



Legislative Fiscal Bureau

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Joint Committee on Finance

Paper #391

Establishment of Domestic Partnership and Related Rights and Benefits (General Provisions)

[LFB 2009-11 Budget Summary: Page 304, #2]

CURRENT LAW

Under current law, many state programs and civil processes include provisions relating to the status or rights of spouses and other family members.

GOVERNOR

Create requirements for the establishment of same-sex domestic partnerships and provide domestic partners with certain rights and benefits that parallel some of the rights and benefits provided to spouses under current law. Define: (a) "domestic partner" as an individual who has signed and filed a declaration of domestic partnership in the office of the register of deeds of the county in which he or she resides; and (b) a "domestic partnership" as the legal relationship that is formed between two individuals under the following provisions.

Permit two individuals to form a domestic partnership if they satisfy all of the following criteria: (a) each individual is at least 18 years old and capable of consenting to the domestic partnership; (b) neither individual is married to, or in a domestic partnership with, another individual; (c) the two individuals share a common residence [even if only one of the individuals has legal ownership of the residence or one or both of the individuals have one or more additional residences not shared with the other individual, or one of the individuals leaves the common residence with the intent to return]; (d) the two individuals are not nearer of kin to each other than second cousins, whether of the whole or half blood or by adoption; and (e) the individuals are members of the same sex.

A complete description of the Governor's provisions relating to same-sex domestic partner rights under Assembly Bill 75 is attached [Attachment 1].

DISCUSSION POINTS

1. Academic specialists tracking data on same-sex relationships based on U.S. Census Bureau and American Community Survey data indicate that the enumeration of same-sex partners in these data is imprecise. A report by the Williams Institute, at the University of California Los Angeles, indicates that approximately 160,700 gay, lesbian, and bisexual people were living in Wisconsin in 2005, which was 2.9% of the state's population in that year. The number of same-sex couples in the state was estimated to total 14,894, an increase of nearly 81% from the 8,232 couples reported in the 2000 data. [In contrast, a 2007 Census Bureau report, based on the American Community Survey, estimates the range of same-sex households in Wisconsin at 9,000 to 13,450.] Based on the 2005 data, approximately 19% of gay, lesbian, and bisexual people living in Wisconsin were living as same-sex couples. The counties reported to have the highest concentration of same-sex couples (five or more same-sex couple households per 1,000 households) were Bayfield, Dane, Iowa, Milwaukee, Menominee, Sawyer, and Vilas.

2. Assembly Bill 75 would permit two individuals to form a domestic partnership if they satisfy all of the following criteria: (a) each individual is at least 18 years old and capable of consenting to the domestic partnership; (b) neither individual is married to, or in a domestic partnership with, another individual; (c) the two individuals share a common residence [even if only one of the individuals has legal ownership of the residence or one or both of the individuals have one or more additional residences not shared with the other individual, or one of the individuals leaves the common residence with the intent to return]; (d) the two individuals are not nearer of kin to each other than second cousins, whether of the whole or half blood or by adoption; and (e) the individuals are members of the same sex.

[For the purposes of the Wisconsin Retirement System and state employee benefits under Chapter 40 of the statutes, the bill provides a different set of criteria to define a domestic partnership that would include both same-sex and opposite-sex domestic partners. A separate budget paper, ETF -- "Domestic Partner Retirement and Group Insurance Benefits," has been prepared to address these provisions.]

3. The establishment of same-sex domestic partnerships would be provided in law through a newly created Chapter 770 of the statutes, which would: (a) define the required criteria for the formation of a domestic partner; (b) specify the process for declaring and registering a domestic partnership; (c) specify the process for terminating a domestic partnership; (d) require the Department of Health Services (DHS) to prepare and distribute the necessary forms for these purposes; (e) establish fees; and (f) establish requirements for records relating to domestic partnerships.

4. Some concerns have been raised about the administrative process under the bill to

establish a domestic partnership. Assembly Bill 75 would require the individuals applying for domestic partnership status to complete the declaration of domestic partnership, sign the declaration, having their signatures acknowledged before a notary, and submit the declaration to the register of deeds of the county in which they reside. The register of deeds would be required to record the declaration and forward the original to the State Registrar of Vital Statistics. Similarly, the bill requires that a domestic partner who is seeking a termination of the domestic partnership must submit a certificate of termination of domestic partnership to the register of deeds of the county in which the declaration of domestic partnership is recorded and the register of deeds would record the certificate and forward the original to the State Registrar of Vital Statistics.

However, the bill does not specify what type of record is represented by the declaration of domestic partnership or the termination of domestic partnership documents. As a result, the State Registrar of vital statistics and county registers of deeds would have no clear directive on what to do with the documentation. Neither Chapter 69 of the statutes, relating to the collection of statistics and the powers and duties of the State Registrar and registers of deeds, nor Chapter 59 relating to counties, including additional responsibilities of registers of deeds, are amended by the domestic partnership provisions under the bill. Without amendment, the State Registrar's and county registers of deeds' responsibilities for these documents are not enumerated. Further, there is no authorization under the bill's provisions for the State Registrar or county registers of deeds to charge a fee for certified copies of these records; such fees are typically charged for copies of records.

This issue could be addressed by including the domestic partnership documentation in the definition of "vital records" and "vital statistics" in Chapter 69, by adding provisions to the Chapter 69 sections relating to the powers and duties of the State Registrar and the duties of county registers of deeds, to reflect their responsibilities under the proposed requirements that would be specified in newly created Chapter 770. The Committee could provide that the application and declaration of domestic partnership, the notice of termination of domestic partnership, and the certificate of termination of domestic partnership would contain such information as the State Registrar of Vital Statistics determines is necessary (rather than DHS). [While the State Registrar of Vital Statistics is part of DHS, if the domestic partnership documentation is deemed a vital record, the responsibility for the design of forms should specifically reside with the Registrar.] Provide that penalties for violations of Chapter 69 provisions as they relate to vital records [s. 69.24 of the statutes] would apply to domestic partnership records.

Designating this documentation as a vital record would also automatically clarify that the State Registrar or a county register of deeds may charge the same fees for certified copies of these records as are charged for other vital records. In addition, as a vital record, requests for copies of the record would generally be limited to those with a direct and tangible interest in a vital record, which may be viewed as an important privacy consideration. [Alternative 2]

Under current law, vital records are defined as any of the following: (a) certificates of birth, death, and divorce or annulment, and marriage documents; (b) worksheets that use forms that are approved by the state registrar and are related to documents specified under point (a); and (c) data related to the documents under point (a) or the worksheets under point (b). The term vital statistics

is defined in statute as the data derived from certificates of birth, death, divorce or annulment, marriage documents, fetal death reports or related reports. Vital records have a clear legal standing in the statutes and the State Registrar's and county registers of deeds responsibilities relating to vital records under the statutes is clear. Including this new area of vital records, however, would likely create workload issues and, in the case of the State Registrar, may result in additional costs for redesign work of the Office's technology systems.

5. County clerks have expressed a concern with their responsibility under the bill to process a termination of a domestic partnership. The bill would allow one or both domestic partners to file a completed notice of termination of domestic partnership form with the county clerk who issued the declaration of domestic partnership. The concern is that, in cases where only one domestic partner seeks a termination of the partnership, the other domestic partner may not desire a termination. These situations may be difficult to address and the county clerks do not feel that their staff have the training or background to deal effectively with disputing parties.

It is possible that the termination process could be handled more effectively by the county clerks of circuit court. The clerks of court are arguably more experienced in dealing with individuals involved in civil disputes and are better prepared to counsel individuals on the means available to deal with such disputes. The Committee may want to consider modifying the provisions relating to domestic partnership terminations to assign this responsibility to the county clerks of circuit court, rather than to county clerks. Under this alternative, the termination process would remain unchanged, except that it would be processed by the clerks of circuit court. [Alternative 3]

6. Other clarifications may be advisable with respect to the manner in which a termination of a domestic partnership is addressed under the bill. The bill would provide that, if a party to a domestic partnership enters into a marriage that is recognized as valid in this state, the domestic partnership is automatically terminated on the date of the marriage. However, there is no requirement under this provision to have the Register of Deeds notified that the domestic partnership has been terminated. [The county register of deeds would only receive a certificate of termination, if one or both parties to the domestic partnership actually go through the termination process.]

The Committee may want to provide that any individual who is registered as a domestic partner and seeks to marry be required to terminate the domestic partnership prior to marriage to ensure that the county Register of Deeds can record the termination. [Alternative 4]

7. On a related issue, under current law, it is unlawful for any person, who is or has been a party to an action for divorce in any court in this state, or elsewhere, to marry again until six months after judgment of divorce is granted, and the marriage of any such person before the expiration of six months from the date of the granting of judgment of divorce is void. Under the bill, an individual could: (a) divorce and immediately enter into a domestic partnership; (b) terminate a domestic partnership and immediately enter into another domestic partnership; or (c) terminate a domestic partnership and immediately enter into a marriage.

It may be advisable to have consistency with respect to time requirements for reforming these legal relationships. The Committee could provide that it would be unlawful for any person, who is or has been a party to an action for divorce in any court in this state, or elsewhere, to enter into a domestic partnership until six months after judgment of divorce is granted, and the domestic partnership of any such person declared before the expiration of six months from the date of the granting of judgment of divorce would be void. Further, the Committee could provide that it would be unlawful for any person, who is or has been a party to an action to terminate a domestic partnership in this state, or elsewhere, to enter into a domestic partnership or a marriage until six months after the date the certificate of termination is submitted to the register of deeds, and the domestic partnership or marriage of any such person declared before the expiration of six months from the date the certificate of termination is submitted to the register of deeds would be void. [Alternative 5]

8. As drafted, AB 75 would have the domestic partner provisions be effective upon enactment. Local officials, however, indicate that county clerks and registers of deeds would have difficulty implementing these provisions immediately because time would be required to design or modify forms, develop procedures, and conduct staff training. The Committee could provide that the provisions take effect 30 days after the effective date of the bill, to provide the officials adequate time to properly implement the changes. [Alternative 6]

9. The bill would include domestic partners, in registered domestic partnerships, in an array of family-relationship rights under the statutes. These areas of law are listed in Table 1, in the same order as each item appears in the attached summary of the Governor's provisions in AB 75. The inclusion of domestic partners in these provisions does not appear to raise any substantive administrative concerns or result in any material state fiscal effect.

TABLE 1

Areas of Domestic Partner Rights

2009 Assembly Bill 75

1. Victim Notification by the Department of Corrections
2. Evidences - Privileges
3. Damages, Recovery, and Miscellaneous Provisions Regarding Actions in Court
4. Crime Victim Compensation Program
5. Ownership of Property-Joint Tenancy
6. Administration and Transfer of a Deceased Individual's Estate
7. Active State Duty National Guard Member Civil Relief
8. Private Employer Health Care Purchasing Alliance Program (PEHCPAP)
9. Rights of Residents in Care Facilities
10. Consent to Admissions to Nursing Homes, CBRFs, and Hospices
11. Mental Illness, Developmental Disability & Alcohol/Other Drug Abuse Treatment Records
12. Health Care Records
13. Power of Attorney for Property and Finances
14. Power of Attorney for Health Care
15. Consent to Autopsies
16. Consent to Make an Anatomical Gift
17. AIDS/HIV Health Insurance Premium Subsidy Program
18. Insurance Provided by Fraternal Organizations
19. Notifications Made to Family Members Following the Release of Certain Persons
20. Real Estate Transfer Fee
21. Family and Medical Leave
22. Worker's Compensation Death Benefits
23. Employee Cash Bonds Held in Trust
24. Wage Payments
25. Insurance for Employees of Local Governmental Units
26. Manufactured Home Title Transfer Fee
27. Motor Vehicle Titles

10. While the areas listed in Table 1 are fairly extensive, a review of the Wisconsin statutes reveals areas of law that include spousal or family-relationship rights or obligations that are unaffected by the domestic partnership provisions under the bill. Table 2 provides a selective list of such provisions and the associated statutory chapters.

11. Under Art. 13, s. 13, of the Wisconsin Constitution: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state." The inclusion of domestic partner rights in the areas listed in Table 1 have raised some concerns that the provisions may create a status for domestic partnerships substantially similar to marriage.

TABLE 2

Selected Areas of Law Not Affected by Domestic Partner Provisions of AB 75

<u>Subject</u>	<u>Chapter</u>
1. Advance Directives Relating to Health Care and Final Disposition	154
2. Campaign Financing	11
3. Children's Code	48
4. Consumer Transactions	421, 425, and 427
5. Disclosure of Personal Medical Information.	610
6. Discrimination in Education	36 and 38
7. Discrimination in Housing	66, 106, 224, and 452
8. Discrimination in Employment	15 and 111
9. Discrimination in Credit	138
10. Discrimination in Insurance	632
11. Divorce, Including Support, Property Division, and Custody	767
12. General Duties of Public Officials	19
13. Insurance Contracts in Specific Lines	632
14. Marital Property Laws	766
15. Marriage Procedures	765
16. Motor Vehicle and Traffic Law	341, 343, 344, and 346
17. Natural Resources	23, 29, 30, and 33
18. Patients' Claims Relating to Medical Malpractice	655
19. Public Assistance and Children and Family Services	49
20. Social Services	46
21. Unemployment Insurance	108
22. Veterans	45

12. This office requested that the Legislative Council Staff assess whether the domestic partner provisions under AB 75 confer to unmarried individuals a legal status identical or substantially similar to that of marriage, contrary to Art. XIII, s. 13 of the Constitution. The Staff's memorandum on this issue is attached [Attachment 2]. The memorandum notes that the legal status of domestic partnership under AB 75 would not include core aspects of the legal status of marriage, including requirements for the mutual obligation of support [ss. 765.001(2) and 766.55(2)(a)], the comprehensive property system under marital property law [Chapter 766], and the requirements for terminating a marriage [Chapter 767]. The Council Staff concludes their memorandum, as follows:

The above analysis suggests that a court could reasonably conclude that the second sentence of art. XIII, s. 13 is intended to prohibit the recognition of civil unions or other relationships recognized by law that confer or purport to confer a legal status that is the same as, or nearly the same as, marriage. As further discussed above, under that interpretation, it is reasonable to conclude that the domestic partnership proposed in Assembly Bill 75 does not confer a legal status identical or substantially similar to that of marriage for unmarried individuals in violation of art. XIII, s. 13. This conclusion is

based on the language of the constitutional provision, evidence of legislative intent concerning the constitutional provision, on the presumption of constitutionality, and on the legal status conferred by a domestic partnership under Assembly Bill 75 contrasted with the current legal status of marriage conferred by Wisconsin Law. Comprehensive, core aspects of the legal status of marriage in Wisconsin are not conferred on domestic partners by Assembly Bill 75.

However, as noted previously, it cannot be concluded with certainty that a court would draw the same conclusions about the intent of art. XIII, s. 13 or the application of that provision to the domestic partnership proposal. Some uncertainty is inherent in attempting to determine how a court will interpret a constitutional amendment.

13. If the Committee believes that current law should be maintained, or that constitutional questions remain, the provision could be deleted [Alternative 7].

ALTERNATIVES

1. Approve the Governor's recommendation to create requirements for the establishment of same-sex domestic partnerships and provide domestic partners with certain rights and benefits that parallel some of the rights and benefits provided to spouses under current law. Define: (a) "domestic partner" as an individual who has signed and filed a declaration of domestic partnership in the office of the register of deeds of the county in which he or she resides; and (b) a "domestic partnership" as the legal relationship that is formed between two individuals under the following provisions.

Permit two individuals to form a domestic partnership if they satisfy all of the following criteria: (a) each individual is at least 18 years old and capable of consenting to the domestic partnership; (b) neither individual is married to, or in a domestic partnership with, another individual; (c) the two individuals share a common residence [even if only one of the individuals has legal ownership of the residence or one or both of the individuals have one or more additional residences not shared with the other individual, or one of the individuals leaves the common residence with the intent to return]; (d) the two individuals are not nearer of kin to each other than second cousins, whether of the whole or half blood or by adoption; and (e) the individuals are members of the same sex. [See Attachment 1 to this paper for a complete description of the Governor's provisions.]

2. Include the domestic partnership documentation (a declaration of a domestic partnership and a certificate of termination of a domestic partnership) in the definition of "vital records" and "vital statistics" in Chapter 69 of the statutes. Provide that the duties of the State Registrar of Vital Statistics and county registers of deeds include the responsibilities that would be created for these officials under Chapter 770 of the statutes. Provide that the application and declaration of domestic partnership, the notice of termination of domestic partnership, and the certificate of termination of domestic partnership would contain such information as the State Registrar of Vital Statistics determines is necessary (rather than DHS). Provide that penalties for violations of Chapter 69 provisions as they relate to vital records [under s. 69.24 of the statutes]

would apply to domestic partnership records.

3. Modify the provisions relating to domestic partnership terminations to specify that a domestic partner may terminate the domestic partnership by filing a completed a completed notice of termination of domestic partnership form with the county clerk of circuit court (instead of the county clerk) in the county which issued the declaration of domestic partnership. Provide that, upon receiving a completed, signed, and notarized notice of termination of domestic partnership, the affidavit, if required, and the required fee, the county clerk of court (instead of the county clerk) would be required to issue to the domestic partner filing the notice of termination a certificate of termination of domestic partnership.

4. Provide that any individual who is registered as a domestic partner would be required to terminate the domestic partnership prior to marriage to another individual.

5. In addition to Alternative 4, provide that it would be unlawful for any person, who is or has been a party to an action for divorce in any court in this state, or elsewhere, to enter into a domestic partnership until six months after judgment of divorce is granted, and the domestic partnership of any such person declared before the expiration of six months from the date of the granting of judgment of divorce would be void. Further, provide that it would be unlawful for any person, who is or has been a party to an action to terminate a domestic partnership in this state, or elsewhere, to enter into a domestic partnership or a marriage until six months after the date the certificate of termination is submitted to the Register of Deeds, and the domestic partnership or marriage of any such person declared before the expiration of six months from the date the certificate of termination is submitted to the Register of Deeds would be void.

6. Provide that the provisions take effect 30 days following the effective date of the bill to provide state and local officials adequate time to properly implement the changes.

7. Delete provision.

Prepared by: Art Zimmerman
Attachments

ATTACHMENT 1

Establishment of Domestic Partnership and Related Rights and Benefits

Create requirements for the establishment of same-sex domestic partnerships and provide domestic partners with certain rights and benefits that parallel some of the rights and benefits provided to spouses under current law. Define: (a) "domestic partner" as an individual who has signed and filed a declaration of domestic partnership in the office of the register of deeds of the county in which he or she resides; and (b) a "domestic partnership" as the legal relationship that is formed between two individuals under the following provisions:

Criteria for Forming a Domestic Partnership. Permit two individuals to form a domestic partnership if they satisfy all of the following criteria: (a) each individual is at least 18 years old and capable of consenting to the domestic partnership; (b) neither individual is married to, or in a domestic partnership with, another individual; (c) the two individuals share a common residence [even if only one of the individuals has legal ownership of the residence or one or both of the individuals have one or more additional residences not shared with the other individual, or one of the individuals leaves the common residence with the intent to return]; (d) the two individuals are not nearer of kin to each other than second cousins, whether of the whole or half blood or by adoption; and (e) the individuals are members of the same sex.

[Note: for the purposes of the Wisconsin Retirement System and state employee benefits under Chapter 40 of the statutes, and family or medical leave under s. 103.10 of the statutes, the bill provides a different definition of domestic partnership that would include both same-sex and opposite-sex domestic partners. For these statutes, the bill would define domestic partnership as a relationship between two individuals that satisfies all of the following criteria: (a) each individual is at least 18 years old and otherwise competent to enter into a contract; (b) neither individual is married to, or in a domestic partnership with, another individual; (c) the two individuals are not related by blood in any way that would prohibit marriage under state law; (d) the two individuals consider themselves to be members of each other's immediate family; and (e) the two individuals agree to be responsible for each other's basic living expenses. See the summary item under "Employee Trust Funds" for the provisions affecting the Wisconsin Retirement System and state employee benefits.]

Unless otherwise noted, the following provisions apply to same-sex domestic partnerships only.

Application. Require that individuals who wish to form a domestic partnership must apply for a declaration of domestic partnership to the county clerk of the county in which at least one of the individuals has resided for at least 30 days immediately before applying. The county clerk would not be authorized to issue a declaration of domestic partnership until at least five days after receiving the application for the declaration of domestic partnership, except that the county clerk may, at his or her discretion, issue a declaration of domestic partnership in less than five

days, if the applicant pays an additional fee of not more than \$10 to cover any increased processing cost incurred by the county. Require the county clerk to pay this fee into the county treasury.

Under the bill, no declaration of domestic partnership would be issued unless: (a) the application for it is subscribed to by the parties intending to form the domestic partnership; (b) it contains the social security number of each party who has a social security number; and (c) it is filed with the clerk who issues the declaration of domestic partnership. Require that each party must present satisfactory, documentary proof of identification and residence and must swear, or affirm, to the application before the clerk who is to issue the declaration of domestic partnership. Require that, in addition to the social security number of each party who has a social security number, the application must contain such informational items as the Department of Health Services (DHS) directs. The portion of the application form that is collected for statistical purposes only would be required to indicate that the address of an applicant may be provided by a county clerk to a law enforcement officer under certain conditions specified below.

Require each applicant to exhibit to the clerk a certified copy of a birth certificate and any judgment, certificate of termination of domestic partnership, or death certificate affecting the domestic partnership status. If any applicable birth certificate, death certificate, notice of termination of domestic partnership, or judgment is unobtainable, other satisfactory documentary proof may be presented instead. Whenever the clerk is not satisfied with the documentary proof presented, he or she would be required to submit the proof, for an opinion as to its sufficiency, to a judge of a court of record in the county of application.

If these requirements are complied with, require the county clerk to issue a declaration of domestic partnership. With each declaration of domestic partnership the county clerk would be required to provide a pamphlet describing the causes and effects of fetal alcohol syndrome. After the application for the declaration of domestic partnership is filed, the clerk must, upon the sworn statement of either of the applicants, correct any erroneous, false, or insufficient statement in the application that comes to the clerk's attention and must notify the other applicant of the correction, as soon as reasonably possible.

Completion and Filing of Declaration. In order to form the legal status of domestic partners, the individuals would be required to complete the declaration of domestic partnership, sign the declaration, having their signatures acknowledged before a notary, and submit the declaration to the register of deeds of the county in which they reside. Require the register of deeds to record the declaration and forward the original to the State Registrar of Vital Statistics.

Termination of a Domestic Partnership. Under the bill, a domestic partner may terminate the domestic partnership by filing a completed notice of termination of domestic partnership form with the county clerk who issued the declaration of domestic partnership and paying a fee, as specified below. Require that the notice be signed by one or both domestic partners and notarized. If the notice is signed by only one of the domestic partners, that individual must also file with the county clerk an affidavit stating either of the following: (a) that

the other domestic partner has been served in writing [in accordance with civil procedure law relating to commencement of action and venue] that a notice of termination of domestic partnership is being filed with the county clerk; or (b) that the domestic partner seeking termination has been unable to locate the other domestic partner after making reasonable efforts and that notice to the other domestic partner has been made in a newspaper of general circulation in the county in which the residence most recently shared by the domestic partners is located. The notice would not need to be published more than one time.

Upon receiving a completed, signed, and notarized notice of termination of domestic partnership, the affidavit, if required, and the required fee, the county clerk would be required to issue to the domestic partner filing the notice of termination a certificate of termination of domestic partnership. Require that the domestic partner submit the certificate of termination of domestic partnership to the register of deeds of the county in which the declaration of domestic partnership is recorded. The register of deeds would record the certificate and forward the original to the State Registrar of Vital Statistics.

Under the bill, the termination of a domestic partnership would be effective 90 days after the certificate of termination of domestic partnership is recorded, except that, if a party to a domestic partnership enters into a marriage that is recognized as valid in this state, the domestic partnership is automatically terminated on the date of the marriage.

Department of Health Services (DHS) Forms Development. Require that the application and declaration of domestic partnership, the notice of termination of domestic partnership, and the certificate of termination of domestic partnership contain such information as the DHS determines is necessary. The form for the declaration of domestic partnership must require both individuals forming a domestic partnership to sign the form and attest to satisfying all of the required criteria. Require DHS to prepare and distribute forms in sufficient quantities to each county clerk.

Fees. Require each county clerk to receive as a fee for each declaration of domestic partnership issued and for each certificate of termination of domestic partnership issued in the same amount that the clerk receives for issuing a marriage license (\$49.50 under current law). Of the amount received, the clerk would be required to pay into the state treasury the same amount that the clerk pays into the state treasury from the fee collected for issuing a marriage license (\$25). The remainder would be funds of the county. For each declaration of domestic partnership issued and for each certificate of termination of domestic partnership issued, the clerk would also receive a standard notary fee in the same amount as a standard notary fee in connection with issuing a marriage license (\$0.50). Provide that the fee may be retained by the clerk, if the clerk is operating on a fee or part-fee basis, but would otherwise be funds of the county.

Records. Require the county clerk to maintain a suitable book, called the declaration of domestic partnership docket, as a complete record of the applications for, and the issuing of, all declarations of domestic partnership, and of all other matters which the clerk would be required

to ascertain related to the rights of any person to obtain a declaration of domestic partnership. Provide that an application may be recorded by entering into the docket the completed application form, with any portion collected only for statistical purposes removed. Provide that the declaration of domestic partnership docket would be open for public inspection or examination at all times during office hours.

Provide that a county clerk may provide the name of a declaration of domestic partnership applicant and, from the portion of the application form that is collected for statistical purposes, may provide the address of the declaration of domestic partnership applicant to a law enforcement officer. Require a county clerk to provide the name and, if it is available, the address, to a law enforcement officer who requests, in writing, the name and address for the performance of an investigation or the service of a warrant. If a county clerk has not destroyed the portion of the declaration of domestic partnership application form that is collected for statistical purposes, he or she would be required to keep the information on the portion confidential, except as authorized by law. Provide that, if a written request is made by a law enforcement officer, the county clerk must keep the request with the declaration of domestic partnership application form and, if the county clerk destroys the declaration of domestic partnership application form, he or she must also destroy the written request.

Upon the basis of the above provisions, the bill would establish certain rights and benefits for domestic partners. These provisions are summarized below.

Victim Notification by the Department of Corrections. Modify current law related to crime victim notification to include domestic partner in the definition of a "member of the family."

Under current law, Corrections is required to notify an adult member of a victim's family (if the victim died as the result of the crime) of an offender's release into the community in the following circumstances: (a) the offender was convicted of certain homicides, sexual assaults, and child-related crimes, and is being placed in the community residential confinement program, the intensive sanctions program, or has a sentence which is about to expire; (b) escape; (c) application for parole; and (d) request for pardon.

In addition, under the sex offender registration laws, notification is provided to a victim or a victim's family member of the initial registration of a sex offender or any change of information regard that offender, if the victim or family member requests the information.

Evidences - Privileges. In addition to "spouse," include domestic partner in all provisions related to husband-wife privilege. Under current law, a person has a privilege to prevent the person's spouse or former spouse from testifying against the person as to any private communication by one to the other during their marriage.

Damages, Recovery, and Miscellaneous Provisions Regarding Actions in Court. In addition to "spouse," include domestic partner in all provisions related to wrongful death actions.

Crime Victim Compensation Program. Expand the definition of "dependent" under the program to include a domestic partner and a parent of a domestic partner. Expand the definition of "family member" under the program to include a domestic partner and a parent or sibling of a domestic partner.

The crime victim compensation program compensates victims and their dependents for the cost of medical treatment (both physical and mental), lost wages, funeral and burial expenses, loss of support to dependents of a deceased victim, and replacement costs of any clothing or bedding that is held for evidentiary purposes. In addition, victim compensation awards may be made to family members of a victim of a homicide.

Ownership of Property-Joint Tenancy. In addition to "husband and wife" in situations where the marital property law does not apply, create a presumption for domestic partners named as owners in a document of title, transferees in an instrument of transfer, or buyers in a bill of sale, that they take ownership of the property as joint tenants if they are described in the document, instrument, or bill of sale as domestic partners, or if they are in fact domestic partners.

A joint tenancy is ownership of property by two or more persons in which each person owns an undivided interest in the whole property with a right of survivorship. An example of this situation would be one in which two people own a home as joint tenants and one dies, and upon the first person's death the remaining tenant is the sole owner of the home.

Administration and Transfer of a Deceased Individual's Estate.

a. *Definitions.* In addition to the previously defined terms domestic partner and domestic partnership, define a "surviving domestic partner" to mean a person who was in a domestic partnership with the deceased individual, at the time of the deceased individual's death.

b. *Revocation of Certain Provisions in Favor of a Former Spouse.* Under current law, a "divorce, annulment or similar event": (1) revokes any revocable transfer of property made by the deceased individual to his or her former spouse or a relative of the former spouse (such as under a will); (2) revokes any disposition created by law to the former spouse or a relative of the former spouse (such as the default rules for property distribution in the absence of a will discussed below); (3) revokes any revocable provision made by the deceased individual in a legal instrument conferring a power of appointment on the former spouse or a relative of the former spouse; (4) revokes the deceased individual's revocable nomination of the former spouse or a relative of the former spouse to serve in any fiduciary or representative capacity; and (5) severs the interests of the deceased individual and former spouse in property held by them as joint tenants with the right of survivorship or as survivorship marital property and transforms the interests of the decedent and former spouse into tenancies in common. [With a tenancy in common, on the deceased individual's death his or her interest in the property does not automatically transfer to the surviving former spouse as it would with either a joint tenancy or survivorship marital property.]

Provide that a "divorce, annulment or similar event" would include a termination of a

domestic partnership, or other event or proceeding that would exclude a person as a surviving domestic partner. Provide that a "former spouse" would include a person whose domestic partnership with the deceased individual had been the subject of a "divorce, annulment or similar event."

As with a remarriage between spouses under current law, these provisions do not apply if the deceased individual and his or her partner had entered into a new domestic partnership before the death of the deceased individual.

c. *Unintentional Exclusion from a Deceased Individual's Will.* As with a surviving spouse under current law, provide that a surviving domestic partner is generally entitled to a share of the deceased domestic partner's probate estate, notwithstanding the deceased partner's execution of a will prior to the recording of the domestic partnership that did not provide for the surviving domestic partner. The surviving domestic partner would receive the share he or she would have received had the deceased partner died without a will equal to the net estate, but the net estate would be reduced by the value of gifts to the deceased partner's children born prior to the domestic partnership and their heirs.

As with a surviving spouse under current law, a surviving domestic partner is not entitled to a portion of the deceased partner's estate under if it appeared from the will or other evidence that the will: (1) was made in contemplation of the domestic partnership with the surviving domestic partner; or (2) was intended to be effective notwithstanding any subsequent domestic partnership, or there was sufficient evidence that the deceased partner considered revising the will after the domestic partnership but decided not to.

d. *Default Rules for the Transfer of Property to Heirs in the Absence of a Will.* Provide that for purposes of distributing the assets of a deceased individual's net estate, a surviving domestic partner would be treated the same as a surviving spouse under current law. Under current law, these default rules determine who among the surviving spouse, children, parents, brothers and sisters, grandparents, and their descendants will receive the net assets of an estate if the deceased individual died without a will.

e. *Priority with Respect to Certain Personal Property.* In addition to a surviving spouse, provide that a surviving domestic partner may file with a probate court a written selection of the following personal property, which must then be transferred to the domestic partner: (1) wearing apparel and jewelry held for personal use by the deceased individual or the surviving spouse/domestic partner; (2) automobile; (3) household furniture, furnishings and appliances; and (4) other tangible personal property not used in trade, agriculture or other business, not to exceed \$3,000 in inventory value. This selection of personal property may not include items specifically bequeathed to another individual, except that the surviving spouse/domestic partner may in every case select the normal household furniture, furnishings, and appliances necessary to maintain the home. [Antiques, family heirlooms, and collections that are specifically bequeathed are not classifiable as normal household furniture or furnishings.]

As with a surviving spouse under current law, provide that the "net estate" of a deceased individual be reduced by the selections of personal property made by a surviving domestic partner under the prior paragraph.

f. *Right to Purchase Deceased Individual's Interest in Joint Home.* In addition to a surviving spouse, provide that a surviving domestic partner also has the right to purchase the home in which he or she lived with his or her domestic partner prior to the domestic partner's death.

Under current law, if a deceased individual who was married had a property interest in a home, the deceased individual's entire interest in the home must be transferred to the surviving spouse if the surviving spouse petitions the probate court requesting the transfer, and if a legal document does not provide a specific transfer of the deceased individual's interest in the home to someone other than the surviving spouse. The court must transfer the interest in the home to the surviving spouse upon payment of the value of the deceased individual's interest in the home that does not otherwise pass to the surviving spouse.

g. *Exempting Certain Property Transferred to the Surviving Spouse or Surviving Domestic Partner from General Creditors' Claims.* As with a surviving spouse under current law, provide that once the amount of claims against the deceased individual's estate has been ascertained the surviving domestic partner may petition the probate court to set aside as exempt from general creditors' claims an amount of property reasonably necessary for the support of the domestic partner, not to exceed \$10,000 in value, if it appears that the deceased individual's assets are insufficient to pay all claims and still leave the surviving domestic partner such an amount of property in addition to certain other allowances.

h. *Family Support During Administration of the Deceased Individual's Estate.* Provide that a probate court may order payment for the support of a surviving domestic partner. Under current law, a probate court may order payment of an allowance as the court determines necessary or appropriate for the support of the surviving spouse and any minor children of the deceased individual during the administration of the deceased individual's estate.

i. *Accelerated Distribution and Closure of Small Estates.* Expand these provisions to include a domestic partner. Under current law, a probate court may settle the estate of a deceased person under an accelerated process whenever the estate (less the amount of the debts for which any property in the estate is security) does not exceed \$50,000 in value and the deceased individual is survived by a spouse or one or more minor children or both. When an estate is closed in this manner, any property not otherwise transferred must be transferred to the surviving spouse or minor children or both.

Active State Duty National Guard Member Civil Relief. Include a domestic partner as an individual who may not be evicted from a rented dwelling during a National Guard member's active state duty.

Private Employer Health Care Purchasing Alliance Program (PEHCPAP). Modify the definition of a "dependent" to include a domestic partner, as it relates to the requirement that an employer participating in the PEHCPAP provide health care coverage under one or more plans to at least 50% of its eligible employees who do not otherwise receive health care coverage as a dependent under any other plan that is not offered by the employer. Although the Department of Employee Trust Funds is authorized to administer PEHCPAP, the program is not in operation and all statutory provisions relating to the program will be repealed on January 1, 2010.

Rights of Residents in Care Facilities. Require adult family homes, residential care apartment complexes, community-based residential facilities (CBRF), nursing homes, hospitals, and hospices to extend the same visitation and accompaniment rights to domestic partners that are currently accorded to the spouse of a patient or resident of these facilities. Modify provisions relating to the rights of nursing home residents to include the right to privacy for visits by a domestic partner.

Consent to Admissions to Nursing Homes, CBRFs, and Hospices. Permit domestic partners of an incapacitated individual to consent to an individual's admission from a hospital to a nursing home or CBRF, or directly to a hospice, if the incapacitated individual does not have a valid power of attorney for health care and has not been adjudicated incompetent.

Mental Illness, Developmental Disability and Alcohol and Other Drug Abuse (AODA) Treatment Records. Include domestic partners as family members who may access treatment records in certain situations. Currently, a spouse, parent, adult child, or sibling who directly cares for or monitors the treatment of an individual for a mental illness or a developmental disability may access the individual's treatment records kept by the state, a county department, or a treatment facility. A parent, sibling, child, or spouse may also access information on whether an individual is a patient at an inpatient facility (and the individual's current location), unless the individual requested that the information be withheld.

Health Care Records. Include the domestic partner of a deceased patient in the definition of "person authorized by the patient" for the purposes of disclosure and release of health care records.

Power of Attorney for Property and Finances. In addition to spouse, include domestic partner under this provision. Under current law, an "agent" is a person assigned by an individual to act on their behalf in matters including finances and property. If a spouse is an agent and the marriage is terminated, the power of attorney document is terminated.

Power of Attorney for Health Care. Include domestic partner in the definition of "relative" for the purposes of designating a power of attorney for health care, and add domestic partner to the list of relatives prohibited from acting as a witness to the execution of power of attorney for health care. If an individual's domestic partner has power of attorney for health care, the power of attorney would be revoked upon termination of the domestic partnership. The bill would amend the written forms provided in statute to reflect these changes.

Consent to Autopsies. Allow a domestic partner who assumes custody of a deceased individual's remains to consent to the performance of an autopsy by a licensed physician.

Consent to Make an Anatomical Gift. Permit the domestic partner of an individual to donate the body or part of the body for transplantation, therapy, research, or education, if an individual who is near death or has died did not specify another agent. Current law specifies a priority order of individuals who can make an anatomical gift of the body or part of the individual, with first priority for the individual's agent under a health care power of attorney, second priority for the individual's spouse, and lower priority for other family members specified in statute. This provision would classify the decedent's domestic partner in the same priority as a spouse for this purpose.

AIDS/HIV Health Insurance Premium Subsidy Program. Include domestic partner in the definition of "dependent" as it relates to the AIDS/HIV health insurance premium subsidy program. Under the program, the Department of Health Services (DHS) pays for all or part of group or individual health insurance premiums for people whose employment has been terminated or reduced due to conditions related to HIV infection, and who have household income of less than 300% of the federal poverty level (FPL). The subsidy is provided to individuals whose policy also covers the individual's dependents.

In addition, DHS pays for all or part of group health insurance premiums for individuals who are on unpaid medical leave from employment due to a condition related to HIV infection, and who have household income of less than 300% of the FPL. The bill would require the subsidy be paid for any plan that also covers an individual's domestic partner.

This provision may slightly increase the total amount of subsidies DHS would be authorized to pay under the program, since DHS would begin paying subsidies for insurance that covers the person's domestic partner.

Insurance Provided by Fraternal Organizations. Allow a fraternal organization to provide insurance benefits to domestic partners of its employees. Currently, a fraternal organization may provide health insurance benefits to a spouse or dependent child of an employee.

Notifications Made to Family Members Following the Release of Certain Persons. Include domestic partners under the definition of "family member" as it relates to the requirements that: (a) a district attorney notify members of the victim's family if a court conditionally releases an individual who was found not guilty by reason of mental disease or mental defect; (b) DHS notify members of the victim's family if a court orders the termination or discharge of an individual who was found not guilty by reason of mental disease or mental defect; and (c) DHS notify family members after a court discharges or places on supervised release an individual who was committed as a sexually violent person.

Real Estate Transfer Fee. Provide an exemption from the real estate transfer fee for conveyances of real property between domestic partners. The provision would be first apply to

conveyances of property between domestic partners on the day after publication of the bill. It is estimated that the provision would reduce state real estate transfer fee revenues by a minimal amount.

Under current law, the real estate transfer fee is imposed on conveyances of real property at the rate of \$3 per \$1,000 of value. The county in which the property is located collects the fee when a conveyance of real estate is submitted for recording. The county retains 20% of the fee and remits the remaining 80% to the state. Current law exempts certain transfers between family members from the fee, such as conveyances between husband and wife, as well as conveyances for little or no consideration between parent and child, stepparent and child, parent and son-in-law, or parent and daughter-in-law.

Family and Medical Leave. Modify current law family and medical leave provisions related to care of family members for serious health conditions to include domestic partners. [As noted above, for the purposes of the Wisconsin Retirement System and state employee benefits under Chapter 40 of the statutes and family or medical leave under s. 103.10 of the statutes, the bill provides a different definition of domestic partnership that would include both same-sex and opposite-sex domestic partners.]

For employers of 50 or more, current law requires that an employee be allowed up to two weeks of leave in a twelve-month period for the care of a child, spouse, or parent with a serious health condition.

Worker's Compensation Death Benefits. Modify current law related to worker's compensation death benefits to provide a domestic partner with the same treatment as a spouse. Under current law, if a work-related accident or occupational disease causes death, or if a worker dies while entitled to permanent total disability benefits, death benefits are paid to a spouse, parent, or relative. Extra benefits are paid to dependent children. Burial expenses are also provided.

Employee Cash Bonds Held in Trust. Modify current law to provide a domestic partner with the same treatment as a spouse in payouts of employee cash bonds, in cases where the employee dies. Current law authorizes an employer to require an employee to furnish a cash bond. If the employee dies, the bond is repaid to the decedent's family in a specified order of priority.

Wage Payments. Modify current law to require an employer to pay a domestic partner an employee's unpaid wages, in cases where the employee dies. Current law establishes when an employee must be paid wages earned. In cases where the employee dies, unpaid wages are required to be paid to the decedent's spouse, children, and dependents.

Insurance for Employees of Local Governmental Units. Expand current law provisions to domestic partners and dependent children and include the Milwaukee Public Schools in the definition of a "local governmental unit" for this purpose. Under current law, the state or a local governmental unit may provide for payment of premiums for health, accident and life insurance

for municipal employees, their spouses, and dependent children.

Manufactured Home Title Transfer Fee. In addition to surviving spouse, add "or domestic partner" to the supplemental title fee exemption afforded when a mobile home title is transferred after death. The supplemental fee is currently \$7.50. In 2007-08 manufactured home supplemental title fee revenue totaled \$52,900, with 132 spousal exemptions (less than 2% exempt). Revenue is deposited in a Department of Commerce program revenue appropriation for operations of the Safety and Buildings Division.

Motor Vehicle Titles. Modify provisions that establish the procedures for the transfer of a decedent's interest in a motor vehicle to a surviving spouse, to specify that these provisions also apply to a surviving domestic partner. Modify a provision that waives the supplemental motor vehicle title transfer fee in cases where the title to a vehicle is being transferred to a surviving spouse from a deceased spouse, to specify that the fee waiver also applies in situations where a vehicle title is being transferred to a surviving domestic partner.

[AB 75 Sections: 1391 thru 1394, 1396, 1399, 1402, 1411, 1412, 1416, 1418, 1422 thru 1424, 1429 thru 1431, 1464, 1465, 1830, 2158 thru 2166, 2170 thru 2172, 2174 thru 2178, 2180 thru 2186, 2211 thru 2213, 2430, 2437 thru 2443, 2505, 2506, 2532, 2536, 2537, 2539, 2667, 2669, 2690, 2691, 2713, 2749, 2773, 2774, 2901, 2905, 3140, 3200, 3218, 3244 thru 3267, 3269, 3284, 3285, 3357, 3358, 3374, 3375, 3405, and 9343(16)]

ATTACHMENT 2



WISCONSIN LEGISLATIVE COUNCIL

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

TO: BOB LANG, DIRECTOR, LEGISLATIVE FISCAL BUREAU

FROM: Don Dyke, Chief of Legal Services

RE: Domestic Partnership in 2009 Assembly Bill 75 (Biennial Budget Bill) and Article XIII, Section 13, Wisconsin Constitution

DATE: May 6, 2009

You ask whether the domestic partnership provisions in 2009 Assembly Bill 75 (the Biennial Budget Bill) confer to unmarried individuals a legal status identical or substantially similar to that of marriage, contrary to art. XIII, s. 13, Wis. Const., which was adopted in November 2006. The latter constitutional provision provides in pertinent part: "A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state."

Based on a comparison of the legal status conferred by a domestic partnership under Assembly Bill 75 with the legal status conferred by a marriage; on the language of art. XIII, s. 13, Wis. Const.; on evidence of legislative intent concerning art. XIII, s. 13; and on the presumption of constitutionality, it is reasonable to conclude that the domestic partnership provisions proposed in Assembly Bill 75 do not confer a legal status identical or substantially similar to that of marriage for unmarried individuals in violation of art. XIII, s. 13.

It is recognized, however, that there is no Wisconsin appellate jurisprudence concerning the meaning of art. XIII, s. 13 and that others might reach a different conclusion concerning the application of art. XIII, s. 13, to the proposed domestic partnership. Thus, while this memorandum suggests that it is reasonable to conclude that the domestic partnership provisions in Assembly Bill 75 are not contrary to art. XIII, s. 13, Wis. Const., it cannot be concluded with certainty that a court would reach the same conclusion. Final resolution of the issue ultimately falls to the courts.

ESTABLISHMENT AND TERMINATION OF DOMESTIC PARTNERSHIP UNDER ASSEMBLY BILL 75

Assembly Bill 75 authorizes the legal relationship of domestic partnership to be entered into by two individuals who are at least 18 years old, who are not married or in another domestic partnership, who share a common residence, who are of the same gender, and who are not nearer of kin than second cousins. See, generally, SECTION 3218 of Assembly Bill 75 for detail of provisions summarized in this part.

Under the bill, application for a declaration of domestic partnership is made to the county clerk of the county in which at least one of the individuals has resided for at least 30 days. The application process requires submission of specified identifying information. If the parties are eligible to enter into a domestic partnership, the clerk issues a declaration of domestic partnership which the parties must complete, sign before a notary, and submit to the Register of Deeds of the county of residence.

To terminate a domestic partnership, at least one of the domestic partners is required to file with the county clerk a notice of termination of domestic partnership, which must be signed by one or both of the domestic partners and notarized. If only one domestic partner signs the notice, he or she must file an affidavit stating that he or she has notified personally or, if that is not possible, by publication, the other domestic partner of intent to file a termination. Upon receipt of notice of a termination, the county clerk issues a certificate of termination of domestic partnership, which is recorded in the Office of the Register of Deeds. Termination is effective 90 days after the certificate of termination is recorded.

LEGAL STATUS CONFERRED BY DOMESTIC PARTNERSHIP

Assembly Bill 75 defines the legal status of a domestic partnership by specifying what benefits and rights are extended to domestic partners. Generally stated, these rights and benefits include such areas as: health care, including access to treatment records, visitation rights, health care decision-making, and anatomical gifts; ability to bring a wrongful death action; ability to invoke spousal evidentiary privilege in court proceedings; eligibility for victim's compensation; eligibility for Worker's Compensation death benefits; eligibility for family leave to care for a domestic partner; holding property as joint tenants if both partners are owners in a document of title; and exemption from real estate transfer fee for transfers of real property between domestic partners. Further, benefits to a surviving domestic partner generally include: rights to the estate of the deceased partner that does not pass by will (intestacy); qualified interest in deceased partner's interest in a home; ability to petition probate court for an allowance for support from deceased partner's estate; authority to select from deceased partner's estate designated personal and household items; limited exemption of deceased partner's estate from creditors' claims; and transfer of deceased partner's interest in motor vehicle. Finally, the bill provides that a local governmental unit may provide health and life insurance for a local employee's or officer's domestic partner and dependent children.

(Note that the bill also provides that domestic partners must be treated in the same manner as spouses with respect to all pension benefits provided public employees who are covered under the Wisconsin Retirement System, ch. 40, Stats., and all other ch. 40 benefits provided state employees. However, for these purposes, a definition of "domestic partnership" applies that is different than the more general domestic partnership provisions described in this memorandum. For purposes of ch. 40, "domestic partnership" is defined as a relationship between two individuals that satisfies the following criteria: (a) each individual is at least 18 years old and otherwise competent to enter into a contract; (b) neither individual is married to, or in a domestic partnership with, another individual; (c) the two individuals are not related by blood in any way that would prohibit marriage under state law; (d) the two individuals consider themselves to be members of each other's immediate family; and (e) the two individuals agree to be responsible for each other's basic living expenses. See SECTIONS 774 and 775 of the bill. This concept of domestic partnership is for limited purposes and may, but does not necessarily, include the more general concept of domestic partnership under the bill; for example, the more general concept does not require that both partners be responsible for each other's basic living expenses and the

ch. 40 definition is not limited to same gender partners. Note, also, that Assembly Bill 75 includes both definitions of domestic partner for purposes of family and medical leave. See SECTION 2170 of the bill.)

A more complete summary of the rights and benefits conferred by a domestic partnership under the bill is included in "Summary of Governor's Budget Recommendations, 2009-11 Wisconsin State Budget," Legislative Fiscal Bureau, March 2009, pp. 308 to 314 [<http://www.legis.state.wi.us/lfb/2009-11Budget/Governor/general%20provisions.pdf>].

WHAT THE LEGAL STATUS OF DOMESTIC PARTNERSHIP DOES NOT INCLUDE

Perhaps more important for the discussion in this memorandum is not what the legal status of domestic partnership includes but, rather, what that status does not include. Among other things, the legal status of domestic partnership does not include:

1. The mutual obligation of support that spouses have in a marriage. See, e.g., ss. 765.001 (2) and 766.55 (2) (a), Stats.
2. The comprehensive property system that applies to spouses under the marital property law. See, generally, ch. 766, Stats. That property system covers property ownership, management and control of property, access to credit, creditor and debtor rights and remedies, marriage agreements, and interspousal remedies.
3. The requirements of divorce law for terminating a marriage. See, generally, ch. 767, Stats. Among other things, divorce law covers the procedure for terminating a marriage, division of spouse's property, support requirements, and a six-month prohibition against remarriage.

The above represent a substantial body of codified law and interpreting case law. Because the legal status of domestic partnership does not generally include these legal aspects of marriage, it is arguably unnecessary to do a side-by-side comparison of all benefits, rights, and obligations conferred by each respective legal status. The above legal aspects of marriage are comprehensive, core aspects of the legal status of marriage that are not generally included as part of the legal status conferred by a domestic partnership under Assembly Bill 75.

DISCUSSION

The Wisconsin Supreme Court has said that the purpose of construing a constitutional amendment is to give effect to the intent of the framers and of the people who adopted it. The intent of an amendment is to be determined in light of the circumstances in which the framers and people approving it were placed at the time. Thus, a court, in interpreting the meaning of a constitutional provision, will examine the following:

1. The plain meaning of the words and the context used.
2. The historical analysis of the constitutional debates.
3. The earliest interpretation of a particular provision by the Legislature as manifested in the first law passed following the adoption of the provision. [See *Dairyland Greyhound Park, Inc., v. Doyle*, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408 (2006).]

Also note that laws enacted by the Legislature are presumed by the courts to be constitutional and a person challenging the constitutionality of a statute must show that the statute is unconstitutional beyond a reasonable doubt. Where any doubt exists as to a law's unconstitutionality, it must be resolved in favor of constitutionality. [See, e.g., *State ex rel. Hammervill Paper Co. v. La Plante*, 58 Wis. 2d 32, 205 N.W.2d 784 (1973).] Thus, a party arguing the invalidity of the domestic partnership created by Assembly Bill 75 is required to show beyond a reasonable doubt that it violates art. XIII, s. 13. The historical context, the plain language, and the expressed intent concerning the constitutional provision arguably make it difficult for a challenger to overcome the strong presumption of constitutionality that the law creating the legal status of domestic partnership would enjoy.

The Plain Meaning of Article XIII, Section 13, Wisconsin Constitution

Article XIII, Section 13, Wisconsin Constitution, provides

Marriage. Section 13. [*As created Nov. 2006*] Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.

The Context

The intent of a constitutional provision is to be “ascertained, not alone by considering the words of any part of the instrument, but by ascertaining the general purpose of the whole” through recognition of the reasons which lead to the framing and adopting of the amendment. Once that intent is ascertained, “no part is to be construed so that the general purpose shall be thwarted, but the whole is to be made to conform to reason and good discretion.” [*Thompson v. Craney*, 446 N.W.2d at 131, citations omitted.] Courts may review the general history relating to a constitutional amendment as well as the legislative history of the amendment. [*Schilling v. Wisconsin Crime Victims Rights Board*, 2005 WI 17, 278 Wis. 2d 216, 692 N.W.2d 623 (2005).]

At the time of the introduction of the first joint resolution proposing the creation of art. XIII, s. 13 (2003 Assembly Joint Resolution 66), Vermont had enacted, and Massachusetts was considering enacting, a “civil union” law granting couples of the same gender the opportunity to venture into a state-sanctioned relationship conferring “the same benefits, protections, and responsibilities” granted to married couples or extending to those in a civil union “a legal status equivalent to marriage.” It is arguable that the intent of the Legislature in drafting the constitutional provision’s second sentence was to prohibit the creation or recognition of “civil unions” like those in Vermont or like those being proposed in Massachusetts. Support for this position is found in a cosponsorship memorandum circulated by the primary author of 2003 Assembly Joint Resolution 66, seeking cosponsors of the proposed amendment on first consideration. The cosponsorship memorandum explains that the proposal would “prevent same-sex marriages from being legalized in the state, regardless of the name used by a court or other body to describe the legal institution.” The memorandum also notes: “In addition, the proposal states that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid in the state, regardless of what creative term is used—civil union, civil compact, state sanctioned covenant, whatever. Marriage is more than just the particular eight letters used to describe it—it is a fundamental institution for our society, regardless of the particular term used to describe it.”

[Memorandum from Representative Mark D. Gundrum, regarding cosponsorship of LRB-4072/2, constitutional amendment affirming marriage.]

It appears, then, that the primary author of the constitutional amendment intended the amendment to prohibit same gender marriages and legal arrangements like civil unions and civil compacts that essentially confer a legal status identical or substantially similar to that of marriage.

The Language

The second sentence of art. XIII, s. 13, addresses a “legal status,” or standing in law, identical or substantially similar to that of marriage. “Identical,” of course, means “exactly the same for all practical purposes” [Black’s Law Dictionary], “being the same, having complete identity,” “characterized by such entire agreement in qualities and attributes that identity may be assumed,” or “very similar, having such close resemblance and such minor difference as to be essentially the same.” [Webster’s Third New International Dictionary.]

“Similar” is defined as “having characteristics in common, very much alike, comparable,” “alike in substance or essentials,” or “one that resembles another, counterpart” [Webster’s Third New International Dictionary], or “nearly corresponding, resembling in many respects, somewhat like, having a general likeness, although allowing for some degree of difference.” [Black’s Law Dictionary.] “Substantially” is defined as meaning “essentially; without material qualification.” [Black’s Law Dictionary.] Thus, something can be said to be “substantially similar” if it is essentially alike something else. The Legislature could have adopted, but did not adopt, language that prohibits unmarried individuals, or unmarried individuals of the same gender, from contracting for a right or benefit enjoyed by married couples or that prohibits the public or private conferring of such rights or benefits on unmarried individuals. Instead, it prohibited the recognition of a “legal status” identical or substantially similar to that of *marriage* between unmarried individuals.

Because the legal relation of domestic partnership under Assembly Bill 75 does not include comprehensive, core aspects of the legal relation of marriage, the legal relation of domestic partnership is not the same as and arguably is not nearly the same as, the legal relation of marriage.

The Intent of Art. XIII, Section 13

There is evidence of intent regarding art. XIII, s. 13 to support the position that it is reasonable to conclude that the provision does not prohibit the domestic partnership proposal included in Assembly Bill 75. The intent of the second sentence of art. XIII, s. 13, Wis. Const., was discussed in a 2006 memorandum prepared by this office. [Memorandum to Representative Mark Gundrum 2005 Assembly Joint Resolution 67 (Marriage Amendment), from Don Dyke, Chief of Legal Services, dated February 24, 2006.] The memorandum cites the following from the co-sponsorship memorandum from Representative Mark Gundrum, author of 2003 Assembly Joint Resolution 66 (first consideration), creating art. XIII, s. 13, explaining that the proposal:

...does not prohibit the state, local governments or private entities from setting up their own legal construct to provide particular privileges or benefits, such as health insurance benefits, pension benefits, joint tax return filing, hospital visitation, etc. as those bodies are able and deem

appropriate. As long as the legal construct designed by the state does not rise to the level of creating a legal status 'identical or substantially similar' to that of marriage (i.e., marriage, but by a different name), no particular privileges or benefits would be prohibited.

[Memorandum from Representative Mark D. Gundrum, regarding co-sponsorship of LRB-4072/2, constitutional amendment affirming marriage.]

The 2006 Legislative Council staff memorandum continues:

The circulation memo accompanying the Senate version of 2005 Assembly Joint Resolution 67 (2005 Senate Joint Resolution 53) contains similar language:

This proposal does not prohibit the state, local governments or private entities from setting up their own legal construct to provide particular privileges or benefits, such as health insurance benefits, pension benefits, joint tax return filing, hospital visitation, etc. as those bodies are able and deem appropriate. As long as the legal construct designed by the state does not rise to the level of creating a legal status identical or substantially similar to marriage, no particular privileges or benefits would be prohibited. [Memorandum, Senator Scott Fitzgerald and Representative Mark Gundrum, "Cosponsorship of 3729/1, Constitutional Amendment Affirming Marriage," dated November 17, 2005.]

In a similar vein, a Legislative Council staff memorandum dated January 29, 2004, discussed how the courts might interpret the proposed amendment. [Footnote omitted.] The Legislative Council memorandum pointed out that it was reasonable to interpret the second sentence of the amendment as follows:

- The state Legislature and courts may not provide for the establishment of a civil union, or other arrangement, however designated, that confers or purports to confer on unmarried individuals the legal status of marriage or a status substantially similar to that of marriage.
- If another jurisdiction confers or purports to confer a legal status of marriage or a status substantially similar to that of marriage on unmarried individuals, that status is not valid under law in this state or recognized at law in this state.
- The Legislature or the governing body of a political subdivision or local governmental unit is not precluded from authorizing or requiring that a right or benefit traditionally associated with marriage be extended to two or more unmarried individuals; for example, family health insurance benefits, certain probate rights, or the ability to file joint tax returns.

- The conferring of a right or benefit traditionally associated with marriage to unmarried individuals in a private setting is not precluded; for example, benefits by a private employer for employees, visitation privileges by a hospital, or family membership status in a health club.
- The Legislature or a court (or the executive branch) is precluded from extending the rights and benefits of marriage to unmarried individuals to the extent those rights and benefits confer a legal status identical to that of marriage or substantially similar to that of marriage.

[Memorandum from Don Dyke, Chief of Legal Services, Legislative Council Staff, to Representative Mark Gundrum, regarding Assembly Joint Resolution __ (LRB-4072/2), Relating to Providing That Only a Marriage Between One Man and One Woman Shall be Valid and Recognized as a Marriage in This State, January 29, 2004.]

It is of interest to note that 2003 Assembly Joint Resolution 66 was introduced after the date of the Legislative Council memorandum and was introduced in identical form as the draft reviewed in that memorandum.

Staff memoranda such as those referred to above can provide a court a window into the intent of the Legislature when it adopted the successive joint resolutions that became art. XIII, s. 13, Wis. Const. For example, in the *Dairyland* case, *Id.*, both the majority opinion and the concurring and dissenting opinion of Justice Prosser reviewed legal memoranda prepared by Legislative Council staff, in order to determine what the Legislature believed would be the impact of constitutional amendments relating to gambling on the Indian gaming compacts entered into by the state and Wisconsin's Indian tribes.

Note, too, that media accounts of statements from supporters of the constitutional amendment that created art. XIII, s. 13, would be relevant in determining intent. In order to determine not only the legislative intent behind a constitutional amendment but also to determine the intent of the electorate in approving a constitutional amendment, a court will review expressions made in the media. [See, e.g., *Dairyland, Id.*, 719 N.W.2d, at 426-427.]

While perhaps not dispositive, the above contemporary expressions of intent, combined with the historical context and plain language of art. XIII, s. 13 support the conclusion that the intent with respect to the second sentence of the amendment is to prohibit the recognition of Vermont-style civil unions or a similar type of government-conferred legal status for unmarried individuals that purports to be the same as or nearly the same as marriage in Wisconsin. As previously discussed, the legal status conferred on domestic partners by Assembly Bill 75 is not the same as and arguably is not nearly the same as the legal status of marriage.

CONCLUSION

The above analysis suggests that a court could reasonably conclude that the second sentence of art. XIII, s. 13 is intended to prohibit the recognition of civil unions or other relationships recognized by law that confer or purport to confer a legal status that is the same as, or nearly the same as, marriage. As further discussed above, under that interpretation, it is reasonable to conclude that the domestic

partnership proposed in Assembly Bill 75 does not confer a legal status identical or substantially similar to that of marriage for unmarried individuals in violation of art. XIII, s. 13. This conclusion is based on the language of the constitutional provision, evidence of legislative intent concerning the constitutional provision, on the presumption of constitutionality, and on the legal status conferred by a domestic partnership under Assembly Bill 75 contrasted with the current legal status of marriage conferred by Wisconsin law. Comprehensive, core aspects of the legal status of marriage in Wisconsin are not conferred on domestic partners by Assembly Bill 75.

However, as noted previously, it cannot be concluded with certainty that a court would draw the same conclusions about the intent of art. XIII, s. 13 or the application of that provision to the domestic partnership proposal. Some uncertainty is inherent in attempting to determine how a court will interpret a constitutional amendment.

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

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