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# Judicial Powers of Non-Judges: The Legitimacy of Referee Functions in Minnesota Courts

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## JUDICIAL POWERS OF NON-JUDGES: THE LEGITIMACY OF REFEREE FUNCTIONS IN MINNESOTA COURTS

by JOHN M. STUART†

*Important questions concerning the role of referees in Minnesota's courts are in the process of legislative resolution. In this Article, Mr. Stuart examines the historical origins and functions of referees, and their accountability to the judiciary. His investigation offers important insights into the effects any proposed change in the role of referees might have on our judicial system, with an emphasis on the legitimacy of referee decision making. While not supporting any specific proposal, this Article discusses important considerations by which any future legislation should be examined. Mr. Stuart's analysis offers a starting point for the reader to formulate an intelligent assessment of how referees are used, and how they should be used in the future.*

I. INTRODUCTION: JUDGES, REFEREES, AND THE 1977 LEGISLATURE—A DISPUTE WITH A HISTORY . . . . .	66
II. REFEREES IN THE COURTS: AN OVERVIEW OF THE PRESENT SYSTEM . . . . .	71

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Although the author takes sole responsibility for the information and views expressed herein, he wishes to acknowledge the assistance of Ms. Marlene Johnson, former staff counsel for the Judicial Planning Committee.

This Article owes its inception to Mr. Chief Justice Robert J. Sheran of the Minnesota Supreme Court, whose concern with the place of referees in our court system prompted him to request a report on the subject. The Article also has benefitted from the careful reading and comments of Mr. Justice Lawrence R. Yetka, Chairperson of the Judicial Planning Committee.

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III.	THE FUNCTION OF REFEREES IN MINNESOTA'S SPECIALIZED COURTS .....	73
	A. <i>Hennepin County Special Term Referee</i> .....	77
	B. <i>Juvenile Court Referees</i> .....	80
	C. <i>Family Court Referees</i> .....	89
	1. <i>Family Estrangement: The Default Marriage Dis-</i> <i>solution</i> .....	91
	2. <i>Child Care: The Custody Decisions</i> .....	93
	3. <i>Financial Allocation: Property Settlement, Alimony,</i> <i>and Child Support</i> .....	96
	D. <i>Hennepin County Deputy Title Examiners</i> .....	99
	E. <i>Hennepin County Administrative Hearing Officers</i> .....	101
	F. <i>Hennepin County Conciliation Court Referees</i> .....	103
	G. <i>Probate Court Referees</i> .....	104
IV.	THE PROBLEM OF ACCOUNTABILITY: JUDICIAL REGULATION OF REFEREES .....	106
	A. <i>The Weight of Referees' Findings</i> .....	107
	B. <i>Appeals within the Specialized Courts</i> .....	110
	C. <i>Appeals beyond the Specialized Courts: Supreme Court</i> <i>Controls on the Reference Process</i> .....	111
V.	OPTIONS .....	114
	A. <i>Eliminate Referees</i> .....	115
	B. <i>Replace Referees with Judges</i> .....	116
	C. <i>Restore Referees to Pre-1977 Status</i> .....	118
	D. <i>New Mixtures of Judges and Referees</i> .....	121
VI.	THE LEGITIMACY OF THE QUASI-JUDGE: THREE MODELS OF REFEREE PARTICIPATION IN LEGAL CONFLICT .....	123
	A. <i>The Pre-Abolition Model and the Problem of Delegated</i> <i>Discretion</i> .....	124
	B. <i>The Supreme Court Model: Shaping the Persuasive</i> <i>Conflict</i> .....	127
	C. <i>The Legislature, Referees, and the Power to Incarcerate:</i> <i>Two Bills and Some Ideas for the Future</i> .....	130
VII.	CONCLUSION .....	134
	I. INTRODUCTION: JUDGES, REFEREES, AND THE 1977 LEGISLATURE—A DISPUTE WITH A HISTORY	

The 1977 Court Reorganization Act<sup>1</sup> thrust the work of referees

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1. Act of June 2, 1977, ch. 432, 1977 Minn. Laws 1147 (amending scattered sections

in Minnesota's courts into public controversy. By abolishing the position of referee,<sup>2</sup> the Act pushed into the spotlight such obscure academic questions as "what is judging?" Caseload statistics clearly demonstrate the referees' usefulness to the judges of the various trial courts<sup>3</sup> and seemingly favor the retention of referees. In contrast, arguments against the employment of referees are intangible and diverse, though they share a due process flavor: referees make decisions that should be made by juries<sup>4</sup> or by judges;<sup>5</sup> referees put juvenile defendants in fifth amendment double jeopardy;<sup>6</sup> referees are not adequately supervised;<sup>7</sup> and, referees are not democratically elected.<sup>8</sup> The complete abolition of referees by the Legislature was a demonstration of strong concern over these possibilities. Suddenly, however, the judiciary, the bar, and the public realized that unless the Legislature could provide an alternative

of MINN. STAT. chs. 2, 15A, 43, 271, 480, 484, 485, 487, 488, 488A, 490, 524, 525, 530, 531, 532, 633 (1976)).

2. See *id.* § 48, 1977 Minn. Laws at 1168 ("Notwithstanding any other provision of law, the position of referee in the county, municipal and district courts of the state is hereby abolished.") (current version at MINN. STAT. § 484.70 (1978 & Supp. 1979)). The Act scheduled the abolition of referees to become effective on July 31, 1978. See *id.* § 50, 1977 Minn. Laws at 1168. Before it became effective, however, the position of referee was reinstated by the 1978 Legislature. See notes 11-14 *infra* and accompanying text.

3. See Letter from Jack M. Provo, Hennepin County Court Administrator, to Lawrence Harmon, State Court Administrator (June 27, 1978) (on file at William Mitchell Law Review office) (assessing impact of abolition of part-time referees in Hennepin County); *cf.* Interview with Judge Ronald E. Hachey, former Chief Judge of Ramsey County District Court (Nov. 2, 1977) (on file at William Mitchell Law Review office) (noting that civil calendar will suffer if referees are abolished); D. McLean, The Hennepin County Family Court 59 (1977) ("Approximately 84 percent of the contacts between the court and the public are made by referees . . .") (footnote omitted). *But cf.* Interview with William E. Haugh, Jr., former Chairman of Family Law Section, Minnesota State Bar Association (Oct. 28, 1977) (on file at William Mitchell Law Review office) (weighted workload statistics, showing that judges are working to capacity and cannot assume the duties of referees, are not available).

4. *Cf.* Parness, *The Parajudge—Oiling the Wheels of Justice*, TRIAL, Mar.-Apr. 1974, at 55 (compulsory use of parajudge might deny right to trial by jury).

5. See, e.g., Interview with State Senator Robert Tennesen (Nov. 3, 1977) (on file at William Mitchell Law Review office).

6. See *Brady v. Swisher*, 436 F. Supp. 1361, 1370 (D. Md. 1977) (Maryland procedure permitting state to appeal juvenile court master's finding of nondelinquency violates constitutional prohibition against double jeopardy), *rev'd*, 438 U.S. 204 (1978). See generally notes 124-37 *infra* and accompanying text.

7. See Interview with State Senator Robert Tennesen, *supra* note 5; *cf.* Interview with State Representative Gordon O. Voss (Nov. 10, 1977) (on file at William Mitchell Law Review office) (referees do same work as judges but not subject to same sanctions).

8. See Interview with State Senator Robert Tennesen, *supra* note 5. See also MINN. CONST. art. VI, § 7 ("[Judges] shall be elected by the voters from the area which they are to serve . . .").

before July 31, 1978,<sup>9</sup> the loss of these previously inconspicuous quasi-judges would throw Minnesota's heaviest court calendars into a turmoil.<sup>10</sup>

On the last day of the 1978 session the Legislature acted, passing chapter 750 of the 1978 laws.<sup>11</sup> This statute (1978 law) met the most urgent concerns of the referees and the courts by permitting incumbent full-time referees to continue to serve at the pleasure of the chief judges of their judicial districts.<sup>12</sup> The bill also began the process of circumscribing referee functions by precluding referees from hearing contested juvenile trials and, except by stipulation of both parties, contested final trials in family court matters.<sup>13</sup> Presumably, time formerly spent handling these prohibited duties will be taken up by additional work in the general civil calendar. The 1978 law explicitly frees family and juvenile court referees to take on assignments outside those specialized courts, at the discretion of the chief judge.<sup>14</sup>

Because the 1978 legislation appears to be only a temporary solution, major problems remain to be resolved. For example, what will happen when the present referees retire or resign?<sup>15</sup> What will happen if the family and juvenile court caseloads continue to ex-

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9. This was the effective date of that section of the 1977 Act which abolished the position of referee in Minnesota courts. See Act of June 2, 1977, ch. 432, § 50, 1977 Minn. Laws 1147, 1168 (repealed 1978).

10. According to Jack M. Provo, Hennepin County Court Administrator, "[t]here is no way we can function without referees. We couldn't possibly handle the caseload in juvenile and family courts." Minneapolis Tribune, Oct. 10, 1977, at 1. In Ramsey County, former Chief Judge Ronald E. Hachey said that the civil calendar will suffer if the referees are abolished. See Interview with Judge Ronald E. Hachey, *supra* note 3.

11. Act of Apr. 5, 1978, ch. 750, § 2, 1978 Minn. Laws 907, 908 (amending MINN. STAT. § 484.70 (1976 & Supp. 1977)).

12. See *id.* (amending MINN. STAT. § 484.70(1) (1976 & Supp. 1977)).

13. See *id.* ("No referee sitting in family court may hear any final trial involving a contested case if either party or his attorney objects in writing to the assignment of a referee to hear the matter.") (amending MINN. STAT. § 484.70(2) (1976 & Supp. 1977)); *id.* ("No referee sitting in juvenile court may hear a contested trial on any petition, or any motion made pursuant to section 260.125.") (amending MINN. STAT. § 484.70(3) (1976 & Supp. 1977)).

14. See *id.* ("All referees are subject to the administrative authority and assignment power of the chief judge of the district . . . and are not limited to assignment to the family or juvenile court.") (amending MINN. STAT. § 484.70(1) (1976 & Supp. 1977)).

15. The statute only provides that "[p]ersons holding the office of referee full time on June 30, 1977 . . . may continue to serve at the pleasure of the chief judge of the district under the terms and conditions of their appointment." *Id.* (amending MINN. STAT. § 484.70(1) (1976 & Supp. 1977)). Although the present referees are covered by the statute, no provision is made for hiring additional referees. Thus, as the law presently stands, referees will become extinct as they retire or resign, because they will not be replaced.

pand?<sup>16</sup> What effect will the provision subjecting all referees to the general assignment power of the chief judge<sup>17</sup> have on the tradition of the referees' special expertise in family and juvenile courts?<sup>18</sup> The 1978 law further mandates that the Minnesota Supreme Court study and review:

whether the office of referee . . . should be retained or abolished; whether, if it is recommended that referees . . . be retained, their powers and duties should be modified; whether, in the event that some or all of the existing offices of referee . . . are recommended for abolition, new judgeships should be created and in which districts; whether a consolidated family division should be created in the district or county municipal courts of Hennepin and Ramsey counties, and what categories of cases should be assigned thereto; and any other issues the court deems relevant to the function of the office of referee . . . in the state court system.<sup>19</sup>

Because the law requests the court to report its recommendations to the Legislature by October 1, 1980,<sup>20</sup> it appears that a comprehensive plan for the function of referees is destined to emerge from the court in time for the next legislative session. Perhaps some of the major questions will be answered when the court complies with the Legislature's directive.

This Article is directed primarily to those readers who are concerned with the future of referees in Minnesota and with the more general question of when and how judicial authority may be delegated. Its purposes are fivefold:

- (1) to provide background information on present referee functions;<sup>21</sup>

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16. The Hennepin County Court Administrator, Jack M. Provo, said, "We have trouble with the [juvenile and family court] caseload even with the referees." Minneapolis Tribune, *supra* note 10. In Ramsey County, the caseload of the family court is so great that already it is unable to give litigants sufficient time. Interview with William E. Haugh, Jr., *supra* note 3.

17. See MINN. STAT. § 484.70(1) (1978).

18. One judge has expressed her belief that if referees were made judges, they would have to rotate, which would destroy their special expertise in family court matters. See Letter from Judge Susanne C. Sedgwick, Hennepin County District Court, to John Stuart (Nov. 29, 1977) (on file at William Mitchell Law Review office).

19. Act of Apr. 5, 1978, ch. 750, § 8, 1978 Minn. Laws 907, 910. The Minnesota State Bar Association has also recommended further study and consideration of the use of referees in Minnesota courts. See Interview with Jonathan Morgan, Chairman of the Judicial Administration Comm., Minnesota State Bar Association (Nov. 3, 1977) (on file at William Mitchell Law Review office).

20. Act of Apr. 5, 1978, ch. 750, § 8, 1978 Minn. Laws 907, 910.

21. See notes 64-263 *infra* and accompanying text.

- (2) to trace the historical evolution of referees;<sup>22</sup>
- (3) to summarize the leading proposals for restructuring the work of referees;<sup>23</sup>
- (4) to offer a theoretical framework within which these proposals may be evaluated;<sup>24</sup> and finally,
- (5) to reach some conclusions as to how the decision-making powers of our courts should be allocated between judges and their quasi-judicial colleagues, the referees.<sup>25</sup>

Historical background is particularly important. One could easily infer from the dramatic actions of the 1977 and 1978 Legislatures that the dispute over referees is a new one. In fact, referees have been part of the Minnesota court system for over 125 years<sup>26</sup> and have antecedents that can be traced back even further into the Anglo-American judicial past.<sup>27</sup> This history has not been tranquil. There has been a persistent tension between the needs of judges to delegate some of their functions and the concern of parties to a controversy who insist that legitimate authority support the decisions that resolve their conflicts.<sup>28</sup>

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22. See notes 39-63, 67-73 *infra* and accompanying text.

23. See notes 329-83 *infra* and accompanying text.

24. See notes 384-444 *infra* and accompanying text.

25. See notes 445-49 *infra* and accompanying text.

26. An 1849 statute first made legislative provision for the use of chancery masters in the territory of Minnesota. See Act of Nov. 1, 1849, ch. XX, ch. II, § 48, 1849 Minn. Terr. Sess. Laws 55, 63-64 (repealed 1851). The statute allowed the appointment of a master in chancery when the judge was on vacation. See *id.* In 1851 the Territorial Legislature passed revised statutes that repealed all provisions of the 1849 laws that were inconsistent with the revised statutes. See MINN. REV. TERR. STAT. ch. 137, § 1 (1851). The 1851 revised statutes also made provision for trial by referee, see *id.* ch. 71, §§ 47-54, but in a much more detailed manner than the 1849 law. Compare *id.* with Act of Nov. 1, 1849, ch. XX, ch. II, § 48, 1849 Minn. Terr. Sess. Laws 55, 63-64 (repealed 1851).

It is interesting to note that no reference was made in the 1851 session laws to the fact that the 1851 revised statutes were enacted into law by the Legislature. The revised statutes were, however, passed by the House of Representatives, see MINN. TERR. H.R. JOUR. 196 (1851), and the Counsel. See MINN. TERR. COUNSEL JOUR. 179 (1851) (reporting that Governor Ramsey had signed the bill). The absence of any reference in the 1851 session laws to the 1851 revised statutes may be explained by the fact that the authorization for the printing of the session laws is contained in the bound version of the revised statutes. See MINN. REV. TERR. STAT. ch. 135, § 2 (1851). Further, nothing in the Organic Act of Minnesota required the publishing of laws passed by the Legislature. See Act of Mar. 3, 1849, ch. CXXI, § 20, 9 Stat. 403, 409 (1849).

27. See notes 67-73 *infra* and accompanying text.

28. Compare Interview with Judge Andrew A. Glenn, Ramsey County Probate Court (Nov. 22, 1977) (on file at William Mitchell Law Review office) ("If a judge is going to do a good job, he has to be relieved of some of the time-consuming work.") with Interview with State Senator Robert Tennessen, *supra* note 5 (referee decision making objectionable because judging should be done by judges).

Members of the 1977 Legislature were not the first to complain that referees are not accountable to the public.<sup>29</sup> But the action taken in the 1977 session—away with all referees!—was too sweeping. There were babes in the murky bathwater the Legislature threw out, some of whom are the legitimate offspring of the specialized courts in Minnesota's most populous counties. These offspring are appropriate referee functions. Some of them have developed under the guidance of many generations of concerned parents. An understanding of the origins of referees and the long struggle over their role should help the people who must decide the proper functions of referees to determine intelligently what kinds of authority properly can be delegated and what kinds can not.

## II. REFEREES IN THE COURTS: AN OVERVIEW OF THE PRESENT SYSTEM

To convey the magnitude of the present controversy surrounding referees, the institutions that may be affected by future legislation must be examined. The specialized courts in Hennepin County undoubtedly would experience the greatest impact from any change because this county employs more referees, with a wider range of responsibilities, than any other court system.<sup>30</sup> At present the Hennepin County specialized courts employ sixteen full-time referees: Juvenile Court employs five; Family Court and Probate Court each employ four; the Examiner of Titles employs two; and there is one Special Term referee.<sup>31</sup> The Hennepin

29. See, e.g., Bryant, *The Office of Master in Chancery: Early English Development*, 40 A.B.A.J. 501, 533 & n.39 (1954) ("That the Masters in Chancery have always exercised judicial authority . . . and have done judicial acts, not warranted by the King's Commission . . .") (quoting S. BURROUGHS, *THE LEGAL JUDICATURE IN CHANCERY* 93-94 (London 1727)). The English chancery masters are the predecessors of the modern American referees. See notes 67-69 *infra* and accompanying text.

30. See Minneapolis Tribune, Oct. 10, 1977, at 1 (most Minnesota referees are employed in Hennepin County); cf. Finch, *Court Reform—Solution or Problem?*, HENNEPIN LAW., Sept.-Oct. 1977, at 9 ("Because the Hennepin County courts utilize referees so extensively, many judges and administrative personnel are seriously concerned about their prospective elimination.")

31. See Provo, *Referee System in Hennepin County* (Nov. 1977) (unpublished report) (on file at William Mitchell Law Review office). Mr. Provo notes, however, that there are three referees in the Examiner of Titles office: the examiner and two deputy examiners of title. See *id.* The Hennepin County Examiner of Titles believes that only the two deputies are referees, both because of their functions and their classification under the Hennepin County civil service system as "court referee." See Letter from Richard W. Edblom, Hen-

County Conciliation Court employs referees on a per diem basis.<sup>32</sup> Additionally, Hennepin County employs two administrative hearing officers who perform certain limited functions in traffic matters.<sup>33</sup>

Future legislation involving referees would also have a marked effect on the Ramsey County court system, which employs two full-time and one part-time referee in Juvenile Court, three full-time referees in Family Court, and one referee in Probate Court.<sup>34</sup> Unlike Hennepin County, Ramsey County has no referees or administrative hearing officers in its Title Examination Department, Traffic Court, or in Special Term.<sup>35</sup>

At present, there is only one referee employed outside the Hennepin-Ramsey County area; St. Louis County District Court employs a referee to hear domestic relations matters.<sup>36</sup> County courts across the state do, however, employ more than thirty "judicial

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nepin County Examiner of Titles, to John Stuart (Dec. 1, 1977) (on file at William Mitchell Law Review office).

Recent enactments of the Minnesota Legislature, however, have removed title examiners from that class of court personnel known as referees. See notes 218-23 *infra* and accompanying text.

32. See Letter from Jack M. Provo, *supra* note 3; Interview with Gordon Griller, former Assistant Hennepin County Municipal Court Administrator (Nov. 1, 1977) (on file at William Mitchell Law Review office).

33. See Interview with Gordon Griller, *supra* note 32.

34. See Interview with G.A. Hatfield, Ramsey County Court Administrator (Oct. 26, 1977) (on file at William Mitchell Law Review office).

35. Cf. Interview with Ron Bushinski, Ramsey County Municipal Court Administrator (Nov. 14, 1977) (on file at William Mitchell Law Review office) (no referees or hearing officers employed in Ramsey County Municipal Court); Interview with G.A. Hatfield, *supra* note 34 (Ramsey County employs referees in family, probate, and juvenile courts).

On August 1, 1979, Ramsey County began the limited use of referees in its conciliation court. Interview with Ron Bushinski, Ramsey County Court Administrator (Aug. 24, 1979) (on file at William Mitchell Law Review office). Because this use of referees in Ramsey County is of such recent origin, it will not be discussed in this Article. The discussion of other conciliation court referees is probably applicable to those in Ramsey County. For the discussion of referees in Hennepin County Conciliation Court, see notes 245-53 *supra* and accompanying text.

36. See Issue Paper for Planning Subcommittee of Judicial Planning Committee, Abolishing of Position of Court Referee: Hennepin and Ramsey Counties 15 (Dec. 12, 1977) (on file at William Mitchell Law Review office); notes 160, 176 *infra* and accompanying text.

The St. Louis County Examiner of Titles also conducts hearings involving real estate matters. See Letter from Robert C. Brown, St. Louis County Examiner of Titles (Oct. 9, 1979) (on file at William Mitchell Law Review office). Title examiners, however, no longer can be considered referees. See notes 218-23 *infra* and accompanying text.

officers.”<sup>37</sup> Although some of the functions of judicial officers are analogous to those of referees, the former have different historical origins and somewhat broader powers.<sup>38</sup> Because of these differences, the issue of what, if anything, should be done with the position of judicial officer is outside the ambit of this Article.

Any future legislation pertaining to referees will affect the court systems in Hennepin, Ramsey, and St. Louis Counties. Because all of these counties have large urban populations, the question at the heart of the present referee controversy may well be how best to deliver legal decisions to people in cities, where population density and other conditions of urban life contribute to an enormous volume of human problems. In the past, the urban courts have relied heavily on referees to aid in handling the sheer mass of litigation they face. Whether this reliance should continue can only be decided after careful examination of specific referee functions in the system as it now exists.

### III. THE FUNCTION OF REFEREES IN MINNESOTA'S SPECIALIZED COURTS

Each referee position has its own legal origin and its own function to be performed. Any broad legislative change will tamper with each of these roles and historical traditions in a different way. To understand the effects of any proposed reform, one must examine each referee position in light of its own characteristics, function, and historical evolution. Minnesota first made legislative provision for referees in 1851.<sup>39</sup> It is uncertain whether the statute authorizing referees created the position or merely recognized an existing practice.<sup>40</sup> In any event, legislation in 1853 made it clear that the powers bestowed on referees came from the court's juris-

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37. See Issue Paper for Planning Subcommittee of Judicial Planning Committee, *supra* note 36, at 1.

38. See generally Johnson & Stuart, *Minnesota's Judicial Officers: A Short History of an Endangered Species*, BENCH & B., Dec. 1979, at 23.

39. See MINN. REV. TERR. STAT. ch. 71, §§ 47-54 (1851) (repealed 1905).

40. See *Fair v. Stickney Farm Co.*, 35 Minn. 380, 382, 29 N.W. 49, 50 (1886) (“[In equity] cases the court does not get its power to order a reference from the statute. The statute regulates the exercise of a power previously existing,—possibly restricts it, or, in some particulars, enlarges it.”); cf. *State ex rel Rockwell v. State Bd. of Educ.*, 213 Minn. 184, 192, 6 N.W.2d 251, 258 (1942) (“[appointing referees] has been practiced by courts of equity since time immemorial, and without statutory authority”); *Toulmin v. Becker*, 94 Ohio App. 524, 529, 115 N.E.2d 705, 707 (1952) (“a court of chancery has the inherent power to order a reference”).

diction to hear equity matters.<sup>41</sup> This was an important clarification, because in actions at law, as opposed to equity, parties have a constitutional right to a jury trial.<sup>42</sup> The Minnesota Supreme Court specifically recognized this jury trial right in *St. Paul & Sioux City Railroad v. Gardner*.<sup>43</sup> In that decision, the court held that the process of referring a matter to a referee cannot be compelled in an action at law.<sup>44</sup> To the extent that any statute allowed compulsory reference, it was ruled unconstitutional.<sup>45</sup>

With the merger of law and equity courts,<sup>46</sup> confusion developed over what cases were properly subject to compulsory reference. In an 1886 case,<sup>47</sup> the court adopted what seemed to be a logical procedure; if, from the pleadings, an action appeared to be one that formerly would have been heard in equity, a reference could be ordered even against the wishes of the parties.<sup>48</sup> As evidenced a few years later by *Bond v. Welcome*,<sup>49</sup> however, this solution was not a complete answer to the question of which cases should be heard by referees. In *Bond* the plaintiff sought money damages, traditionally a remedy granted at law, in pleadings which revealed that a long accounting would be necessary to determine the rights of the parties, traditionally an equitable remedy.<sup>50</sup> Had the case clearly been one that, prior to the merger of law and equity, would have been an equitable action for an ac-

41. See Act of Mar. 5, 1853, ch. I, § 10, 1853 Minn. Terr. Sess. Laws 3, 4 ("In all cases where, in chancery before this act took effect, masters and examiners were required to act, or might have acted, the like acts and duties shall and may hereafter be performed when necessary, by a referee or referees appointed as in civil actions.") (repealed 1866).

42. See U.S. CONST. amend. VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ."); MINN. CONST. art. I, § 4 ("The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy.").

43. 19 Minn. 132 (Gil. 99) (1872).

44. See *id.* at 137-38, 141 (Gil. at 103, 107) (compulsory reference in action at law held unconstitutional).

45. See *id.*

46. See MINN. REV. TERR. STAT. ch. 70, § 1 (1851) (repealed 1905) ("there shall be in this territory hereafter, but one form of action . . . to be called a civil action . . ."). This is the forerunner of rule 2 of the Minnesota Rules of Civil Procedure. See MINN. R. CIV. P. 2 ("There shall be one form of action to be known as 'civil action.'"). After law and equity were merged, the Minnesota Supreme Court ruled that the merger did not affect the court's power to order a reference. See *Berkey v. Judd*, 14 Minn. 394, 399 (Gil. 300, 303) (1869).

47. *Fair v. Stickney Farm Co.*, 35 Minn. 380, 29 N.W. 49 (1886).

48. See *id.* at 381-82, 29 N.W. at 50.

49. 61 Minn. 43, 63 N.W. 3 (1895).

50. See *id.* at 43-44, 63 N.W. at 3-4.

counting, there would have been no difficulty in ordering a reference. Unfortunately the pleadings made the case an action at law.<sup>51</sup> To resolve this dilemma, the *Bond* court looked through the surface of the pleadings, defined an "action for an accounting" broadly, and then ordered a reference.<sup>52</sup> Whether the holding in *Bond* represents an unlawful denial of the right to trial by jury or an intelligent allocation of scarce decision-making resources remains an open question today.<sup>53</sup>

Of course, the right to a jury trial in actions at law has always been subject to waiver.<sup>54</sup> Thus, in addition to equitable actions in which reference could be compelled, many cases were disposed of through reference by stipulation after a jury trial had been waived.<sup>55</sup> The only major issue presented by a stipulated reference is whether the stipulation is truly voluntary and not coerced by the court.<sup>56</sup> The tendency in Minnesota has been to uphold the validity of a stipulated reference even when the trial court appears to

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51. *See id.* ("If this is an action at law for the recovery of money only, the plaintiff is entitled absolutely to a trial by jury . . . . It is true, the prayer of the complaint is for the recovery of money only . . . .").

52. *See id.* at 44-45, 63 N.W. at 4 ("[I]f the amount for which judgment is demanded can only be ascertained by an accounting between the parties, it is an equitable [action]."). Cases involving long accounts were never tried before Minnesota juries anyway. *See Berkey v. Judd*, 14 Minn. 394, 399-400 (Gil. 300, 303) (1869) ("No court should ever submit the taking of such accounts to a jury.").

Without discussing the form of the pleadings, the Wisconsin Supreme Court has permitted compulsory reference when long accounts are involved, whether the action is legal or equitable. *See Killingstad v. Meigs*, 147 Wis. 511, 517, 133 N.W. 632, 634 (1911). *But see Barnes v. Barnes*, 282 Ill. 593, 598, 118 N.E. 1004, 1006 (1918) ("The duties of the court, the public interest, and the rights of the litigants forbid the examination by the court of intricate and complex accounts."); *but cf. Steck v. Colorado Fuel & Iron Co.*, 142 N.Y. 236, 37 N.E. 1 (1894) (reference denied when need for accounting arises from defendant's counterclaim rather than plaintiff's complaint).

53. Broadly defining an equitable action for purposes of reference, the *Bond* decision confined *St. Paul & Sioux City Railroad* within narrow limits. *Compare St. Paul & S.C.R.R. v. Gardner*, 19 Minn. 132, 136-37 (Gil. 99, 102) (1872) ("[A]n order which directs a reference in a case in which a reference is not authorized by law is appealable.") with *Bond v. Welcome*, 61 Minn. 43, 45, 63 N.W. 3, 4 (1895) ("[A]n order directing a compulsory reference is not an appealable order."). According to the court in *State ex rel. Rockwell v. State Bd. of Educ.*, 213 Minn. 184, 6 N.W.2d 251 (1942), "in Minnesota, the only limitation upon a court's power to appoint a referee is that it cannot be exercised in actions purely at law in which there was an absolute right of trial by jury as the law stood at the time of the adoption of our constitution." *Id.* at 192, 6 N.W.2d at 258. Apparently, Minnesota courts still possess broad powers to order a reference.

54. *See, e.g., St. Paul & S.C.R.R. v. Gardner*, 19 Minn. 132, 143 (Gil. 99, 109) (1872).

55. *See, e.g., Newcomb v. Wood*, 97 U.S. 581, 583 (1878) (approving reference by consent in actions at law).

56. *See, e.g., Bohles v. Boland*, 44 Minn. 481, 481, 47 N.W. 155, 155 (1890).

have applied some coercion in convincing the parties to waive their jury trial rights.<sup>57</sup>

The most extensive nineteenth-century discussion of the referees' position in Minnesota took place in *Carson v. Smith*.<sup>58</sup> In *Carson* the court confronted directly the question of whether referees represented "a diversion of the judicial power of the State from its legitimate channels, and a location of it in unauthorized hands."<sup>59</sup> Although the statute that recognized referees had been in existence only nine years,<sup>60</sup> the court recognized the importance of their work in words that sound curiously modern: "[p]robably there is no act upon the statute book under which more interests have been affected, more rights passed, and property involved, than the statute authorizing the appointment of referees . . . ."<sup>61</sup> The court could only justify the great power of the referees, however, by explaining that their work was merely what defenders of the chancery masters called ministerial.<sup>62</sup> The *Carson* court also based the legitimacy of referees on the fact that they operated on a case-by-case basis.<sup>63</sup> At that time there was no such thing as a perma-

57. *See id.* (absence of express objection means consent to reference); *Deering v. McCarthy*, 36 Minn. 302, 302, 30 N.W. 813, 813 (1886) (reference upheld even though made a condition to permitting defendant to amend answer).

58. 5 Minn. 78 (Gil. 58) (1860).

59. *Id.* at 87 (Gil. at 61).

60. *See id.* at 86 (Gil. at 61); MINN. REV. TERR. STAT. ch. 71, §§ 47-54 (1851) (repealed 1905).

61. 5 Minn. at 86 (Gil. at 61); *cf.* D. McLean, *supra* note 3 ("Approximately 84 percent of the contacts between the court and the public are made by the referees . . . .") (footnote omitted). *See generally* Interview with Judge Susanne C. Sedgwick, Hennepin County District Court (Nov. 1, 1977) (on file at William Mitchell Law Review office).

62. Proponents of the use of chancery masters in the English courts alleged that the masters performed ministerial functions only. *See* Bryant, *supra* note 29, at 500 (English chancery masters were merely assistants and had no judicial power) (reviewing S. BURROUGHS, *THE HISTORY OF THE CHANCERY* (1726)). For an explanation of the relationship between English chancery masters and modern referees, see notes 67-73 *infra* and accompanying text.

Justifying the referees' powers, the Minnesota Supreme Court said in *Carson*:

The court speaks and operates through the referee, its subordinate officer. The referee exerts no power *proprio vigore*. Without the Court he could have no existence; without the Court he could not act after his creation; and without confirmation and adoption by the Court, his acts have no force or validity whatever. Nothing can originate before a referee, and nothing can terminate with or by the decision of a referee. The Court acquires the jurisdiction, and the Court renders the judgment upon the controversy, therefore the whole exercise of the judicial power is by the Court, the referee acting only in an intermediate capacity as an auxiliary to the Court in the ascertainment of certain facts and law necessary to its enlightenment in giving the proper decree or judgment.

5 Minn. at 87-88 (Gil. at 62).

63. *See* 5 Minn. at 87 (Gil. at 61).

nent referee.

### A. Hennepin County Special Term Referee

In 1975 the Hennepin County District Court hired a referee to hear special term matters.<sup>64</sup> Although this position appears to be a recent creation, in fact, the special term referee is an outgrowth of a long historical tradition. More than any other modern quasi-judicial figure, the special term referee functions like a master in chancery.<sup>65</sup> While there is not a perfect correspondence between these two offices, there are enough parallels to make it worthwhile to take a brief look at the chancery master's history.<sup>66</sup>

The Minnesota Supreme Court has described the appointment of referees as "a practice as old as our system of jurisprudence, [that] has been practiced by courts of equity since time immemorial."<sup>67</sup> This is a clear recognition of the continuity between the English chancery master and the American referee.<sup>68</sup> In England, the office of master was created because the expansion of equity jurisdiction made the chancellor feel overworked.<sup>69</sup> Not surprisingly, the issue of whether too much authority was being delegated to masters arose very early. The dispute led Chancellor Bacon, early in the seventeenth century, to withdraw the masters' power to hear and determine cases.<sup>70</sup> This controversy, which centered on the question of whether the masters were mere assistants performing only "ministerial" work or whether they were usurpers of the chancellor's authority, persevered in England well into the

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64. See Interview with Thomas F. Haeg, Hennepin County Special Term Referee (Nov. 21, 1977) (on file at William Mitchell Law Review office). Ramsey County District Court does not employ a special term referee. See notes 34-35 *supra* and accompanying text.

65. See Interview with Thomas F. Haeg, *supra* note 64.

66. Cf. Act of Mar. 5, 1853, ch. I, § 10, 1853 Minn. Terr. Sess. Laws 3, 4 ("In all cases where, in chancery before this act took effect, masters and examiners were required to act, or might have acted, the like acts and duties shall and may hereafter be performed when necessary, by a referee or referees appointed as in civil actions.") (repealed 1866).

67. State *ex rel.* Rockwell v. State Bd. of Educ., 213 Minn. 184, 192, 6 N.W.2d 251, 258 (1942).

68. Cf. Silberman, *Masters and Magistrates Part I: The English Model*, 50 N.Y.U. L. REV. 1070, 1070-72 & 1070 n.1 & 1071 n.2 (1975) (federal magistrates and state court parajudges modeled after English chancery masters).

69. See *id.* at 1076-79 (as judges' terms increased, work of masters expanded to include more judicial matters); cf. Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297, 1298 (1975) (use of masters frees additional time for judges).

70. See Comment, *Masters and Their Fees*, 3 MIAMI L.Q. 403, 405 (1949).

eighteenth century.<sup>71</sup> The American colonies, however, did not hesitate to appoint masters to hear equitable actions.<sup>72</sup> Indeed, one legal scholar has concluded that by the time of the Revolutionary War all the more populous colonies were using masters in one capacity or another, under a variety of names.<sup>73</sup>

Minnesota continued to assign referees case-by-case in the nineteenth century.<sup>74</sup> As time went on, other states that had retained separate courts of equity developed the position of "standing master."<sup>75</sup> When the Hennepin County District Court created the position of Special Term Referee, it shaped the duties of the job to correspond to those of an equity court's standing master in several important respects.<sup>76</sup>

The Special Term Referee almost exclusively hears matters that formerly fell into the realm of equity: marriage dissolutions, trust matters, and actions for accounting.<sup>77</sup> In addition, the position

71. Samuel Burroughs wrote a history of chancery in 1726 which claimed that the role of the masters was as mere assistants, performing ministerial work only. See Bryant, *supra* note 29, at 500 (discussing S. BURROUGHS, *THE HISTORY OF CHANCERY* (1726)); cf. 5 BAYLOR L. REV. 374, 375 (1953) (several others regard masters as purely ministerial officers). Burroughs' view was immediately refuted in a rival book by the Earl of Hardwicke, who took the position that the masters had, in practice, broader powers than Burroughs had acknowledged. See Bryant, *supra*, at 500-01 (discussing P. YORKE, *A DISCOURSE OF THE JUDICIAL AUTHORITY BELONGING TO THE OFFICE OF MASTER OF THE ROLLS IN THE HIGH COURT OF CHANCERY* (London 1727)).

72. See Bryant, *The Office of Master in Chancery: Colonial Development*, 40 A.B.A.J. 595 *passim* (1954). For example, by 1686 Connecticut had appointed five people to perform this function, and masters were appointed in Pennsylvania at least as early as 1720. See *id.* at 598.

73. See *id.*

74. See, e.g., *Carson v. Smith*, 5 Minn. 78, 87 (Gil. 58, 61) (1860) ("[T]here is no such officer as a referee permanently attached to a Court.").

75. See 5 BAYLOR L. REV. 374, 376 (Massachusetts); cf. Silberman, *supra* note 68, at 1106 (federal courts' use of magistrates).

76. See Interview with Thomas F. Haeg, *supra* note 64.

77. See *id.* In 1976, the Hennepin County Special Term Referee heard 7857 matters, broken down into the following categories:

- I. Action Resulting in Disposal of Cases:
  - 1890 Marriage Dissolutions without Children<sup>a</sup>
  - 1241 Entries of Judgments in Civil Matters<sup>b</sup>
  - 383 Change of Name Petitions
  - 149 Transfers from District Court to Municipal Court
  - 296 Tax Appeals Settled or Dismissed
  - 191 Delinquent Trust Files Closed<sup>c</sup>
  - 4150 Subtotal
- II. Formal Action on Civil Matters:
  - 832 Uncontested Trusts<sup>d</sup>
  - 317 Contested Matters<sup>e</sup>
  - 1149 Subtotal

carries with it the responsibility of advising *pro se* litigants on procedure, a practice corresponding to the chancery masters' role in helping parties to select the appropriate writs.<sup>78</sup> Like the master's relationship with the chancellor, the Special Term Referee makes recommendations to the Special Term Judge rather than issuing final orders.<sup>79</sup> The present Special Term Referee estimates, however, that almost ninety-nine percent of his recommendations are followed by the court.<sup>80</sup> In this respect, the duties of the special term referee also approximate those of the chancery master, who, according to one authority, was neither a purely ministerial officer nor did he really have any final determinative powers in judicial matters.<sup>81</sup> The Special Term Referee's position, like that of his predecessor, the standing master, is an ambiguous one. On paper, he has no power at all, yet in practice it is obvious that he holds a

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III. Non-Formal Action on Civil Matters:

1342 Miscellaneous Civil Matters<sup>f</sup>  
 696 Delinquent Trusts Reviewed  
 513 Tax Pretrial Settlement Conferences  
   1 Civil Pretrial<sup>g</sup>  
   6 Pre-Trust Hearings

2558 Subtotal

7857 Total

- a. 550 with Change of Name
- b. Includes Default Judgment Entered, Promissory Notes, Replevin Actions, Mechanics Liens, Mortgage Foreclosures, Quiet Title Actions, etc.
- c. By Termination or Discharge of Trustee
- d. Approximately 4000 active trust files remained
- e. Primarily Temporary Orders in Marriage Dissolutions
- f. Includes Cases Continued, Stricken, Further Discovery, Bench Warrants, Default Dissolutions, Advances, and other matters referred to Special Term Referee
- g. Contested Domestic Matter

T. Haeg, Special Term Referee: Annual Report of Judicial Business (Jan. 10, 1977) (on file at William Mitchell Law Review office). Monthly reports from 1977 indicate a similar volume and distribution of business. *See, e.g.*, Letter from Thomas F. Haeg, Hennepin County Special Term Referee, to Chief Judge Eugene Minenko, Hennepin County District Court (Nov. 7, 1977) (on file at William Mitchell Law Review office).

Equity traditionally has exercised jurisdiction in marriage dissolutions, trust matters, and actions for accounting. *See, e.g.*, *Caldwell v. Hill*, 179 Ga. 417, 176 S.E. 381 (1934) (trust matter); *Klekamp v. Klekamp*, 275 Ill. 98, 113 N.E. 852 (1916) (marriage dissolution); *Fair v. Stickney Farm Co.*, 35 Minn. 380, 29 N.W. 49 (1886) (accounting).

78. *Compare* Interview with Thomas F. Haeg, *supra* note 64 (special term referee's duties include advising *pro se* litigants) with Bryant, *supra* note 29, at 500 ("One of [the chancery masters'] principal duties was to consider the proper writ for the people who sought amelioration of the laws from the king.").

79. *See* Interview with Thomas F. Haeg, *supra* note 64.

80. *See id.*

81. *See* Bryant, *supra* note 29, at 500.

great deal. As will be seen below, this discrepancy exists to a greater or lesser degree in all of the referee positions. It is one of the central problems that will ultimately have to be resolved by the Legislature.

### B. *Juvenile Court Referees*

As with the development of the position of special term referee, the history of referees in juvenile court also exhibits a persistent tension between law and equity. Here it takes the form of conflict between the equitable doctrine of *parens patriae* and the need to protect the constitutional rights of criminal defendants.<sup>82</sup>

In England, where the king or queen was *parens patriae*, the parent of the nation, the court of chancery's position as the "King's conscience" carried with it the power to appoint guardians for abandoned or neglected children.<sup>83</sup> The *parens patriae* doctrine has been severely criticized by American courts as inapplicable in countries that are not monarchies.<sup>84</sup> Nevertheless, American courts have widely relied on the doctrine to serve as the foundation of the referee's power to determine juvenile delinquency cases.<sup>85</sup>

Colorado, the second state to create a juvenile court,<sup>86</sup> followed the chancery analogy by creating special chancery masters called "masters of discipline" to hear juvenile cases.<sup>87</sup> Officers designated

82. See, e.g., Evans, *The Constitutional Rights of Juveniles—or Parens Patriae v. Due Process*, 4 WILLAMETTE L.J. 152, 152 (1966); Note, *The Parens Patriae Theory and Its Effect on the Constitutional Limits of Juvenile Court Powers*, 27 U. PITT. L. REV. 894, 907-11 (1966).

83. See, e.g., Shelley v. Westbrooke, 37 Eng. Rep. 850 (1821) (court took custody of poet Percy Bysshe Shelley's children because father was immoral and an atheist); Nicholas, *History, Philosophy, and Procedures of Juvenile Courts*, 1 J. FAM. L. 151, 151-61 (1961).

84. Cf. *In re Gault*, 387 U.S. 1, 17-18 (1967) (criticizing *parens patriae* doctrine); *Kent v. United States*, 383 U.S. 541, 554-55 (1966) (*parens patriae* doctrine has American constitutional limitations).

85. See, e.g., Peterson v. McAuliffe, 151 Minn. 467, 469, 187 N.W. 226, 226 (1922); Kenney, *The Juvenile Court: Pioneer in Social Jurisprudence*, 16 MARQ. L. REV. 184, 185 (1932); Nicholas, *supra* note 83, at 158, 160.

86. See Act of Apr. 28, 1909, ch. 158, 1909 Colo. Sess. Laws 339.

87. *Id.* (creating juvenile court "masters of discipline"); see Mack, *The Juvenile Court*, 23 HARV. L. REV. 107, 118 (1909). Illinois was the first state to create a juvenile court. See *id.* at 107.

In this early commentary, the author approved the practice of appointing masters, in the same terms used by modern advocates of referees: "This [practice] may prove to be the best solution of a difficult problem, combining as it does the possibility of a quick disposition of the simpler cases in many sections of a large city or county, with a unity of administration through the supervisory power of a single judge." *Id.* at 118.

For a study of present practice in Denver, where two full-time referees are "empowered to hear any case or matter under the court's jurisdiction," see Hufnagel & Davidson,

as chancery masters still hear juvenile cases in at least three states,<sup>88</sup> while a large number of states employ juvenile court referees or similar quasi-judicial officers.<sup>89</sup>

In the Minnesota juvenile justice system, the struggle over what sorts of authority could be given to quasi-judges goes back at least a century. In 1870, legislation was passed which provided that a child who "by reason of incorrigible or vicious conduct . . . has rendered his or her control beyond the power of parent, guardian or next friend" could, for the sake of his or her "morals and future welfare," be committed to a reform school by a justice of the peace.<sup>90</sup> Although these justices were elected officials, they were not required to be "learned in the law."<sup>91</sup> Moreover, the statute did not provide a mechanism for review of their commitment orders.<sup>92</sup>

There must have been widespread opposition to the justices' broad discretionary power over children, for, in 1883, the law was amended to require that the justice submit a written report of evidence to a district judge for review before the commitment could become final.<sup>93</sup> It is not hard to see in this amendment one of the

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*Children in Need: Observations of Practices of the Denver Juvenile Court*, 51 DEN. L.J. 337, 344 (1974). See also Gough, *Referees in California's Juvenile Courts: A Study in Sub-Judicial Adjudication*, 19 HASTINGS L.J. 3 (1967) (examining California juvenile court referees).

88. See DEL. CODE ANN. tit. 10, § 913(b) (1974); NEV. REV. STAT. § 62.090 (1977); R.I. GEN. LAWS § 8-10-3.1 (Cum. Supp. 1978).

89. See, e.g., MICH. COMP. LAWS ANN. § 712A.10 (West 1968) (judge of probate court may designate a probation officer or county agent to act as referee); N.J. STAT. ANN. § 2A:4-12 (West 1952) (judge may appoint a probation officer or other suitable person to act as referee); N.D. CENT. CODE § 27-20-07 (1974) (judge may appoint one or more persons to serve as referees). See generally Administrative Office of the Courts, *Issues and Recommendations on Implementation of the Judicial Article 462-78* (Oct. 1976) (summarizing the law as of 1976 in all states).

90. Act of Mar. 3, 1870, ch. VII, § 3, 1870 Minn. Gen. Laws 7, 9 (repealed 1905).

91. MINN. CONST. of 1857, art. VI, § 8 provided for justices of the peace, without specifying that they should possess any educational qualifications. On the other hand, the 1857 Minnesota Constitution provided that "[j]udges of the supreme court and the district court shall be learned in the law." *Id.* § 6. This provision was retained in the Minnesota Constitution of 1974. MINN. CONST. art. VI, § 5.

Justices of the peace were abolished by the Minnesota Legislature in 1977. See Act of June 2, 1977, ch. 432, § 27, 1977 Minn. Laws 1147, 1161 (amending MINN. STAT. § 487.35 (1976)).

92. See Act of Mar. 3, 1870, ch. VII, § 3, 1870 Minn. Gen. Laws 7, 8-9 (repealed 1905). A mechanism for review was established in 1883. See note 93 *infra* and accompanying text.

93. See Act of Mar. 2, 1883, ch. 37, § 2, 1883 Minn. Gen. Laws 35, 35 (repealed 1905); cf. *In re Welfare of Fields*, 285 Minn. 184, 172 N.W.2d 322 (1969) (referee's order not final and not appealable until signed by judge). The 1883 amendment, in addition to requiring district court approval, also required corroboration by two witnesses of the fact that the

enduring ironies in the field of juvenile justice.<sup>94</sup> Supposedly, the commitment was meant solely for the welfare of the child.<sup>95</sup> Nevertheless, district court review was deemed necessary to protect children from the possibility that the non-judges entrusted to decide who needed moral betterment might make arbitrary decisions.<sup>96</sup>

Despite the due process concerns embodied in the 1883 amendment, by the end of the nineteenth century it was firmly established that the state's *parens patriae* powers allowed the delegation of judicial duties in juvenile cases.<sup>97</sup> Although the act that established Minnesota's juvenile courts in 1905, like the nation's first juvenile court act,<sup>98</sup> was an attempt to codify "ancient equitable jurisdiction over infants,"<sup>99</sup> the 1905 Act somehow omitted posi-

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juvenile had committed an unlawful act before the juvenile could be committed by a justice of the peace. See Act of Mar. 2, 1883, ch. 37, § 2, 1883 Minn. Gen. Laws 35, 35 (repealed 1905).

94. See generally C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 309-70 (1978).

95. See Act of Mar. 3, 1870, ch. 7, § 3, 1870 Minn. Gen. Laws 7, 9 (repealed 1905). A district court opinion quoted by the Minnesota Supreme Court provides a colorful example of nineteenth century *parens patriae* rhetoric. See *State ex rel. Olson v. Brown*, 50 Minn. 353, 354 (1892) ("It is the duty of the state in cases where evil courses have been entered upon, to stretch forth its hand and rescue children from their evil surroundings . . . .") (The case is reported at 52 N.W. 935 without the quoted language.)

96. See Act of Mar. 2, 1883, ch. 37, § 2, 1883 Minn. Gen. Laws 35, 35 (repealed 1905); cf. *State ex rel. Connolly v. Brown*, 47 Minn. 472, 473-74, 50 N.W. 920, 920-21 (1891) (granting writ of habeas corpus because, although signed by the district court judge, report of justice of the peace omitted testimony of juvenile's witnesses). See also *In re Welfare of I.Q.S.*, 309 Minn. 78, 86, 244 N.W.2d 30, 38 (1976) (recognizing need for modern juvenile courts to furnish complete records of facts supporting adjudications), noted in 4 WM. MITCHELL L. REV. 461 (1978).

97. According to the Minnesota Supreme Court:

The language of the constitution does not apply where the state acts as the common guardian of the community, exercising its power whenever the welfare of an infant demands it, or where the state acts in the legitimate exercise of its police power. Therefore the lawmakers were not prohibited from conferring jurisdiction in such cases upon any of the judicial officers of the state.

*State ex rel. Olson v. Brown*, 50 Minn. 353, 359, 52 N.W. 935, 936 (1892); cf. *In re Adoption of Pratt*, 219 Minn. 414, 422-23, 18 N.W.2d 147, 152 (1945) (*parens patriae* doctrine permits delegation of state function of protecting juveniles).

98. The nation's first juvenile court was established in Illinois by Act of Apr. 21, 1899, 1899 Ill. Laws 131. See Mack, *supra* note 87, at 107. Juvenile courts were established in Minnesota by Act of Apr. 19, 1905, ch. 285, § 3, 1905 Minn. Laws 418, 419 (current version at MINN. STAT. §§ 260.019-.024 (1978)). The Minnesota act closely followed the original Illinois law. See Waite, *New Laws for Minnesota Children*, 1 MINN. L. REV. 48, 60-61 (1917).

99. *People ex rel. Houghland v. Leonard*, 415 Ill. 135, 138, 112 N.E.2d 697, 699 (1953) (construing Illinois law).

tions for referees and masters.<sup>100</sup> Juvenile court judges, however, soon requested that referees be hired.<sup>101</sup> More than half a century later, the Committee on the Standard Juvenile Court Act recommended the employment of referees in juvenile courts—though apparently not without misgivings<sup>102</sup>—and Minnesota judges played a leading role in bringing about the recommendation.<sup>103</sup> It was asserted that by setting up a juvenile court with one judge and a number of referees, it would be possible to adhere to consistent policies.<sup>104</sup> In 1957, the Legislature enacted a bill allowing the Hennepin County Juvenile Court to employ referees.<sup>105</sup> Two years later the Legislature used the Standard Family Court Act as a model for its authorization of referees for all Minnesota juvenile courts.<sup>106</sup>

Among other things, the 1959 Act provides that “[t]he judge may direct that any case or class of cases shall be heard in the first instance by the referee in the manner provided for the hearing of cases by the court.”<sup>107</sup> Thus there is no line of demarcation between the function of juvenile court judges and referees, other than that drawn by an individual judge. In the Hennepin County Juvenile Court, until the 1978 law precluded referees from hearing

100. See Act of Apr. 19, 1905, ch. 285, 1905 Minn. Laws 418 (current version at MINN. STAT. §§ 260.011-.57 (1978)).

101. See, e.g., Waite, *supra* note 98, at 61. The author of this article was a juvenile court judge. See *id.* at 62 n.1.

102. See COMMITTEE ON THE STANDARD FAMILY COURT ACT, STANDARD FAMILY COURT ACT § 7 (6th ed. 1959). “The National Council of Juvenile Court Judges has a committee that is studying the question of the use of referees in juvenile and family courts. It is considering, among other aspects, whether use of referees is a proper way of supplying needed additional judicial manpower.” *Id.* at 115, comment.

103. See, e.g., Arthur, *The Uniform Juvenile Court Act*, 19 JUV. COURT JUDGES J. 153 (1969).

104. See *id.* at 156 (recognizing “the value of having a single judge with numerous referees in order to obtain complete consistency of policy, of program, and of methodology within the courts”). It should be noted, however, that some commentators question whether uniformity is attained, and even question its validity as a goal. See, e.g., C. SILBERMAN, *supra* note 94, at 345-46; Interview with William Kennedy, Hennepin County Public Defender (Nov. 21, 1977) (on file at William Mitchell Law Review office); Interview with State Representative Gordon O. Voss, *supra* note 7; Interview with State Senator Robert Tennesen, *supra* note 5.

105. See Act of Apr. 26, 1957, ch. 742, 1957 Minn. Laws 1006.

106. Compare COMMITTEE ON THE STANDARD FAMILY COURT ACT, *supra* note 102, § 7 with Act of Apr. 24, 1959, ch. 685, § 5, 1959 Minn. Laws 1275, 1279-80 (authorizing referees for all Minnesota juvenile courts) (current version at MINN. STAT. § 260.031 (1978)). See generally UNIFORM JUVENILE COURT ACT § 7.

107. Act of Apr. 24, 1959, ch. 685, § 5(2), 1959 Minn. Laws 1275, 1279 (current version at MINN. STAT. § 260.031(2) (1978)).

contested trials and motions to refer a juvenile for adult prosecution, the five full-time referees and one part-time referee heard many of the same kinds of cases as the judge.<sup>108</sup> In 1976, when there were four full-time and three part-time Hennepin County Juvenile Court referees, they heard the following matters:

Detention hearings:	2100	(97% of such matters heard)
Arraignments:	2600	(95%)
Adult references:	1	(1%)
Pre-arraignments/ Omnibus:	410	(95%)
Default trials:	180	(98%)
Contested trials:	340	(85%)
Dispositions:	3800	(90%)
Adoptions:	740	(98%)
Traffic:	4500	(100%) <sup>109</sup>

In short, of the nine kinds of hearings in the repertoire of the court, the Hennepin County Juvenile Court referees handled the vast majority of cases in eight categories, leaving only references for adult prosecution as the near-exclusive preserve of the judge.

Until the 1978 law took effect, Ramsey County Juvenile Court referees heard all juvenile traffic matters, nearly all delinquency hearings and trials, and occasionally heard neglect or termination of parental rights cases.<sup>110</sup> The two full-time referees and one part-time referee heard 12,163 delinquency matters, 5,878 traffic cases—of which 266 were contested—and 32 boat or snowmobile traffic cases in Ramsey County during 1976.<sup>111</sup> Statistics on the use of referees in juvenile matters in the non-metropolitan counties

108. See Interview with Judge Lindsay G. Arthur & Referee Patricia Belois, Hennepin County Juvenile Court (Oct. 28, 1977) (on file at William Mitchell Law Review office). Similarly, hearings conducted in Hennepin County reveal that referees hold court in a style indistinguishable from judges, use the same court rooms, wear robes, and are addressed as "your Honor."

Juvenile court referees are now forbidden, however, to hear any contested trial or motion. See MINN. STAT. § 484.70(3) (1978). In 1979 this provision was amended to allow referees in the Second Judicial District to hear contested cases if no objection is made. See Act of June 5, 1979, ch. 318, § 1, 1979 Minn. Laws 831, 831.

109. See Letter from Judge Bruce C. Stone, Hennepin County District Court, to Members of Committee on Referees (July 7, 1977) (on file at William Mitchell Law Review office).

110. See Interview with Referee Kenneth M. Truax, Ramsey County Juvenile Court (Nov. 23, 1977) (on file at William Mitchell Law Review office).

111. Interview with Clerk of Court, Ramsey County Juvenile Court (Dec. 1, 1977).

are not presently available.<sup>112</sup>

During the same period in which referees have been absorbing the bulk of juvenile court duties in Minnesota, there has been a continuing debate over what constitutes due process of law in juvenile court adjudications. *In re Gault*,<sup>113</sup> a United States Supreme Court decision, required that juvenile courts conform their procedures to those guaranteed adults by the Bill of Rights in a number of important respects.<sup>114</sup> Speaking through Justice Fortas, the Court also attacked the basic doctrine of *parens patriae* in scathing terms.<sup>115</sup> The experience of many states since *Gault* has been that specific procedural reforms—right to notice of charges, right to present evidence, and right to counsel—come easier than the fundamental changes of attitude the *Gault* Court urged in dicta.<sup>116</sup> In Minnesota, where notification of charges and right to counsel were required by state supreme court decisions long before *Gault*,<sup>117</sup> the *parens patriae* philosophy has continued to have strong adherents.<sup>118</sup> One has a sense that there is an uneasy truce between those critics of the juvenile court system who would give children

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112. For the county courts' use of probation officers as referees in juvenile traffic cases, see Note, *Basic Rights for Juveniles in Juvenile Proceedings Under the Minnesota Juvenile Court Rules: A Response to Gault*, 54 MINN. L. REV. 335, 341 (1969).

113. 387 U.S. 1 (1967).

114. *See id.* at 34, 42, 57 (right to notice of charges, right to counsel, opportunity to cross-examine witnesses). The Supreme Court has stopped short, however, of requiring that juveniles be guaranteed the right to a jury trial. *See McKevier v. Pennsylvania*, 403 U.S. 528, 545 (1971).

115. *See In re Gault*, 387 U.S. 1, 16 (1967) ("The Latin phrase [*parens patriae*] proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance.").

116. *See* C. SILBERMAN, *supra* note 94, at 312.

117. *See State ex rel. Knutson v. Jackson*, 249 Minn. 246, 248, 82 N.W.2d 234, 236 (1957); Act of July 16, 1937, ch. 79, § 2, 1937 Minn. Laws Ex. Sess. 138, 138-39 (repealed 1959). *See generally* Supreme Court Juvenile Justice Study Comm'n, Report to the Minnesota Supreme Court, app. A, at 98-109 (1976).

118. *See, e.g.*, *Loyd v. Youth Conservation Comm'n*, 287 Minn. 12, 17, 177 N.W.2d 555, 558 (1970) ("The Minnesota youth correctional system is grounded in the philosophy of *parens patriae*, namely that the state has the inherent power to take such steps as are necessary for the protection and welfare of the child."); *cf.* *Peterson v. McAuliffe*, 151 Minn. 467, 470, 187 N.W. 226, 226 (1922) (pre-*Gault* case; language similar to *Loyd*).

To develop a sense for the potential clash of purposes in the juvenile court system, compare *Loyd v. Youth Conservation Comm'n*, 287 Minn. 12, 17, 177 N.W.2d 555, 558 (1970) and *Peterson v. McAuliffe*, 151 Minn. 467, 469, 187 N.W. 226, 226 (1922) with *J.E.C. v. State*, 302 Minn. 387, 401, 225 N.W.2d 245, 254 (1975) ("the whole purpose of the Juvenile Court Act is to rehabilitate a young person before he or she becomes a menace to society"). The critical area is that in which the welfare of the individual child diverges from the interest in the protection of society.

all the rights of adults, and those who would prefer to return to the pre-*Gault* era when a benevolent despotism over the young was accepted as "in their best interests."

The present position of the juvenile court referees is in the no-man's-land between the two camps. On the one hand, it is their presence in the court system that enables the courts to provide the many hearings required to make the Bill of Rights a reality for juveniles. On the other hand, the fact that most juvenile contacts with the courts are presided over by these non-elected quasi-judges raises new questions.

The most serious due process objection to the use of referees in Minnesota juvenile courts is that they are not required to be lawyers.<sup>119</sup> The role of lay judges in handling adult misdemeanors has received considerable criticism in recent years.<sup>120</sup> Minnesota's solution has been to give these adult defendants convicted by non-lawyer judges the right to a trial de novo before a judge "learned in the law."<sup>121</sup> Similarly, in the juvenile system, a child has a corresponding right to a rehearing before a judge.<sup>122</sup> Given the increasing complexity of juvenile law it is questionable whether a rehearing is an adequate remedy. There is considerable support for the view that if juvenile court referees are to be retained at all, they should be lawyers.<sup>123</sup>

A more fundamental problem stemming from the present system is whether a rehearing by a judge of a referee's decision that a child is not delinquent subjects the juvenile to double jeopardy.<sup>124</sup>

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119. See MINN. STAT. § 260.031(1) (1978) (referee must be "suitable" person, qualified by "previous training and experience").

120. See, e.g., Comment, *The Right to a Legally Trained Judge*: Gordon v. Justice Court, 10 HARV. C.R.-C.L. L. REV. 739 (1975); Note, *Gordon v. Justice Court: Defendant's Right to a Competent Tribunal*, 2 HASTINGS CONST. L.Q. 1177 (1975); 25 U. KAN. L. REV. 275 (1977).

121. See *State v. Lindgren*, 306 Minn. 133, 135, 235 N.W.2d 379, 381 (1975) (per curiam).

122. See MINN. STAT. § 260.031(4) (1978) (right to rehearing by judge available after referee makes findings). This rehearing is available regardless of whether the referee is learned in the law. See *id.*

123. See, e.g., U.S. DEP'T OF HEW, STANDARDS FOR JUVENILE AND FAMILY COURTS 105-06 (1966); Piersma, Ganousis & Kramer, *The Juvenile Court: Current Problems, Legislative Proposals, and a Model Act*, 20 ST. LOUIS U.L.J. 1, 11 (1975). A complicating factor is that non-lawyer referees in Hennepin County have a great deal of experience, social service training, and job dedication—things that are not taught in law school. See Interview with Judge Lindsay G. Arthur & Referee Patricia Belois, *supra* note 108.

124. See, e.g., *Jesse W. v. Superior Court*, 20 Cal. 3d 893, 899, 576 P.2d 963, 967, 145 Cal. Rptr. 1, 5 (rehearing after referee finding of nondelinquency constitutes double jeopardy), *vacated*, 439 U.S. 922 (1978); cf. *Breed v. Jones*, 421 U.S. 519, 541 (1975) (trial of juvenile as adult, after juvenile court finding of delinquency, constitutes double jeopardy).

For the moment this question has been put to rest by *In re Welfare of C.W.S.*,<sup>125</sup> the Minnesota Supreme Court decision holding that the double jeopardy issue does not have to be reached because Minnesota's statute precludes the state from requesting a rehearing on an adverse finding by a referee.<sup>126</sup> In other jurisdictions, the double jeopardy issue has been squarely met. It has generally been determined that a referee's adjudication of delinquency or nondelinquency is a subjection to jeopardy, even if the resulting order is subject to review.<sup>127</sup>

Of the recent double jeopardy cases, it is probably the United States Supreme Court's decision in *Swisher v. Brady*<sup>128</sup> that raises the most interesting questions about the role of referees in the juvenile justice system. *Swisher* held that the Maryland procedure of making a juvenile defendant go through the process a second time after winning an advisory finding of nondelinquency from a juvenile court master did not constitute double jeopardy.<sup>129</sup> Speaking for the majority, Chief Justice Burger explained that, although jeopardy does attach when a matter is heard before a juvenile court master, it is a continuing jeopardy that persists until the judge signs an order.<sup>130</sup> There is no double jeopardy because the child is subjected to one long jeopardy before two fact-finders, not two separate adjudications.<sup>131</sup> Chief Justice Burger explicitly bases this view on the idea that juvenile court masters "serve only as ministerial assistants to judges,"<sup>132</sup> a conclusion stemming from their inability to enter binding judgments.<sup>133</sup>

That this interpretation exalts form over substance is argued in dissent by Justice Marshall, Justices Brennan and Powell concur-

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125. 267 N.W.2d 496 (Minn. 1978).

126. *See id.* at 498-99; *cf. Jesse W. v. Superior Court*, 20 Cal. 3d 893, 899 n.5, 576 P.2d 963, 967 n.5, 145 Cal. Rptr. 1, 5 n.5 (same result in California), *vacated*, 439 U.S. 922 (1978).

127. *See, e.g., Aldridge v. Dean*, 395 F. Supp. 1161 (D. Md. 1975); *Jesse W. v. Superior Court*, 20 Cal. 3d 893, 576 P.2d 963, 145 Cal. Rptr. 1, *vacated*, 439 U.S. 922 (1978). *Contra, Swisher v. Brady*, 438 U.S. 204 (1978). *See also Breed v. Jones*, 421 U.S. 519, 534 (1975) (double jeopardy issue in case involving retrial as adult after juvenile court finding of delinquency).

128. 438 U.S. 204 (1978).

129. *See id.* at 219.

130. *See id.* at 215-16.

131. *See id.* at 208 (quoting *In re Anderson*, 20 Md. App. 31, 47, 315 A.2d 540, 549 (1974)).

132. *See id.*

133. *See id.* at 208-09.

ring.<sup>134</sup> Justice Marshall sees the judge-master relationship not as that of judge and ministerial assistant, but as that of "a trial judge and an appellate court with unusually broad powers of review."<sup>135</sup> Thus, in his view, the Maryland arrangement violates the double jeopardy clause.<sup>136</sup> He says, in effect, the state is given a chance to appeal from a judgment of acquittal.<sup>137</sup>

Minnesota's juvenile justice system would not violate the double jeopardy clause even under Justice Marshall's standard.<sup>138</sup> The one suggestion by Justice Marshall that may foreshadow constitutional problems in Minnesota is that the use of referees or masters must be carefully tailored to avoid conflict with the due process clause.<sup>139</sup> Here, the concern is that it may be inappropriate for a judge who has not personally taken testimony and evaluated the credibility of witnesses to enter a binding judgment based on another person's findings.<sup>140</sup> The only solution Justice Marshall can envision for this difficulty is that masters and referees be empowered to enter binding judgments.<sup>141</sup> To do so, of course, would destroy the referee system and make complete nonsense of Chief Justice Burger's view that referees are simply "ministerial" employees. In short, while the *Swisher* majority has momentarily provided the referees a safe harbor from constitutional storms, there is massive due process litigation on the horizon.

By precluding the state from requesting a rehearing, Minnesota's statute avoids any unfairness that might result from compelling a juvenile defendant to go through the process a second time after winning an advisory finding of nondelinquency from a referee.<sup>142</sup> For juveniles who lose their delinquency hearings before referees, however, it may be unfair to inflict emotional hardship by

134. *See id.* at 219 (Marshall, J., dissenting).

135. *Id.* at 222 (Marshall, J., dissenting).

136. *See id.* at 219 (Marshall, J., dissenting).

137. *See id.* (Marshall, J., dissenting).

138. *Compare id.* at 219 (Marshall, J., dissenting) (reversal of master's finding of nondelinquency violates prohibition against double jeopardy) with *In re Welfare of C.W.S.*, 267 N.W.2d 496, 499 (Minn. 1978) (double jeopardy issue not reached because statute precludes review of referee finding of nondelinquency) and MINN. STAT. § 260.031(4) (1978) (authorizing juvenile defendant, not state, to seek review of referee's findings).

139. *See Swisher v. Brady*, 438 U.S. at 229-30 (Marshall, J., dissenting).

140. *See id.* at 231-32 (Marshall, J., dissenting).

141. *See id.* at 232-33 (Marshall, J., dissenting).

142. *See In re Welfare of C.W.S.*, 267 N.W.2d 496, 498 (Minn. 1978) (construing MINN. STAT. § 260.031(4) (1978)); *cf. Brady v. Swisher*, 436 F. Supp. 1361, 1366 (D. Md. 1977) (discussing anxiety, insecurity, and personal strain on juvenile subjected to rehearing), *rev'd*, 438 U.S. 204 (1978).

forcing them to request rehearings before the juvenile court judge. Some such consideration must have prompted the Legislature to enact a section in the 1978 law that withdraws from juvenile court referees the power to hear contested trials.<sup>143</sup> Currently there are two bills before the Legislature that would restore this power to the referees in all cases in which the parties fail to object.<sup>144</sup> In keeping with the spirit of the 1978 legislation, which was aimed at curtailing the most questionable duties of the referees pending further study, these bills should be defeated.<sup>145</sup>

### C. Family Court Referees

Family courts are a relatively recent development in American law. Because they were conceived as a hybrid of courts and social service agencies, their historical roots are more complex than those of juvenile courts.<sup>146</sup> In 1951, Minnesota judges and lawyers began to study the feasibility of special handling for divorces involving children.<sup>147</sup> Eight years later, the Family Court Division of the Hennepin County District Court became the first American family court to be created by court rule.<sup>148</sup> The 1967 Legislature recognized this development by a statute creating a similar family court division for Ramsey County.<sup>149</sup>

143. See Act of Apr. 5, 1978, ch. 750, § 2, 1978 Minn. Laws 907, 908 (amending MINN. STAT. § 484.70(3) (1976)).

In 1979, the Legislature amended MINN. STAT. § 484.70 (1978) by adding subdivision 4. This subdivision allows referees in the Second Judicial District to hear a contested case unless either party or his attorney objects. See Act of June 5, 1979, ch. 318, § 1, 1979 Minn. Laws 831, 831 (codified at MINN. STAT. § 484.70(4) (Supp. 1979)). This provision expired on March 1, 1980. See *id.* § 3, 1979 Minn. Laws at 832.

144. See S.F. 392, 71st Minn. Legis., 1979 Sess.; H.F. 263, 71st Minn. Legis., 1979 Sess.

145. S.F. 392 died after being referred to the Senate Judiciary Committee. See MINN. S. JOUR. 169 (1979). H.F. 263 died after reference to the House Judiciary Committee. See MINN. H.R. JOUR. 143 (1979).

146. See Arthur, *A Family Court—Why Not?*, 51 MINN. L. REV. 223, 224-26 (1966); Gordon, *The Family Court: When Properly Defined, It is Both Desirable and Attainable*, 14 J. FAM. L. 1, 3-4 (1975). See generally Alexander, *The Family Court—An Obstacle Race*, 19 U. PITT. L. REV. 602 (1958); Alexander, *Family Cases are Different—Why not Family Courts?*, 3 U. KAN. L. REV. 26 (1954); Dyson & Dyson, *Family Courts in the United States*, 8 J. FAM. L. 505, 507-09 (1968); Pound, *The Place of the Family Court in the Judicial System*, 5 NAT'L PROBATION & PAROLE A.J. 161 (1959).

147. See McVeety, *Problems in Divorce Where Children are Concerned Lead to Establishment of a Domestic Relations Court*, HENNEPIN LAW., Feb. 1959, at 67.

148. See Knudson, *Family Court—One Year Later*, BENCH & B., Apr. 1960, at 38; D. McLean, *supra* note 3, at 9.

149. See Act of May 31, 1967, ch. 22, §§ 2-6, 1967 Minn. Laws Ex. Sess. 2088, 2089-90 (current version at MINN. STAT. §§ 484.64-.65 (1978)). In Ramsey County, a district court judge is appointed as family court judge for a one-year term, while in Hennepin County, a

The family court has often been described as being like a court of equity because, in the words of Roscoe Pound, "a court of equity can deal with a complicated situation for a protracted period and keep a proceeding alive so long as its supervisory powers were [sic] called for to do complete justice."<sup>150</sup> A corollary of this view is that "reference to masters who take evidence, make findings, and make reports . . . should be used in the disposition of the many-sided situations which may develop in the affairs of a family."<sup>151</sup>

Although the first full-time Minnesota family court referees were appointed under the "inherent powers" of the court,<sup>152</sup> their use "to assist said judge" was authorized by the 1967 Legislature.<sup>153</sup> The 1977 legislative session—the same session that abolished referees<sup>154</sup>—also provided a domestic relations referee for St. Louis County.<sup>155</sup>

The duties of all family court referees include the handling of default marriage dissolution cases,<sup>156</sup> but their other functions vary from court to court. Ramsey County, for example, specifies by court rule that referees will hear custody motions.<sup>157</sup> In Hennepin County, the policy of former Family Court Judge Robert E. Bowen was that there should be a "qualitative difference" between what referees and judges hear.<sup>158</sup> Consequently, he believed that referees should conduct fact-finding hearings and write temporary orders, subject to review, in cases that would ultimately be decided

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judge is similarly appointed for a term not to exceed two years. Compare MINN. STAT. § 484.64(1) (1978) (Ramsey County) with *id.* § 484.65(1) (Hennepin County). In the rest of the state, county courts have concurrent jurisdiction with the district courts in domestic relations matters. See MINN. STAT. § 487.19(1) (1978).

150. Pound, *supra* note 146, at 168. This may have a parallel in the juvenile justice field, where cases are monitored after court disposition.

151. *Id.* at 164; see COMMITTEE ON THE STANDARD FAMILY COURT ACT, *supra* note 102, § 7 (authorizing referees in family court).

152. See D. McLean, *supra* note 3, at 13.

153. Act of May 31, 1967, ch. 22, §§ 2-6, 1967 Minn. Laws Ex. Sess. 2088, 2089-90 (current version at MINN. STAT. §§ 484.64-.65 (1978)).

154. See note 2 *supra* and accompanying text.

155. See Act of May 27, 1977, ch. 341, 1977 Minn. Laws 695 (current version at MINN. STAT. § 484.67 (1978)).

156. See MINN. STAT. § 518.13(4) (1978) (authorizing reference in default marriage dissolutions).

157. See MINN. SPEC. R.P. DIST. CT., 2D DIST. 17 (1.06).

158. See Interview with Judge Robert E. Bowen, Hennepin County Municipal Court (former Judge of Family Court) (Oct. 28, 1977) (on file at William Mitchell Law Review office).

by the court.<sup>159</sup> The statute creating the St. Louis County referee position puts broad limits on the referee's duties, leaving the court considerable flexibility.<sup>160</sup>

Judge Lindsay G. Arthur has classified the problems handled by the family court into three groups: family estrangement, child care, and financial allocation matters.<sup>161</sup> These categories provide a convenient structure for a closer view of the origins of the family court referees and their duties.

### 1. *Family Estrangement: The Default Marriage Dissolution*

In medieval England, the power to grant divorces lay in the ecclesiastical courts.<sup>162</sup> After Henry VIII broke with the Catholic Church over the issue of divorce, divorce decrees were granted by special acts of Parliament.<sup>163</sup> Many American legislatures were uncomfortable with this power and turned it over to courts of equity.<sup>164</sup> Some of these courts then appointed referees or masters to hear divorce cases.<sup>165</sup>

Minnesota inherited its earliest judicial views of divorce from the ecclesiastical courts,<sup>166</sup> and, like England, went through a period when divorces were granted by the Legislature.<sup>167</sup> This practice ended in 1852 when Governor Ramsey started vetoing divorce

159. *See id.*

160. *See* MINN. STAT. § 484.67(2)(a) (1978) (referee empowered to "[h]ear and report all matters involving dissolution of marriage, annulment, or legal separation, including proceedings for civil contempt for violation of orders issued in the proceedings, and reciprocal enforcement of support actions . . ."). The referee's power is, however, clearly limited to making recommendations. *See id.* § 484.67(2)(b), (3)-(4).

161. *See* Arthur, *supra* note 146, at 229-30.

162. *See, e.g.,* True v. True, 6 Minn. 458, 463 (Gil. 315, 319) (1861).

163. *See* R. GARRITY, MINNESOTA DIVORCE LAW 3-4 (1972).

164. *See* G. IRELAND & J. DE GALINDEZ, DIVORCE IN THE AMERICAS 1 (1947).

165. *See, e.g.,* Young v. Young, 18 Minn. 90, 94-95 (Gil. 72, 77) (1871). *But cf.* Madden v. Madden, 44 Hawaii 442, 444, 355 P.2d 33, 36 (1960) ("a divorce judge lacks the power of an equity court to delegate powers to a master in chancery"); Gomes v. Gomes, 26 Hawaii 128, 130 (1921) (authority cannot be delegated to master in divorce proceeding). Besides Minnesota, 12 other states specifically provide for family court referees. *See* NAT'L CENTER FOR STATE COURTS, PARAJUDGES: THEIR ROLE IN TODAY'S COURT SYSTEM 13-16 (1976).

166. *See, e.g.,* True v. True, 6 Minn. 458, 464 (Gil. 315, 320) (1861) ("We have pointed out the radical difference between the marriage contract and other civil contracts, which we think is alone sufficient to authorize the court to adopt the principles of the canon law concerning its dissolution.").

167. *See, e.g.,* Act of Mar. 9, 1851, ch. XX, 1851 Minn. Terr. Sess. Laws 39 (dissolving the marriage of Thomas and Mary Morton); R. GARRITY, *supra* note 163, at 5-6.

bills.<sup>168</sup> After 1852, only courts granted divorces in Minnesota.<sup>169</sup> Whether they viewed this function as part of their equity jurisdiction or as a common law power, however, remains unclear.<sup>170</sup> Whichever side of the court handled divorces, a default proceeding that could take place before referees was developed.<sup>171</sup> The non-defaulting party was required to prove sufficient facts to justify the decree, but the proof could take place before a referee because the action was uncontested.<sup>172</sup> In a default proceeding, “[t]here is no *issue* of fact joined.”<sup>173</sup>

During 1976, Minnesota referees heard approximately 4500 default marriage dissolution cases, broken down by county as follows:

Hennepin:	2,134 (plus 105 contested) <sup>174</sup>
Ramsey:	1,654 <sup>175</sup>
St. Louis:	733 (may include some contested) <sup>176</sup>

If these figures suggest a dramatic increase in the volume of de-

168. See R. GARRITY, *supra* note 163, at 7-8.

169. Cf. MINN. CONST. of 1857, art. IV, § 28 (denying Minnesota Legislature the power to grant divorces).

170. Compare MINN. REV. TERR. STAT. ch. 66, § 13 (1851) (providing for trial by jury in divorce proceedings) (repealed 1866) and *id.* § 14 (procedure same “as in the trial of a civil action, unless the complaint be filed in the equity side of the court”) (repealed 1866) with *Berkey v. Judd*, 14 Minn. 394, 398 (Gil. 300, 302) (1869) (dictum) (“The actions mentioned in *Sec. 198*, are all, except that for divorce, what were formerly known as actions at law . . .”) and *Atwood v. Atwood*, 229 Minn. 333, 336, 39 N.W.2d 103, 105 (1949) (dictum) (court has equitable jurisdiction in divorce proceedings).

171. See *Young v. Young*, 18 Minn. 90, 95 (Gil. 72, 77) (1871) (acknowledging practice of reference for hearing in default divorce action); MINN. REV. TERR. STAT. ch. 66, § 165 (1851) (“[P]laintiff may upon . . . default, apply to the court . . . for the relief demanded . . . . If the . . . proof of any fact is necessary to enable the court to give judgment . . . the court . . . may in its discretion order a reference for that purpose.”) (emphasis added) (repealed 1905). In default divorces, the complaining party was required to prove facts sufficient to justify a decree of divorce. See *True v. True*, 6 Minn. 458, 464-65 (Gil. 315, 321-22) (1861).

172. See authorities cited in note 171 *supra*.

173. *Young v. Young*, 18 Minn. 90, 95 (Gil. 72, 77) (1871) (emphasis in original).

174. Statistics as to Hearings in Hennepin County Family Court, Trial Calendar Before Family Court Judge and Referee (1977) (on file at William Mitchell Law Review office). In 1977, Judge Bowen no longer allowed contested divorces to be heard by referees. See Interview with Judge Robert E. Bowen, *supra* note 158. Similarly, referees are now prohibited by statute from hearing contested matters in family court, if either party objects to the reference. See MINN. STAT. § 484.70(2) (1978).

175. Statistical Data—Ramsey County District Court: Family Court Division (1977) (on file at William Mitchell Law Review office).

176. Referee’s Report: District Court, Family Court Division, St. Louis County (1977) (on file at William Mitchell Law Review office).

fault divorces since 1871,<sup>177</sup> when the Minnesota Supreme Court first approved the use of referees to hear such cases, the rationale for permitting the practice has remained the same. A more “ministerial” referee function than supervising the proof of uncontested facts would be hard to imagine. To the extent that the family court referees hold specialized skill in the handling of delicate intrafamily problems, their employment in default hearings may be a waste of talent. One might ask why uncontested dissolutions are not simply heard by the clerk of court.

Certainly the use of referees to hear these proceedings raises no due process problems. Even some of the legislators who have been most critical of the referee system see no serious problems in using referees to handle default dissolutions.<sup>178</sup> Accordingly, the 1978 Legislature imposed limitations on family court referees that apply only to contested matters.<sup>179</sup>

## 2. *Child Care: The Custody Decisions*

The allocation of child custody has clearly absorbed some of the *parens patriae* doctrine from the juvenile justice field. The Minnesota Supreme Court ruled in 1861 that the child custody aspect of divorce “is the special province of a court of equity.”<sup>180</sup> The view that custody determination is an equity power also applies to separate maintenance actions that do not involve marriage dissolution.<sup>181</sup>

Minnesota’s marriage dissolution statute provides for custody determination at three stages of the proceeding. An order to set custody rights during the process of litigation is the first step.<sup>182</sup>

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177. In 1871 the Minnesota Supreme Court first approved the use of referees to hear default divorce matters. *See* *Young v. Young*, 18 Minn. 90, 95 (Gil. 72, 77) (1871). Increased volume of family court matters justified the use of referees, according to a 1976 opinion. *See* *Peterson v. Peterson*, 308 Minn. 297, 305, 242 N.W.2d 88, 93 (1976) (“[T]he necessity for the routine use of family court referees is plainly the ever-increasing volume and complexity of domestic relations litigation. We take judicial notice of the impossibility of a single family court judge in a metropolitan area handling this burden without assistance.”); *cf.* Interview with G.A. Hatfield, *supra* note 34 (Three new judges would be needed to replace the referees in Ramsey County Family Court.).

178. *See, e.g.*, Interview with State Senator Robert Tennesen, *supra* note 5.

179. *See* Act of Apr. 5, 1978, ch. 750, § 2, 1978 Minn. Laws 907, 908 (amending MINN. STAT. § 484.70(2) (1976)).

180. *True v. True*, 6 Minn. 458, 467 (Gil. 315, 324) (1861).

181. *See* *Atwood v. Atwood*, 229 Minn. 333, 336 & n.3, 39 N.W.2d 103, 105 & n.2 (1949).

182. *See* Act of May 29, 1979, ch. 259, § 11, 1979 Minn. Laws 557, 561 (codified at MINN. STAT. § 518.131 (Supp. 1979)).

The court's dissolution judgment contains a second order.<sup>183</sup> Finally, if the circumstances of the parties and their children change, a revised order may be necessary.<sup>184</sup> Referees conduct at least some of the initial custody hearings in all three metropolitan counties,<sup>185</sup> including contested cases when the parties are willing to stipulate to proceeding before a referee.<sup>186</sup> In contested cases, however, the referee's findings are merely advisory.<sup>187</sup>

Whether the referees should be involved in child custody hearings at all is a controversial issue. Hennepin County District Court Chief Judge Eugene Minenko believes that the Hennepin County referees are "well able to hear [motions for initial custody orders] and make findings on them."<sup>188</sup> Other participants in the court agree, stressing the importance of having custody decisions made by someone with an interest in children and experience in communicating with them.<sup>189</sup> This line of argument is a departure from the traditional justification for referee powers which holds that referees are merely assistants who free judges from some of the mechanical drudgery of their courts. Rather, the advocates of

183. See MINN. STAT. § 518.17(2)-(3) (1978).

184. See *id.* § 518.18 (Supp. 1979). See also *id.* § 518.175 (1978 & Supp. 1979) (visitation rights allowed at all stages).

185. During 1976 Hennepin County Family Court referees heard 4,896 motions for relief, which include temporary custody motions and motions for custody studies, as well as motions relating to support obligations. See Statistics as to Hearings in Hennepin County Family Court, *supra* note 174. Referees in Ramsey County also make a similar number of custody decisions. See Interview with Referee Gerald Alfveby, Ramsey County Family Court (Oct. 26, 1977) (on file at William Mitchell Law Review office). The statistics do not indicate, however, how many of these decisions are made, or at what stages of the proceedings. In 1976 the St. Louis County referee heard 24 child custody matters. See Referee's Report, *supra* note 176.

186. This practice is permitted by MINN. STAT. § 484.70(2) (1978). Referees are prohibited from hearing contested family court trials only if a party or the attorney objects. See *id.*

187. *Peterson v. Peterson*, 308 Minn. 297, 304, 242 N.W.2d 88, 93 (1976); see *Rosenfeld v. Rosenfeld*, 311 Minn. 76, 78, 249 N.W.2d 168, 169 (1976) (affirming judge's power to reverse referee's determination); *LaBelle v. LaBelle*, 296 Minn. 173, 176, 207 N.W.2d 291, 293 (1973) (judge has discretion to reverse referee).

Although MINN. R. CIV. P. 53.05(2) says, "the court shall accept the referee's findings of fact unless clearly erroneous," the *Peterson* court held this rule to be inapplicable to family court references. See *Peterson v. Peterson*, 308 Minn. at 304, 242 N.W.2d at 93.

188. Interview with Chief Judge Eugene Minenko, Hennepin County District Court (Nov. 4, 1977) (on file at William Mitchell Law Review office).

189. See, e.g., D. McLean, *supra* note 3, at 46. Judge Sedgwick believes that the ability to communicate with children is an important factor in making custody decisions. See Letter from Judge Susanne C. Sedgwick, *supra* note 18. Although this consideration seems obvious, it is seldom addressed by those critics who would abolish referees in family court and replace them with rotating judges.

child custody decision making by referees are arguing that, as dedicated specialists, the referees do a better job than rotating judges would do.

Critics of the use of referees point out that initial custody orders are often hotly contested.<sup>190</sup> Although under the 1978 law parties can avoid referee involvement in custody matters if they choose to be heard by a judge, the history of reference by stipulation suggests that there may be subtle pressures to waive this right.<sup>191</sup> Also, the initial referee order may in some sense set a precedent for the court's final custody decision, even though the statute contemplates a much more thorough evaluation for the second order than for the first.<sup>192</sup> The result may be that undue emphasis is placed upon the initial findings made by the referee.

In Hennepin County, the family court referees no longer conduct any hearings that result in final custody orders. As Judge Bowen explained it, "the parties have an absolute right to be heard by an elected judge. Even if the parties stipulate to trial by referee, at some point the loser is going to say 'I wish I'd had a judge.'"<sup>193</sup> As with the juvenile court referees, there is a continuing debate that points up the contradictions between advocates of full-time expert decision making and the proponents of decision making legitimated by the full range of formal constitutional guarantees. Although referees may have considerable expertise in family court custody matters, opponents argue that their use is an improper delegation of judicial power.<sup>194</sup>

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190. See Interview with State Senator Robert Tennesen, *supra* note 5.

191. See notes 54-57 *supra* and accompanying text (noting that pressures might be put upon parties to accept reference).

192. See Interview with State Senator Robert Tennesen, *supra* note 5 (temporary orders in family court set precedents for final orders); cf. MINN. STAT. § 518.17 (1978 & Supp. 1979) (listing 14 factors to be considered in final custody orders).

193. Interview with Judge Robert E. Bowen, *supra* note 158. The 1978 law, however, permits family court referees to hear all matters in which the parties do not object. See MINN. STAT. § 484.70(2) (1978). After more than one year of experience under this law, Judge Bowen believes that parties are satisfied with trials conducted by referees. See Interview with Judge Robert E. Bowen, Hennepin County Municipal Court (Nov. 15, 1979) (on file at William Mitchell Law Review office). As a result, so long as parties have a right to a judge trial if they do not want referees, he believes the system works well. See *id.*

194. Compare Interview with State Senator Robert Tennesen, *supra* note 5 (opposing use of referees in family court) with Interview with Judge Harold W. Schultz, Ramsey County District Court (Nov. 2, 1977) (on file at William Mitchell Law Review office) (noting that family court referees have developed expertise over the past decade).

### 3. *Financial Allocation: Property Settlement, Alimony, and Child Support*

Most people would agree that family courts should help parties who are dissolving a marriage to reach a financial settlement that is "equitable."<sup>195</sup> This term may be used simply in its nontechnical sense to mean *fair* or *just*,<sup>196</sup> but there are also several attributes of awarding property, alimony, or support that reflect the tradition of courts of equity. First, marriage dissolution is an area of the law in which the trial court has always had broad discretionary powers.<sup>197</sup> Second, a primary concern is providing for the welfare of dependent children.<sup>198</sup> Third, the examination of long accounts may be involved,<sup>199</sup> and finally, lengthy supervision of the parties may be necessary to ensure that the court's orders are carried out.<sup>200</sup> A party who fails to abide by a support or alimony order may be punished for contempt, like one who disobeys an equitable injunction.<sup>201</sup>

Thus, it is not surprising that referees are used to conduct hearings in virtually all stages of property and support allocation.<sup>202</sup>

195. Cf. MINN. STAT. § 518.58 (Supp. 1979) ("Upon a dissolution of a marriage . . . the court shall . . . make a just and equitable disposition of the marital property . . ."); Letter from Judge Susanne C. Sedgwick, *supra* note 18 (thousands of people engaged in a divorce look to the court for an "equitable" financial disposition).

196. Compare WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 769 (1971) (defining equitable as "fair to all concerned") (nontechnical definition) with Day, *The Development of the Family Court*, in AMERICAN ASSOCIATION OF LAW SCHOOLS, SELECTED ESSAYS ON FAMILY LAW 99 (1950) ("[Divorce] cases from the beginning were tried by courts of equity, and paramount in importance was the division of community property.") (using "equity" in its technical sense).

197. See, e.g., *Cozik v. Cozik*, 279 Minn. 91, 96, 155 N.W.2d 471, 475 (1968).

198. See, e.g., *Smith v. Smith*, 282 Minn. 190, 194, 163 N.W.2d 852, 856 (1968).

199. Judge Sedgwick stated that many of the cases decided by the family court judge involve the determination of the value of close corporations, family stock holdings, and real estate. See Interview with Judge Susanne C. Sedgwick, *supra* note 61. Describing the examination of accounts, Judge Schultz put it this way: "If you'd listen for a day, you'd see the many decisions that aren't judgmental—who gets the pots and pans, and who gets the dog." Interview with Judge Harold W. Schultz, *supra* note 194.

200. Cf. note 150 *supra* and accompanying text (courts of equity have the ability to engage in lengthy supervision).

201. See MINN. STAT. § 518.24 (1978) (punishment for contempt allowed for disobedience of court order to pay maintenance or support).

202. Minnesota's marriage dissolution statute specifically enumerates many of these stages of property and support allocation. See *id.* § 518.131 (Supp. 1979) (temporary orders); *id.* § 518.57 (1978) (child support); *id.* § 518.58 (Supp. 1979) (disposition of marital property); *id.* § 518.62 (Supp. 1979) (temporary maintenance); *id.* § 518.64 (1978 & Supp. 1979) (modification of decrees and orders).

The following table provides a rough idea of the extent of their work in this area:

1976 Family Court Hearings Before Referees on Property, Alimony, and Support<sup>203</sup>

	Hennepin County	Ramsey County	St. Louis County
Paternity (uncontested)	1,034	—	—
Temporary support	4,896 <sup>204</sup>	817 <sup>205</sup>	288
Statutory support actions	—	64	—
Welfare actions for support	2,867	—	—
Actions brought under Uni- form Reciprocal Enforcement of Support Act	1,091	152	74
Contempt	—	726	461
Attachments	—	—	30
Amendments	—	825	116 <sup>206</sup>

Because the referees handle such a large volume of these cases,<sup>207</sup> they develop consistent views as to what sorts of awards are fair, given the ages of children involved, and their parents' means and income-earning potential.<sup>208</sup> Undoubtedly, the referees

203. For the source of these figures, see Statistics as to Hearings in Hennepin County Family Court, *supra* note 174 (Hennepin County); Statistical Data, *supra* note 175 (Ramsey County); Referee's Report, *supra* note 176 (St. Louis County).

204. This figure includes all motions, those relating to child custody as well as property division, support, alimony, and amendments.

205. This figure may include some temporary custody motions.

206. This figure may also include some amendments of custody or visitation rights.

207. This volume is increasing. According to the Ramsey County Court Administrator, a fourth referee is needed to provide coverage for contempt and support motions, which are increasing rapidly. See Interview with G.A. Hatfield, *supra* note 34.

One of the main causes of this increase in volume is the Social Service Amendments of 1974. These amendments require, as a condition to the continuation of certain federal social service funding, that paternity actions be brought by local authorities. See Social Service Amendments of 1974, § 101, 42 U.S.C. §§ 651-658 (1976 & Supp. I 1977), as amended by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, tit. III, § 328, 92 Stat. 2549, 2679 (repealing 42 U.S.C. § 756(b)), reprinted in [1978] U.S. CODE CONG. & AD. NEWS; D. McLean, *supra* note 3, at 31; cf. Interview with Judge Susanne C. Sedgwick, *supra* note 61 (eight to nine referee-days per week spent on welfare cases that must be brought by county attorney to prevent cutting off funds).

208. According to Judge Sedgwick, the family court referees see literally hundreds of people raising children on a given income and they consequently develop a feel for what is reasonable. See Interview with Judge Susanne C. Sedgwick, *supra* note 61.

develop a valuable expertise from this specialized experience. There is also, however, the theoretical possibility that hearing so many similar cases could cause a referee to become stale or insensitive to the individual problems of litigants.<sup>209</sup>

The fact that referees serve at the pleasure of the judge also tends to bring about a certain uniformity of decisions.<sup>210</sup> Judge Bowen believes that this consistency helps encourage out-of-court settlements because lawyers can predict the award in a given case fairly well.<sup>211</sup> On the other hand, a major study of the Hennepin County Family Court concluded that “[a]s to uniformity and consistency qualified judges are expected to apply the law, as interpreted by the Supreme Court; accordingly, reasonable consistency and uniformity may be expected in adjudication by judges.”<sup>212</sup> Consistent decision making, therefore, might not be unique to referees.

Perhaps referees should be restricted to hearing only motions for temporary support and alimony. This was Judge Bowen’s policy

209. See Interview with Chief Judge Eugene Minenko, *supra* note 188 (referee expertise carries with it the possibility of engendering callousness). *But cf.* Letter from Judge Susanne C. Sedgwick, *supra* note 18 (Although judges expect their positions on the bench to entail a wide variety of duties and a prolonged stay in family court might result in their becoming stale, referees take their jobs because of a special interest in family law and have different career expectations than judges.). Judge Sedgwick’s position is confirmed by Hennepin County Family Court Referee Edward Dietrich. See Letter from Referee Edward P. Dietrich, Hennepin County Family Court, to John Stuart (Nov. 17, 1977) (on file at William Mitchell Law Review office).

210. According to Dyson & Dyson, *supra* note 146, at 576:

Since referees have no tenure, the judge is free to dictate policies that must be followed by all of them. By contrast, the senior judge [of the Hawaii Family Court] noted, a court with five different independent judges often presents “five different faces of justice to the average Mr. Citizen,” who may be “more concerned about uniform treatment in the amount of alimony awarded against him than about his more abstract procedural rights.”

*Id.* (footnotes omitted) (quoting, in part, Senior Judge Gerald R. Corbett, First Circuit Family Court of Hawaii). Judge Sedgwick’s view is that, during her work with the family court, uniformity resulted from a more collegial relationship than suggested by Dyson & Dyson, *supra*. See Interview with Judge Susanne C. Sedgwick, *supra* note 61 (groups met to discuss problems and make things run more smoothly; the best solution to a problem was used, whoever suggested it; citing the amendment of support orders to reflect inflation as an example of uniform treatment). See generally MINN. STAT. § 484.70(1) (1978) (referees may continue to serve at the pleasure of the chief judge); see also Arthur, *supra* note 146, at 230 (family court judges should not be subject to rotation); Paulsen, *Juvenile Courts, Family Courts, and the Poor Man*, 54 CALIF. L. REV. 694, 702 (1966) (same).

211. See Interview with Judge Robert E. Bowen, *supra* note 158.

212. Fuller & Solomon, Feasibility Study of an Integrated Family Court for the District Court of Hennepin County 15 (1976) (on file at William Mitchell Law Review office).

in Hennepin County.<sup>213</sup> Such a policy would also conform to the requirement of the 1978 law that family court referees may not hear “any final trial” of a contested case.<sup>214</sup> Even temporary orders raise concern in the minds of some legislators, however, because people can be jailed for contempt if they do not comply with these orders.<sup>215</sup> The Minnesota Supreme Court has ruled that a referee’s findings are advisory, with only prima facie validity, as applied to custody orders.<sup>216</sup> More recently, the rule has been extended to cover property divisions as well.<sup>217</sup> This holding indicates that the court is concerned with the referees’ role in sorting out the finances of parties to defunct marriages and suggests that standards for supervising their work in this area will continue to evolve.

#### *D. Hennepin County Deputy Title Examiners*

There was substantial doubt as to whether the two referee positions in the Hennepin County Title Examiner’s office were abolished by the 1977 Legislature.<sup>218</sup> If, however, future legislation eliminates all positions designated as “referee,” the deputy title examiners might be included for two reasons. First, the Hennepin County Civil Service System classifies their positions as “Court Referees.”<sup>219</sup> Second, the statute authorizing hearings in land title cases, in effect at the time referees were abolished, provided for “referring the application to an examiner of titles who shall . . .

213. See Interview with Judge Robert E. Bowen, *supra* note 158. Referees must also continue to aid in the enforcement of existing orders. See *id.*

214. See MINN. STAT. § 484.70(2) (1978) (if either party objects in writing).

215. See, e.g., Interview with State Senator Robert Tennesen, *supra* note 5. See generally MINN. STAT. § 518.24 (1978) (punishment for contempt allowed for disobedience to court order to pay maintenance or support).

216. See *Peterson v. Peterson*, 308 Minn. 297, 305-06, 242 N.W.2d 88, 93-94 (1976).

217. See *Berg v. Berg*, 309 Minn. 281, 285, 244 N.W.2d 149, 151 (1976) (per curiam).

218. “Even if the referees are abolished, they [the two Hennepin County Deputy Title Examiners] wouldn’t lose their jobs because that isn’t their main function.” Minneapolis Tribune, *supra* note 10, at 6A, col. 1 (quoting Richard W. Edblom, Hennepin County Examiner of Titles); see *id.* (Deputy Title Examiners considered an exception to law abolishing referees because their complex position requires very technical knowledge) (quoting State Senator Robert Tennesen). This doubt may have been resolved by the 1978 Legislature in favor of retaining the Deputy Title Examiners. See note 220 *infra*.

Abolition of referees also had a potential impact on the St. Louis County Examiner of Titles. Like the Hennepin County counterparts, the person occupying this position also conducts Torrens registration hearings, and hears other land title matters, such as quiet title and partition actions on an occasional basis. See Letter from Robert C. Brown, *supra* note 36.

219. See Letter from Richard W. Edblom, *supra* note 31.

possess the same authority as is vested by law in referees appointed by the district court."<sup>220</sup> In other words, the deputy title examiners, although primarily occupied with research and advisory duties, have the power to hear cases.<sup>221</sup> The rationale for investing them with this authority seems to be that land title cases are complex, require specialized knowledge, and would, if taken from the referees, put an intolerable burden on the calendar of the special term judge.<sup>222</sup> For the present, however, title examiners are exempt from the law abolishing referees. Title examiners are no longer considered referees under a 1978 amendment to the title examiner statute.<sup>223</sup>

Title examiners have been hearing Torrens registration cases since 1912.<sup>224</sup> Most of the cases heard by referees fall into three categories: defaults,<sup>225</sup> contested cases referred by stipulation,<sup>226</sup>

220. Act of Apr. 19, 1905, ch. 305, § 13, 1905 Minn. Laws 454, 459-60 (current version at MINN. STAT. § 508.13 (1978)); *see id.* § 19, 1905 Minn. Laws at 463 ("The court may refer the case . . . to one of the examiners, as referee, to hear the parties and their evidence, and make report thereon to the court.") (current version at MINN. STAT. § 508.20 (1978)). Amendments to the above statutes in 1978 removed the term "referee" to avoid including them within the law which abolished referees. *See* Act of Apr. 5, 1978, ch. 750, §§ 4-5, 1978 Minn. Laws 907, 909 (amending MINN. STAT. §§ 508.13, .20 (1976)). *See also* MINN. STAT. § 508.12 (1978) (deputy title examiners shall be competent attorneys).

221. *See* MINN. STAT. § 508.20 (1978) (authorizing reference to examiner of titles for trial); Interview with Richard W. Edblom, Hennepin County Examiner of Titles (Nov. 21, 1977) (on file at William Mitchell Law Review office); Letter from Robert C. Brown, *supra* note 36 (St. Louis County).

222. *See* Minneapolis Tribune, *supra* note 10, at 6A, col. 1 (deputy title examiners occupy very complex position requiring highly technical knowledge) (quoting State Senator Robert Tennesen); Letter from Richard W. Edblom, *supra* note 31 ("The use of Examiners of Title as Referees in Hennepin County to hear Torrens cases is the most efficient possible method for processing these matters . . . Without Referees," the special term judge would have to hear land registration matters "intermingled with other cases."). *See generally* Sullivan, *The Land Court Revisited*, 10 NEW ENGLAND L. REV. 269 (1975) (similar procedure used in Massachusetts).

223. *See* Act of Apr. 5, 1978, ch. 750, §§ 4-5, 1978 Minn. Laws 907, 909 (amending MINN. STAT. §§ 508.13, .20 (1976)).

224. *See* Report, District Court Referees in Hennepin County Examiner of Titles Office 1 (1977) (on file at William Mitchell Law Review office). The Legislature originally authorized title examiners to hear land title cases in 1905. *See* Act of Apr. 19, 1905, ch. 305, §§ 13, 19, 1905 Minn. Laws 454, 459-60, 463 (current version at MINN. STAT. §§ 508.13, .20 (1978)).

225. According to Examiner of Titles Richard W. Edblom:

A default Torrens case is one in which no answer has been filed . . . [I]t is necessary to make sure all liens, easements and other rights noted in the Examiner's Report are properly reflected in the Decree of Registration. The holders of such interests invariably default in a Torrens proceeding but yet expect to have their interests properly restated in the Decree of Registration.

Letter from Richard W. Edblom, *supra* note 31.

226. Well over 95% of the contested cases are heard by deputy title examiners by con-

and contested cases subject to compulsory reference by the special term judge.<sup>227</sup> In 1977, the work of the Hennepin County referees included 200 original registration proceedings, 400 proceedings subsequent, 400 probate transfers, 70 trustees' deeds, 150 district court decrees awarding real property, 200 lost owner's duplicate certificates of title, and 300 directives to the Registrar of Titles.<sup>228</sup> Recently, this caseload has increased "with the advent of townhouse developments and condominiums" and new forms of trust agreements.<sup>229</sup> Because it appears that no one really has any objection to the Torrens referees hearing these matters,<sup>230</sup> and because the incumbent title examiners have built up a body of specialized knowledge that enables them to hear land title matters efficiently, it seems these positions should continue to be exempted from any wholesale removal of referees that may occur.<sup>231</sup>

#### *E. Hennepin County Administrative Hearing Officers*

Another position that could be affected by future legislation is that of the administrative hearing officers who settle limited categories of traffic matters in Hennepin County.<sup>232</sup> The two persons presently in office were appointed by the Hennepin County Municipal Court when it created the positions pursuant to its "inherent powers" in 1971.<sup>233</sup> Administrative hearing officers have the power to suspend parking fines, accept guilty pleas to petty misdemeanor moving violations, such as speeding, and arrange time-payment plans for certain fines.<sup>234</sup> They cannot, however, suspend

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sent of the parties because the attorneys prefer to be heard by someone with a background in real estate law. See Interview with Richard W. Edblom, *supra* note 221. It is also cheaper for the parties to be heard before a deputy than to be heard on the special term calendar. See *id.*

227. These are so rare that the Hennepin County Examiner of Titles does not remember when the last one occurred. See Letter from Richard W. Edblom, *supra* note 31.

228. See Report, *supra* note 224, at 2.

229. See *id.* at 3.

230. See, e.g., Interview with State Senator Robert Tennesen, *supra* note 5 (examiners of title should continue as in the past); Interview with State Representative Gordon O. Voss, *supra* note 7 (excluding title examiners from list of referees over which Legislature was concerned).

231. For the present, this already appears to have been accomplished. See note 223 *supra* and accompanying text.

232. Cf. Interview with Gordon Griller, *supra* note 32 (describing role and function of administrative hearing officers).

233. See *id.*

234. See *id.*

a fine for any moving violation.<sup>235</sup> The more serious traffic offenses, like careless driving, are handled exclusively by the municipal court.<sup>236</sup> With respect to misdemeanors, the hearing officers do not even have the authority to arrange for installment payment of fines.<sup>237</sup> In 1976, 20,124 defendants appeared before these officers.<sup>238</sup> Although they are neither referees nor judicial officers,<sup>239</sup> their functions could be called quasi-judicial. At the very least, the public and the Legislature should know enough about the administrative hearing officers to avoid eliminating these positions inadvertently.

There has been an academic debate going on for several years as to whether or not it is appropriate and constitutional to handle traffic offenses administratively.<sup>240</sup> The discussion revolves around the extent to which a traffic violation is a crime. One position is that even a parking violation is a criminal matter. As one legislator puts it, "parking tickets are court functions; these are criminal things and they are court functions automatically."<sup>241</sup> Thus they should be handled, he urges, by judges learned in the law.<sup>242</sup> On the other hand, there is a strong counterargument that because traffic offenses are commonplace, generally carry no stigma, and

235. *See id.*

236. Reckless driving is a misdemeanor, *see* MINN. STAT. § 169.13(1) (1978), which comes within the jurisdiction of the municipal courts. *See id.* § 488A.01(6)(a)(1) (Hennepin County Municipal Court); *id.* § 448A.18(7)(a)(1) (Ramsey County Municipal Court).

237. *See* Interview with Gordon Griller, *supra* note 32; *cf.* State v. Hoben, 256 Minn. 436, 444, 98 N.W.2d 813, 819 (1959) (defendant entitled to jury trial for serious traffic offense).

238. *See* Hennepin County Court 5 (1977).

239. *See* Interview with Gordon Griller, *supra* note 32 (hearing officers are considered to be administrative, not judicial).

240. Many commentators have suggested that it may be desirable to handle some categories of traffic offenses administratively, so long as the due process rights of defendants are guaranteed, and there is proper judicial supervision. *See* Force, *Administrative Adjudication of Traffic Violations Confronts the Doctrine of Separation of Powers*, 49 TUL. L. REV. 84 (1974) (noting specific constitutional difficulties); Note, *A Study of the Constitutionality of Limiting Administrative Adjudication of Traffic Offenses to a Portion of the State*, 33 BROOKLYN L. REV. 301 (1966-1967) (same). *See generally* Berg & Samuels, *Improving the Administration of Justice in Traffic Court*, 19 DE PAUL L. REV. 503 (1970); Netherton, *Fair Trial in Traffic Court*, 41 MINN. L. REV. 577 (1957).

241. Interview with State Representative Gordon O. Voss, *supra* note 7.

242. *See id.*; *cf.* ABA COMM. ON THE TRAFFIC COURT PROGRAM, STANDARDS FOR TRAFFIC COURT JUSTICE § 2.0 (1975) (traffic offense decisions should be kept within the judicial branch of government). *See generally* Carrow & Reese, *State Problems of Mass Adjudicative Justice: The Administrative Adjudication of Traffic Violations—A Case Study*, 28 AD. L. REV. 223, 228-30 (1976) (surveying and discussing jurisdictions that characterize traffic offenses as criminal acts and those that do not).

require no criminal intent, they should not be regarded as crimes.<sup>243</sup> The solution adopted by Hennepin County in allocating adjudicatory duties according to the seriousness of the offense seems to be a reasonable compromise.<sup>244</sup>

#### F. Hennepin County Conciliation Court Referees

The Hennepin County Conciliation Court has jurisdiction in civil actions when the amount in controversy does not exceed \$1,000.<sup>245</sup> Although the 1977 legislation that removed referees from certain enumerated courts did not include the conciliation court,<sup>246</sup> this court does employ referees and could be affected by subsequent legislation.<sup>247</sup>

Conciliation court referees are employed on a per diem basis.<sup>248</sup> In 1977, 477 referee-days were authorized, at a total cost of \$31,500.<sup>249</sup> If this figure seems high, it should be noted that, given the county's need to make conciliation court services available in the suburban "satellite courts," the alternative to the use of per diem referees would probably have been the appointment of two

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243. See, e.g., Note, *Traffic Court Reform*, 4 COLUM. J.L. & SOC. PROB. 255, 256-58 (1968).

244. As Senator Tennesen explained, "The guilty plea for parking is uncontested. It is a plea of guilty with a plea for mercy." Interview with State Senator Robert Tennesen, *supra* note 5. There is little doubt that the present procedure does make traffic justice more accessible to the public than the prior traffic court system. See Hennepin County Court 5 (1977). Moreover, it encourages consistency. See Note, *supra* note 243, at 263-64 ("There should be a permanent staff of referees to preside over all hearings. Such an approach would promote consistent treatment of traffic infractions."). Chief Judge Eugene Minenko describes the existing program in Hennepin County as "excellent, a service to the citizens." Interview with Chief Judge Eugene Minenko, *supra* note 188.

245. See MINN. STAT. § 488A.12(3) (1978).

246. The law that abolished referees, Act of June 2, 1977, ch. 432, § 48, 1977 Minn. Laws 1147, 1168 (current version at MINN. STAT. § 484.70(1) (1978)), only pertained to "the position of referee in the county municipal and district courts . . ." *Id.* Thus, it seems that conciliation court referees were excluded from the Legislature's abolition. See Interview with Gordon Griller, *supra* note 32; cf. MINN. STAT. § 488A.12(2) (1978) ("The conciliation court . . . is separate from the municipal court of the county of Hennepin.").

247. Ramsey County Conciliation Court also employs referees—a practice that began on August 1, 1979. See Interview with Ron Bushinski, Ramsey County Municipal Court Administrator (Aug. 24, 1979) (on file at William Mitchell Law Review office). Presumably, this Article's discussion of the Hennepin County Conciliation Court referees also is applicable to those in Ramsey County. See generally note 35 *supra*.

248. See Interview with Gordon Griller, *supra* note 32; Letter from Jack M. Provo, *supra* note 3.

249. See Interview with Gordon Griller, *supra* note 32.

additional municipal court judges.<sup>250</sup> One judge in the municipal court system sees the employment of referees as an experiment that has worked out “exceptionally well” in terms of low costs, low appeal rates, and conservation of the time of municipal court judges.<sup>251</sup> Apparently, some of the referees also offer the advantage of specialization, having received training in matters pertaining to housing and real estate.<sup>252</sup> Moreover, conflict of interest problems—always a concern when a given individual is an advocate one day and a quasi-judge the next—are avoided by requiring the referees, as a condition of their employment, not to practice before the conciliation court.<sup>253</sup>

Like the administrative hearing officers and title examiners, the conciliation court referees force critics of quasi-judges to face the issue of how totally they want to purge the system of referees and related positions. In a period of increasing concern over governmental expenditures, these critics should confront what seems to be an undisputed fact; conciliation court referees, like hearing officers and title examiners, are providing public access to the court system with much more convenience and at a much lower cost than an all-judge system.

### G. Probate Court Referees

Although the positions of the four Hennepin County Probate Court referees and the one Ramsey County Probate Court referee were not abolished by the 1977 Legislature,<sup>254</sup> they, like the officials discussed in the three preceding sections, seem vulnerable to future legislative action. Therefore, a brief outline of their duties is included here to complete the picture of the work of referees in Minnesota.

Referee positions in the probate courts were first authorized in 1929, with the requirement that they be filled by qualified attor-

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250. See Letter from Jack M. Provo, *supra* note 3.

251. See Letter from Judge William B. Christensen, Hennepin County Municipal Court, to Members of the Government Administrative Subcommittee of the House Governmental Operations Committee (Oct. 11, 1977) (on file at William Mitchell Law Review office).

252. See Interview with Gordon Griller, *supra* note 32.

253. See *id.*

254. See Act of June 12, 1977, ch. 432, § 48, 1977 Minn. Laws 1147, 1168 (current version at MINN. STAT. § 484.70(1) (1978)); *cf.* note 246 *supra* and accompanying text (discussing conciliation court referees).

neys.<sup>255</sup> Presently, it is in the discretion of the probate judge to submit “any matter, cause, or proceeding” in probate court to a referee.<sup>256</sup> The present judges of the probate courts agree that their referees primarily do administrative work relating to estates and guardianships.<sup>257</sup>

In Hennepin County, one of the four probate court referees has major responsibilities in the area of civil commitments.<sup>258</sup> Eventually, the current discussion of due process rights in the field of mental health may create a controversy around this practice.<sup>259</sup> As one judge in Ramsey County noted, “[t]here should be a sensible way to allocate the work. Commissioners [Ramsey County’s equivalent of the Hennepin County civil commitment referee] are committing people to mental hospitals for the rest of their lives while I hear jury trials of careless driving cases.”<sup>260</sup> The reason behind the present practice is the sheer volume of commitment hearings.<sup>261</sup> Several legislators feel that as the discussion of Minne-

255. See Act of Apr. 22, 1929, ch. 271, § 1, 1929 Minn. Laws 331, 331 (current version at MINN. STAT. § 525.10 (1978)).

256. MINN. STAT. § 525.102 (1978).

257. See Interview with Judge Andrew Glenn, *supra* note 28; Interview with Judge Melvin Peterson, Hennepin County Probate Court (Nov. 22, 1977) (on file at William Mitchell Law Review office).

258. See Interview with Judge Melvin Peterson, *supra* note 257. In Ramsey County, according to Judge Glenn, commitments are heard by a court commissioner appointed by the county board. See Interview with Judge Andrew Glenn, *supra* note 28.

259. See Interview with Judge Melvin Peterson, *supra* note 257 (some critics are moving to apply all criminal due process safeguards to civil commitment proceedings). See generally Flaschner, *The Role of the Court as Mental Health Laws Change*, 62 ILL. B.J. 128 (1973); Shlensky, *Constitutional Problems with Mental Commitment in Illinois*, 62 ILL. B.J. 552 (1974); Zander, *Civil Commitment in Wisconsin: The Impact of Lessard v. Schmidt*, 1976 WIS. L. REV. 503; Note, *Involuntary Civil Commitments—How Heavy the Burden?*, 29 BAYLOR L. REV. 187 (1977); 87 HARV. L. REV. 1190 (1977).

260. Interview with Judge Joseph P. Summers, Ramsey County District Court (Oct. 26, 1977) (on file at William Mitchell Law Review office). Judge Peterson of the Hennepin County Probate Court feels that the rights of mental patients are constitutionally protected in eight distinct areas, and, while the present practice of using a referee under his supervision presents no constitutional problems, he would prefer this work to be done by a full-time judge. See Interview with Judge Melvin Peterson, *supra* note 257.

261. In Hennepin County during 1976, there were approximately 3300 approaches for a commitment, leading to about 700 commitments. See Interview with Judge Melvin Peterson, *supra* note 257. Hearings are held by the referee in the various hospitals involved. See *id.*

According to Judge Minenko, “commitment proceedings in Hennepin County are just horrendous in sheer numbers.” Interview with Chief Judge Eugene Minenko, *supra* note 188. He feels that it would be impossible to have the same due process protections in this area as in criminal law. See *id.*

Judge Peterson’s view is that not quite the same protection is required because many alternatives are explored in each case before the commitment decision is reached, and

sota's referees continues, the commitment responsibilities of the probate court referees should be examined in greater detail.<sup>262</sup> As has been suggested with regard to juvenile court work, the spirit, if not the letter, of the due process clause may entitle persons facing involuntary commitment to be heard by an elected judge.

Most of the other duties performed by probate court referees appear, however, to be fully justifiable under the same sort of policies that support the Hennepin County title examiner's office.<sup>263</sup> Nobody seems to object to the use of referee expertise in probate administration.

#### IV. THE PROBLEM OF ACCOUNTABILITY: JUDICIAL REGULATION OF REFEREES

Because referees are appointed by the judges they serve and serve at the pleasure of the judges rather than being subject to election,<sup>264</sup> some critics have stated that they are not accountable to the public.<sup>265</sup> In some respects, this criticism is an oversimplification. It is possible to prevent a referee from hearing a particular case by filing a notice of removal.<sup>266</sup> Serious or prolonged misconduct or disability can lead to the removal of a referee by the Board on Judicial Standards.<sup>267</sup> In addition, the public could express a negative opinion of a referee by failing to reelect that referee's supervising judge,<sup>268</sup> but the realities of the political process make

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because many avenues to release are available via a restoration hearing. See Interview with Judge Melvin Peterson, *supra* note 257.

262. See, e.g., Interview with State Senator Robert Tennesen, *supra* note 5; Interview with State Representative Gordon O. Voss, *supra* note 7.

263. Judge Glenn noted that the work was specialized and so close to a ministerial level that, if the referee's job were to be done by an elected official, it would be hard for the electorate to become sufficiently informed to make a meaningful voting decision. See Interview with Judge Andrew Glenn, *supra* note 28.

264. See MINN. STAT. § 484.70(1) (1978).

265. See, e.g., Interview with State Senator Robert Tennesen, *supra* note 5.

266. See Interview with Thomas F. Haeg, *supra* note 64 (noting that only one affidavit of prejudice has been filed against the Hennepin County Special Term Referee during the first 14 months that this office has been in existence); cf. MINN. R. CIV. P. 63 (procedure for filing affidavit of prejudice against any judge before whom a motion or trial is scheduled for hearing).

267. See MINN. STAT. § 490.18 (1978) ("The provisions of sections 490.15 and 490.16 [creation and powers of Board on Judicial Standards] apply to all judges, judicial officers, referees and justices of the peace."). Of the judges interviewed, Judge Gingold is the only one who has ever removed a referee. See Interview with Judge Archie L. Gingold, Ramsey County District Court (former Judge of Juvenile Court) (Nov. 2, 1977) (on file at William Mitchell Law Review office).

268. According to Judge Sedgwick, "With respect to the fact that referees are not an-

this an unlikely occurrence.<sup>269</sup> Nevertheless, in practice, it is true that the judge controls the referee.<sup>270</sup> Accordingly, it becomes important to understand the channels, both formal and informal, through which the trial judge exercises control over the referee, and how decisions of the supreme court shape this control process.

### A. *The Weight of Referees' Findings*

The findings and recommendations of the special term referee and those of a family or juvenile court referee are given different effects by law. The weight of the special term referee's findings is governed by rule 53 of the Minnesota Rules of Civil Procedure, which provides two different standards.<sup>271</sup> If a jury trial is involved, the referee's report may be read to the jury as evidence, subject to objection by the parties.<sup>272</sup> If trial is to the court, the referee's findings of fact are accepted by the court unless they are "clearly erroneous."<sup>273</sup> Of course, the litigants are always free to stipulate that the referee's findings will be final, subject to appeal only on points of law.<sup>274</sup>

Rule 53 has limited application to family court proceedings.

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swerable to the public in the same way as judges are, i.e., by the elective process, it seems to me that the judge in charge of family court is responsible to the electorate and has the responsibility to correct such personnel problems as may from time to time exist." Letter from Judge Susanne C. Sedgwick, *supra* note 18. Judge Arthur agrees: "The ballot says 'Judge of the Juvenile Court.' If the voters don't like how our system works, they can change it every six years." Interview with Judge Lindsay G. Arthur, *supra* note 108.

269. Many referees maintain a low level of public visibility. Judge Glenn notes that the Ramsey County Probate Court referees perform largely ministerial functions which do not receive much notice from the public. *See* Interview with Judge Andrew A. Glenn, *supra* note 28.

270. Former Chief Judge Ronald E. Hachey of Ramsey County District Court believes that judges have more control over a referee than the public has, in practice, over a judge. *See* Interview with Judge Ronald E. Hachey, *supra* note 3. As the Hennepin County Special Term Referee explains, "I have 19 bosses here; if I'm not doing my job, I'm going to hear about it." Interview with Thomas F. Haeg, *supra* note 64.

271. *See* MINN. R. CIV. P. 53.05(2)-(3); Interview with Thomas F. Haeg, *supra* note 64.

272. *See* MINN. R. CIV. P. 53.05(3). *See generally* Copp v. Henniker, 55 N.H. 179 (1875).

273. *See* MINN. R. CIV. P. 53.05(2); *cf.* Locklin v. Day-Glo Color Corp., 429 F.2d 873 (7th Cir.) (holding "clearly erroneous" to be the proper standard for accepting the findings of a master in federal court), *cert. denied*, 400 U.S. 1020 (1970). *But cf.* United States v. Twin City Power Co., 248 F.2d 108 (4th Cir. 1957) (in federal court, "clearly erroneous" standard merely a guide for trial judge). *See generally* Holland v. Gross, 89 So. 2d 255 (Fla. 1956).

274. *See* MINN. R. CIV. P. 53.05(4). *See generally* notes 54-57 *supra* and accompanying text; *see also* Dundee Mortgage & Trust Inv. Co. v. Hughes, 124 U.S. 157 (1888).

Furthermore, before the recent case of *Peterson v. Peterson*,<sup>275</sup> the impact of the "clearly erroneous" standard was unclear. *Peterson* cleared up some confusion surrounding the practical meaning of "clearly erroneous" by holding that, in family court, "[t]he referee's recommended findings and order . . . will carry only such weight and persuasive force as their merits demand . . ." <sup>276</sup> It is possible that this standard applies to the juvenile court as well<sup>277</sup> because the statutes creating both family and juvenile courts provide that referees' orders are not final unless confirmed by the judge.<sup>278</sup>

In a very large percentage of cases in all courts that employ referees, however, referees' findings are adopted routinely.<sup>279</sup> The

275. 308 Minn. 297, 242 N.W.2d 88 (1976).

276. *Id.* at 306, 242 N.W.2d at 94. In other words, MINN. R. CIV. P. 53.05 does not establish the standard determining what effect should be given to referee findings in family court. *See* 308 Minn. at 306, 242 N.W.2d at 94.

277. *See In re Welfare of C.W.S.*, 267 N.W.2d 496, 499 n.1 (Minn. 1978) (Peterson, J., dissenting) ("This view of the limited powers of juvenile court referees is consistent with the limited powers of family court referees under analogous statutes."); *cf.* *Peterson v. Peterson*, 308 Minn. 297, 306, 242 N.W.2d 88, 94 (1976) ("only findings of a trial judge and referee appointed pursuant to Rule 53 are to be governed by the 'clearly erroneous' standard").

278. *Compare* MINN. STAT. § 260.031(5) (1978) (juvenile court) *with id.* § 484.65(9) (family court). Parties in family court have ten days in which to request review of referee findings, *see id.*, but in juvenile court they have only three days. *See id.* § 260.031(4).

279. The extent of review given referee findings by the various judges might not always measure up to the expectations of outside observers. According to Fuller & Solomon, *supra* note 212, at 15:

[R]eviewing and signing referee's [*sic*] orders can easily consume significant judicial time. Statistics from the juvenile court recorded an average of 300 orders per month, or about 15 per court day. Since, by definition, the process of review and signing referee orders is not a perfunctory act, it is estimated that this function should take about an hour of a judge's time daily.

None of the judges interviewed for the present study, however, thought that they averaged five hours of review time per week. *See* notes 284-87, 296-99 *infra* and accompanying text.

One commentator has criticized minimal judicial review of referee decisions as follows:

The requirement in many states that referee recommendations be reviewed by a judge would place an impossible burden on the judge, were he or she to carefully review each referee decision.

Accordingly, pro forma judicial approvals are common. A California district court of appeals ruled that pro forma judicial ratification of referee recommendations violated that state's constitutional provision banning commissioner performance of other than 'subordinate judicial duties.' In effect, the referee was functioning as a judge. . . . Judges may be unable to resist the temptation to support their referee's findings in order to avoid rehearings that occupy more time than they wish to allocate.

ABA JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO COURT ORGANIZATION AND ADMINISTRATION 23 (§ 2.2 Commentary) (Tent. Draft 1977).

Hennepin County Special Term Referee reports that the judge accepts ninety-eight or ninety-nine percent of his recommendations.<sup>280</sup> With respect to temporary orders, one of the Hennepin County Family Court referees says, "we have a stamp; when the judge sees our names, he signs it."<sup>281</sup> The former family court judge states that he checked "all Findings, Conclusions, and Orders of referees in default or stipulated cases," but this review process was carried out while he was on the bench.<sup>282</sup> He says that reversals of the referees' decisions at this stage seldom occurred.<sup>283</sup> In Hennepin County Juvenile Court, the former juvenile court judge did not spend "much time" going over daily decisions, though periodically he did conduct thorough random checks.<sup>284</sup>

In Ramsey County, the family court judge says that most recommendations are adopted and confirmed (signed by the judge) without review.<sup>285</sup> The referees generally point out special cases for more careful review by the judge.<sup>286</sup> With respect to civil commitments in Hennepin County, the probate judge states that the referee "does the bulk of the commitments; under the present statute we have to make detailed findings. My review of those is to look at the orders and the language he uses, and if they look alright I sign them. He's quite competent, and I really wouldn't have the time to review all those files."<sup>287</sup>

It is important not to evaluate these relatively brief review procedures out of the context of the total relationship between judges and referees in each court. For one thing, the cases heard by the referees are usually pre-screened to make sure they do not present difficult issues.<sup>288</sup> Second, the referees' decisions are guided by the policies of their respective judges.<sup>289</sup> Third, when a problem does

280. See Interview with Thomas F. Haeg, *supra* note 64.

281. Interview with Referee Daniels McLean, Hennepin County Family Court (Oct. 26, 1977) (on file at William Mitchell Law Review office).

282. Interview with Judge Robert E. Bowen, *supra* note 158.

283. See *id.*

284. See Interview with Judge Lindsay G. Arthur, *supra* note 108.

285. See Interview with Judge Harold W. Schultz, *supra* note 194.

286. See *id.*

287. Interview with Judge Melvin Peterson, *supra* note 257.

288. See, e.g., Interview with Judge Lindsay G. Arthur, *supra* note 108 (Judge of Hennepin County Juvenile Court hears cases that present issues likely to be appealed); Interview with Judge Robert E. Bowen, *supra* note 158 (Judge of Hennepin County Family Court withdraws contested cases from referees); Interview with Judge Melvin Peterson, *supra* note 257 (Hennepin County Probate Court has an extensive program of screening cases before referee hearing).

289. See note 210 *supra* and accompanying text. The Ramsey County Probate Judge,

come up in a given case, the referees consult their judges before making findings and recommendations.<sup>290</sup> For all of these reasons, referee decisions are not often appealed.

### *B. Appeals within the Specialized Courts*<sup>291</sup>

In the Hennepin and Ramsey County juvenile courts, one might expect a large number of appeals of delinquency determinations for several reasons. First, a finding that a child is a juvenile delinquent carries a social stigma.<sup>292</sup> Such a finding can also result in the institutionalization of the child involved.<sup>293</sup> Finally, public defenders are available to represent children who do appeal.<sup>294</sup> In practice, however, such appeals are astonishingly rare. Judge Arthur heard only twenty appeals in Hennepin County during 1976.<sup>295</sup> These cases took up approximately one hour per week of his time.<sup>296</sup> Judge Gingold in Ramsey County states that the number of appeals is not great.<sup>297</sup> Reviewing orders and hearing appeals, combined, took three to four hours of his time in an average week.<sup>298</sup>

Three to four hours per week is approximately the amount of

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acknowledging frequent informal discussions with the referee, states: "I'm the boss; I set the policy, and he carries it out." Interview with Judge Andrew Glenn, *supra* note 28. In the Hennepin County Juvenile Court, referees follow written statements of court policy. *See* Interview with Judge Lindsay G. Arthur, *supra* note 108.

290. *See, e.g.*, Interview with Thomas F. Haeg, *supra* note 64 ("[I]f there's anything unusual about a file, I bring it to [the judge's] attention."); Interview with Judge Melvin Peterson, *supra* note 257 (In Hennepin County Probate Court, "if the [civil commitment] case is contested [the referee] comes back and we discuss the evidence."); Interview with Judge Harold W. Schultz, *supra* note 194 (In Ramsey County Family Court, referees indicate to the judge which cases are troublesome, so the judge can read them carefully.).

291. This area of the present study considers only the Hennepin and Ramsey County family and juvenile courts. It should be noted, however, that "less than two percent" of all conciliation court actions in Hennepin County are appealed. Letter from Judge William B. Christensen, *supra* note 251. In the field of civil commitments, Judge Glenn of the Ramsey County Probate Court notes that appeals are rare, in part because "it is easier to get a restoration hearing." Interview with Judge Andrew Glenn, *supra* note 28.

292. *See* *Breed v. Jones*, 421 U.S. 519, 529 (1975).

293. *See id.*

294. As Judge Arthur says, "[Hennepin County has] 13 juvenile public defenders who do not hesitate to appeal from referee to judge." Interview with Judge Lindsay G. Arthur, *supra* note 108.

295. *See* Interview with Judge Lindsay G. Arthur, *supra* note 108. These are appeals on the record, not trials de novo. *Id.*

296. *See id.*

297. *See* Interview with Judge Archie L. Gingold, *supra* note 267.

298. *See id.* Occasionally there is a trial de novo before the judge. When that occurs, substantially more time is required.

time that the Hennepin County Family Court judge spends on appeals as well, according to Judge Bowen.<sup>299</sup> He estimates that he affirmed seventy to eighty percent of the referees' decisions in these cases, explaining that "I'm trying to draw the line, based on the *Peterson* case, . . . between 'clearly erroneous' and second guessing. In other words, I try to give the referees some credit."<sup>300</sup> In the Ramsey County Family Court, there are "maybe eight or ten" appeals per year, not enough to interfere at all with Judge Schultz's dissolution hearings.<sup>301</sup> It is hard not to conclude from these figures that a large majority of the litigants leave the specialized courts satisfied with the decisions of the referees. As will be argued below, however, the significance of satisfied decision-consumers is not entirely clear. When private parties alone are involved, perhaps any forum that they believe to be satisfactory *is* satisfactory. It may be, however, that different considerations should come into play when the state is a party, as in juvenile cases.

*C. Appeals beyond the Specialized Courts: Supreme Court Controls on the Reference Process*

The number of cases appealed to the supreme court on the issue of trial judge supervision of referees has, until recent years, been miniscule.<sup>302</sup> The decisions in these cases are important, however, because they seem to indicate conflicting views as to how the referees should fit into the judicial system.

In *Peterson*, the court suggested that the job of the referee should be a "narrowing of the dispute," that "cannot help but promote more efficient, careful decision making by the family court judge, for it enables both counsel for the parties and the judge to move directly to the decisive issues which find support in the record."<sup>303</sup>

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299. See Interview with Judge Robert E. Bowen, *supra* note 158.

300. *Id.*

301. See Interview with G.A. Hatfield, *supra* note 34.

302. The question of whether compulsory reference is appropriate in a given case is appealable. See, e.g., *St. Paul & S.C.R.R. v. Gardner*, 19 Minn. 132 (Gil. 99) (1872). This issue, however, is not likely to arise in modern litigation. Once the trial court adopts the findings of a referee, these findings have the same force and effect as findings made by the court itself, for purposes of appeal. See *Prior Lake State Bank v. National Sur. Corp.*, 248 Minn. 383, 389, 80 N.W.2d 612, 617 (1957). The major remaining issue, then, is what force and effect referee findings should have at trial.

303. *Peterson v. Peterson*, 308 Minn. 297, 306, 242 N.W.2d 88, 94 (1976). The *Peterson* court also suggested that the work of federal magistrates, as discussed in *Matthews v. Weber*, 423 U.S. 261 (1976), provides a useful analogy to referees in Minnesota courts. See 308 Minn. at 306 n.5, 242 N.W.2d at 94 n.5.

*Peterson* contemplates a process, at least for child custody adjudication, in which a referee hears oral testimony as a basis for recommended findings that are then considered by a judge who is familiar with the testimony on the record.<sup>304</sup>

In the more recent case of *Berg v. Berg*,<sup>305</sup> the referee's job of predigesting the dispute for the judge was set forth in greater detail:

The assistance which a referee renders by narrowing and focusing the issues should not be understated. In many cases once the issues being litigated have been sharply drawn by a hearing before a referee, the parties will recognize that further litigation before a judge of the district court would be unproductive. Even if the district court is called upon to review a referee's decision, the time required to decide the case will ordinarily be greatly reduced by virtue of the referee's prior work.<sup>306</sup>

Thus it appears that the supreme court sees the referee as performing two distinct functions for the district judge. The first function is that of the *Peterson* "pretrial specialist"<sup>307</sup> who sharpens the issues under dispute so they go before the judge with a record and with recommended findings already prepared. The other function, to paraphrase bluntly the language of *Berg*, is to get some cases off the calendar altogether by convincing one of the parties to quit before getting to the judge.<sup>308</sup> To accomplish this goal, it is necessary that referees appear to the litigants as something more than pretrial issue-shapers; the referees want the parties before them to feel they have had their day in court. Hence, referees use various judicial symbols such as black robes, elevated benches, and the title "Your Honor."<sup>309</sup>

Later cases indicate that the line between the *Peterson* and the *Berg* versions of family court referee functions will be drawn ac-

304. See 308 Minn. at 306, 242 N.W.2d at 94.

305. 309 Minn. 281, 244 N.W.2d 149 (1976) (per curiam).

306. *Id.* at 285, 244 N.W.2d at 151-52.

307. Silberman, *supra* note 68, at 1106. In addition to their other duties, referees conducted many pretrial hearings or conferences in the family courts during 1976. See Statistics as to Hearings in Hennepin County Family Court, *supra* note 174 (659 in Hennepin County); Statistical Data, *supra* note 175 (404 in Ramsey County); Referee's Report, *supra* note 176 (150 in St. Louis County). According to Judge Sedgwick, "referees 'sort out' cases to some extent, and will request early court hearings where a critical or explosive situation exists." Letter from Judge Susanne C. Sedgwick, *supra* note 18.

308. See *Berg v. Berg*, 309 Minn. 281, 285, 244 N.W.2d 149, 151-52 (1976) (per curiam).

309. Referee McLean explained that the litigants see that black robe up there and they think that they are in court. See Interview with Referee Daniels McLean, *supra* note 281.

ording to whether or not child custody is involved. In *Sieber v. Sieber*,<sup>310</sup> the Minnesota Supreme Court upheld a family court judge's decision to affirm referee findings that were based only on affidavits, not oral testimony.<sup>311</sup> The decision that no oral testimony was needed was made by the referee.<sup>312</sup> Because the issue was not one relating to child custody, but rather, whether alimony arrearages should be forgiven, the supreme court held it was proper to proceed by affidavits.<sup>313</sup> A few months later, in *Beaudet v. Beaudet*,<sup>314</sup> the supreme court stated explicitly that, although the family court judge's order vacating earlier alimony and property division stipulations was based on a less thorough review of the referee's findings than was required by *Peterson*, the judge's review process was adequate because there was no child custody issue.<sup>315</sup> Apparently, when the subject of dispute is money, the family court judge need not do much more to affirm the referee's findings than state that the referee who made the findings was competent to hear the testimony and heard the testimony.<sup>316</sup> It should be easy, then, in the language of *Berg*, for a referee to convince parties to a property dispute that "further litigation before a judge . . . would be unproductive."<sup>317</sup>

A child custody issue was involved in *Griffin v. Van Griffin*,<sup>318</sup> when the family court referee ordered that a father, behind in his support payments, could begin to have limited visitation rights.<sup>319</sup> The family court judge, after a new hearing and a reading of the record, denied visitation to the father on the ground that visits would not be in the child's best interests.<sup>320</sup> On appeal the supreme court upheld the family court judge, reiterating the *Peterson* view that a referee's findings and order are "advisory only."<sup>321</sup> In the family court, then, it appears that the force of the referees' findings may be determined by what is at stake. A thorough re-

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310. 258 N.W.2d 754 (Minn. 1977).

311. *See id.* at 756.

312. *See id.*

313. *See id.*

314. 263 N.W.2d 425 (Minn. 1978) (per curiam).

315. *See id.* at 426-27.

316. *See id.* at 426 (quoting trial court's memorandum adopting referee's findings).

317. *Berg v. Berg*, 309 Minn. 281, 285, 244 N.W.2d 149, 151 (1976) (per curiam).

318. 267 N.W.2d 733 (Minn. 1978).

319. *See id.* at 735.

320. *See id.*

321. *Id.* at 735 n.1.

view of the referee's findings will be necessary only when an issue relating to child custody is involved.

In juvenile court, although the double jeopardy issue may be resolved,<sup>322</sup> questions still remain as to the advisability of having two hearings in delinquency matters.<sup>323</sup> To put the issue very briefly, who is the judge—the person who hears all the testimony, evaluates credibility, and recommends a finding, or is it the person who signs the final order? In *Swisher v. Brady*,<sup>324</sup> Justice Marshall suggested that to separate these functions violates the due process clause.<sup>325</sup> Even though he was unable to persuade four of his colleagues on this point, state legislatures are still free to decide whether the present division of labor, which designates the order-signer as *the judge*, has elevated form over substance.

The Minnesota Supreme Court has left trial court judges with wide discretion over what effect they choose to give to referee findings.<sup>326</sup> Although referees appear to retain considerable power, appeals and reversals of their decisions are infrequent.<sup>327</sup> This suggests that, generally, referees are accountable to the bench and litigants are satisfied with the results. Although opponents of referees argue that they are not accountable to the public,<sup>328</sup> public opinion seems to acknowledge the legitimacy of referee decision making.

## V. OPTIONS

The first report on the referee question that the Judicial Planning Committee received from its staff counsel listed seventeen possible courses of action that alone, or in combination, could resolve the problem of whether to have referees in Minnesota's courts.<sup>329</sup> Proposals for the retention of referees raise the further question of what their functions should be—a problem also ad-

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322. See *Swisher v. Brady*, 438 U.S. 204, 219 (1978) (compelling juvenile to go through procedure a second time after referee finding of nondelinquency does not violate double jeopardy).

323. See notes 142-45 *supra* and accompanying text.

324. 438 U.S. 204 (1978).

325. See *id.* at 229-30 (Marshall, J., dissenting).

326. See, e.g., *Peterson v. Peterson*, 308 Minn. 297, 304, 242 N.W.2d 88, 93 (1976) ("findings and orders of a family court referee in custody matters are advisory only").

327. See notes 295-301 *supra* and accompanying text.

328. See note 265 *supra* and accompanying text.

329. See Issue Paper for Planning Subcommittee of Judicial Planning Committee, *supra* note 36, at 17-18.

dressed in the report.<sup>330</sup> All of the suggested options are presented below, grouped for convenience into four categories. Not all of the proposals are mutually exclusive. Accordingly, an attempt has been made to indicate when several ideas might have to be combined to produce a workable overall plan. At least four questions should be examined in evaluating each option:

(1) Human resources: will the work of the courts be done under this plan, without intolerable backlogs?

(2) Due process: does this plan properly allocate functions between judicial and nonjudicial personnel?

(3) Personnel: is this plan fair to the people who presently hold jobs in the court system?

(4) Specialization: how would this plan affect the specialized courts?

#### A. Eliminate Referees

A plan to eliminate referees was enacted into law by the 1977 Legislature,<sup>331</sup> but apparently no one thought it wise to let the plan take effect.<sup>332</sup> Because of the need to give priority to juvenile and family matters, without referees, judges would be taken from the civil calendar to serve in those courts.<sup>333</sup> The result would be that ordinary civil litigation could not take place.<sup>334</sup>

Moreover, to the extent referees are appointed pursuant to "inherent powers of the court,"<sup>335</sup> it is conceivable that legislative abolition of their positions creates separation of powers problems.<sup>336</sup> Referees appointed by court order without enabling legislation, such as the first family court referees, might argue that the Legisla-

330. *See id.* at 10-15.

331. *See* Act of June 2, 1977, ch. 432, § 48, 1977 Minn. Laws 1147, 1168 (current version at MINN. STAT. § 484.70(1) (1978)).

332. *See* notes 9-12 *supra* and accompanying text. Even those legislators who have been most critical of referees recognize that some alternatives are needed before referees are phased out completely. *See, e.g.*, Interview with State Senator Robert Tennesen, *supra* note 5; Interview with State Representative Gordon O. Voss, *supra* note 7.

333. *See* Interview with Chief Judge Eugene Minenko, *supra* note 188.

334. *See* note 10 *supra* and accompanying text. According to Judge Minenko, "Nobody seems to make the concession that something like this is necessary to get the work done. This is the system we have. It may not be perfect, but we haven't asked to have it changed. They say it should be changed. Okay, but changed to what?" Interview with Chief Judge Eugene Minenko, *supra* note 188.

335. *See* notes 40, 76, 148 *supra* and accompanying text.

336. The Minnesota Constitution gives the Legislature control over judicial officers, but the term *judicial* is not defined. *See* MINN. CONST. art. VI, § 1. Thus, there is some room for debate over the degree to which referees exercise judicial functions.

ture lacks the power to eliminate their jobs. Several state courts have ruled that these inherent court powers cannot be abrogated by legislation.<sup>337</sup>

### B. Replace Referees with Judges

Substituting judgeships for referee positions has the obvious advantage of ensuring that all judicial functions are performed by judges.<sup>338</sup> One major obstacle, however, would be cost. The judges who were interviewed by the Judicial Planning Committee agreed that it would take at least one full-time judge to replace each full-time referee.<sup>339</sup> Not only are the salaries of judges higher

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337. See, e.g., *In re* 1976 PA 267, 400 Mich. 660, 663, 255 N.W.2d 635, 636 (1977) (*sua sponte* opinion informing Legislature that open meeting law compelling court deliberations to be open to the public violated constitutional endowment of specified powers to the courts); *Judges for the Third Judicial Circuit v. County of Wayne*, 386 Mich. 1, 33, 190 N.W.2d 228, 240 (1971) (compelling county to provide funds for certain judicial officers pursuant to inherent powers of court), *cert. denied*, 405 U.S. 923 (1972); cf. *Mattfeld v. Nester*, 226 Minn. 106, 121, 32 N.W.2d 291, 303 (1948) ("Independent of statute, courts have such power [to supply any omission in any proceeding or record] as an inherent one."). Thus, some cases seem to provide some general support for Judge Arthur's view that "the courts ought to be running the judicial branch of government." Interview with Judge Lindsay G. Arthur, *supra* note 108.

338. See Gough, *supra* note 87, at 14 ("Questions could be raised on a theoretical level as to whether referees should be used at all. Ideally, all judicial functions should be performed by regularly-appointed judges."); ABA JUVENILE JUSTICE STANDARDS PROJECT, *supra* note 279, at 22 (The juvenile court is striving to overcome the inferior rank it has held for so long within the family of courts, and its use of referees has symbolized its inferior status. Competent referees should become judges.). Hennepin County Public Defender William Kennedy agrees with this view, stating that "as a lawyer, I'd like to see all the positions [in juvenile court] be judgeships." Interview with William Kennedy, *supra* note 104. One commentator has explained why referees are not included in family courts in New York:

[T]he chief draftsman of the New York Family Court Act felt that a referee position would have been out of keeping with the spirit of the Act. Under his view, the whole tenor and thrust of New York's Act was to affix judicial responsibility for intervention in the lives of citizens. Referees would have detracted from that purpose, rather than aiding its realization.

Dyson & Dyson, *supra* note 146, at 578.

Of course, the notion that referees should be replaced with judges does not enjoy universal support. See, e.g., Clark, *Parajudges and the Administration of Justice*, 24 VAND. L. REV. 1167, 1172 (1971) ("Rather than more judges, I submit that we need to change our attitude about the functions that require a judge's attention."). Referee Truax feels that the need for uniformity of dispositions and the supervisory powers of judges combine to make the present system better for the juveniles who appear in his court than an all-judge system would be. See Interview with Referee Kenneth M. Truax, *supra* note 110. See generally Hazard, *Justice Courts in Oregon: An Introduction*, 53 OR. L. REV. 407 (1974); Parness, *supra* note 4.

339. See, e.g., Interview with Judge Lindsay G. Arthur, *supra* note 108 (six judges required to replace five referees; "Judges play more golf than referees. We get more work

than those of referees,<sup>340</sup> but judges also are entitled to a greater number of support personnel.<sup>341</sup> Moreover, because counties pay referees and the state pays judges,<sup>342</sup> a change from referee positions to judgeships would result in a drastic reallocation of judicial costs.

Other problems also might arise, depending on where the persons to fill new judgeships would be found. One of the first formal reactions to the 1977 abolition was a recommendation by a meeting of referees “[t]hat the fulltime referees existing on June 1, 1977, be retained as judges or referees.”<sup>343</sup> If the present referees, a number of whom have given up lucrative private practices to train themselves for work in the specialized courts, were not given the judgeships, questions of fairness would arise.<sup>344</sup> On the other

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out of the referees than we would if we had judges.”); Interview with Judge Ronald E. Hachey, *supra* note 3 (noting that it would be necessary to appoint one judge to replace each referee); *cf.* Interview with Chief Judge Eugene Minenko, *supra* note 188 (“I don’t think fewer [judges] than the number of referees could do it. . . . [The referees]’ schedule is solid and they are hearing an awful lot of cases.”).

One legislator has suggested that this need for creating more judgeships might be alleviated by bringing county court judges into the metropolitan area for 15 days each year, pursuant to MINN. STAT. § 2.724(1) (1978). *See* Interview with State Senator Robert Tennesen, *supra* note 5. Judge Minenko, however, doubts whether this provision really will make a big difference to the Hennepin County District Court calendar. *See* Interview with Chief Judge Eugene Minenko, *supra* note 188. Judge Irving R. Kaufman of the Second Circuit Court of Appeals apparently agrees with Judge Minenko on this point. *See* Kaufman, *The Judicial Crisis, Court Delay and the Para-Judge*, 54 JUD. 145, 147 (1970) (“Simply creating more judgeships to cope with increased court business is a long, expensive, frustrating, and often inefficient procedure for reducing court congestion.”). Rather than using more judges, Judge Kaufman favors more extensive use of parajudges to combat overloaded calendars. *See id.*

340. *Compare* MINN. STAT. § 15A.083(1) (Supp. 1979) (judge’s annual salary is \$45,000) *with id.* § 15A.083(6) (1978) (referee salaries limited to 90% of judge salaries). In 1977, the top salary for a referee in Hennepin County was \$37,800, and \$33,280 for a referee in Ramsey County. *See* Interview with Referee Gerald Alfveby, *supra* note 184. As Special Term Referee Haeg—whose salary is approximately \$25,000—says, “looking at the economics of it, I’m a bargain.” Interview with Thomas F. Haeg, *supra* note 64.

341. For example, Judge Arthur says that if referees in his court were replaced by judges, two bailiffs, two court reporters, and probably five courtroom clerks would be added. *See* Interview with Judge Lindsay G. Arthur, *supra* note 108.

342. *Compare* MINN. STAT. § 15A.083(3) (1978) (state pays salaries for judges of district courts, county courts, and municipal courts) *with, e.g., id.* § 260.031(1) (counties pay salaries for juvenile court referees) *and id.* §§ 484.64(3), .65(3) (counties pay salaries for family court referees).

343. D. McLean, *supra* note 3, at 81.

344. Judge Minenko says that it would be a “pretty crass thing” to put the current referees “out in the cold.” Interview with Chief Judge Eugene Minenko, *supra* note 188. He would favor “grandfathering-in” present referees if their positions were replaced by judgeships, provided it could be done. *See id.*

hand, there seems to be no constitutional way to ensure their appointment.<sup>345</sup>

Another question raised by the referees is whether, if judgeships replaced referee positions, judicial rotation would destroy the specialized courts.<sup>346</sup> Judge Sedgwick, who is firmly committed to "the concept of a specialized family court," believes that "making the referees judges will predicate their rotation and end the specialized court."<sup>347</sup> Although some referees disagree with Judge Sedgwick on this point,<sup>348</sup> the only way to guarantee that rotation would not occur would be to amend the family court and juvenile court statutes to provide for the appointment of "family court judges" and "juvenile court judges."<sup>349</sup> The accumulated expertise of the present referees would be lost unless they were appointed to these positions.

One more problem would affect juvenile courts. The existing system allows what amounts to an intermediate appeal, from juvenile court referee to juvenile court judge. On this point, former Ramsey County Juvenile Court Judge Gingold states that "[i]f the referees were all judges, an appeal would go to the Supreme Court from the juvenile court. This would hurt accessibility."<sup>350</sup>

### C. Restore Referees to Pre-1977 Status

Beyond the desirability of retaining specific individuals who have put in years of good service and have developed specialized skills, there are other advantages to having referees. There is the

345. Cf. MINN. CONST. art. VI, § 8 (vacancy in office of judge to be filled by appointment by governor).

346. See D. McLean, *supra* note 3, at 82 (recommending "[t]hat specialized family and juvenile court divisions be maintained and staffed by fulltime personnel").

347. Letter from Judge Susanne C. Sedgwick, *supra* note 18.

348. See, e.g., Letter from Referee Edward P. Dietrich, *supra* note 209 (suggesting that referees, if made judges, would not want to rotate "because we have people who are specialists and have willingly assumed the responsibility for this position").

349. Presently, the district court judges in charge of juvenile and family courts are required to rotate. See MINN. STAT. § 260.019(3) (1978) (no judge can be principally or exclusively assigned to juvenile court for more than three years out of any six); *id.* § 484.65(1) (no judge can be appointed to serve consecutive two-year terms in Hennepin County Family Court). But see *id.* § 484.64 (statute establishing Ramsey County Family Court does not require judge rotation).

350. Interview with Judge Archie L. Gingold, *supra* note 267. Other commentators suggest, however, that because judges' opinions might carry more weight than those of referees, there might be fewer appeals from juvenile court judge decisions to the supreme court than there are appeals from referee decisions to judges. See Fuller & Solomon, *supra* note 212, at 15.

value of the uniformity of decisions resulting from a single-judge court that, as indicated above, has been sharply debated.<sup>351</sup> There is also flexibility in that referees can be added on a part-time basis to deal with a sudden bulge in a court's calendar.<sup>352</sup> A related virtue of refereeships is that referees' calendars are generally more flexible than judges' calendars.<sup>353</sup> Thus, referees can provide continuity in handling problems over a long period of time.<sup>354</sup> Additionally, the use of referees rather than judges tends to be cost-effective.<sup>355</sup>

The advantages outlined above, however, do not meet the question of how to allocate functions between referees and judges. While many of the duties presently performed by referees could be characterized as "nonjudicial" or "quasi-judicial,"<sup>356</sup> some could

351. See notes 210-12 *supra* and accompanying text.

352. See Interview with Judge Lindsay G. Arthur, *supra* note 108. Of course, this problem also can be handled by bringing in retired or out-state judges. See MINN. STAT. § 484.61 (1978) (retired judge may be appointed and assigned to hear district court cases); cf. Interview with Chief Judge Eugene Minenko, *supra* note 188 (questioning effectiveness of using out-state judges to hear cases for short periods of time).

353. See State *ex rel.* Rockwell v. State Bd. of Educ., 213 Minn. 184, 192, 6 N.W.2d 251, 258 (1942) ("The appointment of a referee is for the convenience of the parties and the court or tribunal; it is often desirable in the interests of expedition and economy, and, as in the case before us, may appear necessary to avoid both delay and interruption and to insure orderly procedure.").

354. See Interview with Referee Daniels McLean, *supra* note 281 (The present system provides "tremendous economy of court time, getting rid of subsequent appearances. A court appearance is evidence that we haven't helped people resolve their problem. This is where the continuity of experts makes such a difference."); notes 150-51 *supra* and accompanying text.

355. See notes 339-42 *supra* and accompanying text. Former Ramsey County Attorney William B. Randall believes that, if Ramsey County added a fourth referee to family court, the resulting expedition of support decisions would save the county \$100,000 per year in welfare payments, twice the cost of the referee and supporting staff. See Interview with William B. Randall, Former Ramsey County Attorney (Nov. 16, 1977) (on file at William Mitchell Law Review office).

356. According to Judge Schultz, "Not everything that a referee hears is a judgmental thing. It doesn't take a judge to find out somebody's income or fixed expenses." Interview with Judge Harold W. Schultz, *supra* note 194; see Interview with G.A. Hatfield, *supra* note 34 ("[T]hey're performing a function that is removing some of the minor aggravations [and] detailed work. A law clerk performs research for the judge; you could say 'Let's have judges do that research.'"); cf. Ashman & Parness, *The Concept of a Unified Court System*, 24 DE PAUL L. REV. 1, 33 (1974) (recommending that judicial officers, if under proper control, be used to assist judges); Feldman, *A Statutory Proposal to Remove Divorce from the Courtroom*, 29 ME. L. REV. 25, 33 (1977) ("To divide property, award custody of children and free a couple from an unhappy marriage, one needs only objectivity and the authority of the state. Judges and lawyers are not needed as such."). See generally Comment, *The Family Court*, 7 OTTAWA L. REV. 251, 256 (1975) ("The Institute is not convinced that all judges need be lawyers. . . . [w]e need judges of whatever background, who are sensitive to new

not.<sup>357</sup> This difficulty is aggravated by a dislike on the part of many judges for juvenile and family court matters.<sup>358</sup> Perhaps the judges' preferences should be disregarded.<sup>359</sup> On the other hand, it is axiomatic that those in authority will delegate unpleasant duties if they can.<sup>360</sup> Conceivably, referees' duties could be specified by legislation or by court rule. The referee question, however, is a far more delicate area than controlling referees' salaries<sup>361</sup> or placing referees under the supervision of the Board on Judicial Standards.<sup>362</sup>

A less ticklish course would be simply to reinstate the authority of the referees as it existed prior to 1977. This option has been favored, at least initially, by the Ramsey County Court Administrator<sup>363</sup> and a large majority of the Ramsey County bar.<sup>364</sup> A slight modification of this plan would allow referees to be assigned outside juvenile and family courts, as needed. A narrow majority of the Ramsey County lawyers surveyed found this variation to be

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family forms, cultures, roles and environments and not just to family law and some single idealized form.”).

357. For example, contested trials of delinquency petitions in juvenile court could not be characterized as merely being quasi-judicial. *See* note 109 *supra* and accompanying text.

358. *See* Interview with Judge Harold W. Schultz, *supra* note 194 (noting that family court litigants tend to call judges at home late at night; “I dislike the family court. . . . You’re dealing with people who are . . . emotionally involved and upset.”); Letter from Judge Susanne C. Sedgwick, *supra* note 18 (“Many lawyers and judges do not like the emotional overlay involved with domestic matters.”). For a discussion of the difficulties in attracting judges to family and juvenile courts, *see* Waite, *Children of Divorce in Minnesota: Between the Millstones*, 32 MINN. L. REV. 766 (1948); Winnet, *Fifty Years of the Juvenile Court: An Evaluation*, 36 A.B.A.J. 363 (1950).

359. According to Senator Tennesen, “We have certain cases that come before the court and they have to be judged, and we try to have a system of accountability.” Interview with State Senator Robert Tennesen, *supra* note 5.

360. *See* THE ILIAD OF HOMER, Book I (S. Butler trans. 1952) (Agamemnon delegates to subordinates task of taking Briseis from Achilles); notes 69-72 *supra* and accompanying text.

361. *See generally* Klekamp v. Klekamp, 275 Ill. 98, 108, 113 N.E. 852, 856 (1916) (reducing award of chancery master’s fees in divorce action); note 340 *supra* and accompanying text (discussing referee salaries).

362. Presently, referees are subject to supervision by the Board on Judicial Standards. *See* note 267 *supra* and accompanying text. Judge Sedgwick feels that supervising judges have the responsibility to deal with any potential referee problems before they reach the stage where the Board on Judicial Standards would intervene. *See* Interview with Judge Susanne C. Sedgwick, *supra* note 61.

363. *See* Interview with G.A. Hatfield, *supra* note 34.

364. When asked whether referees should be retained in their present positions in family court, 226 members of the Ramsey County Bar responding to the survey favored their retention, while 27 were opposed. *See* RAMSEY BARRISTER, NOV., 1977, at 3. Similarly, 169 members favored retaining referees in juvenile court, while 27 were opposed. *See id.*

acceptable.<sup>365</sup> From the referees' point of view, a disadvantage of these options is that they present no guarantee that referee positions would not be abolished again by subsequent legislation.<sup>366</sup>

Another possibility, suggested by Judge Bowen, would be "to continue the referees but put them under the state system, with protection for their accumulated county pension rights."<sup>367</sup> Apparently, the only overt change this would make in the existing system is the reallocation of costs. In the long run, however, becoming state employees might provide the referees with greater job security, though possibly at the eventual cost of having the Legislature spell out their duties.

#### *D. New Mixtures of Judges and Referees*

A number of plans have been suggested under which referees and judges would continue to coexist. These ideas range from simply renaming the referees "magistrates,"<sup>368</sup> to complex reorganizations of the specialized courts that include multiple judges and referees in each.<sup>369</sup> Any proposal that is considered should be required to differentiate between judicial and nonjudicial functions. As one legislator who has studied the problem puts it, "where a referee is used in a court function, and you want it to be a court function, that referee should be replaced with a judge."<sup>370</sup>

A plan that might satisfy the need for differentiating functions

365. One hundred thirteen responses favored this proposal, and 106 responses were opposed. *See id.* This plan carries with it the possibility of detracting from the value of specialized skills which referees have developed.

366. *See* Interview with William E. Haugh, Jr., *supra* note 3. ("The referees would be nervous about how long it would be before the legislature did it again.")

367. Interview with Judge Robert E. Bowen, *supra* note 158.

368. *See, e.g.*, Interview with Judge Lindsay G. Arthur, *supra* note 108; Interview with Chief Judge Eugene Minenko, *supra* note 188.

369. Juvenile courts in the cities of Detroit, Denver, and Los Angeles presently use combinations of referees and judges. *See* ABA JUVENILE JUSTICE STANDARDS PROJECT, *supra* note 279.

370. Interview with State Representative Gordon O. Voss, *supra* note 7. Senator Tennesen agrees that any such system should prevent referees from hearing controversial matters. *See* Interview with State Senator Robert Tennesen, *supra* note 5.

An eighteenth-century commentator noted, however, that it is often difficult to distinguish non-judicial functions from judicial:

[I]t is one thing to exercise judicial authority in a court, and another thing to be a Judge of that court. Every officer of a court who assists and helps the Judge in the exercise of judgement, so far as such assistance goes, does a judicial act, but yet he is not thereby the Judge.

Bryant, *supra* note 29, at 501 (quoting S. BURROUGHS, *THE LEGAL JUDICATURE IN CHANCERY* (London 1727)).

has been proposed by Ramsey County District Court Judge Joseph P. Summers.<sup>371</sup> His plan is based on the 1966 proposal by Judge Arthur to integrate family court, juvenile court, and some municipal court functions, so that legal problems relating to marriage, children, and assaultive misdemeanors within a household could all be handled in one court.<sup>372</sup> Judge Summers does not contemplate that the court be staffed by a single judge, but rather, there should be several judges as well as referees.<sup>373</sup> Referees would be able to hear all uncontested matters and part-time referees could be brought in to deal with "peaks in judicial business."<sup>374</sup> As the present referees retired, it could be provided that no new referee be appointed unless a study by the Chief Justice of the Supreme Court and the Court Administrator indicated that such an appointment was needed to handle the work.<sup>375</sup> Furthermore, a provision such as "No order authorizing the filling of a referee position shall become effective until July of the year next following the year in which it is entered," would give the Legislature ample opportunity to replace the position with a judgeship or eliminate it entirely.<sup>376</sup> Thus, referees could be phased out slowly, if this were thought desirable, without abrupt termination of existing jobs.<sup>377</sup>

A similar proposal that evolved from discussions among the referees themselves would be to combine all of the above functions under the aegis of municipal court.<sup>378</sup> Legislation could recommend that existing referees be considered for the new municipal court judgeships that would be necessary.<sup>379</sup> Those referees who

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371. See Interview with Judge Joseph P. Summers, *supra* note 260.

372. See generally Arthur, *supra* note 146. Conceivably, the guardianship and commitment functions of probate court could be added as well.

373. See Interview with Judge Joseph P. Summers, *supra* note 260. Judge Minenko agrees that it might be appropriate to combine juvenile and family courts, while adding new judgeships to assist in cases where affidavits of prejudice are filed, and possibly to lessen complaints opposing a single-judge court. See Interview with Chief Judge Eugene Minenko, *supra* note 188.

374. Interview with Judge Joseph P. Summers, *supra* note 260. The occasional use of part-time referees might present conflict of interest problems unless controls like those used in Hennepin County Conciliation Court were adopted. See generally note 253 *supra* and accompanying text.

375. See Interview with Judge Joseph P. Summers, *supra* note 260.

376. See *id.*

377. Cf. Fuller & Solomon, *supra* note 212, at 16 (discussing recommendation to "[r]educe the number of referees and seek additional judgeships when the integrated family court is created").

378. See Interview with Referee Daniels McLean, *supra* note 281.

379. See *id.*

were not made judges could stay on as referees until retirement.<sup>380</sup> Judges from the general bench could be assigned to preside over the municipal court for non-consecutive two-year terms.<sup>381</sup> This practice would assure that referee expertise is preserved, while periodically providing the municipal court with a source of new ideas.<sup>382</sup> Although this plan would make those referees who were appointed judges more accountable to the electorate, any accountability problems that presently exist would continue with respect to those who remain referees. Another disadvantage could result from perceived stigmatization of family problems by their relegation to a "lower court." This drawback would diminish in seriousness, however, as court integration proceeds.<sup>383</sup>

## VI. THE LEGITIMACY OF THE QUASI-JUDGE: THREE MODELS OF REFEREE PARTICIPATION IN LEGAL CONFLICT

For the moment, the passage of the 1978 law seems to have resolved some of the conflicts suggested by the options presented above. The fact that the Legislature directed the supreme court to complete a major study by October, 1980<sup>384</sup> strongly suggests that this law is intended as a temporary measure, a compromise that will keep the referees in their jobs and keep the specialized courts operating until sometime in 1981. The law is a practical means of meeting the immediate needs of the courts. The differences among several early versions of the bill that became the 1978 law indicate, however, that the Legislature is far from settling the ultimate question of what the referees' role in the courts will be, if any, in the long run.<sup>385</sup> The Legislature's mandate to the Minnesota Supreme Court shows an awareness that the next time this question is considered, it should be discussed in the context of a much better theoretical understanding of the courts than that represented by the tautology "judging should be done by judges." The following cri-

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380. *See id.*

381. *See id.*

382. *See id.*

383. *Cf.* MINN. STAT. § 15A.083(1)(3) (Supp. 1979) (municipal court judge salary same as district court judge salary).

384. *See* MINN. STAT. § 260.019 (1978).

385. *Compare* S.F. 1586, 70th Minn. Legis., 1978 Sess., as amended by Judicial Ad. Subcomm. of Senate Judiciary Comm., Mar. 2, 1978 (on file at Minnesota Legislative Reference Library) with Act of Apr. 5, 1978, ch. 750, 1978 Minn. Laws 907 (amending scattered sections of MINN. STAT. chs. 260, 484, 487, 508 (1978)).

tiques of three conceptual models of referee functions are intended to provide some of the background for such a discussion.

### A. *The Pre-Abolition Model and the Problem of Delegated Discretion*

Americans conceive of courts as *passive* or *reactive* institutions that do not seek out conflicts to resolve, but wait for parties to bring conflicts to them.<sup>386</sup> Only when presented with a conflict will a court react by issuing an adjudicatory resolution. People choose to resort to the court system for a variety of reasons.<sup>387</sup> Many parties to conflicts are attracted to courts because they feel that judge-made decisions—as opposed to, for example, the awards of arbitrators—are determined by rules.<sup>388</sup> Decisions that appear to be rule determined are thought to be predictable<sup>389</sup> and are perceived as conferring moral victories on successful parties.<sup>390</sup>

In practice, however, decisions that have the superficial appearance of being generated mechanically by rule application are often the products of judicial discretion.<sup>391</sup> To be more specific, it would be hard to imagine areas of the law in which judicial discretion has more leeway than child custody allocations,<sup>392</sup> civil commit-

386. See generally Eckhoff, *The Mediator, the Judge and the Administrator in Conflict-resolution*, in CONTRIBUTIONS TO THE SOCIOLOGY OF LAW 148 (Blegvad ed. 1966).

387. See Aubert, *Courts and Conflict Resolution*, 11 J. CONFLICT RESOLUTION 40, 41 (1967) ("A large proportion of the parties who appear before a court of law could have stayed away if they had strongly preferred to do so. In this sense they are recruited to their role in court on the basis of choice . . .").

388. Cf. Eckhoff, *supra* note 386, at 161 ("The judge is distinguished from the mediator in that his activity is related to the level of norms rather than to the level of interests. His task is not to try to reconcile the parties, but to reach a decision about which of them is right.") (emphasis in original). But cf. Nader, *Styles of Court Procedure: To Make the Balance*, in LAW IN CULTURE AND SOCIETY 69-91 (Nader ed. 1969) (examining a court in rural Mexico which administers case-by-case individualized justice, usually in the form of compromise, while de-emphasizing rules; court's existence seems to depend upon long-term relationships with the people in the surrounding community).

389. See Aubert, *supra* note 387, at 44.

390. *Id.*

391. According to one commentator:

There are two different ways in which the rule form shores up the legitimacy of judicial action. First, the discretionary elements in the choice of a norm to impose are obscured by the process of justification that pops a rule out of the hat of policy, precedent, the text of the Constitution, or some other source of law. Second, once the norm has been chosen, the rule form disguises the discretionary element involved in applying it to cases.

Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1708 (1976).

392. See Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROB. 226 (1975); Oster, *Custody Proceedings: A Study of Vague and Indefinite Standards*, 5 J. FAM. L. 21 (1965). See generally Bryant v. Bryant, 264 Minn. 509, 512,

ments,<sup>393</sup> and juvenile delinquency dispositions.<sup>394</sup> Indeed, broad discretion in these areas seems inevitable because they require “person-oriented” rather than “act-oriented” determinations, that is, “evaluation[s] of the ‘whole person viewed as a social being.’ ”<sup>395</sup>

A leading study of child custody adjudication has suggested that “person-oriented” decisions are so discretionary as to be virtually unreviewable:

Because the trial court’s decision involves an assessment of the personality, character, and relationship of the people the judge has seen in court, appellate courts are extremely loath to upset the trial court’s determination on the basis of a transcript. . . . Since only the broadest principle is typically announced in these decisions, it is difficult to know when a trial judge has acted upon some inappropriate principle or factor. Constrained little by precedent or appellate review, the trial court’s discretion is very wide indeed.<sup>396</sup>

This analysis can be extended easily to cases involving termination of parental rights, commitments, and juvenile court dispositions.<sup>397</sup>

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119 N.W.2d 714, 716-17 (1963) (trial court has wide discretion in allocating child custody). The general rule to be applied in child custody disputes is the determination of what is in the best interests of the child. *See id.*

393. *See* MINN. STAT. § 253A.07(13) (1978) (probate court not bound by evidence presented by examiners in civil commitment proceedings); *id.* § 253A.07(17)(a) (mentally ill person can be committed for person’s own welfare or for protection of society).

394. “[T]he power of the judge to make essential decisions in the disposition of individual cases remains great. Traditionally, these decisions have been based upon a number of extralegal criteria, usually personal and social characteristics of the offending youth.” Scarpitti & Stephenson, *Juvenile Court Dispositions: Factors in the Decision-making Process*, 17 CRIME & DELINQUENCY 142, 143 (1971).

One commentator takes a jaundiced view of this wide discretion in juvenile courts:

To some the dispositional decision ought to be left to those experts in achieving beneficial changes in human behavior. For these, the choices to be made are clinical or educational. ‘How can we best serve the needs of this child?’ is the classic way of putting the issue. The answer, however, will often turn on facts that ought to be tested by the constant, searching creative questioning of the adversary process. Experts, particularly experts who must deal with large numbers of cases, grow weary, make mistakes, take short cuts, bend to frustration, and, in some cases, respond to dislike and prejudice.

Paulsen, *The Constitutional Domestication of the Juvenile Court*, 1967 SUP. CT. REV. 233, 256.

395. Mnookin, *supra* note 392, at 250-51 (quoting unpublished paper of L. Fuller).

396. *Id.* at 254. Ultimately, the author concludes that children’s interests would be better protected by a considerable narrowing of judicial discretion in the area of child custody adjudication. *See id.* at 277.

397. *Cf.* notes 281-83 *supra* and accompanying text (family court decisions); notes 284-86 *supra* and accompanying text (civil commitment proceedings); note 287 *supra* and accompanying text (juvenile court decisions).

It also applies to the referee-judge relationship as well as the relationship between trial and appellate courts.

A leading legal historian believes that the desire to make the exercise of judicial discretion legitimate has led, historically, to the election of judges.<sup>398</sup> Judicial discretion represents an area of political decision making. Therefore, if judges were elected, "their decisions would be democratic, and hence, in a democracy, legitimate."<sup>399</sup> It may be assumed that this is the sort of reasoning that led the framers of the Minnesota Constitution to require that judges be "elected by the voters from the area which they are to serve."<sup>400</sup>

From this objective, legalistic point of view, therefore, it seems anomalous that for so long Minnesota trial judges have been permitted to delegate some of their most discretionary decision making to non-elected officials.<sup>401</sup> Seen in this light, there is room for serious doubt whether person-oriented determinations made by family and juvenile court referees are legitimate, as opposed to act-oriented determinations, such as trust accountings, that traditionally have been supervised by referees or chancery masters.<sup>402</sup>

By prohibiting referees from hearing any final custody orders, Judge Bowen's realignment of family court responsibilities in Hennepin County begins to meet the objection to using referees to make person-oriented determinations.<sup>403</sup> The use of juvenile court referees, including a lay referee, to do ninety percent of the Hennepin County Juvenile Court dispositions, however, remains open to criticism under this conceptual model.<sup>404</sup> At issue is the legitimacy of discretionary decisions being made by judicial officials who are not elected.

398. See Friedman, *On Legalistic Reasoning—A Footnote to Weber*, 1966 WIS. L. REV. 148, 162.

399. *Id.* at 162.

400. MINN. CONST. art. VI, § 7.

401. The objective, legalistic point of view suggested here is exemplified by Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

402. For a discussion of the traditional act-oriented determinations, see notes 39-63 *supra* and accompanying text.

A contempt hearing, where the issue is whether a certain payment was made, is an act-oriented determination. See MINN. STAT. § 518.24 (1978) (punishment for contempt allowed for disobedience to court order to pay maintenance or support). Although a jail term can result from a contempt hearing, this may be a less important consideration than the fact that relatively little judicial discretion is involved.

403. See note 193 *supra* and accompanying text.

404. See note 109 *supra* and accompanying text. This criticism is not aimed at the people who are referees in juvenile court. Although they are experienced, dedicated, and

Using referees to hear uncontested matters is not objectionable, following this line of reasoning, because such hearings do not constitute discretionary decision making. There is really no decision to be made and consequently no discretion to be exercised. Moreover, even in contested matters, when the issue is act-oriented—was a payment made by a certain date or not?—decision making by referees does not really represent a delegation of discretionary power. It is to be hoped that the distinction between judicial and non-judicial functions was what prompted the Legislature, in the 1978 law, to remove some of the referees' powers to make person-oriented decisions in contested matters.<sup>405</sup>

### *B. The Supreme Court Model: Shaping the Persuasive Conflict*

The objective, abstract analysis of the legitimacy of referee functions, which focuses on person-oriented versus act-oriented adjudication, by no means exhausts the points of view from which the issue may be considered. As previously indicated by the low rate of appeals, the parties to cases heard by referees appear to exhibit a high degree of subjective satisfaction with referee decisions.<sup>406</sup> The factors that account for these perceptions of referee legitimacy merit examination because to the extent that such factors may be augmented without increasing the perceived illegitimacy of referee decisions, the dispute-settlement function of the courts clearly benefits.<sup>407</sup>

One study has suggested that a major factor in a person's selection of courts as a dispute-settlement mechanism is that in court a "persuasive conflict"—which is resolved by a verdict—takes the place of the underlying dispute.<sup>408</sup> Ambiguous, complex problems

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competent, the criticism is aimed at some of the specific functions which these referees are required to perform.

Referees dispose of juvenile cases in Ramsey County as well; reference here is made to Hennepin County because it has compiled more concrete statistics.

The problem of referees conducting adjudications of delinquency, however, may have been resolved by the 1978 law. See Act of Apr. 5, 1978, ch. 750, § 2, 1978 Minn. Laws 907, 908 (prohibiting referees from hearing contested trials in juvenile court) (amending MINN. STAT. § 484.70(3) (1976)).

405. See note 13 *supra* and accompanying text.

406. See notes 295-301 *supra* and accompanying text.

407. Person-oriented determinations need to fulfill two functions; the dispute between the parties must be settled, and the rights of each person involved must be decided. See generally Mnookin, *supra* note 392, at 229.

408. See Golding, *Preliminaries to the Study of Procedural Justice*, in LAW, REASON, AND JUSTICE 71, 76 (Hughes ed. 1969).

are clarified and resolved in the formal drama of trial.<sup>409</sup> Often, this court function is discussed only apologetically, as if it were an oversimplification to narrow the shape of a conflict. For example, parties to a divorce are made to focus on what may have been years of vague dissatisfaction by adjudicating a few more-or-less representative incidents of adultery or cruelty.<sup>410</sup> While this role of the courts is admittedly reductive, the reduction of a conflict to manageable proportions may be just what the parties want, as indicated by their choice of an adjudicatory forum as opposed to a mediator or a marriage counselor. Moreover, in the field of juvenile law, the "persuasive conflict" in the courtroom may have more of a rehabilitative impact on children than any other event in their passage through the justice system.<sup>411</sup>

Referees believe that the parties to most family and juvenile court cases perceive them as judges.<sup>412</sup> Certainly in Hennepin County Family Court it would be difficult for an uninitiated party to differentiate between referees and judges. While referees have somewhat smaller courtrooms and chambers, their rooms clearly are courts, they wear the same robes as judges, and they are addressed as "Your Honor."<sup>413</sup> Here "it is the referee, from a point of view as neutral as that of the judge, who helps focus attention on the critical factual issues involved, the applicable legal principles, and the relevant portions of an often voluminous record which support his evaluation of the cumulative effect of the evidence and his recommended findings and order."<sup>414</sup> In short, while a referee cannot satisfy the parties' ultimate desire—a binding decision—the referee may have primary responsibility for imparting a shape to the persuasive conflict. Thus, the parties who appear before referees emerge with the subjective feeling of having had their day in court. Essentially, this is the *Peterson* court's view

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409. See generally *id.*

410. See Sarat & Grossman, *Courts and Conflict Resolution: Problems in the Mobilization of Adjudication*, 69 AM. POLITICAL SCI. REV. 1200, 1207 (1975).

411. See, e.g., Snyder, *The Impact of the Juvenile Court Hearing on the Child*, 17 CRIME & DELINQUENCY 180, 185 (1971) (in many cases "[t]he children's most positive attitudes were toward the judge"). For a more recent compilation of studies on attitudes toward the courts, see Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 L. & SOC'Y REV. 427, 466-69 (1977).

412. See note 309 *supra*.

413. In juvenile court, the judges and referees often use available courtrooms interchangeably.

414. *Peterson v. Peterson*, 308 Minn. 297, 306, 242 N.W.2d 88, 94 (1976).

of referees as pretrial issue-shapers.<sup>415</sup>

As will be seen, the referees not only help simplify issues for trial,<sup>416</sup> but they eliminate many trials completely by inducing the parties to work out agreements themselves. This role complements the supreme court's view in *Berg* of the ability of referees to dissuade further litigation before the judge.<sup>417</sup>

Like the pretrial conference and, on the appellate level, the prehearing conference,<sup>418</sup> the hearing before a referee encourages parties to settle their cases.<sup>419</sup> While there is some potential for unfairness in all these mechanisms, whenever parties are persuaded to settle litigation on the basis of seemingly authoritative predictions of final outcomes, there may be unjust results.<sup>420</sup> This danger, however, is obviated in part by the presence of counsel. Moreover, like other risks stemming from the delegation of discretionary decision making, the hazard of less-than-perfect settlements should be weighed against the desirability of prompt decision making in courts handling family matters, especially when disputes involve children.<sup>421</sup> Although it remains to be seen whether the Legislature struck a proper balance in the 1978 law, so far, at least, there is no indication that the referees are compelling unsatisfactory settlements.

415. See notes 303-04, 307 *supra* and accompanying text.

416. This is one of the functions of the pretrial conference. See MINN. R. CIV. P. 16(1). See generally Louisell, *Discovery and Pre-Trial Under the Minnesota Rules*, 36 MINN. L. REV. 633 (1952) (discussing the use of the pretrial conference).

417. See notes 305-06 *supra* and accompanying text.

418. For an analysis of prehearing conferences, see Todd, *Prehearing Conferences and a Judge's Look at Appellate Advocacy*, in MINNESOTA APPELLATE PRACTICE 25-40 (1978).

419. See *Berg v. Berg*, 309 Minn. 281, 285, 244 N.W.2d 149, 151 (1976) (per curiam).

420. In the criminal law context, much of the criticism of plea bargaining is based on this insight. Cf. *State v. Goulette*, 258 N.W.2d 758, 761-62 (Minn. 1977) (discussing standards under which trial courts may accept guilty pleas while avoiding injustice), noted in 5 WM. MITCHELL L. REV. 509 (1979).

421. The *Peterson* court recognized that referees are needed in family court to ensure prompt decision making, stating, "the necessity for the routine use of family court referees is plainly the ever-increasing volume and complexity of domestic relations litigation. We take judicial notice of the impossibility of a single family court judge in a metropolitan area handling this burden without assistance." *Peterson v. Peterson*, 308 Minn. 297, 305, 242 N.W.2d 88, 93 (1976). The same could be said for juvenile court. It should be added, however, that the *Peterson* decision does not consider whether it is necessary to have only one judge in each of these metropolitan courts. Perhaps additional judges could ensure prompt decision making as well.

*C. The Legislature, Referees, and the Power to Incarcerate: Two Bills and Some Ideas for the Future*

The referee bill that became law in 1978 restored to the referees many of the functions they had before their positions were abolished.<sup>422</sup> It also made three other substantial changes. First, referees were no longer "limited to assignment to family or juvenile court."<sup>423</sup> Theoretically, this provision opens the possibility for a dissatisfied chief judge to dismantle the specialized courts. Second, in family court, referees were prohibited from hearing "any final trial involving a contested case if either party or his attorney objects in writing."<sup>424</sup> This provision brings Ramsey and St. Louis counties into compliance with Judge Bowen's Hennepin County Family Court policy.<sup>425</sup> Again, however, since most parties, and their attorneys, who like the predictability of referees' decisions, are satisfied with referees, there are not likely to be many objections.

The juvenile court is where the most substantial changes in procedure have occurred. In addition to barring referees from hearing motions for reference of a juvenile to adult court,<sup>426</sup> the 1978 law precluded referees from hearing "a contested trial on any petition."<sup>427</sup> This means that referees are no longer able to adjudicate delinquency or termination of parental rights.<sup>428</sup> Moreover, because a traffic ticket issued to a juvenile "shall have the effect of a petition," it is doubtful whether the juvenile traffic court function of the referees can be continued.<sup>429</sup> These changes mean that

422. See Act of Apr. 5, 1978, ch. 750, § 2, 1978 Minn. Laws 907, 908 ("Referee[s] . . . may continue to serve . . . under the terms and conditions of their appointment") (current version at MINN. STAT. § 484.70(1) (1978)).

423. *Id.* (current version at MINN. STAT. § 484.70(1) (1978)).

424. *Id.* (current version at MINN. STAT. § 484.70(1) (1978)).

425. See note 193 *supra* and accompanying text.

426. See Act of Apr. 5, 1978, ch. 750, § 2, 1978 Minn. Laws 907, 908 ("No referee sitting in juvenile court may hear . . . any motion made pursuant to section 260.125.") (amending MINN. STAT. § 484.70(3) (1976)). Referring a juvenile for trial as an adult is the kind of motion authorized by section 260.125. See MINN. STAT. § 260.125 (1978). In Hennepin County during 1976, however, only one such motion was heard by a referee in juvenile court. See note 109 *supra* and accompanying text.

427. Act of Apr. 5, 1978, ch. 750, § 2, 1978 Minn. Laws 907, 908 (amending MINN. STAT. § 484.70(3) (1976)).

428. Both of these types of hearings proceed from petitions. See MINN. STAT. § 260.131 (1978) (procedure to petition for finding of delinquency); *id.* § 260.231 (procedure to petition for termination of parental rights).

429. Compare *id.* § 260.193(2) (notice to juvenile to appear in court when accused of traffic violation "has the effect of a petition and gives the juvenile court jurisdiction") with

judges will have to do more juvenile court work. In recognition of this increased workload, the 1978 law also included a section that allows "one or more" judges to be assigned to juvenile court.<sup>430</sup> This increase of judge-time in juvenile court should be welcomed both by critics of prior practice, who questioned the historical credibility of juvenile courts operating as chancery courts under the *parens patriae* doctrine,<sup>431</sup> and by those whose sociological and psychological surveys of juvenile offenders have pointed to the judge-child relationship as the key to the effectiveness of these courts.<sup>432</sup> Whether one's primary concern is the "objective legitimacy" of court decisions or the "persuasive conflict," the juvenile courts have been improved by the 1978 law.

The possibility of more drastic changes in the future is suggested by the Senate Judicial Administration Subcommittee report on its version of a 1978 bill, Senate File 1586.<sup>433</sup> In the family courts, for example, this bill provided that:

No referee may be assigned to hear any proceedings for civil contempt, any other matter which may result in an order for the confinement of any person, or any family court matter in which the custody of children is contested, unless the parties or their attorneys consent to the assignment of a referee to hear the matter.<sup>434</sup>

Such a provision would make even referee powers to hear temporary custody matters dependent on stipulation and would grant the defendant in a contempt proceeding the right to demand a hearing before a judge.

The question of whether referees in family court should hear civil contempt cases appears to be a difficult one primarily because confinement is a sanction that can be imposed in such a proceed-

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Act of Apr. 5, 1978, ch. 750, § 2, 1978 Minn. Laws 907, 908 ("no referee sitting in juvenile court may hear a contested trial on any petition") (amending MINN. STAT. § 484.70(3) (1976)).

430. See Act of Apr. 5, 1978, ch. 750, § 7, 1978 Minn. Laws 907, 910 (codified at MINN. STAT. § 260.019(2) (1978)). Under the new law, juvenile court judge assignments also are required to rotate at least once every three years. See Act of Apr. 5, 1978, ch. 750, § 7, 1978 Minn. Laws 907, 910 (codified at MINN. STAT. § 260.019(3) (1978)).

431. See, e.g., Scarpitti & Stephenson, *supra* note 394; note 115 *supra* and accompanying text.

432. See, e.g., note 411 *supra* and accompanying text.

433. S.F. 1586, 70th Minn. Legis., 1978 Sess., as amended by Judicial Ad. Subcomm. of Senate Judiciary Comm., Mar. 2, 1978 (on file at Minnesota Legislative Reference Library).

434. *Id.*

ing.<sup>435</sup> Nevertheless, the line of analysis that attempts to allocate discretionary, person-oriented functions to judges, and non-discretionary, act-oriented functions to referees, would seem to permit referees to find people in contempt, because a determination of contempt depends on a finding that a clear, unambiguous court order was disobeyed.<sup>436</sup> While it is true that discretion is involved in evaluating a defendant's ability to comply with a court order and whether the threat of confinement likely will lead to compliance, these determinations must be reduced to formal findings, susceptible to review.<sup>437</sup> To permit referees to hold contempt hearings may thus be seen as part of the chancery tradition described by Pound, in which masters are responsible for the supervision of judges' orders.<sup>438</sup> Moreover, as long as the family courts are single-judge courts, there may be some advantage to defendants in having their allegations of contempt heard before a different official than the author of the final order that they allegedly violated.

In the juvenile court, Senate File 1586 proposed to restrict referee discretion as follows:

No referee may be assigned to hear any juvenile court matter involving a reference for prosecution pursuant to section 260.125, any adjudicatory hearing which will resolve an issue relevant to whether an order for the confinement of any person may result, or any disposition hearing in which an order for confinement may be made, unless the parties or their attorneys consent to the assignment of a referee to hear the matter.<sup>439</sup>

As with civil contempt, Senate File 1586 appears to have focused on the possibility of incarceration as the major factor to determine whether referees may participate in juvenile court matters. Never-

435. See MINN. STAT. § 518.24 (1978) (disobedience to family court order "may be punished by the court as for contempt"); *id.* § 588.12 (contempt carries potential punishment of "imprisonment until performance").

436. Enforcement of civil contempt has been explained as follows:

The order must have clearly defined the acts to be performed and the relief granted. Only when courts have been explicit and precise in their commands may they be strict in exacting compliance. A party seeking benefits under an ambiguous and indefinite order may move for an order of clarification and interpretation based upon the entire record; the latter may be enforced by contempt.

Sutherland & Iverson, *Constructive Civil Contempt in Minnesota*, BENCH & B., Jan. 1969, at 10 (citations omitted). See generally Hopp v. Hopp, 279 Minn. 170, 156 N.W.2d 212 (1968).

437. See Davis v. Davis, 280 Minn. 44, 47-48, 158 N.W.2d 196, 198-99 (1968); Hopp v. Hopp, 279 Minn. 170, 174-75, 156 N.W.2d 212, 216-17 (1968).

438. See notes 150-51 *supra* and accompanying text.

439. S.F. 1586, 70th Minn. Legis., 1978 Sess., as amended by Judicial Ad. Subcomm. of Senate Judiciary Comm., Mar. 2, 1978 (on file at Minnesota Legislative Reference Library).

theless, the purposes to be served by the confinement of juveniles, and the degree of discretionary power involved in ordering a juvenile incarcerated, are considerably different from those in the contempt area. Juveniles are incarcerated not for disobedience of a clear court order, but because it is in their "best interests."<sup>440</sup> This is precisely the kind of discretion that should be exercised by elected officials, if the historical arguments of Friedman and others are persuasive.<sup>441</sup> In this respect it seems that the Senate was better attuned to considerations of legitimacy or due process—not to mention the persuasive aspects of a juvenile disposition hearing—than was the conference committee that put together the final bill.

Perhaps none of the functions of juvenile court should be delegated to referees. All of the work of this court requires person-oriented evaluations of how specific individuals function in society—hardly a "ministerial" role by any stretch of the imagination. Because each adjudication is meant to be highly individualized, arguments for the referee system based on "consistency" seem to miss the point. Within the boundaries set by the equal protection clause, the juvenile court should prefer a decision-making style based on the uniqueness of each case to one based on "consistency." Moreover, if consistency is required on a policy level, it could just as well be derived from the interactions of a collegial panel of several judges as from a supervisory relationship of one judge and several referees.<sup>442</sup> Specialization could be fostered in a multi-judge system by rotating judges every five or six years in staggered terms rather than every two or three, as is the present practice.<sup>443</sup>

Finally, if the Legislature is indeed worried about citizens being incarcerated by non-elected officials, it would do well to set new guidelines for the participation of referees and commissioners in the civil commitment proceedings of probate court. Commitment to mental institutions is a far more serious area of concern than such questions as whether Torrens title examiners are usurping judicial power, or whether parking violations are crimes. In fact, it seems that no one besides a small minority of legislators would be

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440. See MINN. STAT. § 260.185(1) (1978); *cf. id.* § 260.191(1) (same for dispositions involving neglected or dependent children).

441. See generally L. FRIEDMAN, A HISTORY OF AMERICAN LAW 110-12 (1973); notes 398-400 *supra* and accompanying text.

442. See note 212 *supra* and accompanying text.

443. See note 349 *supra* (discussing the existing requirements of judge rotation).

much disturbed by a resolution that would allow all referees and other quasi-judges, except for those in juvenile and probate courts, to continue functioning indefinitely under the terms of the 1978 law.<sup>444</sup> Such a resolution might not satisfy every concern, but it would be a fair compromise between the complete abolition of referees and their restoration to pre-1977 status.

The juvenile and probate courts should receive special attention, however, not because of criticism of any individuals presently serving in the courts, but because their determinations are person-oriented and because they represent major state interventions into citizens' lives. Because both of these courts routinely use state power to stigmatize and institutionalize individuals who come before them, their discretionary decision-making functions should be performed not by "ministerial" employees but by elected judges.

## VII. CONCLUSION

The role of referees in Minnesota has changed a great deal since the days when they were assigned, on a case-by-case basis, to hear actions requiring long accountings. Today, referees present the face of the judiciary seen each year by thousands of citizens who have problems involving marriage, children, land, money, and mental illness.<sup>445</sup> The referees' traditional tedious balancing of figures has been transformed into handling the emotional lives of troubled people. This metamorphosis claims historical antecedents that appear more persuasive, or less, depending on the specific referee functions under discussion. Helping to divide property in a marriage dissolution case, for example, is a harmless extension of the chancery master's function of supervising partnership accountings.<sup>446</sup> On the other hand, the delegation of discretionary authority to determine what is "in the best interests" of a child—presumably traceable to the equitable origin of the *parens patriae*

444. See Act of Apr. 5, 1978, ch. 750, § 2, 1978 Minn. Laws 907, 908 (amending MINN. STAT. § 484.70 (1976)).

445. See Tennessen, *Court Reform 1977*, HENNEPIN LAW., Sept.-Oct. 1977 at 8 ("Since use of referees seems to be greatest in the kinds of cases in which a larger segment of the public may become involved, such as dissolutions, traffic cases, and juvenile matters, the public questioning seems legitimate."); D. McLean, *supra* note 3, at 59 ("Approximately 84 percent of the contacts between the court and the public are made by the referees . . .").

446. See notes 67-77 *supra* and accompanying text.

doctrine<sup>447</sup>—is contrary to the spirit of the requirement in the state constitution that judges are to be elected.<sup>448</sup>

Despite the unquestioned competence, expertise, and dedication of the present specialized court referees, there will have to be a reshaping of their duties. Perhaps the provision that referees may be assigned outside the juvenile and family courts is an indication that their abilities to “shape the persuasive conflict” are to be more widely used in the district courts’ civil calendar. In the future, there also seems to be the possibility that some of their positions will be replaced by additional judgeships.<sup>449</sup> Meanwhile, the Legislature’s decision to preserve the referees’ jobs and most of their pre-1977 responsibilities pending further study seems a wise one. Certainly the public that depends on the family and juvenile courts to resolve its most difficult human problems has a right to expect that major changes in these institutions will be carefully considered. This Article may raise more questions than it answers, but it is intended to be just an introduction to a discussion that has been going on in England and the United States for a long time, and can be expected to continue in Minnesota.

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447. See notes 82-89, 97 *supra* and accompanying text.

448. See MINN. CONST. art. VI, § 7.

449. For example, the original version of Senate File 1586 simply created ten more judgeships in Hennepin County, six more in Ramsey County, and allowed the abolition of referees to stand. See S.F. 1586, 70th Minn. Legis., 1978 Sess., as amended by Judicial Ad. Subcomm. of Senate Judiciary Comm., Mar. 2, 1978 (on file at Minnesota Legislative Reference Library).

