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WISCONSIN LEGISLATIVE COUNCIL STAFF

INFORMATION MEMORANDUM 78-8

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POWERS AND DUTIES OF  
FAMILY COURT COMMISSIONERS  
[RELATING TO DOMESTIC VIOLENCE]

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This Information Memorandum summarizes the powers of the family court commissioner, under statutory law and as limited by the Wisconsin Constitution, and includes enforcement and review of the family court commissioner's orders. Particular attention is given to the provision within s. 247.23 (1), Wis. Stats., which provides that the family court commissioner may prohibit either spouse from imposing any restraint upon the personal liberty of the other spouse during the pendency of an action affecting marriage.

SUMMARY

The family court commissioner is a parajudicial appointed officer of the court with broad authority, specifically defined duties concerning actions affecting marriage, enumerated in Ch. 247, Wis. Stats., and the powers of a court commissioner, herein defined.

When an action affecting marriage under Ch. 247, Wis. Stats., has been commenced, either the family court commissioner or the court may prohibit one spouse from imposing any restraint upon the personal liberty of the other spouse (s. 247.23 (1), Wis. Stats.). Under this provision, courts in all counties order an abusive spouse away from the home for the pendency of the action.

Although the criteria for issuance of a family commissioner's order to vacate are not expressly provided by statute, county courts have determined that imminent danger of physical harm must be shown before such an order will issue. In all counties except Milwaukee, the commissioners may order the spouse to vacate prior to a hearing on the matter; in Milwaukee County, the spouse is not removed prior to an opportunity to be heard. In all counties a spouse who protests the order may petition the court before which the matter is pending for review.

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A spouse seeking to enforce an order to vacate must petition the court before which the Ch. 247 proceeding is pending. The court could find the violating spouse in civil or criminal contempt.

#### WISCONSIN CONSTITUTION

The court commissioner's position is authorized by Wis. Const. art. VII, s. 23, which provides as follows:

The Legislature may provide for the appointment of one or more persons in each organized county, and may vest in such persons such judicial powers as shall be prescribed by law. Provided, that said power shall not exceed that of a judge of a circuit court at chambers.

The powers of a circuit court judge in chambers are not enumerated in the Wisconsin Constitution and have not been determined by the Wisconsin Supreme Court. While the Court's decisions generally suggest that the constitutional authority for court commissioners is broad, the precise contours of the authority under Wis. Const. art. VII, s. 23, remain unclear because of the Court's case-by-case treatment.

A text writer has defined the power of the court commissioner in the negative, as not including the trial of a case on its merits, or the hearing of preliminary, intermediate or ex parte matters involving the merits of a cause (20 C.J.S. 1309). But whatever the scope of the limitation on the powers of family court commissioners under Wis. Const. art. VII, s. 23, that limitation will expire on August 1, 1978 when the amendments to the judicial article of the state constitution ratified by the electorate in April 1977 take effect. After that date, court commissioners will no longer be specifically referred to in the state constitution.

#### POWERS OF FAMILY COURT COMMISSIONER

Section 247.13, Wis. Stats., provides that the family court commissioner has the powers of a court commissioner "by virtue of his office and to the extent required for the performance of his duties."

Section 753.15, 1977 Wis. Stats., lists the general powers of court commissioners, while s. 753.152 (1) and (2), 1977 Wis. Stats., grant special powers to court commissioners in single-county judicial circuits. These statutes were extensively revised by the 1977 Legislature in Senate Bill 72, now awaiting approval by the Governor. If Senate Bill 72 becomes law, the powers and duties of a court commissioner will be specified by s. 757.69, 1977 Wis. Stats., which will read as follows:

757.69 POWERS AND DUTIES OF COURT COMMISSIONERS. (1)  
On authority delegated by a judge, which may be by a standard order, and with the approval of the chief judge, and subject

to any rules duly adopted by the county board of judges in counties having a population of 100,000 or more, a court commissioner appointed under s. 575.68 may:

(a) Direct a case to the proper court if the defendant wishes to enter a plea after intelligent waiver of rights.

(b) In criminal matters issue summonses, arrest warrants or search warrants and conduct initial appearances of persons arrested and set bail to the same extent as a judge. At the initial appearance, the court commissioner shall when necessary inform the defendant in accordance with s. 970.02 (1). If the defendant appears or claims to be unable to afford counsel, the court commissioner may refer the person to the state public defender for an indigency determination and appointment of counsel under ch. 977.

(c) Conduct initial appearances in all traffic cases, in traffic regulation cases receive noncontested forfeiture pleas and impose monetary penalties according to a schedule adopted by a majority of the judges of the courts of record within the county, and refer applicable cases to court for enforcement for nonpayment.

(d) In small claims type actions, conduct initial return appearance and conciliation conferences.

(e) Conduct noncontested probate proceedings.

(f) Issue warrants and capiases for those who do not appear as summoned.

(g) When assigned to juvenile court a court commissioner may, under ch. 48, issue summonses and warrants, order the release or detention of children apprehended, conduct detention and shelter care hearings, conduct preliminary appearances and enter into consent decrees. Waiver hearings under s. 48.18 and dispositional hearings under ss. 48.33 to 48.35 shall be conducted by a juvenile court judge. When acting in an official capacity and assigned to the juvenile court center, a court commissioner shall sit at the juvenile court center or such other facility designated by the chairperson of the county board of judges. Any decision by the commissioner shall be reviewed by the judge of the branch of juvenile court to whom the case has been assigned upon motion of any party. Any determination, order or ruling by the commissioner may be certified to the branch of juvenile court to whom such case has been assigned upon a motion of any party for a hearing de novo.

(h) Hear petitions for commitment and conduct probable cause hearings under ss. 51.20 and 51.45, advise a person alleged to be mentally ill of his or her rights under the United States and Wisconsin constitutions and refer such persons, if they claim or appear to be unable to afford counsel, to the state public defender for an indigency determination and appointment of counsel under ch. 977.

(2) A judge may refer to a court commissioner appointed under s. 757.68 cases in which:

(a) The trial of an issue of fact requires the examination of an account, in which case the court commissioner may be directed to report upon any specific question of fact involved therein.

(b) The taking of an account is necessary for the information of the court before judgment or for carrying a judgment or order into effect.

(c) A question of fact other than upon the pleadings arises.

(d) Proposed findings of fact and conclusions of law are to be prepared pertaining to default mortgage and land contract foreclosures and mechanics liens.

(3) Court commissioners appointed under s. 757.68 may under their own authority:

(a) Officiate at a marriage ceremony.

(b) Issue subpoenas and attachments or other process to compel the attendance of witnesses, administer oaths and affidavits, take depositions and testimony when authorized by law or rule or order, and certify and report the depositions and testimony.

(c) Issue the following writs returnable before a judge at a time set by the judge or the judge's clerk: habeas corpus; certiorari; ne exeat and alternative writs of mandamus.

(d) Supervise accountings subsequent to a forced tax sale of land.

(e) Issue subpoenas returnable before a judge on behalf of the Wisconsin department of justice for antitrust violations under s. 133.06 (1) or bingo control act violations under s. 163.71 (1).

(f) Investigate and dispose of unclaimed property under ss. 171.04 to 171.06.

(g) Conduct a paternity proceeding according to the procedures set out in ch. 52 whenever a court commissioner is specifically authorized to do so.

(h) Conduct supplementary hearings on the present financial status of a debtor.

(i) Take and certify acknowledgments.

(4) In addition to the duties expressly set forth in sub. (3) (a) to (c), a court commissioner may perform other ministerial duties as required by a court.

(5) A court commissioner may transfer to a court any matter in which it appears that justice would be better served by such a transfer.

(6) Every judge of a court of record has the powers and duties of a court commissioner.

(7) A court commissioner shall refer to a court of record for appropriate action every alleged showing of contempt in the carrying out of the lawful decisions of the commissioner.

Since the family court commissioner has the above enumerated powers only "to the extent required for the performance of his duties," this Memorandum will shortly examine what those duties are. First, however, a word about the manner in which the family court commissioner is appointed.

#### APPOINTMENT OF FAMILY COURT COMMISSIONERS

Section 247.13 (1), Wis. Stats., requires the circuit and county judges in each county of the state except Milwaukee to appoint a "reputable attorney of recognized ability and standing at the bar" to be family court commissioner for such county. The commissioner may be placed under a county civil service system by resolution of the county board. The county board may provide for one or more assistant family court commissioners, appointed by the judges of the county, and having the same qualifications as the family court commissioner.

Under s. 247.13 (2), Wis. Stats., the Milwaukee County Family Court Commissioner and such additional assistant family court commissioners as the County Board authorizes are to be appointed from the membership of the bar residing in Milwaukee County by

the chief judge of Milwaukee County. The Milwaukee County Family Court Commissioner and his assistants perform their duties under the direction of the chief judge of the County. They are within the Milwaukee County civil service system.

#### SUMMARY OF THE DUTIES OF THE FAMILY COURT COMMISSIONER

The enumerated duties of the family court commissioner are provided throughout Chapter 247, and in addition, in Milwaukee County, the Family Court Commissioner performs other duties as the Chief Circuit Judge directs. There are several areas of responsibility.

Section 247.08, Wis. Stats., requires the family court commissioner to certify that he or she informed all parties in actions for annulment, divorce and legal separation of the availability of certain marital counseling, and to certify that parties in actions for divorce or legal separation receive the required counseling.

Section 247.14, Wis. Stats., requires a family court commissioner to appear in an action affecting marriage when requested by the court. The commissioner may appear in such actions as appropriate. Actions affecting marriage are listed in s. 247.02 (1), 1977 Wis. Stats., as follows:

- (1) Actions affecting marriage are:
  - (a) To affirm marriage.
  - (b) Annulment.
  - (c) Divorce.
  - (d) Legal separation (formerly divorce from bed and board).
  - (e) Custody.
  - (f) For child support.
  - (g) For maintenance payments.
  - (h) For property division.
  - (i) To modify a judgment in an action affecting marriage granted in this state or elsewhere.
  - (j) For periodic family support payments;
  - (k) To seek court permission to remarry under s. 245.105.

Section 247.23 (1), Wis. Stats., provides that the family court commissioner or court may issue various temporary orders concerning the support of a spouse; the care, custody or support of children; and counseling or lawyer fees during the pendency of the action. Under this section, the family court commissioner may prohibit a spouse from imposing any restraint upon the personal liberty of the other spouse.

Under s. 247.245 (7), Wis. Stats., the family court commissioner must refer complaints concerning interference with or violation of visitation rights to the county social service agency for investigation.

Under s. 247.265 (2), Wis. Stats., the family court commissioner must give notice to a spouse who has failed to make a required maintenance payment or child support payment of a hearing on the payment default. At the hearing, the family court commissioner must decide whether to enforce a wage assignment against the delinquent former spouse.

ORDERING A SPOUSE FROM THE HOME OR FROM IMPOSING UPON THE PERSONAL LIBERTY OF THE OTHER SPOUSE

Chapter 247 does not expressly authorize a family court commissioner to order a spouse to vacate the home. However, according to Dan Moeser, President of the Wisconsin Family Court Commissioners Association, in all counties, abusive spouses are ordered out of the home pursuant to s. 247.23 (1), Wis. Stats., which reads, in part, as follows:

...the family court commissioner...may prohibit either spouse from imposing any restraint on the personal liberty of the other....

According to Waukesha Family Court Commissioner Cahill, prior to 1972, family court commissioners in all counties except Milwaukee issued orders to vacate the home based upon an affidavit from a spouse that his or her legal rights would be jeopardized if the other spouse was allowed to remain in the home. The spouse who was the subject of the order was required to vacate the home immediately with the opportunity for an after-the-fact hearing on the matter.

Discussion with family court commissioners from Dane, La Crosse, Polk and Waukesha Counties reveals that in courts in those counties and apparently most counties, a greater showing of need is required to secure the order to vacate. Generally, in those counties, the affidavit must be based upon danger to the complaining spouse's personal safety. In Waukesha, the spouse must swear to actual acts of physical violence. In Dane, La Crosse and Polk Counties, the spouse's affidavit must evince imminent danger of physical harm.

Milwaukee County Family Court Commissioner Goodsitt states that in that county the spouse is not removed from the home prior to the opportunity of a hearing with both spouses present. In all counties, a spouse who protests the order may petition the court before which the matter is pending for review.

REVIEW OF FAMILY COURT COMMISSIONER ORDERS

The family court commissioner's order is reviewable by the presiding judge of the court before which the Ch. 247 proceeding is pending, upon a valid motion of the spouse who is the subject of the order. However, because there is no record of proceedings before the family court commissioner, unless one of the parties had employed a



stenographer, review by the court would amount to an entire new hearing before the court, on the need to issue the order. According to Family Court Commissioner Goodsitt, court backlog often causes judges who are reluctant to conduct an entire rehearing on the matter to require the petitioner to come forward with strong evidence of error to secure any review at all.

The court will not alter the family court commissioner's order unless the order or the commissioner's findings of fact stand against the great weight and clear preponderance of the evidence [Tuttle v. Hanson (1957), 274 Wis. 423].

#### CONTEMPT

The family court commissioner has no power to enforce his order to vacate [In re Remington (1858), 7 Wis. 643]. An aggrieved spouse must petition the court before which the Ch. 247 proceeding is pending for enforcement of the order and the court could find the offending spouse in civil or criminal contempt, depending upon the relief sought, or the court could refuse to find the spouse in contempt. Discussion with the Milwaukee County Family Court Commissioner reveals that in that court a spouse may petition the Family Court Commissioner who will order and seek a court certification of his order for enforcement purposes. The spouse could be found in civil contempt for purposes of enforcing the Family Court Commissioner's orders and could be found in criminal contempt for purposes of vindicating the authority and dignity of the court because of the misconduct [Metzler v. Glassner (1925), 185 Wis. 593].

If 1977 Senate Bill 72 becomes law, s. 247.40, 1977 Wis. Stats., will specifically provide that all contempt orders in actions affecting marriage in which confinement is imposed shall be issued by a judge.

The court's contempt finding may be appealed but will not be reversed, absent mistake or abuse of power [In re Adam's Rib Inc. (1968), 39 Wis. 2d 741]. Therefore, upon review the questions before the Supreme Court would be: (1) whether the order was proper, and (2) whether the order had been violated [Vilter Mfg. Co. v. Humphrey (1907), 132 Wis. 581]. The decision not to find in contempt would stand, absent proof that the complaining spouse's rights were prejudiced by the noncompliance [Heffernan v. Heffernan (1964), 27 Wis. 2d 307].

#### CONSTITUTIONAL ISSUES CONCERNING THE REQUISITE SHOWING TO SECURE AN ORDER TO VACATE

A 1972 decision of the federal District Court for the Eastern District of Wisconsin, Geisinger v. Voss (1972), 352 Fed. Supp. 104, suggests that absent a showing of imminent physical harm, a court order to vacate the home without the opportunity for a hearing is constitutionally deficient.

In Geisinger federal District Judge Reynolds denied on procedural grounds, a class action challenging a family court commissioner's order to vacate based upon a wife's affidavit that her husband's presence in the home threatened her legal rights, but stated that the suit was sound on its merits. Based upon a U.S. Supreme Court decision concerning a debtor's rights prior to repossession of the debtor's property [Fuentes v. Shevin (1972), 407 U.S. 67], the Court reasoned that a temporary deprivation of one's home is within the protection of the Due Process Clause of the 14th Amendment to the U.S. Constitution. The Court then examined the nature of the state's interest to determine whether that justified the postponement of a hearing until after the spouse had vacated the home; the Court concluded that such a pre-hearing order would be justified only upon a showing that the petitioning spouse is likely to be subject to physical abuse and is unable to reside temporarily elsewhere pending completion of the hearing.

Apparently no counties in the state require the second showing, namely that the complaining spouse is unable to reside elsewhere temporarily. However, according to UW Law School Professor Marygold Melli, notwithstanding Geisinger the failure to require the showing of no temporary alternative residence would not render an order to vacate constitutionally deficient.

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