

March 25, 2011

Today I am the “duty judge” or “on call” judge who is designated to deal with emergency matters brought to the Dane County courts. Earlier this evening, I received a telephone call from Dane County District Attorney Ismael Ozanne. He indicated that he would like to request an ex parte order in a lawsuit entitled Ismael R. Ozanne vs. Jeff Fitzgerald, et al., Dane County Case Number 2011CV001244. The case is assigned to Judge Maryann Sumi, who is presently out of state. The ex parte order requested by District Attorney Ozanne would be in regard to the “publication”¹ today by the Legislative Reference Bureau of 2011 Wisconsin Act 10. I instructed Attorney Ozanne to contact counsel for Secretary of State Doug LaFollette, one of the named parties in the lawsuit, and he did so, speaking to Assistant Attorney General Maria Lazar.

Initially I set a hearing on the motion for 10:00 am on March 26, 2011. Both sides were informed of that scheduled hearing. But I have come to the conclusion that there is no need to have a hearing this weekend.

I have looked at the website for the Legislative Reference Bureau and it appears that 2011 Wisconsin Act 10 has been displayed on that website. I am not sure what the technical requirements are for the LRB in order to “publish” an act. There is a note to the act from the LRB that reads as follows:

Pursuant to section 35.095(3)(b), Wis. Stats. The secretary of state designated March 25, 2011, as the date of publication for this act. On March 18, 2011, the Dane County Circuit Court enjoined the secretary of state from publishing 2011 Wisconsin Act 10 until further order of the court. Section 35.095(3)(a), Wis. Stats., requires the Legislative Reference Bureau to publish every act within 10 working days after its date of enactment.

There will likely be questions raised in the underlying lawsuit about the significance of the “publication” by the Legislative Reference Bureau in light of the existence of the restraining order issued by Judge Sumi. I am not taking any position on whether the LRB has effectively “published” the act, nor on the effect of the LRB’s action in regard to a potential effective date of the bill. However there is no critical urgency to resolving those questions. Restraining orders are issued to protect the status quo. As Judge Sumi said in issuing the temporary restraining order enjoining publication of the bill on March 18, 2011:

Finally, the necessity to preserve the status quo. I think relief is essential to preserve the status quo, which is what exists here and now. The bill has passed. But it has not been published.

¹ I am using quotation marks around the word “published” to make clear that this is not a ruling on whether the Act has now been legally published.

Whatever the significance of it may be, the LRB acted today by putting the bill on its website. That bell cannot be “unrung”. Ordering that the bill be taken off the website, as I believe Attorney Ozanne would like to request, would have no legal significance. Therefore I am declining to hold a hearing in this matter. Judge Sumi already has a hearing scheduled for early next week, and can take whatever actions are necessary at that time.

It is important that the impartiality of Dane County judges acting in these important matters not be put in doubt because of concerns about the judge’s own relationships or activities. For that reason I am disclosing the following. First, I am in a long-term relationship with an administrator, who is a non-lawyer, at the Department of Justice. Second, in recent months I have walked through and around the capitol several times while protestors were present, without participating in any way in the protests. I did this simply out of interest in public events unfolding in Madison, and not to demonstrate a position on any side of the issues being debated. I am confident that these facts do not make it difficult for me to be impartial in this matter. I have taken an oath to follow the law, and I am doing so in declining to hold a hearing at this time. However, if any party has a concern about my impartiality in this matter as a result of these facts, they may bring that to my attention and I will consider whether other actions are necessary in dealing with this request for an ex parte restraining order.

Sarah B. O’Brien
Circuit Judge Branch 16
Dane County, Wisconsin