assembly. Article VII, sections 2, 5, and 8, vest the judicial powers of the state in a unified court system and grants circuit courts and the courts of appeals original and appellate jurisdiction, respectively.

Under the separation of powers doctrine, the constitution confers on each branch of government certain powers upon which the other branches may not intrude. See, e.g., *State v. Holmes*, 106 Wis. 2d 31, 42 (1981); *Thoe v. Chicago M. & St. P. R. Co.*, 181 Wis. 456, 465 (1923) (involving an attempt by the legislature to legislate what constitutes legally sufficient evidence). Although the separation of powers doctrine does not always require a strict, absolute division of powers, in areas of shared power, one branch may not exercise power in a manner that will unduly burden or substantially interfere with another branch’s essential role and powers. See *Demmith v. Wisconsin Judicial Conference*, 480 N.W.2d 502, 508, 166 Wis. 2d 649, 663 (1992).

Further, the Supreme Court has held that “the setting and enforcement of time periods for judges to decide cases lies within an area of authority exclusively reposed in the judicial branch of government.” *In Matter of Complaint Against Grady*, 118 Wis. 2d 762, 783, 348 N.W.2d 559 (1984) (finding the statute at issue to be an unconstitutional intrusion by the legislature into the exclusively judicial area of judicial decision-making); *but see Grady*, 118 Wis. 2d at 792–93 (Justice Abrahamson, concurring) (finding that the statute governing the timing of judicial decision-making at issue in the case is not unconstitutional as a violation of the doctrine of separation of powers because it does not thwart the court’s power or unduly burden the judicial branch).

This bill withdraws from the circuit and appellate courts the ability to enforce certain judgments (temporary and permanent injunctions), that may in some cases be the only form of remedy available to the party seeking the injunction (restraining the enforcement of a law that may cause irreparable harm if enforced). In so doing, this bill effectively deprives these courts of judicial decision-making authority. In addition, the bill requires the temporary stay of an injunction to become a permanent stay unless the stay is suspended or lifted within 45 days; this requirement effectively imposes a

time period on judicial decision-making in contravention of *Grady*. A court considering the constitutionality of this bill may determine that this bill substantially interferes with the judicial branch's essential role and powers.

Please let me know if you have any questions or wish to make any changes to the draft.

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